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There Goes The Neighborhood: Florida's Crackdown On Adverse Possession In The Wake Of The Foreclosure Crisis

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THERE GOES THE NEIGHBORHOOD: FLORIDA’S CRACKDOWN ON ADVERSE POSSESSION IN THE WAKE OF THE FORECLOSURE CRISIS

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I. INTRODUCTION

In the slow-settling dust of the 2007 United States housing market collapse, Florida’s state court system is still struggling to adjudicate a backlog of more than 360,000 pending foreclosure cases. Meanwhile, new foreclosure filings continue to flood the courts, frustrating judicial and legislative efforts to clear the docket. The average Florida foreclosure case has spent 600 days working its way toward a judicial resolution. The unusually long pendency has prompted many “underwater” borrowers to preemptively abandon their homes. The U.S. Census Bureau estimates that more than one out of every six Florida homes now lies abandoned in the aftermath of the housing market collapse.

Many of these abandoned properties will ultimately be repossessed by lenders ill-equipped to dutifully maintain them. In the interim, scores of residential properties have been left to

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3 See Paul Owers, RealtyTrac: Foreclosures up in the first half of year, SUN SENTINEL, Jul. 12, 2012, http://articles.sun-sentinel.com/2012-07-12/business/sfl-realtytrac-foreclosures-link-20120712_1_realtytrac-listing-foreclosure-filings-daren-blomquist (“Florida has had 139,241 foreclosure filings so far this year, a 23 percent increase from the same period last year.”)

4 Toluse Olorunnipa, Foreclosure Crisis Hits Home For All, MIAMI HERALD, Jan. 9, 2011, http://www.miamiherald.com/2011/01/09/2008157_p2/foreclosure-crisis-hits-home.html (explaining how a legislatively approved 9.6 million dollar grant that was intended to streamline the judicial foreclosure process instead created a “rocket docket” that favors lenders at the expense of defaulting mortgagors).

5 See Id.; see also, Owers, supra note 2 (reporting that, during the second quarter of 2012, it took an average of 861 days to foreclose on a property).


7 Alvarez, supra note 2.

8 See Jason Garcia, Banks Balk at Caring for Abandoned Homes, SUN SENTINEL, Apr. 23, 2009 (“Banking lobbyists have quietly crafted a measure in the Florida Legislature that would prevent cities and counties from forcing the banks that hold mortgages on properties in foreclosure to maintain those properties until they have actually acquired the title to the land.”).
deteriorate in the hot Florida sun.⁹ Opportunistic thieves have pillaged abandoned homes for appliances, copper wiring and pipes.¹⁰ Vandalism, pestilence, and black mold have worked to further diminish the value of distressed and non-distressed properties alike.¹¹ Writer George Packer provided a grim prognosis for the hardest-hit Florida neighborhoods:

“Driving around Florida’s ghost subdivisions, you feel … that they are physically hollowing out. In a place like Lehigh Acres, near Fort Myers, where half the driveways are sprouting weeds, and where garbage piles up in the bushes along the outer streets, it’s already possible to see the slums of the future.”¹²

Mark Guerette, the owner of Save Florida Homes Inc., saw the abandonment problem as an opportunity to provide affordable housing for struggling families in Broward and Palm Beach Counties.¹³ In 2009, Guerette took the initiative to repair the distressed properties, and offered them to families who might otherwise be living in the streets.¹⁴ Fabian Ferguson and his family were homeless before moving into one of Guerette’s Broward County homes.¹⁵ The Fergusons’ housing arrangement was paying dividends for the family—and for neighboring property owners who no longer had to live next to an uninhabited eyesore.¹⁶ In response to this seemingly noble endeavor, Broward County Sheriffs arrested Guerette and charged him with organized fraud in

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¹¹ Bajaj, supra note 9.


¹⁴ Id.

¹⁵ Id.

¹⁶ Id.
the second degree. The Fergusons were subsequently evicted from the home. The reason? Guerette’s claim to the property was based not on ownership, but instead on the doctrine of adverse possession.

This article examines adverse possession in the foreclosure context, and argues that a properly undertaken campaign of adverse possession can yield a host of benefits for communities that have been hard hit by the housing crisis. The haphazard criminal prosecution of adverse possessors in Florida calls for an appraisal of adverse possession jurisprudence in the foreclosure context. Careful attention to the adverse possession doctrine and how it is being applied in the current crisis may help refute common misconceptions that application of the doctrine sanctions or constitutes theft or fraud. Adverse possession is both within the law and presents the possibility of a partial solution to the foreclosure crisis. Thus, this article argues that the law should uphold this practice, rather than punishing it.

In Section I, this article explains the origins and purposes of the adverse possession doctrine. Section II evaluates the strength of Guerette’s adverse possession claims under Florida law, and scrutinizes Florida’s criminalization of the practice. Finally, in Section III, this article argues that the law should accommodate this type of adverse possession because, when properly undertaken, it can help mend a distressed real estate market.

I. ADVERSE POSSESSION MAY SERVE PREFERRED POLICY OBJECTIVES


18 Skipp, supra note 19.

19 Id.
The medieval doctrine of adverse possession allows a person in possession of real property to acquire fee simple title superior to that of the true owner, provided certain legal elements are met.\textsuperscript{20} Put another way, adverse possession prescribes a statute of limitations, beyond which the titled owner is barred from bringing an action to eject the trespasser.\textsuperscript{21} Under a typical adverse possession statute, new title is vested in the trespasser by operation of law where his possession is (1) actual\textsuperscript{22}; (2) open and notorious\textsuperscript{23}; (2) adverse or hostile to the true owner\textsuperscript{24}; (3) exclusive\textsuperscript{25}; and (4) continuous for the statutory period.\textsuperscript{26} The core elements vary by jurisdiction, but adverse possession is generally established where the trespasser uses the property “in the manner that an average true owner would use it under the circumstances, such that neighbors and other observers would regard the occupant as a person exercising exclusive dominion.”\textsuperscript{27}


\textsuperscript{21} Id. It is worth noting that the adverse possessor is in fact trespassing at all times during his occupation of the target property. Thus, in a sense, adverse possession has already been criminalized. See FLA STAT ANN 810.08. However, the relatively minor trespassing infraction is generally overlooked where the claim survives to maturity and all of the other elements are satisfied.

\textsuperscript{22} Id. at 129. (“This requirement essentially boils down to the unalarming proposition that the adverse possessor must be in ‘possession’ of the disputed tract in order to have a valid claim to title based on limitations.”).

\textsuperscript{23} Id. at 130 (“The general concept of open and notorious possession is that the occupier’s acts must provide some form of visible evidence that the land is being adversely used.”).

\textsuperscript{24} Id. at 132 (“At a minimum, the requirement that the possession be adverse means that the possessor had no legal right to do whatever he did on the land.”).

\textsuperscript{25} Id. at 135 (“A general statement of the element of exclusivity is that the adverse claimant’s possession cannot be shared with the true owner.”).

\textsuperscript{26} Id. at 136 (“[T]he possession of the adverse claimant must remain intact without any legally significant interruption for a duration not less than the period of time specified by the relevant state statute of limitations.”).

\textsuperscript{27} Jesse Dukeminier et al., PROPERTY 125 (6th ed. 2006).
Commentators have noted that “[t]itle by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it.”\(^{28}\) However, unlike the adverse possessor, a “thief does not enter into a contest for legitimate authority” for possession of the property with the owner.\(^{29}\) Indeed, the “open and notorious” element of the doctrine protects the titled owner against clandestine claims of adverse possession.\(^{30}\)

A. CLASSIC ADVERSE POSSESSION SCENARIOS

With a few exceptions, claims of adverse possession generally arise under one of two scenarios: boundary-line disputes and so-called “squatter’s rights.”\(^{31}\) The archetypal boundary-line dispute involves two neighboring property owners, each holding legal title to their respective parcel. Neighbor A builds a structure\(^{32}\)—for example, a shed or a fence—on Neighbor B’s parcel under the mistaken good-faith\(^ {33}\) belief that he is building on his own property. The structure remains for the duration of the statutory period, during which Neighbor B fails to object to the encroachment. Neighbor A may then file a “quiet title” action, asserting that the disputed plot now legally belongs to him under a theory of adverse possession.\(^ {34}\) Successful claims of this


\(^{30}\) See Hand, *supra* note 21 at 130.

