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Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881-1986)

John Lovett

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ARTICLE

DISSEISIN, DOUBT, AND DEBATE: ADVERSE POSSESSION SCHOLARSHIP IN THE UNITED STATES (1881–1986)

by: John Lovett*

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In the history of our law there is no idea more cardinal than that of seisin.

Frederick Pollock and William Maitland (1998)¹

The question in this whole matter, it seems to me, is not whether I've been right in what I've said about the purpose of the doctrine of adverse possession, or whether I've made proper deductions, or whether I haven't missed this or that important aspect of the matter. I'll concede on that. The real question is whether it isn't better to talk in this way than to purport to solve a problem by an incantation, such as the assertion that disseisin is an intentional act.

Charles C. Callahan (1960)²

I. INTRODUCTION

Property law scholars in the United States have discussed the doctrine of adverse possession for more than a century. Indeed, ever since American property law scholars began to write property law treatises, formalize property law courses in modern law schools, publish property specific articles in law reviews, and publish property law case books, adverse possession has served as a staple of property law discourse. This Article examines how property law scholars think about and discuss adverse possession. It explores how adverse possession talk has changed—and not changed—over time. In other words, this Article examines both the substance and rhetoric of property law scholars' attempts to explain, appraise and, at times, reform the doctrine of adverse possession.

The primary focus of this Article is adverse possession with respect to land rather than chattels.³ A number of prominent property law scholars have recently addressed the broad theoretical question of

1. SIR FREDERICK POLLOCK AND FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, VOL. 2, 29 (2d ed. 1898) (Cambridge Univ. Press Reissue 1968).

2. CHARLES C. CALLAHAN, *ADVERSE POSSESSION* 111 (1961).

3. For an important study of the law of chattels, see ROBIN HICKEY, *PROPERTY AND THE LAW OF FINDERS* (2010).

why possession itself is protected independently from ownership from a law and economics perspective.⁴ This Article examines a more specific, and perhaps more concrete, subject: How property law scholars discuss and justify the legal institution that allows a person who lacks formal title to land or realty but who possesses or uses that land for a specified period of time to acquire ownership or other real rights (servitudes or easements as the case may be) in that land.

This Article visualizes the history of American adverse possession talk as taking place in a series of conversations focusing on several distinct topics. Those conversations have unfolded across a relatively long period of time, beginning with statements by Oliver Wendell Holmes and Charles Langdell in the early 1880s and continuing to the present day.⁵ This Article focuses on the conversations that began largely with Holmes' publication of *The Common Law* in 1881 and continued to the early 1980s. At that time, a very different kind of adverse possession talk, informed by law and economics scholarship and other theoretical innovations, began to supplant the traditional discourse.⁶

The conversations in this long century of adverse possession dialogue focused on several subjects and themes. First, the participants often struggled to describe the fundamental nature of the emerging law in the United States. Is adverse possession a specialized statute of limitation that extinguishes the remedies of a landowner who has been dispossessed (or disseised) of his land?⁷ Or is it primarily an affirmative means of acquiring ownership?⁸ If the former characterization is the most apt, then the crucial determination should be when exactly

4. YUN-CHIEN CHANG, ED., *LAW AND ECONOMICS OF POSSESSION* (2015).

5. The doctrine of adverse possession was, of course, frequently addressed by American courts, legal commentators and treatise writers before 1880. The writing of earlier American commentators on property law, however, has exerted less influence on how we understand adverse possession today compared to the work of Holmes and the scholars who followed him. For instance, Kent's *Commentaries on American Law* makes only one oblique reference to adverse possession in a brief discussion of the problem of the purchase of pretended titles. JAMES KENT, IV *COMMENTARIES ON AMERICAN LAW*, Lecture LXVI, 438 (1830). Washburn's 1860 treatise on American property law did devote a full chapter to "Title by Possession and Limitation," EMORY WASHBURN, III, *A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY*, 117-63 (6th ed. 1902), but it is infrequently cited in modern academic commentary on adverse possession. In his 1873 edition of Kent's *Commentaries*, Holmes expanded the discussion of adverse possession, but only to a limited extent. See JAMES KENT, IV *COMMENTARIES ON AMERICAN LAW*, Lecture LXVII, 446(d) (O.W. Holmes ed., 12th ed. 1873).

6. A detailed study of the development of adverse possession discourse in the United States from the middle of the 1980s to the present day will be the subject of a subsequent article, though this Article will at times make reference to a number of prominent examples of scholarship from that period.

7. Prominent advocates of this view include Ames, Fuller, Walsh and Cunningham. See *infra* Sections II.B, II.C.2 and IV.A.3.

8. Prominent advocates of this view include Langdell, Ballantine, Bordwell and Helmholtz. See *infra* Sections II.B, II.C.1 and IV.A.3.

the dispossessed owner's right to bring an ejectment action began to accrue.⁹ If the latter description proves more accurate, and if adverse possession really concerns the acquisition of a new or original title in land rather than extinguishing an old title, the focus should shift to identifying the distinctive elements of proof that a possessor or a *claimant*, as the commentators began to say, must establish to justify the new title or at least to sure up an existing but somehow defective title.¹⁰

As the conversations deepened, the participants argued over many doctrinal points, including the elements an adverse possession claimant must prove,¹¹ the role of subjective intent in adverse possession and the related problem of "pure mistake,"¹² and even whether tacking should be allowed and, if so, whether privity of estate should be required for tacking.¹³ It would be incorrect, however, to think that adverse possession talk during this lengthy period was entirely descriptive.

From the beginning, some of the key participants made claims about the instrumental purposes that the doctrine served or should serve. Indeed, they were aware that the doctrine could be justified on competing grounds. Interestingly, one of the first clear taxonomies of the rationales that could justify adverse possession emerged from English scholars, Frederick Pollock and Frederick William Maitland.¹⁴ Important American figures such as Oliver Wendell Holmes, Henry Ballantine, Percy Bordwell, and Charles Callahan made important contributions to the growing rationalization of adverse possession law.¹⁵ That said, the general aim of the academic commentary during this long century was to clarify the law, and where possible, to exert a modest influence on judges as they continued to refine the doctrine of adverse possession in practice. This first great phase of adverse possession talk came to an end with the famous debate between R.H. Helmholz and Richard Cunningham in the first half of the 1980s.¹⁶

Throughout all of this doctrinal debate, a third important theme became apparent—a concern with the national identity of adverse possession law. Many participants—especially Ballantine, Bordwell, and Walsh—claimed that the practice of American courts had diverged

9. This is the position advocated famously by Roger Cunningham. *See infra* Section IV.A.3.

10. Many scholars, including Ballantine and Hemholz, took this view. *See infra* Sections II.C.1 and IV.A.3.

11. *See* discussion of Lon Fuller, *infra* Section II.C.2.

12. Almost all of the scholars discussed in this article, except Holmes, Pollock, Langdell and Ames, address this subject at one point or another.

13. For a brief synopsis of this lively debate, see *infra* notes 108–10, 130, and accompanying text.

14. *See* discussion *infra* Section II.A, notes 49–64 and accompanying text.

15. *See* discussion *infra* Sections II.A, II.C.1 and III.B.

16. *See* discussion *infra* Section IV.

from what had transpired or was still transpiring in English courts as they applied English statutes of limitation.¹⁷ In this sense, although several prominent English voices did exert an active influence on the development of American adverse possession discourse,¹⁸ generally speaking, adverse possession doctrine in the United States provides a nice illustration of the broader process of Americanizing the English common law of property.¹⁹

A final overarching feature of adverse possession talk throughout this long period is the degree to which the participants generally grounded their commentary in careful observation of developments in American courts and sought to exert a modest influence on further jurisprudential development. Although this is not a remarkable observation, it is important nonetheless because what came next in the second great phase of adverse possession talk was a move away from careful observation of case law and toward more generalized and prescriptive scholarship, heavily influenced by law and economics theory but also shaped by other schools of property law theory. As I will discuss in Parts III and IV of this Article, Charles Callahan²⁰ and Richard Helmholz²¹ played particularly important roles in disrupting the general descriptive quality of American adverse possession scholarship and moving it in a more theoretical direction. Thomas Merrill's article, *Property Rules, Liability Rules and Adverse Possession* solidified that movement.²² That article adopted an approach so novel that it marked the beginning of the second major phase of American adverse possession talk and will be discussed in the sequel to this Article.

The plan of this Article is straightforward. Part II addresses three groups of commentators and their insights into the nature and purpose of adverse possession, including the basic question of whether adverse possession was a fundamentally negative or affirmative doctrine and their views on the relevance of an adverse possessor's state of mind. Part II adopts a historical approach, focusing first on the contributions of Holmes, Pollock and Maitland, the first generation of adverse possession theorists, then reviews the contributions of Langdell and Ames, and finally examines the American scholars whose primary body of work was written in the interwar years between 1918 and 1940.

17. See discussion *infra* Sections II.C.1 and II.C.3.

18. See discussion of Pollock and Maitland, *infra* Section II.A.

19. For a general discussion of how American property law diverged from English common law, especially in the 1700s and early 1800s, see STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY AND WHAT WE OWN* 4–22 (2011).

20. See discussion *infra* Section II.B.

21. See discussion *infra* Section IV.

22. Thomas W. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 *Nw. U. L. REV.* 1122 (1985). In some sense, Merrill's article was a bridge between the descriptive and prescriptive approaches to adverse possession because his twin points of departure were (1) Helmholz's article and (2) the California Supreme Court's decision in *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584 (Cal. 1984).

Part III focuses on the work of post-World War II scholars William Stoebuck and Charles Callahan and takes a particularly close look at Callahan's book *Adverse Possession*, the first extended work that sought to reframe adverse possession through a much more skeptical lens that resembles the approach many contemporary scholars deploy today. Part IV analyzes the famous debate between Professor Helmholtz and Professor Cunningham in the early 1980s. That part distills the controversy into ten discrete subjects of dispute. It also demonstrates why Helmholtz's conclusions were so disturbing to Cunningham and argues that some of the broader issues in that debate set the stage for the future development of adverse possession discourse. Part V concludes by reviewing the general themes that emerged during the century-long first phase of adverse possession talk and looks forward to divergent themes that surfaced in the following decades.

