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ADVERSE TO CHANGE: A MODERN LOOK AT ADVERSE POSSESSION

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I. INTRODUCTION

Adverse possession is an ancient legal principle that has a counterintuitive outcome in practice. It seems to fly in the face of our deeply held views of property ownership in the United States. Because of this, it is often misunderstood by the general population.

The basic social theory underlying our legal system is that the law protects the rights of the citizenry and punishes those who do wrong. The theory of adverse possession seems to flip that on its head. In this case, society rewards a trespasser for encroaching upon the land of another by turning title over to the trespasser after a certain amount of time. The original land owner is left without recourse and has lost one of society's most sacred rights – that to quiet enjoyment of privately-owned land. Why would any legal principle allow such a thing?

Historically, land was not seen to be of intrinsic value, the only value came from what it could produce. Under the theory of adverse possession, the record owner of the piece of property is considered the legal “wrongdoer” because they have failed to put their land to productive use. Under modern theory, productive use can mean passive as well as active use. Fallow fields and static wetlands are just as much considered a productive use as planted fields.

Although hard to imagine when looking out over vast fields, land is a finite resource that is best when being used. Neglected or abandoned land has limited value. It can become a financial burden for owners, state and local governments, and neighboring property owners. If land is not maintained, it becomes a nuisance and lowers the value of the properties surrounding it. In this way, an absentee owner infringes on the rights of others.

Adverse possession provides an opportunity for a trespasser to put such land to productive use and potentially claim the land as his own. The record owner retains the ability to eject the trespasser at any point until the time requirement has run. There is an assumption that an engaged record owner will discover the trespasser and eject him, therefore extinguishing any adverse possession claims on the property. This, arguably, shifts the burden of loss to the person who will suffer it the least, the person whose roots are less embedded in the land. As such, adverse possession advances two main legal objectives: protecting property rights from those who seek to wrong and encouraging the productive use of land. The majority of cases are brought today to quiet title to portions of land whose boundaries are in dispute.

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II. HISTORY

The first known codification of adverse possession appears in the Code of Hammurabi around 2000 BCE. Law 30 of the code states, “If a chieftain or a man leaves his house, garden, and field... and someone else takes possession of his house, garden, or field and uses it for three years: if the first owner returns and claims this house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it.”¹ As with the modern adaptation of adverse possession, Hammurabi’s Code has exceptions to the rule: a soldier captured or killed in battle and the case of a juvenile son of a land owner. Of the 282 rules, three deal directly with the concept of adverse possession.

Ancient Romans believed the land itself had a spirit that had to be nurtured and cared for by the person using the land. This gave the person who possessed the land greater claim to it than the person who merely held paper title to the land. This concept has been immortalized by the saying that possession is nine-tenths of the law. Under ancient Jewish laws, possession of real property for three years was assumed to be sufficient evidence of ownership, which outweighs all other claims of ownership, even if those claims were backed by evidence and testimony.²

The entirety of Europe has doctrines similar to adverse possession. French law permits the acquisition of title to land by prescription over a 30-year period if there is “continuous and uninterrupted, peaceful, public, and unequivocal possession, and in the capacity of an owner.” Good faith possession shortens the statutory requirements. No compensation is required to the record owner under French law. Spain utilizes a concept called acquisitive possession,

whereby ownership may be transferred so long as possession is exercised under claim of ownership, and must be “public, peaceful, and uninterrupted,” and no compensation is owed to the original owner.

Canada also recognizes adverse possession. Much like the United States, the requirements vary slightly since they are regulated by the laws of the states and provinces. In Ontario, adverse possession is recognized after 10 years with respect to unregistered land and does not apply at all to registered lands. And, again, no compensation is required for loss of title due to adverse possession. A comparison of 10 European countries shows that the elemental requirements of adverse possession are incredibly similar: one must act as a true owner, occupy the land continuously, and be obvious to any who would seek to know. Finally, no compensation is required by any of these jurisdictions.³

The modern theory of adverse possession used in the United States finds its roots in English common law. In early English history, land records were not well kept, and the majority of the population could not read them anyway. Therefore, possession was the best evidence of ownership. In 1275, the Statute of Westminster limited claims of seisin (legal claims of property) starting after 1189. This effectively established an 86-year statute of limitations on adverse possession claims. In 1623, the Statute of Limitations set the period within which an owner could sue for recovery from such a possession at 20 years, and that period was shortened to 12 years in 1874.⁴

1 “Code of Hammurabi: Translated by L.W. King,” Yale Law School, Lillian Goldman Law Library, The Avalon Project, 2008, avalon.law.yale.edu/ancient/hamframe.asp. Accessed January 2019.

2 Friedlander, Michael, and Marcus Jastrow. “Baba Batra (The Last Gate).” Jewish Encyclopedia, jewishencyclopedia.com/articles/2274-baba-batra. Accessed January 2019.

3 “Adverse Possession.” British Institute of International and Comparative Law, September 2006, biicl.org/files/2350_advposs_sep_ftnsv3.pdf. Accessed October 2018.

4 Casner, James. “American Law of Property: A Treatise on the Law of Property in the United States.” Boston, Massachusetts, Little, Brown and Company, 1952.

III. ADVERSE POSSESSION IN THE UNITED STATES

English common law came to the United States during the colonial period and was recognized at the founding as the bedrock of American jurisprudence. The first statutory evidence of adverse possession in the United States appeared in North Carolina in 1715.⁵ Most early American jurisdictions adopted the 20-year limitation model that was in place in English common law at the time.⁶ The majority of the eastern states still adhere to this timeline. This is not surprising; much of the land in these states already had clear boundaries and ownership.

