From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World

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IN THE POST-CRASH WORLD

Kristine S. Cherek*

ABSTRACT

Since the financial crisis began in September of 2008, there have been approximately 3.7 million completed foreclosures in the United States, and approximately 1.4 million additional homes are currently in some stage of the foreclosure process.¹ In the midst of this post-housing crash world, the centuries-old doctrine of adverse possession is gaining new attention. This Article examines the doctrine of adverse possession as it may be used, and as it is currently being used, with respect to residential properties that stand vacant as a result of foreclosure actions. As adverse possession is currently construed in a majority of states, a trespasser can illegally enter a vacant home and, assuming the trespasser satisfies the elements of the doctrine, ultimately prevail in obtaining title to the home by adverse possession. The trespasser can be transformed into the homeowner through the doctrine of adverse possession. This Article argues that the doctrine must be reformed to prevent this unjust and undesirable result.

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¹ See infra notes 188 and 189 and accompanying text.
I. INTRODUCTION

“You’re trespassing, I’ll shoot.” That was the response a local television reporter received from Pastor Marcellous Dunbar when questioning Mr. Dunbar as to why he was “squatting” in a Jacksonville area home. At some point in 2011, Mr. Dunbar had removed the locks on the doors of a home to which he had no legal right, entered, installed new locks, and moved his personal belongings into the home. The home, which was bank-owned as the result of a foreclosure, was valued at $440,000.00. In subsequent interviews with the local media, Mr. Dunbar proclaimed that

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3 See BLACK’S LAW DICTIONARY 1533 (9th Ed. 2009) (defining squatter as “[o]ne who settles on another’s land, without legal title or authority. A person entering upon lands, not claiming in good faith the right to do so by virtue of any title of his own or by virtue of some agreement with another whom he believes to hold the title. Under former laws, one who settled on public land in order to acquire title to the land.”).
4 Pastor Accused of Squatting in Home, supra note 1.
5 Id.
6 Id.
he had acquired title to the home by adverse possession. Unfortunately for Mr. Dunbar, his occupancy of the home was discovered when the home was sold and the realtor arrived to check on the property for the out-of-state buyers. Mr. Dunbar was later arrested and charged with grand theft and burglary, but not before making a splash in the local media and causing many people to ask the question: could this really happen? Could a squatter somehow transform himself from a trespasser into a homeowner through the seeming magic of adverse possession? In Florida and in most states, the answer is yes.

As demonstrated by the story of Mr. Dunbar set forth above, the concept of a trespasser entering a vacant home and claiming title by adverse possession is not a theoretical examination. Nor does this Article address a mere isolated incident. Recent news reports recount numerous situations in which individuals intentionally trespassed into and took possession of vacant, bank-owned homes with the intent of claiming title by adverse possession. In Denver, for example, when a local television station investigated the issue it uncovered at least one dozen instances in which individuals had moved into vacant houses that were in various stages of foreclosure. In Clay County, Florida (the county in which Mr. Dunbar filed his claim of adverse possession), officials reported that at least five other individuals had filed affidavits claiming title by adverse possession to vacant, foreclosed homes within a several week period in 2011.

Perhaps nowhere is the situation more common or has the issue received more attention than in Tarrant County, Texas. A study of the

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7 Id.
8 Id.
11 KCNC CBS4, supra note 10.
12 Rincon, supra note 9.
Tarrant County real estate records conducted by the *Fort Worth Star-Telegram* found that squatters had taken possession and filed affidavits claiming title by adverse possession of homes with an aggregate value of over $8 million.\(^\text{13}\) Tarrant County has become the “go-to place for an assortment of squatters” who claim title to vacant, foreclosed homes through adverse possession.\(^\text{14}\) The “chaos”\(^\text{15}\) currently plaguing Tarrant County is the result of those who trespass into vacant homes, file affidavits of adverse possession in the county real estate records, pay the $16.00 filing fee, and take up residency in the homes. One such situation involved one of Tarrant County’s priciest residences, a mansion valued at $2.7 million.\(^\text{16}\) The mansion, owned by Bank of America as the result of a foreclosure action, had been vacant for approximately two years before Samantha Carter, a former insurance agent from Tennessee, took possession and filed an affidavit claiming title to the mansion by adverse possession.\(^\text{17}\) Ms. Carter even took the unusual step of calling the local police department to inform them (incorrectly) that the police had no authority to require her to vacate the home because she had filed the claim of adverse possession.\(^\text{18}\) While Ms. Carter was eventually arrested, her adverse possession filing forced Bank of America to remove the mansion from the market until the ambiguity in the title to the home could be resolved.\(^\text{19}\)

In nearby Flower Mound, Texas, Kenneth Robinson became somewhat of a local celebrity after he unabashedly and unapologetically claimed title to a vacant home valued at $340,000.00.\(^\text{20}\) After paying the $16.00 recording fee to file an affidavit in which he claimed he held title to the home by adverse possession, Mr. Robinson took possession of the home, moved his personal belongings into the home, hung a “No Trespassing” sign in the window, and even invited local news reporters inside for a tour.\(^\text{21}\) Mr. Robinson considers himself to be a “savvy

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\(^{14}\) Associated Press, *Squatters Claim $2.7 Million Texas Mansion*, supra note 13.

\(^{15}\) Id.

\(^{16}\) Berard, supra note 13.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id.


\(^{21}\) Id.
investor," not a trespasser or a squatter. In an attempt to publicize and even capitalize on his knowledge of the doctrine of adverse possession, Mr. Robinson even created a website which he cleverly titled www.16dollarhouse.com, in reference to the $16.00 fee that Tarrant County charged to record Mr. Robinson’s affidavit of adverse possession, where he offers would-be squatters the opportunity to purchase his e-book entitled, Open and Notorious: Kenneth Robinson on Adverse Possession. In Robinson’s words, “I wrote everything that helped me acquire a $340,000 house, rent free and mortgage free, in my e-book . . . . I followed a simple process and wrote it all down. Buy it now.” While Mr. Robinson has not been charged with a crime in connection with his occupancy of the home, Bank of America (which owned the home as the result of a foreclosure proceeding) had to bring an eviction action against Mr. Robinson to remove him from the home. After living in the home rent-free for over six months while under the spotlight of the local and national media attention, Mr. Robinson was finally ordered to vacate the home in February of 2012 upon order of the court.

While Mr. Robinson’s claim of adverse possession received the most media attention, another adverse possessor, Mark Guerette, was perhaps the most inventive. Mr. Guerette attempted to utilize the doctrine of adverse possession to obtain title to a cadre of residential properties located in Palm Beach and Broward Counties in the State of Florida. Mr. Guerette, through an entity called Save Florida Homes Inc., filed claims of adverse possession on approximately 100 vacant, residential properties which had been foreclosed upon or were in various stages of foreclosure. Of these properties, he focused on twenty or so homes that could be easily renovated and prepared for rental to third parties. Without obtaining the permission of the record owners, Mr. Guerette took possession of the homes, made repairs, and held the homes out for rent to third parties.

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22 Id.
23 Id.; see also www.16dollarhouse.com.
24 See www.16dollarhouse.com.
25 Merchant, supra note 20.
26 See Dorning, supra note 10 (stating that Robinson was in possession of the home as of July 19, 2011, the date on which the article was written), and Merchant, supra note 20 (stating that Bank of America obtained a judgment of eviction and Robinson was ordered to vacate the property on or before February 13, 2012).
27 Merchant, supra note 20.
29 Id.
30 Id.
31 Id.
even sent letters to the record owners to inform them of his intent to claim title by adverse possession. He then rented the homes to third parties at below-market rental rates. At the highpoint of his operation, Mr. Guerette was managing seventeen homes which he rented to third parties, all of which he claimed title to by adverse possession, and none of which he actually owned. Mr. Guerette’s rental “business” became known to the local and national media. He was eventually arrested on multiple charges. In 2011, he pleaded no contest to charges of fraud in the second degree and received a sentence of two years of probation.

A number of the aforementioned would-be adverse possessors were eventually arrested and, in the case of Mr. Guerette, sentenced (albeit a sentence of probation). Therefore one might wonder, is this really such a problem? Shouldn’t we as a society, as scholars, leave it to the criminal justice system to deal with these trespassers? In light of the volume and increasing frequency of adverse possession claims, the media attention, the public outcry, and the need to curtail these actions before they become even more frequent, this Article argues that the law must change so that would-be adverse possessors no longer view the doctrine as a viable means to obtaining title to a house for the cost of a recording fee. While financial institutions which lose title to residential properties through claims of adverse possession are not likely to garner much sympathy, there is, to most people, something inherently unfair about the notion that one can proactively and intentionally take the property of another without right and without compensating the true owner. Yet in most jurisdictions the doctrine of adverse possession allows it to be so.

In order to understand how adverse possession is being used in the context of the current housing crisis and why that utilization is no longer desirable or necessary, it is necessary to first examine the origin and history, the policy justifications, and the current application of the doctrine. Part II of this Article provides a brief overview of the doctrine. It also discusses the origins of adverse possession at common law and the development of

32 Id.
33 Id.
34 Id.
36 Id.
37 Berard, supra note 13 (reporting the arrest of Samantha Carter in Tarrant County, TX); Rincon, supra note 9 (reporting the arrest of Pastor Marcellous Dunbar in Jacksonville, FL); Skipp & Cave, supra note 28 (reporting the arrest of Mark Guerette in Broward County, FL).
adverse possession in the early American tradition. Part III examines the policy justifications that underlie the doctrine of adverse possession. Next, Part IV examines the statutory and common law elements required to establish a claim of adverse possession. Part V further defines and discusses the mental state required to prevail in a claim of adverse possession. Next, Part VI describes how the doctrine of adverse possession, as it is applied in a majority of jurisdictions today, can lead to unjust enrichment and a litany of other problems that necessitate the reform of the doctrine. In Part VII, this Article discusses legislation recently enacted in Colorado and New York that reforms the doctrine in those states to no longer permit claims by intentional adverse possessors. Part VII then argues for the adoption of similar statutory reforms in other states for the purpose of preventing the unjust enrichment of intentional adverse possessors and removing the incentive for individuals to take possession of vacant, foreclosed homes under claims of adverse possession.

II. BACKGROUND INFORMATION AND HISTORICAL DEVELOPMENT

A. What is Adverse Possession?

Adverse possession is a legal doctrine that permits a trespasser who occupies the real property of another in an open, notorious, visible, continuous, and adverse manner for a specified period of time to obtain legal, record title to such property. “In most states, the law permits even the knowing trespasser (or so-called bad-faith adverse possessor) to take advantage of this doctrine. Although not a criminal law doctrine, adverse possession ultimately converts someone who would otherwise qualify as a criminal trespasser into an owner.” As a result of adverse possession, the trespasser does not merely gain permission to continue to trespass on another’s property, nor does the trespasser gain the right to purchase the property from the true owner at fair market value. “Instead, the result of successful adverse possession is an outright involuntary and uncompensated transfer of ownership from the original owner to the unlawful possessor.”

38 3 AM. JUR. 2d Adverse Possession §2, §10 (2011).
40 Id. at 149.
41 Id.
B. Early Foundation in England

The doctrine of adverse possession under common law dates back to the decline of the feudal period in England. As feudalism declined, private ownership of real property by an emerging middle class developed. “Adverse possession evolved in England as a method to protect the true owner of land by barring ancient (and presumably frivolous) claims, much like a modern statute of limitations.” In a mature, populated, agricultural society without an effective system for registering or recording title to real property, long term possession served as a substitute for, and sufficient evidence of, actual ownership. If a party remained in possession of real property for an extended period of years without a claim of ownership by another, such possession was construed as evidence that the party in possession was, in fact, the true owner. Under this approach, the key elements of adverse possession as recognized in the post-feudal period in England (and as currently recognized in a majority of jurisdictions in the United States today), namely, actual possession, adverse and hostile possession, exclusive possession, continuity, and open and notorious possession, provided constructive notice to the world of the adverse possessor’s claim of title to the land.

