The Uneasy Case for Adverse Possession

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ARTICLE

The Uneasy Case for Adverse Possession

JEFFREY EVANS STAKE*

"[M]an, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life."1

INTRODUCTION

In the above quotation, Justice Holmes explained title by prescription and the "strange and wonderful"2 doctrine of adverse possession. Judge Posner has argued that Holmes was making a point about the diminishing marginal utility of income.3 I think not. One purpose of this Article is to develop a different interpretation of Justice Holmes, an interpretation with roots in modern experimental psychology and the theory of loss aversion.4

Professors Stoebuck and Whitman stated in their property treatise, "If we had no doctrine of adverse possession, we should have to invent something very like it."5 That was true in the past and may still be true today, but it is not at all clear that it will remain true in the future. The more general purpose of this Article is to examine the various rationales for adverse possession, exploring a number of questions: Which rationales, if any, supply a satisfactory normative justification for the doctrine today and will continue to do so tomorrow? What harms would be done and benefits lost if

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3. See infra text accompanying note 142.


5. STOEBUCK & WHITMAN, supra note 2, at 860.

2419
future wrongful possessions could never ripen into title? What reforms of the adverse possession doctrine may be beneficial?

The purpose of this Article is not to argue the historical reasons that adverse possession became part of our law or developed as it did. The purpose is to determine whether adverse possession is worth keeping. History may help us identify potential benefits of the doctrine, but it will not answer whether adverse possession continues to yield those benefits. Nor will history tell us whether other rules, rules with fewer negative consequences, could better serve the ends obtained by statutes limiting the time during which owners can bring actions to recover land.

I conclude that the case in favor of adverse possession is not overwhelming. Nevertheless, it does serve a useful purpose and can continue to do so in the future. For various reasons, a judicial allocation of land can turn out to be a lasting allocation of that land. The purpose of adverse possession is to reduce losses by getting that allocation right. When a case of adverse possession arises, someone loses land. Modern experimental psychology gives us good reason to believe that the doctrine places the loss on the person who will suffer it least—the person whose roots are less vitally embedded in the land.

The topic of adverse possession receives prominent treatment in most property casebooks and courses. Why? Perhaps the doctrine provides a good vehicle for teaching the basic lesson that rights in land are limited. Another possibility is that adverse possession is a conceptual building block on which other doctrines or areas of legal study depend. Certainly it exemplifies the important point that the loss of a remedy sometimes amounts to the loss of a right. And the doctrine has large practical importance as it could be dangerous for a lawyer not to know it. Yet many other topics that have the same or similar attributes trail adverse possession in the curriculum.

Perhaps professors present adverse possession early in law school because the doctrine strikes at the heart of our concept of property.6 “Property” means rights—rights in a thing, rights that are enforced by the state. We support state enforcement of rights in things for reasons of both justice and efficiency. The fundamental idea of property is that it cannot be taken against the owner’s wishes. I could not call my house my property if the law allowed someone else to wrest ownership from me against my will. Yet that is what adverse possession does. The doctrine effects a transfer of state-sanctioned rights in land from owners to nonowners without the consent of the owner.7

The usual assumption of our economic and legal system is that we protect rights in land and personalty with what Calabresi and Melamed have famously

6. “Adverse possession is perhaps the most significant possessory concept in the law of the land.” CHARLES DONAHUE, JR. ET AL., CASES AND MATERIALS ON PROPERTY 63 (3d ed. 1993).

7. This reallocation of rights bears comparison to eminent domain. Both doctrines shift land rights away from owners without their consent. They differ in that adverse possession pays no compensation, but does allow a record owner to prevent it from happening. Eminent domain pays compensation, but in no meaningful sense could the owner prevent her loss of rights.
named "property rules"—rules that require someone who wants to obtain a thing to buy it from its owner. Our system assumes that the owner values the thing more highly than anyone else, except those persons willing to pay the owner’s price to acquire it. The doctrine of adverse possession carves out a small exception to this general rule. Within this exceptional domain, a person can wrest title from another by mere possession, without paying the owner’s price or even a fair market price for the transfer.

When does the law of adverse possession work such an involuntary transfer, and why? For all its importance, this remarkable doctrine does not seem well understood, at least as property doctrines go. It is a puzzle. There are many pieces to this puzzle, most of which have well-defined borders. But how the pieces fit together and whether they form some coherent whole remain something of a mystery. A number of rationales for the doctrine have been advanced. On careful examination, however, the traditional rationales fall short. Some rest on shaky or outdated normative foundations. Others do not fit the doctrinal contours.

One of the difficulties in finding a rationale for this doctrine is that it applies in widely varying situations. Of course, the issue can always be boiled down to whether a given person owns a given piece of land. But the context of the disputes varies in ways that could be important. In title disputes, the basic issue is whether some person owns anything at all. In boundary disputes, the issue is not who owns land, but how far geographically that ownership extends. Adverse possession applies in both title and boundary disputes, but the rationale might not be the same for the two kinds of cases.

I. THE STATUTORY BASIS OF ADVERSE POSSESSION

Statutes limiting the time for bringing an action to recover possession of land—an action in ejectment—were first passed centuries ago in England and exist today in all American states. By their terms, most statutes of


9. As Professor Merrill notes, "[A] threshold question is why we are ever justified in shifting the entitlement from the [true owner] to the [adverse possessor] after the passage of a number of years. Surprisingly, there is very little systematic discussion of this fundamental issue in the legal literature." Thomas W. Merrill, Property Rules, Liability Rules, and Adverse Possession, 79 NW. U. L. REV. 1122, 1127 (1984).

10. Ejectment is an action to restore possession of land to the person entitled to it. It requires that the plaintiff show he has a right to possession and that the defendant is in wrongful possession. BLACK'S LAW DICTIONARY 463 (5th ed. 1979).

11. See 3 AMERICAN LAW OF PROPERTY § 15.1, at 755-56 (A. James Casner ed., 1952) (tracing adverse possession back to the thirteenth century). In 1275, the Statute of Westminster limited writs of right to claims of seisin starting after 1189, effectively establishing an eighty-six-year statute of limitations. Id. A flat period of sixty years was set on the writ of right in 1540. Id. A period of twenty years was set on ejectment in 1623, and then cut to twelve years in 1874. Id.

12. See, e.g., IND. CODE § 34-11-2-11 (1998) (requiring that actions for the recovery of the possession of real estate be commenced within ten years).
limitation merely terminate the record owner's access to judicial assistance in recovering possession of his land. The doctrine of adverse possession takes these statutes one conceptual step further by providing that the adverse possessor (AP) actually gains legal title, displacing the record owner (RO).\textsuperscript{13} This result does not flow ineluctably from the language of the statutes.\textsuperscript{14} Judges could have read the statutes as merely granting to AP an immunity from suit by RO.\textsuperscript{15} But the courts did not stop with immunity; AP gains complete ownership and RO's rights are extinguished. The doctrine also wipes out other claims RO might have had against AP for recent wrongs she has committed, such as the taking of timber from the land.\textsuperscript{16}

This conceptual step from AP's immunity to RO's complete loss of ownership could be justified in a couple of ways. Doctrinally, a prior possessor has rights superior to all subsequent possessors. Hence, while AP's rights are inferior to RO's, her rights are superior to any stranger's by virtue of her prior possession.\textsuperscript{17} Once the statutory time passes and RO loses the right to displace AP, AP's rights become superior to those of everyone.\textsuperscript{18} When no one has greater rights, AP is the new owner.

The conceptual step from immunity to ownership may also be justified on

\textsuperscript{13} For ease of communication, I shall refer to the record owner as RO and consider him to be a male. The adverse possessor will be AP and assumed to be female. It is important to use RO instead of TO (for true owner) for reasons explained infra text accompanying notes 127-29.

\textsuperscript{14} \textit{But cf.} \textit{3 AMERICAN LAW OF PROPERTY, supra note 11, § 15.2, at 760} (stating that "the necessary result has been to extinguish his title").

\textsuperscript{15} In most states, the statute of limitations merely limits the cause of action for recovery of possession (or recovery of land), which by logic is only a cause of action against the possessor. One possible construction of such statutes would be that the old owner retains rights to current possession or rights to exclude AP's guests or tenants or assignees, in which case the rights gained by adverse possession are severely limited. Another possibility would be that RO can sue only those persons against whom AP also has an action. These rights could be senior or junior to those of AP. That none of these possibilities is particularly attractive probably explains why courts have uniformly read the statutes as terminating all rights of the prior owner. \textit{See 3 id. § 15.1, at 757 n.6.}

In a minority of states, the shift of title is not due to a judicial expansion of the statutes. In some states, the statutes themselves are couched in terms of acquisition of title by the occupant. \textit{3 id. § 15.2, at 761 n.4.} Other statutes provide that all rights of the former owner are extinguished. \textit{3 id. § 15.1, at 757 n.6.} In addition, there are a few states in which the period of limitations runs from the time the owner lost possession or seisin instead of (or in addition to) the time at which a cause of action accrued against the current possessor. \textit{3 id. § 15.1, at 757 n.5.} In such states, the statute by its own terms terminates the action for possession against all persons, not just the adverse possessor. Read literally, these statutes following the wording of the earliest English statutes do not require an adverse possessor to show any privity to tack her possession to prior adverse possessors, but the \textit{American Law of Property} assures us that such differences "are without legal significance." \textit{3 id. § 15.1, at 757.} For a discussion of the owner’s rights against third parties not in privity with the first adverse possessor, see \textit{3 id. § 15.2, at 764.}

\textsuperscript{16} \textit{"[T]he barring of the action in ejectment ends the former owner’s title so that he can pursue no other remedy such as trespass, action in equity to quiet title, or an action at law or in equity for partition, based on his former title to the property."} \textit{3 id. § 15.2, at 762; see also infra p. 2452} (discussing the "relation back" doctrine).

\textsuperscript{17} Even before her possession has ripened into title, AP can bring actions in trespass and ejectment and may be entitled to compensation for takings. \textit{3 AMERICAN LAW OF PROPERTY, supra note 11, § 15.2, at 760 n.2.}

\textsuperscript{18} \textit{3 id. § 15.2, at 760.}
practical grounds. Ownership could get overly complex if RO retained rights against strangers even after losing the right to regain possession from AP. Multiple ownership would complicate transfers and interfere with AP's use and enjoyment of the land. These pragmatic considerations support extinguishing RO's rights once AP satisfies the doctrinal elements.

II. THE ELEMENTS OF ADVERSE POSSESSION

To establish title by adverse possession, AP must usually prove that her possession was actual, hostile, open and notorious, exclusive, and continuous for the period of the statute of limitations. Color of title and payment of taxes can also be elements in some cases.

The requirement that AP's possession be "actual" means that AP must occupy or use the property as it would be used by a true or undisputed owner. "Hostile" possession means, at a minimum, that AP's possession is not derived from RO's, as it would be if, for example, AP were RO's tenant. I will discuss later the hotly disputed issue of whether that element requires more than a mere lack of legal right to possession. For possession to be "open and notorious," AP's actions must be visible to others, either the neighbors or a diligent owner. For AP's possession to be "exclusive," she cannot share possession with the true owner. Because one of the key attributes of ownership is the

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19. These ownership rights, not being especially valuable, may often pass to a number of heirs or devisees in a residuary clause, resulting in multiple ownership problems similar to those arising with remotely contingent future interests or small value interests, such as those in Hodel v. Irving, 481 U.S. 704, 717 (1987) (holding unconstitutional a federal statute designed to solve problems caused by fractured ownership of Indian lands caused by earlier federal programs).


21. See infra notes 29-33 and accompanying text.

22. "Actual possession of the land existing as a fact is legal possession, and actual and legal possession of land exists when an actual possessio pedis is established with the degree of actual use and enjoyment of the parcel of land involved which the average owner would exercise over similar property under like circumstances." 3 AMERICAN LAW OF PROPERTY, supra note 11, § 15.2, at 765. Wrongful possession is enough; the adverse possessor need not have disseised the true owner. 3 id. § 15.2, at 763-64.

23. 3 id. § 15.3, at 772-73 (supplying citations to cases involving servants, tenants, grantors, purchasers, mortgagees, family members, and cotenants). Even such a person may, however, become an adverse possessor if the relationship making her possession legal is terminated and a cause of action accrues to the owner. 3 id. § 15.3, at 773.

24. Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937). The American Law of Property challenges this as a separate requirement. In its view, concealed or stealthy ownership would not be actual possession, but there is no independent requirement that the possession be such as to give notice to the true owner. 3 AMERICAN LAW OF PROPERTY, supra note 11, § 15.3, at 768-69. In this view, Marengo was decided erroneously. 3 id. § 15.3, at 769 n.12. A contrary and also unorthodox approach to the open and notorious requirement was taken by the court in Mannillo v. Gorski, 255 A.2d 258, 264 (N.J. 1969). The court there held that a concrete walk encroaching fifteen inches onto a neighbor's land was not open and notorious because the encroachment could be discovered only by a survey. The effect of that approach is to dramatically reduce the scope of the adverse possession doctrine and the reach of the statute of limitations.

25. See STOEBUCK & WHITMAN, supra note 2, at 859.
right to exclude others, AP must act as a true owner would act, exercising the right to exclude when appropriate.\textsuperscript{26} AP's possession is "continuous" if she does not abandon the land and no one else interrupts her possession.\textsuperscript{27} Occasional use may be continuous if a true owner would use the property in such a manner.\textsuperscript{28}

"Color of title" has various effects depending on the jurisdiction. It is required in some states,\textsuperscript{29} shortens the limitations period in some,\textsuperscript{30} and changes the acts that qualify as actual possession in others.\textsuperscript{31} In some states, mostly in the West, taxes must be paid by the adverse possessor to gain title.\textsuperscript{32} In a few states, the payment of taxes shortens the length of adverse possession required to gain title.\textsuperscript{33}

A. ACTUAL POSSESSION AND EVOLUTIONARY BIOLOGY

To avoid doctrinal confusion, it is important to understand that actual possession has two component parts. Legal possession means having both some physical control over the thing and the intent to maintain dominion.\textsuperscript{34} A person claiming title by adverse possession must establish intent to maintain physical occupancy and control of the land in question. An entry onto the land of another is a mere trespass if done without claim of right, but it is an ouster if made with the necessary intent.\textsuperscript{35} Intent will be noted again below in connection with the hostile element and the Maine doctrine.\textsuperscript{36}

The prerequisite of physical control is familiar to anyone whose property course included the landmark case of \textit{Pierson v. Post}.\textsuperscript{37} As that case famously

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\textsuperscript{26} Cf. Snowball Corp. v. Pope, 580 N.E.2d 733, 736 (Ind. Ct. App. 1991) (holding that adverse possessor's allowing children to skate on ice and cut across land did not prevent claim of adverse possession).
\textsuperscript{27} \textit{See} \textit{Stoebuck & Whitman}, \textit{supra} note 2, at 859.
\textsuperscript{29} \textit{Jesse Dukeminier & James E. Krier, Property} 137 (4th ed. 1998); \textit{William E. Taylor, Titles to Land by Adverse Possession}, 20 Iowa L. Rev. 551, 553 (1935) (discussing requirements in Alabama, New Mexico, South Dakota, and Georgia).
\textsuperscript{30} \textit{Dukeminier & Krier}, \textit{supra} note 29, at 137; \textit{Taylor, supra} note 29, at 554, 557.
\textsuperscript{31} \textit{See} \textit{Van Valkenburgh v. Lutz}, 106 N.E.2d 28 (N.Y. 1952); \textit{Stoebuck and Whitman, supra} note 2, at 857 n.7.
\textsuperscript{32} \textit{Taylor, supra} note 29, at 553 (listing California, Idaho, Indiana, Montana, Nevada, and Utah).
\textsuperscript{33} \textit{See infra} note 72.
\textsuperscript{34} \textit{Brumagim v. Bradshaw}, 39 Cal. 24 (1870) (appropriation of land with a claim of exclusive dominion over it establishes actual possession); \textit{Black's Law Dictionary, supra} note 10, at 1046 (defining "possession").
\textsuperscript{35} \textit{Ewing's Lessee v. Burnet}, 36 U.S. 41, 52 (1837) ("[I]n legal language, the intention guides the entry, and fixes its character.").
\textsuperscript{36} Because intent to maintain control of the land is an element of possession, it is appropriate to describe the Maine doctrine as a corollary of the actual possession requirement. For a discussion of the Maine doctrine, see \textit{infra} notes 56-61 and accompanying text.
\textsuperscript{37} 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).
\end{flushleft}
held, possession sufficient to form the basis for title requires more than a high probability of gaining control—it requires physical control.\(^3\) Although it could be argued that this important legal line in the sand is arbitrary, evolutionary theory suggests that humans may share a common understanding of the level of physical control sufficient to make a person an owner.

