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# Rethinking Adverse Possession: An Essay on Ownership and Possession

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# RETHINKING ADVERSE POSSESSION: AN ESSAY ON OWNERSHIP AND POSSESSION

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## INTRODUCTION

In the wake of the present real estate crisis, there has been prolonged discussion of the wrongdoing that led to systemic failures in the national real estate market. The mortgage crisis caught the nation's attention because of its large scale and its rippling effect throughout the economy. Equally nefarious is the impact of adverse possession on the rights of individual property owners. While a single adverse possession does not affect the national market in the same way as the mortgage crisis did, to the individual owner, the wrongdoing, in the form of a trespass, that ripens into title, is just as devastating. We should reexamine, more broadly, concepts such as adverse possession that result in loss of ownership and move away from those whose foundation is in wrongdoing.

Possession and ownership of real property are distinct concepts under the law.[1] Possession expresses a factual state of being, while

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1. J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 133 (1976) (citations omitted). Roman jurists distinguished ownership from possession: "*[N]ihil commune habet proprietas cum*

ownership describes a legal relationship. We have grown concerned with what we view as an increasing disregard for established private property rights. This disregard is evident in cases liberally applying adverse possession law to divest real property owners of their good title for the benefit of mere trespassing possessors, thereby elevating possession over ownership and transforming the once trespasser into an owner.

The origins of adverse possession are grounded in Roman law.[2] Under Roman law, dominion signified legal sovereignty and ownership.[3] Dominion was the most indefinite and unrestricted right one could have over a thing and was the oldest recognized title. Dominion remained in the last to acquire it by recognized process until it was acquired by another through a recognized process.[4] Possession was a separate concept, with distinctive legal consequences, though quite connected to dominion.[5] If dominion represented legal sovereignty, possession was factual sovereignty.[6] Through derivative possession, tenants, lenders, and easement beneficiaries acquired present possessory interests but certainly not in derogation of the ultimate rights of the owner.[7]

Over time, possession grew to be very connected to ownership and legal rules developed to protect the interests of possessors against interference from strangers and even out-of-possession owners.[8] Roman law recognized that a possessor, one without dominion, which again, was the equivalent of ownership, could acquire dominion (legal ownership) based upon possession for a sufficiently long time.[9]

Modern scholars and jurists articulate several normative value positions in support of adverse possession. From one normative value position, the role of adverse possession is principally as a doctrine to

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*possessione* (property has nothing in common with possession) Ulpian wrote." *Id.* at 138; *see also* WILLIAM A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE 85 (1994).

2. *See* Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1424 (2006).

3. *See* THOMAS, *supra* note 1, at 133 (citations omitted); *see also* HUNTER, *supra* note 1, at 85.

4. *See* THOMAS, *supra* note 1, at 134.

5. "But in the Roman Law possession is regarded not merely as a provisional state protected by law from interruption by violence, but as a kind of ownership, distinct from *dominium*, but parallel to it." HUNTER, *supra* note 1, at 201.

6. *See* THOMAS, *supra* note 1, at 138.

7. *Id.* at 139.

8. *See* HUNTER, *supra* note 1, at 203-04 (regarding possession as equitable ownership and adverse possession doctrine as making the equitable estate permanent thereby effectively removing the distinction between equitable and legal ownership).

9. *See id.* at 199-203; Ripstein, *supra* note 2, at 1424-25.

repair title issues–ownership issues.[10] From another, the purpose of adverse possession is to create a mechanism to protect the "justified" ownership expectations of long-term possessors against absentee owners.[11] And still another normative value position is that adverse possession is really a boundary dispute reparation doctrine.[12] Underlying these positions is the claim that adverse possession is motivated by efficiency and fairness objectives.

Our thesis is that the law should apply a sharp distinction between ownership and possession, treating trespassory possession as only a fact and not a right capable of ripening into indefeasible title. Adverse possession ought to be abrogated as a means of divesting owners of title because, in fact, adverse possession often does not produce the fairest and most efficient outcome.

Adverse possession is an anachronistic doctrine within a legal context of mature statutory, constitutional, and common laws that have developed to address increasingly complex ownership models, competing interests, and facts. The doctrine unduly elevates possession over title. Possession is no longer the clearest, most unequivocal indication of ownership and there are increasingly valid and efficient reasons why an owner might be out of physical possession. Additionally, very few assume that real property is necessarily owned, in the fee simple absolute understanding of ownership, by the one who is in actual possession. Examples include mortgagees; leaseholds and licenses; cooperatives; time-shares; and condominiums. And, we have developed an intricate system of positive laws and rules to govern parties operating within these frameworks.

For example, the mortgagor in a title theory state transfers legal title to the mortgagee in the form of a defeasible estate.[13] The mortgagor typically remains in actual possession so that the title and

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10. *See* discussion *infra* Part II.D (hypothetical discussing the use of adverse possession in the context of color of title); 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.08 (Michael Allen Wolf ed. 2007) (discussing strengthening of case if adverse possessor has color of title).

11. *See* discussion *infra* Part I.

12. *See* Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L. Q. 331 (1983).

13. In a "title theory" jurisdiction a mortgage is viewed as a form of title to property. A "mortgage" is a conveyance of title to property that is given as security for the payment of a debt and more specifically, a mortgage is often considered a conditional conveyance vesting the legal title in the mortgagee . . . . [A] "mortgage" is in essence a defeasible deed, requiring the grantee to reconvey the property held as security to the grantor upon satisfaction of the underlying debt or fulfillment of established conditions. 54A AM. JUR. 2D *Mortages* § 1 (2009).

possession are not in the same person.[14] While possession and ownership remain separate, the parties operate under express contractual provisions in the mortgage that establish the defeasible estate and the point of defeasance.