The English codification of adverse possession appears to begin in 1275 with the enactment of the Statute of Westminster. The Statute of Westminster established the year 1189 as the earliest date back to which title to real property could be searched for the purpose of establishing the true owner of such real property. By establishing a commencement date for searching the validity of title to real property, the party in possession of real property as of such date became the presumed owner even if such party

43 Id.
45 Id.
46 Id.
47 Id. See also John G. Sprankling, An Environmental Critique of Adverse Possession, 79 CORNELL L. REV. 816, 840-853 (1994) (arguing that the doctrine of adverse possession was developed as a means of negating the existence of undeveloped land).
48 Swanson, supra note 42, at 308 (citing Limitation of Prescription Act, (1275), 1 Stat. of the Realm 26, 36 (Eng.)).
49 Id.
did not legitimately obtain his interest.\textsuperscript{50} The Statute of Westminster can be viewed as establishing the foundation upon which the law of adverse possession was later built.\textsuperscript{51} Building upon that foundation, in 1540 a statute was enacted that limited the amount of time within which a true owner of real property could file an action to assert his property rights.\textsuperscript{52} Later, in 1623, the first statute of limitations in the modern incarnation was enacted in England.\textsuperscript{53} The 1623 statute established a twenty year time limit for actions for the recovery of real property.\textsuperscript{54} By 1874, the twenty year limitation period was shortened to twelve years with the passage of the Real Property Limitation Act.\textsuperscript{55} The Real Property Limitation Act is particularly important because it declared that, at the end of the twelve year statutory period, the true owner’s rights, if not asserted, would be extinguished in favor of the adverse possessor.\textsuperscript{56} It is through the application of these Acts that the key elements of the doctrine of adverse possession developed in England.\textsuperscript{57}

\textbf{C. Adverse Possession in Early America}

While rooted in English law, the doctrine of adverse possession further developed and flourished in colonial America and the succeeding millennia. In fact, some scholars argue that the very foundation of private ownership of real property in the United States – the acquisition of lands from the Native American tribes – was, in itself, an act of adverse possession.\textsuperscript{58} Such scholars argue that the lands of the Native American tribes were not legitimately purchased by the United States government.\textsuperscript{59} Rather, such scholars argue that the lands were taken from the Native American tribes in an open, notorious, hostile, actual, adverse and


\textsuperscript{51}Swanson, \textit{supra} note 42, at 308.

\textsuperscript{52}Swanson, \textit{supra} note 42, at 308 (citing Limitation of Prescription Act, (1540) § 3, 3 Stat. of the Realm 747, 747 (Eng.)). \textit{See also} Gardiner, \textit{supra} note 49, at 127.

\textsuperscript{53}Swanson, \textit{supra} note 41, at 308 (citing Limitation Act, (1623) § 1, 4 Stat. of the Realm 1222, 1222 (Eng.)). \textit{See also} Gardiner, \textit{supra} note 50, at 127 (referring to the Limitation Act of 1623 as a statute of limitations).

\textsuperscript{54}Swanson, \textit{supra} note 42, at 308 (citing Limitation Act, (1623) § 1, 4 Stat. of the Realm 1222, 1222 (Eng.)). \textit{See also} Gardiner, \textit{supra} note 50, at 127 (discussing the policy justifications in support of the Limitation Act of 1623).

\textsuperscript{55}Swanson, \textit{supra} note 42, at 308 (citing Real Property Limitation Act, 1874, 37 of 38 Vict., c.57 (Eng.)).

\textsuperscript{56}Id.

\textsuperscript{57}\textit{See generally}, Sprankling, \textit{supra} note 44, at 538.

\textsuperscript{58}Swanson, \textit{supra} note 42, at 310.

\textsuperscript{59}Id.
continuous manner, a manner which is analogous to the modern day definition of adverse possession. As such, it can be argued that the judicial ratification of such actions served as the initial recognition of the doctrine of adverse possession in the United States. In the foundational case of Johnson v. M'Intosh, the Supreme Court of the United States reasoned that it was appropriate for the United States government to seize the lands of the Native American tribes in part because the Native American tribes had not put the lands into productive use. In delivering the opinion of the Court, Chief Justice John Marshall stated that to leave the Native American tribes “in possession of their country, was to leave the country a wilderness . . . .” “Leaving land a wilderness was of course seen as the antithesis of cultivation, profit, and progress.” The concept that land should be utilized in the most productive manner is one of the fundamental public policy justifications in support of the doctrine of adverse possession.

During the seventeenth and eighteenth centuries, American property law evolved into a system that emulated English property law; more specifically, it evolved into a system that emulated the 1623 codification of the statute of limitations and the Real Property Limitation Act of 1874. During this period the American courts followed the doctrine of adverse possession as it had been developed in England by requiring evidence that the claimant engaged in activities that provided actual or constructive notice of the claimant’s possession of the land to the true owner. Accordingly, to prevail in an adverse possession claim in the seventeenth and eighteenth century American courts, the claimant was required to demonstrate that he engaged in activities such as residing on the land, cultivating or farming the land, fencing or enclosing the land, or making improvements to the land.

“Nineteenth-century American courts, however, transformed the doctrine in order to promote the development of wilderness land.” Over time the courts abandoned the requirement that the claimant reside on the

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60 Id.
61 See generally Swanson, supra note 42, at 310-313.
63 Id.
64 Swanson, supra note 42, at 310.
65 See infra Part III (discussing the public policy justifications in support of adverse possession).
66 Sprankling, supra note 44, at 522 n.13.
67 See Limitation Act, (1623) § 1, 4 Stat. of the Realm 1222 (Eng.).
68 See Real Property Limitation Act, 1874, 37 of 38 Vict., c.57 (Eng.).
69 Sprankling, supra note 44, at 538.
70 Id.
71 Id. at 539.
land, cultivate or farm the land, fence or enclose the land, or make 

improvements to the land.72 Instead, the courts adopted a new standard 

which measured the sufficiency of the acts necessary to establish adverse 

possession based on the nature and character of the land involved in the 

particular dispute.73 Said differently, courts began to ease the requirements 

for establishing adverse possession in situations involving real property 

(such as wilderness and other undeveloped lands) that would not typically 

be cultivated, farmed, fenced or improved. “Under this calculus, adverse 

possession of wilderness land could be premised on infrequent, 

inconspicuous actions that were unlikely to afford notice to anyone.”74 

“[T]he courts adopted a public policy that as much land should be put to use 

as possible.”75

Why did the courts adopt this more relaxed standard? Because 

undeveloped lands were vast and expansive, the population was growing, 

and there was a strong societal need for productivity and the development 

of real property. It was of critical importance to society as a whole that the 

lands be cultivated and farmed, that crops be harvested, and that animals be 

herded and raised in order to feed the ever-growing population. “Early 

Americans viewed the seemingly endless wilderness with repugnance. It 

impeded progress, retarded prosperity, and blocked national expansion.”76 

“[L]and in its natural condition was considered essentially worthless until 

converted to human use.”77 As one might expect, the judiciary shared this 

“societal prejudice”78 against undeveloped lands. “This ideology spawned 

an American judicial attitude that strongly favored the agrarian 

development of wilderness land.”79

As the young nation matured and the agricultural society 

transformed into an industrial society, the need for the productive use of 

land did not diminish. As the industrialization movement took hold, the 

productive use of land meant the use of land for the construction of 

factories, the development of infrastructure such as railroads, the building 

of cities, and the change from a society dependent upon agriculture and 

farming to a society dependent upon industrial development. Throughout 

the early history of the United States, the doctrine of adverse possession

72 Id.
73 Id. See also Sprankling, supra note 47, at 848-49 (analyzing the courts’ progression 
toward measuring the sufficiency of the acts necessary to establish adverse possession 
based on the nature and character of the land).
74 Sprankling, supra note 44, at 539.
75 Id. (citing Seddon v. Harpster, 403 S.2d 409, 413 (Fla. 1981)).
76 Id. supra note 44, at 530.
77 Id. at 531.
78 Id.
79 Id. at 532.
was not only consistent with, but it also advanced and promoted, the needs and values of society as a whole.\textsuperscript{80}

III. POLICY JUSTIFICATIONS IN SUPPORT OF ADVERSE POSSESSION

As every first-grader knows, it is wrong to take someone else’s things. It is wrong to take something that does not belong to you, whether it is your classmate’s toy, candy from the corner store, or something more significant like a friend’s bicycle. Why, then, did the doctrine of adverse possession – a doctrine that rewards the taking of someone else’s property – develop? And why does it continue to be a part of the American property law tradition? Scholars have long strove to provide a satisfactory explanation to these policy-based questions.\textsuperscript{81} Certain of the justifications in support of the doctrine of adverse possession emanate from social justice theory; others from utilitarian theory.\textsuperscript{82} Certain rationales emphasize efficiency while others are concerned with influencing the future behavior of property owners and would-be adverse possessors.\textsuperscript{83} While it is beyond the scope of this Article to provide a comprehensive review of the scholarship discussing the policy basis for adverse possession, it is important to highlight the most significant and generally agreed-upon justifications.

Although stated in various ways, there are four primary categories of policy justifications in support of the doctrine of adverse possession: (1) those which focus on encouraging the productive use of land and punishing the idle land owner; (2) those which focus on improving the marketability of title to real property; (3) those which focus on remediying errors and boundary uncertainties; and (4) social justice-type arguments which focus on the use of adverse possession as a means of social change. The following sub-sections provide an explanation of these primary policy justifications.

A. Productive Use and “Sleeping” Rights

One of the most often-cited policy justifications in support of the doctrine of adverse possession is that real property should be used in a

\textsuperscript{80} See infra Part III for a discussion of the public policy justifications in support of the doctrine of adverse possession.

\textsuperscript{81} For a thorough examination of the justifications in support of the doctrine of adverse possession, see Jeffrey Evans Stake, The Uneasy Case for Adverse Possession, 89 GEO. L.J. 2419, 2434-2455 (2001).

\textsuperscript{82} Id.

\textsuperscript{83} Id.
productive manner so as to benefit society as a whole.\textsuperscript{84} This theory holds that society will reap the benefit when a party (whether it be the true owner or a trespassing user) makes productive use of the land.\textsuperscript{85} Accordingly, where the true owner of real property allows the land to remain undeveloped, one can argue that society as a whole is harmed. Where land sits idle and undeveloped, it necessarily is not being used for the production of food, the raising of livestock, the production of goods, or the provision of services. Accordingly, this theory holds that undeveloped land has no true benefit to society in general. This theory argues that adverse possession promotes economic development and therefore benefits society as a whole because it reallocates title from the idle true owner to the trespassing active user.\textsuperscript{86} Stated differently, “[a]dverse possession favors the productive thief over the idle true owner.”\textsuperscript{87}

As a corollary to the productive use theory, scholars also point to the “sleeping” theory as a public policy basis for the doctrine of adverse possession.\textsuperscript{88} Under the sleeping theory, adverse possession acts as a penalty or punishment for those who “sleep” on their rights by failing to make productive use of their real property.\textsuperscript{89} The sleeping theory contends that adverse possession is justified on the basis that it reallocates real property from the wrongdoer (the sleeping true owner) to a trespassing user who is making productive use of the land.\textsuperscript{90} Similar to the productive use theory discussed in the preceding paragraph, the sleeping theory is based on the utilitarian premise that real property should be put to productive use for the benefit of society as a whole. The productive use theory and the sleeping theory elevate the productive, trespassing user over the rights of the true owner.