Throughout this Article, brief biographical sketches of some of the key participants are offered, especially for those scholars whose careers may be less well-known to readers today. The purpose of these sketches is to situate these adverse possession commentators in their intellectual and social context.

II. THE FIRST SEVENTY YEARS: DEBATING THE NATURE AND PURPOSE OF ADVERSE POSSESSION

From roughly 1881 to 1952, academic debate about adverse possession law focused on several fundamental questions. Most importantly, scholars argued about whether adverse possession was best understood as a limitation device designed to cut off ejection claims of a passive landowner, a positive and dynamic means of recognizing the moral entitlement of a long-term possessor to a new title, or perhaps a transactional tool to clear title for market participants. They also argued about several of the key elements of an adverse possession claim, including what state of mind, if any, should be required of an adverse possession claimant and whether privity of title should be required for tacking. Some commentators also ventured to articulate the social, legal and institutional purposes that the doctrine served. In this period, some commentators were true innovators; others played important roles emphasizing the divergence between American and English law and consolidating an emerging consensus view of what American courts were or should be doing when they applied the doctrine.

A. *Holmes, Pollock and Maitland: The First Theorists*

This study of adverse possession talk begins at the end of the nineteenth century with the writing of Oliver Wendell Holmes and the English legal historians Frederick Pollock and Frederick William Maitland. These figures are important for many reasons. First, and

most obviously, they wrote some of the first canonical texts in modern Anglo-American property law scholarship. Second, Holmes and Pollock knew each other well, exchanged letters and ideas over many decades and, no doubt, influenced one another.²³ Third, these writers were among the first modern Anglo-American scholars to carry on a relatively high level theoretical discussion of the rationales for adverse possession in a manner informed by the work of the German legal science school.²⁴ Their style, however, differed from the German scholars they had read and their purposes were also different. Holmes was witty yet austere, striving to identify general principles that could explain the disorganized clutter of case law that confronted the typical American lawyer. Pollock and Maitland had a knack for capturing the sweep of centuries of legal development in breezy passages that highlighted themes and reduced complex doctrines into easily understood examples. Through their literary style and because of their then novel ideas about adverse possession, Holmes, Pollock and Maitland all exerted a major influence on subsequent generations of American property law scholars.²⁵

Countless American property law students read and puzzle over the passage that introduces Holmes' chapter on "Possession" in *The Common Law*.²⁶ In that chapter, Holmes seeks to answer the theoretical question that had preoccupied the great German legal scientists of the nineteenth century: "Why is possession protected by the law, when the possessor is not also an owner?"²⁷ After posing this question, Holmes writes famously:

23. See generally MARK D. HOWE, ED. HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 (1961).

24. See *id.* at 15 (June 17, 1880 letter from Holmes to Pollock) (thanking Pollock for a reference to Gaius and observing that it "tends to confirm a suspicion which I have often had that even the Roman law as the Roman lawyers understood it would give partial support to the theories of German philosophers upon possession. I was content to assume for the purposes of my article that they were justified on their data but I have never felt quite convinced."). Holmes' comment culminated an exchange of letters about possession dating from November 1888. See *id.* at 8-14 (collecting various letters). Pollock appeared to approve of the general direction of Holmes' work, commenting on Holmes' article on common carriers which also focused extensively on possession: "I have not had time to consider it much, but it seems alright & at all events to dispose of the Roman law theory." *Id.* at 12 (Pollock letter to Holmes, Aug. 2, 1879).

25. The Author acknowledges that many philosophers writing in English (Locke, Hobbes, and Hume, among others) addressed subjects associated with property theory today and that Blackstone and the Scottish Institutional Writers (Stair, Bankton, Erskine, and David Hume) also wrote extensively about property law, but consideration of their impact on contemporary adverse possession talk will have to wait for another day.

26. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Little Brown ed. 1881).

27. *Id.* at 206. For a succinct but helpful discussion of the debate between Savigny and Jhering regarding the essential element of possession, see A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 525 (1991) (explaining that Savigny emphasizes the importance of *animus domini*, the intent to own, in his *subjective* theory of possession,

Kant and Hegel start from freedom. The freedom of the will, Kant said, is the essence of man. It is an end in itself; it is that which needs no further explanation, which is absolutely to be respected, and which is the very end and object of all government to realize and affirm. Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object. As Hegel would have said, possession is the objective realization of free will. And by Kant's postulate, the will of any individual thus manifested is entitled to absolute respect from every other individual, and can only be set aside by the universal will, that is, by the state, acting through its organs, the courts.²⁸

Many later recognized that Holmes seemed to be endorsing a personality theory of possession—the idea that possessory rights and actions (and property rights more generally) can be grounded in the deeply rooted attachment between a person and an object under her direct physical control or that she can control by the exertion of her will.²⁹

If we read further into the chapter, however, we find signs that Holmes himself may have been skeptical of this theory. First, Holmes immediately points out Savigny's disagreement with Kant on this point.³⁰ Next, Holmes discusses Ihering's view that "possession is ownership on the defensive,"³¹ by which he appears to mean that possession is a useful proxy for ownership because the legal system relies on it to allow apparent owners to repel claims by unlawful possessors with minimal transaction costs.³²

Finally, Holmes offers a lengthy critique of the continental civil law distinction between possessory and petitory actions and especially the civil law rule preventing the defendant in a possessory action from asserting his own title in defense, a position he somehow attributes to Kant.³³ Despite these signals of his skepticism of a personality theory

whereas Jering's *objective* theory stresses that the "subjective intent of the person who has factual control over a thing is implicit in his factual authority" and therefore "any intentional exercise of physical control over a thing is possession").

28. *Id.* at 207.

29. For one of the most extensive contemporary discussions of Holmes' "roots" rationale for adverse possession, see Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2455–59 (2001). See also Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L. Q. 739, 741–42, 745–50 (1986) (arguing that a Hegelian "personality theory" can be used to explain adverse possession doctrine).

30. HOLMES, *supra* note 26, at 207.

31. *Id.* at 208.

32. *Id.* (explaining that possession allows an apparent owner "who is exercising ownership in fact (i.e. the possessor) [to be] freed from the necessity of proving title against one who is an unlawful position").

33. *Id.* at 208–11. Holmes was obsessed with this technical point of civil law procedure, which he claimed "follows from the Kantian doctrine." *Id.* at 208. At the end of this critique, Holmes disparages the civil law dichotomy between the possessory and petitory action as marking "a stage or society which has long been passed" and ob-

explanation, Holmes confuses us again with the following seemingly throw-away (but often cited) observation at the end of the first part of the chapter:

Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again.³⁴

Holmes seems to suggest that we protect possession to avoid dog-fights, to prevent possessors from resorting to violent means of self-help to maintain or regain control of things they possess. But, as Pollock and Maitland soon noted, society could control the tendency to engage in violent self-help through the imposition of criminal fines and penalties.³⁵ Moreover, it must be admitted that Holmes' dog-fight analogy does not explain why a long-term possessor is able to take title away from a true owner in a court of law.

Although Holmes ruminates on possession for many more pages in *The Common Law*, particularly with reference to movables,³⁶ Holmes does not attempt to identify a general rationale for adverse possession until the very end of the book. This omission is somewhat surprising given that his project in *The Common Law* was to generate a series of general or "scientific" theories to explain patterns in case law and enable lawyers to see the underlying reasons that similar cases produced similar results despite the often anachronistic and formalistic reasons offered by judges.

At the end of *The Common Law*, Holmes returns to a highly specialized adverse possession problem—whether a possessor of a tract of land may assert possessory rights in an easement appurtenant to that tract against third persons before the statutory period of adverse possession has run. But his real interest here is to show how the dominant estate is personified as a natural person, rather than in rationalizing the acquisition of a prescriptive easement.³⁷

In 1888, Sir Frederick Pollack published his *Essay on Possession in the Common Law*³⁸ and addressed the problem of title to land and

serving that in "ninety-nine cases out a hundred, it is about as easy and cheap to prove at least a *prima facie* title as it is to prove possession." *Id.* at 211.

34. *Id.* at 213.

35. See discussion *infra* notes 57–58 and accompanying text.

36. In the rest of the chapter on "Possession," Holmes focuses on cases involving first possession, especially wild animals, cases involving disputes between finders and other persons, and on whether agents or servants in possession of movables should be recognized as having possessory rights against third persons. HOLMES, *supra* note 26, at 213–35.

37. *Id.* at 384–85.

38. FREDERICK POLLOCK & ROBERT S. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW (Fred. B. Rothman & Co. 1985) (1888). Although Pollock and

adverse possession in a section entitled “Title by Possession.” Pollock’s commentary covers many subjects: (1) he strongly endorses the *jus tertii* principle; (2) he explains why the right to possess must be a “transmissible right;” and (3) he accepts the view that possession is the necessary root of title.³⁹ In a seeming jab at his friend Holmes, Pollock defends the separation of possessory actions from petitory actions and the postponement of the question of true title in the former, noting “we must not be too swift to call such a state of things archaic or anomalous.”⁴⁰ Finally, although he acknowledges that modern conveyancing practices might have diminished the importance of possession as the root of title, at least as compared to the Middle Ages when resolution of title defects without resort to possession would have led to “intolerable complication and interminable family quarrels,”⁴¹ Pollock still asserts that even in late Victorian England, adverse possession could serve important practical purposes:

With very few exceptions, there is only one way in which an apparent owner of English land who is minded to deal with it can show his right to so to do; and that way is to show that he and those through whom he claims have possessed the land for a time sufficient to exclude any real probability of a superior adverse claim.⁴²

In other words, Pollock adopts what we might regard as a familiar utilitarian justification for adverse possession. The doctrine’s primary purpose is to facilitate transactions, not to assuage psychological needs or provide moral justifications for current claims of ownership. In short, adverse possession enables current possessors who believe they have a legitimate claim to land to enter into market transactions relating to that land by clearing title expeditiously.