In the 1830s, it has been argued that American courts, trying to serve the goal of national economic development, transformed adverse possession “from a mechanism designed to protect the title of the true owner against false claims into a tool designed to transfer title to wild lands from the idle true owner to the industrious adverse possessor.”⁷ This switch came at a time when large tracts of land were being settled in the west. Land speculation was rampant and the potential for idle land was high. States in the west and the south split on how to handle this. Some states shortened the statute of limitations, which allowed a quicker settling of property boundaries and strengthening titles to lands. Other states began requiring the payment of taxes as an essential element of adverse possession, virtually destroying any otherwise meritorious claims and ensuring the rights of record owners. Currently, all 50 states utilize the concept of adverse possession to some degree.

5 Dukeminier, Jesse, and James E. Krier. “Property.” Boston, Massachusetts, Little, Brown and Company, 1981. Supra Note 15, at 83.

6 “Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws.” Vol. 8:1, Ind. Int’l & Comp. L. Rev., 1997, mckinneylaw.iu.edu/iiclr/pdf/vol8p119.pdf. Accessed October 2018.

7 Sprankling, John G. “Environmental Critique of Adverse Possession.” Vol. 79, Issue 4, Article 2, Cornell Law Review, May 1994, scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2517&context=clr. Accessed October 2018.

IV. AN ANALYSIS OF VICTIMIZATION IN ADVERSE POSSESSION

In the United States, the visceral response to adverse possession is almost always negative, and the record owner is almost always considered the “victim” of the act. This is likely because of three main reasons. First, as mentioned above, adverse possession seems to reward the wrongdoer at the expense of the innocent landowner. At its most basic level, adverse possession seems to be nothing more than “theft or robbery, a primitive method of acquiring land without paying for it.”⁸

Second, land ownership is one of the founding promises of this country. Therefore, Americans have a strong emotional connection to their land. Land ownership is a symbolic indicator of material wealth, identity, social standing, and financial security. Adverse possession represents a direct attack on these constructs, which makes it particularly upsetting.

Finally, it upsets the expectations of the very role of laws. To most people, laws are there to protect property rights. This is the foundation of a “civilized society.” In a successful adverse possession case, the state allows the adverse possessor to “take” land without compensation from the registered owner, effectively sanctioning theft.^{9,10} The role of the state adds insult to injury.

8 Ballantine, Henry W. “Title by Adverse Possession.” Vol. 135, Harvard Law Review, Dec. 1, 1918.

9 Conway, Heather, and John Stannard, “The Emotional Paradoxes of Adverse Possession.” Northern Ireland Legal Quarterly 64(1), May 16, 2013, ssrn.com/abstract=2265847. Accessed October 2018.

10 Interestingly, this is not the only state sanctioned deprivation of land. Eminent domain allows the state to take land for beneficial purpose so long as just compensation is provided. Adverse possession mandates that the state transfer land rights to the adverse possessor once all of the statutory requirements are met without any compensation. Both doctrines shift the land rights without the land owner’s consent. The main difference is the land owner’s ability to stop the transfer. Eminent domain is an absolute power of the state’s, the land owner has no power to prevent the transfer. However, under adverse possession, the land owner has absolute power to prevent the transfer and protect her property rights.

This speaks to a deeper societal fear, realized in the “specter of a decent, law-abiding citizen who works hard, pays their taxes, and obeys the rules, yet is still vulnerable (through no perceived fault of their own) to have their interests subordinated to those who fail to respect the rights of others.”¹¹ Landowners who are unaware of the doctrine may feel blindsided and betrayed by such laws.¹²

A study of adverse possession cases shows that the emotional reaction to adverse possession is shaped by external factors.¹³ If adverse possessors act in “good faith,” truly believing they have some claim over the property, such as in boundary disputes or minor encroachments, society is more likely to turn a blind eye or consider it a “victimless” situation. Who the adverse possessor is also has an affect on moral outrage. In the Kirlin’s case in Colorado, a judge and his wife, who was a lawyer, used adverse possession to take control of a parcel of land next to their home. This land was owned by a couple who planned to build their dream home there one day. The public was outraged that people who were supposed to represent the legal rights of others “stole” the land. The fact that their actions were lawful did not matter.¹⁴

On the other hand, in England, farmers, who knew they had no legal claim to land they were farming, used adverse possession to quiet title on a \$10 million property owned by a corporation. The corporation intended to develop the

land at some point but had not done so in the 12 years the farmers were using it. No one batted an eye at this transfer. One reason might be that the corporation was a wealthy, faceless entity with an abundance of land in the area. Another might be that the land was intended for development and not a private residence. Someone’s “home” was not at stake.¹⁵

A minute amount of people place the “victim” sentiment on the adverse possessor. Their argument is that adverse possession rewards the hard work of the adverse possessor and punishes the “lazy” owner who, through carelessness, indifference, or actual neglect, fails to maintain the property or remove the adverse possessor. This is in line with the investment-attachment theory of property which favors the actual possessing individual over the titled owner. This rewards the actual possessor, who appears to “value” the land more than the absentee titled owner. Justice Oliver Wendell Holmes was a supporter of this theory. He wrote,

“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. 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.”¹⁶

11 Conway, Heather, and John Stannard, “The Emotional Paradoxes of Adverse Possession.” Northern Ireland Legal Quarterly 64(1), May 16, 2013, ssrn.com/abstract=2265847. Accessed January 2019.

12 Johnson, Ruth Lee. “The Shocking Law of Adverse Possession: What is Adverse Possession and Why Does It Exist?” Psychology Today, May 7, 2018, psychologytoday.com/us/blog/so-sue-me/201805/the-shocking-law-adverse-possession. Accessed October 2018.

13 Conway, Heather, and John Stannard, “The Emotional Paradoxes of Adverse Possession.” Northern Ireland Legal Quarterly 64(1), May 16, 2013, ssrn.com/abstract=2265847. Accessed October 2018.