\(^{31}\) Id. at 126.

\(^{32}\) Note that, in most jurisdictions, the adverse possessor need not erect a structure in order to establish his claim. See, e.g., *McLean v. DK Trust*, slip op No. 06-CV-982 (Colo. Dist. Ct.) (plaintiffs successfully laid claim to portion of neighbors’ land by using a foot path, gardening, and stacking wood on disputed parcel over period of 25 years).

\(^{33}\) See DUKEMINIER, *supra* note 28, at 126–28. Bad-faith adverse possessors know that the target property belongs to someone else, whereas the good-faith type enter the property under the belief that it belongs to them.
type are generally met with a firestorm of public outrage and/or calls for the doctrine’s abolition.\textsuperscript{35}

The second type of adverse possession, sometimes called “squatter’s rights,” refers to a situation where a “bad-faith” disseisor\textsuperscript{36} occupies property with the knowledge that it belongs to someone else.\textsuperscript{37} The adverse possessor in this case may or may not have the express intention of gaining legal title to the property. In either event, his possession is hostile to the rights of the titled owner.\textsuperscript{38} If the remaining elements are met, and the true owner fails to object, the disseisor’s possession and use will eventually ripen into good legal title.\textsuperscript{39} This type of adverse possession may be established where, for example, the true owner neglects or abandons his parcel for a long period of time. However, this method of acquiring title is rare in American jurisdictions, where squatting is generally not tolerated.\textsuperscript{40}

\textsuperscript{34} A “quiet title” action is a lawsuit to establish a party's title to real property against anyone and everyone, and thus “quiet” any challenges or claims to the title. BLACK’S LAW DICTIONARY (9th ed. 2009).

\textsuperscript{35} See generally, END ADVERSE POSSESSION NOW, \url{http://www.eapnow.org/} (last visited Aug. 22, 2012).

\textsuperscript{36} A disseisor is one who puts another out of the possession of his lands wrongfully. BLACK’S LAW DICTIONARY (9th ed. 2009).

\textsuperscript{37} A squatter is defined as “a person who settles on property without any legal claim or title.” BLACK’S LAW DICTIONARY (9th ed. 2009).

\textsuperscript{38} See Hand, \textit{supra} note 21 at 132.

\textsuperscript{39} Id. at 125.

\textsuperscript{40} See Brian Gardiner, \textit{Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws}, 8 IND. INT\textsuperscript{•}L & COMP. L. REV. 119, 148 (1997) (“In light of the experiences of European countries, United States municipalities should change their adversarial attitudes toward legitimate residential squatters[.]”).
B. THE HISTORICAL ORIGINS AND PURPOSES OF ADVERSE POSSESSION

The precise origins of the adverse possession doctrine remain shrouded in mystery, but statutes fixing limitations on actions for the recovery of land were known to English common law as early as the 13th century.\(^{41}\) Adverse possession law in the United States can be traced to a statute enacted by the North Carolina legislature in 1715.\(^{42}\) The doctrine has since been adopted in every American jurisdiction. Adverse possession has remained a part of American jurisprudence for nearly 300 years despite frequent and innumerable campaigns calling for its abolition.\(^{43}\)

The adverse possession doctrine validates the ancient and enduring notion that possession is the ultimate root of all land titles.\(^{44}\) Under Roman law, to possess meant loosely “to hold in the manner of an owner.”\(^{45}\) While possession does not necessarily imply ownership, it is a generally reliable indicator. This principle has given rise to the well-known axiom: “Possession is nine


\(^{43}\) See END ADVERSE POSSESSION NOW, http://www.eapnow.org/ (last visited Aug. 22, 2012) (“Adverse possession has no place in today’s society. Like other reprehensible laws of history, such as the Fugitive Slave Act of 1793, adverse possession is simply wrong -- it is an insidious, immoral and obsolete law that provides no social benefits.”); See also, Hal Spence, Bill to end Adverse Possession goes through Senate, PENINSULA CLARION May 12, 2003.

\(^{44}\) See Ballantine, supra note 29 at 137.

\(^{45}\) See Katz, supra note 30 at 21.
points of the law.”46 Indeed, “a right to possess is all the possessor has to start with, and all that she or anyone can have at the end of the day.”47

The traditional justifications for adverse possession reveal that it serves several important purposes: to quiet title and bar stale claims to land;48 to correct errors in conveyancing;49 to discourage owners from “sleeping”50 on property; to encourage the best or highest use of land;51 to settle boundary disputes;52 and to validate the inherent power of possession.53

At English common law, adverse possession was a vitally important means of resolving ownership disputes, which were the inevitable product of a faulty, inconsistent and unreliable system of transferring real property.54 Paper deeds were often lost or nonexistent, and there was no centralized system of recording.55 The possibility of undetected outstanding interests meant property owners could not easily be secure in their holdings. For example, established property

46 The saying “possession is nine points of the law” is generally attributed to Lord Mansfield, Corporation of Kingston upon Hull v. Horner, Lofft 576, 591 (1774). However, the principle is not formally recognized in modern law.
47 See Katz, supra note 30 at 14.
48 See CASNER, supra note 41, at 759.
49 Ballantine, supra note 29 at 135;
50 See Katz, supra note 30 at 18. “Sleeping” simply indicates that the owner has lost interest in his or her property.
51 Id.
52 See Hand, supra note 21 at 125-26.
53 See Ballantine, supra note 29; See also Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73, 73 (1985).
54 See historical source.
55 See historical source.
owners often had to defend their status against claimants brandishing alternate chains of title. The earliest known adverse possession statutes came about as a means of protecting property owners from “stale” claims—those originating before a prescribed date. Land claims brought after the expiration of the statutory period were barred by adverse possession, giving the landowner confidence that his title was absolute and indefeasible. Eventually, more sophisticated land transfer recording systems were developed to ensure the validity of titles, prompting some to argue that the adverse possession doctrine has outlived its usefulness.

The goals of punishing “sleeping” property owners and encouraging the best or highest use of land arise from “the recognition that an ownership interest carries with it the de minimus obligation to put the land to some use and/or protect the land from use by others.” Adverse possession underscores a preference for the active use of land over mere paper ownership. The doctrine recognizes that, if left unchecked, absentee ownership can have debilitating effects on the immediate community. Simply stated, one of the central tenets of the doctrine is “use it or lose it.” For instance, in the nineteenth century American West, vast tracts of frontier land were held hostage by wealthy East Coast speculators, frustrating settlement efforts on the new

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56 See historical source.
57 See CASNER, supra note 41, at 755.
58 See historical source explaining Deeds registration & Torrens systems.
59 See Katz, supra note 30 at 19.
61 Id.
Western courts ultimately sided with the settlers and brought an end to the stalemate by liberally enforcing adverse possession law.\textsuperscript{63}

Punishing “sleeping” landowners by stripping them of legal title may strike many today as disproportionately and even radically punitive.\textsuperscript{64} In the squatting context, however, this consequence is generally reserved for owners who are either extremely derelict in their duty or have abandoned the property outright.\textsuperscript{65} In the interest of fairness, the doctrine provides additional safeguards for titled owners who are imprisoned, mentally incompetent or minor children during the adverse possession period.\textsuperscript{66} Thus, the true owner is at a decided advantage in a contest for dominion over his holdings. He need only discover the adverse occupation and object to it at any time during the statutory period, which can be as long as twenty years in the United States.\textsuperscript{67} The landowner who fails to meet this minimal obligation risks forfeiture of his holdings in favor of the trespasser. Justice Oliver Wendell Holmes summed up the matter thusly: “Sometimes it is said that, if a man neglects to enforce his rights, he cannot be heard to complain if, after awhile, the law follows his example.”\textsuperscript{68}

C. THE DOCTRINE’S PURPOSES REMAIN RELEVANT TODAY


\textsuperscript{63} Id.