The leasehold is a present possessory estate and the tenant has the exclusive right of present possession. The landlord is the legal owner of the leasehold property and retains a reversion which becomes a present possessory estate when the lease terminates.[15] Licenses convey mere rights of use to the licensee and are freely terminable by the owner, making them more tenuous than leasehold rights.[16] Because licensees may have exclusive use or they may share use with the owner, it can be difficult to distinguish leases from licenses.[17] Actual physical possession may provide evidence of the legal entitlements and responsibilities in such a case but it is not unequivocal evidence.

Cooperatives, time shares, and condominiums are statutory creations that permit co-ownership under different plans. Cooperators in housing cooperatives own shares in a non-profit corporation.[18] The corporation holds fee simple absolute title to the property.[19] Through proprietary leases between individual cooperators and the non-profit corporation, the cooperators obtain a leasehold interest and a concomitant right of possession to a particular unit.[20] Time-sharing evolved from the condominium concept and resembles the hotel form of housing. They can be classified in one of two ways: (1) as non-fee interests that convey to the time-sharer only the right of use of the property during designated periods of time or (2) as a fee interest transferring to the time-sharer a fee simple absolute interest in the

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14. In the absence of a stipulation or agreement to the contrary, the general rule at common law is that a mortgagee is entitled by virtue of his or her legal title to immediate possession, on the execution of the mortgage, to the premises mortgaged. Some authority, however, supports a modification of this common law rule, under which modification the mortgagee is not entitled to possession of the mortgaged premises prior to default unless, provision is made for a different result in the mortgage or a collateral instrument. 54A AM. JUR. 2D *Mortgages* § 142 (2009).

15. The landlord may also retain a right of re-entry in the event of default in payment of rent or breach of a lease covenant.

16. *See, e.g.*, Garza v. 508 W. 112th St., Inc., 869 N.Y.S.2d 756, 760 (Sup. Ct. 2008) (stating that "licenses connote use" and "leases connote exclusive possession" and stating that licenses are cancelable without cause and at the will of the licensor). Of course, licenses can become irrevocable by estoppel.

17. *See, e.g.*, Delauter v. Shafer, 822 A.2d 423 (Md. 2003); David Lee Boykin Family Trust v. Boykin, 661 So. 2d 245 (Ala. Civ. App. 1995).

18. 19 N.Y. JURIS. 2D *Condominiums and Cooperative Apartments* § 142 (1999).

19. *Id.*

20. *Id.*

property.[21] Condominium statutes can permit ownership of a fee simple absolute interest though the interest may be essentially of air space and not of surface area on the earth, subject to reference by boundaries.[22]

These few examples illustrate the de-coupling of exclusive possession from ownership and the diminished value of possession as a public expression of ownership. Additionally, states have modern recording systems for publically documenting and searching real estate titles and interests. This system of written verification of title further diminishes the role of possession as a source of information regarding title and, we contend, seriously undermines the bona fides of an actual possessor that could be the foundation of a justified expectation of title. It is remarkably easy for one to know whether one owns a parcel of land and, in those rare circumstances where such knowledge is not so easily obtained, the risk of loss to the possessor can be easily managed through our system of title insurance.

In *McLean v. DK Trust*, a Colorado district court considered the viability of an adverse possession claim when the plaintiffs, a retired judge and a former mayor of Boulder and his wife, sued to acquire title of an adjacent portion of their neighbor's lot.[23] The plaintiffs used the property continuously for twenty-five years knowing that the disputed property belonged to someone else.[24] The defendants paid the property taxes and the dues on the property during this period.[25] The court ruled in favor of the plaintiffs, holding that the plaintiffs' attachment to the property was greater than the defendants' and that efficiency and equitable principles favored quieting title in the plaintiffs.[26] Public backlash against the decision resulted in a modification of the state's adverse possession statute.[27] The Colorado court's decision is a present example of the failures of the adverse possession doctrine and the need for greater protections of legitimate private property interests.

Part I of this article briefly discusses foundational concepts inherent in the adverse possession doctrine. It also examines the *McLean* decision in light of the concepts developed in Part I. Part II presents four examples of property ownership and discusses alternative

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21. *See* Ellen R. Peirce & Richard A. Mann, *Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment*, 59 NOTRE DAME L. REV. 9, 12-17, 20-22 (1983). *See generally* 8 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 54A.01 (Michael Allen Wolf ed. 2000).

22. 8 POWELL & ROHAN, *supra* note 21, § 54A.01[2].

23. No. 06 CV 982, slip op. at 1 (Dist. Ct. Colo. Oct. 17, 2007).

24. *Id.*

25. *Id.* at 9 n.1.

26. *Id.* at 8-9.

27. *See* COLO. REV. STAT. § 38-41-101 (West 2007 & Supp. 2009).

property theories that appropriately safeguard title and the interests of owners while also attending to equities that may exist in favor of possessors. We conclude by summarizing the policies that justify abrogating the adverse possession doctrine.