While the productive use theory and the sleeping rights theory may have been legitimate justifications for the doctrine of adverse possession in post-feudal England and frontier America, such theories are at odds with the values held by modern society. As scholars have argued, “[t]here is little justification today for legal rules that force the use of land. In several ways,
the law has recognized that productive use of land can be undesirable.91 We, as a society, no longer hold as a virtue one’s ability or right to make the most intensive or productive use of one’s land. On the contrary, modern law more often favors the preservation, not the development, of real property. If one desires to develop or even change the use of one’s land, one must comply with the myriad of federal statutes and regulations, state statutes and regulations, and municipal ordinances governing and restricting land use. Several decades ago, states and municipalities across the United States began enacting statutes and ordinances which regulate, restrict, and in some instances prohibit, the development of real property.92 In addition, during the twentieth century the federal government reversed its prior policy of encouraging the development of real property by enacting various laws aimed at preserving wilderness lands,93 protecting endangered species and preserving their natural habitats,94 preserving wetlands,95 and preserving historic properties.96 The importance of preserving – not exploiting – land was perhaps most poetically explained by the United States Congress in its enactment of the Wilderness Act:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American

91 Stake, supra note 81, at 2435.
92 For example, in 1973 the State of Oregon enacted a number of land use and preservation laws aimed at restricting land use, managing growth, preserving agricultural and forest lands, and promoting economic growth. See generally Or. Rev. Stat. §197 (2011). Shortly after the enactment of such laws, every local municipality in Oregon was required to establish an urban growth boundary which defines the boundaries within which development may occur. See id. The development of any real property located outside of each defined urban growth boundary is strictly prohibited. Id. Said differently, all land located outside of the urban growth boundary (a boundary which was established decades ago) must remain rural or agricultural in nature. Such laws are codified at Or. Rev. Stat. §197 (2011). For a discussion of the Oregon statutes, the effect thereof in limiting the development of lands within the State of Oregon, and the attempts to overturn the statutes, see Michael C. Blumm & Erik Grafe, Enacting Libertarian Property: Oregon’s Measure 37 and Its Implications, 85 Denv. U. L. Rev. 279, 285-86 (2007).
people of present and future generations the benefits of an
enduring resource of wilderness.97

The importance of land preservation is even recognized in the Internal
Revenue Code.98 Under I.R.C. § 170, an owner of real property may be
entitled to a charitable contribution deduction from his or her federal
income taxes if he or she agrees (through the granting of a “conservation
easement”99) to voluntarily restrict the use and development of his or her
lands in order to preserve the lands for conservation purposes.100

With the primary policy justification in support of the doctrine of
adverse possession (e.g., to promote the productive use of real property and
to punish the idle land owner) no longer being an important societal value,
the case for the continuance of adverse possession is greatly diminished. In
fact, modern societal values actually disfavor the productive use of land.
Rather than encouraging the productive use of land, the law now
encourages its preservation and conservation.

B. Improving Certainty and Marketability

The second category of policy justifications in support of the
document of adverse possession focuses on how the doctrine facilitates the
certainty of ownership and improves the marketability of title to real
property.101 By recognizing the party in possession of the real property as
the in-fact owner, the doctrine makes ownership of, and title to, real
property “more settled or certain.”102 Said differently, adverse possession

97 Sprankling, supra note 44, at 559 n.211 (citing Wilderness Act of 1964 § 1131(a)).
99 A conservation easement is a voluntary restriction placed on one’s land whereby
the owner agrees to preserve the land for the benefit of the public. Timothy Lindstrom, A
Guide to the Tax Aspects of Conservation Easement Contributions, 7 WYO. L. REV. 441,
445 (2007). Conservation easements are typically used to protect and preserve farm land,
forests and timber land, wetlands, wildlife habitats, scenic views, historical lands and
structures, and open spaces, particularly where the property is under residential or
commercial development pressure. Id. at 445-46. In a typical scenario, the owner of the
land agrees to grant a conservation easement to a third party steward which is typically a
non-profit conservation organization or a governmental agency. Id. at 445. The property
owner and the third party steward enter into an easement agreement whereby the property
owner places certain restrictions on the land. Id. at 445. The conservation easement
restricts the right of the property owner (and future owners of the same property) to use or
develop the land in a manner that is inconsistent with the conservation purposes set forth in
the easement. Id.
101 Swanson, supra note 42, at 315 (citing Henry W. Ballantine, Title by Adverse
Possession, 32 HARV. L. REV. 135, 135 (1918)).
102 Stake, supra note 81, at 2441.
protects the party who is in possession by barring lawsuits based on aged claims of ownership. If a party has occupied a parcel of real property for ten or twenty years, should not that be long enough for the true owner to bring a claim to oust the party in possession? By establishing this certainty of ownership, title to the real property becomes more marketable, conveyances of real property can be accomplished with more certainty and ease, the parties in possession of real property will have more incentive to make investments in the land, and owners will likely feel more secure in their property rights.\textsuperscript{103}

The question to consider is whether this policy justification is still necessary or relevant. Recall that adverse possession evolved in the post-feudal period in England as a method to protect the true owner of land by barring old (and presumably frivolous) claims.\textsuperscript{104} “In a heavily populated, agricultural country lacking an effective title recording system, long-term possession was optimum evidence of ownership.”\textsuperscript{105} Given the absence of an effective system for recording title to real property in the post-feudal period, society relied on long-term possession as sufficient evidence of ownership.\textsuperscript{106} In contrast, today we have long-established systems for the recording of title to real property. It is customary for prospective buyers, lenders and others seeking to gain an interest in real property to undertake (or engage an attorney or title insurance company to undertake) a thorough examination of the real estate records to determine the ownership status. Title insurance companies routinely issue title insurance policies which insure an owner’s title to the subject property based upon the title insurance company’s examination of the records. “If a recorded transfer were the only way to gain title, purchasers could be certain that they were buying from the right person merely by checking the record.”\textsuperscript{107} If the law recognizes the possibility that a third party may have acquired title by adverse possession, the doctrine of adverse possession actually makes the record less reliable and decreases the certainty of ownership.\textsuperscript{108} In the modern world, the doctrine of adverse possession has the exact opposite impact as that put forth by the second policy justification. In modern times, adverse possession actually makes title to real property less certain because it provides an avenue for one to gain title to real property outside of the established recording system.\textsuperscript{109} With the second policy justification (e.g.,

\textsuperscript{103} Id.
\textsuperscript{104} Sprankling, supra note 44, at 538.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Stake, supra note 81, at 2442.
\textsuperscript{108} Id.
\textsuperscript{109} See Stake, supra note 81, at 2442-43.
to improve the certainty of ownership and the marketability of title) having lost importance in light of the modern system for recording title to real property, the case for the continuance of adverse possession is, again, significantly weakened.

C. Remediing Errors and Boundary Uncertainties

The third category of policy justification in support of the doctrine of adverse possession focuses on how the doctrine aids in remedying errors and resolving uncertainties in property boundaries. As any real estate practitioner can attest, mistakes in legal descriptions of real property are relatively common. Typographical errors occur (e.g., “Lot 58” is typed as “Lot 85”) on a relatively frequent basis. Correct legal descriptions are not always attached to conveyance documents before they are recorded. Boundary lines between properties are not always clear. Surveys of real property are not exact. Many of us can recite stories from our own personal experiences of fences that were not installed on the boundary line, or sheds that were constructed on the neighbor’s land, or driveways that traversed over the neighbor’s yard. In the extreme case, some of us can even recite stories of clients who did not actually own the home in which they lived or the building in which their business operated; instead, they owned an adjoining lot or a different property altogether, all due to a simple error in the legal description. The doctrine of adverse possession facilitates the correction of these defects and errors by awarding title to the party who has been in possession of the property for the requisite statutory time period. As best stated by scholar and law professor Jeffrey Evans Stake, “[w]ere it not for the doctrine, people would more often lose the land on which they were living.”

While the other policy justifications in support of the doctrine of adverse possession are no longer relevant in the modern world, this Article does not argue that adverse possession should be abolished entirely. As demonstrated by the foregoing examples, the doctrine of adverse possession retains value in its ability to reform errors in legal descriptions and ambiguities or mistakes in boundary lines. While other remedies are available, in this author’s view adverse possession remains at least a somewhat useful tool for remedying errors in legal descriptions and bringing certainty to boundary line disputes.

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110 Id. at 2446-47.
111 Id. at 2446.
112 See Stake, supra note 81, at 2446-2449 (arguing that adverse possession is not justified on the policy basis of remedying errors and uncertainties in boundaries because other legal remedies and other practical solutions are available to property owners).
D. Adverse Possession as an Agent of Social Change

The fourth policy justification in support of the doctrine of adverse possession is based on a social justice-type theory which posits that adverse possession can, and should, be used as an agent of social change. Under this theory, property is viewed as an allocation of resources rather than as an inherent right or a legal relationship between persons and real property. In this view, property law involves policy choices which can, and should, be used to effectuate social change. Because this policy justification is likely the primary argument in favor of permitting trespassers to take occupancy of vacant homes and claim title by adverse possession, this policy justification and the critique thereof is examined in detail in Part V.B. of this Article.

IV. THE ELEMENTS OF ADVERSE POSSESSION

Having examined the policy justifications that underlie the doctrine of adverse possession, we now turn to an examination of the doctrine itself. This Part focuses on the ultimate question of what elements must be satisfied in order to prevail in a claim of title by adverse possession. This Part begins with an overview of the doctrine and proceeds through a discussion of the elements that one must satisfy to succeed in a claim of title to real property by adverse possession.

Adverse possession is a “strange and wonderful system” whereby one’s occupation of another’s real property can result in the transfer of title from the true owner to the adverse possessor. Conceptually, a party who is in possession of real property but lacks legal title to it may gain legal title if he or she has maintained such possession for at least the number of years prescribed by statute and he or she has satisfied all other elements of adverse possession. If the adverse possessor satisfies all such elements, the rights of the true owner will be extinguished and the adverse possessor’s title to the real property will be valid against all others including the true

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115 See Id.
117 Id.
owner. Through the application of the doctrine of adverse possession, the successful claimant is vested with “as perfect title as if there had been a conveyance by deed.”

To succeed in a claim of title by adverse possession, a claimant must satisfy two distinct components: he or she must be in possession (adversely) of the real property for at least the statutory period of limitation, and he or she must prove each element of the doctrine of adverse possession. While the precise elements of the doctrine vary somewhat by jurisdiction, there is a general consensus and substantive commonality that can be derived from the judicial opinions. To succeed in a claim of title to real property by adverse possession, a claimant must generally prove that his or her possession is: (1) actual; (2) open and notorious; (3) exclusive; (4) hostile (sometimes referred to as adverse and hostile, or some similar derivation); and (5) continuous, in each instance for the period of time prescribed by the applicable statute. In addition to these common elements, some jurisdictions impose additional requirements such requiring that the claimant has cultivated or improved the land; or that the claimant occupied the real property under a “claim of right” by demonstrating his or her intention to use the land as his or her own, irrespective of any actual title or right. Other jurisdictions have enacted statutes which shorten the statutory period for adverse possession if the claimant has taken certain actions such as the payment of real property taxes on the disputed property. The remainder of this Part IV will address, in turn, each of the five aforementioned commonly-held elements.

118 Stake, supra note 81, at 2422.
120 STOEBUCK & WHITMAN, supra note 116, § 11.7, at 853.
124 Compare, e.g., Wis. Stat. § 893.25 (2009-10) (providing for a twenty year statutory period for adverse possession claims generally); and Wis. Stat. § 893.27 (2009-10) (providing for a reduction in the statutory period for adverse possession to seven years if the claim is based upon a written instrument and the claimant has paid the real estate taxes on the claimed real property for the seven year statutory period).
125 See infra Part IV.A-E for the discussion of the elements of actual possession, open and notorious possession, exclusive possession, continuous possession, and the statutory period. See infra Part V. for the discussion of the element of adverse and hostile possession.
A. Actual Possession

The first element of the doctrine of adverse possession requires the claimant to establish that he or she was in actual possession of the real property for the statutory period.\textsuperscript{126} To establish actual possession some degree of physical occupation of the real property by the claimant is required; however, exactly what degree is the subject of a great number of cases.\textsuperscript{127} The claimant must generally prove that he or she physically possessed and maintained control over the real property in the same manner that a typical owner would, given the nature and condition of the property,\textsuperscript{128} and the location of the property.\textsuperscript{129} Stated differently, actual possession requires that the claimant made use of the real property in a manner that would be consistent with “the ordinary use to which the land is capable and such as an owner would make of it.”\textsuperscript{130} Because the nature, location and condition of the real property are taken into consideration, the degree of actual possession required to establish adverse possession of vacant land located in a wooded area, for example, is far less than the degree of actual possession required to establish adverse possession of an existing home in a residential area.\textsuperscript{131}

The vast majority of adverse possession cases involve disputed lands between neighboring property owners or disputes regarding the ownership of undeveloped lands. Accordingly, the case law typically focuses on acts that are far less intensive than actual residence at the property. Examples of acts that courts have found to be sufficient to establish actual possession include occupying, clearing, cultivating, pasturing, erecting fences or other improvements, and paying taxes on the land.\textsuperscript{132} For unimproved, wooded lands in undeveloped areas, courts have found that even seasonal or sporadic acts such as harvesting timber, cleaning up debris, and keeping land clear for recreational use were sufficient to establish the element of actual possession.\textsuperscript{133} Even with respect to improved real property, it is not necessary that the claimant actually reside on the land, although doing so

\textsuperscript{126} Gurwit v. Kannatzer, 788 S.W.2d 293, 295 (Mo. Ct. App. 1990).
\textsuperscript{127} STOEBUCK & WHITMAN, supra note 116, § 11.7, at 854.
\textsuperscript{128} Clear Lake Amusement Corp. v. Lewis, 18 N.W.2d 192, 195 (Iowa 1945).
\textsuperscript{129} Gurwit, 788 S.W.2d at 296.
\textsuperscript{130} Burkhardt v. Smith, 115 N.W.2d 540, 544 (Wis. 1962).
\textsuperscript{131} See, e.g., Teson v. Vasquez, 561 S.W.2d 119, 125 (Mo. Ct. App. 1977).
\textsuperscript{132} Id. at 126. See also Palac v. Disanto, 622 A.2d 378, 380 (Pa. Super. Ct. 1993) (finding that the claimant’s acts were sufficient to establish all elements of adverse possession of an unimproved parcel of land where the claimant planted a garden, removed a gravel roadbed and replaced it with topsoil, leveled the property, and kept a trailer, boat and vehicles on the property).
\textsuperscript{133} Gurwit, 788 S.W.2d at 295-296.
would clearly establish actual possession. Courts have held that mere seasonal occupancy of a home is sufficient to establish actual possession if seasonal occupancy is consistent with the nature and location of the home. The best test of actual possession, as increasingly recognized by the courts, is whether the claimant’s acts of possession would be typical for an owner to make, given the particular real property and circumstances.

