ADVERSE POSSESSION: PRACTICAL REALITIES AND AN UNJUST ENRICHMENT STANDARD

by

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I. INTRODUCTION

“For true it is that neither fraud nor might can make a title where there wanteth right.”

“Possession is very strong; rather more than nine points of the law.”

All first year law students learn about adverse possession. It shocks many, setting their minds racing to thoughts of beautiful uninhabited rural properties that might be theirs in spite of their student loans; the doctrine seems to provide a legal way to get something for nothing. The doctrine allows that after continuous possession for a period of time defined by statute, commonly between five and twenty years, a trespasser may gain ownership of the land, extinguishing the rights of the landowner of record. Most adverse possession cases are, however, much more mundane than the law student’s dream, generally involving boundary disputes between neighbors. Nevertheless, the ability to shock remains, as several recent cases across the United States illustrate.

These cases have encouraged news media to write and broadcast stories about adverse possession; local residents to demonstrate against adverse possession statutes and those who have used them to their advantage; and state legislatures to write bills that change or eliminate existing adverse possession statutes. Many academic articles have analyzed the doctrine, offering a variety of rationales for it and suggestions for tweaking its application. More is required, however, when there is a public perception that the law is unfair and encourages thievery, unfair surprise, and unjust enrichment.

In the next section, this article will briefly describe the purposes and history of the adverse possession doctrine and its relevance to modern day situations. The third section will discuss the recent problematic cases. In section four, the article reviews various ideas that have been suggested for reforming the doctrine and title recording and registration systems. Section five discusses fairness, unjust enrichment, and unconscionability in the context of the problems of adverse possession. The article concludes that the adverse possession doctrine should be tempered by the application of an unjust enrichment standard.

II. THE DOCTRINE OF ADVERSE POSSESSION

A. History and Requirements

1. England

The first notable statutory reference to landowners being barred from recovering their land from a trespasser was in England’s Limitation Act of 1623. It imposed a limitation period of twenty years after which time the owner could not oust a trespasser even though the owner did not lose title to the property. The common law courts in England developed the doctrine of adverse possession between 1623 and 1833 allowing the ouster of a true owner only by another’s possession of the property that was clearly inconsistent with the true owner’s interest. As a practical matter, the doctrine created many problems with title, rendering many unmarketable, and so the Real Property Commissioners in England proposed some changes which were enacted in the Real Property Limitation Act of 1833. Under the 1833 Act, actual possession extinguished all the owner’s rights, and title passed to the possessor whether the possession was adverse to the interests of the owner or not. The purpose for developing this rule, which in effect substituted a “possession” doctrine for the “adverse possession” doctrine, was “for the public good” by making the alienation of land easier, more consistent, more certain, and cheaper. The Real Property Limitation Act of 1874 reduced the limitation period during which the true owner could remove a trespasser to twelve years. Around the same time, the English Parliament also established the first land registry system. Land registration is an important alternative in judging the appropriateness of an adverse possession doctrine and will be considered in section four of this article.

In 1879 the English Court of Appeal resurrected the adverse possession doctrine that the 1833 Act had abolished. The court held that in order for a trespasser to become the owner of property through use of it, the trespasser’s acts must be

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“inconsistent with [the owner’s] enjoyment of the soil,” a trespasser’s use that did not interfere with the owner’s use was not sufficient to oust the owner. The term “adverse possession” appeared in the statutes again in the Limitation Act of 1939. Parliament reiterated the twelve-year limitation period for recovering land adversely possessed in the Limitation Act of 1980. Parliament made the most dramatic change in recent English law concerning adverse possession in the Land Registration Act of 2002. It, in effect, requires notice to true owners so that they can act to protect their property if an adverse possessor brings an action to quiet title, markedly decreasing the chances of an adverse possessor acquiring title to the property without paying for it.

There has been jostling back and forth with the details of adverse possession rules in England because, while its purposes seemed appropriate for the general welfare, its specific application often seemed unfair. The European Court of Human Rights, in considering whether a United Kingdom court decision favoring adverse possessors (who were in possession for the statutory period prior to the enactment of the 2002 Land Registration Act) adhered to the European Union’s Convention for the Protection of Human Rights and Fundamental Freedoms, noted that the adverse possession doctrine with a twelve-year limitation period serves a legitimate general interest in ensuring legal certainty and finality, protecting defendants from stale claims, preventing injustice from unreliable and incomplete evidence, and giving more weight to “lengthy, unchallenged possession” than to formal land ownership. The Convention allows that

Every . . . person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest . . . . The preceding . . . shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.

Thus, the European Court has given its imprimatur to the adverse possession doctrine as long as there is a case to be made that it protects the public interest.

The English High Court has also noted that the adverse possession doctrine and its statute of limitation advance the public interest by encouraging the use of land and protecting an adverse possessor who has used land for a long time in reliance on inaccurately placed fences or other boundary markers. Despite these accepted purposes, there is a great deal of litigation both in England and in the United States involving adverse possession because the modern relevance of those purposes is moot and the application of the doctrine in specific situations can create great and surprising loss for landowners of record.