## I. ADVERSE POSSESSION AND THE *MCLEAN* DECISION

Our system of private property law is a positive law regime, based upon citizen-held and government-held expectations created by law. Property systems that create and enforce stable rights are an effective means of creating social benefits.[28] "Well-defined property standards" with limited exceptions and deviations when compelled by equitable considerations "enhance the stability of property rights."[29] In this Article, we contend that adverse possession destabilizes established private property rights, unjustified by compelling equitable considerations. Often, the equitable considerations are simply not compelling and, in those situations in which they are, our argument is that adverse possession is rarely the superior legal enforcement mechanism for addressing these equitable considerations because of the doctrine's destructive effect on legal property rights.

Peñalver and Katyal describe adverse possessors as an example of intentional property outlaws who engage in what they term "acquisitive lawbreaking."[30] Acquisitive lawbreaking involves actions intended to result in direct appropriation.[31] Procurement of possession and immediate access are the goals of these lawbreakers.[32] In contrast, "expressive lawbreaking" is analogized to social protest or civil disobedience.[33] The central motivating factor for expressive lawbreakers is to communicate the lawbreaker's perceptions of the "injustice of existing property arrangements" to the larger society.[34] "Acquisitive lawbreakers" intend to secure benefits for themselves, personally, while "expressive lawbreakers" are aiming to achieve goals, the legal significance of which is greater than the individual.[35]

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28. *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 552 (2005).

29. *See* Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 44 (2003).

30. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1102 (2007).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1102.

35. Peñalver & Katyal, *supra* note 30, at 1102.

Approaches to adverse possession have oscillated on the spectrum between liberal, possession-centered applications and conservative, private property rights oriented applications.[36] These trends sometimes reflect public outrage and concomitant legislative response to what is perceived as an undue trouncing on private property rights. *McLean* is a perfect example of liberal application of the adverse possession doctrine, public outrage, and legislative response.

In 1984, Mr. and Mrs. Kirlin and DK Trust (the "defendants") purchased lots 49 and 50 in the Shanahan Ridge Six Subdivision in Boulder, Colorado.[37] They intended to build their home on lot 49 and discussed selling lot 50 to finance the construction.[38] Mr. McLean and Ms. Stevens are husband and wife (the "plaintiffs").[39] He is a former judge and mayor of Boulder and she is an attorney.[40] The plaintiffs purchased lot 51 in 1981, which was adjacent to lot 50, then owned by the defendants.[41] The plaintiffs immediately began using a portion of lot 50 (the "Disputed Property") for various purposes over the next twenty-five years, without the defendants' permission.[42] The plaintiffs eventually sued the defendants for quiet title to the Disputed Property alleging that they had adversely possessed the defendants.[43] The case was tried before a Colorado state court which held in favor of the plaintiffs.[44]

The court issued extensive findings of fact and discussed the common law and statutory foundations of adverse possession doctrine in Colorado.[45] It cited the personhood model, articulated by Oliver Wendell Holmes,[46] as a justification for adverse possession and held

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36. *See McLean v. DK Trust*, No. 06 CV 982, slip op. at 5-6 (Dist. Ct. Colo. Oct. 17, 2007); 3 AMERICAN LAW OF PROPERTY § 15.1, at 755-58 (A. James Casner ed. 1952) (discussing the history of adverse possession).

37. *McLean*, No. 06 CV 982, slip op. at 1, 4.

38. *Id.* at 4.

39. *Id.* at 1.

40. Monte Whaley, *Boulder Neighbors Settle Land Case*, DENVER POST, Nov. 19, 2008, at B.2.

41. *Id.*; *McLean*, No. 06 CV 982, slip op. at 1.

42. *McLean,* No. 06 CV 982, slip op. at 1-9. The Denver Post reported that the Kirlins lost thirty-four percent of lot 50 in the court case and ultimately, the parties settled with the Kirlins giving up fifteen percent of the lot after spending nearly $400,000 in litigation costs. Whaley, *supra* note 40, at B.2.

43. *Id.* at 1.

44. *McLean*, No. 06-CV-982, slip op. at 9.

45. *Id.* at 1-7.

46. *See* Oliver W. Holmes, The Path of the Law (Jan. 8, 1897), *reprinted in* 10 HARV. L. REV. 457, 477 (1897) ("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

that equity compelled a disposition in favor of the plaintiffs because the plaintiffs' attachment to the Disputed Property was greater than that of the defendants.[47]

The court found that the plaintiffs used the Disputed Property for more than twenty-one years, uninterrupted by the defendants.[48] The plaintiffs used the Disputed Property daily as a footpath to their lot (lot 51) as a delivery path, and as a storage location for stacked wood.[49] They performed regular yard maintenance activities such as trimming trees, raking leaves and cutting weeds.[50] Plaintiffs also used the Disputed Property for entertainment and gardening.[51] The court held that the plaintiffs' use was the type of actual, exclusive and uninterrupted possession required for adverse possession.[52]

The plaintiffs testified that they knew the Disputed Property was owned by someone else and was not their property.[53] The court adopted the object-state-of-mind approach to the question of hostility, the "Connecticut Rule," which has been adopted by a majority of states.[54] Accordingly, the plaintiffs' lack of bona fides was irrelevant to the question of hostility. Hostile use, so as to support an adverse possession claim, only required that the plaintiffs occupy the Disputed Property intending to assert exclusive ownership and without claiming under or through the defendants.[55]

Defendants testified that, over the years, they "went by" lot 50 on numerous occasions but that they did not go specifically to lot 50 and make an assessment of the lot because they were focused on lot 49 on

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law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.").