If we remain on the British side of the Atlantic a little longer, we come across another crucial text in this initial phase of professional adverse possession talk—Pollock and Maitland’s *The History of English Law Before the Time of Edward I*.⁴³ In their chapter entitled “Seisin,”⁴⁴ the authors describe how the English royal courts developed possessory actions to bring order and efficiency to disputes over possession of land in the period from 1164 to 1272. In a sense, the entire chapter serves as a kind of love song to one of those possessory actions—the assize of novel disseisin—which Pollock and Maitland

Wright themselves describe the essay as a “composite,” rather than a joint work, the sections relevant to this article were all written by Pollock and therefore he is referred to as the author. *Id.* at v–vi.

39. *Id.* at 93.

40. *Id.* at 94.

41. *Id.*

42. *Id.* at 94–95.

43. POLLOCK & MAITLAND, *supra* note 1, at 29.

44. Recall Pollock and Maitland’s magnificent opening declaration: “In the history of our law there is no idea more cardinal than that of seisin” and, therefore, all of English land law is really “about seisin and its consequences.” *Id.*

describe as a particularly useful summary procedure to sort out possessory rights. Although they never address statutes of limitation or adverse possession in this chapter, their rhetorical and methodological approach is novel.

First, the authors draw attention to the slipperiness of the language of possession. Moving back and forth from the past to the present, they note that “[i]n common talk, we constantly speak as though possession were much the same as ownership,”⁴⁵ and illustrate the substitutability of the terms with a folksy example of a man leaving his watch with a watchmaker. In one instant, they illustrate how seisin had more to do with the ability to control land than the ability to enjoy its fruits,⁴⁶ but then demonstrate the ambiguity of physical control by observing a Victorian gentleman walking down the street with an umbrella and noting all the possible legal conclusions that could be drawn about the relationship between the man and the umbrella.⁴⁷ In these lucid, entertaining passages, Pollock and Maitland initiate a tradition that future property law scholars would eventually follow. They looked at possession and adverse possession from a linguistic or sociological perspective, giving us a license to step back from the technicalities of legal doctrine and view possession through the eyes of a bemused linguistic or cultural anthropologist.⁴⁸

The second key contribution Pollock and Maitland made to adverse possession discourse surfaces when they pause in their discussion of the possessory remedies to address the dispute between “legal theorists of our own day” over why the law even protects possession, particularly when possession collides with or is protected against the rights of the owner.⁴⁹ Pollock and Maitland’s answer is strikingly modern, conceptual and cast in the language of theoretical pluralism and historicism.⁵⁰

Just like a handful of contemporary property scholars,⁵¹ Pollock and Maitland claim that judges tend to justify the protection of possession

45. *Id.* at 33.

46. *Id.* at 34.

47. *Id.* at 34–35.

48. One thinks here of Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

49. POLLOCK AND MAITLAND, *supra* note 1, at 40.

50. “The only true answer that we are likely to get,” they write, “is that the law of different peoples at different times has protected possession for many different reasons.” *Id.* at 41.

51. See, e.g., Merrill, *supra* note 22, at 1128–33 (identifying four distinct but complimentary rationales for adverse possession: (1) a limitations rationale concerned with overcoming stale claims and dealing with lost evidence; (2) a quieting title rationale that is focused on the administrative need to cure easily missed conveyancing errors with a minimum of transaction costs; (3) a moralistic rationale associated with punishing those who “sleep on their rights;” and (4) a rationale associated with vindicating the reliance interests of long-term possessors); John Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 818–27 (1994) (identifying a doctrinally dominant limitations model, a good faith model derived

with reference to four clusters or “types” of principles.⁵² First, and perhaps with a nod to history and Holmes, they identify the maintenance of social peace and deterrence of violent acts of self-help as one rationale.⁵³ Pollock and Maitland immediately recognize, however, that this justification alone is insufficient because if acts of self-help and violence are our primary concern, society could probably deter such behavior through criminal penalties alone.⁵⁴

The second justificatory principle they observe resembles Holmes’ apparent version of will theory:

The possessor’s possession is protected, not indeed because he has any sort of right in the thing, but because in general one cannot disturb his possession *without being guilty, or almost guilty, of some injury to his person*, some act which, if it does not amount to an assault, still comes as dangerously near to an *assault* that it can be regarded as *an invasion* of that sphere of peace and quiet which should guarantee to every one of its subjects.⁵⁵

The third rationale noted by Pollock and Maitland is one they associate with Ihering, namely, the idea that to protect actual owners who have been temporarily ousted by “thieves and land-grabbers,” it is often more practical to protect their prior possession than require them to prove their title.⁵⁶ Rejecting Holmes’ skepticism, Pollock and Maitland argue that to require an owner to make out a “flawless title” in every case before he could be reinstated to possession would be to require “too much.”⁵⁷ “Possession then,” for Pollock and Maitland, “is an outwork of property.”⁵⁸ To protect “rightful possessors” efficiently, one must occasionally be ready to protect the “unjust possessor” as well.⁵⁹

Pollock and Maitland’s fourth justification is not too different from the third. It is essentially a defense of relativity of title.⁶⁰ Of course, it

from Helmholz, and a later emerging developmental model of adverse possession that he subjects to heavy criticism); Stake, *supra* note 29, at 2434–55 (building on Merrill, Sprankling, and others and identifying at least 14 different “uneasy cases” for adverse possession before partially endorsing a “roots” or “loss aversion” rational for the doctrine). Sprankling later constructed four distinct utilitarian models for adverse possession in his useful treatise for law students. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 465–67 (3d ed. 2012) (identifying a limitations model, an administrative model, a development model and an efficiency/personhood model).

52. POLLOCK AND MAITLAND, *supra* note 1, at 41.

53. *Id.*

54. *Id.*

55. *Id.* at 41–42 (emphasis added).

56. *Id.* at 42.

57. *Id.*

58. *Id.*

59. *Id.*; see also *id.* at 49 (“But the most important point for us to observe is that in Bracton’s day this assize protects a thoroughly wrongful, untitled and vicious possession.”).

60. *Id.* at 43 (“He who possesses has by the mere fact of his possession more right in the thing than the non-possessor has; he of all men has most right in the thing until

is true that the *jus tertii* principle, though a means of ordering rights among a series of possessors, does not prove why a long-term possessor should prevail against a certain formal title holder. Yet Pollock and Maitland claim that relativity of title was still at the core of contemporary English property law.⁶¹ Here, in their defense of relativity of title and the need to protect even wrongful possessors against almost everyone else in the world, Pollock and Maitland link the past to the present and cite—almost in defiance—none other than Holmes and *The Common Law*,⁶² even though Holmes was himself skeptical of these kinds of rationales.

Finally, one cannot help but observe how pleased Pollock and Maitland apparently are with their taxonomy of rationales for protecting possession. They reiterate all of them several pages later in their text,⁶³ and then boast that, unlike the striving German monists of their time, they are happy pluralists, content to recognize that all four justifications could work together, or at least that, in the thirteenth century, they operated “in harmonious concert.”⁶⁴

Now we return to the banks of the Charles River. In his 1897 Boston University lecture that was eventually published as “The Path of the Law,”⁶⁵ Holmes embraces legal theory as the noblest calling in the law and illustrates the importance of fundamental principles by turning at last to “statutes of limitation and the law of prescription.”⁶⁶ In an apparent allusion to Pollock and Maitland, Holmes first articulates the lost evidence, social peace and neglectful owner rationales for adverse possession.⁶⁷ But almost immediately he attempts to reveal their collective inadequacy by describing a difficult hypothetical case: A person accused of trespassing defends his use of the plaintiff’s land by asserting that he has acquired a prescriptive easement by twenty years of adverse use. The plaintiff landowner responds by charging that he had “granted a license to a person whom he reasonably supposed to be the defendant’s [the trespasser’s] agent, although not so in fact, and therefore has assumed that the use of the way was permissive.”⁶⁸ Has

someone has asserted and proved a greater right.”); see also *id.* at 77 (“Thus our law of the thirteenth century seems to recognize in its practical working the relativity of ownership One ownership is valid until an older is proved.”).

61. *Id.* at 78 (“The land law of the later middle ages is permeated by this idea of relativity, and he would be very bold who said that it does not govern us in England at the present day”).

62. *Id.* at 78 n.5 (citing, *inter alia*, HOLMES, *supra* note 26, at 215).

63. POLLOCK AND MAITLAND, *supra* note 1, at 44–46.

64. *Id.*

65. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

66. *Id.* at 476.

67. *Id.* The last two rationales were set forth by Pollock and Maitland and the lost evidence rationale can be understood as another version of the administrative rationale for protecting possession that Pollock and Maitland also articulated. See POLLOCK AND MAITLAND, *supra* note 1, at 41–46, discussed *supra* note 53–62 and accompanying text.

68. Holmes, *supra* note 65, at 476–77.

the defendant—the alleged trespasser—acquired a right of way because of the objective nature of his use, Holmes asks, or has the landowner’s own subjective belief that he was granting someone—albeit not the defendant—permission to use his land destroyed the defendant’s adverse possession claim?⁶⁹

Initially, Holmes responds by pointing out that the neglectful owner rationale cannot justify acquisition of a prescriptive easement on these facts because the owner, by definition, has reasonably assumed he granted a license.⁷⁰ In other words, the owner is not guilty of neglect. Yet aware that this reasoning is too simplistic, Holmes then assumes the role of “defendant’s counsel,”⁷¹ and suggests “that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser.”⁷² It is here, in rebuttal to himself, that Holmes offers his second classic articulation of the personhood rationale for adverse possession:

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.⁷³

The paradoxes do not end here, though. Holmes next justifies his personhood account by adopting the perspective of the landowner, at least to the extent that Holmes believes the law owes *him* a convincing moral justification for why he must lose some of his property. Now Holmes suggests that it is the owner’s “neglect” that allows “the gradual dissociation between himself and what he claims,” and this disconnection between the owner’s will and object is just as important as the “gradual association” between the possessor and the thing.⁷⁴ Holmes closes the loop, or encircles himself, by suggesting that in this hypothetical case, the owner should have been more careful. When the owner observes that someone he presumes is a mere licensee conducts himself as if he actually held some firmer property interest in the

69. *Id.* at 477.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (emphasis added). Holmes’ other famous, similarly worded personhood account of adverse possession is found in his 1907 letter to William James, in which he wrote: “[M]an, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.” Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS*, 417, 417–418 (Max. Lerner ed. 1943). See also Stake, *supra* note 29, at 2456–57 (commenting on this passage and linking it to personality theory).