2. United States

General ideas about adverse possession in the United States are based on English law. Nevertheless, perhaps because owning land was so important to colonists in the United States and there was a lot of vacant land and frequent disputes about ownership, nineteenth century U.S. common law developed somewhat differently. Whereas the 1833 English act gave the advantage to land possessors, U.S. judges tended to favor the titled owner. For example, in 1806 Justice Spencer of the New York Supreme Court opined that “strict proof [of a hostile claim of title] has always been required” to bar the recovery of land by a titled owner from a claimant in possession. The requirement of “strict proof” has developed into a clear-and-convincing-evidence standard of proof for all elements of the adverse possessor’s case in all states. The U.S. Supreme Court has described the clear-and-convincing-evidence standard as requiring the creation of “an abiding conviction [in the fact finder] that the truth of [the] factual contentions are ‘highly probable.’” This burden makes the adverse possessor’s case significantly more difficult to prove than the usual civil case.

How difficult the adverse possessor’s case is depends on the state where the property is located. Although the basic features of the adverse possession doctrine are similar in all states, specific elements vary from state to state. Generally, the adverse possessor’s use must be open and notorious; exclusive; adverse or hostile or by claim of right; and continuous and uninterrupted for the statutory period. Mississippi adds “peaceful” to the list, requiring adverse possessors to prove that their possession has been unchallenged. Indiana has “modernized” the list by renaming the elements “control” (exclusive), “intent” (claim of right, hostile, adverse), “notice” (open and notorious), and “duration” (continuous), and adding a requirement that the person claiming ownership through adverse possession has paid the real estate taxes on the property in question. Several other states also require that the adverse possessor have proof of having paid the real property taxes on the property during the time of possession.

Differences in the statutory limitation period for ousting an adverse possessor, in particular, can give a greater or lesser advantage to the party seeking ownership through adverse possession. There is wide variation among the states in the number of years of continuous, notorious, and hostile possession the adverse possessor must prove in order to gain ownership of the titled owner’s property. It is three years in Texas; five years in California, Montana, and Nevada; seven years in Alaska, Arkansas, Florida, Georgia, Tennessee, Utah, and Washington; ten years in Alabama, Iowa, Mississippi, New Mexico, New York, Oregon, and Rhode Island; fifteen years in Connecticut, the District of Columbia, Kansas, and Michigan; eighteen years in Colorado; twenty years in Delaware, Idaho, Illinois, Maine, Maryland, North Carolina, North Dakota, and South Dakota; twenty-one years in Pennsylvania; thirty or sixty years in New Jersey depending on whether the land is cultivated (thirty) or not (sixty).
B. Purpose

Over the years, many purposes have been advanced for the adverse possession doctrine. A primary purpose has always been to settle land titles and bar stale claims. This was important so that land owners, land purchasers, and creditors could feel more secure about land investments, thus encouraging the alienability of land. A second reason for the doctrine was to discourage landowners from sleeping on their rights. This reason not only advanced the first purpose but implied a punishment for the lazy landowner. Third, the doctrine was viewed as encouraging the best use of the property. This reason also implies wrongdoing on the part of the landowner for allowing land to lie fallow and unattended. Fourth, the doctrine was used to settle boundary disputes. Fifth is Lord Mansfield’s idea, captured in the second quote at the beginning of this article, about the power and importance of possession.

Given the public dissatisfaction with the adverse possession doctrine as indicated in connection with the cases described below, do any of these purposes make sense any longer? Probably not, and many scholars have come to that conclusion. Today, given computerization, it is relatively easy and inexpensive to determine who has record title, so that purpose does not justify the adverse possession doctrine. Furthermore, adverse possession makes alienability more problematic because potential buyers and creditors do not know if titled owners have potential adverse possession claims against them. Similarly, technological advances such as Global Positioning Systems make surveys easier and cheaper to do, providing a better solution to boundary disputes than adverse possession.

The conviction that developing land in some way is a higher or better use than doing nothing with it is also anachronistic. In the early days of the United States, it was reasonable for a “highest and best use” analysis to focus on economic concerns and profitability which generally meant the most development. In a market like the one we have today in many areas of the country, the “highest and best use” of a piece of property may be merely to hold it to wait for a future better market. Moreover, today an argument can be made that “highest and best use” should emphasize environmental consequences. Thus, perhaps the titled owner who is not “using” the land is being civic-minded and responsible and should not be punished by giving an advantage to a trespasser. In fact, some states have recognized, in their rules for taxing real property, the importance of land for its environmental possibilities, not merely for its economic value. California and Minnesota, for example, reduce property taxes under certain circumstances if wetlands are undisturbed, native prairie is not used for grazing, or land is left as open space.

Lastly, Lord Mansfield’s idea that actual possession of land is much more powerful than mere ownership of land has been reiterated by Justice Oliver Wendell Holmes, Judge Richard Posner, and others, as a justification for the adverse possession doctrine. Although the power of possession may trump the interest of the titled owner in some cases, it would be hard to make the argument convincing for the Colorado case that follows.