47. *McLean*, No. 06 CV 982, slip op. at 6.

48. *Id.* at 8.

49. *Id.*

50. *Id.*

51. *Id.*

52. *McLean*, No. 06 CV 982, slip op. at 8. The statute of limitation for adverse possession in Colorado, without color of title, is eighteen years. *See also* COLO. REV. STAT. ANN. § 38-41-101.

53. *McLean*, No. 06 CV 982, slip op. at 2. The public backlash that attended the decision was in significant response to the plaintiffs' knowing wrongdoing, particularly because Mr. McLean was an attorney and a former judge and former Mayor of Boulder. *See* Heath Urie, *Ritter Signs Bill Aimed at Judges – Law Would Require Some To Step Down in Cases of Conflict*, DAILY CAMERA (Boulder, Colo.), Apr. 15, 2008, at B05.

54. *Id.* at 9.

55. *Id.* at 7.

which they intended to build their residence.[56] The defendants testified that they never had actual notice of any of the activity or improvements on lot 50.[57] During the entire time of plaintiffs adverse possession, the defendants paid the taxes and dues assessed on the land.[58] The payment of taxes and the defendants' "mere casual entry" on lot 50 was insufficient to establish their joint use of the property or to otherwise defeat plaintiffs' adverse possession claim.[59]

*McLean* was a very controversial decision. Public backlash brought the doctrine of adverse possession under legislative scrutiny. In 2008, the Colorado General Assembly amended the state's adverse possession statute to address key deficiencies of the *McLean* case.[60] First, the Colorado legislature modified the hostility requirement to require a reasonable, good faith belief that the person in possession is the true owner.[61] Had the good faith standard applied in the *McLean* case, the plaintiffs' concession to inquiring neighbors that the Disputed Property was part of the adjacent lot likely would have failed to meet the definition of hostility.

Second, the Colorado legislature raised the burden of proof to establish title by adverse possession from preponderance of the evidence to clear and convincing.[62]

Last, and perhaps most important, the legislature amended the statute to permit an award of damages to an owner who loses title to an adverse possessor based upon the actual value of the property as determined by the county tax assessor.[63] Owners, like the defendants in *McLean*, could also obtain reimbursement for property taxes and other assessments levied against the property and paid by the owners for the period beginning at the commencement of the adverse possession and including a statutory rate of interest.[64] Unfortunately, these statutory changes were too late for the defendants who expended more than $400,000 in litigation costs attempting to defend their title against the

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56. *Id.* at 4.

57. *Id.*

58. *McLean*, No. 06 CV 982, slip op. at 9 n.1.

59. *Id.*

60. *See* COLO. REV. STAT. § 38-41-101.

61. *Id.* § 38-41-101(3)(b)(II) (stating that to acquire title by adverse possession, the person claiming title by adverse possession or that person's predecessor in interest must prove "a good faith belief that the person in possession of the property of the owner of record was the actual owner of the property and the relief was reasonable under the particular circumstances").

62. *Id.* § 38-41-101(3)(a).

63. *Id.* § 38-41-101(5)(a)(I).

64. *Id.* § 38-41-101(5)(a)(II).

plaintiffs.[65]

The adverse possession doctrine is no longer needed to deal with the problems of stale land claims, abandoned property, and uncertain titles. And, the rush to grow the country and conquer its frontiers no longer dominates social thought. The narratives developed in Part III are intended to illustrate the problems inherent in the adverse possession doctrine and to suggest better alternatives that are currently available under our modern system of laws.

## II. AN ANALYSIS OF THE IMPACT OF ADVERSE POSSESSION ON THE PRIVATE PROPERTY AND ISSUES OF EQUITY

### *A. Hypothetical Number One: The Purchaser and the Bona Fide Donee*

*A purchases the property from X. Later, X dies, testate. X leaves the property to B.*

Consider this situation: *X* sells a piece of property to *A*. *A* searches the title and confirms that *X* has good and marketable title. *A* pays value for the property and in exchange, *X* gives a general warranty deed to *A*. *A* accepts the deed but does not record it. *A* never takes actual possession and *X* never mentions to anyone that he sold the property. *X* lives for several years after selling the property to *A* and eventually dies, testate. In his will, he leaves the property to *B*. *B* takes actual possession and makes valuable improvements to the property which causes the property to appreciate. A learns of *B's* possession only after *B* has been in possession for the requisite period of time under his state's adverse possession statute.[66] *A* sues to eject *B*, and *B* counter-claims and seeks to quiet title by adverse possession.

If there is adverse possession and if *B* satisfies the elements, he would acquire title to the property and *A* would be left with no recourse. *A* would not have a claim against *X* or *X's* estate. *X* did not breach a deed warranty because, at the time of the conveyance, *X* owned the property. Likely, there are no viable causes of action in tort or contract against *X* either. *A* would have no claim under any title insurance policy because, again, there was no defect in title at the time of the conveyance.

If there is no adverse possession statute, and if *A* can produce the general warranty deed from *X*, then *A* would win as against *B*. The property would not have been part of *X's* estate at the time of his death

65. Whaley, *supra* note 40, at B.2.

66. For purposes of this hypothetical, *B* cannot seek protection under the recording acts as a donee.

and, therefore, would not have passed under *X's* will to *B*. But *B* has made valuable improvements and the value of the property's appreciation can be directly attributed to *B's* improvements. *B* has also paid the property taxes and other assessments since the death of *X* based upon his reasonable belief that he inherited the property from *X*. The belief is reasonable because *X* never disclosed the prior conveyance, *A* was not in actual possession so *B* had no actual notice of *A's* claim, and *A's* failure to record meant that *B* had no constructive notice of *A's* claim. So perhaps, to some, this presents as a perfect case for adverse possession.