John Maynard Smith and others have developed a theory that animals may be genetically programmed to be assertive when defending food in their possession and deferential with regard to food that is in the possession of other similar animals.\(^3\) Depending on the payoffs of fighting, this strategy can be an evolutionarily stable strategy.\(^4\) For the strategy to work, both parties to a potential fight must be able to tell which has “possession”; the two must respond to the same environmental trigger. Those prehistoric humans who did not share a common sense of possession found themselves trying to grab what would be defended fiercely rather than grabbing what could be taken without encountering much resistance. Those who did not behave according to the common definition did not know when to be assertive and when to be deferential. Humans without the property-recognition gene had their genes eliminated from the gene pool. In other words, evolutionarily stable patterns of behavior could have developed around a shared sense of what is in a person’s possession and what is not. It is possible that a common sense of possession built into our brain structure solve the coordination problem that arises from scarcity of goods. Notice that communication is another large coordination problem. Because communication aids reproduction, our brains have evolved in a way that helps us communicate. Just as we have brain modules for grammar,\(^4\) we humans have a sense of ownership that is rooted in our biology.

There are some data that lend modest credence to the theory. Scientists have established that a certain group of neurons fire when a monkey grasps a piece of food in a certain way.\(^4\) That is not too surprising. More interestingly, when another monkey or the human experimenter grasps the food in the same way, some of the same neurons (called “mirror neurons”) fire in the monkey.\(^4\)

Although there are mirror neurons for many actions, the fact that there are neurons activated by the observation of the act of grasping raises the possibility

\(^3\) Id. at 179.


\(^4\) Smith, supra note 39, at 23.


\(^4\) Id.
that there may be neurons associated with recognizing possession. Humans might be programmed to recognize when they have a certain proximate relationship to a physical object and to recognize when others have a similar relationship to an object. A combined knowledge that we have that certain relationship with a thing and that no one else is the "owner," or that the prior owner has relinquished ownership, may throw a biological switch making us more willing to be assertive in preventing others from taking the thing. Such a neurological structure may provide the basis for a very "natural" law of property.

B. THE DIFFICULT "HOSTILE" ELEMENT

Unsurprisingly, given the name of the doctrine, all courts agree that AP cannot gain title by adverse possession unless her possession is "adverse." Perhaps because this element is so central to the doctrine, there is great disagreement as to what "adverse" means. Indeed, no part of the judicial gloss added to the statutes of limitation is more vigorously contested than this element.44 Both reflecting and contributing to this lack of consensus, the element goes by a variety of names, including "adverse," "hostile," "under claim of title," "under claim of right," and "hostile and under claim of right."45

Of the varying content given this element,46 three readings are common. The first and most basic, noted above, is that AP's possession is adverse if it cannot be derived from RO's title. If RO has transferred to AP some right of occupation, as in a lease, RO has no cause of action against AP and the statute of limitations cannot begin to run (unless AP repudiates the lease).47 Under this simple construction, "adverse" means without legal right to possess the land. AP's state of mind is completely irrelevant.48 A number of courts and commenta-

44. "This brings us to the most difficult, thoroughly maddening, question in all adverse possession, whether an adverse possessor's subjective state of mind, imprecisely often called 'intent,' can destroy hostility." STOEBUCK & WHITMAN, supra note 2, at 857.

45. An adverse claimant holds property under claim of title or claim of right when she has the intent to hold the land as an owner. As discussed, see supra text accompanying notes 34-35, the intent to maintain dominion and control is an essential component of possession.

46. Although it may be possible to find a pattern connecting the terminology with the interpretation, the content of the doctrine is not necessarily suggested by the term used for the adverse element. For example, the court in Monnot v. Murphy, 100 N.E. 742, 743 (N.Y. 1913), was willing to find the defendant-possessor had a "claim of title," required by New York statute, despite the fact that the defendant had lost the previous suit in ejectment.

47. If RO gives AP permission to enter or use the land, he does not have a cause of action and AP's use is not hostile. See Brennan v. Manchester Crossings, 708 A.2d 815, 824 (Pa. 1998) (holding that AP could establish hostility because RO had not expressed permission to AP).

48. See Chaplin v. Sanders, 676 P.2d 431, 436 (Wash. 1984) (stating that "subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant," but not stating anything about intent to exercise dominion); see also STOEBUCK & WHITMAN, supra note 2, at 857 ("It is the view here, along with that of most decisions and of nearly all scholars, that what the possessor believes or intends should have nothing to do with it."). But cf. ROBERT F. MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY 1034 (5th ed. 1984) (indicating that the law may differ in England, where the squatter must be "seeking to dispossess the owner").

This position that the mental attitude of the occupier would be irrelevant in an action to eject the
tors have endorsed this straightforward approach.\textsuperscript{49}

Other readings narrow the doctrine by placing additional requirements on AP beyond the basic requirement of having no legal right to occupancy. These additional requirements relate to the state of mind of the would-be adverse possessor. Unfortunately, courts have not been careful in their discussion of AP's state of mind, and much confusion arises from the courts' frequent failure to distinguish between two different, and mostly independent, aspects of mental state: intent and awareness.\textsuperscript{50}

occupant has been attributed to the \textit{American Law of Property}, which states, "[I]t necessarily follows that the statute runs against the owner's right of action in ejectment from the time the wrongdoer took possession irrespective of his mental attitude" and that "[a]dverse possession must necessarily mean any wrongful possession which subjects the wrongdoer to the action of ejectment." 3 \textit{AMERICAN LAW OF PROPERTY}, \textit{supra} note 11, § 15.2, at 762-63 (emphasis added); see also 3 id. § 15.4, at 776-77 ("[H]ostile... means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor... [C]laim of title and hostility of possession [do not turn on] the possessor's actual state of mind or intent."). The context of those quotations makes it clear, however, that the only mental attitude being discussed is that of good faith and that the \textit{American Law of Property} does not deny that the occupant must have the intent to exercise control.

Difficulties have arisen from statements made in the cases that the adverse possessor must have occupied under claim of right;...If a real possession exists without the owner's consent, is there any doubt of the right of the true owner to maintain ejectment against him at any time after he acquired his actual possession? Would he have any defense against such an action by introducing evidence that he so occupied without intent to claim a title superior to that of the plaintiff, or that he had in conversations with third persons admitted the superiority of the plaintiff's title? There is, of course, no doubt at all that such evidence would be excluded. A claim of title on his part is not essential to the maintenance of ejectment against him. Even positive affirmative evidence that he at all times admitted that he occupied the premises without right or title, in the absence of proof that he occupied as licensee or tenant of the true owner or of notice of such statements to the owner, would not make him any the less a trespasser and disseisor, liable to a suit in ejectment and the usual action for mesne profits either following that action or in connection with it... If he has possession in fact, irrespective of his mental attitude toward the title of the true owner, he has a possessor title subject to the owner's right of action in ejectment, and the statute of limitations runs against that action.

3 id. § 15.2, at 761-62.

A subsequent passage indicates that the \textit{American Law of Property} considers intent to be a part of possession. "[Certain activities] will be important in establishing the physical control and dominion which is essential to actual and legal possession..." 3 id. § 15.3, at 765 (emphasis added). \textit{But cf.} 3 id. § 15.3, at 767 ("In contrast with these cases, occasional trespasses not involving continual physical control do not amount to possession."). The \textit{American Law of Property}'s recognition that possession includes an element of intent is cast into some doubt, however, by two other passages. At one point, the \textit{American Law of Property} implies that continuous trespass may be possession. See 3 id. § 15.3, at 767. At another point, the \textit{American Law of Property} argues that the Maine doctrine is impractical because it substitutes "all the uncertainties and ambiguities which arise out of a test depending on proof of an actual mental state for the simple objective physical test of possession..." 3 id. § 15.4, at 789.

49. \textit{See} Warsaw v. Chic. Metallic Ceilings, Inc., 676 P.2d 584 (Cal. 1984) (finding a prescriptive easement when trespasser must have known he was encroaching); \textit{DUKEMINIER \& KRIER, supra} note 29, at 133; \textit{STOEBUCK \& WHITMAN, supra} note 2, at 857 n.26; \textit{cf.} Helmholz, \textit{supra} note 20, at 347-48 (admitting that some bad faith adverse possessors have won).

50. Intent and awareness are not the same; AP could have either, neither, or both. Obviously she could be unaware that she does not own her hut and have the intent to use the land and exclude others
Intent could be considered the antecedent question, for it is more directly implicated by the statute of limitations. The statute limits the time for bringing an action to recover possession, but, obviously, the clock will not start to run against RO until he has a cause of action. He does not have a cause of action to regain possession until the trespasser takes possession. Under the traditional doctrinal analysis, as noted above, possession requires control, which is physical occupation coupled with the intent to exercise dominion. To be a possessor, AP must have had a true owner’s intent to use the land, develop the land, or exclude others from the land. Thus, the underlying cause of action itself requires that AP be able to prove some sort of intent.

It is true that an ordinary case for repossession does not revolve around the defendant’s state of mind, but that fact tells little. In cases in which the invasion is recent enough that adverse possession is not an issue, anyone defending a suit in ejectment has, by the very defense, admitted the same current intent to exercise dominion and control that the plaintiff must show to establish his case. Because that current intent not to relinquish occupation to the plaintiff is the only intent that matters and is then beyond question, courts do not bother to ask whether the defendant intends to assert dominion. For that reason, it is easy—and, when adverse possession is not at issue, harmless—to forget that possession of land includes a requirement that the occupant also have a certain intent. When AP claims adverse possession, however, AP is making a claim about her possession in the past and, hence, her historical intent becomes critical. AP’s assertion of adverse possession at present tells us nothing about her intent in the past.

She could also be aware RO is the owner, yet still intend to use the land and exclude others from it. In Murphy, the adverse possessor won despite having lost a suit in ejectment more than twenty years earlier. Monnot v. Murphy, 100 N.E. 742 (N.Y. 1913); see also Pettis v. Lozier, 290 N.W.2d 215, 217 (Neb. 1980) (stating that claim of ownership means an intention to use the land as one’s own, irrespective of any right to do so); Van Valkenburgh v. Lutz, 106 N.E.2d 28, 31-32 (N.Y. 1952) (Fuld, J., dissenting) (“That Lutz knew that he did not have the record title to the property—a circumstance relied upon by the court—is of no consequence, so long as he intended, notwithstanding that fact, to acquire and use the property as his own.”); Patterson v. Reigle, 4 Pa. 201 (1846) (finding adverse possession when occupant “intended to leave when the real owner, with a good deed, that is, the old soldier, who had a good deed, should come for it, but not till then”). It is also possible for AP to be aware that she is not the owner and, at the same time, to lack the intent to exclude others. And finally, it is possible, though perhaps not likely, for AP to be unaware that she is not the owner (that is, to be possessing in good faith), yet lack the intent to exclude others. She could think she is the owner but not intend to act like one.

51. AMERICAN LAW OF PROPERTY, supra note 11, § 15.3, at 767. The doctrine of adverse possession is based on the statute limiting the action in ejectment or the action to recover possession of land. The plaintiff in an action for ejectment must show the defendant is in possession. If the defendant has only trespassed, the action is for trespass. See BLACK’S LAW DICTIONARY, supra note 10, at 463-64 (defining “ejection”).

52. See supra notes 34-35 and accompanying text.

53. This statement does not apply to those statutes, see supra note 15, that by their terms run in favor of all persons, not just the adverse possessor.

54. This presents an oddity. Suppose AP enters onto land in 2002 and makes some minor but appropriate use without the intent to exercise dominion. If RO sues to eject her in 2003, she cannot
Given the integral importance of intent to possession itself, the intent requirement should be seen as a component of actual possession rather than as part of the adverse element. Judicial opinions are often unhelpful regarding this issue of categorization. Finding an absence of the proper intent, the courts conclude that there was no adverse possession without making clear whether possession or adversity was missing. Ultimately, where we put the intent requirement in the doctrine is not terribly important. It is important, however, to bear in mind that AP's intent to assert dominion over the land is not merely a dispensable part of the judicial gloss on the statute of limitations; it is required by the statute and cannot be eliminated without changing the nature of the action in ejectment.\(^5\)

The Maine doctrine\(^56\) adds to the confusion about the intent requirement. This doctrine, which appears to apply only in cases of mistaken boundaries, says that AP cannot gain title by adverse possession if she admits having intended to enclose or use only the land she owned.\(^57\) To the extent courts merely require AP to intend to use the land as her own, the Maine doctrine does not depart from the statutory scheme. However, to the extent that a court applying the Maine doctrine requires AP to intend to claim title, rather than merely to intend to assert the dominion typical of a true owner, the result cannot be explained by the intent requirement inherent in the concept of possession. If a court requires AP to show intent to claim or gain title,\(^58\) the court creates an

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55. See supra note 10 (defining ejectment).
57. The court wrote:

If, for instance, one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain fence beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title by possession" up to that fence, such possession, having the requisite duration and continuity, will ripen into title.

Id. at 150. If a party has "no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting." Id; see Stoebeck & Whitman, supra note 2, at 857.

Inclusion of the phrase "claim of title" in the statutory law of a state does not necessarily signal an adherence to the Maine doctrine. New York required a claim of title, but in Belotti v. Beckhardt, 127 N.E. 239 (N.Y. 1920), the adverse possessor prevailed despite having thought he was building on his own property.

58. Whether AP must have an intent to claim title or to gain title depends on whether she is acting in good faith.
additional hurdle over which the adverse possessor must jump.\footnote{59} In such jurisdictions, AP loses if she testifies that she intended to use a specified parcel of land but either did not have any intent to gain title to the land or intended to claim title only to the true line.\footnote{60} To sum up the various intent requirements, at its most basic level, “adverse” means merely without legal right. Some courts have imported into the adverse element an additional requirement of intent (to use the property as an owner) that is implicit in the “actual” element. Some courts and statutes go even further, requiring an intent to claim title or ownership.\footnote{61}

The other requirement sometimes read into the adverse element relates to the state of awareness of the possessor. Unlike intent, awareness of legal right is not implied by the mere mention of possession. Awareness may matter in either of two opposite ways. In rare instances, courts have indicated that AP 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!\footnote{62} On the other hand, some opinions sensibly indicate that AP must show that her possession was in good faith.\footnote{63}

\footnote{59} For an example, see Myers v. Folkman, 99 A. 97 (N.J. 1916) (holding that when defendant built house that unintentionally encroached on adjoining land, possession not adverse because no intent to claim ownership of land). That this added inquiry into intent makes litigation more costly was recognized in French v. Pierce, 8 Conn. 439 (1831), which rejected the doctrine stating, “but from this plain and easy standard of proof we are to depart, and invisible motives of the mind are to be explored.” \textit{Id.} at 446. The court seems not to have recognized, however, that possession itself usually requires some inquiry into state of mind.

\footnote{60} See, e.g., Ennis v. Stanley, 78 N.W.2d (Mich. 1956); see also 3 \textsc{American Law of Property}, supra note 11, \textsection 15.5, at 786 (listing cases). For cases going both ways on the Maine doctrine, see 3 \textit{id.} \textsection 15.5, at 786-88 nn.1-2. There are two slightly different versions of this doctrine. One presumes possession is adverse unless the owner shows that the possessor intended to claim only to his line. The other presumes possession is not adverse unless the possessor shows intent to claim the land regardless of the true line. 3 \textit{id.} \textsection 15.5, at 788. Presumably, for a good faith adverse possessor to win, she would have to testify that she would have done the same thing even if she had known the land was not hers.

\footnote{61} This seems to be the best explanation of the perverse result in \textit{Van Valkenburgh v. Lutz}, 106 N.E.2d 28 (N.Y. 1952), in which the court disallowed the claim of adverse possession based on a garage encroachment because the adverse possessor “thought he was getting it on his own property.” \textit{Id.} at 30. After the court threw out the gardening and the shack, all that was left was a border case, to which the Maine doctrine sometimes applies. This is, however, a misapplication because that doctrine looks to intent, not awareness. Nonetheless, the case shows that the Maine doctrine may come close to requiring bad faith.

\footnote{62} See \textit{id.} ("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."). The court might have been attempting to apply the Maine doctrine, see \textit{supra} note 61, but it looks more like the court was trying to find some excuse for holding against the adverse possessor.

Some scholars have interpreted the Maine doctrine as a requirement that there was no mistake. \textsc{Stoebuck & Whitman}, \textit{supra} note 2, at 857 n.28; Thomas J. Miceli & C.F. Sirmans, \textit{An Economic Theory of Adverse Possession}, 15 \textsc{Int'l Rev. L. \\& Econ.} 161, 166 (1995). Such a requirement would mean that the Maine doctrine requires bad faith.

\footnote{63} One court stated:

This idea of acquiring title by larceny does not go in this country. A man must have a bona fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession.
Good faith can be established by color of title, which is some document appearing to give title to the possessor. But color of title, while helpful, is not the only way of showing good faith. Convincing testimony by AP that she believed she owned the land would also be enough.

While the American Law of Property takes the position that there is "very little authority to support" a good faith requirement, Professor Helmholz has taken issue with this traditional position. According to his reading of 850 cases from the 1960s through the 1980s, a doctrinal framework that ignores good faith cannot claim to describe or explain the results or opinions in all adverse possession cases. Professor Cunningham has joined issue, defending the traditional doctrine as being a fair description of the law. Despite the many rounds of argument, readers are left uncertain as to how many cases require good faith (by holding against an AP because she was in bad faith) and how many cases preclude good faith as an element (by holding for an AP who was aware she did not have title).