“To acquire title to land by adverse possession, a possessor must ordinarily exercise the usual acts of ownership such as making useful improvements, continuously residing on the land, cutting timber, cultivating the soil, or otherwise using the land in the way a reasonable landowner would use his property.” As applied to the circumstance of a claimant who takes possession of a vacant, foreclosed home and resides in the home, the claimant could satisfy the element of actual possession with relative ease. The claimant would only be required to demonstrate that he or she possessed the home in a manner that would be typical of a true owner, taking into consideration the nature and location of the home. Residing on the land is typically in itself sufficient evidence of actual possession. Accordingly, as long as the claimant resided in the home (or allowed another to reside in the home as a “tenant”), actual possession would be satisfied because residence in a home (or the leasing of a home to a “tenant”) is typical of how a true owner would possess it.

134 See, e.g., Ray v. Beacon Hudson Mountain Corp., 666 N.E.2d 532, 536 (N.Y. 1996) (finding that the claimant’s occupancy of a summer cottage in a resort town for one month each summer throughout the statutory period, coupled with efforts taken to secure and improve the premises and to eject trespassers during the remaining months of the year, satisfied the elements of continuous possession and actual possession). But cf., MEA Family Investments, LP v. Adams, 667 S.E.2d 609, 611 (Ga. 2008) (finding that the claimant’s “mere entry” onto the second floor of a commercial building that was leased to a tenant was insufficient to establish title by adverse possession where the claimant entered the second floor several hundred times over a period of forty years but never actually occupied the second floor).

135 Ray, 666 N.E.2d at 536.

136 STOEBUCK & WHITMAN, supra note 116, § 11.7, at 855.


138 See Clear Lake Amusement Corp. v. Lewis, 18 N.W.2d 192, 195 (Iowa 1945) (holding that the claimant must have physically possessed the real property in the same manner that a typical owner would, given the nature and condition of the property); Gurwit v. Kannatzer, 788 S.W.2d 293, 295 (Mo. Ct. App. 1990) (holding that the claimant must have possessed and exercised control over the property “as much as the character of the property admitted”).

139 See Houston, 652 F.2d at 473 (holding that a claimant must exercise the “usual acts of ownership” such as continuously residing on the land or otherwise using the land in the manner a reasonable owner would use his property).
B. Open and Notorious Possession

The second element of the doctrine of adverse possession requires the claimant to establish that he or she possessed the real property in an open and notorious manner for the statutory period. Open and notorious possession has been defined as possession that is “conspicuous, widely recognized and commonly known.” To satisfy this element the claimant must demonstrate that he or she took actions that were so visible and open such that if the true owner had visited the property, the true owner would have been on notice that the property was in the possession of another. An adverse possessor will not prevail in his or her claim if the acts of possession were “so covert that it is unknown to the persons who deal regularly with and around the land claimed.” Stated differently, the claimant must take actions that are so obvious that if the true owner or a third party visited the property, he or she would be aware that the claimant is in possession of the real property.

As with the element of actual possession, the actions necessary to satisfy the element of open and notorious possession depend upon the nature, location and character of the land. Open and notorious possession will be found where the claimant demonstrates that he or she maintained and exercised “such open dominion as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.” The acts that a claimant relies upon to establish actual possession typically also establish open and notorious possession. For example, courts have found the following acts to be sufficient to establish open and notorious possession: enclosing vacant land with a fence, grazing cattle on the land, and irrigating the land; enclosing most of the land with a fence, posting “no trespassing” signs, cutting trees, hunting, and

140 Gurwit, 788 S.W.2d at 295; ITT Rayonier, Inc. v. Bell, 774 P.2d 6, 8 (Wash. 1989) (en banc).
141 Teson v. Vasquez, 561 S.W.2d 119, 127 (Mo. Ct. App. 1977) (citing Long v. Lackawanna Coal & Iron Co., 136 S.W. 673, 681 (Mo. 1911)).
143 Teson, 561 S.W.2d at 127.
144 Id. See also Jake’s Granite, 442 B.R. at 700 (holding that a claimant need only show that he or she “occupied or used the land as would an ordinary owner of the same type of land taking into account the uses for which the land was suitable”) (quoting Rorebeck v. Criste, 398 P.2d 678, 682 (Ariz. Ct. App. 1965) (citing Norgard v. Busher, 349 P.2d 490, 494 (1960))).
145 Clear Lake Amusement Corp. v. Lewis, 18 N.W.2d 192, 195 (Iowa 1945).
147 Jake’s Granite, 442 B.R. at 700.
placing posts and stringing cable across the means of ingress; and posting “no trespassing” signs, harvesting timber, picking up trash and debris, and keeping the land clear for recreational use. The key inquiry is whether the claimant’s acts would make it obvious to the true owner that the claimant is in possession of the real property.

The claimant is not necessarily required to reside on the property, although doing so would certainly satisfy the element of open and notorious possession. To constitute adverse possession, the claimant must either “remain permanently upon the land, or else occupy it in such a way, as to leave no doubt on the mind of the true owner, not only who the adverse claimant is, but that it was his purpose to keep him out of the land . . .” Applying this standard to the circumstance of a claimant who takes possession of a vacant, foreclosed home and resides in the home, the claimant could satisfy the element of open and notorious possession with relative ease. The claimant would only be required to demonstrate that he or she actually resided in the home because actual residence at the real property is sufficient to establish open and notorious possession. Alternatively, if the claimant took possession of the vacant home but did not reside there, he or she could still satisfy the element of open and notorious possession by showing that he or she took actions (such as changing the locks on the exterior doors) that made it obvious to the true owner that someone other than the true owner was in possession of the home. Such overt actions would have the effect of putting the true owner on notice that the claimant has taken possession of the real property, thereby satisfying the element of open and notorious possession.

C. Exclusive Possession

The third element of the doctrine of adverse possession requires the claimant to demonstrate that he or she had exclusive possession of the real

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150 Hoffman v. Freeman Land & Timber, LLC., 994 P.2d 106, 110 (Or. 1999) (en banc).
151 MEA Family Investments, LP v. Adams, 667 S.E.2d 609, 611 (Ga. 2008) (quoting Denham v. Holeman, 26 Ga. 182, 183 (Ga. 1858)). See also Houston v. U.S. Gypsum Co., 652 F.2d 467, 473 (5th Cir. 1981) (holding that a claimant must exercise the “usual acts of ownership” such as continuously residing on the land or otherwise using the land in the manner a reasonable owner would use his property).
152 See Houston, 652 F.2d at 473; MEA, 667 S.E.2d at 611.
153 See Hoffman, 994 P.2d at 110 (stating that a claimant’s use of real property satisfies the element of open and notorious possession if such use is “of such a character as to afford the [owner] the means of knowing it, and of the claim.”) (quoting Hicklin v. McClear, 22 P. 1057, 1057 (Or. 1889)).
property for the statutory period.\textsuperscript{154} Exclusive possession does not require absolute exclusivity; it only requires that the claimant has occupied the real property for his or her own use and not for the use of another party.\textsuperscript{155} Stated differently, exclusive possession means that the claimant has exercised possession and control over the real property in a manner that would be expected of a true owner of the particular type of real property.\textsuperscript{156} So long as the claimant exercises possession and control over the real property in the same manner as a true owner would, courts will typically find sufficient evidence of exclusive possession. Courts will also consider “the nature of the land, its uses, and the purposes for which it is naturally adapted” in determining whether the claimant has satisfactorily demonstrated exclusive possession.\textsuperscript{157}

Occasional use of the real property by others does not destroy a claimant’s exclusivity.\textsuperscript{158} The claimant may permit others (such as guests, invitees, and even occasional trespassers) to come onto the real property. However, the claimant must not have shared possession and control of the real property with the true owner or anyone else (other than those to whom the claimant gives permission to use the real property, such as an invitee or guest).\textsuperscript{159} This point is perhaps best illustrated by a hypothetical. For example, in a boundary dispute between neighboring property owners wherein one neighbor claims title by adverse possession to a portion of the other’s land, exclusive possession would not be found if both neighbors made use of the land during the statutory period. The purported adverse possessor’s claim would fail because he or she would not have exercised dominion and control over the land to the exclusion of the true owner. Conversely, if the purported adverse possessor allowed guests and invitees onto the land (but not the true owner), the claimant could establish exclusive possession because the guests and invitees were given permission by the claimant in a manner similar to how a true owner would act vis-à-vis granting others the right to come onto the land.

Applying these standards to the circumstance of a claimant who takes possession of a vacant home and claims title by adverse possession, it

\textsuperscript{155} Teson v. Vasquez, 561 S.W.2d 119, 127 (Mo. Ct. App. 1977); Gurwit, 788 S.W.2d at 296; ITT Rayonier, Inc. v. Bell, 774 P.2d 6, 8 (Wash. 1989) (en banc).
\textsuperscript{157} Stickler, 794 F. Supp at 400 (citing Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, 2005 WL 1153752, at *9 (S.D.N.Y. 2005)).
\textsuperscript{158} Stickler, 794 F. Supp at 400 (citing Robinson v. Robinson, 825 N.Y.S.2d 277, 280 (N.Y. App. Div. 2006)).
\textsuperscript{159} 39 AM. JUR. POF 2D Acquisition of Title to Property by Adverse Possession § 6 (2010).
would not be difficult for the claimant to satisfy the element of exclusive possession. The claimant would only be required to demonstrate that he or she excluded the true owner and maintained possession of the home in a manner that would be typical of a homeowner. In this scenario the claimant’s actions would satisfy the element of exclusive possession with relative ease because the claimant could demonstrate a level of dominion and control over the home (by entering the home, changing the locks, and residing in the home, and thereby excluding others) that would be expected of a true owner. Alternatively, if the claimant took possession of the vacant home initially then rented it to a third party, the claimant could still satisfy the element of exclusive possession. Absolute exclusivity is not required; the doctrine only requires that the claimant has excluded all persons other than those to whom the claimant gave permission. Since, in this scenario, the claimant would have given permission to the “tenant” to occupy the home, the claimant’s exclusive possession would remain intact.

D. Continuous Possession

The fourth element of the doctrine of adverse possession requires the claimant to demonstrate that he or she was in continuous possession of the real property for the statutory period. “To be continuous, use of the property must be constant and not intermittent.” However, continuous possession does not literally mean constant possession. The level of continuity of possession required to establish this element requires only “repeated acts that are consistent with the acts of possession of an owner of such a property.” Stated differently, courts consider the nature and condition of the particular property in determining what constitutes continuous possession of that property.