14 “McLean and Stevens v DK Trust and Kirlin.” Boulder District Court, Case No. 06 CV 982, Oct. 4, 2006, [la.utexas.edu/users/jmciver/357L/P3/06CV982%20-%20McLean%20&%20Stevens%20v%20Kirlin%20\(adverse%20possession%20order\).pdf](https://la.utexas.edu/users/jmciver/357L/P3/06CV982%20-%20McLean%20&%20Stevens%20v%20Kirlin%20(adverse%20possession%20order).pdf). Accessed October 2018.

15 “JA Pye (Oxford) Ltd v UK.” (2006) 43 EHRR 3, (2008) 46 EHRR 45, Aug. 30, 2007, [swarb.co.uk/j-a-pye-oxford-ltd-v-the-united-kingdom-echr-30-aug-2007/](https://www.swarb.co.uk/j-a-pye-oxford-ltd-v-the-united-kingdom-echr-30-aug-2007/). Accessed October 2018.

16 Holmes, Oliver Wendell, Jr. “The Path of the Law.” Harvard Law Review, 1897.

V. ADVERSE POSSESSION IN NEBRASKA

Nebraska has adopted the legal concept of adverse possession. *Wanha v. Long*¹⁷ establishes that four elements must be proven in order to establish adverse possession. The use of the property must be actual, exclusive, open and notorious, and hostile.

“Actual” means the adverse possessor must occupy and/or use the land as it would be used by a true or undisputed owner. Wrongful possession is enough to satisfy this requirement, the adverse possessor does not have to take the property from the true owner. Actual possession has two components: physical control over the land and the intent to maintain dominion over it. This means that anyone attempting to establish adverse possession must show they have the intent to maintain physical occupancy and control over the land in question. No particular act is necessary to show actual possession, rather it is required that the acts be those inline with the land and use that can reasonably be made of it.

“Exclusive” requires the adverse possessor not share possession with the true owner. Such exclusivity must be in keeping the reasonable standards that a record owner would operate. If a property is typically used as a winter hunting property, and the record owner would allow others to use the property to hunt, the adverse possessor could also allow others to use the property in this way and not extinguish the exclusive element.

“Open and notorious” possession requires the adverse possessor’s actions be visible and ascertainable to an ordinarily prudent person, such as the neighbors or a diligent owner. It should be obvious to anyone who inspects the property that the land is being used in some fashion. An adverse possessor cannot conceal their use of the property and still hope to gain title to the property.

“Hostile” possession¹⁸ is often the hardest to ascertain in adverse possession cases. There are two main theories regarding what it means to be hostile. The first simply requires that the adverse possessor’s possession of the land does not derive from the record owner’s title. This means that the adverse possessor cannot have received any kind of permission from the record owner to utilize the property. This would automatically extinguish any claim of adverse possession. Under this theory, the state of mind of the adverse possessor is completely irrelevant. *Wanha* established that, in Nebraska, hostile is “not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land.” This seems to indicate that Nebraska follows this theory of hostile action.

Some jurisdictions in the United States have limited this requirement even further by reading into it the requirement of “good faith” on behalf of the adverse possessor. This means the adverse possessor must have an honestly held belief that the property in question belongs to them. Good faith can be shown by color of title but is not necessary; a convincing testimony by the adverse possessor could also be enough. In some jurisdictions, good faith is not required, but is used instead to reduce the time requirements for proving adverse possession.

Nebraska also requires a fifth element by statute – the adverse possessor must establish the previous four elements continuously over a 10-year period.¹⁹ The evidence in these cases must be strong. The claimant must prove all five elements by the clear and convincing standard of evidence, which is significantly more difficult to prove than other typical civil cases.

17 “*Wanha v. Long*.” Supreme Court of Nebraska, 255 Neb. 849, 587 M.W.2d 531, Dec. 31, 1998, law.justia.com/cases/nebraska/supreme-court/1998/808-3.html. Accessed October 2018.

18 Goes by a variety of names including ‘adverse,’ ‘under claim of title,’ ‘under claim of right,’ and ‘hostile and under claim of right.’

19 Nebraska Revised Statute § 25-202.

VI. MODERN QUESTIONS REGARDING APPLICATION OF ADVERSE POSSESSION

A. FREQUENCY WITH WHICH ADVERSE POSSESSION IS APPLIED

When researching for his paper “Adverse Possession and Subjective Intent,” Richard Helmholz looked at approximately 850 adverse possession cases from 1966 to 1983. He stated, “the relevant [adverse possession] cases are abundant. In fact, they are over-abundant.”²⁰ This number has provided modern scholars an academic baseline for understanding the frequency of adverse possession cases. The legal search engine Westlaw²¹ shows that “adverse possession” were keywords in 5,046 cases in the United States over the 55-year period between 1960 and 2015. That is an average of 92 cases per year. This indicates the use of adverse possession is alive and well. During that same period, there were 176 – 3 percent of the national rate – in Nebraska. A breakdown of the Nebraska cases by decade follows:

• 28 in the 1960s:

- › Adverse possessors were successful 14 times.
- › Record owners were successful 14 times.

• 24 in the 1970s:

- › Adverse possessors were successful 9 times.
- › Record owners were successful 15 times.

• 47 in the 1980s:

- › Adverse possessors were successful 22 times.
- › Record owners were successful 25 times.

• 28 in the 1990s:

- › Adverse possessors were successful 19 times.
- › Record owners were successful 9 times.

20 Helmholz, Richard H. “Adverse Possession and Subjective Intent.” 61 Washington University Law Quarterly 331, 1983.

21 Thank you to Kelsey Heino of Goosmann Law for her help with this search.

• 33 in the 2000s:

- › Adverse possessors were successful 11 times.
- › Record owners were successful 22 times.