The variation in statutory schemes further confounds the analysis of whether good faith is one layer in the judicial gloss. In some states, the statutes of limitation themselves require good faith. In other states, the statutes of limitation themselves require good faith.

Jasperson v. Scharnikow, 150 F. 571, 572 (9th Cir. 1907); see 3 American Law of Property, supra note 11, § 15.4, at 781 n.41 (listing cases). But see Brennan v. Manchester Crossings, 708 A.2d 815 (Pa. Super. Ct. 1998) (finding adverse possession even though it appeared that adverse possessors knew they did not own the property). Because the traditional doctrine does not include a good faith requirement, it cannot tell us who bears the burden of proof on this element.

64. Cf. Taylor, supra note 29, at 553 (listing the states in which color of title is required). Color of title necessarily presumes that the adverse possessor is acting in good faith.

65. 3 American Law of Property, supra note 11, §15.4, at 782 (acknowledging only dictum in one case and an indefensible holding in another). In the narrower context of boundary disputes, there is some support for the proposition that intentional encroachers will not succeed in adverse possession. See Dukeminier & Krier, supra note 29, at 151. That proposition runs contrary, however, to the wording of the statutes of limitation and the traditional doctrine.

66. Helmholz, supra note 20, at 332. Helmholz assumes that the traditional formulation of the test for adverse possession does not include consideration of either subjective intent or subjective knowledge of the adverse possessor. Id. This Article contends that subjective intent is a component within actual possession and that only subjective knowledge or awareness is outside the traditional doctrine.

67. Id. at 331-33.

68. Roger A. Cunningham, Adverse Possession and Subjective Intent: A Reply to Professor Helmholz, 64 Wash. U. L.Q. 1, 37, 58 (1986).


70. It is possible that Cunningham and Helmholz are taking different approaches to the law, with Helmholz looking at what courts do and Cunningham focusing more on what they say. It is also possible that they could have resolved their differences by paying more attention to the distinction between intent and awareness, or by accepting that the law may differ across the states.

do not require good faith, but good faith reduces the period of limitations. In a third group of states, good faith is an element of the related, but different, adverse possession and occupying claimant statutes (or innocent improver doctrine). Adverse possession statutes spell out the requirements of adverse possession and explicitly grant title to the adverse possessor. Occupying claimant statutes give the improver a right to recover the value of improvements from the true owner. Where they exist, these statutes exist in addition to the ordinary statutes of limitation. The cases requiring good faith under these statutes provide little support for the proposition that good faith is part of the common-law doctrine or that courts will, in a stroke of judicial activism, insist on good faith before shifting title. Because of the statutory variations, good faith could be determinative in some cases and irrelevant in others.

In sum, courts have both stretched and narrowed the statutes of limitation on actions to recover land. They have stretched the statutes slightly by according long-time possessors full title rather than just immunity. On the other hand, courts have narrowed the statutes by requiring that possession be open and notorious. In addition, some courts have narrowed the statutes by requiring adverse possessors to show good faith, an intent to claim title to the land, or both.

III. SOME COSTS OF ADVERSE POSSESSION

Before turning to the various rationales for adverse possession, it may be useful to ask whether adverse possession does any harm. If not, like an arbitrary rule that we drive on the right side of the road, it needs little justification. However, it is easy to identify a number of costs associated with statutes of limitation and the doctrine of adverse possession.

To start, adverse possession diminishes utility by discouraging owners from letting others use their land. It is entirely possible that RO has no current, competing use for the land and does not mind (perhaps even enjoys) that AP is making use of it. I currently have this very problem. A private road was mistakenly built across the corner of my lot. Each day my neighbors drive over the corner of my lot while traveling the misplaced road. Although their use does

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73. For an economic analysis of the mistaken improver problem, see generally Thomas J. Miceli & C.F. Sirmans, The Mistaken Improver Problem, 45 J. Urb. Econ. 143 (1999). For further description, see infra text accompanying note 114.

74. See Brennan v. Manchester Crossing, 708 A.2d 815, 820 (Pa. Super. Ct. 1998) (holding that because record owner knew adverse possessor had planted grass and was maintaining his adjoining land, but did not bring suit because he did not mind, record owner lost land to adverse possessor).
me no actual harm, the doctrine of prescription requires me to stop them or else lose my right to control my land. In this way, the law deters optimal use of my land.

To be sure, RO and AP can sometimes execute a lease at a nominal rate that would obviate a suit, but some owners may be afraid that a lease would create undesirable rights on the part of the possessor, a reasonable fear given the changing and unpredictable state of landlord-tenant law. Even when a lease will work, the transaction costs of making the arrangement official constitute at least small losses attributable to the doctrine.

Furthermore, mutual agreements sometimes just do not happen. I tried to avoid prescription by granting each of the two neighbors a license to travel across the corner of my lot. One accepted the license. The other consulted his lawyer and, on advice of counsel, refused to accept my gift. Now, the statute of limitations says that I must use my right to exclude or lose it. It seems to me that the statute (along with the neighbor’s lawyer) strains neighborhood relations and could force us away from the most efficient use of the land, which is simply to leave both the road and its usage as they are.

This is one cost of adverse possession that could be reduced by statutory reform. Statutes of limitation could provide that they are tolled when RO notifies AP that he does not mind AP’s current use, but wants to preserve his right to bring an action in ejectment in the future. To avoid problems that would arise if AP did not agree with RO’s claim of rights, the statutes should also provide that AP can serve return notice of her claim and thereby prevent RO’s notice from tolling the statute.

Even if that cost were eliminated, however, there are others. A second cost of adverse possession is the cost of monitoring. To avoid losing his land, RO must expend time and effort in the search for possessors. What benefits society reaps from owners’ additional visits to their lands are not immediately obvious. There is no reason to believe that owners left to make decisions on their own will monitor too little. The additional monitoring stimulated by the statute of limitations is a waste of resources.

A third inefficiency can arise when the best use of land is no use at all. AP may see the unused land and improve it in an attempt to gain title. Those improvements are, by hypothesis, wasteful and not worth making, yet the doctrine creates an incentive for AP to make them. Even if those efforts by AP are not wasteful, they tend to displace more productive activities. In short, the doctrine of adverse possession creates an opportunity to steal land, a behavior we do not want to encourage.

75. The idea here is similar to that under U.C.C. § 1-207 (1989) (§1-308 in the November 2000 draft), which allows a party to continue to perform or accept performance without prejudicing his rights if he notifies the other that he reserved his rights.

76. See Jeffrey M. Netter et al., An Economic Analysis of Adverse Possession Statutes, 6 INT’L REV. L. & ECON. 217, 220 (1986) ("Monitoring costs incurred only to prevent the loss of title through adverse possession are wasted from a social standpoint.").
A fourth cost of adverse possession is that it slightly reduces the incentive for owners to build their improvements in the correct locations. This problem is hardly worth noting, however, as the doctrine of adverse possession changes the expected cost of an error and the associated incentives very little because RO can bring suit for a number of years. A fifth cost of adverse possession is the cost imposed on the judicial system. Although adverse possession cases are not a huge burden, they do take time away from other cases. If possible, it would be better if courts never had to hear adverse possession disputes.

In addition to the utility losses just identified, adverse possession may be unfair. The fact that students and other lay persons are surprised by the doctrine is some evidence that it works against fairness and justice. There must be times when poor, unsuspecting, innocent owners lose all or part of their land without having done anything wrong. The legal doctrine creating the possibility of such injustice would seem to call for some countervailing benefits to support its existence. Other costs of the doctrine, such as uncertainty, will be identified in the course of attempting to find the benefits of adverse possession.

All in all, the costs of adverse possession are probably not huge, and some of them could be reduced by statutory reform. Nevertheless, although the harm is not great, the price paid in utility and fairness demands that adverse possession yield at least some countervailing benefits. Looked at another way, these costs could be saved by eliminating entirely the possibility of gaining or losing title by adverse possession.

IV. MANY UNEASY CASES FOR ADVERSE POSSESSION

Scholars have worked long and hard to supply a satisfactory rationale for this “strange and wonderful”77 doctrine. Some of their justifications sound in justice, others in efficiency. Some focus on the doctrine’s effects on the parties—the status effects—while other justifications focus on the way adverse possession will influence the behavior of owners and nonowners in the future—the incentive effects.78 Some rationales sound reasonable; others a bit silly.

A. THE SLEEPING THEORY

One oft-mentioned explanation can be summed up as “you snooze, you lose.” According to this “sleeping” theory, adverse possession acts as a civil penalty for wrongdoers.79 The wrongdoers are those who sleep on their rights, and their

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77. STOEBUCK & WHITMAN, supra note 2, at 853, 860.
78. “Status effects” refers to changes in the states-of-being of the parties, others who are similarly situated, and others who will become similarly situated in the future. It may be helpful to contrast status effects with “incentive effects,” the latter being the changes in the behavior of people trying to avoid or achieve the situation of the parties. See generally Jeffrey Evans Stake, Status and Incentive Aspects of Judicial Decisions, 79 GEO. L.J. 1447, 1450 (1991).
79. See STOEBUCK & WHITMAN, supra note 2, at 860.
penalty is to lose those rights. The law shifts rights away from those who do not use their land because they no longer deserve to hold title. Similarly, those who abstain from suing no longer deserve the right to sue. In either case, the shifting of rights from one person to another is desirable because it balances the scales of justice.

Put this way, the sleeping theory is hard to accept as a justification for adverse possession today. To my eyes, the person who leaves land untended or refrains from suing someone is not culpable; he has not behaved reprehensibly and does not deserve to lose his rights. While the sleeping theory might once have fit social norms, it runs against them today.

B. PUTTING LAND TO PRODUCTIVE USE

Perhaps the sleeping theory makes more sense when we examine the incentives generated by adverse possession than when we look at the corrective justice of its effects on the status of the parties. Adverse possession could be viewed as an instrument of social policy for molding the behavior of owners. The doctrine prods lazy owners into putting their land into production. Assuming, arguendo, that this might have been desirable in the past,\(^8\) there is little justification today for legal rules that force the use of land. In several ways, the law has recognized that productive use can be undesirable. For one, the federal government paid farmers (and others who threatened to grow food) not to plant some crops on some lands.\(^9\) For another, federal statutes prohibit the development of lands needed for the habitat of endangered species.\(^10\) Likewise, legislation will often protect historic buildings from profitable destruction.\(^11\) Courts, as well, recognize the benefits of non-use by honoring restrictive servitudes ("conservation easements") that allow private groups such as the Nature Conservancy to accomplish their goal of keeping lands from being developed.\(^12\) In all these ways, the law has acknowledged that less "productive" uses may be best for society. Indeed, the incentives adverse possession creates for destroying wilderness have been criticized in the literature.\(^13\) Even if we are not convinced of the merit of the policy embodied in these rules (perhaps especially if we are not convinced), we might presume that the owner knows what use of the land is good for.

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\(^8\) For a discussion of the goal of putting land into production, see John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519, 526, 539-40 (1996) (observing that adverse possession was "adjusted for wilderness land in a manner that tended to vest title in the industrious user rather than the idle claimant").


\(^13\) See John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 Cornell L. Rev. 816, 816 (1994) (contending that adverse possession doctrine favors development over environmental preservation and should not apply to "wild lands").
best or most appropriate. Leaving land idle may serve the beneficial purpose of holding it until the best use becomes clear.

It is, of course, possible that an owner's non-use will generate substantial negative externalities or that his use will generate important benefits that the owner cannot capture for himself. In either case, a nudge toward production may be appropriate. Productive use of land could generate labor or consumer surplus that would qualify as a positive externality. If the owner expects the returns from the land to be higher if its development were delayed, however, then we should also expect the consumer and labor surplus to be larger in the future. Unless there is some reason to believe that a current use would generate proportionately more positive externalities than a future use, the owner's self-interested decision will also serve society's interest.

Even assuming that it is good policy to prod owners toward production, the statute of limitations is a poor stick for doing so because RO can avoid loss of title merely by monitoring. Of course, slightly raising the cost of leaving land idle will nudge a few owners into production. But, because the costs of monitoring are so low, that number will be very small. The incentive to use the land thus withers into an incentive to inspect for possessors every few years.

C. STIMULATING RECORD OWNERS TO MONITOR THEIR LAND

The statute of limitations and the doctrine of adverse possession do create an incentive for RO to keep an eye on his land and discover people in possession. By requiring absentee owners to monitor their lands, adverse possession may create opportunities for buyers to communicate their offers to purchase. This justification is also problematic. The monitoring need only occur every few years, so the purchasing opportunities will be far between and unpredictable. Very few buyers will want to camp out on the land in hopes of meeting the record owner. Stimulating monitoring will do nothing to help most buyers find sellers. A buyer could take possession and improve the land in hopes of triggering action by the seller, but few buyers will see this as a realistic approach to negotiations. Because mere trespass is not sufficient, a buyer would have to invest something in possession. This investment would be costly, either in time or in money. In addition, AP knows that if her investment improves the land, it increases the cost of the land when she buys it. If the investment reduces the value of the land, AP is liable for the loss. The slightly greater chances for buyers to find sellers of land is not enough to dislodge the conclusion that increased monitoring is a cost rather than a benefit of adverse possession.

86. Perhaps there is a much larger consumer surplus in food, which has a fairly low price considering that it keeps us alive, than in other uses of land. If so, we should prod inattentive owners into producing food. On the other hand, perhaps there would be only minimal consumer surplus in the additional food produced.

87. The occupying claimant statutes are no help to her here. If she knows the land is not hers, it will be hard to take advantage of the protections created by those laws. For description of that doctrine, see infra text accompanying note 114.
A contrary version of the monitoring rationale is suggested in an article by Professors Miceli and Sirmans. They point out that boundary mistakes by AP give RO an opportunity to extract quasi-rents from her. Because the amount RO can extract from AP increases as AP increases her investment, RO has little incentive to correct boundary errors in a timely fashion. There are really two arguments here. One, discussed later, is that RO will not sue promptly even though he knows of the error. The other is that RO will take too long to discover AP’s error. Miceli and Sirmans do not spell out the losses in such cases, but there are some. In rare instances, AP will invest in further improvements that RO could have prevented, and after RO discovers AP’s error, AP and RO will fail to come to terms and the valuable improvement will be destroyed. The innocent-improver doctrine and betterment acts can be used to avoid waste in these rare cases, just as they avoid similar waste when the statute has not run on RO’s claim against AP. Much more often, AP will pay RO, and there will be no social loss other than the cost of negotiations. Because those negotiating costs could well be less than the costs of litigating adverse possession, however, it is not clear that adverse possession saves more than it costs.

One could argue that the statute of limitations and adverse possession will make monitoring more costly and thus will cause some absentee owners to sell their lands to others who can monitor more cheaply. Sometimes those buyers will be owners of smaller parcels for whom the marginal costs of monitoring are negligible. From a populist perspective, it may be good that adverse possession encourages owners whose holdings are so large that they live a long way from the boundaries to sell to persons who have smaller holdings, thus decreasing the size of land holdings. If we want owners of land to be more numerous, adverse possession might move us in that direction. Without a more complete theoretical case in favor of numerous owners and some actual evidence that adverse possession can achieve that end, however, this justification for adverse possession remains less than compelling.

D. ENCOURAGING LITIGATION

RO’s additional visits to his land that are motivated by the statute of limitations will increase the chances that he will detect AP and bring suit against her. This raises the issue of whether we want owners to bring actions to recover their

88. Miceli & Sirmans, supra note 62, at 162-64. Miceli and Sirmans argue that the optimal adverse possession period balances the incentive for AP to prevent the error in the first place—which increases as the adverse possession period lengthens—against the incentive for RO to correct the error quickly—which diminishes as the period lengthens. They also say that RO may spend too many resources attempting to find AP’s error. Id. at 163. Eliminating the statute of limitations would, however, reduce this problem by freeing RO to put off such wasteful efforts to a later date which may never arrive.

89. Id.

90. See infra text accompanying notes 92-98.

91. See DUKEMINIER & KRIER, supra note 29, at 151; HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY 82 (5th ed. 2001); supra text accompanying note 73; infra text accompanying note 114.
lands. The answer to that question is no. We do not want to encourage litigation not otherwise desired by the owner. The point of enforcing property rights is to offer the arm of the state for the protection of owners, not to force those protective processes upon them.

E. TELLING OWNERS TO SUE PROMPTLY

Adverse possession encourages RO to bring his claim sooner rather than later. Miceli and Sirmans argue that this encouragement is needed because RO has an opposing incentive to refrain from suing: AP's investment increases the quasi-rents RO can capture.92 Their argument ignores the fact that RO might be barred by laches or estoppel if he waits to sue while AP improves the land.93 In addition, RO might be barred by the doctrine of agreed boundaries if AP can convince the court there was a private agreement regarding the boundary. Moreover, the doctrine of acquiescence, which says that long acquiescence is evidence of an agreement fixing the boundary, may bar RO from suing if he waits for further investment. Even without adverse possession, RO has good reasons to bring suit without delay, or at least to warn AP of RO's conflicting claim.