III. Recent Problematic Cases

A. Colorado

The case that received the most national as well as local publicity involved a dispute between neighbors in Boulder, Colorado. The Kirlins bought the lot at issue in 1984 for $55,000. The lot was several blocks from their home, had spectacular mountain views, and they hoped to build a “dream home” there some day. Richard McLean, a former mayor and judge in Boulder, and his wife, a lawyer, lived next door to the Kirlins’ lot and for twenty-five years used about 1,400 square feet or one third of it as a garden and as a walkway to their backyard patio. They also kept a wood pile on that property and had regular social events there. When the Kirlins realized in 2006 that their land was being used, they started to put up a fence. McLean got a restraining order to stop the fence installation and, in October 2007, a Boulder District Court judge awarded the property to McLean based on his adverse possession for more than the eighteen year statutory period. The Kirlins claimed that before the trial, they attempted mediation during which they offered to sell part of the property to McLean. They claimed the appraised value of the entire lot was $1 million, and therefore, the price of the piece that McLean was using was about $300,000. The Kirlins also claimed that they offered to give McLean an easement so that he could walk over the property to get to his backyard. Instead McLean went to court to quiet title in his favor and won.

The Kirlin case caused a firestorm of criticism of the Colorado justice system and the adverse possession rules that would permit such a perceived injustice. Hundreds of protesters amassed to protest the court’s decision. The idea that land owners who paid taxes on their property for many years and were looking forward to building on it some day could have that property given to strangers was shocking. The anger was probably exacerbated by the fact that the adverse possessors were lawyers who knew that the land was not theirs but that if they used it for eighteen years as though it were, openly and without permission from the owners, property worth several hundred thousands of dollars could become theirs for nothing.

The outcry was so widely publicized that the Colorado legislature acted almost immediately to change the adverse possession law. The proposed bill has passed in the Colorado House and Senate and is awaiting the Governor’s signature. The bill makes three changes in Colorado adverse possession law. First, it specifies that the burden of proof for the adverse possessor is to prove each element of the claim “by clear and convincing evidence.” Second, it makes an adverse possession claim unavailable to the “bad faith” possessor by requiring that “the person claiming by adverse possession or a predecessor in interest . . .
context. The notes to the bill describe its purpose as preventing "the situation where ‘the person knew the whole time that he didn’t own the property and he intentionally took it.’ The Colorado Legislature is clearly responding as the public did to the Kirlin case.

B. New York

The New York Legislature also passed a bill last year that would have precluded adverse possessors who knew that another was the true owner from gaining title to the property, but then-Governor Spitzer vetoed the legislation. The Legislature’s action was in response to a case decided by the New York Court of Appeals, Walling v. Przybylo. The result in Walling was the same as in the Colorado Kirlin case; the Wallings, the adverse possessors, were awarded land that belonged to their neighbors.

The Wallings and Przybylos had purchased adjoining unimproved lots on which they each built a home and a swimming pool. The Wallings built their home several years before the Przybylos built theirs and, before the Przybylos arrived, the Wallings deposited fill and topsoil on the Przybylos’ property, constructed an underground dog fence there, cared for lawn there, installed sixty-nine feet of PVC pipe, and installed a birdhouse on a ten-foot long post. Seventeen years later, the Przybylos had the land surveyed, discovered that they owned the strip of property in dispute, sued to quiet title, and lost. This case does not seem as egregious as the Kirlin case because there was some question about whether the Wallings (unlike McLean), as well as the Przybylos, thought the disputed property was theirs. Furthermore, the Przybylos’ plans for the property where they had lived for almost ten years and its value were not being severely compromised as was the case for the Kirlins. Nevertheless, the case created significant public concern that unsuspecting landowners, especially in rural areas, could lose their land to unscrupulous trespassers.

Concern was encouraged by the Court of Appeals’ short and straightforward opinion. The court recounted the basic common law rules in New York: [a]dverse possession must be proven by clear and convincing evidence;” and “[p]ossession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period.” The court also noted that the Wallings had satisfied the ten-year statutory period. Most disturbing was the court’s iteration of “the principle, well established since the nineteenth century, that an adverse possessor’s actual knowledge of the true owner is not fatal to an adverse possession claim.” In other words, a “bad faith” trespasser can oust an innocent titled owner, the one getting something for nothing, the other losing something of, perhaps, great value.

The New York Assembly specifically noted that its bill was designed to address the holding in Walling because “[p]roperty rights should not be subject to trickery and deceit.” Then-Governor Spitzer, in vetoing the bill, declared that the change requiring an inquiry into the intent of the adverse possessor would cause “extensive litigation of virtually every adverse possession claim.” The Governor’s explanation is probably hyperbolic; intent is not an unusual element in legal claims, and proving that one acted in good faith when one made an innocent mistake should not be particularly difficult.

C. Rhode Island

The adverse possession case in Rhode Island that has given rise to a great deal of publicity and has encouraged legislation changing the statutory period is the most problematic of the three cases discussed here in terms of fairness. The Ericksons moved into their house next door to the Friedmans in 2001. In 2004 the Ericksons had their property surveyed and discovered that a fence the Friedmans had installed in 1987 was enclosing 2,500 square feet of the Ericksons’ property, and the Friedmans had been paying the taxes on it. The Friedmans sued to have the disputed property declared theirs by adverse possession. Because this case has not yet been litigated, there is no public information indicating with any reliability whether or not the Friedmans knew they did not own the fenced property. Nevertheless, an argument can be made that when the Ericksons bought their house, they should have asked the seller for a property survey or had one done themselves. Furthermore, the Friedmans had been enjoying the use of this property for seventeen years, and the Ericksons were content to purchase their house, thinking that the disputed property was not theirs and that their taxes were fair enough. This case might be a good example of Mansfield’s, Holmes’s, and Posner’s “power of possession” theory, arguing for the maintenance of the adverse possession doctrine as is. On the other hand, even if trickery is not involved, people generally feel dissatisfied when one person gets something valuable for nothing at the expense of a relatively innocent other.