\textsuperscript{64} See Illustrative Case.

\textsuperscript{65} See Illustrative Case.

\textsuperscript{66} See CASNER, supra note 41, at 822.

\textsuperscript{67} See List of Statutory Periods.

\textsuperscript{68} Oliver Wendell Holmes, The Path of the Law 10 Harv. L Rev. 457, 476–477.
The continued utility of the doctrine to achieve its acknowledged goals has been the subject of much scholarly debate. Nevertheless, courts have continued to enforce adverse possession and legislatures have been reluctant to endorse its abolition, perhaps because adverse possession remains a useful mechanism for addressing problems peculiar to ownership and possession.

Modern land recording systems have not eliminated the conveyancing problems addressed by adverse possession. Property ownership in the modern era has become increasingly obfuscated by complex financial practices, such as mortgage securitization—the practice of bundling home loans and selling them as financial securities. Borrowers whose loans have been resold are often unable to identify the entity that holds their mortgage. Recent revelations suggest that even the lenders themselves are confused—Bank of America, for example, has repeatedly sued itself to foreclose on properties in its own portfolio. Adverse possession cuts through the confusion by guaranteeing that, if all else fails, clean title will automatically vest in the

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69 See Carol Necole Brown & Serena M. Williams, Rethinking Adverse Possession: An Essay on Ownership and Possession, 60 SYRACUSE L. REV. 583, 585 (“Adverse possession ought to be abrogated as a means of divesting owners of title because, in fact, adverse possession does not produce the fairest and most efficient outcome.”); Katz, supra n. 30 at 28 (“[A]dverse possession is justified [by] the imperative in any property system to guard against vacancies in the position of owner.”);

70 See Failed Attempts to Repeal Adverse Possession.


72 Id. at 4.

possessor. The doctrine also provides a backstop for modern recording systems, which remain susceptible to human error.\footnote{Ballantine, supra note 29 at 144. (“In spite of our elaborate books of record, possession remains the great source, muniment, and quieter of titles to land.”)}

The doctrine’s goals of encouraging the best use of land and discouraging “sleeping” owners go hand-in-hand, and their relevance has not diminished with the passage of time. In the past, “putting land to good use” ordinarily meant developing wild lands by logging, farming, mining or building structures.\footnote{See historical source.} As undeveloped land became more scarce, people began to appreciate the value of conservation—the act of preserving wild lands in their pristine state.\footnote{See historical source.} This value-shift led some scholars to conclude that adverse possession was no longer necessary to encourage the “best use” of land because “our society no longer considers letting land lie fallow to be imprudent, unproductive or unreasonable.”\footnote{Martin, supra note 86, at 150.} However, this conclusion misses the mark because it assumes that conservation is \textit{always} desirable. The conservation-based\footnote{This argument is largely based on the idea that modern society puts a high value on environmental preservation.} argument may be appropriate for pastoral lands, but it fails mightily when applied to an urban setting. Indeed, the catastrophic effects of inner-city property neglect are well-documented.\footnote{See Lior Jacob Strahilevitz, The Right to Abandon, John M. Olin Law \& Economics Working Paper No. 455 at 14. (“abandoned homes…may experience burst pipes, vandalism, vermin infestations, fixture stripping by scavengers, icy sidewalks, or become dens of criminality if they remain unoccupied for a significant period of time.”).} One would be hard-pressed to convince property owners in afflicted neighborhoods that it is better to let abandoned

\footnote{74 Ballantine, supra note 29 at 144. (“In spite of our elaborate books of record, possession remains the great source, muniment, and quieter of titles to land.”)}
homes deteriorate than to allow a trespasser to maintain them. Thus, the doctrine’s goal of encouraging the “best use” of land is still a valid justification for adverse possession, especially in residential areas beset by abandonment. Nowhere is this more apparent than in Florida, where the widespread availability of abandoned homes has invited enterprising adverse possessors to test the legal boundaries of the doctrine.

II. THE INNOVATIVE APPLICATION OF ADVERSE POSSESSION IN FLORIDA’S HOUSING MARKET MELTDOWN

A. THE ENTRPRENEURIAL USE OF ADVERSE POSSESSION IN THE FORECLOSURE CRISIS

In many respects, Florida’s housing market was ground zero for the 2007 U.S. financial crisis. A volatile mixture of mortgage fraud, subprime lending and bloated property values led to the utter collapse of Florida’s real estate market. The suddenness and scale of the collapse paralyzed government agencies and left homeowners searching for answers. While traditional institutions lurched toward a solution, a handful of adverse possessors, including Mark Guerette,

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81 Id.

82 See Article Regarding Florida’s Collapse.
took the matter into their own hands. Their innovative approach added a new twist to an old doctrine, and offered a solution to the burgeoning abandonment problem.

In 2009, Guerette scouted South Florida neighborhoods in search of abandoned homes that had been designated “public nuisance” properties by their county of record. Guerette targeted homes that were in the process of foreclosure, and had been abandoned by the owner of record. Many of these properties exhibited the familiar symptoms of neglect—broken windows, unkempt lawns—that frequently entail a downward spiral for the surrounding neighborhood.

Guerette filed claims of adverse possession on nearly 100 residential properties by invoking an 1869 Florida statute that would transfer title of the properties to him after seven years, provided certain legal elements are satisfied. For the 20 properties he deemed most habitable, Guerette sent notification letters to the record owner (in most cases the defaulting mortgagor) and the lender to inform them of his plans to acquire title via Florida’s adverse possession law. Guerette received only one response. As required by Florida’s adverse possession statute, Guerette also alerted the county property appraiser’s office by filing a DR-452 notice form for

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83 Skipp, supra note 19.
84 Id. In general, municipal public nuisance provisions give the municipality the power to sanction property owners whose premises have been repeatedly used as the site of criminal activity. See, e.g., CODE OF METROPOLITAN DADE COUNTY, FLORIDA, ORD. NO. 99–43 (1999).
85 Skipp, supra note 19.
86 Bajaj, supra note 9.
87 Skipp, supra note 19.
88 Id.
89 See infra Section II. B. for an in-depth discussion of Florida’s adverse possession law.
90 Skipp, supra note 19.
91 Id.
each of the claimed properties, signifying an attempt to establish adverse possession without color of title. He then undertook to repair the abandoned homes, and leased them to low-income renters.

It is the act of collecting rents on these properties that sets Guerette apart from the typical squatter. While the practice is unusual, Guerette is not the first person in the history of property law to match needy individuals with empty homes. However, unlike Guerette’s endeavor, most of these efforts are not-for-profit. In England, for example, the non-profit Advisory Service for Squatters helps potential squatters choose from a list of vacant buildings. The group also publishes “The Squatter’s Handbook,” which boasts “83 pages of detailed legal and practical information about squatting.” Similarly, organizations like the Association of Community Organizations for Reform Now (ACORN) have mobilized squatters to participate in “urban homesteading movements” here in the United States. In Guerette’s own backyard, the Miami chapter of a volunteer organization called Take Back the Land works openly to move homeless people into vacant homes. Unlike Guerette, however, these organizations do not

92 Id. Florida Department of Revenue Form DR-452 (“Return of Real Property In Attempt To Establish Adverse Possession Without Color Of Title”) is available at, http://dor.myflorida.com/dor/forms/2010/dr452.pdf.
93 Skipp, supra note 19.
94 A squatter is defined as “a person who settles on property without any legal claim or title.” BLACK’S LAW DICTIONARY (9th ed. 2009).
97 Id.
98 See Gardiner, supra note 42, at 145.
collect rents and seldom contemplate the squatter’s (or the agency’s) long-term possession or eventual ownership of the property.