There are, however, other reasons for the law to encourage quick suits. Assuming a fixed set of legal rules, it is probable that claims asserted sooner will cost less to resolve than the same claims brought later.94 As evidence gets stale, it becomes less trustworthy and more ambiguous. The dearth of good evidence causes a longer and more expensive trial as both parties try to bolster their case with additional evidence. Ambiguity of ownership also increases the number of cases. Shorter statutes of limitation reduce both the cost of litigating and the frequency of litigation by turning attention away from stale evidence and toward facts that are more easily and clearly determined. As Professor Merrill puts it, "A rule requiring prompt resolution of claims is thus efficient in that it helps to minimize the costs of litigation and trial."95

For our purposes, however, the proper comparison is not between a short statute of limitations and a long one. When we sum up the litigation costs borne by society,96 the proper comparison is between a legal regime that includes adverse possession and a regime that does not. There are two issues here: first, whether having a statute of limitations makes trials messier; and second, whether having a statute of limitations makes trials occur more frequently.

If the statute of limitations and the doctrine of adverse possession were

92. The argument raises the empirical question of whether record owners today wait until the last year of adverse possession to sue the possessor. Evidence of such actions would support their viewpoint.
93. See Dukeminier & Krier, supra note 29, at 142-43.
94. See Merrill, supra note 9, at 1128.
95. Id.
96. The savings referred to here are those reaped by society, in reduced costs of operating the court system, and possibly the savings enjoyed by the defendant. Savings to the record owner should not be included because they are taken into account when deciding whether or not to sue quickly.
eliminated today, courts and parties in the future might have to delve far into history to determine the holders of rights. However, they would only have to look for relatively easily identified and proved behaviors having to do with the transfer of title. From the time of elimination, most of the relevant evidence would be found in recorded documents, such as deeds, wills, and court orders.

Compared with the rules of title transfer, which determine record title primarily from documents that remain reliable for many years, the elements of adverse possession are indeterminate. When is possession actual, open and notorious, exclusive, hostile, and continuous for the statutory period? The doctrine raises factual issues calling for evidence of behavior that was not necessarily recorded or witnessed, evidence about whether the possessor acted toward the land as a true owner would, evidence about whether a reasonable owner would have been put on notice, and evidence about whether the possessor had the requisite state of mind. To make matters worse, these difficult issues cannot be resolved with a snapshot of the possessor’s actions; they must be established over a lengthy period of time—in many places at least five years and in some places up to twenty. By hinging on such evidence, the doctrine creates a substantial group of situations in which title is uncertain and requires litigation for resolution. Helmholtz’s study covered less than twenty years and produced over 800 cases. This indeterminacy, however, is not all the fault of the courts. With the exceptions of the open-and-notorious element and good faith, the doctrine of adverse possession merely compartmentalizes the inquiry called for by the statute of limitations itself: Did RO have a cause of action to regain possession from AP? When did that cause of action first arise? Have there been any periods of time during which RO did not have a cause of action?

Because of the statute of limitations and its judicial gloss, parties and courts need not look as far back into history, but they do have to search for behaviors and states of mind that are difficult to identify. Adverse possession trades a search for a few specific behaviors over a long period of time for a wider inquiry into fuzzier actions and thoughts over a shorter period of time. Shortening the statute of limitations period improves the quality of evidence on difficult elements, but eliminating it would eliminate the need for much of that evidence. The effect of the statute on the frequency of suits for possession is far from clear, but the net result is probably an increase in the number of disputes and the costliness of each case. The doctrine of adverse possession has become, in Merrill’s words, “a font of litigation.”

F. REDUCING THE COSTS OF ACTIONS FOR DAMAGES

If adverse possession does not reduce the costs of litigating title, perhaps it reduces the costs of other suits—suits not over title but over trespass. Were it not for the

97. The argument here assumes that the only issue is whether to eliminate adverse possession from now on. For a discussion of transitional issues, see infra Part IV.N.

98. Merrill, supra note 9, at 1144 n.72.
doctrine of adverse possession, \( RO \) could sue \( AP \) for damages for trespass and wrongful possession in addition to suing for recovery of possession. The doctrine of adverse possession precludes \( RO \)'s claims for damages because the relation-back doctrine says that \( AP \)'s title relates back to the beginning of the adverse possession.\(^9\) In the absence of the doctrine of adverse possession, many more claims for damages would have to be heard, each requiring the resolution of the highly factual issue of damages. Adverse possession saves us these costs.

Some of this same benefit could be achieved by reducing the statute of limitations for the damages actions. This approach would be less harsh to \( RO \) than the current rule that results in his loss of title. The law need not cut off ownership entirely to cut off suits for damages from old trespasses. However, early termination of trespass suits is probably not the right approach either. It is better to ask why we should be unwilling to incur the costs of adjudication. Current law calls upon the public to provide a decisionmaker when an owner sues a possessor for three years worth of damages if the suit occurs three years after dispossession. Even thirty years after \( AP \)'s initial entry, \( RO \) could have the same right to sue for damages for the most recent three years.

Long ago, before deeds were recorded in county courthouses, adverse possession might well have reduced the costs of litigation. In the absence of a good set of records, contests would turn on evidence of earlier enfeoffments. Property professors tell stories of land grantees giving young children a swift boot in the pants to etch the livery of seisin in their memories. These stories suggest how difficult it might have been to generate long-lasting evidence of land transfers. Today, deeds and probated wills, even old ones, are easily found, and record title is inexpensively resolved. Because the elements of adverse possession are harder to determine than record title, a concern for reducing the amount spent on the judicial system would not seem an adequate justification for continuing to adhere to the doctrine of adverse possession.

G. FLUSHING OUT OFFERS TO PURCHASE

The statute of limitations encourages \( RO \) to assert his right to exclude, which in turn may flush out a purchase offer from \( AP \). This is not, however, a convincing defense of the doctrine. If \( AP \) is not the higher user, her offer to purchase will be inadequate and accomplish nothing. On the other hand, assuming \( AP \) is the higher user, society still has little interest in the transfer as it would only be a transfer of naked legal title. When the potential buyer has already taken possession and is using the land, there is little societal reason to elicit a purchase offer other than that the sale would allow more investment by the possessor (if the possessor has the capital).\(^{100}\)

Possession of the land has already been transferred to the higher user.

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99. See infra p. 2452.
100. In rare cases, the possessor does indeed wish to buy so that he can invest more heavily in improvements to the land. The facilitating-transfers and protecting-investments rationales are discussed infra text accompanying notes 104-17.
H. PROVIDING PSYCHOLOGICAL COVER

One could argue that the statute of limitations helps owners by allowing them to assert their rights against neighbors and to blame the statute for the confrontation. I doubted adverse possession could serve this purpose until I discussed this Article with a colleague who said that he had used the law in just this way. When a neighbor had planted flowers on his land, my colleague made his neighbor remove them, citing the possibility of losing ownership as his reason. Suspecting that his knowledge of adverse possession was the source of his discomfort with the flowers, I asked my colleague whether he really would have minded the flowers if he had been secure in the knowledge that he would not lose any rights regardless of how long the flowers remained on his land. He surprised me by saying that his true reason was his dislike of the flowers. This real example shows the possibility of the doctrine saving RO some emotional trauma by offering an excuse for asserting his preferences.

I. PROTECTING LENDERS

It is possible that vendors advance goods and services to purchasers based upon the knowledge that the purchaser has lived on a piece of land for a substantial length of time. By increasing the chances that the purchaser actually owns the land the vendor assumes he owns, the law increases the chances that the vendor will be able to collect on the debt. In the past, when shop owners knew their clients and the land they tilled, lenders might have often relied on their knowledge of the borrower's possession. But that is relatively rare today. Indeed, it may be more likely today that vendors rely on the records of land ownership in extending credit instead of merely relying on the knowledge of the borrower's possession. In such cases, the net effect of adverse possession could be to decrease the chances that vendors will be repaid. If adverse possession were eliminated, vendors would learn not to extend credit based on the debtor's possession of land and would instead turn to the records to determine which purchasers were creditworthy.

J. QUIETING TITLES

A time-honored rationale offered for statutes of limitation is that they quiet titles. In other words, the adverse possession doctrine makes ownership more settled or certain. Quieted titles are good because they facilitate market transfers, reduce disincentives to investment, make it easier to obtain credit, and help owners feel more secure. The importance of this security is demonstrated by the high popularity of title insurance. It is also implied by the passage of marketable


102. The introduction of one old statute reads: "For quieting of men's estates, and avoiding of suits, be it enacted . . ." Statute of Limitations, 1623, 21 Jam., c. 16 (Eng.), quoted in 3 AMERICAN LAW OF PROPERTY, supra note 11, § 15.1, at 756.
title acts, which quiet titles by quashing old claims inconsistent with the recent record. While these two modern developments underscore the need for certainty, they also show that the doctrine of adverse possession never did quiet titles completely, and they raise the question of whether adverse possession is still needed. Now that we have possibly more effective means of quieting titles, how much noise does adverse possession silence?

K. FACILITATING MARKET TRANSFERS

Clearer ownership makes for easier purchase by the person who values the land most highly. To take an extreme hypothetical, it would be difficult for the highest user to obtain the land if no one knew who owned it. In the typical case, title uncertainty causes a buyer to do more title searching and fact gathering to ensure that the purported owner is the true holder of the fee. Netter, Hersch, and Manson claim to have found empirical support for this rationale purporting to justify the statute of limitations. They assume that shortening a statute of limitations increases a prospective purchaser’s certainty and that a marginal increase in certainty will do more good where land values are higher. Given that, we should expect, and they found, that shorter statutes were adopted where land was more valuable.

We here are not searching for the historical rationale, however, but rather a modern one, and on this criterion of facilitating transfers, statutes of limitation and adverse possession are at best a mixed blessing. 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. If we add the possibility of acquiring title by adverse possession, we make the record less reliable and decrease the certainty it provides. It is possible for a person to hold record title and possession today and still not be the legal owner because someone else gained title by adverse possession ending two years ago. Moreover, adverse possession itself is an uncertain doctrine. The elements are fuzzy and call for evidence that is hard to obtain, such as past uses of the land and the mental state of the possessor during those uses. It is hard to be confident that today the net effect of adverse possession is to increase a purchaser’s certainty that his seller is the legal owner. Put differently, the existence of the doctrine of adverse possession affects both kinds of uncertainty, it is helpful to distinguish between the two because they can be mitigated in different ways.

103. A recent study of title registration suggests that certainty can be added by giving additional weight to the record. See generally Thomas J. Miceli et al., Title Systems and Land Values (April 2000) (unpublished manuscript, on file with the author).

104. “Title uncertainty,” as used here, is not meant to include boundary uncertainty. Although adverse possession affects both kinds of uncertainty, it is helpful to distinguish between the two because they can be mitigated in different ways.


106. Netter et al., supra note 76, at 220, 222, 224.

107. Id. at 225.
possession makes it more costly for owners to prove their ownership to judges and, therefore, to potential buyers.

Nevertheless, adverse possession does help deal with a different sort of uncertainty: the problem of the missing owner. Suppose O dies with a will leaving Blackacre to his son, RO, but RO has already left home and cannot be found, and indeed will never be found. With their brother gone, O’s daughters, AP and AP2, live on Blackacre for forty years. P, the highest user, wants to buy Blackacre and build an apartment building. Without a doctrine like adverse possession, P cannot buy or build with any assurance that RO will not show up and reclaim the land. Adverse possession allows P to buy from AP and AP2 and put Blackacre to its best use. Thus, adverse possession facilitates investment in and use of property.

While adverse possession helps deal with the problem of missing owners, there may be better solutions. Marketable title acts could allow AP and AP2 to record their claim to Blackacre at the time they take possession. By the time P arrives, they will have a marketable title. Another statutory approach would be to require absentee owners to record their interests and mailing addresses every twenty years. Most states have property taxes, and most allow land to be sold for failure to pay property taxes. A statute repealing the limitations period could provide the government with the authority to sell land for a failure to supply a mailing address after a given period of time. Notices prior to sale would have to be sent to the last registered address.108 Hence, even if adverse possession helps buyers find owners, more of the same benefit could be obtained with a statute that simply requires owners to record an accurate address (electronic or physical), through which potential buyers could make offers.

Adverse possession could indirectly facilitate market transfers by lowering the price of title insurance—an increasingly important means of reducing the costs of title uncertainty. Rather than exhaustively exploring the record and other facts relevant to ownership, the purchaser buys insurance against defects in title.109 Professor Merrill has argued that, in the absence of adverse possession (and presumably the underlying statute of limitations), there would be more defects in titles, making insurance premiums much higher and resulting in a drag on the market for transactions in land.110 Although this is certainly possible, when marketable title acts are in place it is not clear that adverse possession actually reduces the kinds of financial losses covered by insurance.111 While it clears away some old claims, it also creates new ones that may

108. While there may be some question as to the constitutionality of such a statute, it appears to be supported by the Supreme Court decision in Texaco v. Short, 454 U.S. 516 (1982) (upholding forfeiture of mineral interest under retroactive Indiana statute requiring re-recording of mineral interests every twenty years).
109. The title insurance company will run the record the first time it insures, but will only need to update the title for subsequent purchases.
110. Merrill, supra note 9, at 1129.
111. For discussion of the ability of adverse possession to reduce losses of investments, see infra Part IV.L.
be more costly. All told, as one author has concluded, "statutory provisions barring actionable claims not asserted within a specified time contribute little to improving the salability of land." Not only does adverse possession fail to cure many kinds of defects, adverse possession itself muddies the waters of ownership.

L. ELIMINATING BARRIERS TO DEVELOPMENT BY PROTECTING INVESTMENTS

Title uncertainty hampers the development of land by adding a risk of loss. Few owners would invest much in their land if only to lose it the next day. Adverse possession, one may claim, promotes development by clearing up errors in the records and increasing certainty of ownership.

This justification for the traditional doctrine of adverse possession, while in many ways appealing, has a number of problems. First, it rests on the dubious proposition that adverse possession does in fact increase certainty for investors in improvements to land. Adverse possession may increase certainty that the possessor holds title, but it decreases certainty that the record title holder holds title. Moreover, not all possessors are made more certain of their ownership. When adverse possession is part of the law, record title holders who have been in possession for a long time are more certain, but record title holders who have not been in possession for a long time are less certain of their ownership because a previous adverse possessor or her transferee may still be the owner. Today, adverse possession is one of the primary reasons why the record is not accurate. It is possible that title certainty would be greater if the law did not allow adverse possessors to gain title by virtue of possession.

Another difficulty with this justification is that the goal of eliminating investment disincentives deriving from uncertainty may be achieved in other ways. Marketable title acts largely mitigate the problem by eliminating claims that trace back to a transfer before a certain date. These acts are similar to adverse possession in that they terminate old defects in the record; however, marketable title acts are superior to adverse possession in three ways. First, they terminate old claims even more effectively. Second, marketable title acts do not shift attention from the record to unrecorded and unrecordable evidence, but rather restrict attention to the newer instruments in the record, making disputes cheaper to resolve. Third, marketable title acts do not generate as much useless monitoring by record title holders. A possible fourth benefit is that marketable title acts do not deprive true owners of their property as often as does adverse possession.


113. Unless notice of the interest is recorded, an interest that stems from a transfer predating the root of title is no good. The root of title is the last recorded document in the chain of title that is older than thirty (or forty) years at the time of litigation. See DUKEMINIER & KRIER, supra note 29, at 711. It is possible to dream up scenarios in which the adverse possession doctrine helps to prevent a person from stealing land by use of a marketable title act. Those scenarios do not seem sufficiently likely, however, to justify keeping adverse possession.
The possibility of underinvestment because of uncertainty is also greatly diminished by occupying claimant or betterment statutes existing in some states. Under these acts, the record owner pays the possessor the market value of improvements made in good faith.\textsuperscript{114} If the owner chooses not to pay, the possessor can buy out the owner at a judicially determined price. If the improver chooses not to buy out the owner, the land is sold and the proceeds divided. This system assures the developer that a good part of his investment will be returned to him if the land turns out to belong to someone else. These statutes also reduce the hold-up problem that occurs if a record owner discovers that a neighbor has made a valuable improvement on the wrong land. The problem is usually one of rent-seeking losses incurred during negotiations to pay off the record owner, but the problem can escalate to a much larger loss in rare cases when the record owner insists on removing the improvement. The innocent improver statutes can avoid these losses without resorting to the drastic remedy of depriving the record owner of title. Together with title insurance and marketable title acts, occupying claimant statutes provide a great degree of security, allowing substantial investment in land and undermining that proffered justification for the doctrine of adverse possession.