Some in the Rhode Island Legislature are persuaded by the latter point of view and the Erickson/Friedman situation and have acted to provide additional protection to title holders. Unsuccessful bills amending Rhode Island’s adverse possession law have been submitted in both the House and the Senate over the last several years. The 2008 version requires adverse possession claims to be made in good faith (that is, not knowing that someone else is the owner of the property in dispute) after possession of fifteen successive years (instead of the current ten) during which time the adverse possessor has paid the taxes on the disputed property.
IV. IDEAS FOR REFORMING ADVERSE POSSESSION LAW

A. Theories

Many commentators have written about problems with the current U.S. approach to adverse possession, but they do not agree on what the problems are and some of the solutions are in diametric opposition.\textsuperscript{cxxxiv} A major area of disagreement has to do with the intent of the adverse possessor. Generally in the United States, neither state statutes nor common law require adverse possessors to have acted in good faith, although there is legislative movement in that direction as indicated above in Colorado, New York, and Rhode Island.\textsuperscript{cxiv} In civil law systems, there has generally been a distinction between good and bad faith possession.\textsuperscript{cxxxv} For example, in France and Belgium the statutory period for adverse possession is ten years for the good faith possessor, but thirty years for the bad faith possessor.\textsuperscript{cxxxvi} In Italy the title holder has twenty years to oust a bad faith possessor, but only ten years if the person in possession of the property has been acting in good faith.\textsuperscript{cxxxvii} In fact, one widely cited study determined that in adverse possession cases in the United States, courts tend to rule in favor of the good faith trespasser and against those in possession who knew that someone else was the owner of the disputed property.\textsuperscript{cxxxviii}

Professor Stake opines that the adverse possession doctrine is worth keeping because “depriving people of lands they have long occupied . . . would cause them too much pain,” but “fairness demands that [the adverse possessor] compensate [the real owner] because [the adverse possessor] knows she is in the wrong.”\textsuperscript{cxxxix} On the other hand, Professor Fennell asserts that only the bad faith possessor should be able to claim ownership by adverse possession.\textsuperscript{cxxxx} Following that protocol, she declares, would accomplish the only remaining useful goal of the adverse possession doctrine, namely, to give ownership to the one who values the disputed property more highly when the parties’ valuations are very disparate and a market solution is unavailable (because the owner will not sell).\textsuperscript{cxxxxi} Professor Fennell would add two requirements to the adverse possession doctrine to accomplish the stated goal: (1) to acquire property through adverse possession, trespassers must know they are trespassing, and (2) they must document that knowledge when they first trespass by offering to buy the property from the landowner.\textsuperscript{cxxxxii} These requirements would add the element of “documented knowledge” to the adverse possession requirements.\textsuperscript{cxxxxiii} Professor Fennell recognizes the moral objection to advantaging the “bad faith” possessor but justifies the position by asserting that it encourages the efficient transfer of property which is the only remaining purpose of the adverse possession doctrine.\textsuperscript{cxxxxiv} Her argument is reasonable to the extent that it dismisses the historical reasons for the doctrine as no longer being useful; however, it is unreasonable to support a change in the law that would specifically support the “land thief.”\textsuperscript{cxxxxv} Economists have often dismissed notions of fairness and morality in the law in favor of efficiency,\textsuperscript{cxxxxvi} but if a legal system is to work, then citizens must respect it as being fair. Lay people are more concerned about fairness than efficiency, as the public reaction to the Kirlin case in Colorado illustrates.

Professors Merrill and Smith have proposed the unusual, but eminently reasonable, association of property law and morality.\textsuperscript{cxxxxvii} They assert that because the protection of property rights requires coordinating the behavior of large numbers of strangers, both the law and “[s]elf-help, such as erecting fences and hiring guards, are not adequate to insure the necessary widespread compliance.”\textsuperscript{cxxxxviii} It is essential to the whole notion of property, therefore, that people have “automatic prelegal intuitions that it is wrong to violate property rights, especially by stealing, crossing boundaries, and interfering with possession.”\textsuperscript{cxxxxix} The public reaction to the cases in Colorado, New York, and Rhode Island suggest that, in fact, people do have the perception that taking someone else’s property without paying for it and without their permission is wrong and, if the law allows it, then the law is wrong, unfair, and should be changed.

As an alternative to having the adverse possession doctrine apply only to the “land thief,” Professor Fennell suggests eliminating the doctrine completely.\textsuperscript{cxxxv} That position would probably have many supporters but, as a practical matter, it would not happen very quickly. Probably the best method for eliminating the adverse possession doctrine would be to convert from a recording system to a registration system but, as discussed below, that is unlikely to happen. Therefore, a stop-gap arrangement is needed to eliminate the most serious negative aspect of adverse possession, namely, the perception of unfairness.