74. Holmes, *supra* note 65, at 477.

owner's land, it is the owner's responsibility to investigate and, if necessary, stop the adverse user.⁷⁵

Just like Pollock and Maitland, Holmes emerges then as a kind of theoretical pluralist, at least when it comes to justifying adverse possession. In a difficult prescriptive easement case, Holmes contends a good judge or lawyer will inevitably see the problem from both sides—that of the possessor whose activities are gradually sinking his being into the soil and that of the owner who at some point should notice that the defendant is acting like a property holder himself and must, therefore, make appropriate inquiries.

We should not forget that Holmes, Pollock, and Maitland were all enthralled with their own language and with their ability to sow doubt about the universality of any explanation of adverse possession. Pollock and Maitland combined their historical admiration for the assize of novel disseisin with an uncanny modernist ability to link the past to the present through conceptual rationalization. Holmes acknowledged that adverse possession and prescription fill some core need in any property system. Yet, in the end, even though today we often focus on his articulation of a personality theory justification for these doctrines, Holmes resisted committing to any single explanation.

B. *Langdell and Ames: The Great Aphorists*

Two more early movers in the debate over the fundamental nature and purpose of adverse possession were both deans of the Harvard Law School: the first, Christopher Columbus Langdell; the second, James Barr Ames.⁷⁶ Neither wrote extensively about adverse possession, but several of their pithy comments are still quoted frequently today.

In his short book, *A Summary of Equity Pleading*, designed to accompany his casebook, *Cases in Equity Pleading*, Langdell addresses the defenses available to a possessor “in an action to recover property (especially land).”⁷⁷ After reviewing the conceptual difficulties in-

75. *Id.* at 477 (“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.”).

76. For a detailed history of Langdell and Ames' deanships at Harvard and their impact on American legal education more generally, see ROBERT STEVENS, *LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 35–72 (1983). Langdell served as Dean from 1870 to 1895. *Id.* at 35–36. Ames was a student of Langdell's at Harvard and was appointed Assistant Professor at Harvard in 1873, while still pursuing his graduate studies in law and, notably, without any significant practice experience. *Id.* at 38. In 1895, Ames succeeded Langdell as Dean and served in that capacity until 1909, one year before his death. *Id.* According to Stevens, Ames' most important contribution was to refine Langdell's case method for teaching law. *Id.* at 51–64.

77. C.C. LANGDELL, *A SUMMARY OF EQUITY PLEADING* 135 (2d ed. 1883). The first edition was published in 1877. *Id.* at v.

volved in framing an adverse possession defense from the true owner's point of view and trying to determine when the owner's cause of action might have begun to accrue,⁷⁸ Langdell recommends memorably that:

*The thing to be looked at is the possession of the defendant, —not the want of possession in the plaintiff. A possession which has continued for a long time without interruption, and which has been accompanied by an uninterrupted claim of ownership, ought to prevail against the whole world.*⁷⁹

Based on a review of the experience of English courts applying the statute of limitations over the centuries,⁸⁰ Langdell concludes that “the courts came naturally and almost inevitably to regard the defendant's possession as the important consideration; and hence out of this statute⁸¹ has grown the doctrine of adverse possession.”⁸² In short, Langdell encourages his students and readers to think about adverse possession as a form of *positive prescription*,⁸³ rather than as a device to determine when a cause of action for ejectment had begun to accrue and when the statute of limitations on that action had run. Even more clearly than Holmes, Langdell thus provides one of the major rhetorical tropes that would come to dominate adverse possession talk in subsequent decades.

Although Ames followed and entrenched Langdell's approach to legal education at Harvard, we tend to remember him for having made the opposite claim about adverse possession—that in England, at least in contrast to Continental Europe, the most important thing was “not the merit of the possessor, *but the demerit of the one out of possession.*”⁸⁴ To the extent he was describing Anglo-American law, Ames appears to be asserting a historical view of the doctrine which requires that adverse possession be viewed in terms of the true owner's opportunity to bring a cause of action for ejectment and that

78. *Id.* at 137–38. He complained, in particular, that looking at the problem this way meant that “the defence (sic) of the statute would always depend on an event which had no real connection with the action.” *Id.* at 138.

79. *Id.* at 139 (emphasis added).

80. *Id.* at 142.

81. The statute Langdell is referring to is 32 H. VIII, ch. 2.

82. *Id.*

83. The Scottish Roman law scholar David Johnston traces the historical evolution of the concept of positive prescription and distinguishes it from acquisitive prescription in Scots law in DAVID JOHNSTON, *PRESCRIPTION AND LIMITATION* 255–59 (1999). For Johnston, an “accurate account of what positive prescription achieves . . . is not that it constitutes a new title,” but rather that it “creates an irrebuttable presumption . . . that the title on which the possessor holds is valid.” *Id.* at 257.

84. JAMES BARR AMES, *LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ISSUES* 197 (Harv. Univ. Press 1913) (emphasis added). Ames' two lectures addressing adverse possession were published originally as J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 23 (1889); J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313 (1890). The second lecture, appearing with the subtitle “The Nature of Ownership,” is the source of Ames' famous merit/demerit distinction. *Id.* at 318.

the true owner's failure to do so for the statutory period is what counts.⁸⁵

In truth, however, Ames may have actually been agnostic about the entire conceptual dispute. A few sentences later he points out that, putting aside *bona fides*, "there was no essential difference between the two systems [English and Roman law]" because "[a]s a matter of legal reasoning, the same result obtained—acquisition of a new title."⁸⁶ Indeed, the rest of Ames' discussion of adverse possession supports the conclusion that once a statute of limitation has run not only is the true owner prevented from exercising revendicatory rights but the possessor's "imperfect title must become perfect."⁸⁷

In sum, although neither Langdell nor Ames were memorable theorists of adverse possession, they were memorable aphorists. Their aphorisms about adverse possession provided useful benchmarks for subsequent generations of property law scholars.

C. *The Inter-War Years*

The next group of adverse possession scholars considered in this Article wrote primarily in the inter-war period in the United States, when social scientists and legal realists were making a challenge to traditional doctrinal scholarship.⁸⁸ These scholars were not necessarily legal realists themselves, though they often exhibited skepticism of formal, conceptual categories and were interested in the social consequences of legal rules.⁸⁹ They were all, however, deeply learned in English and American adverse possession doctrine. They were also keen to Americanize and codify the law of adverse possession. They sometimes disagreed with one another over technical issues such as tacking,⁹⁰ but they also agreed on many substantive points of law—especially the view that a possessor's state of mind should generally not concern a court.⁹¹ Unlike later scholars, they were certainly not determined to overthrow the entire institution of adverse possession. Rather, they saw themselves as working within that system to clarify, streamline, and rationalize the law as best they could.

85. As discussed in Sections II.C.3 and IV.A, this historical view continued to attract prominent adherents, including Walsh and Cunningham.

86. AMES, *supra* note 84, at 197–98.

87. *Id.* at 198.

88. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); STEVENS, *supra* note 76, at 131–80.

89. For a detailed critique of one account of the legal realist movement and an alternative version emphasizing the importance of the public/private distinction, see Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (reviewing Laura Kalman, *LEGAL REALISM AT YALE: 1927–1960*) (1986)).

90. See discussion *infra* notes 107–09, 129, and accompanying text.

91. See discussion *infra* notes 105–06, 119–23, 137–46, 160–65, and accompanying text.

1. Ballantine and Bordwell: The Transactional Perspective and the Americanization of Adverse Possession

Henry W. Ballantine and Percy Bordwell are often linked together in the imagination of American property law professors. A descendant of John Winthrop and the son of an Oberlin College president, Henry Ballantine graduated from Harvard Law School in 1904 and from there went on to become a law school dean or law professor at, successively, the University of Montana, the University of Wisconsin, the University of Illinois, the University of Minnesota, and finally the University of California, where he spent most of his career becoming the principal architect of California corporate law.⁹²

In the early stages of his remarkable career, Ballantine published *Title by Adverse Possession* in the Harvard Law Review.⁹³ In that article, he provides what may be the best known statement of what many scholars have come to call the “administrative” or “quieting title” rationale for adverse possession.⁹⁴ Ballantine’s main idea is that adverse possession serves not so much to promote land development, “to reward the diligent trespasser,” or even to “penalize the negligent and dormant owner for sleeping upon his rights.”⁹⁵ Rather, it functions primarily to “quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.”⁹⁶

After quoting from Langdell and Pollock,⁹⁷ Ballantine zeroes in on the sympathetic claimant he really worries about—the long-term possessor who possesses by virtue of *some title*.⁹⁸ Ballantine is particularly anxious about this kind of possessor when that person is either (1) suddenly ousted by a trespasser and wants to quickly recover possession or (2) wants to enter into a transaction with a third party. In the first situation, Ballantine muses that: “The deed under which plaintiff acquired title, without evidence of possession by the grantor of the premises conveyed is not even prima facie proof of title such as to

92. See Henry Winthrop Ballantine, *Law: Berkeley and Hastings*, UNIVERSITY OF CALIFORNIA: IN MEMORIAM (Sept. 1951), <http://texts.cdlib.org/view?docId=HB229003gf&doc.view=frames&chunk.id=div00001&toc.id> [https://perma.cc/Z4VN-T2QB]; Thomas W. Dalquist, *Henry W. Ballantine*, 37 CAL. L. REV. 171 (1949).

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

94. See SPRANKLING, *supra* note 51 at 466; Merrill, *supra* note 22, at 1129 (describing one set of rationales as falling under the general heading of “the interest in ‘quieting titles’ to property” and quoting Ballantine in support at n.27); Stake, *supra* note 29, at 2441–42 (discussing quieting title rationale).