An additional problem with the investment rationale is that the disincentive for investment could be avoided with a less drastic remedy than the uncompensated forfeiture imposed by adverse possession. The law could tell \textit{AP} to buy the land from \textit{RO} at a reasonable price, protecting \textit{RO} with a liability rule rather than not protecting him at all.\textsuperscript{115} If the purpose of adverse possession is to protect investments, completely depriving the record owner of title seems to be overkill.

The investment-protection rationale also fails to fit other doctrinal contours. For example, the doctrine does not require \textit{AP} to make a permanent improvement to the land; mere cultivation will do.\textsuperscript{116} Protection of investment also does not explain why, at least under the traditional doctrine, bad faith adverse possessors can gain title. Certainly they do not invest in reasonable reliance on

\footnotesize{\textsuperscript{114} See \textit{id.} at 151. Some courts have employed the "innocent improver" doctrine to reach the same result without a statute. See \textsc{Hovenkamp & Kurtz, supra} note 91, at 54, 82-83.

\textsuperscript{115} Consistent with this rationale, Merrill suggested this as a reform of adverse possession. Merrill, \textit{supra} note 9, at 1145. (Occupying claimant statutes, if modified to eliminate the record owner's option to buy, would yield a similar result where \textit{AP} has made improvements.) Merrill argues for a system of limited indemnification, under which \textit{AP} would pay \textit{RO} the value of the property if \textit{RO} can show \textit{AP} entered in bad faith. \textit{id.} at 1145-54.

\textsc{Miceli and Sirmans} criticize this proposal on two grounds. See \textsc{Miceli & Sirmans, supra} note 62, at 166. They argue that litigation over the value of land at the time adverse possession commenced could be quite costly. \textit{id.} That problem could be easily solved, however, by awarding the value of the land at the time of judicial decision in favor of \textit{AP}, less the value of her improvements. They also argue that extended liability protection would increase the number of suits by persons with old claims. \textit{id.}

\textsuperscript{116} \textit{But see} \textsc{Miceli & Sirmans, supra} note 62, at 167 (noting that some states require \textit{AP} to improve or place enclosures on the land).}
Even if adverse possession generally decreases certainty, proponents of the doctrine might argue that it increases investment by creating an incentive to invest in land. The act of investing helps to satisfy the elements of the adverse possession doctrine and thus diminishes the chances of losing title. An investment not only yields income returns, it decreases the chances of capital loss. However, this beneficial incentive effect is quite limited for two reasons. First, the capital benefits are substantially delayed; an additional investment in land (as opposed to maintaining a usage) has very little effect on the chances of winning a title suit until seven to twenty years after the investment is made. Second, while it encourages small investments, adverse possession discourages large investments in land. Investments above the level needed to assert possession provide no marginal increase in the chances of winning the title suit and increase the loss if the suit is not won. In sum, a rationale focusing on incentives for investment in land improvements has some appeal, but ultimately cannot justify the scope of the traditional doctrine today.

M. AUGMENTING REPOSE BY REDUCING BOUNDARY UNCERTAINTIES

I relaxed a little more comfortably in my previous house knowing that even if my lawnmower shed were over the boundary according to the recorded plat, the property underlying the shed was, by then, mine. Certainly there are others for whom adverse possession generates similar repose. Unfortunately, they are almost all lawyers. I do not mean to make the fashionable suggestion that the happiness of lawyers diminishes society’s net utility. My point is that most lay people know little about adverse possession and do not share in the repose that comes from knowing that the law protects their possession so directly. We do not see owners heave big sighs of relief when the statutory period passes; owners do not throw parties seven years after they take possession of their parcels of land.

Of course, owners do not have to understand or be aware of adverse possession to benefit from it. Were it not for the doctrine, people would more often lose the land on which they were living. News of these cases would spread and generate uncertainty in other owners. Thus, adverse possession may generate repose in persons unaware of it. One response to this is that stories of loss by adverse possession may also generate uncertainty. The costs of monitoring do not form an impervious cap on this worry because there could be situations when the worrier is hindered from monitoring by his lack of ownership. Greedy, expectant devisees may not wish to expose or signal their greed to the testator by suggesting that the boundaries be checked for adverse possession. Thus, it is

117 Miceli and Sirmans, who argue for the reliance rationale, acknowledge that the rationale does not justify bad faith adverse possession. They adopt Helmholz’s position that adverse possession is generally not allowed in such situations. Id. at 166. However, they do not discuss Cunningham’s opposing reading of the cases.
far from clear that adverse possession fosters repose today. Nevertheless, reducing uncertainty about boundaries has been viewed as the major benefit of the adverse possession doctrine.118

Boundary uncertainty is most often a problem where the land in question is being employed for low-value uses. If an owner is considering building a wall of a major building, he will usually employ a surveyor rather than rely on adverse possession. In such situations, the survey cost is low relative to the total value of the project. Of course, there will be some disputes involving an expensive improvement that encroaches on a neighbor, and in such cases, adverse possession reduces the likelihood that the improvement will have to be removed; but such cases will be rare.

Confining the boundary problem to low-value land uses does not, however, relegate it to secondary status. The huge number of situations involving such uses—gardens at the edge of the backyard and driveways at the sides—makes the small-potatoes cases a major concern. What would be the costs of uncertainty over boundaries if adverse possession were abolished? I doubt they would be high, but even if my guess were wrong, they are usually limited to the cost of an accurate survey.119 If uncertainty costs are higher than the price of a survey, a surveyor will be hired to reduce the uncertainty. While surveys have until now been somewhat costly, modern technology is driving the price down. With the help of a handheld positioning device,120 it is easy to calculate the exact location (within decimeters) of any spot by taking readings from a network of satellites now orbiting the Earth.

Although the price is dropping, low-cost surveys are still not a practical reality. The first difficulty is that a known and fixed point of comparison is needed in each jurisdiction.121 This problem could easily be solved by erecting a monument in each county for this purpose. The second difficulty is the burden

118. See Netter et al., supra note 76, at 219 ("The premise of this paper is that adverse possession is primarily a device that reduces uncertainty over who holds title . . ."); cf. Richard A. Posner, Economic Analysis of Law 90 (5th ed. 1998) (observing that boundary cases are the majority).

119. The reader who notes that insurance will not cover the consumer surplus associated with the owner's subjective valuation of the land perhaps anticipates the psychological explanation offered infra Part V.c.

120. These positioning devices were available for about $3,000 a few years ago. Using two at the same time, it takes about three hours to determine a relative location to within a few centimeters. Units costing about $10,000 allow one to determine a similarly exact location in about ten minutes. The cost of these instruments is expected to fall as their use increases. The cost, volume, and weight of global positioning systems (GPS) receivers are also expected to decrease. See David Wells et al., Guide to GPS Positioning 2-8, 7-19 (1987). Current technology allows measurements which are accurate to a few centimeters, but accuracy to less than one centimeter is often hampered by difficulties in determining the electrical center of the receiving antenna. Id. at 3.11. "Eventually, we may even have the 'wrist locator,' a cheap ($10 in current funds), accurate (1 mm) device that would be as ubiquitous as today's electronic wrist watches." Id. at 3.15.

121. There are two reasons that absolute locational readings cannot be taken directly from the satellites. First, for reasons of national security, the positional signals produced by the satellites include an intentional error. To get an accurate fix on a location, the readings taken at the location in question must be compared to readings taken at a place of known location. The second problem is that absolute
of converting the latitude and longitude data into local metes and bounds or land survey information. This problem could be solved in a couple of different ways. One approach would be to develop computer software that would calculate relative locations, latitude, and longitude, from information obtained from local records. Given the complexity of local descriptions, such software may not be easy to develop, but the size of the potential market could justify the expenditure.

Another approach would be to require by law that relative satellite readings be taken at each corner of the property and recorded each time an accurate survey is done by the traditional methods. For example, once a surveyor reaches a corner of the property, he would take a reading from his positioning device, which would tell him that he is 4.532 seconds north and 1.089 seconds west of the reference monument in the county seat. From that date forward, the recorded satellite readings would allow that realty to be surveyed accurately at very low cost. For the present, reducing boundary anxiety is still a plausible rationale for adverse possession. In a few decades, however, the costs of determining exact property boundaries by Global Positioning System (GPS) survey will drop to the point that GPS surveys will be the preferred method of dealing with boundary questions.

Adverse possession was, undoubtedly, of great importance in quieting titles in the past, but it is a dull tool that generates uncertainties of its own and, on occasion, unfairly deprives rightful owners of their title. Title insurance, marketable title acts, occupying claimant statutes, and low-cost methods of survey may make statutes of limitation superfluous, especially if

readings would, over long periods of time, become inaccurate because land moves across the surface of the earth.

122. There are many ways of describing locations in the United States. One geographic method describes points on the surface of the earth as being a certain number of degrees (and minutes and seconds and parts thereof) of latitude and longitude away from two reference arcs—the equator and the prime meridian (half of a great circle passing through the Earth's poles and Greenwich, England). The satellite-based global positioning system enables one to determine position in terms of latitude and longitude.

In another system, the Public Land Survey System or United States National Land System, places are described by reference to the intersection of a "principal meridian" and a "principal base or parallel." See Norman J.W. Thrower, Original Survey and Land Subdivision 2-8 (1966). There are thirty-four principal meridians across the United States, all west of Cleveland. Id. at 8. Range lines are marked at six-mile intervals from the principal meridian, and township lines are spaced at six-mile intervals from the principal parallel. Id. at 5. Each township, defined by the range and township lines, is further subdivided into approximately one-mile square sections. Id.

Other methods of survey, known as "unsystematic" or "indiscriminate location" methods, describe lands by reference to natural features such as streams, ridges, and trees. Id. at 2-3. In the "metes and bounds" system, lines are run with a magnetic compass; in other unsystematic systems, the boundary lines may follow trails or hedgerows or the like. See id. at 3 n.2; id. at 41 n.2.

123. To get these relative readings, the surveyor needs to get simultaneous data from a positioning device placed at the monument. Either a second person could be deployed to that location with proper equipment or the state could set up a continuous broadcasting station at each of the monuments. (Indeed, the broadcasting station could be the monument.) Such stations may soon be set up in some states for other purposes.
the elimination of adverse possession would lead to even more careful recording of transactions.

N. PATH DEPENDENCE AND TRANSITIONAL PROBLEMS

Another explanation for the persistence of statutes of limitation and the doctrine of adverse possession is that there is no fair and practical way to get rid of them. There are many persons who have, as of today, adversely possessed land long enough for their title to have vested. If the statutes of limitation were repealed, they could lose their lands to record owners. Legislation effecting such a massive shift of rights from possessors to record owners would be quite unfair. Now that we have started down the road of adverse possession, is it impossible to switch to another path? No. It is possible to change the law without jeopardizing current titles. The statute of limitations on actions to recover possession of land could be repealed for the future without affecting those who have already gained title by adverse possession.

Transitional problems, however, may present the largest obstacle to elimination of the doctrine of adverse possession. Prospective abolition of a statute of limitations, while preserving existing rights, may increase the costs of hearing title cases. Suppose the statute is repealed as of the year 2002. Cases involving adverse possession beginning after 2002 would be easy to resolve, so easy that they would rarely arise, but cases involving adverse possession that began before 2002 would become more difficult to decide as time passes. A record owner as of 2002 could, for example, challenge the title of the successor to the adverse possessor in 2052. Without repeal, such cases would be decided on the facts of possession from 2037 to 2052 (assuming a fifteen-year statute). With repeal, however, that future possessor can defend only by showing facts of adverse possession from 1987 to 2002, a messier process that could increase the costs of litigation in the future. To prevent such situations from arising, many owners would bring quiet title actions shortly after the repeal, raising the current burden on the judicial system.

The immediate burden of this transitional problem could be reduced by piecemeal elimination of the statute of limitations. For example, a statute requiring recordation of GPS coordinates may state that there shall be no statute of limitations on actions to recover possession of any parcel whose coordinates have been so recorded. Such a statute could work as follows: If the possessor claims no more than the land described in the record, the surveyor records the coordinates of the land described on the record. If the possessor claims more than the record indicates, the surveyor records the coordinates of the claimed area as well as the area described on the record, thus placing AP’s claim on the record. Claimants having a competing claim as of the time of that recording are

124. The statute of limitations would continue to apply for the benefit of persons in possession as of the date of recordation and their successors of record.
the only persons allowed to contest the validity of those coordinates.\textsuperscript{125} There is no new limitation on the time for assertion of such a claim. Their successors are barred from asserting any claim in conflict with the record and the recorded GPS coordinates, except to the extent that they are able to show the GPS coordinates were inaccurate at the time they were recorded.\textsuperscript{126} This would mean that successors would have to check the record at the time of succession to see whether adjoining owners have recorded coordinates and, if so, whether those coordinates assert a conflicting claim. With a GPS survey system, it should be fairly easy for each jurisdiction or a state office to provide a computerized service that would raise an electronic red flag if any owner entered a claim that overlapped a previously entered claim. With such a system, it would be possible to move, parcel by parcel, away from the adverse possession regime.

This gradual elimination of adverse possession should eliminate claims conflicting with the record within the time it takes to transfer all the land surrounding a parcel. This scheme would also offer some compensation, in the form of increased protection from loss, to those who are required under the statute to pay more for their survey because the surveyor must gather the GPS information. Thus, in the future, titles could be very quiet even if the law did not include a doctrine of adverse possession.

\section*{O. Protecting Ownership of "True" Owners}

Many discussions of adverse possession set the scene with a hypothetical fight between a true owner and an adverse possessor.\textsuperscript{127} In other words, the discussions often assume that RO is the true owner and AP has no claim other than by adverse possession. Framing the issue this way hides a key benefit of the statute of limitations: protecting the rights of those who have a compelling fairness claim to ownership. Suppose that an owner, O, contracts to sell to A two adjoining parcels, Blackacre and Whiteacre. After O shows A around the parcels, A agrees to pay O the full asking price. At closing, O delivers a deed to A and A takes possession of both. Years later, after O has died, O's heir, S, shows up claiming Whiteacre. Upon a careful survey, A discovers that her deed from O describes only Blackacre. Because of the scrivener's error, S is the record owner of Whiteacre. In an important sense, however, A is the true owner of Whiteacre, though formally he is only the adverse possessor. In this case, possession is better evidence of true or just ownership than the evidence from

\begin{itemize}
  \item \textsuperscript{125} Personal representatives and future interest holders could assume the standing of decedents for a limited period of time.
  \item \textsuperscript{126} The statute could also provide that erroneous satellite readings—ones identifying points outside the recorded boundaries of the parcel—would have no effect whatsoever. This would prevent people from taking advantage of the statute to gain title to a neighbor's land.
  \item \textsuperscript{127} See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 155 n.16 (1988); POSNER, supra note 118, at 90 (discussing adverse possessor versus original owner); Merrill, supra note 9 (using the abbreviations TO for true owner and AP for adverse possessor throughout); Netter et al., supra note 76, at 217 ("In reality, it transfers the ownership in the property to the person currently using the property, and away from the true, but absent owner.").
\end{itemize}
recorded documents, not because the recorded evidence got stale, but because it was only half-baked to start. The statute of limitations correctly focuses our attention on the better evidence of ownership.128

Under this view, the AP-versus-TO cases are aberrations. The important cases—those potentially justifying the doctrine—are the ones pitting the adverse possessor against a false record owner.129 Such situations may be common, yet they will rarely reach the courts because S's lawyer will tell him that he has no case because of the doctrine of adverse possession. In short, the person claiming title by adverse possession may be the true owner trying to fend off a claim based on defective documents.

To put the proposition more generally, a court can determine ownership by reference to at least two kinds of evidence: testimony from witnesses about transactions that occurred in the past and testimony about who is currently in possession. Witness testimony about past transactions grows less reliable over time. In the extreme case, the most recent transfer (other than by inheritance) may be centuries old. In contrast, evidence of current possession is, by definition, current and does not grow less reliable over time. Indeed, as the possession lengthens, the very fact of possession becomes more reliable as an indicator of title. A person living on land for thirty years is much more likely to be the owner than a person who has been living on land for thirty days. So, as transfer evidence becomes less reliable, possession evidence becomes slightly more reliable. At some point in time, as shown in Figure 1, the lines cross. After that point, the possessor is more likely to be the owner than is the person who relies on transfers as evidence of title.

There is another way in which true owners are protected by the statute of limitations. Suppose that a grandchild of an ancient owner claims that his grandfather's signature was a forgery and the deed from the grandfather was therefore void. If no statute existed, this claim could go to trial. Even if, as is likely, the current possessor prevails, she would still incur the costs of a trial on the facts. To prevent that, and the small chance of a total loss, she may settle out of court. This would create both an incentive and tremendous opportunity for fraudulent claims, much to the financial detriment of true owners.130

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128. Ballantine recognized this long ago:

The state has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping on his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

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

129. If this is a correct rationale for adverse possession, and if uncertainty is increased by the doctrine, it is backwards to say that we accept demoralization in order to achieve reduced transaction and litigation costs. See Merrill, supra note 9, at 1129-30 (characterizing one rationale for adverse possession as such a trade-off).