B. Recording and Registration Systems

The recording system is the predominant system in the United States for protecting landowners’ rights.\textsuperscript{cxxxvii} The earliest known record of a deed in the future United States was in Plymouth, Massachusetts in 1627.\textsuperscript{cxxxviii} In 1640 the Massachusetts Bay colony adopted a detailed recording act.\textsuperscript{cxxxix} Under this system, property owners file records of title in a local county clerk’s office which maintains a public record of real property transactions.\textsuperscript{cxxxx} Thus, there are more than 3100 separate title recording systems in the United States.\textsuperscript{cxxxxi} The systems do not guarantee the legal effect or the accuracy of the data, and missing data is the responsibility of the landowner. Furthermore, not all claims against land are recorded in the system; for example, judicial liens are recorded elsewhere.\textsuperscript{cxxxxii} Therefore, title abstract companies and title insurance companies have become major parts of the U.S. real property regimen.\textsuperscript{cxxxxiii} They maintain title data bases which may be more complete and more accurate than those held by the government.\textsuperscript{cxxxxiv} Each new owner wanting to protect his or her property purchase will buy a new title search, title abstract, and title insurance.\textsuperscript{cxl} Professor Barnett notes how expensive this system makes property transactions.\textsuperscript{cxl} In addition, title insurance does not provide total protection. Most policies have broad exclusions including those for adverse possession claims and problems that a survey or inspection would reveal.\textsuperscript{cxxi}
Responding to the burden and expense of the recording system in the British Empire, Sir Robert Torrens in 1858 in Australia created what is universally called the Torrens System of Land Registration. The purpose of Torrens' land registration system is to provide a method for making title to land certain, indefeasible and readily ascertainable. In 1898 the Massachusetts General Court created what since 1904 has been called the Land Court to administer the Massachusetts version of the Torrens registration system. In the Massachusetts system, the Land Court has a court-appointed examiner search the title of an applicant and gives all interested parties the opportunity to contribute information for its deliberations. The Land Court has a Survey Division that prepares surveys and plans for an original registration, paid for by the private applicant seeking to quiet title. After reviewing all the data, the Land Court decrees the state of the title and guarantees it. That is the important difference between a recording system and a registration system. Registered owners have no need of private title insurance because they will retain title even if a “true owner” surfaces. “True owners” will not get title to the registered property but may be compensated through a government insurance system funded by registration fees. The registration system also eliminates the copying of documents and examination of long chains of past transactions because proof of ownership is accomplished merely by recording a certificate of ownership issued by a land court or registrar and giving a copy to the owner. Although registration seems to have worked well in parts of Massachusetts, even where it has been used the most, registration has never accounted for more than twenty percent of the land or ten percent of land values.

The Torrens system went into effect in New York State in 1910 and it was terminated in 1997. From its beginning to its end, it was the subject of intense lobbying by those with economic interests at stake. By 1910 the Torrens Land Company had been created and it was incorporated in 1916 to act as a real estate broker for Torrens-registered properties and to secure mortgage loans on Torrens certificates. In describing the system’s advantages, a company spokesperson in 1910 noted that under the Torrens registration system only one search of title was necessary because after the first transfer of a piece of property, title is established forever. To transfer the property again, the owner has merely to execute and deliver the deed, surrender to the county Registrar the duplicate certificate originally issued by the State, and pay a nominal fee to the Registrar who then issues a new certificate to the new owner. On the other hand, the New York State Assembly’s memorandum to support the legislation eliminating the Torrens system described it as “outdated and inefficient.” The executive of Suffolk County, which has the largest number of Torrens parcels in the United States, urged its elimination citing the expense of maintaining it and the fact that it was unnecessary because it duplicated the county’s recording system. The duplicative nature of the two systems, not any positive attributes of recording systems, is the most common reason for eliminating Torrens registration although, in fact, that problem could also be overcome by ending the recording systems. That solution does not, however, have large groups of strongly motivated advocates; most of the advocates are individuals writing in academic journals.

In general, registration systems have been unsuccessful in the United States, local governments preferring, instead, to maintain their recording systems. Once a government system is created, a political bureaucracy develops that is intent on maintaining itself. Furthermore, most of the states that embarked on a registration system did not provide for separate space or personnel for registration, requiring the recording staff to do registration in addition to their former duties. Staff in registration offices also might have had some difficulty explaining the program to citizens. Soon after the enactment of the registration statute in New York, some attorneys started to advertise their ability to make bad titles good which reflected negatively on the registration system. The purpose of the system was, of course, to create a form of registration for good titles, not to create a method for making bad titles good.

Registration statutes were enacted in about twenty states, but they were repealed in at least half of them, and remain in substantial use in only Hawaii, Minnesota, and Ohio, in addition to Massachusetts. The lack of popularity is attributable in part to the expense of the original registration and the longer time involved in the process of registration. States also incorporated a wide variety of exceptions in their registration statutes, eliminating some of the advantage of certainty, as did problems of errors such as overlapping and duplicate registrations. A committee in Cook County, Illinois was commissioned to report on the Torrens system and concluded that there was neither the funds nor the expertise to run an adequate system. One commentator has reasonably concluded that probably the primary reason for the failure of the Torrens system in the United States is that it has never been compulsory as it is in other countries. Indeed, it has to compete with a recording system that has largely been privatized and, thus, has strong advocates in the legal community, title abstract businesses, and title insurance companies. Therefore, it is highly unlikely that the United States will change to using a title registration system like most of the rest of the world does. That would be the simplest and best way to eliminate the hardships and surprises of the adverse possession doctrine. The more realistic goal is to temper injustices created by the doctrine.