95. Ballantine, *supra* note 93, at 135.

96. *Id.*

97. *Id.* at 136 (quoting LANGDELL, *supra* note 77, at 139). Ballantine’s quotation of Pollock (“It is better to favor some unjust than to vex many just occupiers”) does not contain a reference, but is likely from POLLOCK AND WRIGHT, *supra* note 38.

98. Ballantine, *supra* note 93, at 136–37.

warrant recovery in ejectment.”⁹⁹ In the second situation, which one suspects that Ballantine considers even more grave, he notes that “[n]or is a connected chain of deeds, which does not reach back to the Government or to some grantor in possession, sufficient, unless it reaches back to some common source of title, or to some source acknowledged to be genuine and valid, or unless there is some estoppel to deny title.”¹⁰⁰ Ballantine continues in this vein to elaborate on all of the reasons that the “proof of a paper title sufficient to make out a prima facie right to possession of land” can be complicated, including questionable signatures on and delivery of deeds, difficulties in proving the legitimacy of corporate entities, and powers of attorney found in chains of title, not to mention compliance with statutory notice and formalities required in connection with involuntary sales, tax sales and probate proceedings.¹⁰¹

Perhaps Ballantine is simply attempting to rebut Holmes’ claim in *The Common Law* that “[i]n ninety-nine cases out of a hundred, it is about as easy and cheap to prove at least a *prima facie* title as it is to prove possession.”¹⁰² Or perhaps he is just speaking like someone who had himself examined titles, or at least talked to other lawyers who had labored in that field. Either way, it is clear that Ballantine takes seriously the difficulties in store for a typical possessor/owner, possessing by virtue of a title, faced with the challenge of proving his title with perfect clarity. One senses that Ballantine is beginning to think about adverse possession in a transactional sense; that is, he views it as a practical tool to facilitate market transactions or to reduce information and transactional costs that might otherwise impede market transactions from occurring.¹⁰³

We see this transactional view emerging in particular when Ballantine expresses concern over the problem of measuring transactional costs in matters of title. Indeed, Ballantine asks how much effort the legal system should demand of any possessor seeking to gain certainty

99. *Id.* at 136.

100. *Id.*

101. *Id.* at 136.

102. HOLMES, *supra* note 26, at 211.

103. See Stake, *supra* note 29, at 2442–44 (describing some of the law and economics literature that justifies adverse possession in terms of facilitation of market transactions, but also noting that the doctrine might increase uncertainty and thus retard market transactions as well). As we will see, Callahan was the first property scholar to explore this idea in a detailed way. See CALLAHAN *supra* note 2, discussed *infra* notes 220–44 and accompanying text. Before Stake, Merrill also viewed adverse possession from this transactional perspective, focusing in particular on the reduction in transaction costs that the doctrine allows. See Merrill, *supra* note 22, at 1129–30 (“The institution of adverse possession is designed to reduce this drag [produced by uncertainty in chain of titles] by extinguishing most of the older claims. In the language of takings jurisprudence, adverse possession rests on a collective judgment that the reduction in information and transaction costs (or insurance costs) achieved by wiping these older claims off the books outweighs the ‘demoralization costs’ of eliminating such remote claims.”)

of title for a particular transaction.¹⁰⁴ Ballantine answers his own question by noting that due to statutes of limitations the English conveyancer only needs to find a root of title going back forty years.¹⁰⁵ In the United States, Ballantine implies, the conveyancer would also similarly benefit from the applicable statute of limitation, unless a “scientific system for the registration of titles” were to emerge, in which case, he admits, “adverse possession would be of far less importance.”¹⁰⁶

For all the strengths of *Title by Adverse Possession*, it is notable that Ballantine never addresses whether a pure trespasser, one who holds possession without any “claim of title” whatsoever, deserves to be rewarded with prescriptive title. Although he comes close to answering that question in another less often cited article, *Claim of Title in Adverse Possession*,¹⁰⁷ even there Ballantine’s position is not crystal clear.¹⁰⁸ Oddly, most of *Title by Adverse Possession* is devoted to a detailed attempt to rebut a claim made by Ames that when successive possessors without formal title occupy land (or possess a chattel for that matter), tacking of the successive periods should be permitted even in the absence of privity of title between the possessors.¹⁰⁹ To say that Ballantine found Ames’ view objectionable is hardly an understatement given that Ballantine devoted pages and pages to a demonstration of just why “privity of estate” was necessary for an adverse possessor to take advantage of tacking.¹¹⁰ Indeed, for Ballantine, the tacking doctrine and the requirement of privity both served to illustrate that “the very purpose” of adverse possession is “to cure technical defects in the evidence of title.”¹¹¹

104. See Ballantine, *supra* note 93, at 137 (“Upon every sale or mortgage of land it is necessary that the evidence of title be critically examined. For what period and from what source should title be deduced?”).

105. See *id.*

106. See *id.* at 43.

107. Henry Winthrop Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L. J. 219 (1919).

108. In this second article, Ballantine stated that the basis of adverse possession is a “claim of title or right,” see *id.* at 219, by which he seems to mean either some claim based on an apparent belief that one is entitled to possess as owner or perhaps just a claim hostile to that of the true owner. At one point, Ballantine states: “No title can be acquired against the true owner by merely squatting on real estate.” *Id.* But in the next breath, he states: “Color of title is not necessary, but the possession must evidence some claim inconsistent with that of the true owner.” *Id.* In other passages, Ballantine seems to emphasize the importance of hostility to the true owner’s title as the primary requirement for adverse possession. See *id.* at 219–24.

109. See AMES, *supra* note 84, at 205–06. Ames mustered support for this position from a grab-bag of American and Canadian decisions, see *id.* at 205, n.1, and also argued that this position was supported by his general theory of adverse possession—namely, that the transfer of title to the possessor was justified more by the true owner’s neglect than any merit on the part of the adverse possessor. *Id.* at 206.

110. See generally Ballantine, *supra* note 93, 147–158.

111. *Id.* at 151. Indeed, Ballantine notes that tacking provides an “acid test” of the underlying theory of adverse possession because it reveals that transfer of possession

Percy Bordwell was just as important to the development of adverse possession discourse as his relative contemporary Henry Ballantine. Interestingly, Bordwell is the first major American participant in the adverse possession debate not affiliated with the Harvard Law School.¹¹² Born in San Francisco in 1878, three years before publication of *The Common Law*, Bordwell earned his undergraduate degree and his LLB from the University of California and then came east and earned an LLM and PhD from Columbia University, a hot bed of legal realism.¹¹³ After a four-year stint at the University of Missouri,¹¹⁴ Bordwell joined the faculty at the University of Iowa Law School, where he became a much loved and respected scholar-teacher (often referred to as “Bordy”) for the rest of his career and contributed mightily to establishing that law school’s national reputation.¹¹⁵

In two important articles,¹¹⁶ Bordwell claims that adverse possession had become a distinctly American legal doctrine and that this

to the long-term possessor is justified, not because of the true owner’s laches, but because of “how long the defendant by himself and his predecessors asserted a consistent claim of title.” *Id.* at 152. Another interesting feature of Ballantine’s lengthy discussion of tacking and the debate over whether privity was required to tack is how it motivated him to generate vivid metaphors for the adverse possessor. At one point, Ballantine describes the tacking adverse possessor as a gardener tending a “growing plant, becoming more and more rooted in the soil.” *Id.* at 156. Later, he visualizes the tacking adverse possessor as a kind of military figure who marches onto the field of the true owner bearing the same flag that his predecessors have been waving and who is therefore justified to claim a perfect title because “[t]he same flat has been kept flying for the whole period.” *Id.* at 158. In these passages, we must admit, Ballantine seems to endorse alternative justifications for adverse possession—in particular a personhood rationale and a neglectful owner rationale.

112. *Cf.* discussion *supra* note 76 (Langdell and Ames); *supra* note 92 (Ballantine). Holmes entered Harvard College in 1857, graduated in 1861, and then entered the Union Army and fought in the Civil War until 1864. G. Edward White, *Introduction to HOLMES, THE COMMON LAW*, *supra* note 26, at xi–xii. After the war, Holmes eventually returned to Harvard Law School, attended lectures for three semesters, and was awarded a degree in 1866. *Id.* at xiii–xiv. His views of Harvard Law School at the time were not flattering. *Id.* at xiv. Holmes later returned to Harvard Law School as a professor for a term in the fall of 1882 before accepting his appointment to the Massachusetts Supreme Judicial Court. LIVA BAKER *THE JUSTICE FROM BEACON HILL* 261–70 (Harper Collins 1991). For more on Holmes’ experience at Harvard Law School as a student, see *id.* at 163–77.

113. Mason Ladd, *Percy Bordwell—Teacher, Scholar, Associate and Friend*, 56 *IOWA. L. REV.* 3, 3–5 (1970). For a discussion of the intellectual milieu of Columbia University Law School in the 1920s, see STEVENS, *supra* note 76, at 137–40. Bordwell, like Ballantine, exemplified how the Langdellian revolution in legal education spread across the United States. Young graduates of Harvard and Columbia, like Ballantine and Bordwell, were sent to provincial law schools in the Midwest or West with the expectation that they would learn their craft and then return East. See SCHLEGEL, *supra* note 88, at 25–27 and n.20 (listing Ballantine and Bordwell as exemplars). Of course, these young scholars often acclimatized and never returned East.

114. See *Percy Bordwell*, *THE UNIVERSITY OF IOWA LAW LIBRARY* <https://library.law.uiowa.edu/percy-bordwell> [<https://perma.cc/BE3Q-79Y6>].