Guerette’s controversial approach to adverse possession drew praise from his tenants, some of whom had been homeless before moving into one of his properties. Neighboring property owners also expressed their approval, indicating that they understood the alternative—living next door to an empty, dilapidating structure that threatened to attract crime and drag down property values. Guerette’s supporters saw him as something of a “modern-day Robin Hood” who was doing the community a service by putting “needy people in needy homes.” On the other hand, his critics argued that Guerette was just another scam artist trying to turn a buck in Florida’s notoriously loose and fast real estate market.

Mark Guerette was not the only real estate entrepreneur engaged in this type of endeavor. An examination of Florida newspapers suggests that others have interpreted Florida’s adverse possession law as allowing a person to acquire title to a property they do not own via landlording. For example, Sarasota adverse possessor Joel McNair repaired and leased 11 residential properties to tenants while doing business as “Homes for Americans, LLC.”

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100 Skipp, supra note 19.
101 Id.
102 See Skipp, supra note 19 (Reader comment submitted Nov. 9, 2010 by “miller”).
103 Id. (Reader comment submitted Nov. 9, 2010 by “CJ.”).
104 Id. (Reader comment submitted Nov. 8, 2010 by “David.”).
105 Skipp, supra note 19.
Likewise, adverse possessor Stephen Bybel made claims on 72 Pasco County homes through a company called “Real T Solutions, LLC.” The practice has been adopted by dozens of enterprising Floridians, and has subsequently appeared in other states as well.

A. MARK GUERETTE’S ADVERSE POSSESSION CLAIMS ARE VALID UNDER FLORIDA COMMON LAW

The unique response of Guerette and other entrepreneurs to the housing market prompts a question about the limits and utility of adverse possession: May adverse possession be lawfully established by leasing properties instead of living in them? By taking this approach, Guerette appears to have deviated from the traditional rules governing adverse possession. Unlike a typical squatter, Guerette was seeking to establish title ownership of the abandoned property by assuming the role of landlord. Nevertheless, an analysis of Guerette’s claims under Florida law reveals that his activity fits comfortably within the doctrine.

As in most jurisdictions, adverse possession in Florida is a blend of statutory and common law. The Florida Supreme Court has observed that “[a]cquisition of rights by one in the lands

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108 Carrie Wells, Home rental strategy a service or a fraud?, SARASOTA HERALD-TRIBUNE, Nov. 23, 2010, http://www.heraldtribune.com/article/20101123/Article/11231049. McNair’s rental enterprise unraveled when a homeowner who had vacated her home several months earlier due to impending foreclosure returned to check on the property, only to discover McNair’s tenants living there. Id.


111 Skipp, supra note 19.

112 See DUKEMINIER, supra note 28, at 112.
of another, based on possession or use, is not favored in the law, and the acquisition of such rights will be restricted.”

However, a claim of adverse possession without color of title may be successful if the occupant can establish “seven years of open, continuous, actual possession, hostile to all who would challenge such possession.” Moreover, the adverse claimant must make a return of the property by its proper legal description to the county tax assessor within one year of entry, and pay all taxes on the property during the statutory period.

While “[t]here is no general rule prescribing the particular acts of ownership which constitute adverse possession,” Guerette’s activity seems to meet the criteria under Florida law. Actual possession may be established where the property has been “protected by a substantial enclosure” or “usually cultivated or improved.” Florida’s highest court has acknowledged that “[i]t is not necessary to reside upon property to claim it adversely.”

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112 Downing v. Bird, 100 So.2d 57, 65 (Fla. 1958).

113 BLACK’S LAW DICTIONARY (9th ed. 2009) (“color of title. (18c) 1. A written instrument that appears to establish title but does not in fact do so”). A minority of American jurisdictions require that the adverse possessor enter under color of title. However, in most jurisdictions, including Florida, a written instrument is not a necessary element of adverse possession.

114 Meyer v. Law, 287 So.2d 37, 40 (Fla. 1973). See also FLA. STAT. ANN. § 95.18 (West 2010).

115 FLA. STAT. ANN. § 95.18 (West 2010). See also Meyer, 287 So.2d at 40; Manin v. Milander, 452 So.2d 997, 997 (judgment rendered against plaintiff seeking to establish adverse possession upheld where plaintiff failed to make a return of the property to the county appraiser). The “return of the property” element is essentially a notice requirement. Although they are not obligated to do so, some Florida counties notify the owner of record upon receiving an adverse possession claim.

116 FLA. STAT. ANN. § 95.18 (West 2010).


118 FLA. STAT. ANN. § 95.18 (West 2010).

119 Id.

120 Baldwin Co. v. Mason, 52 So.2d 668, 669 (Fla. 1951); see also Casner, supra n.41 at 766 (“While residing on the property is always strong evidence of adverse possession, it is not essential where other acts of dominion regularly exercised establish unbroken possession in fact for the required period.”).
Baldwin Co. v. Mason was deemed to have adversely possessed a pair of adjacent lots by living on the first and periodically leasing the second to various tenants over a period of 23 years. However, merely leasing the property without some act of physical dominion over it might be inadequate to sustain a claim of adverse possession. It is likely that Guerette’s performance of repairs and regular property maintenance would satisfy any “physical dominion” requirement.

Guerette’s approach to adverse possession raises the question of whether property can be held adversely against a title owner who no longer wants it—the answer is yes. In general, unlike chattel, real property cannot be legally abandoned. Even in his absence, the titled owner maintains the right to bring an action for trespass or ejectment against the adverse possessor. Thus, Guerette’s occupation is sufficiently hostile, regardless of the true owner’s intentions.

Finally, it should be noted that Guerette had no obligation to notify the mortgagee during the foreclosure pendency. Florida is a “lien theory” state; the mortgagee therefore has no legal

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121 Id.

122 Id. (“at all times [the claimant] seems to have maintained possession either through herself or her tenants.”).

123 See Ben-Jay, 154 So.2d at 829 (upholding a finding of adverse possession where the occupant’s acts of ownership consisted of platting the disputed lands and laying them off into town lots for the purpose of sale). But see Cox v. Game, 373 So.2d 364 (Fla. 1979) (“in the absence of some exercise of physical dominion over the property, [platting alone] is not enough to establish title through adverse possession.”); see also ANDREW JAMES CASNER, AMERICAN LAW OF PROPERTY, Vol 3., § 15.3 (1952) (“Sales of parts of the land … without sufficient acts of physical control to establish actual possession are not sufficient in themselves [to establish title by adverse possession”]. The foregoing authorities suggest that a scheme to collect rents without performing repairs or maintenance may fail to establish that the possession was “actual.”

124 See Shepard, supra note 60 at 575 (noting that the concept of abandonment of real property is not formally recognized in American property law).

125 See DUKE MINIER, supra note 28, at 544 n.17. In a lien theory state, the mortgagor holds legal title to the property. The mortgagee holds only a lien against the property, which is lifted when the mortgage is satisfied. By
right to possession. Moreover, “[p]ossession cannot be adverse to one who has no right to possession.” Hence, assuming that Guerette’s claim satisfies all of the other elements of adverse possession, the seven-year statute of limitations as against the lender would begin to run only after completion of the foreclosure sale. Any claim of adverse possession against the defaulting homeowner would be extinguished by the foreclosure, provided that title transfer to the bank was properly recorded. Thus, Guerette would likely need to sustain his uninterrupted occupation of the property for longer than the prescribed seven-year period in order for his claim of adverse possession to be successful.