• 16 from 2010 to 2015:

- › Adverse possessors were successful 7 times.
- › Record owners were successful 9 times.

On average, there are three adverse possession cases brought in Nebraska each year. From this data, the frequency with which adverse possession is applied to quiet land claims in Nebraska has been stable over the past 55 years. The majority of these cases involved settling boundary disputes.²²

An in-depth look at these cases shows a relatively even distribution of success between adverse possessors and record owners. Over the past 55 years, adverse possessors have been successful in their claims 82 times whereas record owners have been successful 94 times. Adverse possessors saw a spike in successful claims in the 1990s; however, the 2000s swung back in favor of the record owners.

Why is adverse possession still so pervasive? The most likely answer is the emotional ties people have to land. These heightened emotions can make it difficult for parties to negotiate or reach a settlement, and can quickly escalate toward litigation. These disputes can also be complicated. This is why the loss is felt so acutely by the party who, through no actions of their own, has lost their land. Modern adaptations, such as requiring the adverse party to compensate the record owner for the property taxes paid during the adverse period, could help offset that sense of loss.

B. MODERN TRENDS

Adverse possession has been utilized in the United States since the birth of the nation. However, as society has changed, so too has the law. Most often, the changes in adverse possession doctrine have occurred when an outcome of a case shocks the conscience of society’s sense of justice and fairness. The following looks at

22 Interestingly, the majority of those cases involved boundary disputes that were created because of avulsion and accretion in wetland areas.

different ways legislatures have sought to update their adverse possession laws and modern legal theories on how adverse possession could be updated.

In the 2008 Kirlin case mentioned above, Colorado citizens gathered together to protest the court's ruling. The anger was most likely exacerbated by the fact that adverse possessors were sophisticated bad actors. This prompted the Colorado Legislature to take immediate action to change their adverse possession laws.

The bill made three changes to the law. First, it clarifies that the burden of proof for adverse possession claims is "clear and convincing evidence" for every element. Second, it denies any adverse possession claim of a "bad faith" possessor by requiring "the person claiming by adverse possession or a predecessor in interest had a good faith belief that he or she was the actual owner of the property and that the belief was reasonable under the particular circumstances."

Third, the bill gives the court discretion to order the successful adverse possessor to compensate the title holder for the "actual value of the property" and for some or all of the taxes paid during the period of the adverse possession.²³ The effect has been to severely limit the amount of adverse possession claims brought in Colorado.

Another case that caused citizen outrage and prompted legislative action occurred in New York in 2006. This case involved a boundary dispute²⁴ where a man had cared for the lawn, constructed an underground dog fence, and erected a 10-foot tall bird house on his neighbor's property. Ultimately, the man met the requirements for adverse possession, and the court quieted title in his favor. Once again, the bad faith of the adverse possessor created cause for concern. The New York Assembly created a bill that was specifically designed to address the bad faith possessor because "property rights should not

be subject to trickery and deceit."²⁵ The governor at the time vetoed the bill. Undaunted, the legislature tried again in 2008, when they passed a law providing that the acts of lawn care and "de minimis" features that straddle or pass over the boundary line which are not buildings or the like are considered permissive and not adverse.²⁶ The law does not define the term "de minimis," and this has created ambiguity within the law that has not yet been fully cured.

In light of the 2008 economic recession and housing crisis that plagued the country, individuals began attempting to use adverse possession to gain title to properties that had fallen into foreclosure. Multiple states considered bills that would clarify, amend, or abolish adverse possession. In Texas, where a man attempted to adversely claim a \$330,000 home, the legislature considered a bill that would require any person interested in gaining ownership of an unused property to send written notice to the last known address of each person who holds an interest in it, including mortgage lenders and recorded owners. This bill failed to pass.

In 2011, Washington updated its adverse possession laws, adding two new provisions. The first is that a party who succeeds in an adverse possession claim may now be required to reimburse the record owner for property taxes at the court's discretion. This might help offset the perceived unfairness of adverse possession. Second, the court has discretion to award all or part of attorneys' fees and costs to the prevailing party. At one point in the legislative process, this bill provided for a "winner pays" scheme that would have required the losing party to pay the winning party's attorneys' fees and costs; however, the legislature finally agreed on giving discretion to the judge. This could have a cooling effect on adverse possession cases, ensuring that only those who honestly believe they have a winning case will reach the stages of actual litigation.

Florida distinguishes between adverse possession "under color of title" and adverse possession "without color of title." If a person has color of title – an honest belief that they have a claim

23 House Bill 08-1148, 2008 Legislature (Colorado Revised Statute § 38-41-101)

24 "Walling v. Przybylo." New York State Law Reporting Bureau, 7 NY3d 228, April 26, 2006, courts.state.ny.us/reporter//3dseries/2006/2006_04747.htm. Accessed October 2018.

25 A9156 Memo, 2007 Legislature (New York 2007).

26 New York Real Property Actions and Proceedings § 543(1)

of title on a property based on some sort of recorded written document, even if it's faulty – and has had possession of the property for seven years, they shall be able to claim title to the land. If a person does not have color of title, then they must, within one year of occupying the property, file a document that includes a full and complete legal description with the county appraiser and pay all taxes and liens assessed during their possession of the property to obtain title.

Legislatures are not the only entities taking a fresh look at adverse possession. Modern legal scholars have also picked up the torch. The majority of these scholars seem to agree that the doctrine is antiquated, and, at best, needs updated. At worst, they argue adverse possession should be abolished.

Flying in the face of legislatures and most of society, Professor Lee Ann Fennell makes the argument that only bad faith possessors should be able to claim ownership by adverse possession.²⁷ She argues this protocol would support the only remaining useful goal of adverse possession – to give ownership to the person who values the land more highly when the parties' valuations are very disparate and a market solution is unavailable because the owner will not sell. Professor Fennell would require two elements to a successful claim: (1) the trespasser must know they are trespassing and (2) they must document this knowledge by first offering to buy the land from the record landowner. She justifies this position by asserting that it encourages the efficient transfer of property. However, it is unlikely that the majority of society would find this palatable.