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160 *See* Stickler, 794 F.Supp. 2d at 400 (finding sufficient evidence of exclusive possession to avoid dismissal on summary judgment based on the claimant’s actions being characteristic of those of a typical owner where the claimant and her predecessors erected a retaining wall and fence which limited the true owner’s access to a disputed strip of land between their homes even though the true owner arguably had some access to the disputed area).

161 39 A.M. JUR. POF 2d *Acquisition of Title to Property by Adverse Possession* § 6 (2010).


163 Hoffman, 994 P.2d at 110.

164 *Stickler*, 794 F.Supp. 2d at 400.

165 *Id.* (citing Robinson v. Robinson, 825 N.Y.S.2d 277, 280 (N.Y. App. Div. 2006)).

The frequency and duration of the periods of possession that have been found to be sufficient to meet this element vary depending upon the nature and character of the real property. For example, in an adverse possession case involving a beach house whose physical use was restricted to summer occupancy, the court rejected the conclusion that the summer-only occupancy destroyed the element of continuous possession. Holding that the occupancy of the beach house for the summer months of each year during the statutory period constituted uninterrupted and continuous possession, the court stated, “it has become firmly established that the requisite possession requires such possession and dominion ‘as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.’” Finding that a typical owner of a beach house would only occupy that type of property during the summer months, the court concluded that the claimant’s acts were sufficient to establish continuous possession even though the claimant’s possession was not continuous throughout the year. Applying a similar principle to an adverse possession case involving a disputed strip of land between two neighbors’ homes, the court rejected the record owner’s motion for summary judgment and instead found that the installation of a retaining wall, landscaping, and pavement on the disputed land by the claimant and her predecessors may be sufficient to constitute continuous possession of the land even though the claimant offered no evidence of how frequently she or her predecessors actually used the disputed land. Further, in cases involving the adverse possession of undeveloped lands, courts have found continuous possession even in situations in which the claimants visited the lands only periodically and were not physically present on the lands for several weeks at a time.

Applying these standards to the circumstance of a claimant who takes possession of a vacant home, occupies the home, and claims title by adverse possession, such claimant could satisfy the element of continuous possession with relative ease. The claimant would only be required to demonstrate that he or she has occupied the home “continuously,” meaning in a manner that would be typical of a homeowner. Residing on the land

167 Howard, 477 P.2d at 213-14.
168 Id. (quoting Whalen v. Smith, 167 N.W. 646, 647 (Iowa 1918)).
169 Id.
172 See Teson v. Vasquez, 561 S.W.2d 119, 127 (Mo. Ct. App. 1977) (stating that “[i]n judging the continuity of possession, the character and use to which the land is adaptable must be taken into account.”).
is typically, in itself, sufficient evidence of continuous possession. So long as the claimant resided in the home, continuous possession would be satisfied because residence in a home is typical of how a true owner would possess it. Alternatively, if the claimant took possession of the vacant home initially then leased it to a third party, the claimant could still satisfy the element of continuous possession. In that circumstance, the continuity of possession would still be accomplished because the claimant would be in possession of the home as a true owner would, either through personally residing in the home or through renting the home to a third party.

E. The Statutory Period

A claimant who seeks to establish title by adverse possession must meet all of the foregoing elements of adverse possession (actual possession, open and notorious possession, exclusive possession, and continuous possession), plus the element of adverse and hostile possession which is discussed in Part V. below, for a certain period of time which is typically set by statute in the particular state. The statutory period for adverse possession varies greatly by jurisdiction. The statutory period ranges from as short as a few years in some states to several decades in other states. For example, the statutory period is just two years in Arizona, five years in Nevada, seven years in Florida, ten years in New York and Texas, fifteen years in Michigan, twenty years in Massachusetts, and thirty years in New Jersey. In addition to a general statutory period for adverse possession, many jurisdictions provide for a shortened statutory period if the claimant takes certain actions such as the payment of real estate taxes on the claimed real property, or if the adverse possessor’s claim is based on a written instrument that supports his or her claim of title. In some states,

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173 See Houston v. U.S. Gypsum Co., 652 F.2d 467, 473 (5th Cir. 1981) (holding that a claimant must exercise the “usual acts of ownership” such as continuously residing on the land or otherwise using the land in the manner a reasonable owner would use his property).
174 Swanson, supra note 42, at 321.
183 See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 16.024-26 (West 2011) (providing for a general statutory period for adverse possession of ten years; however, if the adverse
the statutory period may be reduced from ten or more years to as little as two or three years if the claimant takes such actions.\textsuperscript{184}

In the context of a claimant who takes possession of a vacant home and claims title by adverse possession, whether the statutory period is satisfied depends upon the jurisdiction in which the home is located and the facts and circumstances of the particular case. While it seems unlikely that an adverse possessor could remain in possession of a vacant, foreclosed home for a sufficient period of time to meet the statutory period in a state such as Massachusetts (which has a twenty year statutory period),\textsuperscript{185} it is quite likely that he or she could remain in possession for the requisite time period in a jurisdiction with a shorter statutory period such as Arizona (which has a two year statutory period)\textsuperscript{186} or Nevada (which has a five year statutory period)\textsuperscript{187}.

“Since the financial crisis began in September 2008, there have been approximately 3.7 million completed foreclosures across the country.”\textsuperscript{188} Furthermore, as of June 2012 approximately 1.4 million \textit{additional} homes were in some stage of the foreclosure process.\textsuperscript{189} The United States Government Accountability Office estimates that at least several million homes currently sit vacant in large part as a result of the foreclosure crisis.\textsuperscript{190} Given the astounding number of foreclosed homes, the current inventory of vacant homes resulting from foreclosure actions, and the continued backlog of homes that are in some stage of the foreclosure process, it seems quite likely that an adverse possessor could remain undetected in a vacant home for the statutory period in many states.

\textsuperscript{184} For example, in Colorado the general statutory period for adverse possession is eighteen years. \textit{Colo. Rev. Stat. Ann.} § 38-41-101 (West 2011). However, if the claim is made in good faith and under color of title, and if the claimant pays the real estate taxes due for the claimed real property during the statutory period, the statutory period for adverse possession is reduced to seven years. \textit{Colo. Rev. Stat. Ann.} § 38-41-108 (West 2011).


\textsuperscript{189} \textit{Id.}

\textsuperscript{190} See \textit{United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending, Committee on Oversight and Government Reform, House of Representatives – Vacant Properties Growing Number Increases Communities’ Costs and Challenges}, 1 (Nov. 2011), \textit{available at} http://www.gao.gov/new.items/d1234.pdf (stating that vacant properties increased to approximately 10 million as of April 2010).
It is interesting to note that Arizona, California, Florida and Nevada - four states which have experienced the most significant decline in housing values since the economic crisis began in 2008, and which routinely have among the highest foreclosure rates in the country, also have among the shortest statutory periods of limitation for adverse possession. These states which have the highest number of foreclosed homes are also the states in which an adverse possessor could successfully obtain title to a vacant home in the shortest amount of time. Therefore, where the risk is the greatest (due to the large number of foreclosures), the opportunity to successfully gain title by adverse possession is also the most achievable (at least in terms of satisfying the statutory time period). Due to the relatively recent incidence of trespassers taking possession of vacant, foreclosed homes and claiming title to the homes by adverse possession and the fact that a trespasser must remain in occupancy for the statutory period, cases have not yet proceeded through the courts and have not yet resulted in reported opinions. If and when such cases begin to reach the appellate court level and judicial opinions begin to be rendered on this topic, it is most likely that the first opinions will be delivered by courts in the states of Arizona, California, Florida and Nevada because such states have relatively short statutory periods and among the highest incidences of foreclosure.

V. THE MENTAL STATE: DEFINING ADVERSE AND HOSTILE POSSESSION

This Part provides a close examination of the final element of the doctrine of adverse possession: the element of adverse and hostile
All jurisdictions agree that a claimant’s possession must be adverse; however, there is significant disagreement as to what “adverse” actually means. While the meaning of adversity is unclear and varies by jurisdiction, all jurisdictions do agree that any type of permissive use (such as by a tenant, licensee, easement holder, or other party in possession with permission of the true owner), is rightful and cannot be adverse and hostile. While permissive use clearly destroys an assertion of adverse and hostile possession, there is little agreement as to what else is required (or not) to satisfy this element.

The disagreement regarding this element focuses on the adverse possessor’s requisite state of mind. Courts have developed three general approaches to evaluating the mental state required to satisfy the element of adverse and hostile possession. Each standard takes a different view of the role of the claimant’s state of mind. The three standards are generally described as: (a) the objective standard; (b) the bad faith or intentional trespass standard; and (c) the good faith standard. The remainder of this Part examines each such standard in turn.

A. Objective Standard

The first approach to defining the element of adverse and hostile possession is to apply an objective standard whereby the court does not consider the state of mind or the intent of the adverse possessor. Instead, the court assesses the element of adverse and hostile possession based solely on the adverse possessor’s actions. This standard is widely recognized as the majority rule in the United States. The objective standard is concerned with only two questions: did the claimant meet all other elements of the doctrine of adverse possession, and did the true owner grant the claimant permission to take possession of the real property? So long as the claimant satisfies all other elements of the doctrine and the claimant’s use of the real property was not permissive, the element of

193 Depending upon the jurisdiction, this element is referred to by a variety of names including “adverse,” “adverse and hostile,” “hostile,” “under claim of right,” “under color of title,” and “hostile and under claim of right.” Stake, supra note 81, at 2426. For consistency, this Article refers to the element as “adverse and hostile.”
194 Stake, supra note 81, at 2426.
195 STOEBUCK & WHITMAN, supra note 116, § 11.7, at 856.
196 Fennell, supra note 88, at 1046.
197 See infra Part V.A.-C.
198 Fennell, supra note 88, at 1046-47.
199 Id. at 1047.
200 Id.
adverse and hostile possession is deemed to be satisfied. The approach both the intentional trespasser and the accidental encroacher would be successful in obtaining title by adverse possession because the state of mind of the adverse possessor is irrelevant. Accordingly, as the objective standard is applied to a claimant who takes possession of a vacant home and claims title by adverse possession, such claimant would meet the element of adverse and hostile possession because the intentional trespasser’s state of mind is not relevant.

**B. Bad Faith or Intentional Trespass Standard**

The second approach to defining the element of adverse and hostile possession is to apply the so-called bad faith or intentional trespass standard. Under this standard the adverse possessor must have known that he or she was not the true owner of the real property and must have intended to take title away from the true owner by adverse possession. This somewhat counter-intuitive approach favors the party who intentionally trespasses onto another’s land and proactively wrestles title away from the true owner. It is a subjective standard that focuses on the intent of the particular claimant. Under this standard, a claimant will only prevail if the claimant subjectively knew that he or she was not the true owner.

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201 See, e.g., ITT Rayonier, Inc. v. Bell, 774 P.2d 6, 10 (Wash. 1989) (en banc) (rejecting the good faith standard and holding that the hostility element shall be determined solely on the basis of the claimant’s actions, the court stated, “[h]is subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.” (quoting Chaplin v. Sanders, 676 P.2d 431, 435-36 (Wash. 1984) (en banc))).

202 Fennell, supra note 88, at 1046-47.

203 See id.

204 Id. at 1046 (“[K]nowledge of one’s encroachment or an intent to take what one did not own might be required, disqualifying some or all of those making innocent mistakes.”). One often-cited example of a court applying the bad faith standard is Van Valkenburgh v. Lutz, wherein the court stated, “Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his own property, which certainly falls short of establishing that he did it under a claim of title hostile to the true owner.” 106 N.E.2d 28 (N.Y. 1952). However, with the enactment of recent changes to the adverse possession statute in the State of New York (which changes are discussed in Part VI.A. of this Article), the bad faith requirement indicated in Van Valkenburgh appears to no longer be controlling in the State of New York.

205 For a thorough discussion of the mental state required to establish the adverse and hostile element of adverse possession, and the ambiguities and uncertainties resulting from the case law, see Fennell. supra note 88, at 1037-1049. Arguing in favor of a bad faith standard, Fennell argues that an adverse possessor should be successful in claiming title by adverse possession only if the adverse possessor knew that he or she was encroaching onto someone else's real property and he or she documented that knowledge. Id. at 1038.
owner and he or she intended to take title from the true owner. Accordingly, as applied to a claimant who takes possession of a vacant, foreclosed home and claims title by adverse possession, such claimant would easily satisfy the bad faith standard because he or she knows that he or she is not the true owner and he or she intends to take title by adverse possession.