V. FAIRNESS AND THE PERCEPTION OF FAIRNESS, UNJUST ENRICHMENT, AND UNCONSCIONABILITY

A. Fairness and the Perception of Fairness

Being fair and creating a perception of fairness have always been important elements in our legal system. Professors Paternoster, Brame, Bachman, and Sherman did an empirical study of suspects arrested for spouse assault that suggested that perceptions of unfair procedural due process would decrease confidence in the legal system and increase the likelihood of future criminal behavior. They concluded that fair procedures increase compliance with the law even when compliance is perceived
as opposing one’s self-interest. Fairness also makes people feel better about their experiences with the law and legal authorities. In studies about arbitrators’ awards in automobile accident cases, investigators found that recipients were more accepting of the arbitrators’ judgments if they perceived the process to be fair. Studies have also shown that when people perceive courts as being fair, the respect they have for courts and the legal system increases markedly. Contrarily, when people think the courts are unfair, their perceptions of the legal system are negative and may make them less likely to obey the law.

One commentator has argued that if the music industry wants to discourage infringements of its copyrighted music, it should mount a public relations campaign to encourage its fans to perceive it as fair; if fans perceive it as fair, they will be more willing to follow the rules. Studies of business methods have shown that workers who are disadvantaged by company changes, even those who know they will be laid off, accept the changes and cooperate if they perceive company processes as fair.

The biggest problem with the adverse possession doctrine is that it can produce results that people perceive as completely unfair. That is what happened in the Boulder, New York, and Rhode Island cases discussed above. The results of taking away property from owners of record who have, in the eyes of lay observers who have never heard of adverse possession, done nothing wrong, encourages those observers to react negatively to the law and to their neighbors who are the adverse possessors.

B. Unjust Enrichment

Not only did these cases cause observers to see innocent people being violated by the law, but guilty people being rewarded. A Boulder observer described the case as “legal theft.” Such conclusions undermine confidence in the law in general. Recognizing that, the law has always attempted to prevent “unjust enrichment.”

The concept of unjust enrichment appears in Roman law and early French and German law. It generally applies when one party receives a benefit to the other party’s detriment in violation of the principles of justice, equity, and good conscience. Although quasi-contract, which is closely associated with the development of unjust enrichment, is historically a legal issue, unjust enrichment has long been viewed as an equitable issue, an issue of fairness. It is a principle that can be applied when legal rules produce results in particular cases that appear unfair. For example, one commentator has suggested that the principle of unjust enrichment is too often “underutilized” and “overlooked” and should be used by consumers who are the victims of price-fixing when the law does not provide them with a fair or adequate remedy. This use of unjust enrichment could be particularly important in evaluating the doctrine of adverse possession because the reasons for it are, for the most part, anachronistic, elevating the importance of fairness.

If unjust enrichment is viewed as “a principle of individualized, fact-specific decision-making, capable of overriding otherwise applicable rules,” it could have been applied in the Boulder case without rebuffing the doctrine of adverse possession as a general rule. The appropriate way of looking at that case would have been to apply the rules of adverse possession, and then to have taken note of 1) McLean’s knowledge that he was trespassing on the Kirlins’ property; 2) McLean’s failure to ask permission to use Kirlins’ property or to offer to pay for that use; 3) McLean’s taking advantage of his professional knowledge of the rules of adverse possession; 4) no existing issue of the Kirlins’ title to the property; 5) the Kirlins’ intent to use the property in the future; 6) no issue of “higher use” of the property by McLean; 7) the Kirlins’ payment of taxes on the property in question for the entire time of their ownership and McLean’s not having paid taxes on it; and 8) the high value (perhaps $300,000) of the property at issue that the Kirlins’ would lose and McLean would gain without making any payment. After such an analysis, the court would have concluded that, in spite of satisfying the requirements of the adverse possession law in Colorado, the ownership of the property should remain with the Kirlins unless McLean was willing to pay them the market value of the property and reimburse them for the taxes they paid during McLean’s years of possession. This decision would respect the adverse possession rules by giving McLean an opportunity to continue in possession of the property, but it would respect the doctrines of fairness and unjust enrichment by not allowing McLean to have this valuable piece of property for nothing and by not punishing the Kirlins so severely when they acted the way any reasonable citizens would and did not act to the detriment of society in general.

Seavey and Scott, the Reporters for the original Restatement of Restitution, opined that one “person is not permitted to profit by his own wrong [that is, be unjustly enriched] at the expense of another.” The broad proposition of seeing unjust enrichment “as a more general authorization for courts to depart from legal rules when the rules produce unjust results – an authorization that would cut across the substantive fields of private law,” was articulated by Professor Sherwin in connection with the field of restitution. She noted that the notion of preventing unjust enrichment is “useful as [an] outlet[] for common sentiments of comparative justice. This analysis is particularly applicable to the doctrine of adverse possession; however, individualized decisions can be problematic because of the possibility that the rule will disappear under ad hoc decision-making. If that were to happen to the adverse possession doctrine, it might be a good thing. The doctrine as discussed above does not any longer serve the purposes for which it was intended; nevertheless, suddenly eliminating it without a simultaneous movement to a registration system would create new problems of ownership. On the other hand, registration systems have been rejected or at least under-utilized in places they have been tried in the United States. Having the rules of adverse possession bounded by an unjust enrichment standard would eliminate the perception of unfairness that adverse possession decisions have engendered in observers. This use of the unjust enrichment principle would be in keeping with its interpretation as a vehicle for “cover[ing] conduct that was morally wrong although sanctioned by law.”
In addition to the problem of subsuming the legal doctrine of adverse possession by an equitable application of unjust enrichment, the more important problem is the issue of vagueness, but that is inevitably problematic in making judgments about fairness. In the situations presented in the Boulder, New York, and Rhode Island cases, lack of fairness is arguably a more important problem than having the law make no attempt to be fair. An appropriate time for the rules of adverse possession to be limited by unjust enrichment occurs when strict adherence to the legal rules would be harsh or oppressive, creating unfair surprise and hardships for title holders by violating their reasonable expectations.