An argument put forth by Susan Lorde Martin is to add the elements of unjust enrichment or unconscionability into the requirements of adverse possession.²⁸ Each of these would address the perceived unfairness and injus-

27 Frennell, Lee Ann. "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession." *Northwestern University Law Review*, Vol. 100, No. 1037, 1038, 2006, papers.ssrn.com/sol3/papers.cfm?abstract_id=800529. Accessed October 2018.

28 Martin, Susan Lorde. "Adverse Possession: Practical Realities and an Unjust Enrichment Standard." Frank G. Zarb School of Business, 2008, alsb.roundtablelive.org/Resources/Documents/NP%202008%20Martin.pdf. Accessed October 2018.

tices that society finds in adverse possession. Unjust enrichment generally applies when one party receives a benefit to the detriment of the other party in violation of the principles of justice, equity, and good conscience. It is typically applied on a sliding scale, balancing the benefits and harms of both parties to reach a fair conclusion. In the case of adverse possession, courts would consider factors such as knowledge of the trespass, existing issues to current title, record owners' potential future use of the property, no "higher uses" on behalf of the adverse possessor, and both parties' investment in the property, such as property tax payments, improvements on the land, and value of the loss. Unconscionability is typically associated with contracts that "shock" the conscience, are overly harsh, and exceedingly callous. In other words, strict application of the law or agreement would result in undue hardship on one of the parties. In the case of adverse possession, it could be argued that the loss of property would place an undue burden on a party.

Another argument by Martin recommends abolishing adverse possession and putting in its place a comprehensive land recording system. Modern technology makes determining who has record title relatively easy and inexpensive, and the global positioning system (GPS) makes surveys cheaper and easier, providing better solutions to boundary disputes.²⁹ Putting in place a land recording system similar to the Land Courts administered in Massachusetts would provide a simplified registration system and reduce boundary disputes to almost nothing.

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 court orders a survey and plans be done by their Survey Division, which is paid for by the private applicant seeking to quiet title. After review, the Land Court decrees that state of the title and declares it, extinguishing all previous claims to the land, even if a "true owner" surfaces. To limit the loss of land, "true owners" may be compensated through a government insurance system funded by registration fees. However, this would be nearly impossible to enact on a national level.

29 Ibid.

And, even in Massachusetts, which has not mandated this system, the registration has never accounted for more than 20 percent of the land or 10 percent of the land values.

In his article “The Uneasy Case for Adverse Possession”,³⁰ Jeffery Stake makes the case that, though there may still be a place for adverse possession in modern jurisprudence, it is not a strong one. He argues modern application of adverse possession generates litigation, creates wasteful incentives, and will produce less justice than injustice. Under modern norms, it is no longer considered wasteful to leave land undeveloped or unproductive. Indeed, farmers are compensated for taking fields out of production to preserve topsoil and nutrient production. Therefore, the theory of putting land to productive use is no longer necessary. He takes aim at the justification for quieting title by pointing out that adverse possession never has quieted title completely and has created its own set of problems in the recording acts. In fact, title insurance often carves out wide exceptions for the possibility of adverse possessors because they are settled by judicial decree and are not required to be recorded with the Register of Deeds. This also reduces the certainty of title needed to protect any future investments. He states the only rationale left standing today for adverse possession is that the law refrains from depriving people lands they have long occupied because doing so would cause them too much pain.

Overall, modern trends in adverse possession have intended to limit the perceived unfairness of the process and protect established property rights. States have enacted legislation that have stronger requirement notices, require compensation to the property owner, and effectually limit the number of cases that will be brought. Although modern legal scholars make the claim that adverse possession is no longer necessary in today’s society, no state has been able to pass legislation abolishing adverse possession, though some have tried.

30 Stake, Jeffery E. “The Uneasy Case for Adverse Possession.” *The Georgetown Law Journal*, Vol. 89, No. 2419, 2001, repository.law.indiana.edu/cgi/viewcontent.cgi?article=1220&context=facpub. Accessed October 2018.

C. PAYMENT OF PROPERTY TAXES AS A SIXTH ELEMENT

The payment of property taxes as a required element of adverse possession is not new. The first jurisdiction to establish the requirement was Illinois in 1872.³¹ The western states predominate in this requirement.³² Proponents of the requirement argue that it affords security and certainty to titles and diminishes a highly litigious claim out of the field.³³

One purpose for this requirement has been to encourage people to pay their taxes, which is a benefit to any state or municipality. Another is to protect a bona fide purchaser of property and provide evidence that a person is making their adverse possession claim in good faith. Yet another purpose is to provide notice to the owner that there might be a potential adverse possession claim on their property, although this notice does seem slight when compared to that given by a person possessing the land or by recording an instrument giving color of title.³⁴

Others argue that requiring payment of property taxes demonstrates open, hostile, and exclusive use. Under this scenario, payment of property taxes by the record owner is considered clear evidence of use and maintenance of the land. If the record owner is actively paying property

31 Illinois Statute 1872, p. 257.

32 Ford, Moira Deirdre. “The Payment of Taxes as a Requirement in Adverse Possession Statutes.” *California Law Review*, Vol. 37, No. 3, September 1949, scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3498&context=californialawreview. Accessed October 2018.

33 Gavit, Albert H. “In Defense of the Indiana Adverse Possession Act of 1927.” *Indiana Law Journal*, Vol. 4, No. 5, 1929, repository.law.indiana.edu/cgi/viewcontent.cgi?article=4077&context=ilj. Accessed October 2018.