115. Ladd, *supra* note 113, at 3–6.

116. Percy Bordwell, *Mistake and Adverse Possession*, 7 *IOWA. L. BULL.* 129, 129–30 (1922) [hereinafter Bordwell, *Mistake*]; Percy Bordwell, *Disseisin and Adverse*

process of Americanization had led to its fundamental reorientation. Under the old English cases dealing with disseisin, Bordwell asserts, the focus was always on the remedial interests of the owner who was out of possession and his loss of remedies if the statutory period had run.¹¹⁷ In the United States, however, the focus shifted to the interests of the claimant in possession in acquiring a new title based on his possession.¹¹⁸ In England, adverse possession and prescription was essentially “negative” in character; whereas in the United States it had become “affirmative.”¹¹⁹

Although this nationalistic dichotomy does not appear especially radical in hindsight, it would be a mistake to underestimate Bordwell’s impact. Though he was undeniably a man at home in the American Midwest,¹²⁰ Bordwell was also remarkably learned about English law, and this learning pervades his scholarship.¹²¹ Ironically, his vast knowledge of English legal history was put to the service of legitimizing an American approach to adverse possession and encouraging American judges and scholars to leave behind the obscurities of the English law of disseisin and formulate their own native law of adverse possession.

Several general themes emerge from Bordwell’s adverse possession scholarship. First, Bordwell clearly favors an objective view of adverse possession and is suspicious of any judicial attempt to justify the outcome of an adverse possession dispute in terms of the subjective intentions of the claimant. In this sense, Bordwell anticipates what became

Possession, 33 YALE L. J. 1–13, 141–158, 285–301 (1923) [hereinafter Bordwell, *Disseisin*].

117. Bordwell, *Mistake*, *supra* note 116, at 129; Bordwell, *Disseisin*, *supra* note 116, at 8–9.

118. Bordwell, *Mistake*, *supra* note 116, at 129–30; Bordwell, *Disseisin*, *supra* note 116, at 9–13.

119. Bordwell, *Mistake*, *supra* note 116, at 129, n.4.

120. Ladd recounts Bordwell’s talents as a baseball player, that he was a committed fan of the St. Louis Cardinals, and his avid support of the University of Iowa sports program, and especially some of its great football teams. Ladd, *supra* note 113, at 3–6. Another admirer remembers that Bordwell urged the manager of the St. Louis Cardinals, a friend of his from World War I, that the team should break from the racial segregation of major league baseball and hire Jackie Robinson to join the team. Charles W. Davidson, *Percy Bordwell: Man of Indomitable Spirit*, 56 IOWA. L. REV. 8 (1970).

121. Ironically, one of the decisive moments in this reorientation, according to Bordwell, occurred in Lord Mansfield’s opinion in *Taylor d. Atkyns v. Horde*, (1757 K.B.) 1 Burr. 60, 119, in which Mansfield had heaped so much scorn on the word *disseisin* that he coined the new phrase “adverse possession” to replace it. Bordwell, *Disseisin*, *supra* note 116, at 1. Bordwell also had many interesting things to say about the Real Property Limitations Act of 1833, which he viewed rather critically as having cut off what could have been a promising development of adverse possession law in England. Bordwell, *Mistake*, *supra* note 116, at 129, n.3. Bordwell also authored numerous articles about English law both prior to and after its property law reforms. For a complete list, see <https://library.law.uiowa.edu/percy-bordwell> [<https://perma.cc/SA7G-HZJK>].

the dominant mid-century view of adverse possession as reflected in the *American Law of Property*.¹²² In his article on *Disseisin and Adverse Possession*, for example, Bordwell regrets “the vast amount of needless litigation over the title to boundary strips long held by the adjoining owner under a mistake as to the boundary line.”¹²³ Although requiring a claimant to show a “deliberate intention to oust another from his property” might have made sense in the context of a tort action, that is, in the framework of the old English law of disseisin, he observes, “it was entirely out of place in acquisitive prescription.”¹²⁴ Eventually, he argues that the proper inquiry should be on whether the claimant “acts as owner.”¹²⁵ In his article *Mistake and Adverse Possession*, Bordwell also demonstrates convincingly that the actual effect of decisions requiring a hostile intent in the boundary context were actually quite limited because courts in those cases generally ruled in favor of the claimant relying on the alternative ground of acquiescence whenever there was an explicit or implicit agreement among the parties regarding the boundary line.¹²⁶

The second theme to emerge in Bordwell’s scholarship is ambivalence about the “claim of title” requirement. In his article on disseisin, he points out how the term itself evolved from referring to “claim of a title,” that is, something close to what we mean today by “color of title,” and came to mean “claim of right or ownership, or the intention to acquire ownership, or to hold as owner.”¹²⁷ Although he never explicitly addresses whether American adverse possession law should adopt an express “color of title” requirement and thus limit the acquisition of title to good faith claimants, he does argue that when a claimant enters land that he thinks belongs to the government intending to

122. 3 AMERICAN LAW OF PROPERTY, § 15.4, 771–85 (A. James Casner, ed. 1952). See discussion *infra* Section II.C.3

123. Bordwell, *Disseisin*, *supra* note 116, at 152.

124. *Id.* Bordwell thus criticizes the position adopted in *Preble v. Maine Cent. Ry.*, 27 A. 149 (1893), that a boundary claimant must prove “a conditional intention to oust the true owner” if a mistake as to the boundary location appears. *Id.* at 153. In contrast, he asserts that both an “absolute or conditional intent to oust the old owner” are “entirely non-essential to prescriptive acquisition,” and, in fact, both are “directly traceable to the old disseisin and the outstanding example of how badly the attempt to read disseisin into adverse possession works.” *Id.* Bordwell also praises Justice Holmes objective approach to the problem of mistaken boundaries in *Bond v. O’Gara*, 177 Mass. 139, 58 N.E. 275 (1900), calling it “so helpful that the law should choose the intention directed towards the physical object rather than the intention to hold in accordance with the deed.” *Id.* at 154. In his shorter article addressing the problem of mistaken boundaries under Iowa law, Bordwell dwells on this theme again and points out that the *Maine rule* resulted from the influence of the old English cases concerning disseisin and confusion over the “not very happy phrase ‘claim of title.’” Bordwell, *Mistake*, *supra* note 116, at 132–133.

125. Bordwell, *Mistake*, *supra* note 116, at 133.

126. *Id.* at 134–37. Bordwell also notes Iowa’s unique status as the only state where courts actually imposed good faith as an element for adverse possession separate and apart from a statutory requirement. *Id.* at 130 n.7.

127. Bordwell, *Disseisin*, *supra* note 116, at 153.

acquire it under a statutory provision but then discovers that the land is, in fact, owned by a private person, the claimant's possession is "much more meritorious than if he had known of the real facts."¹²⁸ In this context at least, the seemingly good faith claimant is more deserving than a person who might be classified as "an avowed usurper."¹²⁹

Finally, though, Bordwell's most important and constant theme was the Americanization of the law of adverse possession. At the end of his long article, *Disseisin and Adverse Possession*, he reminds his readers that "we have a doctrine of affirmative prescription and much of the criticism of our law has resulted from failing to recognize that fact."¹³⁰ Although he acknowledges that the negative prescription of the English law had its "advantages in cutting off stale claims," he goes on, following the transactional theme announced by Ballantine, to boast that "[o]urs is more logical from the point of view of quieting titles."¹³¹ Moreover, when he joins the contemporary debate over whether privity was required for tacking, Bordwell uses the controversy to observe that while in English law tacking would appear to be allowed in all cases, regardless of the connection between adverse possessors,¹³² in the United States the affirmative nature of adverse possession justifies the privity requirement and this characteristic further reveals the doctrine's "destiny as a true prescription."¹³³ Indeed, for Bordwell, the crucial point was that "where we [Americans] have definitely rejected the old law and substituted something different and perhaps better in its place, it would seem to be lacking in proper pride to ignore it and go on judging the living present by the discarded past."¹³⁴

2. Lon Fuller and Moral Agnosticism

A surprising intervention in adverse possession debates from the inter-war period appears in the form of a short, 1928 article authored by none other than Lon Fuller while he served as an associate profes-

128. *Id.* at 155.

129. *Id.*

130. *Id.* at 301.

131. *Id.*

132. Bordwell elaborates at length on that view, noting that in early English law under the statutes of Henry VII and James I, no connection at all between successive possessors was required for the applicable statute to run and that under the English Real Property Limitations Act of 1833, the rule was more or less to the same effect. *Id.* at 5-6.

133. *Id.* at 9. As Bordwell explains, if, as in the United States, adverse possession was really positive, then the crucial question became "whether a new title has come into being," *id.* at 12, and thus successive adverse possessors should be required to "hold under the same claim" and show that rights acquired by one possessor had passed to the successor by privity of estate. *Id.* at 13.

134. *Id.* at 301.

sor at the University of Oregon.¹³⁵ On its face, Fuller’s article looks like nothing more than a case note analyzing a 1928 Oregon Supreme Court decision.¹³⁶ Yet it also represents an incisive invitation to rethink the law of adverse possession from the ground up and may have partially inspired one of the most frequently cited contemporary articles on adverse possession.¹³⁷

Fuller begins by rejecting the traditional adverse possession formula with five or six elements and suggests instead that the elements could be reduced to three:

- (1) Possession must be entered into and maintained for the statutory period. (2) The possession must operate to give the owner of the land a cause of action. (3) The possession must be “unaccompanied by any recognition, express or inferable from the circumstances, of the right” of the owner.¹³⁸

Here, Fuller essentially calls for a radical simplification of adverse-possession law, grounded in the view that the fundamental question was, as William Walsh would argue a decade later,¹³⁹ whether a claimant had done something to warrant the true owner having a cause of action in ejectment against him.

With this new framework in place, Fuller then turns to the problem of mistaken-boundary cases, of which the noted case was an exemplar, and focuses on his proposed third element—possession must not be permissive or, as most courts then put it, “hostile and under a claim of right.”¹⁴⁰ Fuller’s key insight is recognizing that there are really two different classes of mistaken boundary cases: (1) “conscious-doubt” cases, *i.e.*, those in which “a landowner encroaches on the land of his neighbor when he is consciously doubtful as to the location of his boundary”; and (2) “pure-mistake” cases, *i.e.*, “those where a landowner encroaches on the land of his neighbor through a mistake as to the extent of his own boundaries, under circumstances which show that the possibility of error was not in his mind.”¹⁴¹ Seventy years later, Lee Fennell identified these two categories as the basis for her

135. Lon L. Fuller, *Adverse Possession—Occupancy of Another’s Land Under Mistake as to Location of a Boundary*, 7 ORE. L. REV. 329 (1928).