In theory, adverse possession claims based in land-lording could ripen into title in a majority of American jurisdictions. However, notwithstanding the enormity of the foreclosure crisis in Florida and elsewhere, it is highly improbable that such claims would remain uninterrupted for the entire statute of limitations. It is more likely that the bank would oust the adverse possessor when, at the conclusion of judicial foreclosure proceedings, it is prepared to put the property back on the market. In fact, Guerette’s lease addendum anticipates that his adverse possession claims might be interrupted by a “cash for keys” offer from the bank before the statute of

contrast, under the “title theory” of mortgages, the mortgagee holds title to the property in its name until the mortgage obligation is satisfied in full. Id. at 543–44.

126 Wright Estates, Inc. v. Germain, 12 So.2d 451, 452 (Fla. 1943).
127 Id.
128 Wright Estates, 12 So.2d at 452.
129 With regard to foreclosure properties, it is not uncommon for banks to transfer title improperly—by leaving the property in the name of the defaulting mortgagor, for example. One can easily imagine a scenario where a bookkeeping error results in a “bank-held” property being adversely possessed against the defaulting mortgagor.
130 This accounting includes the time between his initial entry and the foreclosure sale, combined with the subsequent seven year statutory period.
131 Guerette’s success in any particular jurisdiction would, of course, be subject to the idiosyncrasies of its adverse possession law.
limitations expires.  

“Cash for keys” describes a transaction where a bank seeking to regain possession (to which it is entitled) pays the squatter to vacate the property, rather than filing an action for ejectment. Guerette’s addendum contains provisions purporting to release him and the tenant from their mutual obligations under the lease agreement should the tenant accept a “cash for keys” offer. Thus, the addendum reflects Guerette’s expectation that his rentals might be a stop-gap arrangement, rather than a long-term solution.

In sum, the collecting of rents does not by itself invalidate a claim of adverse possession. By leasing the claimed homes to tenants, Guerette used the properties in the manner of a true owner. Thus, his adverse possession claims are legitimate.

B. FLORIDA’S PROSECUTION OF ADVERSE POSSESSION

Despite Guerette’s seemingly “by-the-book” approach, the Broward County State Attorney’s Office launched a criminal investigation that led to his indictment on multiple counts of organized fraud in the second degree. Guerette denied any wrongdoing. Yet, he

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132 See Saving Florida Homes Addendum to Contract [hereinafter Addendum] (“If tenant agrees to exchange keys for cash, landlord will no longer charge tenant for any rent in order to assist tenant to move in a timely fashion. Tenant will be given the option to move on their own, or have landlord help with another property for tenant to rent under the same conditions as the previous rental.”). Many lenders prefer “cash for keys” over the judicial alternative because it is often the more efficient method of restoring foreclosed properties to the market.

133 Id.

134 See Section III, infra, for a discussion of the benefits that accrue to each party from such an arrangement.

135 The rules governing adverse possession can be difficult to discern, even for those with legal training. See John R. Barlow II & Donald M. VonCannon, Skelton on The Legal Elements of Boundaries & Adjacent Properties, 2nd ed., (1997) 372 (“Adverse possession is distinctly a necessary evil and presents some of the most difficult and litigated questions known to law.”). However, Guerette took measures to verify that his enterprise was within the law. For instance, he consulted an attorney prior to making any claims of adverse possession.

136 Broward County Case Summary, Case No. 10006038CF10A [hereinafter Guerette Case Summary]. Guerette was indicted under section (4)(a)2 of the Florida Communications Fraud Act. See FLA. STAT. ANN. § 817.034 (West 2010) (“Any person who engages in a scheme to defraud and obtains property [with an aggregate value of $20,000-$50,000] thereby is guilty of organized fraud.”). The statute purports to criminalize the temporary deprivation of
received two years probation under a plea agreement that also obliged him to refrain from filing any adverse possession claims for the probationary period. It is not uncommon for law enforcement officers to assert that adverse possessors are “misusing” the adverse possession law to “steal other people’s property.” However, contrary to this characterization, the conduct of the adverse possessors suggests that they have used the law precisely as the Florida legislature intended.

Nevertheless, many of those who have attempted to adversely possess property under this theory have faced criminal charges from Florida prosecutors. For example, Sarasota sheriffs arrested Joel McNair and charged him with organized fraud and grand larceny. McNair insists that he was operating within the letter of the law. Likewise, adverse possessor Stephen Bybel was steadfast in proclaiming his innocence after being charged with scheme to defraud. There are countless other claimants who, like Guerette, McNair, and Bybel, assert that they (1)

another person’s right to real property or a benefit therefrom. However, this theory of criminality is problematic in this instance for, inter alia, reasons of valuation and intent. Additionally, the FSCA would be in derogation of the common law and § 95.18 if it were interpreted as foreclosing claims of adverse possession.

137 Guerette summary, supra note 136]. See infra Section V for a full discussion of the criminal charges.


139 See Wells, supra note 107.

140 Indeed, one of the frequently cited purposes of adverse possession law is to facilitate the transfer of property in an abandonment situation. See DUKEMINIER, supra note 28, at 124 n. 15.

141 Sarasota County Case Summary, Case No. 2010 CF 015634 NC [hereinafter McNair Case Summary].

142 Id.

143 See SSO Report, supra note 106 (“McNair stated that he had paid to have legal research done by a company from Virginia that would allow him to use the adverse possession statute, FSS 95.18, to place people in vacant houses.”).

found the properties unlocked and abandoned,\textsuperscript{145} (2) put the owner of record on notice prior to entering,\textsuperscript{146} (3) performed repairs on the homes, and (4) leased the properties to tenants under a claim of right.\textsuperscript{147} As a result, they argue that they cannot be held criminally liable for leasing the properties because such activity is within the purview of Florida’s adverse possession law.\textsuperscript{148}

The facts suggest that, even if they were turning a profit,\textsuperscript{149} Guerette and McNair went to great lengths to ensure that their conduct complied with the law.\textsuperscript{150} For example, both men sought legal advice prior to filing any claims of adverse possession.\textsuperscript{151} They paid for and performed the repairs necessary to make the properties habitable.\textsuperscript{152} Each also set rent according to what the tenant was able to pay, and in some cases “allowed” tenants to perform repair work in lieu of paying rent.\textsuperscript{153} In addition to notifying the bank and the defaulting mortgagor,\textsuperscript{154}

\textsuperscript{145} See, e.g., Sullivan, supra note 106. Nearly every entrepreneurial adverse possessor who was arrested claimed that the home was open and unlocked when they found it. Nevertheless, several of these individuals were charged with burglary.

\textsuperscript{146} McNair seems to have made no attempt to notify the owners. However, he was not obligated to do so under Florida’s adverse possession law.

\textsuperscript{147} See DUKE MINIER, supra note 28, at 126–29 (6th ed. 2006). “Claim of Right” (sometimes called “Claim of Title”) is one formulation of the hostility requirement for adverse possession.

\textsuperscript{148} See SSO Report, supra note 106 (“McNair went on to speak for almost two hours and fifteen minutes, explaining why he believes what he is doing is legal under the adverse possession statute.”).

\textsuperscript{149} See SSO Report, supra note 106 (indicating that McNair’s bank account deposits outpaced withdrawals by $13,272.06 during a three month period). However, he was financially crushed by his arrest

\textsuperscript{150} “Good faith” is used here in the ordinary sense, not to describe the mindset of the adverse possessor.