Our society no longer considers letting land lie fallow to be imprudent, unproductive, or unreasonable. In fact, it is common knowledge that farmers are given monetary incentives not to use their land under certain circumstances. Furthermore, many localities buy, at taxpayer expense, parcels of land for the specific purpose of keeping them undeveloped. Given such situations, it is unreasonable to expect landowners to be aware of a doctrine premised on the anachronistic notion that use of land is more highly valued than nonuse, especially when there is no issue about who is the titled owner.

C. Unconscionability

Unconscionability could also serve as a limitation on adverse possession. Unconscionability is generally associated with contracts that shock the conscience, are overly harsh, and are exceedingly callous. There is clearly an overlap between the notions of unjust enrichment and unconscionability. Unconscionability is also identified with situations in which the application of legal rights results in hardship to others by being harsh or oppressive and violating their reasonable expectations.

Nevertheless, unjust enrichment may be the preferable limitation on adverse possession because it is a more limited concept than unconscionability. “Unconscionable” can describe any unfair situation, such as a buyer taken advantage of in a contractual situation and paying more because of language, education, or infirmity. Unjust enrichment cannot be applied to situations where there is an existing contract and, of course, there would be none in the adverse possession situation. Unjust enrichment is a better descriptor of the adverse possession circumstance because it does not necessarily imply that one person has taken advantage of another, but merely that one person has taken advantage of existing law, and when standards are met indicating that someone has been unjustly enriched at the expense of an innocent other, the law will correct the result.

V. CONCLUSION

A title registration system, which would eliminate most adverse possession claims is preferable to the recording system that operates in the United States, but the likelihood of changing from one to the other is very low. Alternatively then, to eliminate the unfairness and the perception of unfairness associated with the adverse possession doctrine, legislatures or courts should modify its results by applying an unjust enrichment standard. If the adverse possessor would be unjustly enriched by a successful claim, and the burden on the titled owner would be harsh or oppressive, causing hardship and unfair surprise, and violating reasonable expectations, then adjustments should be made to balance the interests of the parties, generally by requiring payment by the adverse possessor for the value of the property and any tax payments made by the titled owner during the period of the adverse possession.

Footnotes


3 21 Jac. 1, c.16 (Eng.).


5 Id. ¶ 72.

6 Id. ¶¶ 73-76.

7 Id. ¶¶ 69(a), 77; see also Long v. Sava, [2007] 104 L.S.G. 27, ¶ 35 (Ch. D) (noting that from 1833 until 1939 “the only question was whether the squatter had been in possession in the ordinary sense of the word,” that is, the
possession did not have to be “adverse”).

Beaulane, supra note 4, ¶ 69(b), 76.

37 & 38 Vict., c.57 (Eng.).

Land Registry Act of 1862, 25 & 26 Vict., c. 53 (Eng.).

Beaulane, supra note 4, ¶¶ 69(b), 76.

37 & 38 Vict., c.57 (Eng.).

Land Registry Act of 1862, 25 & 26 Vict., c. 53 (Eng.).


Beaulane, supra note 4, ¶ 87 (quoting Judge Bramwell in Leigh).

Limitation Act 1939, 2&3 Geo. 6. c. 21 (Eng.).

Limitation Act 1980, c. 804 (Eng.).

Land Registratioon Act 2002, c. 9, pt. 9 (Eng.).

Id.


Beaulane, supra note 4, ¶ 175.


Beaulane, supra note 4, ¶¶ 171, 174.


Percy Bordwell, Disseisin and Adverse Possession, 33 YALE L.J. 141, 148, 150 n. 182 (1923).

Brandt v. Ogden, 1 Johns. 156 (N.Y. 1806).


See, e.g., Meadow Lake Estates Homeowners Ass’n, 2008 WL 314850, at *7; Hamons, 2008 WL 204069, at *2.


Garriott, 878 N.E.2d at 438.


TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024, 16.025, 16.026, 16.027 (Vernon 2007). The three-year limitations period is for a landowner to recover property from an adverse possessor who is claiming color of title which generally means apparent title which may in reality be defective. The limitations period is longer under a variety of different circumstances.

CAL. CIV. PROC. CODE § 318 (West 2006).


ALASKA STAT. § 09.45.052 (a) (Michie 2007).
indicate that a person who has a right to recover possession of real property must do so within twenty years.

To explain those two sections and how they compare with sections 2A:14-2 and 2A:14-7. The first two sections determine that title vests in the adverse possessor after thirty or sixty years; the latter two sections indicate that a person who has a right to recover possession of real property must do so within twenty years. *Id.* at 1123. This has been an area of great confusion in New Jersey law.


Clapacs, *supra* note 65, at 306.
See, e.g., Stake, supra note 65, at 2435.