*B* can be made whole though, while recognizing *A's* title. These results can be achieved through recourse to existing property systems. *B* could receive an award for his consequential damages under an unjust enrichment theory.[67] Existing "betterment acts" would support an award for the cost of *B's* improvements with interest so as to avoid unjustly enriching *A*.[68] *B* could easily establish the amount of taxes and dues paid and should receive an award for this amount. Additionally, a court could reference applicable state statutory provisions for property tax sales as a guide for awarding *B* interest on the paid taxes from the date of each annual payment.[69] Further, the court could grant *B* rent free possession during the period of his possession by denying *A* an award against *B* for the fair rental value of the property during *B's* possession. Under this analysis, a damage award makes *B* whole.

In contrast, the unjust enrichment argument in favor of awarding *B* the costs of improvements when the property appreciates is muted if the property depreciates while in *B's* possession.[70] If the property depreciates as a direct result of *B's* "improvements" then *B* would not recover the cost of his improvements. *B* would recover only the taxes paid with interest and, again, the court might also deny *A* an award for the fair rental value of the property during *B's* possession. Having depreciated the property, *B* should not be able to profit from his

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67. *See* Mannillo v. Gorski, 54 N.J. 378, 387 (1969) (discussing fairness to possessors in the context of an adverse possession dispute). *A* could also be forced to pay *B's* costs and legal fees associated with the action.

68. *See* Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 54-55 (1985) (discussing betterment acts in general); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2445 (2001).

69. The statutory interest rates range in amount but often exceeding market rates for similar investments and so provide, in a sense, a return on investment. *See, e.g.*, ALA. CODE § 40-10-122 (LexisNexis 2003 & Supp. 2009) (twelve percent per annum interest rate from date of sale); COLO. REV. STAT. § 39-12-103 (West 2007) (providing interest rate of nine percentage points above the discount rate of interest paid by commercial banks to the federal reserve bank of Kansas City as established September 1 of each year).

70. *See generally* Dickinson, *supra* note 68.

trespass; at best, *B* should be made whole and this option should be available only if the property appreciates as a result of *B's* actions.

If *A* cannot produce the deed or other satisfactory evidence of the transfer of title, then *B* would win. *X* was the record owner until his death and transferred his interest in the property to *B* by his will and there is no reliable evidence that would defeat *X's* ownership of title at the time of his death. *B's* ownership derives from *X's* ownership, not from *B's* adverse possession.

### *B. Hypothetical Number Two: The Co-Owners*

*A and B are tenants in common. A is in possession; B is not. X desires to purchase the property. A wants to sell the property to X, but A cannot get in contact with B because B has disappeared and does not want to be found.*

The tenancy in common exemplifies the distinction between possession as a factual state and ownership as a legal relationship. Under the concept of tenants in common, two or more persons each own an interest in the same property at the same time.[71] Each of the tenants in common may transfer or encumber his or her share without notice to or the consent of the other co-tenant. Each of the tenants in common has the right to possess the whole regardless of the fractional share owned by the co-tenant. However, actual possession is not required to maintain ownership status. The co-owners may agree that only one co-tenant will actually and exclusively possess the property. The tenant out-of-possession continues to own her fractional share, maintaining a right of possession: "each cotenant has an equal right to possess the premises as if they were the sole owner and 'nonpossessory co-tenants do not relinquish any of their rights as tenants-in-common when another cotenant assumes exclusive possession of the property.'"[72] Ownership gives a right of possession, but non-possession does not abrogate ownership. The nonpossessory co-tenant can retain ownership without maintaining actual possession.

A tenant in actual exclusive possession can make a claim to ownership of the entire estate by adverse possession.[73] Courts often

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71. 86 C.J.S. *Tenancy in Common* § 1 (2006).

72. DeRosa v. DeRosa, 872 N.Y.S.2d 497, 499 (App. Div. 2009) (quoting Myers v. Bartholomew, 91 N.Y.2d 630, 633 (1998)).

73. For recent cases in which a co-tenant claims adverse possession against another co-tenant, *see* Perkins v. Francis, No. 04-09-00146-CV, 2009 WL 4140034, at *1 (Tex. App. Nov. 25, 2009); Frazier v. Frazier, No. 2008-CA-00555-COA, 2009 WL 1298413, at *1 (Miss. Ct. App. May 12, 2009); Suarez v. Herrera, No. C054242, 2008 WL 4573913, at *1 (Cal. Dist. Ct. App. Oct. 15, 2008).

heighten the burden of proof for adverse possession by co-tenants because exclusive possession by one co-tenant is not indicative of wrongful possession. Exclusive possession by one co-tenant is not atypical and usually occurs with the acquiescence of the other co-tenants: "The possession of a tenant in common is presumed to be the possession of all co-tenants until the one in possession brings home to the other the knowledge that he claims the exclusive right or title."[74] To prove the wrongful possession necessary for adverse possession, the possessory co-tenant must prove that he has ousted the nonpossessory co-tenant.[75] It is not enough that the other co-tenant is out of actual possession; the co-tenant claiming adverse possession must prove that the other co-tenant has been denied the right to actual possession.[76] To show wrongful possession, the co-tenant in possession must intend to adversely possess, must in fact exclusively and adversely possess, and must make known or give notice of that wrongful possession to the co-tenants out of possession.[77] The ouster must be communicated to the nonpossessing co-tenant.[78] An affirmative act is usually required.[79]