\textsuperscript{151} See SSO Report, supra note 106. (“McNair stated that he had paid to have legal research done by a company from Virginia”).

\textsuperscript{152} See Skipp, supra note 19. The upkeep is noteworthy because most scam artists do not bother to perform repairs on the property. See also SSO Report, supra note 106 (“Hirz stated that McNair has a crew that comes in and mows the lawn and cleans up the property prior to the move in.”).

\textsuperscript{153} See, e.g., Skipp, supra note 19.

\textsuperscript{154} The adverse possessor is not required to personally notify the true owner under Florida’s adverse possession law. However, in response to the perceived adverse possession “crisis” the Florida Legislature enacted SB #1142, which requires county property appraisers to notify the true owner whenever an adverse possession claim is filed. See
Guerette also disclosed to his tenants in a signed addendum to the lease agreement that they were receiving a discount in rent “due to the subject property being part of a claim by the landlord and its agents using: Adverse possession without color of title (Fla. Stat. section 95:18).” McNair’s “Provisional Occupancy Membership Agreement” was even more transparent in disclosing the nature of the rental arrangement. The document provided: “It is understood by both parties, that this is not a lease, they are not tenants, we are not landlords, nor do we own said property. This is a temporary Occupant Agreement. This is a month to month agreement between the two parties.” Finally, there is evidence that Guerette ceased collecting rents when his lawyer informed him that he might be criminally liable for the act of leasing the properties.

Guerette was indicted under the Florida Communications Fraud Act, which purports to criminalize the temporary deprivation of another person’s right to real property or a benefit therefrom. For obvious reasons, this theory of criminality is problematic where the true owner has abandoned the property. The charges bizarrely suggest that the adverse possessor deprived the abandoning homeowner of rights and benefits flowing from the abandoned property. Moreover, Guerette’s notification letters clearly demonstrate that he lacked fraudulent intent.

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155 See Addendum, supra note 132. It could be argued that the addendum did not amount to a true disclosure of the property’s ownership status because it requires the layperson-tenant to understand the meaning of “adverse possession.” It is also unclear whether Guerette provided his tenants with a more explicit verbal explanation prior to execution of the lease agreement. Nevertheless, unlike with many other fraudulent rent schemes, there is no direct evidence that Guerette tried to pass himself off as the true owner of the property.

156 Homes For Americans, LLC, Provisional Occupancy Membership Agreement [hereinafter POMA].

157 Id. At least one of McNair’s tenants confirmed that he understood the terms set forth in the membership agreement. See SSO Report, supra note 106.

158 Skipp, supra note 19.

Finally, the FSCA would be in derogation of the common law and Florida’s adverse possession statute if it were interpreted as foreclosing claims of adverse possession.

The circumstances of Joel McNair’s arrest reveal a pattern of unchecked misapprehension—or worse, willful ignorance—of Florida’s adverse possession law by Florida law enforcement. For example, a detective erroneously concluded that McNair failed to adhere to the adverse possession statute in part because he had yet to file a DR-452 form with the property appraiser’s office. Presumably on this basis, the same detective later declared that “the adverse possession statute does not apply” and that McNair should instead be charged with felony scheme to defraud. Given the civil nature of the adverse possession law and the apparent lack of factual support for the felony fraud charges, it may have been more appropriate for the authorities to advise the complainant-homeowner to file a civil action for ejectment against McNair and/or his tenants. Instead, McNair was publicly arrested and jailed.

Police

160 See SSO Report, supra note 106 (“It was not understood what [adverse possession] was, and a civil disturbance was noted by patrol.”).


162 In regard to the search for at-large adverse possessor George Williams, Larry McKinnon of the Hillsborough County Sheriff’s Department said, “This [arrest warrant] ought to send a clear message that we’re not going to tolerate the adverse possession [sic].” See Arrest Warrant for George Williams, (WFLA-TV News Channel 8 television broadcast), available at http://www2.tbo.com/video/2011/mar/15/arrest-warrant-for-george-williams--70211.

163 See SSO Report, supra note 106. In fact, McNair would have one year following entry to file the form. His failure to do so may invalidate his claim of adverse possession, but under no circumstances does it give rise to criminal liability.

164 The facts simply fail to support a charge of this caliber. The sheriff’s office could perhaps justify a criminal trespass charge against the tenant in possession or a petit theft charge against McNair arising from the alleged removal of the homeowner’s personal property.

165 Wells, supra note 107.
executed a search warrant on McNair’s business office,\(^{166}\) and most of his tenants were ordered to vacate the properties within 72 hours.\(^{167}\) The arrest also had the effect of devastating McNair’s otherwise lawful business enterprise.\(^{168}\) In May 2011, after learning that he was to face a second wave of adverse possession-related criminal charges, McNair took his own life.\(^{169}\)

The issue was finally adjudicated in 2012 when a Broward County jury convicted 65-year-old adverse possessor Fitzroy Ellis of first degree grand theft\(^{170}\). Broward County Prosecutor Don Tenbrook declared: “He was hijacking this house. He was looking for ransom. It’s a scam, pure and simple.”\(^{171}\) The State of Florida asked for the maximum allowable sentence—30 years behind bars.\(^{172}\) Florida Circuit Court Judge Jeffrey Levenson instead sentenced Ellis to five years imprisonment, two years of community control and eight years probation—a term that may nonetheless force Ellis to spend the rest of his life in prison.\(^{173}\)

\(^{166}\) SSO Report, supra note 106.

\(^{167}\) Id.

\(^{168}\) One could argue that McNair has incurred fines in the form of legal fees and bonds. It should be noted that McNair should have been able to resume his claims with continuity because forcible removal does not operate as an interruption of the statutory period. See Horton v. Smith-Richardson Inv. Co., 87 So. 905 (Fla. 1921).


\(^{172}\) Cafiero, supra note 159

\(^{173}\) Cafiero, supra note 159.
Although law enforcement authorities maintain that adverse possessors are criminals, the specific fraud charges most commonly brought against these individuals are unsupported by Florida’s criminal code. It seems likely that conscientious adverse possessors like Guerette and McNair have instead been swept up in an angry wave of real estate fraud prosecutions.  

C.  ALTERNATIVE THEORIES OF CRIMINALITY

In addition to fraud, several adverse possessors have been indicted on grand theft charges. As applied to adverse possession cases, these felony theft charges suggest that the adverse possessor has stolen the home and the real property on which it situates. While real property is implicated by many criminal theft statutes, it is likely that these laws contemplate the wrongful transfer of property on paper—such as by the forgery of a fraudulent deed. Theft indictments also signify a criminal act against the property owner. However, it is dubious whether this type of allegation would have any merit where, as with many foreclosed properties, the true owner has not pressed criminal charges and/or has abandoned the realty. Moreover, it is debatable as to whether one can be charged as a thief for “knowingly employing the law’s own process for acquiring land.”

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175 See McNair Case Summary, supra note 37; SSO Report, supra note 106. McNair was arrested on suspicion of violating §817.034(4)(a)1 (scheme to defraud for property valued at $50,000 or more). Adverse possessor Stephen Bybel was also arrested under the FCSA in Pasco County. See Pasco County Case Summary, Case No. 512011CF00114A0000ES [hereinafter Bybel Case Summary].

176 FLA. STAT. ANN. § 812.014 (2)(A)1 (West 2010). The complainant also alleged that $5,000 worth of personal property was missing from the home, but the charges brought against McNair reflect a far greater amount.