See, e.g., Stake, supra note 65, at 2447.

See, e.g., Stake, supra note 2 and accompanying text; see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 206 (1881) (“Possession is a conception which is only less important than contract.”)

See, e.g., Stake, supra note 65; Clapacs, supra note 65, at 306.

See, e.g., Stake, supra note 65, at 2440-41.

See, e.g., Stake, supra note 65, at 2442.

See, e.g., Stake, supra note 65, at 2447-49.


For a very complete discussion of these ideas, see Stake, supra note 65, who concludes that the theory of loss aversion supports maintaining the doctrine of adverse possession because depriving the adverse possessor would cause him too much pain.


Id.

Id.; NPR, supra note 80; Bunch, supra note 80.


NPR, supra note 80.

Bunch, supra note 80.


Id.

Id.

NPR, supra note 80.


Id. § 38-41-101 (3)(a).

Id. § 38-41-101 (3)(b)(II).

Id. § 38-41-101 (5)(a).
\[\text{id}\] Id. (Attachment B: Notes Pertaining to Particular Provisions of HB081148).

\[\text{A9156 & S5364, 2007 Leg. (N.Y. 2007).}\]

\[\text{851 N.E.2d 1167 (N.Y. 2006).}\]

\[\text{Id.}\]

\[\text{Id. at 1168.}\]

\[\text{Id.}\]

\[\text{Id. at 1169.}\]

\[\text{See, e.g., Jay Romano, Adverse Possession: Mind Your Property, N.Y. TIMES, Nov. 11, 2007, § Real Estate.}\]

\[\text{851 N.E.2d, at 1169.}\]

\[\text{Id.}\]

\[\text{Id. at 1170.}\]

\[\text{A9156 Memo, 2007 Leg. (N.Y. 2007).}\]

\[\text{Romano, supra note 103.}\]

\[\text{Michael P. McKinney, This Is My Land, PROVIDENCE J., Feb. 21, 2007}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{Rhode Island General Assembly, Press Release: Senate Passes Adverse Possession Bills by Sen. Bates to Increase Timeframe to 15 Years, Protect Open Space, May 21, 2007.}\]


\[\text{Supra notes 93, 107, 108, 113 and accompanying text. Oregon already has a good faith requirement in its statute. OR. REV. STAT. § 105.620 (1) (a) (2007).}\]

\[1) \text{A person may acquire fee simple title to real property by adverse possession only if:}\]

\[\text{(a) The person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;}\]

\[\text{(b) At the time the person claiming by adverse possession or the person's predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property and that belief:}\]

\[\text{(A) By the person and the person's predecessor in interest, continued throughout the vesting period;}\]

\[\text{(B) Had an objective basis; and}\]

\[\text{(C) Was reasonable under the particular circumstances; and}\]

\[\text{(c) The person proves each of the elements set out in this section by clear and convincing evidence. Id.}\]


\[\text{Id. at 25.}\]


Depoorter, supra note 116, at 19; Merrill & Smith, supra note 118, at 1875.


cxviiProfessor Fennell objects to calling the knowing trespasser a “thief” because adverse possession is a legally acceptable way to acquire property. Id. at 1053. Nevertheless, intentionally taking someone else’s property without permission falls within the layperson’s idea of theft. That conflict between the law and public perception can contribute to a general public disdain for the law.

cxxviiiSee Todd Barnett, The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law, 12 BUFF. ENVTL. L.J. 1, 12-13 (2004); Miceli, supra note 132, at 566.


cxxviiThomas, supra note 133, ¶ 13.


cxiiBarnett, supra note 135, ¶ 16.


cxiiBUSCHER, supra note 143.
BUSCHER, supra note 143.


BUSCHER, supra note 143.

See Miceli et al., supra note 132, at 566.

Bouckaert & Depoorter, supra note 116, at 29.

Dor Viele, The Problem of Land Titles, 44 POL. SCI. Q. 421, 427 (1929).


Viele, supra note 151; see, e.g., Press Release, Suffolk County Clerk’s Office, supra note 160 (noting that the Suffolk County, N.Y. County Clerk was also the Suffolk County Registrar).

See, e.g., In Re Sherman, 175 N.Y.S. 627 (1919).

Id.

Barnett, supra note 135, at 19; Friedman & Smith, supra note 152.

Friedman & Smith, supra note 152, at 9-110.

Friedman & Smith, supra note 152, at 9-112.

JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES § 690 (2007).

Id.

Id. The New York State Land Title Association, Inc., which has been an advocacy group for title insurance companies, abstract companies, title insurance agents, and law firms since 1921, About NYSLTA, available at www.nyslta.org (last visited May 8, 2008), has lobbied the sponsor of the Torrens-repealing legislation calling the system “very confusing and misleading to the public.” Letter from Sharon Sabol, Executive Vice President, NYSLTA, to Senator Lack, N.Y. Bill Jacket, 1996 Sen. Bill 4606, 219th Legis., 1996 Reg. Sess.


Sometimes modifying the adverse possession doctrine with an unjust enrichment standard might mean that the adverse possessor gets to keep the land but has to pay the title owner for its value and taxes the title owner paid while not in possession. That might be the appropriate outcome in the Rhode Island case, for example.


See, e.g., McConvill & Bagaric, supra note 195, § IV(C).