C. Good Faith Standard

The third and final approach to defining the element of adverse and hostile possession is to apply a good faith standard. To prevail in a claim of title by adverse possession under the good faith standard the claimant must prove that his or her possession of the real property was made in good faith. Good faith can be established in two ways: (i) by color of title wherein the claimant relies on a written instrument, such as a deed, which purports to give the claimant title to the real property; or (ii) by other evidence that demonstrates the claimant believed he or she was the true owner of the real property during the statutory period. Stated differently, the adverse possessor must innocently and mistakenly believe that he or she is the true owner of the real property. Such belief may be demonstrated either through a document on which the claimant relies or through testimony or other evidence.

In some jurisdictions the adverse possession statute itself requires that the claimant have a good faith belief that he or she owned the property to which he or she later claims title by adverse possession. In other jurisdictions a type of good faith requirement may be imposed judicially,

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206 See Stake, supra note 81, at 2430 (“In rare instances, courts have indicated that [the adverse possessor] can gain title only if she knew she did not have an honest legal claim to the land, that is to say, only if she was acting in bad faith!”).
207 See, e.g., Fennell, supra note 88, at 1046 (stating that “knowledge of one’s encroachment or an intent to take what one did not own might be required, disqualifying some or all of those making innocent mistakes.”).
208 Stake, supra note 81, at 2430.
209 Id. at 2431.
210 E.g., ALASKA STAT. ANN. § 09.45.052 (West 2010) (“The uninterrupted adverse notorious possession of real property under color and claim of title . . . because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States.”); OR. REV. STAT. ANN. § 105.620 (West 2011) (“A person may acquire fee simple title to real property by adverse possession only if . . . [a]t the time the person claiming by adverse possession or the person’s predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property . . . .”).
for example, by employing the doctrine of unclean hands.\footnote{E.g., Harsha v. Anastos, 693 P.2d 760, 762 (Wyo. 1985) (holding that the claimant was not entitled to title by adverse possession, even though the claimant had proven all elements of the doctrine of adverse possession, because the claimant did not have “clean hands”).} Regardless of the manner in which the good faith requirement arises, the effect is the same. Absent a good faith belief that one is the true owner of the real property, a claimant will be unsuccessful in obtaining title to such real property by adverse possession. Accordingly, as applied to a claimant who takes possession of a vacant, foreclosed home and claims title by adverse possession, such claimant would not be able to satisfy the good faith standard because he or she knows that he or she is not the true owner.

In summary, a party who takes possession of a vacant, foreclosed home by trespass could successfully claim title by adverse possession under the objective standard utilized in a majority of jurisdictions and under the bad faith standard utilized in a minority of jurisdictions. Only in the small minority of states which employ the good faith standard would the trespasser fail in his or her claim of title by adverse possession. While the good faith standard is utilized in only a minority of jurisdictions,\footnote{See \textit{infra} Parts VI-VII.} as described in further detail herein\footnote{See \textit{infra} Parts VI-VII.} this Article argues that the good faith standard is the standard that \textit{should} be utilized in all jurisdictions when determining whether a claimant has satisfied the element of adverse and hostile possession.

\section*{VI. The Problem with the Trespasser Becoming the Homeowner}

Having established that in a majority of jurisdictions in the United States a trespassing squatter can enter a vacant home without legal right, take occupancy of the home, and successfully claim title thereto under the
doctrine of adverse possession, we now turn to the subject of why that result is problematic and what should be done to resolve the problem. The following subsections describe the problems that arise when the law permits intentional trespassers to gain title by adverse possession and why the application of adverse possession in cases of intentional trespass is no longer justifiable or desirable.

A. The Need for Adverse Possession Has Diminished

With its roots in post-feudal England and its growth in frontier America, the doctrine of adverse possession stemmed from a period in history in which it was essential to the health, wealth and development of a nation that land be utilized in the most productive manner possible. However, the needs of modern society are vastly different than the needs of societies of the past. Modern society holds values that are very different from those of post-feudal England and frontier America. Modern society struggles with the problems of over-development, urban sprawl, depletion of natural resources, pollution of the air and waterways, concerns of environmental contamination resulting from intensive land uses, and the destruction of open spaces, the wilderness and wildlife habitats. We are no longer an economy dependent upon agriculture or a young nation striving to promote the development of its vast holdings of frontier land. The law no longer needs to incentivize property owners to make the most productive use of their real property. On the contrary, societal values and norms have evolved such that laws now aim to preserve and protect – rather than exploit – real property.214 Dating back to the early 1970s, courts began to recognize the inconsistency between the policy justifications that support the doctrine of adverse possession and the emerging public policy that favors land preservation. This sentiment was perhaps best expressed by the Supreme Court of Florida in 1973 when it stated:

The concept of adverse possession is an ancient and, perhaps, somewhat outdated one. It stems from a time when an ever-increasing use of land was to be, and was, encouraged. Today, however, faced, as we are, with problems of unchecked over-development, depletion of precious natural resources, and pollution of our environment,

214 See supra notes 91-100 and accompanying text.
the policy reasons that once supported the idea of adverse possession may well be succumbing to new priorities.\textsuperscript{215}

Simply stated, the policy justifications that support the doctrine of adverse possession no longer reflect the views, priorities, and values of twenty-first century America. Accordingly, the doctrine must be re-thought and revised to better align with the views, priorities and values of modern society.

\textbf{B. Social Justice Theory Does Not Justify Adverse Possession}

As noted in Part III above,\textsuperscript{216} one policy justification in support of adverse possession is a social justice-type argument which focuses on the redistribution of wealth and how adverse possession can be used to affect social change.\textsuperscript{217} Proponents of the social justice theory of property law argue that property rights do not arise inherently, nor is property law founded on the legal relationship between persons and property; rather, property law is a matter of resource allocation.\textsuperscript{218} In this view, property law involves policy choices which can, and should, be used to effectuate social change.\textsuperscript{219}

The majority of the scholarship on this topic examines New York City’s experience with “urban squatting,” (i.e., the occupation of vacant buildings in densely-populated urban areas by squatters who are typically homeless and/or low-income individuals who seek shelter).\textsuperscript{220} In the 1980s and 1990s, activists and community organizers in the City of New York organized and facilitated an urban squatting movement to pressure the City to establish programs to convert vacant, City-owned properties into housing for the homeless and the poor.\textsuperscript{221} Such scholarship generally advocates for the use of urban squatting as a tool and one potential solution to the

\textsuperscript{215} Meyer v. Law, 287 So.2d 37 (Fla. 1973), superseded by statute on other grounds, 1974 Fla. Laws 1255, FLA. STAT. § 95.16(2)(b) (2011), as recognized in Seton v. Swan, 650 So.2d 35, 37 (Fla. 1995).
\textsuperscript{216} See supra Part III.D.
\textsuperscript{217} For a thorough discussion of social justice theory as applied to property law, see Davis, supra note 113, at 78-83.
\textsuperscript{218} Wilson, supra note 114, at 731.
\textsuperscript{219} See Id.
\textsuperscript{221} See Hirsch & Wood, supra note 220, at 611-616; Penalver & Katyal, supra note 220, at 1122-1128; Mirvis, supra note 220, at 544-549; Wilson, supra note 114, at 713-719.
problems of homelessness and the lack of affordable housing for low-income individuals. As well-respected scholars Eduardo Moises Penalver and Sonia Katyal argue, trespassers and squatters may be lawbreakers, however, their actions can play an important role in the development and evolution of property law. These lawbreakers can create “greater social equity and fairness by intentionally transferring ownership from the property rich to the property poor (i.e., themselves).” In Penalver and Katyal’s view, intentional adverse possession is justifiable, at least in certain circumstances, because “it is not wrong to appropriate someone else’s surplus property in order to provide for one’s own need when viable legal alternatives are not available.” Much like a modern-day Robin Hood, this argument posits that the intentional trespasser/squatter is justified in taking another party’s “surplus” real property and redistributing it to himself or herself, assuming he or she is in need and has no viable legal alternative.

Under this rationale it would not be wrong for any homeless person or person living in sub-standard housing without a viable legal alternative to forcibly enter upon, take possession of, and claim ownership by adverse possession of, another’s real property so long as that real property is “surplus” to the true owner. One can easily imagine the argument being made that vacant, foreclosed homes are “surplus” property to the financial institutions that hold title to such homes. After all, don’t the financial institutions collectively hold title to millions of homes which could be used by those in need?

The use of squatting and, ultimately, adverse possession as a means of alleviating the serious ills of homelessness and the shortage of low-income housing is, admittedly, very attractive from a theoretical policy perspective. Rather than allowing residential properties to sit vacant, wouldn’t society as a whole be better-served by allowing the homeless and low-income individuals to reside in such properties? How, this theory asks,

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222 See Hirsch & Wood, supra note 220, at 616; Penalver & Katyal, supra note 220, at 1127-1128, 1170, 1173; Wilson, supra note 114, at 731.
223 Wilson, supra note 114, at 731.
224 Eduardo Moises Penalver and Sonia Katyal have written extensively on this topic. See generally Penalver & Katyal, Property Outlaws (2010), which was developed from their earlier article of the same name (see Penalver & Katyal, supra note 220).
225 Penalver & Katyal, supra note 220, at 1097, 1182.
227 Penalver & Katyal, supra note 220, at 1170.
can we as a society allow residences to sit vacant when so many are in dire need of adequate housing? How can we deny shelter to the most vulnerable in our society when such shelter is readily available?

While attractive from a theoretical perspective, this argument is not without controversy or problem. Even the proponents of the argument acknowledge that it violates property rights, subjects the squatters/ adverse possessors to the risk of arrest, is unfair to low-income individuals who seek to obtain public housing through traditional channels, and is “likely to antagonize neighborhood residents who object to the presence of squatters.”228 Additionally, who would determine whether the squatter is truly “in need?” Who would decide whether the squatter has any viable legal alternative? Why should the individuals who own the real properties—rather than society as a whole—bear the burden of providing adequate housing for the homeless and low-income individuals? Why should the law favor these law-breaking squatters over those homeless persons and low-income individuals who seek to meet their needs and improve their living conditions without breaking the law?

This argument is particularly problematic when viewed with the recognition that squatting can ripen into actual ownership of the real property through the doctrine of adverse possession. Not only could a person in need trespass onto privately owned property and take occupancy while he or she is in need, but if he or she remains in occupancy for long enough, the law will recognize him or her as the true owner of the real property. Any person who owns a second home, rental property, beach condominium, hunting cabin, vacation cottage, ski hut, or any other real property at which he or she does not reside could, under this theory, have that real property justifiably and legally taken from him or her, without compensation, so long as the taker is in need and has no viable legal alternative.

While the social justice theory of intentional trespass could assist in reducing the problems of homelessness and the lack of suitable housing for low income individuals, it brings with it an entirely different set of problems, challenges and unintended consequences, many of which are described in the preceding paragraphs. As Penalver and Katyal conclude, “[i]n the end, the costs associated with self-help suggest that it would be far cheaper for society to provide for the needs of the poor in a more organized and proactive fashion.”229 Acknowledging the problems and challenges associated with the redistribution of real property from the true owner to the intentional trespasser, Penalver and Katyal further conclude that, “[a] comprehensive system of government-sponsored redistribution and social

228 Hirsch & Wood, supra note 220, at 605.
229 Penalver & Katyal, supra note 220, at 1179.
insurance is an obvious substitute for the sorts of self-help redistribution envisioned by doctrines like adverse possession . . . and would generate far fewer spillover effects."

Thus, even the proponents of the theory acknowledge that there are better alternatives to alleviating the problems of homelessness and the lack of affordable housing than to promote self-help through intentional trespass and the redistribution of real property through adverse possession.