177 See State v. Santomaso 764 So.2d 735

One can imagine several alternative theories under which an entrepreneurial adverse possessor could be criminally prosecuted, but none of them seems applicable to the cases-at-hand. Some jurisdictions have specific laws forbidding “rent skimming”—the act of leasing and collecting rent monies on a parcel to which one has no legal claim—but Florida is not among them. Aspiring adverse possessors in Florida have been charged with an assortment of crimes including burglary, breaking and entering and impersonating a real estate agent. Adverse possessors are frequently cited for criminal trespassing, but such charges are minor, and seem more applicable in this instance to the tenants rather than the landlord. Indeed, if trespassing was thought of as a bar to adverse possession, the entire doctrine would be obviated.

It seems far more tenable that criminal conduct arising from entrepreneurial adverse possession would take the form of a fraud perpetrated on the tenant. For example, where the unscrupulous landlord has not disclosed to the tenant the true nature of the rental, the fraud is plain. One could perhaps argue that Guerette forged an unconscionable contract with his tenants by failing to provide a plain English disclosure to people who could not reasonably be

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179 Rent skimming is the act of leasing and collecting rent monies on a piece of property to which one has no legal claim. See CAL. CIVIL CODE § 890 (West 2010).

180 Bybel Case Summary, supra note 179.

181 Note that, in most cases, no trespass charges have been filed by any person who has a right to file them. See SSO Report, supra note 106 at 10 (“The complainant…reported to the Sarasota Sheriff’s Office that unknown and unauthorized occupants were living in his son’s house at the above listed address.”) See also id. at 11 (“A call was made to the [sheriff’s office] advising that a black male was attempting to burglarize the house located at 5150 Bliss Road.”).

182 The tenant who has been duped into believing that the adverse possessor is the true owner of the property finds himself in a precarious position. He will often lose the initial downpayment & rent monies, face trespassing charges and be forced to vacate on short notice.
expected to understand the implications of the addendum. However, it is far more difficult to make the case that he defrauded these individuals. Nevertheless, the law has worked to impute fraudulent conduct to the adverse possessor-landlord, even where the tenant understands that his living arrangements are impermanent.

Civil law provides a remedy for the title owner seeking the removal of an adverse possessor from his property—an action for ejectment. Instead of advising aggrieved landowners to seek this remedy, the State of Florida has criminalized the practice. In many of these cases, the homeowner had not even filed a criminal complaint. Several adverse possessors have now lost their liberty, even though their conduct seemingly complied with Florida’s adverse possession law. In sum, the slapdash enforcement of criminal sanctions against adverse possessors makes plain the urgent need for judicial clarification of the doctrine’s applicability in these cases.

183 See note 170, supra, for a discussion of why Guerette’s addendum may not amount to a true disclosure. It is much more difficult to make the same argument against McNair, whose contract was in the plainest English.

184 Guerette’s lease addendum may have provided him with an affirmative defense to a charge of fraud against the tenants. However, since the matter was never adjudicated, it will remain to some other adverse possessor to test those legal waters.

185 An ejectment action is a lawsuit brought to remove a party who is occupying real property. BLACK’S LAW DICTIONARY (9th ed. 2009).

186 See supra note 181.

III. WHY ENTREPRENEURIAL ADVERSE POSSESSION SHOULD BE ENCOURAGED AS A SOLUTION TO THE HOUSING CRISIS

A. DISTINGUISHING LEGITIMATE ADVERSE POSSESSION FROM REAL ESTATE FRAUD

Clouding a proper analysis of these adverse possession claims is the existence of a pervasive criminal element in Florida’s distressed real estate market. Florida has been described by one expert as the “capital of real estate fraud.” Indeed, it is safe to say that the majority of rental schemes are fraudulent. Most often, the “landlord” simply disappears after collecting the tenant’s initial downpayment. In one egregious example, Carl Heflin of Palm Beach County allegedly leased out properties that were uninhabitable due to mold, had his teenage daughter break in to locked properties in order to take possession of them, attempted to collect back rents from former tenants that he believed had accrued during his 13 month incarceration for a prior real estate fraud conviction, and allegedly threatened to burn one tenant’s house down while her children were home if she refused to pay. Even the relatively upstanding claimants exhibit notable deviations from good faith, such as the failure to disclose

188 See Skipp, supra note 19.
189 Id.


193 Skipp, supra note 19.
194 Id. Obviously, criminal acts such as those allegedly perpetrated by Heflin would derail any claim of adverse possession.
the ownership status of the property to the tenant. Perhaps unsurprisingly, several of the adverse claimants, including Guerette, have previously been convicted of real estate fraud. Florida’s real estate market is rife with fraudulent enterprise; therefore it can be difficult to distinguish legitimate adverse possessors from criminals. Florida’s legitimate interest in deterring real estate fraud is indisputable. However, the mere existence of fraud does not authorize a wholesale crackdown on adverse possessors where the civil remedy of ejectment would suffice.

B. DEBUNKING THE MISGUIDED PUBLIC PERCEPTION OF ADVERSE POSSESSION

This context of fraud has fueled public hostility toward entrepreneurial adverse possessors, who have been excoriated by the popular media. Adverse possessors are usually portrayed in the local news as scam artists who prey on unsuspecting homeowners. Media outlets rarely investigate whether these adverse possession claims are valid, and never mention the benefits flowing from the activity.

As one might guess, the public reaction to Guerette’s scheme has been overwhelmingly hostile, especially among Floridians inclined to believe he is a criminal. Guerette has been branded a “land thief” and worse by his critics. Much of the resentment can likely be traced to the collecting of rents. However, Guerette would likely face many of the same criticisms even if

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196 See Derisive Articles on Adverse Possession.


198 See, e.g., Wells, supra note 107.
he were not collecting these monies because “[t]he adverse possessor is universally regarded as a scoundrel.”199 There is an almost instinctive disdain for adverse possessors, especially those who would invoke the doctrine in order to increase their own holdings.200 Moreover, Guerette is a bad-faith201 adverse possessor—the most detestable type, according to many critics of the doctrine.202 The highest disdain is usually reserved for those who invoke the doctrine to appropriate land from their neighbors.203 However, Guerette does not appear to be this type of adverse possessor. Indeed, by walking away from their properties, the former owners of Guerette’s target properties have made it clear that they are no longer interested in ownership.

Mark Guerette’s actions have been assailed primarily because “even if trickery is not involved, people generally feel dissatisfied when one person gets something for nothing at the expense of a relatively innocent other.”204 This notion of “unjust enrichment” is frequently cited by opponents of adverse possession.205 However, it is not clear that Guerette has been significantly enriched here. He may have collected some monies in excess of his expenditures,

199 Fennell, supra note 178 at 1046.

200 Katyal supra note 62 at, 1105 (2007) (defining “acquisitive outlaws” as those who “seek to obtain for themselves ownership of some property interest presently in the hands of another.”).

201 See DUKEMINIER, supra note 28, at 126–28. Bad-faith adverse possessors know that the target property belongs to someone else, whereas the good-faith type enter the property under the belief that it belongs to them.

202 Fennell, supra note 178, at 1038 (noting that bad faith adverse possessors fare poorly in court and in scholarly writings).

203 The high-profile Colorado adverse possession case of McLean v. DK Trust, slip op No. 06-CV-982, elicited many of the same criticisms now being lobbed at Guerette, even though there was no rental-scheme element in that case. McLean involved a successful bad-faith adverse possession claim by the plaintiffs, who were awarded a portion of their neighbors’ property. In the aftermath of the controversial decision, the McLeans were vilified in the popular media. See, e.g., Tom McGhee, Lawyers awarded property next door, DENVER POST, Nov. 18, 2007, http://www.denverpost.com/news/ci_7494276 (reader comments).