34 Ford, Moira Deirdre. “The Payment of Taxes as a Requirement in Adverse Possession Statutes.” *California Law Review*, Vol. 37, No. 3, September 1949, scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3498&context=californialawreview. Accessed October 2018.

taxes then it is impossible for the adverse possessor to prove hostile or exclusive possession. Requiring the adverse possessor to do so instead guarantees all elements are met.

The primary effect of making the payment of taxes a required element of an adverse possession claim has been defeating an otherwise meritorious claim. In the case of a person seeking to acquire land in bad faith, this might be a morally desirous outcome. It prevents someone from knowingly trespassing on another's land and gaining title to it without also assuming the cost associated with ownership of that parcel. This keeps a "bad acting" adverse possessor from gaining title to land that most people believe they have no moral claim to.

Adding this sixth element may be less desirable when it comes to resolving boundary disputes. Often, in such disputes, the "true" boundary line is determined by a survey that does not, in actuality, correspond to the boundary that has been created on the ground by the erection of buildings, fences, and other structures. However, taxes are normally assessed in reference to the legal description found on a deed that was determined by the survey. Thus, the area found between the "true" boundary and the occupancy boundary will never be taxed to the adverse possessor, even though they, in good faith, thought they were paying taxes on this disputed section of property the entire time. Thus, requiring the payment of taxes will prevent a successful boundary dispute claim every time.

As evident in Tables 1³⁵ and 2,³⁶ located in Appendix, there have been many statutory changes

35 Taken from Ford's *The Payment of Taxes Requirement in Adverse Possession Statutes*. This chart did not include Alabama, where the adverse possessor must have color of title, duly recorded, and must annually list the land for taxation if it is subject to it an Arkansas, where unimproved or unenclosed land is deemed to be in the possession of the person who pays taxes for seven years if he has color of title or the payment of taxes on wild and unimproved land for 15 years creates the presumption of color of title.

36 Information compiled by The Center for Rural Affairs using State-by-State Rules on Adverse Possession, NOLO, n.d. This chart does not include Maine or New Mexico, but independent checking shows that both of these states do still have the tax payment requirements listed in Chart I.

regarding payment of taxes as a required element. There has not been a single state to abolish the tax payment requirement once instituted, though some have altered the time requirements for proving adverse possession claims. This would seem to indicate those jurisdictions are satisfied with the results of these requirements.

It is no surprise that states such as Colorado in 2008 and Washington in 2011 have strengthened their adverse possession statutes during the height of the housing crisis and recession. Over the past decade, property prices have skyrocketed. This has been felt acutely in the housing markets. These increases have kept many people out of the traditional market and forced them to seek other ways to become property owners. At the same time, these increases have forced many owners to abandon their properties because they can no longer afford the costs. This has left many residential properties available to potential adverse possession claims. The idea of losing one's home to adverse possession evokes the strongest negative reactions in people. In light of the housing crisis, these states moved to protect property rights by requiring taxes be paid as an element of adverse possession.

Just this year, in Reno, Nevada, a couple was granted title to an abandoned home they have been adversely possessing. In addition to the common law requirements, Nevada requires that adverse possessors pay property taxes for five years to prove their claim. The home had been abandoned in 2005 and sat in disrepair until 2012, when the adverse possessing couple came across it. The couple paid the back taxes, kept the taxes current, and invested approximately \$200,000 into the home, turning the eyesore on the block into a gem with a value of \$500,000. This is not something they would have been able to do without using adverse possession.

A review of cases over the past 55 years shows the majority of adverse possession cases in Nebraska are used to settle boundary disputes. Not once in that time frame was a residence at risk of adverse possession. This sets Nebraska apart from those states mentioned above. The balance of equities for boundary disputes is somewhat less than those facing a loss of residence. Requiring the repayment of taxes during the adverse possession period by the adverse

possessor to the record owner helps offset the sense of loss the record owner may feel while still supporting the principles of adverse possession.

D. SHOULD TRESPASSER BE REQUIRED TO PAY PROPERTY TAXES DURING ALL OR A PORTION OF THE USE PERIOD?

As asserted above, requiring a property owner to pay taxes during all of the required use period has had the primary effect of defeating otherwise meritorious adverse possession claims.

Some states (including Illinois, Maine, North Dakota, South Dakota, and Texas) have a combination approach to tax payments. In these jurisdictions, payment of taxes on a property reduces the time requirements of an adverse possession case. For example, North Dakota law requires that the adverse possessor demonstrate all five elements are in place for a period of 20 years. If the adverse possessor has been paying the property tax, however, then the elements for a successful claim need only be proven for a period of 10 years.

The reasoning behind the shorter time limit is notice. Under this doctrine, an owner now has two forms of notice of an adverse claim on their property. The first is that someone is utilizing their property without their consent. Second, they are put on notice when the taxes were paid on their property. This gives the record owner ample notice to bring an eviction order against the adverse possessor. Therefore, a shorter time requirement is understandable.

In these states, however, failure to pay the taxes does not extinguish the case. Should an adverse possessor not pay the taxes, an adverse possession claim is still available to them, they simply must meet the extended time requirements. This serves the dual purpose of enabling adverse possession claims but still providing notice to the record owner and promoting the prompt payment of taxes.

Washington updated their adverse possession law in 2011 to include a tax payment provision. A party who succeeds in an adverse possession claim may now be required to reimburse the record owner for property taxes at the court's discretion. In addition, the court has discretion to award all or part of attorneys' fees and costs

to the prevailing party. None of the taxes must be paid during the 10 years in advance of bringing an adverse possession case.