Thus, in the hypothetical, if *A* wants to sell the property to *X*, but *A* cannot get in contact with *B*, *A* can only sell his fractional share. *A* has the right to transfer his share without the consent of *B* and without notifying *B*. *X* then becomes a co-tenant with *B*. If *A* wants to sell the entire estate to *X*, he can attempt to locate *B* to get *B* to agree to sell his interest to *X* as well. Alternatively, *A* could also try to establish his sole ownership of the property by adverse possession since he has actually and exclusively possessed the property. However, *A*, as a co-tenant, must meet a more rigorous standard to show adverse possession than he would if he were a stranger to *B*.[80] *A* will need to establish that his possession was adverse and that he ousted *B* and that the ouster was communicated, either by deed or word, to *B*, the nonpossessory co-tenant. Ordinary acts of ownership are not considered adverse;[81] however, acts that constitute permissive possession are not always clearly distinguishable from acts constituting hostile possession when

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74. Barrow v. Barrow, 527 So. 2d 1373, 1375 (Fla. 1988) (quoting Coggan v. Coggan, 239 So. 2d 17, 19 (Fla. 1970)); *see also* 86 C.J.S. *Tenancy in Common* § 45 (2006).

75. 86 C.J.S. *Tenancy in Common* § 40 (2009).

76. W.W. Allen, Adverse Possession Between Cotenants, 82 A.L.R.2d 5, 21-22 (1962).

77. *Id.* at 21-22; 86 C.J.S. *Tenancy in Common* § 42 (2006).

78. 86 C.J.S. *Tenancy in Common* § 42.

79. *See, e.g.*, Parker v. Shecut, 562 S.E.2d 620, 623 (S.C. 2002) (finding adverse possession where locks were changed and no key was given to the non-possessory co-tenant).

80. *See, e.g.*, Preciado v. Wilde, 42 Cal. Rptr. 3d 792, 795 (Ct. App. 2006).

81. Allen, *supra* note 76, at 107.

all co-tenants have a right to possess the whole.[82]

If *A* is awarded title to the whole estate by adverse possession, one must question the fairness of *B*, the nonpossessing tenant, losing an ownership interest simply by failing to actually possess. With a title transfer by adverse possession, one co-tenant's possession is elevated over the other co-tenant's ownership interest. Yet, for *A*, as a tenant in common, to exercise his right to possess the whole, *B* must be able to exercise his right not to possess without fear of losing title through an adverse possession claim. The fullness of ownership in a concurrent estate must include the liberty to be out of possession. Otherwise, the possessory interest is elevated over the ownership interest, an idea incongruent with the concepts underlying concurrent estates.

Without the existence of the concept of adverse possession, the co-tenant who is out of possession will no longer need to second-guess uses by the co-tenant in actual possession to determine if that co-tenant's acts are hostile to his ownership, thus constituting an ouster which could lead to loss of title.[83] If the possessory co-tenant values the actual use of the property more than the non-possessory co-tenant, he can seek to purchase the non-possessory tenant's share; however, in the hypothetical this is not an option because the nonpossessory co-tenant has disappeared.

In the hypothetical, the possessory co-tenant seeks to sell the entire parcel rather than to continue actually using the property. He can force a sale by asking the court for judicial partition of the property. While partition-in-kind is preferred, a court could take account of the long-term absence of the non-possessory tenant and order partition by sale instead.[84] The co-tenant out of possession would no longer have title to the property, but would have a right to the fractional share of the proceeds. Likewise, the possessory tenant would have a right to his fractional share of the proceeds. Partition by sale would settle any concerns about the marketability of the entire parcel while protecting the equity interest of the non-possessory co-tenant. If the non-

82. *See* Bd. of Trs. v. Griego, 104 P.3d 554, 557-60 (N.M. Ct. App. 2004). *Compare* Williams v. Screven Wood Co., 619 S.E.2d 641, 643-44 (Ga. 2005) (finding adverse possession when co-tenants in possession paid the property taxes, farmed the land, and leased portions) *with* Hopper v. Daniel, 38 S.W.3d 370, 374-75 (Ark. Ct. App. 2001) (finding against adverse possession when the co-tenants paid the taxes, sold timber, and leased the land).

83. If ouster is proven, the ousted tenant can bring an action to demand the right to co-possession against the tenant in wrongful actual possession. 86 C.J.S. *Tenancy in Common* § 57 (2006). The ousted tenant may also seek rent from the tenant in wrongful actual possession. *Id.*

84. 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 50.07[4][a] (Michael Allen Wolf ed. 2000).

possessory co-tenant does not want partition, then he would have to "show up" and defend himself.

Scholars have criticized the use of partition because its effects have frequently been to divest minority landowners of title to their property.[85] However, unlike adverse possession, partition does not undermine the ownership interest of the tenant out of possession.