205 Id.
but this number is insignificant in comparison to the wealth he would acquire in the unlikely event that his claims reach maturity. Even if his claims do survive the seven year statute of limitations, Guerette will have made a significant investment in the claimed properties. By the time he takes title, Guerette will have paid seven years worth of property taxes and repair costs. He will also have spent countless hours managing and maintaining the properties. In spite of these investments, the rightful owner could interrupt Guerette’s possession at any time during the seven year statutory period, thereby erasing his progress and/or extinguishing his claim altogether. Finally, there is a high probability that Guerette will endure harassment by local law enforcement, followed by criminal punishment. He may also incur significant legal fees arising from criminal, as well as civil liability. In short, Guerette’s enterprise is fraught with risk and manual labor. Any enrichment Guerette experiences as a result of his efforts will almost certainly be well-earned.

The public opinion of Guerette presumes that his adverse possession claims will be successful, but the foregoing analysis and Guerette’s own lease addendum suggest that they will fail. People commonly imagine the adverse possessor as “a brazen character with expansionistic designs[,].” But given its slim likelihood of success, Guerette’s enterprise might be more aptly described as a trespass for short-term gain, with a remote shot at eventual permanence and

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206 See supra p. 21.

207 See supra, p. 21.

208 See supra Section II C.

209 One can imagine a variety of situations giving rise to a civil suit against Guerette, such as one of his homes burning down and injuring a tenant.

210 Fennel, supra note 178, at 1052.
outright ownership. When viewed in this light, it is much less susceptible to attack under a theory of unjust enrichment.

C. THE CASE FOR ADVERSE POSSESSION AS A REMEDY FOR THE FORECLOSURE CRISIS

There is a strong utilitarian argument that the law ought to cautiously permit the adverse possessor in certain of these cases to proceed with his activity—both the adverse possession claim and the collecting of rents. Even if these adverse possessors can be criminally prosecuted, the “law should be careful not to protect property rights in such a way to preclude [property] outlaws from productively violating existing official legal norms.”

A properly undertaken campaign of entrepreneurial adverse possession can yield a host of benefits, especially for communities that have been hard hit by the foreclosure crisis. Where residential urban/suburban communities contain large numbers of abandoned homes and there is no functioning and available market to facilitate a transfer, adverse claimants like Guerette can help a battered neighborhood survive until traditional mechanisms, like financial institutions, have recovered. One need not designate a statistical threshold for empty homes and needy people before acknowledging that adverse claimants like Guerette are essentially performing a public service. Indeed, the benefits of adverse possession under the above described conditions are plain: (1) the property will be improved and maintained for the duration of the adverse

211 Id.
212 See Shepard, supra note 60 at 570 (“The trespasser’s behavior then, serves a positive social good…”).
213 Katyal, supra note 62, at 1130.
214 Fennell, supra note 178, at 1065.
possession; (2) impoverished residents will have access to dignified habitation;\textsuperscript{215} (3) the property will produce tax revenue while in the care of the adverse possessor; (4) the occupation will keep crime down and property values up in the affected communities; (5) the adverse possessor will earn an income in exchange for managing and maintaining the property;\textsuperscript{216} and (6) the adverse possession establishes a firm timetable in which banks must choose whether or not to address the abandoned properties. The arguments against Guerette’s activity—that he does not own the property, that he may have profited—seem slight by comparison. It is troubling that the law works to criminally punish a civil transaction that ostensibly benefits most parties and the community at large.

The potential for entrepreneurial adverse possessors to perpetrate fraud is apparent. For this reason I am not suggesting that the law turn a blind eye to adverse claimants. However, heavy-handed attempts to regulate these individuals could stifle their ability to respond sufficiently when the community is in crisis. Florida’s current DR-452 registration system seems to be an appropriate compromise, in that it forces adverse possessors to register, but it is not an impediment to their enterprise.

Although these adverse possession claims will likely be extinguished by the eventual foreclosure action, one could argue that the business model succeeds precisely \textit{because} the adverse possession fails. The unpopular image of the adverse possessor getting a “free house” is illusory. Thus, the established system of property ownership will remain unharmed. In the

\textsuperscript{215} It is worth noting that although this habitation might be temporary, it could nonetheless help people who need assistance. This arrangement would require a measure of cooperation from the banks and the law.

\textsuperscript{216} In an American economy that is currently facing 8.3% unemployment, this type of employment might be preferable to the alternative. \textsc{Bureau of Labor Statistics}, http://www.bls.gov/ (last visited Aug. 27, 2012).
meantime, these claims can work to the benefit of foreclosing lenders, defaulting owners, local
governments, law enforcement, neighboring property owners, desperate tenants and the adverse
possessor himself. However, the arrangement requires a measure of cooperation from parties who feel threatened by it.

In particular, foreclosing lenders should welcome the adverse possessor as a temporary
caretaker for property that must eventually be put back on the market. Even in a functioning
market, banks are not particularly adept at property maintenance. Thus, it makes sense to
allow the adverse possessor to undertake this duty until the market corrects itself. A
continuously inhabited property can be re-sold more quickly, and at a greater profit than a
property ravaged by vandalism and neglect.

Likewise, law enforcement agencies might think of the adverse possessor as an ally, rather
than an adversary. Abandoned structures provide hidden havens for criminal activity. The
sheer number of abandoned homes in Florida makes the task of policing them virtually
impossible. The ouster of adverse possessors wastes police resources, and inadvertently creates
safe harbor for drug dealers, prostitutes, addicts and copper thieves. By keeping these
properties inhabited, the adverse possessor drives the criminal element out from behind closed
doors, making the surrounding community safer.

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217 See Garcia, supra note 8.
219 Id.
Perhaps most disturbingly, the criminal prosecution of adverse possessors diverts attention from the irresponsible and fraudulent banking practices at the heart of the foreclosure crisis. In the years following the housing collapse, the mortgage industry has been scandalized by revelations of predatory lending, mortgage fraud, and appraisal fraud.\textsuperscript{220} Mortgage securitization—the practice of bundling home loans and selling them as securitizations—has been decried as a “three to seven trillion-dollar Ponzi scheme.”\textsuperscript{221} Yet, the white-collar perpetrators of these fraudulent practices have not been subject to criminal prosecution. The dishonest and reckless conduct that led to the housing crisis has generated a firestorm of public outrage. In response, the law has targeted adverse possessors who have creatively applied the doctrine as a means of fixing the foreclosure crisis. While it may satisfy the public, prosecution of these “citizenly trespassers”\textsuperscript{222} seems more like scapegoating than good policy.

D. CONCLUSION

Adverse possession is sometimes considered a primitive method of acquiring title.\textsuperscript{223} But perhaps the doctrine is regaining its importance in an era where globalization and corporate banking have made it much more plausible that urban land will be abandoned. The foreclosure crisis has created the modern-day equivalent of a “speculator’s desert”\textsuperscript{224}—a situation where property rights are held hostage by a distant owner so as to impose hardship on those in close proximity.

\textsuperscript{220} See Kiel, supra note 71.

\textsuperscript{221} Foreclosure Loophole, CNBC Video, Feb. 26, 2009 (http://video.cnbc.com/gallery/?video=1046485426) (Interview with Florida legal-aid attorney April Charney).

\textsuperscript{222} Shepard, supra note 60 at 588.

\textsuperscript{223} Ballantine, supra note 29 at 135.

\textsuperscript{224} See Katyal, supra note 62, at 1109.
proximity to the land. In the nineteenth century American West, the divide between ownership and possession was created by geography.\textsuperscript{225} The rift in Florida’s real estate market was also the product of speculation and greed—this time by banks and real estate investors who endorsed an unsustainable system for the promise of short-term gain. The conduct that precipitated the recent housing market collapse suggests that, if anything, adverse possession law should be relaxed rather than criminalized.\textsuperscript{226}

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\textsuperscript{225} Id.
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\textsuperscript{226} Shepard, supra note 60 at 571 ("Perhaps it is a necessary corollary of the adverse possession doctrine that an…entity's permissible property holdings are capped…at the quantity they can monitor effectively.”)
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