Likelihood that evidence is accurate evidence of true ownership

AP's possession

RO's testimony about past transactions

Time

Figure 1: The effect of time on evidence

This rationale makes sense of the relation-back doctrine. That doctrine says that title by adverse possession relates back to the first day of adverse possession. As a result of this rule, the successful adverse possessor does not merely become the owner at the end of the period, but also becomes the owner for the period during which she was adversely possessing. As noted above, one practical consequence of this doctrine is that a person who gains title by adverse possession is not liable for trespasses occurring before the statute of limitations has run. This result makes sense if we think of adverse possession as a doctrine for quieting title in the hands of the person who is the true owner.

The rationale of protecting true owners that are not record owners also makes sense out of the trend toward shorter periods of limitation. AP's case must be built upon evidence of occupation and intent to control. If we presume that AP is indeed the true owner, then we do not want to make that proof too difficult. As society gets more mobile, it becomes less likely that the true owner will still be in possession when the period runs. If the statutory period remains the same, testimony about occupation and intent of more persons is needed. That testimony is harder to get, and it is also harder to get the testimony of neighbors to...
cover the relevant period of time because they too have moved away. It becomes more difficult to prove intent and occupation when the period started. So, to keep adverse possession equally easy to prove as society becomes more mobile, the statute must be made shorter. 131

There is another way in which the rationale of protecting true owners makes sense of the trend toward shorter statutes. Netter, Hersch, and Manson found that legislatures at the time of statehood adopted shorter periods of limitations where land values were higher. 132 Consider first the relationship between the statutory period and litigation costs imposed on both owners and the public. As the period increases, the frequency of adverse possession claims will diminish, but the cost of deciding the suit will increase because data covering a longer time are needed. There is an optimal statutory period balancing the two effects.

Consider next the influence of monitoring costs on that period. Monitoring costs decrease as the statutory period is increased. Hence, these costs push up

131. The data from a study discussed infra note 76 cast some doubt on this explanation of the trend toward shorter statutes. If mobility rises as population density increases, we would expect a shorter statute where population increases were greater. The study found, however, that longer statutes were adopted in states with higher increases in population density. See Netter et al., supra note 76, at 223.

132. This result was significant to the ninety-five percent level. The study concluded that the variations in length were efficient. Id. at 224. The authors also found, but did not emphasize, that the length of statutes bore no significant relationship to the value of land half a century later. Id. at 223, 225. This finding suggests the striking conclusion that if the legislators responded efficiently to economic factors at the time of statehood, then those efforts to differentiate had lost their value within sixty-five years. The authors speculated that judges might have stepped in to make the law more stringent where appropriate, even though the statutes had not changed. Id. at 223.

The study also confirmed the authors' hypothesis that the statutes would be longer where the increase in population density was greater. Id. at 225. They viewed this variable as a proxy for monitoring costs. This part of their theory is puzzling when taken together with their premise “that adverse possession is primarily a device that reduces uncertainty about who holds title that may arise from inaccurate property descriptions.” Id. at 219. Changes in the density of population (or just the population, because the state would probably remain the same size) may, as they suppose, increase the frequency of land transactions, but have little effect on the costs of monitoring. Regardless of how often a neighbor's land changes hands, the owner has only to monitor for encroachments once each statutory period. The likelihood of an error may increase, but the cost of monitoring does not. (It does not help to take the viewpoint of a buyer instead. While it is true that more frequent transactions would increase the number of surveys to discover adverse possessors and otherwise define the boundaries of the parcel, the length of the statute has no effect on the need for such surveys; each new owner must have one.) If owners rely on neighbors to monitor, then monitoring might be less costly when neighbors are closer, although it is not guaranteed that this would be so. Even if that were true, however, the costs of monitoring should vary with population density rather than with the change in population density. It is hard to see how change in population density can be even a weak proxy for the costs of monitoring property to find adverse possessors. But cf. id. at 224 (discussing regression analysis).

If change in population density is not a proxy for monitoring costs, why would legislators adopt longer periods of limitation in states experiencing rapid growth? Perhaps population growth is another, slightly separate, proxy for land value. The authors used tax values as a land-value proxy. If tax values lag behind market values, then they will lag behind market values more greatly when values are increasing more rapidly. Land values should be increasing more rapidly in states where population is increasing more rapidly. Seen this way, the correlation with population density is merely another window on the fact that the legislators perceived the statute to yield greater benefits where land values were higher.
the optimum. Now consider the relationship between length of statute and value of its protection to true owners. If the statute were 100 years, it would offer little protection to AP-TO because it would be hard for AP-TO to establish adverse possession. So protection of ownership calls for shorter statutory periods, pushing the optimum down. The weight of this protection factor varies with the value of the land. The more valuable the land, the more valuable the protection afforded true owners by the doctrine of adverse possession. The protection factor pushes the optimal period down and pushes it down more where land values are higher. Thus, this theory explains the fact that limitations periods have grown shorter over time, as land values have risen.

As one more point of historical confirmation, this approach to adverse possession makes sense of the rule that we do not require AP to pay RO for the land. If the land justly belongs to AP and not to RO, it would be unfair to require AP to pay RO for it.

There are a few potential problems with the theory that adverse possession serves to protect true ownership. First, it may be somewhat circular. We are willing to call the purchaser (A in the example discussed at the outset of this section) the true owner perhaps in part because the adverse possession doctrine says he is the true owner. If the law clearly said that A had no claim and the land belonged to S until it was transferred on the record, we might think it is just for A to lose because he and his agents have failed to do all that was necessary to perfect the transfer. Our perceptions of what is just are based in part on the legal system. If our title system were based wholly on the record, we might see little justice in claims based on facts outside the record. It is not clear that the concept of true ownership has meaning independent of the legal system.

A second problem with the protecting-true-owners rationale is that, according to the traditional doctrine, even a bad faith adverse possessor can gain title by adverse possession. More generally, it does not matter that RO can prove AP is not the true owner; the doctrine of adverse possession still deprives RO of his rights. Why, if the hornbook description is correct, should the doctrine apply so broadly? Why not exclude cases of bad faith possession, providing they are well proved? Perhaps the law disregards such evidence to save time and effort. If that were the case, however, the law would seem quite unfair. Protection of true owners does not fully justify the doctrine of adverse possession as traditionally

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133. Monitoring and litigation costs do not vary as much with the value of the land.
134. However, it would not be inconsistent with the protecting-true-owners rationale to force AP to pay RO for the land when RO proves AP entered in bad faith, as Merrill has argued. See Merrill, supra note 9, at 1126.
135. We may feel that A should get something for his money. However, he may only get a suit against the person who drafted the defective instrument.
136. This is not to say that true ownership never has meaning outside of the legal system, but our recording acts, marketable title acts, and other legislative structures have strayed so far from a system focused on true ownership that it is hard to tell what true ownership is anymore.
137. This issue is, as noted above, hotly debated. See supra notes 65-70 and accompanying text (discussing Helmholtz's argument that good faith is required for successful adverse possession).
stated. On the other hand, if Helmholz is correct in arguing that courts require good faith, this protection rationale fits adverse possession much more tightly.

Another problem with this rationale is that true owners do not always get a chance to prove that their cause is just. Once AP proves the elements, the doctrine makes evidence from the record and any other evidence on RO's behalf irrelevant. Even if possession were generally better evidence as it ages, it is not perfect. And even if documents and witness testimony become less probative, they do not become worthless. It would seem that allowing judges to consider all of the evidence would go furthest toward protecting true owners. The proposition that limiting courts to one kind of evidence helps obtain correct decisions begs for support, especially because the kind of evidence effectively excluded by the doctrine—recorded documents—is the cheaper kind of evidence to gather. Adverse possession's constriction of the evidence may reduce the cost of protecting true ownership without causing injustice to true owners in too many cases, but it seems doubtful.

The next problem is similar. It is not clear how much additional protection adverse possession affords true owners of realty today. Documentary evidence of land ownership has become more robust as time has passed. The statute of frauds forces parties to make a documentary record, and the recording acts require its safekeeping. Modern repositories for deeds preserve documents while photocopying and electronic preservation dramatically reduce the chances that fire or flood will destroy the critical evidence of title. The chances that the record is wrong have been diminishing for decades, even centuries, and will continue to do so. As the record increases in reliability, the ratio of injustice to justice resulting from adverse possession also increases. While adverse possession may have served justice in the past, it will cease to do so at some time in the future, if it has not already.

V. ROOTS: A LOSS-AVERSION RATIONALE

From what we have seen so far, it appears that adverse possession generates litigation, creates wasteful incentives, and in the future will produce less justice than injustice. This is not to say that adverse possession was unjustified in the past. From the rationales discussed above, a case can be made that there was once a strong utility basis for adverse possession and, indeed, that it might also have served justice. However, regardless of how well they served in the past, none of the justifications discussed so far will be entirely satisfactory in the future, as the same benefits can now be achieved in less costly ways. Is there

138. This is not true for most personalty, as there is no state-maintained record of ownership except for a few items such as automobiles.
139. For those rare situations in which the documents do not reflect the intent of the parties, as evidenced by long possession contrary to the record, the possessor could perhaps be given a cause of action against the draftsman, although something would probably have to be done to prevent collusion between the buyer and seller.
any other reason to adhere to the ancient doctrine? Here we return to the quotation with which this Article began: "The true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life."\(^{140}\)

Justice Holmes’s explanation can be interpreted in a couple of different ways. One possible interpretation of Holmes calls upon personality theory. By investing her will in the land, \(AP\) develops an attachment that is critical to her identity.\(^{141}\) To take the land from \(AP\) is to deprive her of a part of her self. The primary difficulty with this theory, however, is that it is not clear why the property is not an equally deep part of the personality of \(RO\), as he may have invested as much of his will in the land as has \(AP\). Personality theory also has a hard time explaining why, under the tacking doctrine, a new \(AP^2\) is allowed to tack her possession to \(AP\)'s possession. Furthermore, if land is part of the self, its reallocation by the state is akin to physical or mental punishment, which the state ought not be able to impose without a finding of criminal behavior. Seeing land as part of the person may go a bit too far. As we shall see in a moment, however, Professor Radin’s application of personality theory may be on exactly the right track.

A. POSNER’S TAKE ON HOLMES

Judge Richard Posner has interpreted Holmes to have suggested a less dramatic point, a point about "diminishing marginal utility of income":

The adverse possessor would experience the deprivation of the property as a diminution in his wealth; the original owner would experience the restoration of the property as an increase in his wealth. If they have the same wealth, then probably their combined utility will be greater if the adverse possessor is allowed to keep the property.\(^{142}\)

What Posner means by the "same wealth" needs some clarification. If his same-wealth condition presumes that both include the land as part of their wealth, it is obvious that their combined utility (roughly, happiness) would be the same regardless of who wins. The land would generate the same additional

\(^{140}\) Letter from Oliver Wendell Holmes to William James, supra note 1, at 417-18.


\(^{142}\) POSNER, supra note 118, at 89. Posner’s citation is to an earlier speech of Holmes’s:

It is in the nature of a man’s mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 477 (1897). The "It" in the quotation refers to the connection between property and prescription.
utility whether added to the wealth of RO or AP. Hence, Posner’s condition must be that AP and RO would have the same wealth if AP were to include the land in her wealth and RO were to exclude the land from his. This is equivalent to saying that, if neither AP nor RO includes the land in her or his assets, AP’s wealth is less than RO’s wealth by exactly the value of the land.

Posner’s condition can be relaxed somewhat and still yield the conclusion that a decision for AP produces greater utility than does the opposite decision. It does not matter how much poorer AP is. Because marginal utility declines as income rises, as long as AP is poorer, she will get more utility out of adding the land to her assets than would RO. Posner’s interpretation of Holmes is essentially that, assuming the value of the land is included (or excluded) when we measure the wealth of both, AP’s and RO’s combined utility will be greater if AP wins whenever AP is less wealthy than RO.

B. PROBLEMS WITH POSNER’S TAKE ON HOLMES

There are a few difficulties with Posner’s interpretation of Holmes as a rationale for the doctrine of adverse possession. First, the majority of adverse possession cases involve boundary disputes between neighbors. In such cases, it is dubious that AP is poorer than her neighbor, RO. As just noted, if they have equal wealth when both include the land, adverse possession does not increase or reduce utility; its net effect is zero. Of course, AP and RO will rarely have equal wealth. More accurately, then, when the disputed land is included in the wealths of both, AP will be wealthier in about one-half of the cases. In those cases, if all else were equal, the doctrine would be expected to reduce rather than increase utility. The fact that the doctrine improves utility about one-half of the time hardly sounds like a compelling justification for the application of the doctrine to boundary cases.

For adverse possession cases other than boundary disputes, it is reasonable to assume that the possessor is poorer than the record owner. If AP is using land she does not own for her residence, then she probably has no other realty that would be suitable for that purpose; without the land she adversely possesses, she is homeless. Because AP’s possession must, by doctrine, be exclusive, we know RO is not also living on the land. In all likelihood, he has a residence elsewhere. Because he does not need this land for his residence, it is reasonable to conclude that RO is richer than AP and that the land would generate less utility in his hands than in hers. Limited to appropriate cases, Posner’s marginal-utility interpretation of Holmes is logical.

Even in those cases, however, the marginal-utility theory raises troubling

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143. Posner does not attempt to apply this rationale to boundary disputes. See Posner, supra note 118, at 90.

144. The major limitation is to exclude the boundary disputes just discussed. Another less important limitation is that this rationale would not apply to those cases in which the adverse possessor is not living on the land.
questions. First, the same sort of logic would appear to justify leaving stolen cash in the hands of the thief, provided that the thief was poorer before the theft than his victim is after it. The rationale would also seem to justify equalizing individual wealth by use of the government's powers to tax and spend. Like adverse possession, thefts and taxation can enhance utility by changing the status of the parties, making the poor richer and the rich poorer. To be sure, allowing such thefts and imposing confiscatory taxation would create incentives for the rich to protect their assets from theft and taxation, but adverse possession also causes true owners to take measures to protect their assets. All three situations raise the question of whether the gains in utility outweigh the increased costs of monitoring and protection.

There is, however, at least one important difference in incentives between these two examples and adverse possession. Allowing theft would create an incentive to engage in unproductive activity, and imposing severe taxation would remove incentives for industriousness. The doctrine of adverse possession does not have those unwanted consequences. Indeed, the adverse possession doctrine requires, and therefore encourages, some sort of productive activity on land.145 Because of this key difference in incentives, the marginal-utility rationale could be deemed sufficient to support adverse possession while remaining insufficient to justify allowing ordinary theft.

The second difficulty with Posner's marginal-utility rationale relates to the elements of the doctrine. If the difference between the wealth of the parties is the key, the doctrine should include the wealth of the parties in its elements. Although this presents a problem for the theory, it does not completely undermine it. There may be practical reasons, having to do with problems of proof, not to consider the wealth of the parties. It is also possible that it would simply be unfair for the law to expressly take into consideration the wealth of the parties.

A third problem with Posner's rationale is that it rests on the questionable assumption that the poor and rich share the same marginal-utility curve. Money and assets mean more to some people than others, and people who care less about money are not randomly distributed in the income population. There is good evidence from the career I have chosen that I probably care less about money than many of my law school classmates. By the same token, I probably care more about money than my high school classmates who did not seek a law degree. Of course, many people are limited in their ability to generate financial income by poor opportunities and other forms of bad luck, but not all are. Many people poorer than I would, quite sensibly, not trade jobs with me because money ranks lower on their preference scale and leisure or a desire to do good ranks higher. In short, some of the poor are poorer than their equally talented counterparts because they are less materialistic. If the utility curve of a poor

145. As discussed above, however, the adverse possessor's activity is productive in only a limited sense. It is possible that the best use of the land is leaving it idle.
lies under that of a rich RO because AP is less materialistic, the utility lost by AP might not be as great as the utility lost by RO. On the other hand, differences in utility from wealth are hard to measure and fairness may require the law to irrebuttably assume that parties share the same marginal-utility curve. Although Posner’s interpretation of Holmes raises questions, there are good rejoinders, and the theory remains a sensible one.

C. AN ALTERNATIVE TAKE ON HOLMES: LOSS AVERSION

Psychological experiments suggest a different, albeit related, interpretation of Holmes’s justification of adverse possession. Holmes said that it is a wrenching experience to lose property one uses in vital ways, and he implied that it is less troublesome to lose property one has allowed others to use. In this basic idea, Holmes is supported by the results of experiments designed to study the “endowment effect.” The endowment effect is a pattern of behavior in which people demand more to give up an object than they would offer to acquire it.146 This difference between the amount a person is willing to pay (WTP) and the amount she is willing to accept (WTA) has been explained by reference to the theory of loss aversion.147 According to the theory of loss aversion, losses have greater subjective impact than objectively commensurate gains.148 In graphical terms, utility curves are asymmetrical in that the disutility of giving up an object is greater than the utility of acquiring it.149 Moreover, this difference is greater than one would expect from the diminishing marginal utility of wealth alone. This means that no matter which point on the wealth axis represents the status quo, as wealth rises the marginal utility of wealth falls more steeply below that point than above it. As shown in Figure 2, the marginal-utility curve is a dynamic one, changing with wealth, and is kinked at the point representing the individual’s status quo.150

In Figure 2, AP and RO are assumed to have the same wealth if neither


147. The present application of loss-aversion theory was anticipated by Professor Ellickson. See Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 CHI.-KENT L. REV. 23, 38-39 (1989). I am not convinced that the theory of loss aversion is much more than a generalization of the endowment effect or the status quo bias. But cf. Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 ECONOMETRICA 263, 279 (1979) (describing loss aversion’s role in prospect theory). Unlike some critics, however, I do not think that this point reduces the utility of the theory or the generalization.