### *C. Hypothetical Number Three: The Squatters*

*A, who does not have a home of his own, enters into a vacant foreclosed house. A squats, maintains the house, and is a good neighbor in every way for the statutory period.*

While the *McLean* case presents a factual situation which reinforces a perception that adverse possession is unfair,[86] the squatter hypothetical seems to present a factual situation in which adverse possession can lead to a fair result. A squatter who prevails on a claim of adverse possession could receive shelter that he might not otherwise have, or as one commentator stated, "someone who does not have a place to live finds one by whatever means necessary."[87] The act of squatting, that is, moving into a vacant housing unit eventually claiming ownership of it, has resurfaced during the mortgage foreclosure crisis. Because of the crisis, squatting is believed to be increasing.[88] Not only have individuals entered abandoned homes seeking shelter, in some cities, advocacy groups have coordinated moves by the homeless into vacant foreclosed homes, even screening the residents before helping them to move.[89] Neighbors of squatters do not necessarily object to their acts as the trespassing residents may clean the property and make repairs to dilapidated structures; their presence may protect against the theft of fixtures, pipes, and wiring.

The squatters may have intentionally entered the property with the

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85. *See* April B. Chandler, *"The Loss in My Bones": Protecting African American Heirs' Property With the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387, 396-97 (2005); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 579-80 (2001).

86. *McLean v. DK Trust*, No. 06-CV-982, slip op. at 1 (Dist. Ct. Colo. Oct. 17, 2007).

87. Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 241 (2006). For a global perspective on squatting, *see* Oliver Radley-Gardner, *Civilized Squatting*, 25 OXFORD J. LEGAL STUD. 727 (2005); Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARV. INT'L L.J. 433 (2003).

88. John Leland, *With Advocates' Help, Squatters Call Foreclosures Home*, N.Y. TIMES, Apr. 10, 2009, at A1; Associated Press, *Activist Moves Homeless into Foreclosures*, MSNBC, Dec. 1, 2008, http://www.msnbc.msn.com/id/28002276.

89. Leland, *supra* note 88, at A1.

idea of residing there temporarily until they are removed by law enforcement.[90] Other squatters may have wrongfully entered pursuant to a lease with someone who does not have any interest in the property but purports to own it to rent it out. Regardless, if the squatter meets the elements of adverse possession for the statutory period, title may be transferred; a squatter is transformed into an owner. The various theories underlying adverse possession may support the awarding of title to the squatter: the squatter who has used and possessed the property has "labored" and made productive use of the land. The squatter values the property more than the record owner who has neither put the property to any use nor monitored it to prevent the wrongful possession by others. The squatter has put down roots that should not be disturbed.

Theoretically, encouraging squatters to acquire ownership of vacant foreclosed homes through adverse possession appears to fulfill the societal goal of "housing for all." Someone who was once without home ownership has acquired ownership through the actual, open use of unused property.

A deeper analysis reveals the problematic nature of providing home ownership through adverse possession. This transfer of title that elevates possession over title ownership does not have the societal benefits of consensual transfers. First, the squatter is placed in a precarious position in attempting to acquire title. The squatter is improving the property without the certainty of record title.[91] At any time before the statutory period expires, the record owner could have the adverse possessor removed as a trespasser; the squatter does not even have the protection of a tenant with respect to eviction and removal. The squatter risks the loss of shelter at a time not of his choosing and is unlikely to be prepared to quickly find other shelter.

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90. A New York court held that squatters did not acquire title by adverse possession since they entered as expectant licensees; since the squatters entered only with the intention of enjoying a free tenancy, they had no claim of right to ownership of the property. Joseph v. Whitcombe, 719 N.Y.S.2d 44, 47 (App. Div. 2001). The court emphasized the intention at the time of the initial occupancy. *Id.* In *Joseph*, a husband and wife, both artists, entered into a home in the Bronx "out of desperation" and remained there for almost seventeen years before an ejectment action was brought by the owner. *Id.* at 45. They installed an artist's studio, directed mail to that address, and made various improvements to the structure. *Id.* Their neighbors appeared happy with their occupancy as they cleaned up the property; the neighbors also had their art work in their homes. *Id.*

91. Peñalver and Katyal assert that improvements in the technology that have resulted in cost reductions for property surveillance make it easier for property owners to eject trespassers who may eventually have an adverse possession claim; the likelihood of a squatter obtaining tile through adverse possession consequently diminishes. Peñalver & Katyal, *supra* note 30, at 1171. They propose a reduced time period for adverse possession. *Id.*

The community is once again faced with the negative consequences of vacant property.[92] Furthermore, the squatter likely lacks the resources to litigate the matter, whether seeking compensation for improvements or seeking a declaration of ownership by adverse possession.

Awarding title of a house to the squatter who meets the elements of adverse possession does not resolve the societal problems of homelessness and of the shortage of affordable housing.[93] The squatter's title itself could be subject to a claim of adverse possession should a trespasser enter it, leaving a squatter who initially lacked the resources to purchase or rent a home once again without shelter if he loses the claim. Moreover, it is unlikely that a squatter would occupy a foreclosed home for the number of years necessary in most jurisdictions to obtain title by adverse possession. Lenders or their agents are likely to quickly enter the property to prepare it for sale, thus removing anyone and anything on the property and ending any claim for adverse possession. But in the rare case where this does not happen, the squatter who gains title through adverse possession would defeat the lender's expectations that it would recover loan funds through the sale of the foreclosed property.

The problem of housing is a societal one requiring broad-based societal solutions. The original owner who lost title to a home through the foreclosure process and the squatter who entered the vacant foreclosed home seeking title through adverse possession are both in need of secure housing. That security cannot be provided by the doctrine of adverse possession.