C. Intentional Trespass: A Return to the Wild West?

It is important to keep in mind that the doctrine of adverse possession does not apply solely to those in need, as was examined under the social justice theory described above. The doctrine is available for use by any person – from billionaire to pauper – who trespasses onto another’s property and claims title as his or her own. Imagine a world in which a tortious and criminal act is committed and the perpetrator is actually rewarded for his or her law-breaking activity. Imagine a neighborhood in which any vacant home is “up for grabs” by any individual who elects to intentionally trespass. What incentive would there be for homeowners to continue to make payments on their mortgage loans if their squatting neighbors obtain title to “their” homes for free? Would society ever embrace a system in which some homeowners purchase their homes on the open market while others are permitted to take occupancy and gain title without compensating anyone? How would you feel if you paid fair market value for your home while your neighbor paid nothing for “his” home? If the law permits trespassers to transform themselves into homeowners, why would anyone undertake the most significant financial burden of his or her life by purchasing a home? What if one desires a home that is being occupied by another trespasser? Could a would-be adverse possessor take matters into his or her own hands and oust the party in possession of the home? Would your neighborhood turn into the Wild West?

D. Market-Based Problems that Result from Intentional Trespass

There are even greater problems with the concept of transforming a trespasser into a homeowner when it is examined from a practical, market-based perspective. If the law recognizes claims of title to real property based on intentional trespass and such practice proliferates, it is unclear how significant the impact might be on the real estate marketplace. At a

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230 Id.
231 Id.
232 See supra Part VI.B.
minimum, it would complicate the purchase and sale process, thereby adding additional time and expense to each transaction as the parties seek a greater level of certainty regarding the status of title to the real property. What would happen to the long-standing real property recording system that currently serves as the basis for determining ownership of real property in the United States? If courts recognize the ownership rights of squatters who bring claims of title by adverse possession (which claims exist entirely outside of the real property recording system), how reliable would the recording system become? Rather than relying on the recording system through examination of the title records, prospective buyers, lenders, title insurance companies and the attorneys who represent such parties would become increasingly concerned about potential unrecorded claims of ownership through the assertion of title by adverse possession. The certainty of the recording system which currently acts as a stabilizing force in the real estate marketplace would be increasingly questioned. Just how much, and just how significantly this would impact the marketplace, we do not yet know. Unless reforms are made to the doctrine of adverse possession, we will someday find out the answer to these questions and the numerous other questions posed in this Article.

E. Equity and Fairness Weigh Against Intentional Adverse Possessors

If a squatter who takes occupancy of a vacant home is successful in obtaining title to real property through the doctrine of adverse possession, will not the squatter be unjustly enriched? If the squatter (who is transformed into the homeowner through the doctrine of adverse possession) later sells the home, does not he or she obtain a windfall? After all, the squatter obtained title without compensating anyone; yet, when the home is eventually sold, the squatter will be compensated for the property’s fair market value. Is that not that a classic example of unjust enrichment? What about the true owner who lost title to his or her real property but received no compensation whatsoever? Why does the law fail to protect the rights of the innocent true owner whose real property was taken from him or her without remuneration? As eloquently stated by Justice Neuberger of the

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233 Black’s Law Dictionary defines “unjust enrichment” as: “1. The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected. 2. A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. 3. The area of law dealing with unjustifiable benefits of this kind.” BLACK’S LAW DICTIONARY 1678 (9th ed. 2009).
United Kingdom in a case in which the court begrudgingly upheld an award of title by adverse possession:

[It is] ‘hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years’; a conclusion which ‘... does not accord with justice, and cannot be justified by practical considerations, [is] draconian to the owner and a windfall for the squatter.'

Principles of equity and fairness demand that the law not reward those who intentionally enter the property of another with the intent to steal title from the true owner.

F. Scholarly, Political, and Public Opposition To Intentional Trespass

When evaluating whether the law should reward trespassing squatters by bestowing upon them title to the homes which they adversely possess, consideration must also be given to public opinion. Constituencies ranging from politicians to scholars, from property owners who lose title through adverse possession to the neighbors of squatters, from bar associations to the community at large, they have all spoken out in opposition of intentional trespass.

Numerous property law scholars have voiced concerns regarding the intentional or so-called bad faith adverse possessor. Professor Richard Epstein has commented that bad faith adverse possessors are “both bad people in the individual cases and a menace in the future.” Scholar Richard Helmholz stated, “[t]here is something wrong in claiming land when one has known all along that it belonged to someone else. It is impossible not to feel differently about such bad faith possessors than one does about claimants who have made an honest mistake and relied upon it.” Professors Carol Necole Brown and Serena Williams, authors of a

234 It is beyond the scope of this Article to address the law of adverse possession in the United Kingdom. For a discussion of recent developments in the law of adverse possession in the United Kingdom, including the United Kingdom’s legislative and common law responses to the problem of squatting, see Lorna Fox O’Mahony & Neil Cobb, Taxonomies of Squatting: Unlawful Occupation in a New Legal Order, 71(6) M.L.R. 878 (2008).
235 Id. at 879 (quoting J. A. Pye (Oxford) Ltd. v. Graham, [2000] ch. 676, 709-710 (Eng.)).
236 Fennell, supra note 88, at 1048.
237 Id. at 1048 (quoting Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 WASH. U. L.Q. 667, 686 (1986)).
238 Id. (quoting Richard H. Helmholz, More on Subjective Intent: A Response to Professor Cunningham, 64 WASH. U. L.Q. 65, 75 (1986)).
A convincing article calling for the abolition of adverse possession in its entirety, argue that, “the law should apply a sharp distinction between ownership and possession, treating trespassory possession as only a fact and not a right capable of ripening into indefeasible title.” Brown and Williams further argue that the “anachronistic doctrine” of adverse possession should be abolished in all situations, whether the trespass was a good faith mistake or intentional, because possession is no longer the best indication of ownership of real property. The negative opinion of intentional adverse possession in scholarly works exists even outside of the United States. In a scholarly work describing recent developments in the law of adverse possession in the United Kingdom, scholars Lorna Fox O’Mahony and Neil Cobb describe the “backdrop of rising moral outrage towards squatters who acquire title to land” through the doctrine of adverse possession. These are but a few examples of the many scholars who have spoken out in opposition to intentional or so-called bad faith adverse possession.

Politicians and government officials have also voiced their opposition to squatters and intentional adverse possessors. Dating back to the late 1970s, Patricia Harris, the United States Secretary of Housing and Urban Development under President Jimmy Carter, commented on the urban squatting movement that was taking place in the City of Philadelphia at the time by describing the squatters as “no better than shoplifters.” Similarly, the then-president of the Philadelphia City Council described the urban squatting movement as the “beginning of anarchy.” More recently, in introducing legislation to reform the New York adverse possession statute to prohibit bad faith claims, Senator Elizabeth Little stated, “[i]f a person desires land, they can buy it. . . . [Adverse possession] should not be a doctrine which can be used offensively to deprive a landowner of their real property. That only encourages mischief between neighbors and even between families. No good can come of it.”

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240 Id.
241 Fox O’Mahony & Cobb, supra note 234, at 878.
242 But see supra note 88 and accompanying text for a discussion of the scholarship in support of bad faith adverse possession.
243 Penalver & Katyal, supra note 220, at 1125 (citing Seth Borgos, Low-Income Homeownership and the ACORN Squatters Campaign, in CRITICAL PERSPECTIVES ON HOUSING, 428, 433 (Rachel G. Bratt et al. Eds., 1986)).
244 Id.
possession statute would protect “the rights of homeowners and commercial developers from fortune-hunters intent on taking property . . . and from stealth taking of property.”

Moreover, communities at large have expressed strong opposition to the concept that one can successfully obtain title to real property through an intentional act of trespass which ripens into ownership by adverse possession. Public opposition has been so strong in a few states that it has resulted in legislative reforms. For example (and as described in more detail in Part VII hereof), Colorado and New York recently enacted sweeping changes to their respective adverse possession statutes in response to the public backlash following judicial decisions that upheld intentional trespassers’ claims of title by adverse possession. Elsewhere, in communities in which squatters are taking possession of vacant homes, neighbors are joining together to pressure authorities to arrest the squatters, to “make life difficult” for the squatters who remain in possession, to try to prevent new squatters from moving into vacant homes in their neighborhoods, and to bring media attention to the problem. Organized groups have even formed for the purpose of educating the public regarding adverse possession and advocating for reforms to (or even the abolition of) the doctrine. For example, an organization called End Adverse Possession Now provides an online forum to educate the public regarding what it calls “legalized land theft,” to share information regarding pending legislation, and to facilitate grassroots organizing efforts aimed at abolishing the doctrine of adverse possession.

It is difficult to ignore the weight of the scholarship in opposition to intentional trespass, the political climate which disfavors bad faith

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247 E.g., Brown & Williams, supra note 239, at 591 (“Public backlash brought the doctrine of adverse possession under legislative scrutiny. In 2008, the Colorado General Assembly amended the state’s adverse possession statute to address key deficiencies of the McLean case [wherein the court upheld the claimant’s claim of title by intentional adverse possession].”); Jason Greenberg, Note, Reasonableness is Unreasonable: A New Jurisprudence of New York Adverse Possession Law, 31 CARDOZO L. REV. 2491, 2491-92 (2010) (“In response to the lobbying efforts of landowners who “lost” their property to adverse possessors, Governor Paterson signed into law Senate Bill No. 7915 on July 7, 2008. The legislation drastically alters the requirements of adverse possession in New York, specifically regarding what state of mind is required.”).

248 Brown & Williams, supra note 239, at 591; Greenberg, supra note 247, at 2491-92.


250 For additional information regarding End Adverse Possession Now, see http://www.endadversepossession.org.
claimants, the lobbying efforts aimed at reforming the doctrine, and the public outcry that followed recent decisions in which knowing trespassers where successful in obtaining title by adverse possession. The tide appears to have turned. The public, it seems, demands that the doctrine be reformed to prevent trespassers from transforming themselves into homeowners. But how, one might ask, should the doctrine be reformed? The following Part VII addresses that question.

VII. THE SOLUTION: STATUTORY REFORM OF ADVERSE POSSESSION

This Article does not argue that the doctrine of adverse possession should be abolished at its entirety. The doctrine continues to be a sometimes-effective tool in furthering the marketability of real property by quieting title and curing minor title defects. It can also be a useful tool in curing uncertainties in boundary lines and errors in legal descriptions. In addition, it can help promote the marketability of real property by preventing frivolous, stale claims of ownership. For these reasons the doctrine of adverse possession confers some benefits and has some value that is worth retaining. However, it must be reformed the extent necessary to prevent it from being used by the trespassing, opportunistic claimant who seeks to take title to real property intentionally, without right, and without compensating the true owner.

If not abolition, what, then, should be done to reform the doctrine of adverse possession? This Part VII addresses that question. Specifically, this Part examines how the doctrine should be, and in some states has been, reformed to prohibit the opportunistic, intentional adverse possessor from gaining title to real property. First, this Part provides an overview of recently-enacted legislation in the State of New York that is aimed at prohibiting the use of adverse possession by bad faith claimants. This Part then examines recently-enacted legislation in the State of Colorado which takes an even more aggressive approach to curtailing bad faith claimants. Lastly, this Part argues that other states must adopt a good faith standard similar to that adopted in New York and Colorado in order to prevent the unjust enrichment of would-be intentional adverse possessors.

251 See supra Part III.C. for a discussion of how the doctrine of adverse possession assists in curing minor title defects, errors and uncertainties.
A. Reformation of Adverse Possession in New York

On July 7, 2008, Governor Paterson of the State of New York signed into law Senate Bill 7915, which drastically changed the law of adverse possession in that state. The purpose of the legislation was to limit the use of the doctrine to “good faith disputes” over title to real property and bar “bad faith” adverse possession claims. The legislation was enacted in response to the 2006 decisions of Walling v. Przybylo, and Robinson v. Robinson, wherein the intentional adverse possessor in each case was successful in obtaining title to the disputed real property.

In Walling, the plaintiffs and defendants owned neighboring residential properties in Queensbury, New York. In 2004, after residing in their home for nearly ten years, the Przybylos had their property surveyed. The survey disclosed that a portion of the Przybylos’ land was being used and maintained by their neighbors, the Wallings. The Wallings brought an action seeking title to the disputed area by adverse possession. The Przybylos argued that the Wallings could not prevail in their adverse possession claim because the Wallings knew they did not own the disputed area yet they intentionally possessed it. In affirming the lower court’s ruling in favor of the Wallings, the Court of Appeals of New York held that an adverse possessor can prevail even if the adverse possessor knows that the real property is owned by another party. The court held that, “[c]onduct will prevail over knowledge,” and that “adverse possession will defeat a deed” even if the adverse possessor has knowledge of the deed.