149. Kahneman et al., supra note 146, at 194.

150. A declining marginal-utility curve, such as those appearing in Figures 2 and 3, represents the assumption that each additional unit of wealth for one person generates less utility than did the previous unit. It is important to use “wealth” on the horizontal axis rather than “income,” because income, until it becomes wealth, is itself only a prospect and is not part of one’s endowment. The area labeled $c$ in Figure 2 represents the utility lost if there were no endowment effect or if the perceived status quo were
include the land ($W_0$) and the same wealth if both include the land ($W_1$). Both AP and RO are assumed to believe they own the land, so $W_1$ represents the perceived status quo from both of their perspectives. Because RO thinks of the land as a financial asset like cash, his loss would be represented by areas $b + c$. Because AP thinks of the land as a tangible possession, the endowment effect is stronger, and her loss is represented by $a + b + c$.

From a utilitarian perspective, one important goal—perhaps the only goal—of the law should be to maximize the net utility of those subject to the law. Utility is, of course, difficult to define and impossible to measure. It should include, however, psychological reactions—feelings of loss or gain—of those whose utility is being considered. It is necessarily the case that, if we care only about maximizing net utility, we are willing to trade a loss to one person in order to achieve larger gains to others, assuming we can be sure they are indeed larger. The general contribution of loss-aversion theory speaks to this comparison of losses and gains. It says that the loss of an asset has more impact on utility than does the gain of the same asset. If loss-aversion theory accurately captures nonexperimental reality,\textsuperscript{151} it should be an important social goal to avoid subjecting people to what they perceive to be losses of things within their endowments without good reason for doing so.

The experimental evidence goes beyond the conclusion that it is important to avoid subjecting people to reductions in net wealth. In one experiment, subjects

\textsuperscript{151} Some support for this assumption from evolutionary theory is discussed \textit{infra} note 178.
were given either a lottery ticket or $2.00 cash. When they were given the chance to trade their initial endowment for the other endowment, somewhat surprisingly, very few subjects chose to switch. Almost everyone preferred what they were initially given. Because people prefer the things they have to those they do not have, it is not enough to stabilize net financial wealth; to maintain utility, society should avoid subjecting people to involuntary changes in the perceived mix of things to which they are entitled.

From these experiments, it is easy to draw the conclusion that a court should not pull land out of AP's endowment in order to add it to RO's endowment. RO's gain would not be as great as AP's loss. One can readily imagine a case in which RO did not consider the land behind a fence to be his. Even when he learns that the boundary described by the record extends beyond the fence to include AP's garden, RO knows that AP also has a claim. For that reason, RO might not psychologically add the land to his endowment. In such boundary dispute cases, loss-aversion theory applies directly because the land is not part of RO's psychological endowment.

In a more subtle way, loss-aversion theory also applies to disputes in which the realty is, in fact, part of RO's psychological endowment. In such cases, both AP and RO consider themselves to be the owner, and the court must deprive one of them. Fortunately, a careful reading of some other experiments allows us to extend loss-aversion theory beyond cases involving one psychologically endowed person to cases involving a conflict between two endowed persons when one is endowed with a tangible thing and the other has merely a financial asset.

In a test for endowment effects reported by Professors Kahneman, Knetsch, and Thaler, subjects were randomly assigned to one of three groups: sellers, buyers, or choosers. Sellers were given a coffee mug and a chance to sell it at various prices. Buyers were given a chance to buy a mug at various prices. Choosers were given an opportunity to get either a mug or cash. Put another way, choosers were given an option to get a mug (without paying anything) and given the chance to sell the mug-option at various prices. The only difference between choosers and sellers was that choosers were not actually endowed with a mug before they were put to the task of deciding their selling price. The major difference between choosers and buyers was that buyers were already endowed with the cash they would have to spend to get a mug whereas the cash was...


153. This point has obvious implications for the determination of just compensation in the context of eminent domain. In addition, the same principle could justify giving more procedural protection before we deprive criminals of freedom than we accord them at times of potential release from incarceration.

154. See Kahneman et al., supra note 148, at 1329-31. Buyers were given neither mugs nor money. E-mail from Daniel Kahneman to Jeffrey Stake (July 23, 2000, 20:14 EDT) (on file with author).

155. See Kahneman et al., supra note 148, at 1329-31.
merely a prospect for choosers. The prices at which trades, or choices, could take place were varied across a range, and the results—how many subjects in each group would trade—were recorded. In this way, a median valuation (or reservation price) was determined for each group: sellers, $7.12; choosers, $3.12; buyers, $2.87. In a replication of the experiment, in which the price tags were left on the mugs, the results were: sellers, $7.00; choosers, $3.50; buyers, $2.00. These results confirmed conclusions from other loss-aversion experiments. People are biased toward the status quo. Losses have a subjectively larger impact than equivalent financial gains, and the difference is greater than would be predicted from declining marginal utility alone.

For purposes of extending the loss-aversion rationale beyond the cases in which RO does not know of his ownership to the cases in which RO is psychologically endowed, it is important to see that, in these mug experiments, the strength of the endowment effect is different when the endowment is cash. Compare sellers and choosers in their valuations of mugs. The ratio of values of mug-endowed subjects (sellers) to option-endowed subjects (choosers) was $7.12/3.12 (or 7.00/3.50 in the second experiment). Mug-endowed subjects valued mugs 2.28 times more (2.00 in the second experiment) than subjects for whom mugs were only a prospect.

Now compare the effect of being endowed with mugs, as just discussed, with the effect of being endowed with cash. To do that, imagine that cash is now the item being purchased and mugs are the currency being used for exchange. How many mugs will a person demand for a dollar? For an average buyer, $2.87 = 1 mug, so we can divide by 2.87 to get $1.00 = 1/2.87 mugs. To an average buyer endowed with a dollar, that dollar is worth .35 mugs (.5 in the second experiment). Buyers will not give up a dollar for less than a third of a mug. By

156. Because buyers were not given any cash, they would be slightly poorer than choosers because the experiment did not add to their wealth. It is conceivable, but seems unlikely, that such a small difference in total wealth was the reason choosers were willing to give up more money for the mug. In other words, choosers might have been more willing to give up their cash for mugs because they felt luckier and better endowed at the time of making their choice. A replication designed to determine whether loss aversion applies to cash may address this possibility by giving buyers cash to start. However, it does not upset the conclusions drawn in this Article if loss aversion does not apply at all to cash.

If these experiments were replicated with adverse possession in mind, it would be particularly useful to create four experimental groups. The groups would be divided on two criteria: whether the subjects are actually handed a mug (or other object) and whether they are told they own the mug. Such a study would go even further to determine the source of this preference for one’s things. Is it the notion of ownership (or good faith belief) or the physical possession that is more important? It may also be helpful to find out whether the endowment effect increases over time by waiting a few days before asking for prices.

158. Id.
159. Other experiments and hypothetical surveys have generally found that WTA levels are more than twice as high as WTP levels. For citations to hypothetical surveys and exchange experiments involving marshes, fishing, postal service, goose-hunting permits, visibility, elk hunting, deer hunting, lottery tickets, and park trees, see Kahneman et al., supra note 148, at 1327.
comparison, the value of a prospective dollar to an average chooser is 1/3.12
mugs, which is .32 mugs (1/3.50 or .29 mugs in the second experiment). The
ratio of values of cash-endowed subjects to option-endowed subjects is .35/.32
(.5/.29). Cash-endowed subjects valued cash 1.09 (1.72) times more than sub-
jects who were considering giving up merely a prospect, an option to get cash.

Thus, the endowment multiplier for mugs is 2.28 (2.00), whereas the endow-
ment multiplier for cash is 1.09 (1.72).\textsuperscript{160} If the land is worth $100 to nonown-
ers, we would expect the harm to the record owner to be $110 to $172, and the
harm to the possessor to total about $200 to $228. The important conclusion is
that the endowment effect was greater for mugs. This is evidence that people
become more attached to tangible physical assets than to financial assets and
feel a greater sense of loss when deprived of tangible physical objects than
when deprived of intangibles that have the same value to a purchaser.\textsuperscript{161}

D. DOES THIS RATIONALE FIT THE STANDARD DOCTRINAL REQUIREMENTS?

Once one observes this difference in the magnitude of aversion to losses, the
potential connection to the doctrine of adverse possession becomes plain. Land
is a tangible physical object, but estates in land are intangible financial assets. In
order to establish title by adverse possession, \textit{AP} must prove actual possession
for the required number of years. By producing convincing evidence on this
doctrinal point, she shows a physical connection that would seem to be neces-
sary for her to be especially averse to loss of the land.

According to doctrine, \textit{AP} must also show that her possession was hostile.
Although courts have adopted varying interpretations of this element, they
generally require \textit{AP} to have occupied the land under a claim of her own and
not, as a tenant would, under a claim that derives from RO. Furthermore
Helmholz contends that the courts require a good faith belief of ownership by
\textit{AP}.\textsuperscript{162} Assuming Helmholz has the better of the argument, this element also fits
well with the loss-aversion rationale. By showing hostile possession, \textit{AP} shows
that she considered the land to be hers or, at least, that she probably had a strong
expectation that she would be able to continue her possession.\textsuperscript{163}

The open and notorious element also contributes to the conclusion that \textit{AP} is
attached to the land. A person who sneaks around on the land, not making her

\textsuperscript{160}. Having the price tags on the mugs might have reduced the endowment effect differences
between cash and mugs, but the difference did not entirely disappear. More replications of the
experiment may help pin down the difference between cash and tangible assets, and the level of
statistical significance.

\textsuperscript{161}. Possession is not the same as the right to possess. In the experimental situations, at prices
below their reservation price, the choosers gave up the right to possess a mug, but did not give up
possession. At prices below their reservation prices, the sellers gave up both the right to possess and
possession itself. Accordingly, people require more compensation to give up both possession and the
right to possession.

\textsuperscript{162}. See supra text accompanying note 67.

\textsuperscript{163}. Of course, if Cunningham is correct that a bad faith \textit{AP} can gain title, see Cunningham, supra
note 68, at 37, the loss-aversion rationale does not fit the doctrinal contours as nicely.
presence known, is probably not feeling like an owner. Likewise with the continuous element; a person who abandons the land for a period of time probably has not started feeling like an owner. Thus, those elements also help weed out claimants who have not truly become attached to the land or have not become any more attached than the record owner. The open-and-notorious and continuous elements work in conjunction with the hostile and actual elements to establish that AP would feel a loss of an endowment to a tangible asset if she were to lose the case.

By showing that her possession was exclusive, AP shows that RO was not in possession and therefore does not have the connections to the land that would make RO suffer its loss as severely as she would. RO either knew of his legal claim to the land or did not. If he did not know the land was his, he probably had not formed an attachment to it. His recent realization that he has a legal claim against AP has likely created in his mind only a prospect, rather than an endowment. On the other hand, if RO knew of his claim, his lengthy inattention to the land or acquiescence in AP's illegal possession indicates that he likely considered the land to be merely a financial asset—like cash loaned out at a variable interest rate. AP's showing that RO has not taken possession of the land for the full duration of the statutory period helps convince us that RO considers the land to be only a financial asset.

By proving the elements, AP shows that the land is a tangible thing to AP and a financial asset to RO. Given that, loss-aversion theory and the experimental evidence predict that AP would feel more of a loss than would RO. The law recognizes this difference in attachment by depriving the person who is less attached.164

E. FITTING THE LOSS-AVERSION RATIONALE TO OTHER NUANCES OF ADVERSE POSSESSION

The loss-aversion rationale solves a number of puzzles presented by adverse possession. For one, loss aversion makes sense of the fact that limitation periods are diminishing. In the old days, RO could be away from home for an extended period of time without an opportunity to get back to his land. Because travel is so much easier today, RO can readily get to his land if he truly feels a possessory connection and desires to return. Today, less time need pass before we are sure that RO considers the land to be just a credit on the books.

Loss aversion can also explain the tacking doctrine, which says that AP2 can reach the statutory number of years by tacking her possession onto that of AP,

164. One of the most dramatic demonstrations of the proposition that things are best left where they are, even if it is wrong according to the records, can be seen in Howard v. Kunto, 477 P.2d 210 (Wash. Ct. App. 1970), in which a group of houses were all built on the neighboring lots. Id. at 212. It was better to leave each family in the house it had been inhabiting than to make all of the families move into the house next door or go through the painful process of negotiating to buy their houses from the families living on the other side.
marginal utility

W₀ = wealth of AP or RO without land
W₁ = wealth of AP or RO with land
= the perceived status quo
a+b = AP's disutility if she loses the land
b+c = RO's disutility if he loses the land

Figure 3: The endowment effect overcoming generally lower marginal utility

from whom she purchased. The experiments indicate that it takes little time for AP to form her attachment, so the fact that AP₂ has not been in possession long does not mean that she does not feel attached. The tacking rule also makes sense on RO's side of the analysis. If RO had been absent only a short time, he might feel attached to the land. The tacking doctrine allows AP₂ to show that RO has not been in possession for a long time and therefore considers the land to be merely a financial asset. It does not matter who is in possession as long as RO was excluded; once the period has run, we are convinced that RO is not psychologically attached to the land. Tacking is also allowed when RO sells to a new RO₂ during AP's possession. In such cases, it is very unlikely that RO₂ has ever taken possession of the land. Once again, RO₂ probably feels endowed with an estate in land rather than land itself. Because the land is merely a financial asset to RO₂, it is better to deprive him than to deprive AP.

This explanation of adverse possession based on endowment effects does not eliminate the possibility, noted above, that the AP has a marginal utility of wealth curve that lies below that of RO. However, as shown in Figure 3, if the difference between the endowment effect for land and the endowment effect for cash is large enough, it might overcome RO's greater marginal utility from
Thus, this interpretation of Holmes differs importantly from Posner's in that it is less important that $AP$ and $RO$ share a utility curve and there is less need for the doctrine to include a means test.

**F. WHY NOT COMPENSATE?**

When $AP$ gains title by adverse possession, she is not required to pay $RO$ for the land. If avoiding subjective losses is the rationale, why is she not required to compensate $RO$? One old answer was that $AP$ is the true owner, but we need not rely on that. In the case of wholesale adverse possession, the loss-aversion answer is that $AP$ is not required to compensate $RO$ because she cannot afford to do so. $AP$ is in adverse possession precisely because she lacks sufficient income to pay for a place to live. If the law imposes a compensation requirement on $AP$, she will be forced to sell the land, and she will suffer the very subjective losses we were trying to avoid. Requiring $AP$ to compensate $RO$ would result in a net decrease in utility.

In boundary disputes, the value of the disputed land will be far less than $AP$'s endowment and she will rarely have to sell her land to compensate $RO$. And, a compensation requirement would be fair in such cases. Such a requirement, however, would call upon the court to establish the value of the disputed land. In most boundary disputes, the legal costs of determining value would outweigh the value of the land itself. It may be more efficient to let the losses go uncompensated in these small matters than to allow the true owner and the adverse possessor to battle over the proof of the value of the land.\[VI. POTENTIAL PROBLEMS FOR A LOSS-AVERSION RATIONALE\]

From the endowment effect and the theory of loss aversion, we can construct a rationale for adverse possession that fits the contours of the basic doctrine and some of its finer details. Because this rationale does not depend on an assumption that $AP$ is poorer than $RO$, it can explain the application of adverse possession to boundary disputes, as well as to cases in which $AP$ owns none of the land in her possession. This loss-aversion rationale can work even if $RO$ generally gets higher utility from wealth than $AP$. And, of key importance, it is a rationale that will survive even in the future when it costs little for owners to determine the boundaries of their land. Nevertheless, the loss-aversion justification is not perfect. Some apparent difficulties with the rationale are not too serious, but the scientific basis for the loss-aversion rationale could benefit from additional experimentation.

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167. For additional explanation of the figure, see *supra* note 150 and accompanying text.

168. There are doctrines that say that if the parties settle a boundary dispute orally, the courts will enforce that agreement notwithstanding the statute of frauds, which requires transfers of interests in land to be in writing. See *Stoebuck & Whitman*, *supra* note 2, at 861. This exception would seem to confirm the judicial interest in resolving small boundary disputes without litigation.
A. REMEMBER COASE

Professor Coase may ask why we need the doctrine of adverse possession when the possessor who values the land more highly can buy it from RO. To this point there are three responses. First, when AP owns no land other than that which she possesses, she will probably lack the assets and credit to make that purchase. AP's meager initial endowment will not allow her to make use of the market mechanism for transfer. Without adverse possession, the land will be taken from her even though that is the more harmful alternative.