This amendment was almost universally supported in the legislature, members of the House passed the bill in a 96-1 vote, and Senate voted unanimously, with 47 yeas. The legislature's primary purpose was to balance the perceived inequities regarding adverse possession. Though there was vocal support to completely abolish adverse possession from the group End Adverse Possession Now, lawmakers felt it was best to take a different approach. Balancing of equities can be difficult in adverse possession cases because each case is so fact specific. This is why Washington decided to give their courts discretion when deciding the award. The primary rationale was that the courts would be in the best position to ensure the award was fair because the judge would be present for the entire case and have a feel for the circumstances.

Because the law did not go into effect until July 2012, no adverse possession cases under the new law have ripened yet. However, the ruling has not seemed to put a damper on cases being brought in Washington. In the decade between 1981 and 1991, Washington saw 49 adverse possession cases. From 1992 to 2001, the state saw an increase to 107 adverse possession cases. From 2002 to 2011, that number jumped to 171 cases. This severe increase in cases was a catalyst for the 2011 change. From 2012 to 2018, there was a slight decrease, dropping to 106 cases. Having to pay some portion of the taxes and/or attorney's fees will ensure that only those who have strong evidence will bring their adverse possession cases to the courts from here on out.

E. DOES THE CONTINUED AND ACTIVE PAYMENT OF TAXES INDICATE THE RECORD OWNER WAS AWARE OF OWNERSHIP AND ACTIVELY MAINTAINING INVESTMENT?

The purpose of requiring the active payment of taxes can be distilled down to three main theories: the good faith/evidentiary theory, the policing theory, and the notice theory.

The "good faith" theory implies that by paying taxes assessed against the property being

claimed, the adverse possessor shows his good faith in claiming title. Texas utilizes this approach. Their rationale is that since the payment of taxes is one of the incidents of property ownership, the adverse possessor must be required to pay the taxes as evidence of his good faith in claiming title to the property. If the record owner has already paid the taxes, this would show an awareness of their interest in the disputed property, provide evidence of their active maintenance and use, and indicate bad faith on behalf of the adverse possessor.

The “policing” theory claims the purpose of the requirement is to ensure that all of the property taxes assessed against the property in the state will be paid. South Dakota utilizes this theory, stating that the requirement is to “encourage and promote the payment of taxes, so indispensable to the support of government.”

The “notice” theory argues that payment of property tax is necessary because of the notice it provides to the record owner of a potential adverse possessor. This assumes the record owner is aware of their ownership and actively managing his property by remitting their property taxes to the state every year. When the record owner attempts to pay the property taxes, they would become aware of the adverse possession claim. This argument most often applies to land owners who have large amounts of land that make it impractical to police their perimeters.

All three of these theories recognize that payment of property taxes shows a rebuttable presumption that the record owner had knowledge of their property interests and were, at least minimally, maintaining their interest. This deliberate action by the record owner makes it difficult or impossible for an adverse possessor to show they are in exclusive, open, and hostile possession of the property. It is important to note that in these states, payment of taxes by a record owner would not automatically defeat any adverse possession claim. It is considered just one indicator a court would use when balancing the claim.

F. SHOULD RECORD OWNER, WHO IN GOOD FAITH HAS PAID TAXES, BE COMPENSATED FOR THOSE PAYMENTS WHEN PARCEL IS LOST?

Clearly, the majority of society disfavors adverse possession because, on its face, adverse possession seems unjust. To many, it feels like legally sanctioned theft of property. This feeling seems to be exacerbated by Americans’ connection to their land. However, adverse possession clearly still has a place in American jurisprudence. Modern technology has not advanced to a place where absolutely clear boundary lines can be known, and even if it had, there is still economic support for ensuring prime land is put to productive use.

How can we balance the negative perceptions shared by society with the economic need for adverse possession? As we have seen, several states already require the payment of taxes as an element of an adverse possession claim. This, however, has effectively extinguished all adverse possession cases in these jurisdictions. Many would argue this tips the balance too far.

Recognizing this, Washington state has implemented a policy that gives courts discretion to compensate the record owner by awarding them some value of the property should they find that equity calls for it. That state still supports the theories and values behind adverse possession – encouraging productive use of land, limiting waste, and quieting boundary disputes – while also appreciating the hardship that loss of property creates. The law does not diminish the ability to bring an adverse possession claim, as there is no requirement that taxes be paid during the adverse time period. It simply acknowledges that land ownership is held in high esteem and that the adverse possessor should not be able to take possession of the land for nothing. The Washington law recognizes the record owner’s loss and gives the court the power to determine an equitable solution.

A modified version of that approach is appropriate here. Requiring the record owner to be compensated for the taxes they paid in good faith contemplates the perceived unjust enrichment of the adverse possessor without hampering the pursuit of an adverse possession claim. In most cases of adverse possession, the record owner's primary loss is the cost of the taxes they have been paying. The adverse possessor has invested time and often monetary improvements into the land in question. Both parties face a risk of loss. Requiring tax compensation is an equitable result that makes record owner whole again while still safeguarding the rights of an adverse possessor.

Doing so also encourages the productive use of land while guarding against bad faith claims. Many argue that payment of property taxes is clear and convincing evidence that the record owner is actively maintaining property. Their doing so makes it impossible for an adverse possessor to successfully demonstrate open, hostile, and exclusive use. Others consider requiring payment of taxes to prove a claim prohibitively onerous, arguing that such an approach would prevent otherwise beneficial claims. As a result, reserving compensation for payment of property tax for final adjudication strikes an appropriate balance between society's interests and the landowner rights.

Over the past several decades dozens of states have modified adverse possession to reflect the evolution of society and the demands of a modern economy. Nearly all have developed a hybrid response to fit the unique needs of their land and people. It is time for Nebraska to do the same. To do so, we recommend requiring the adverse possessor to compensate the record owner for any property taxes paid during the 10 year period preceding transfer of ownership.