136. See *Heyting v. Bottaglia*, 123 Or. 517 (Or. 1928).

137. See Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 N.W. U. L. REV. 1037, 1051 (2006) (citing Fuller, *supra* note 135).

138. Fuller, *supra* note 135, at 329–30. Fuller explains in detail why the traditional statement that possession must be (1) hostile or under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous does not make sense and how these elements are encapsulated in his simpler, integrated approach. *Id.* at 330. n.4.

139. William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L. Q. REV. 532, 547 (1939), discussed *infra* Section II.C.3.

140. Fuller, *supra* note 135, at 331.

141. *Id.*

own proposal to reorganize adverse possession doctrine around a requirement of bad faith.¹⁴²

Within the first category—conscious-doubt cases—Fuller acknowledges that it might make some sense for courts to explore an encroacher's intentions because sometimes the encroacher might only set up a "provisional or tentative barrier" with the full understanding that if he and the other party are mistaken about the boundary location, the boundary would be moved later on.¹⁴³ In other cases, though, he admits that the encroacher might set up a barrier that is more permanent, reflecting a more definite intention to claim the fenced land as his own, thus satisfying the claim-of-right requirement.¹⁴⁴ But Fuller's real concern is with cases of pure-mistake, which he claims are far more common and constitute the "normal case."¹⁴⁵

After reviewing the somewhat confusing evolution of Oregon case law, Fuller finally recommends that the Oregon Supreme Court abrogate any distinction between conscious-doubt and pure-mistake. He advises that the court should adopt an approach in which an encroacher's intent is "derived directly from the physical senses," which would mean that an encroachers "intent to claim the land actually occupied," would effectively be inferred and would override "the less immediately effective intent to hold in conformity with the deed."¹⁴⁶ In other words, Fuller hopes to steer courts away from distinguishing between conditional or unconditional intent and thus avoid outcomes contingent on pure supposition and hypotheses.¹⁴⁷ Fuller notes an additional benefit of this approach would be elimination of any incentive for well-coached possessors to alter their testimony to fit a court's preferred characterization of the necessary state of mind of a possessor.¹⁴⁸ In the end, although Fuller does not call for a rule that would reward only bad-faith adverse possessors with a title, he is clearly moving in a direction that would *remove* moral intuitions from adverse possession law, a position that attracted scholarly support from

142. Fennell, *supra* note 137, at 1051–52, n.66, 69 (citing Fuller in support of her taxonomy of adverse possessors). While Fennell's proposal was, no doubt, inspired by other scholars of adverse possession, Fuller may have been a crucial inspiration to her search for a more sophisticated taxonomy and theory of adverse possession.

143. Fuller, *supra* note 135, at 331. Fuller also acknowledges that an inquiry into the intent of the possessor could be appropriate when "it appears that the possessor was aware of the possibility that he might be intruding upon his neighbor's land," for example, where a boundary had not been surveyed and both parties were in doubt about the boundary line—but some other exigency led the eventual claimant to erect some temporary barrier. *Id.* at 338, 332 (discussing *Hickey v. Daniel*, 99 Or. 525, 195 Pac. 812 (1921)).

144. *Id.* at 331–32.

145. *Id.* at 333.

146. *Id.* at 336.

147. In any case in which the encroacher was unaware of the possibility of error, Fuller advised, courts should avoid inquiry into his actual intent and presume that possession was held "under a claim of right." Fuller, *supra* note 135, at 338.

148. *Id.* at 336–37.

other scholars in his own day,¹⁴⁹ and eventually from some contemporary property law scholars like Fennell who adopted the rule decades later in even more ingenious forms.¹⁵⁰

3. William Walsh and the *American Law of Property*

William Walsh's contribution to what became the mid-twentieth century American consensus view of adverse possession is probably less well known than that of either Ballantine, Bordwell or even Fuller, but is no less important. Walsh was a professor at the New York University Law School. He was a legal historian and authored a lucid one volume *History of Anglo-American Law* that told the story of the development of English property law from the Anglo-Saxon period through the period of the American colonies.¹⁵¹ Walsh's crucial role in our story derives from his article published in the *New York University Law Quarterly* that made several important claims about the nature and purpose of adverse possession and several of its key elements.¹⁵² Walsh's article, in turn, formed the basis for much of what eventually became the chapter on adverse possession in the *American Law of Property*, published a dozen years later, in 1952, under the supervision of James Casner.¹⁵³

149. In a short 1932 article, William Sternberg essentially argues, just like Fuller, that in mistaken boundary cases, a possessor's intentions should be irrelevant. William Sternberg, *The Element of Hostility in Adverse Possession*, 6 TEMP. L. Q. 207, 212–20 (1932). Reviewing what he calls the “four principal views” regarding the hostility element, *id.* at 213, Sternberg clearly favors the “so-called Connecticut rule,” according to which, “hostility in adverse possession consists merely in the intent to claim as owner” and “it makes no difference whether such claim is made with intent to assert a rightful or wrongful ownership,” *id.* at 214 (citing *French v. Pierce*, 8 Conn. 439 (1831)), and disapproves an approach that would require courts to find a “technical disseisin.” *Id.* at 215. Although Sternberg cites a number of law review articles, he gives Fuller particular credit for stating “the fundamental objection” to a rule which requires courts to parse the subtleties of claimants' intentions in boundary disputes. *Id.* at 217 (citing Fuller, *supra* note 135).

150. See Fennell, *supra* note 137, at 1048–49 (positioning her argument for a bad faith requirement in adverse possession as a “significant departure” from modern scholarly approaches which she contends tend to disfavor bad faith claimants).

151. WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW (2d ed. 1932). Walsh's book was not an original work of scholarship. Instead, it synthesized the work of Pollock, Maitland, Holdsworth, Ames and others in clear, direct prose and with an unmistakable tone of authority.

152. Walsh, *supra* note 139, at 539.

153. See AMERICAN LAW OF PROPERTY, *supra* note 122, § 15.1, at 755 (explaining that preparation of the chapter on adverse possession was originally assigned to Walsh, noting that prior to his death Walsh asked Rutherford G. Patton to take over the project for him and suggested use of his material from the *N.Y.U. Law Quarterly Review*, and acknowledging that work's “excellence” and “incorporation into the present manuscript”). Although Casner acknowledged Patton as the author responsible for the chapter on adverse possession in the *American Law on Property*, *id.* at v., Patton drew on Walsh's treatise, W. WALSH, COMMENTARIES ON THE LAW OF PROPERTY, ch. 3 (1947), which, in turn, was based largely on Walsh's *N.Y.U. Law Quarterly Review* article. Patton, as noted above, acknowledged his heavy borrowing from Walsh's article. AMERICAN LAW OF PROPERTY, *supra* note 122, at 755. All of this was

Walsh possessed an admirable ability to synthesize a great deal of legal history while drawing clear lessons that he cast in the language of “legal theory.”¹⁵⁴ He was also able to draw on the work of other contemporary scholars, including a useful article authored by William Edwin Taylor, which collected all the existing statutory provisions in the United States addressing adverse possession at that time.¹⁵⁵ On some subjects, Walsh’s work is cumulative and cautious. For example, when identifying the fundamental purpose of adverse possession, Walsh tends to split the baby—giving more or less equal credit to the notion that the doctrine’s purpose is to quiet titles for those already in possession and to the idea that it penalizes the slothful owner who allows his remedies to lapse, with perhaps a modest tilt in favor of the former.¹⁵⁶

For Walsh, the only “true approach” to understanding adverse possession is a “historical one.”¹⁵⁷ Thus, much like Pollock, he returns time and again to the principle of relativity of title,¹⁵⁸ and, like Pollock and Maitland, believes that the key historical breakthrough in English common law was the development of the assize of novel disseisin, which allowed a current possessor, even a wrongful one, to protect his possession effectively against any subsequent disseisor and against all the world except the true owner.¹⁵⁹ Walsh continues in this vein by explaining that the statutes of limitation that developed later in English law not only barred the real owner’s right to recover and extinguish his title,¹⁶⁰ but also rendered the wrongful possessor’s title “absolute.”¹⁶¹ Walsh did not characterize this phenomenon as resulting in a transfer of title, but rather as creating a “new title.”¹⁶²

Perhaps Walsh’s most important contribution, though, relates to his role in forming the dominant hornbook view that courts should not base the outcome of an adverse-possession claim on the claimant’s state of mind. Walsh’s key move is to examine the problem from the point of view of a true owner who seeks to bring an action in ejectment against a wrongful possessor or, for that matter, from the point

noted in Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholtz*, 64 WASH. U. L. Q. 1, 2–3, n.7 (1986) [hereinafter Cunningham, *Reply*].

154. Walsh, *supra* note 139, at 540.

155. William Edwin Taylor, *Titles to Land by Adverse Possession* (pts. 1 & 2), 20 IOWA L. REV. 551, 738 (1935). Taylor also published another article addressing “the element of actuality” in adverse possession about the same time that Walsh published his article. William Edwin Taylor, *Actual Possession in Adverse Possession*, 25 IOWA L. REV. 78, 79 (1939).

156. Walsh, *supra* note 139, at 535–36.

157. *Id.* at 536.

158. *See id.*

159. *See id.*

160. *See id.*

161. *Id.* at 537.