### *D. Hypothetical Number Four: The Erroneous Deed*

*A owns fifty acres of land. A agrees to sell a two acre parcel of land to B and enters into a purchase agreement with B. The purchase agreement contains an accurate legal description of the two acre parcel. The attorney handling the transaction makes an error when transcribing the legal description. As a result, a portion of the two acre*

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92. Some cities have attempted to monitor absentee landowners through ordinances regulating vacant buildings. For example, the City of Wilmington, Delaware, has an ordinance requiring the annual registration of vacant buildings. *See* WILMINGTON, DEL., CODE ch. 4, § 4-27 (2003). One of the purposes of the ordinance is "to assess the effects of the condition of those buildings on nearby businesses and the neighborhoods in which they are located, particularly in light of fire hazards and unlawful, temporary occupancy by transients, including illicit drug users and traffickers." *Id.*

93. Urban squatting movements in the 1970s had a variety of motives, including protesting the government's failure to provide affordable housing as well as providing shelter for the homeless. Peñalver & Katyal, *supra* note 30, at 1125-26. In Europe, squatting movements were viewed as a form of artistic expression. *Id.* at 1126 n.145.

*parcel is omitted from the deed transferring the parcel from A to B. A delivers the deed to B; B accepts the deed and pays the consideration stated in the purchase agreement with A. B enters the parcel and occupies it. Many years later, B discovers the error. A is dead and A's estate has been probated and closed.*

Under adverse possession, if *B* proves all of the elements, *B* would acquire title to the omitted portion of the parcel ("Omitted Land"). This result is likely inoffensive to most people. *A* intended to transfer title to all of the two acres; *B* thought that he was paying for all of the two acres and the only reason *B's* deed does not reflect the intentions of *A* and *B* is because the attorney made a drafting error. Moreover, the hypothetical does not raise any conflict of interest between *B* and a third-party who has expectations of ownership in the Omitted Land.

So, if *B* is in an adverse possession jurisdiction and prevails on his claim, *B* can quiet the title and everyone is in the position where they intended to be at the time of the original transfer. However, if *B* does not prevail on his adverse possession claim, *B's* ownership expectations in the Omitted Land are defeated as are *A's* intentions at the time of transferring the deed to *B*. Thus, adverse possession is not certain to resolve the problem created by the erroneous deed. Moreover, the doctrine does not reflect the reality of the transaction between *A* and *B*.

*B* actually acquired equitable title to the two acre parcel, which included the Omitted Land, by entering into the purchase agreement with *A* pursuant to the doctrine of equitable conversion.[94] A continues to have legal title but holds it in trust for *B*. Thus, *B* is deemed to hold the equitable title during the executory period and upon closing, *A* transferred to *B* the legal title to that portion of the two acre parcel described in the deed. Though the deed erroneously left out the Omitted Land, *B* will most likely be treated in equity as having owned the entire two acre parcel and can therefore sue in equity to correct or reform the deed.[95] According to the hypothetical, there is an inadvertent mistake of fact by the attorney;[96] the mistake caused the deed to inaccurately reflect the intentions of *A* and of *B*. The deed was otherwise correct in its formalities. In equity, *B* would likely succeed on these facts in a suit to reform the deed.[97]

Without adverse possession, *B* can obtain judicial relief and have

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94. WILLIAM B. STOEBUCK & DALE A. WHITEMAN, THE LAW OF PROPERTY 786-87 (3d ed. 2000).

95. *Id.* at 815-16.

96. Inadvertent error that causes the deed to inaccurately reflect at least one party's intentions may be cured by reformation of the deed in equity. *Id.* at 815-16.

97. Most jurisdictions require clear and convincing proof. *Id.*

clear title to the Omitted Land. His recourse would be in equity and *B* would secure this relief by relying upon his equitable title and not on claims of wrongful possession, the foundation of an adverse possession claim.[98] Cognitively, *B's* suit for deed reformation recognizes *A's* legal title and *A's* transfer of equitable title to the parcel, including the Omitted Land, through the purchase agreement with *B*. *B's* reformation suit is a better reflection of the consensual transaction between *A* and *B*. The source of his entitlement to reformation of the deed is the equitable title *A* transferred to *B*. An adverse possession claim by *B* would not recognize his equitable title. To the contrary, to be successful under an adverse possession theory, *B* would have to, in essence, *disclaim* ownership of the Omitted Land. Instead, *B* would have to argue that he was in hostile possession of the Omitted Land which was owned by *A*.

Adverse possession, under these facts, encourages *B* to undermine his own title in order to quiet title to the Omitted Land. Further, the multi-faceted, ad hoc inquiries that are unavoidable in an adverse possession action are less likely to surface in a reformation suit. Certainly, in a reformation suit one would have to inquire into what the parties intended, but likely, there will be written documents such as the purchase agreement and other communications between the parties that will help reveal the intentions of the parties. Why permit such an uneasy course of action, that is, the use of adverse possession, when the law already provides mechanisms for addressing the problem of the erroneous deed.

## CONCLUSION

Adverse possession provided a way of clearing title and creating new landowners during America's early history when possession was the best indication of ownership. With advancements in the ease of recording, increases in literacy, and better surveying technologies, adverse possession has become more of a hindrance than an aid in securing property titles. The *McLean* decision is a present call for the abolition of adverse possession and greater protection of legal title.

98. Adverse possession begins with a trespass and the true owner protects his title by suing in ejectment to terminate the trespass.

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