VII. CONCLUSION

Adverse possession may be antiquated, but it is a concept with deep roots. In order to remain useful, however, it must be modernized to fit today's society. With increasingly high property values, and the correspondingly high taxes that go with such a price tag, the stakes of adverse possession have never been higher. In Nebraska, this is felt most acutely by our farmers and rural dwellers. There is a saying, "nothing worth getting comes free." This philosophy is easily applied to adverse possession cases in the 21st Century.

ABOUT THE CENTER FOR RURAL AFFAIRS

Established in 1973, the Center for Rural Affairs is a private, nonprofit organization with a mission to establish strong rural communities, social and economic justice, environmental stewardship, and genuine opportunity for all while engaging people in decisions that affect the quality of their lives and the future of their communities.

ADVERSE TO CHANGE:
A MODERN LOOK AT ADVERSE POSSESSION

APPENDIX

TABLE 1. STATUTES REQUIRING PAYMENT OF TAXES AS AN ELEMENT OF ADVERSE POSSESSION IN 1949

Requirements							
Jurisdiction	Tax Payment	Possession	Good faith	Color of title	Claim of title	Other	Period of limitations (years)
Arizona Code 1939, § 29-102, § 29-104	X X	X X			X X	• Duly recorded deed • Applies only to town and city lots	5 5
California Code Civ. Proc., § 325	X	X			X		5
Colorado Stats. 1935, C. 40, § 143, C. 40, § 144	X X	X	X X	X X	X	• Applies only to vacant and unoccupied lands • Can be defeated by tax payment by person with better title	7 7
Florida Stats. 1941 § 95.16, § 95.18	X X	X X		X	X	• Return of property for assessment by proper legal description	7 7
Idaho Code 1947 § 5-210	X	X			X		5
Illinois Rev. Stats. 1943 C. 83, § 6 C. 83, § 7	X X	X	X X	X X	X	• Applies only to vacant and unoccupied lands • Can be defeated by tax payment by person with better title	7 7
Indiana Stats. 1946 § 3-1314	X	X				• Claimant must have paid taxes during the period he claims to have been in possession	20
Maine Stats. 1944 C. 160, § 16	X	X			X	• Recorded deed • Applies to uncultivated land in unincorporated places	20
Minnesota Stats. 1941 § 541-02	X	X			X	• Not applicable to boundary cases or lands not assessed for taxation • Payment of taxes is required for only five consecutive years	15
Montana Rev. Codes 1935 C. 26, § 9024	X	X			X		10
Nevada Comp. Laws 1929, Supp. 1931-1941, § 8517 (18)	X	X			X	• Tender of payment of taxes will suffice	5
New Mexico Stats. 1941, § 27:121	X	X	X	X	X		10
North Dakota Rev. Code 1943, § 47-0603	X	X					10
South Dakota Code 1939, § 33.0228, § 33.0229	X X	X	X X	X X	X X	• Applies to vacant land and unoccupied land	10 10
Texas Stats. 1936, Title 91, Art. 5509	X	X		X		• Duly registered deed	5
Utah Code 1943, § 104-2-12	X	X					7
Washington Rem. Rev. Stats. 1932, § 788, § 789	X X	X	X X	X X	X	• Applies to vacant and unoccupied lands • Can be defeated by tax payment by person with better title	7 7

TABLE 2. STATUTES REQUIRING PAYMENT OF TAXES AS AN ELEMENT OF ADVERSE POSSESSION IN 2017

State	Adverse possession statute	Time required (in years) for continuous possession	Requirements to make adverse possession claim
Alabama	Ala. Code Ann. § 6-5-200	10 (deed or taxes)	• A document or deed, or paid taxes on the property during this time period
Arizona	Ariz. Rev. Stat. § § 12-522 and following	10, 5 (deed, taxes if city lot), 3 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above
Arkansas	Ark. Code. Ann. § § 18-61-103, 18-11-106	7 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above
California	Cal. Civ. Proc. Code § 325	5 (taxes)	• Paid taxes on the property in this state during this time period
Colorado	Colo. Rev. Stat. § § 38-41-101, 38-41-108	18, 7 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above
Florida	Fla. Stat. Ann. § 95.12 and following	7 (deed or taxes)	• A document or deed, or paid taxes on the property during this time period
Idaho	Idaho Code Ann. § § 5-206 and following	20 (taxes)	• Paid taxes on the property in this state during this time period
Illinois	735 Ill. Comp. Stat. Ann. § § 5/13-105, 107, 109	20, 7 (deed or taxes)	• A document or deed, or paid taxes on the property during this time period
Indiana	Ind. Code Ann. § § 32-23-1-1, 34-11-2-11	10 (taxes)	• Paid taxes on the property in this state during this time period
Minnesota	Minn. Stat. Ann. § 541.02	15 (taxes)	• Paid taxes on the property in this state during this time period
Montana	Mont. Code Ann. § 70-19-411	5 (taxes)	• Paid taxes on the property in this state during this time period
Nevada	Nev. Rev. Stat. § § 11.070, 11.110, 11.150, 40.090	15 (taxes), 5 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above
North Dakota	N.D. Cent. Code Ann. § § 28-01-04 and following, 47-06-03	20, 10 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above
South Dakota	S.D. Codified Laws Ann. § § 15-3-1, 15-3-15	20, 10 (taxes, deed)	• You must have a document or deed in the shorter time period noted
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 16.021 and following	10, 5 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above
Utah	Utah Code Ann. § § 788-2-208 to 788-2-214	7 (taxes)	• Paid taxes on the property in this state during this time period
Washington	Wash. Rev. Code Ann. § § 4.16.020, 7.28.050	10, 7 (deed or taxes)	• A document or deed, or paid taxes on the property during this time period
Wisconsin	Wis. Stat. Ann. § § 893.25 to 893.27	20, 10 (deed), 7 (deed, taxes)	• A document or deed and paid taxes on the property during the shorter time period above