Five months after the Walling decision, the intermediate level court issued a similar ruling in Robinson, finding that a claim of adverse possession can succeed regardless of the adverse possessor’s knowledge or belief of ownership of the disputed real property.

257 Walling, 851 N.E.2d at 1168.
258 Id.
259 Id.
260 Id.
261 Id. at 1169.
262 Id. at 1170.
263 Id.
The decision in Walling merely followed precedent dating back to the mid-1800s; however, the decision “generated a populist backlash against the traditional rule which quickly gained widespread legislative support.” In response to the populist backlash, legislation was enacted to reverse the Walling decision by barring bad faith adverse possession claims. As amended, the New York adverse possession statute reverse the holdings in Walling and Robinson by providing that an adverse possessor can only acquire title if, in addition to meeting all other traditional elements of adverse possession, the adverse possessor has a reasonable basis for the belief that the real property belongs to the adverse possessor. Instead of the objective test followed in Walling, or a test which focuses on the adverse possessor’s objective knowledge, the law of adverse possession in New York now requires proof of a reasonable basis for the adverse possessor’s belief of his or her ownership of the real property.

While the New York adverse possession law, as amended, achieves the legislative intent of barring intentional trespassers from obtaining title to real property by adverse possession, it is not without fault. The amended law has come under criticism for its inartful drafting, ambiguities, and flawed language. In particular, the amended law has been criticized for

265 Walling, 851 N.E.2d at 1170 (“The fact that adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed is not new (see Humbert v. Rector, Churchwardens & Vestrymen of Trinity Church, 24 Wend. 587, 604, 1840 WL 3644 [1840] . . . .”).
269 See supra Part IV.A.-E. and Part V.A.-C. for a discussion of the traditional elements of adverse possession.
270 N.Y. REAL PROP. ACTS. LAW § 501(3) (McKinney 2009); Introducer’s Memorandum in Support, Bill Jacket, S.B. 7915, ch. 269, 231st Leg., Reg. Sess. (N.Y. 2008). Senate Bill 7915 also amended other aspects of the law of adverse possession in New York which are beyond the scope of this Article. For example, it provides that “the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, shed and non-structural walls, shall be deemed to be permissive and non-adverse,” thereby prohibiting claims of adverse possession based on the existence of such items. N.Y. REAL PROP. ACTS. LAW § 543(1) (McKinney 2009).
271 Greenberg, supra note 247, at 2507-08.
273 A critique of the specific statutory language is beyond the scope of this Article. For further discussion of the ambiguities and unresolved issues created by the revised New York adverse possession statute, see Greenberg, supra note 247 (discussing the significance of the amended statute generally); and see Leitman Bailey & Desiderio, supra
its inclusion of the “reasonable basis for the belief” language because of the difficulty in proving one’s belief and further difficulty in proving the basis for that belief. Despite the criticism, the amended law provides the basis for how the doctrine of adverse possession should be revised in other states to prevent the unjust enrichment of squatters. It is the intent and concept, not the specific language, of the New York law that provides a viable solution to curtailing bad faith adverse possession. An intentional trespasser or bad faith adverse possessor can no longer prevail in a claim of title by adverse possession under New York law. As applied in the context of a trespasser who takes possession of a vacant, foreclosed residence and claims title thereto by adverse possession, the trespasser’s claim will necessarily fail under New York law because the trespasser cannot have a reasonable basis of belief that he or she is the true owner.

B. Reformation of Adverse Possession in Colorado

On April 25, 2008, the Colorado General Assembly enacted House Bill 08-1148, which fundamentally revised Colorado’s adverse possession statute. The legislation was enacted in response to the “public backlash” that followed a ruling in McLean v. DK Trust, a case in which the intentional adverse possessors were successful in obtaining title to a portion of their neighbor’s land.

In McLean, the defendants, Mr. and Mrs. Kirlin and DK Trust (the “record owners”) owned two undeveloped residential lots numbered 49 and 50 in Boulder, Colorado. They intended to eventually build their retirement home on lot 49 and potentially sell lot 50 to finance the construction. The adjacent lot 51 was improved with a residential home and was owned by Richard McLean, a retired judge and former Mayor of

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Note 266 (discussing the ambiguity of the reasonableness requirement and the difficulty of meeting the burden of proof); and see Andrianna Mavidis, Note, Retrospective Application of the 2008 Amendments to New York’s Adverse Possession Laws, 85 St. John’s L. Rev. 1057 (2011) (arguing that the amended statute unconstitutionally applies retrospectively to vested property rights).

274 See, e.g., Greenberg, supra note 247, at 2507-08; see also, e.g., Leitman Bailey & Desiderio, supra note 266.


276 Brown & Williams, supra note 239, at 591.


278 Brown & Williams, supra note 239, at 589.

the City of Boulder, and his wife Edith Stevens, an attorney (the “claimants”). Over the course of twenty-five years, the claimants used a portion of the record owners’ lot 50 (the “disputed area”) on a daily basis as a footpath to reach the adverse possessors’ garden and deck located on their property. The claimants also used the disputed area for other purposes such as outdoor entertaining, gardening, and the storage of wood. The claimants eventually instituted an action against the record owners claiming title to the disputed area by adverse possession. Applying the law of adverse possession then in effect in Colorado (which utilized an objective standard pursuant to which the adverse possessor’s state of mind and intent are not considered), the Colorado state court ruled in favor of the claimants and awarded them title to the disputed area. The ruling was particularly detrimental to the record owners because the disputed area comprised approximately one-third of lot 50 and, without the disputed area, the remaining portion of the lot was not large enough to fit the home that the record owners intended to build thereon.

A “firestorm of criticism” followed the McLean decision. In response to the public outcry, the Colorado General Assembly took action to reform the adverse possession statute in several key ways. First, the revised statute provides that a claimant may prevail in an adverse possession claim only if he or she has a good faith belief that he or she is the true owner of the property and that belief is “reasonable under the particular circumstances.” Thus, one who knowingly occupies another’s real property will be barred from claiming title by adverse possession under Colorado law. Second, the statute imposes a heightened burden of proof for adverse possession claims: the claimant must prove each element of adverse possession by clear and convincing evidence, rather than the previously-

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280 Brown & Williams, supra note 239, at 589.
281 McGhee, supra note 279.
282 Brown & Williams, supra note 239, at 589.
283 Id.
284 Id.
285 See supra Part V.A. for a discussion of the objective standard under which courts assess the element of adverse and hostile possession in claims of adverse possession.
286 Brown & Williams, supra note 239, at 589.
287 McGhee, supra note 279.
288 Id.
290 Id. at § 38-41-101(3)(a).
applicable standard of a preponderance of the evidence. Third, the statute imposes several financial disincentives for parties who seek to claim title by adverse possession. If a claimant is successful in obtaining title by adverse possession, the statute gives the court the discretion to award damages to compensate the owner who lost title to the property “if the court determines in its discretion that an award of compensation is fair and equitable under the circumstances.” The damage award may include the actual value of the property as determined by the county tax assessor. In addition, the successful claimant may be required to reimburse the owner who lost title for “all or a part of the property taxes and other assessments” paid by the owner for the entire statutory period of adverse possession, plus interest thereon. The statutory period in Colorado is a lengthy eighteen years. Thus, the revised statute imposes a significant disincentive for parties to claim title by adverse possession. Claimants run the risk that they will be required to compensate the owner who lost title not only for the value of the property taken by adverse possession, but also for the total amount of real estate taxes and other assessments paid by the owner during the eighteen year statutory period.

While the revised Colorado statute achieves the goal of preventing bad faith claimants (like the claimants in McLean) from prevailing in adverse possession claims, the statute has encountered some criticism. For example, while the statute provides that a claimant must prove all elements of the common law doctrine of adverse possession, it does not specifically set forth the elements or the test that should be applied to determine whether each element has been met. Some have voiced opinions that the statute should have set forth the elements and the applicable tests rather than requiring claimants to rely on the common law which is sometimes unclear or inconsistent. Despite the seemingly few criticisms and the minor imperfections of the statute, the statute is a model of how the law of adverse possession can be, and arguably should be, revised in other states to prevent the unjust enrichment of squatters and would-be intentional adverse possessors. In Colorado, an intentional trespasser or bad faith adverse possessor can no longer prevail in a claim of

293 Id. at § 38-41-101(5)(a)(I).
294 Id. at § 38-41-101(5)(a)(II).
295 Id. at § 38-41-101(1).
296 See id. at § 38-41-101(5)(a)(I)-(II).
297 Anderson & Pittinos, supra note 291, at 79.
298 Id. at 74.
299 See id.
title by adverse possession. As applied in the context of a trespasser who takes possession of a vacant, foreclosed residence and claims title thereto by adverse possession, the claim would necessarily fail under Colorado law because the claimant would lack the good faith belief of ownership.

C. The Call for Reformation in Other States

The doctrine of adverse possession has the effect of turning trespassers into homeowners. This results in the unjust enrichment of the adverse possessor, creates uncertainty in the real estate marketplace, engenders ill will among neighbors and the community, and is not supported by public policy.\(^\text{300}\)

States must take action to reform the doctrine to prohibit this undesirable and unjust outcome. Specifically, states should reform their respective adverse possessions statutes to impose a good faith-type requirement whereby a claimant may only succeed in an adverse possession claim if he or she can prove (whether by clear and convincing evidence as required in Colorado,\(^\text{301}\) or by a preponderance of the evidence) that he or she has a reasonable, good faith belief of ownership of the claimed real property. Viewed differently, states should reform their respective adverse possession statutes to prohibit claims by those who knowingly or in bad faith occupy the real property of another with the intent of acquiring title by adverse possession. Either view has the same desired result: to prohibit intentional trespassers from taking occupancy of real property which they know is not theirs and taking title away from the rightful owner.

States should also consider whether to follow the Colorado approach which grants courts the authority to assess damages against the successful adverse possession claimant and award compensation the owner who lost title to his or her real property.\(^\text{302}\) Specifically, states should consider whether to require adverse possession claimants to pay fair value for the real property acquired and/or reimburse the owner who lost title for other expenses (such as the amount of any real estate taxes paid during the statutory period of adverse possession, as provided in the revised Colorado statute).\(^\text{303}\) Lastly, states should consider whether such payments should be required in every case or whether that determination should be left to the discretion of the courts, as is the case under the revised Colorado statute.\(^\text{304}\)

\(^{300}\) See supra Part VI.

\(^{301}\) See COLO. REV. STAT. § 38-41-101(3)(a) (West 2008).


\(^{303}\) Id.

\(^{304}\) Id.
This Article does not purport to prescribe specific statutory language that should be adopted by the states. Instead, this Article is intended to urge states to adopt a good faith-type requirement (or a bad faith-type prohibition) as a conceptual matter. Using the language of the New York and Colorado statutes as a guide, and considering the criticisms of such statutes, states are in the best position to craft solutions that best serve their constituencies. Further, this Article does not purport to urge states to adopt the damages and compensation concepts discussed in the preceding paragraph. Instead, it offers options that states should consider when reforming their adverse possession statutes.

VIII. CONCLUSION

The “Great Recession” which began in 2008 has had a profound and lasting effect on the economy as a whole. The bursting of the housing bubble has had a devastating impact on the residential real estate market, an impact that we will continue to endure for years to come. From major metropolitan areas to rural townships, from east coast to west coast, from modest homes to mansions, the foreclosure crisis has impacted virtually every category of homeownership. This Article does not purport to offer a solution for the overall depressed housing market or the foreclosure crisis. This Article offers suggestions and proposed solutions to address a specific problem: trespassers who occupy vacant, foreclosed homes with the intent of acquiring title by adverse possession. This Article begins the conversation of how states can, and should, reform the doctrine to stop the transformation of these trespassers into homeowners. Whether or not one agrees with the positions taken by this author, it is an invitation to additional study of how the centuries-old doctrine of adverse possession should be reformed to better suit the needs of modern society.