The second response to Coase's point is that AP might not place a higher value on the land. This response requires us to look at other lessons from experimental psychology. One experiment indicates that ownership of a thing does not make the thing more attractive to the owner, it only makes it more painful to give up. In this experiment, some subjects were given pens, and all subjects were asked to rate the attractiveness of the pens. Disproportionate numbers of those given pens chose not to give up their pens in later trading. However, this different behavior was not supported by differing evaluations of attractiveness. The pens were not rated any more attractive by subjects given pens than by subjects not given pens. Therefore, it is not safe to conclude that the transfer from RO to AP will occur.

Third, and most telling, the trade from RO to AP might not occur because RO's WTA price is above AP's WTP price. This is an important point of general application to arguments founded on the Coasean insight that markets can correct the law's misallocations of rights when transactions are not costly. Stated generally, because ownership of an asset generates special attachments to it, its initial allocation can be absolutely critical. Suppose that A would not give up Blackacre unless given $50,000 compensation and B would not give up Blackacre unless given $45,000 compensation. If the law (mis)allocates the land to B, A should be able to buy it for something around $47,500. But the loss-aversion experiments tell us that it is entirely possible, and even likely, that A would be willing to pay only $40,000 for the land (and B only $35,000). A's WTP price of $40,000 is below B's WTA price of $45,000. Once the law allocates Blackacre to B, that is the end of the story; society loses $5,000 of value. Therefore, we must add psychological attachment to our list of barriers to Coasean market correction.

170. See Kahneman et al., supra note 146, at 197.
171. See id.
172. Other barriers to market correction are strategic behavior, imperfect information, net-wealth limitations, and transaction costs. See A. Mitchell Polinsky, An Introduction to Law and Economics 18-24 (1983) (discussing strategic behavior and imperfect formation); Posner, supra note 118, at 13 (discussing a hypothetical situation in which a poor family with a dwarf child would get more utility than a rich family with a normal child from some pituitary extract, but the poor family is unable to outbid the rich family); Coase, supra note 169, at 5-8, 15-19 (discussing transaction costs); Lloyd Cohen, Holdouts and Free Riders, 20 J. LEGAL STUD. 351, 355-56 (1991) (discussing free riders).
For a number of reasons, then, the judicial allocation of the land may turn out to be the final allocation of the land. Hence, it is important to get that judicial allocation right. If loss aversion is as common as the experiments suggest and applies less strongly to financial assets than to tangible ones, the law will do less harm in the long run by depriving adverse possessors than by depriving record owners.

B. RECORD OWNERS MAY NOT BE LIKE THE EXPERIMENTAL SUBJECTS

The discussion above assumes that people form attachments to land in the same way that they do to mugs. One could argue that landowners are not like the subjects in the loss-aversion experiments in a number of ways. For one thing, record owners may have atypical connections to their lands. The conclusion that the endowment effect is stronger when the asset is a physical thing than when it is a financial asset is based on experiments involving normal people.173 Record owners that have not taken possession of their lands may themselves be abnormal or abnormally situated. It may be a special kind of person that buys land and lives elsewhere, a person that has a special appreciation for land. For them, the endowment effect may be just as strong for financial assets as for tangible ones. It is also possible that their aversion to the loss of money is as great as AP’s aversion to the loss of tangible things.174 If so, AP’s loss, even after being increased by the status quo bias, does not outweigh RO’s loss. In such cases adverse possession diminishes their joint utility. Note, however, that these losses should not be large. RO’s loss is often limited by the costs of a transfer from AP to RO. If there is little difference between RO’s WTP and WTA prices, and if RO truly values the land more highly than AP, then RO can buy the land from AP. Unlike AP, RO probably has other shelter and other forms of wealth, so he can borrow or pay cash to buy the land from AP. In other words, the situation is not symmetrical. A legal misallocation to AP is much more likely to be corrected by market transfer than a legal misallocation to RO.

A broader attack may be based on a contention that people do not form relationships with land in the same way that they become connected to mugs. The human experiments conducted to date do not prove that loss aversion applies to land. If the status quo bias is learned through culture, our partially completed historical social shift in priorities from Taras to Testa Rossas may cause us to have special feelings for personalty that we do not have for land. If so, experiments relating to personalty might tell us nothing about the

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173. This assumes that the college students who choose to participate in psychology experiments are normal.
174. This point, in another form, was addressed in Figure 3. See supra p. 2465. The reason RO feels the loss of a financial asset more strongly than AP does not matter.
175. Tara was the name of Scarlet O’Hara’s land in MARGARET MITCHELL, GONE WITH THE WIND (1936).
176. A Testa Rossa is a Ferrari automobile considered by some to be the classiest Italian car ever.
Evolutionary biology furnishes reasons to believe that loss aversion is more than a cultural artifact and applies to land as well as to personalty. As mentioned in the discussion of actual possession, an innate and shared sense of possession would allow people to play an evolutionarily stable "Bourgeois" strategy in life's competition for scarce resources. That strategy is essentially to be averse to losses, to fight harder to retain possession than you would fight to gain possession. This theory ought to apply equally whether the property be land or tangible personalty. In either case, taking what belongs to others could lead to a deletion of one's genes from the pool.

Empirical observations support this theory. People become very attached to land, sometimes so strongly that they will defend it with their lives. Experiments with birds show that they win fights more often when fighting to maintain their turf than when fighting to regain possession. This more successful fighting by current possessors may indicate that birds value turf more if it is part of their current endowment. As applied to land, then, loss aversion may be thought of as another name for "territoriality." Given the frequency of territorial behavior in humans and other animals, it is reasonable to assume that the endowment effect occurs with land as well as with chattels.

C. REMAINING DIFFICULTIES WITH THE LOSS-AVERSION RATIONALE

Like all the other theories of adverse possession, the theory grounded in experimental psychology is far from perfect. First, although the loss-aversion theory conforms to the contours of the traditional adverse possession doctrine, it does not fit every doctrinal detail. The loss-aversion rationale cannot explain why a corporation, which would probably not be averse to losses, can adversely possess land. That the law does not limit adverse possession to individuals may be justified, however, on the ground that such a limit would create an undesirable disincentive to incorporating.

Second, loss aversion is not a perfectly just rationale. If adverse possession does, in fact, increase utility by placing losses where they hurt less, it does so by

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177. Note, however, that land was a key symbol of wealth when Holmes wrote. Therefore, it is possible that loss aversion explains Holmes's view even if it does not justify adverse possession today.

178. See supra text accompanying note 39.

179. See, e.g., Joe Tobias, Asymmetric Territorial Contests in the European Robin: The Role of Settlement Costs, 54 ANIM. BEHAV. 9 (1997). I thank Owen Jones for bringing this study to my attention. By arranging the fights to be between prior possessors and current possessors, the study partially controlled for any possible "home field advantage" stemming from greater familiarity with the location of the fight. That control also made the situation a lot like a case of adverse possession. Cf. Sugden, supra note 39, at 102 (reporting that fights between male swallow-tails in the wild are won more often by the possessor).

180. Its shareholders may, however, be averse to losses, and a close corporation's losses would be felt by them.

181. It also may be that the courts have not had an adequate number of cases to consider whether corporations ought to be able to benefit from adverse possession.
imposing an arbitrary tax on some citizens. There are many landowners that pay no attention to some of their lands. If any of them deserve to pay for the benefits accorded to adverse possessors, all of them do. Yet adverse possessors have taken possession of only a few of those unattended lands, and it is only the unlucky owners of those lands who end up paying this tax. The tax is generally progressive, but it is not consistently applied. Some landowners pay a large tax while others pay none at all. Into which class a record owner falls depends on the preferences and activities of others, in addition to his own behavior. Because the tax is borne unequally among persons of equal wealth, horizontal equity is sacrificed.182 Thus, this loss-aversion justification for adverse possession must rest not on its fairness but on its efficiency.183

Third, our perception of what belongs to us is shaped by the law. Because adverse possession has long been a part of our land law, we know or may be vaguely aware that we may lose our land to an adverse possessor. Because of that awareness, perhaps we do not have the same attachment to land as the attachment to personalty shown in the mug cases. One could argue, in other words, that the ambiguity of title to land puts all people into the category of seeing the land as a prospect rather than as an endowment. One response to this is that many people do not know that land can be lost through adverse possession. It surprises some of my students every year. Another response is that adverse possession can also apply to personalty, because actions for the return of personalty are also subject to a statute of limitations, and so the sense of permanence in ownership may be similar. If so, the lessons of the mug experiments should also apply to land.

Fourth, even assuming good faith on both sides, RO's loss to AP may seem much more like theft to RO than AP's loss to RO would seem to AP. The insult added by the sense of theft may make RO's losses outweigh AP's. This argument assumes, of course, that it feels worse to be the victim of a theft than it feels to lose property in some other way. Nevertheless, if record owners feel more disutility than adverse possessors because only record owners feel like victims of theft, the endowment effect would not be sufficient to justify the adverse possession doctrine.

182. This criticism of the loss-aversion rationale applies equally well to Posner's interpretation of Holmes. Presuming that the rich and poor have the same declining marginal-utility curve, taxes designed to transfer wealth from richer to poorer will increase utility—thus arguably serving vertical justice—but they will not be horizontally equitable.

183. Even this is questionable, however, because it is generally more efficient to redistribute wealth by levying taxes than by changing particular rules of law. See generally Louis Kaplow & Steven Shavell, Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income, 29 J. LEGAL STUD. 821 (2000) (reviewing wealth redistribution).
Fifth, adverse possession cases arise both from situations in which AP was uncertain as to ownership and from situations in which she knew that she did not hold record title to the land. There do not appear to be any analogous groups of possessors in the mug experiments. Presumably, in the mug experiments, the subjects did not believe themselves to be thieves, nor were the subjects in a state of ambiguity as to whether they owned or did not own the mugs they were pricing. For this reason, the mug experiments support adverse possession only when AP is acting in good faith. If Helmholtz is correct, that would include almost all of the successful cases of adverse possession. If Cunningham is correct in describing the law of adverse possession, however, more experiments need to be done. One experimental design may be to tell students to sit at a desk and fill out a form. The form would tell the subjects to pick up the mug and examine it. Then the form would ask either, “For how much money would you sell this coffee mug?” or, “How much money would you pay for this coffee mug?” A significant difference in prices would indicate that possessors are averse to losses of possession even when they do not believe they own the things in question.

D. STILL THE BEST RATIONALE

Although there is need for additional experimentation, the growing evidence about human psychology supports a legal rule that AP defeats RO even if AP and RO are of equal wealth. Loss aversion thus provides the basis for a satisfactory rationale for adverse possession—one that applies to boundary disputes and other cases, one that will remain viable long after the cost of surveying and searching the record is de minimis, and one that may apply to both good faith and bad faith possession. Stated simply, when forced to place a loss on someone, the law chooses to deprive RO of his financial asset rather than deprive AP of her tangible asset. The endowment effect seems able to accomplish what other theories have failed to do; it explains the doctrine of adverse possession in a way that makes sense now and will continue to do so for as long as our genes make us averse to losses.

VII. REFORMS: CAN THE STATUTES OR THE JUDICIAL GLOSS BE IMPROVED?

There are a number of possible reforms of the law of adverse possession. Which reform is appropriate depends on whether the loss-aversion rationale is accepted.

A. REPEAL OF PART OR ALL OF THE STATUTE OF LIMITATIONS

Merrill suggests that the other rationales discussed in Part IV above, such research would be useful not only for policy discussions of adverse possession, but also for eminent domain and various forms of taxation (some applying before, and some after, possession).

185. See supra text accompanying notes 78-139.
though perhaps not wholly satisfactory when considered separately, provide an imposing case for adverse possession when summed together.\textsuperscript{186} I do not find the whole to be substantially greater than the sum of the parts which, without loss aversion, do not constitute an entirely satisfactory rationale for the doctrine. If for some reason loss aversion is not an acceptable rationale, the very existence of the doctrine is called into question. A skeleton draft of a statute that would eliminate adverse possession follows this Article as an Appendix.

Lawmakers should be on the alert for opportunities to let individuals choose the rules that will govern their own lives. Because the viability of the quieting-titles rationale turns on the cost of surveys—costs which are borne by true record owners—and because the unfair effects of the adverse possession doctrine are also borne by true record owners, it may be appropriate to let those owners balance the costs and benefits of the doctrine. This could be done by enacting a law like the one I suggested earlier,\textsuperscript{187} but without the mandatory survey and recording requirement. Such a law would provide that owners that record the coordinates of their lands would not be subject to subsequent adverse possession. Those not bothered by the possibility of loss need not pay for a survey. Those wanting to avoid losing any portion of their land to an adverse possessor can simply pay for a GPS survey and record the results. By providing landowners with a choice of rules to govern their land, the law would allow owners to decide which is the better legal regime.

If, on the other hand, loss aversion is a sound rationale for adverse possession, more experiments are needed to attempt to determine whether good faith should be required of \textit{AP}. If the endowment effect can be extended to subjects lacking a good faith belief in ownership, statutes requiring good faith should perhaps be repealed and judicial requirements should perhaps be overturned.

\textbf{B. COMPENSATING RECORD OWNERS}

Assuming the loss-aversion rationale is otherwise acceptable, adverse possession's arbitrary burdens could be eliminated by paying compensation to \textit{RO} in some cases. Compensation could, in theory, come from either \textit{AP} or the state. Payment by the state would raise problematic incentives. Persons desiring to sell their lands may find inattention to wrongful possession the best way to achieve a sale. Potential buyers may be lured into adverse possession by the attractive price of the land if they are successful. Furthermore, if owners do not bear the losses, there is a substantial potential for collusive adverse possession. In addition to the obvious unfairness, bypassing the market would often result in transfers of possession to less appreciative owners.

A legal rule that places the burden of compensation on \textit{AP} is also highly problematic. As discussed, one major problem with requiring \textit{AP} to compensate \textit{RO} is that, in cases other than boundary disputes, an insufficient endowment

\textsuperscript{186} See Merrill, \textit{supra} note 9, at 1133.
\textsuperscript{187} See \textit{supra} text accompanying notes 123-26.
may prevent her from paying without selling the very land she wants to keep.\textsuperscript{188} To avoid forcing \textit{AP} to sell her land, compensation could be limited to boundary cases.

Another difficulty with paying \textit{RO} is that he may not be the true owner. If there are many cases for which we would describe the possessor as the true and rightful owner, the law would confer a windfall on \textit{RO} by paying him while imposing an injustice upon \textit{AP} by requiring her to pay. The law could, however, mitigate this problem by limiting compensation to cases of bad faith possession. Indeed, in cases of bad faith adverse possession, fairness demands that \textit{AP} compensate \textit{RO} because \textit{AP} knows she is in the wrong. Limited to bad faith extensions of the adverse possessor’s boundaries, a compensation requirement would increase the fairness of the doctrine. That justice could be worth its costs in terms of the judicial time required to listen to evidence on the issue of bad faith.

\textbf{CONCLUSION}

Property law moves very slowly. Rules can endure for centuries after losing all reason for being. Rationales that easily justified the ancient English doctrine of adverse possession have been undermined by modern surveying and record-keeping technology as well as by statutory developments. Statutory reforms could further diminish our need for the doctrine. Nevertheless, a case can still be made for adverse possession. The theory of loss aversion provides a strong central framework, and modern experiments in human psychology furnish empirical support. Although it was far from clear that Justice Holmes was right when he wrote it, his rationale is the only one left standing today. The law refrains from depriving people of lands they have long occupied because doing so would cause them too much pain. “It is in the nature of a man’s mind.”\textsuperscript{189}

\textbf{APPENDIX}

\textbf{THE SIMPLIFICATION OF LAND TITLES ACT [SKELETON DRAFT]}

(1) Each county shall establish an electronic survey reference point and maintain a global positioning device and a radio transmitter at that reference point. The radio transmitter shall provide a continuous broadcast of the position of the reference point, along with occasional broadcasts of the exact time, so that simultaneous comparisons can be made.

(2) If the relative coordinates of a parcel of land and the owner’s current mailing address have been properly recorded, the statute of limitations shall not bar recovery of possession of such parcel by a record owner from a person whose possession began after such recording.

\footnotesize{188. See supra Part V.F.}

\footnotesize{189. Holmes, supra note 142, at 477.}
(3) Only persons (or their estates) having a competing claim at the time the GPS coordinates are recorded may contest either the accuracy of the coordinates as a description of the parcel or the title of the person so recording.

(4) All owners of land lacking a postal delivery address shall record a contact address in the office of the recorder of deeds every twenty-one years. Any person who fails to rerecord the contact address within twenty-one years shall be subject to having the land sold at judicial auction.

(5) [If State has no Marketable Title Act] A person able to show an unbroken record chain of title to real estate from a root of title at least thirty years old has a marketable record title subject only to interests preserved by recording of proper notice of intent to preserve an interest and interests created by or since that root of title.