162. *Id.*

of view of a wrongful possessor, who has himself been dispossessed by a subsequent adverse possessor and wants to recover possession through ejectment. Walsh asks whether the defendant in those actions can defeat a timely ejectment suit by “introducing evidence that he so occupied without intent to claim a title superior to that of the plaintiff, or that he had in conversations with third persons admitted the superiority of the plaintiff’s title.”¹⁶³ Walsh’s answer—in the negative—is stated with a powerful, almost irresistible logic, sweeping seven hundred years of legal history into a single paragraph:

There is, of course, no doubt at all that such evidence would be excluded. A claim of title on his part is not essential to the maintenance of ejectment against him. Even positive affirmative evidence that he at all times admitted that he occupied the premises without right or title, in the absence of proof that he occupied as licensee or tenant of the true owner or of notice of such statements to the true owner, would not make him any the less a trespasser and disseisor, liable to a suit in ejectment and the usual action for mesne profits either following that action or in connection with it. It necessarily follows that the statute runs against the owner’s right of action in ejectment from the time the wrongdoer took possession irrespective of his mental attitude. Every wrongdoer entering without right knows this fact. That is the typical case of the usual disseisor whose possessory title has been protected by possessory assizes, writs of entry and ejectment from 1166 down to the present day.¹⁶⁴

Let us give Walsh his due. In just a few memorable sentences, he makes a compelling, logical case for the black letter rule that a “claim of right” forms no part of the common law of adverse possession, other than to mean that an adverse possessor cannot be holding with the permission of the owner. Nothing more; nothing less. It is no wonder that James Casner permitted this entire passage,¹⁶⁵ along with almost all of the other salient parts of Walsh’s article,¹⁶⁶ to be inserted wholesale into the *American Law of Property*, and thus form the background for one of the greatest debates in American property law

163. *Id.* at 538.

164. *Id.* at 537.

165. AMERICAN LAW OF PROPERTY, *supra* note 122, § 15.2, at 762.

166. In another lengthy section of his article, titled “Hostility of the Possession and Claim of Title,” which also was repurposed wholesale for *American Law of Property*, Walsh argues once again that, if courts were to ask the proper question—“whether the true owner had a right of action in ejectment against the wrongful possessor continuing without interruption for the statutory period,” Walsh, *supra* note 139, at 547, they would certainly dispense with inquiries into the state of mind of the possessor because, of course, a true owner has a legitimate claim for ejectment regardless of whether the possessor is claiming under a title or not. *Id.* at 547–55. To appreciate the debt owed by *American Law of Property* to Walsh, compare Walsh’s other powerful statement about subjective intent in his article, Walsh, *supra* note 139, at 550, with AMERICAN LAW OF PROPERTY, *supra* note 122, at 776–77. Even Walsh’s long footnote 49, at page 550, citing dozens of cases, is repeated largely verbatim in *American Law of Property*. *Id.* at 777–78, n.30.

scholarship.¹⁶⁷ In many ways, this statement represents the proud capstone to the painstaking labor of several generations of preceding American property law scholars. If we appreciate the years of scholarship and reflection that laid the foundation for this statement, perhaps we can better appreciate the surprise that a scholar like Roger Cunningham would have experienced on reading Professor Helmholz's 1983 article, which seemed to toss aside far too casually Walsh's insights and learning.¹⁶⁸

One other aspect of Walsh's article is noteworthy. Walsh appears to be one of the first scholars to focus extensively on the nature of the physical possession sufficient to support a claim of adverse possession. Thus, in another section of his article that reappeared in *American Law of Property*,¹⁶⁹ Walsh observed that the kind of possession required for a successful adverse-possession claim is nothing more than "the degree of actual use and enjoyment of the parcel of land involved which *the average owner* would exercise over similar property under like circumstances."¹⁷⁰ Consequently, while continuous residence, construction of improvements, or cultivation of agricultural fields would normally be ample evidence of actual possession, these acts are not actually essential. Moreover, living on the land is not even required where "other acts of dominion regularly exercised establish unbroken possession in fact for the required period."¹⁷¹ In a passage that would eventually haunt a contemporary scholar like John Sprankling,¹⁷² Walsh writes:

Wild, undeveloped lands so situated and of such character that they cannot be readily improved, cultivated or resided upon involve a very different degree of control evidenced by much less actual exercise of ownership by affirmative acts to establish possession, since the usual acts of ownership by making improvements, cultivation of the soil and residing on it are impossible or unreasonable.¹⁷³

In essence, Walsh supports a sliding-scale or "average owner" approach to the actual possession element.¹⁷⁴ Although "occasional trespasses" are insufficient, other more consistent activities, even if

167. See discussion of the Helmholz-Cunningham debate *infra* Section IV.

168. See discussion *infra* Section IV.A.

169. AMERICAN LAW OF PROPERTY, *supra* note 122, at §15.3 at 765.

170. Walsh, *supra* note 139, at 542 (emphasis added).

171. *Id.* at 543.

172. Sprankling points out that this "average owner" approach to actual possession has roots in nineteenth century American case law, but he also laments its *de facto* national codification in the *American Law of Property*. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 835 n.79 (1994).

173. Walsh, *supra* note 139, at 543; see also AMERICAN LAW OF PROPERTY, *supra* note 122, at §15.3 at 766-67.

174. Walsh, *supra* note 139, at 544.

separated by “considerable intervals,” can suffice if the “average owner” test was met.¹⁷⁵

In sum, Walsh did not theorize any dramatic new ways to understand adverse possession. But he helped crystalize core aspects of the doctrine in a particularly memorable way. Moreover, by linking the pure possession or objective approach to adverse possession with a conceptual framework focused on the accrual of a cause of action for ejectment, Walsh helped establish the key doctrinal background for subsequent debates.

Looking back at this entire first period of adverse possession talk, stretching from Holmes’s writings in *The Common Law* to William Walsh’s scholarship that formed the foundation of the influential, mid-twentieth century monument, *American Law of Property*, we see both continuity and some gradual evolution. The continuity emerges in the recurring debate over whether to frame adverse possession fundamentally as a limitation device, which courts use mechanistically by simply identifying the moment in time when a landowner’s cause of action for ejectment begins to accrue, or as an affirmative, positive means of acquiring a new title. Pollock, Maitland, Ames and Walsh all, in one form or another, advocated for the negative, limitations model; Holmes, Langdell, Ballantine and Bordwell argued for the affirmative model that tended to view adverse possession from the perspective of the claimant proving his right to a new title and from the institutional perspective that the marketplace needed a practical doctrine to quiet titles in order to facilitate real estate transfers. Continuity and evolution appear in the increasingly dominant call for an objective approach to a claimant’s state of mind as advocated by Bordwell, Fuller and Walsh. Interestingly, Holmes, Pollock and Maitland, and to a somewhat lesser extent, Ballantine and Bordwell all made claims about the functional purpose of the doctrine; but as the period concluded, most scholars tended to focus more on the contours and details of the doctrine’s application rather than the ends it served. In the period that followed the publication of *American Law of Property*, the pace of intellectual change increased, with more strident calls for an objective approach to an adverse possessor’s state of mind and with some scholars beginning to question whether the doctrine itself should survive in a modern, increasingly technologically sophisticated age.

175. *Id.* Walsh was also skeptical that the elements of “open and notorious” possession had any independent meaning other than being a way of signaling “possession in fact” or what he called “legal possession.” *Id.* at 545. Walsh admitted that “furtive, hidden, concealed use of the property at odd times” is not typical of the “average owner,” but he also questioned judicial statements linking the “open and notorious” elements to the “purpose of giving the owner notice of the adverse claim” because they do not seem to have any “apparent relevancy or effect in the actual decisions of these cases.” *Id.* at 546.

III. THE NEW CRITICS

The next generation of property scholars who wrote about adverse possession published their work in the lengthy post-war period between 1952, which saw the publication of *American Law of Property*, and 1983, when Richard Helmholz published his famous study of the impact of subjective intent on the outcome of adverse-possession cases. During this period, fewer pieces of memorable adverse-possession scholarship were published than in earlier decades, but several scholars' efforts still deserve study. The scholars working in this period can usefully be viewed together as legal New Critics, that is, as law school cousins of the mid-twentieth century, American school of literary scholarship known as *The New Criticism*.¹⁷⁶ An examination of these scholars' work—especially two of the most prominent scholars in this period, William Stoebuck and Charles Callahan—reveals a rigorous attention to linguistic detail, an almost aesthetic objection to the inelegance of adverse-possession doctrine, a certain bemused detachment, and finally—especially in Callahan—an impulse to subject adverse-possession law to an institutional critique that presaged a law and economics analysis.

A. *William Stoebuck, Ironic Skepticism and the State-Specific Study Approach*

A number of articles that appeared in this era attempted to analyze adverse possession case law and statutes of a particular state.¹⁷⁷ Perhaps the best known, and certainly the most frequently cited example of this genre, is a 1960 article authored by William B. Stoebuck focusing on developments in the State of Washington.¹⁷⁸ Although Stoebuck wrote the article while he was still a practicing lawyer in Washington, he went on to become an influential property scholar and co-authored, along with Dale Whitman and Roger Cunningham, one of the most widely used hornbooks on property law in the United States.¹⁷⁹ In fact, Stoebuck's article shared many features with the

176. For a critical evaluation of the school of literary criticism, which flourished in American universities in the period from the late 1930s to the 1950s and which was known as "American New Criticism," see TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 45–51 (2d ed. 1983).

177. See R.D. Cox, *Adverse Possession and the Presumption of Title*, 11 MEM. ST. U. L. REV. 1 (1980); R.D. Cox, *History of the Adverse Possession Statutes of Tennessee*, 6 MEM. ST. U. L. REV. 673 (1976); Steadman, *The Statutory Elements of Hawaii's Adverse Possession Law*, 14 HAW. B.J. 67 (1968); Williams, *Title by Adverse Possession in Indiana*, 6 VAL. U. L. REV. 27 (1971).

178. William B. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53, 54 (1960).

179. ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* (1984).

chapter that later appeared in the Cunningham-Stoebuck-Whitman hornbook.¹⁸⁰

In many ways, Stoebuck's article is representative of the dominant view of adverse possession discourse in mid-century American legal thought. Although certainly aware of the doctrine's competing public policy justifications, Stoebuck strikes an agnostic position as to which justification is most convincing.¹⁸¹ Rather than reveal either a clear moral or functional view of the doctrine, his tone is instead one of ironic mystification at the doctrine's persistence.¹⁸²

Stoebuck's task in analyzing adverse possession in Washington was simplified by the then-existing statutory framework, which was relatively clear.¹⁸³ Focusing on the adverse-possession claimant's requisite intent, Stoebuck pictures Washington case law as illustrating the majority approach in the United States; that is to say, to prove possession is "hostile," a claimant need only show that her possession is neither subservient to the owner nor permissive.¹⁸⁴ Decisions stating that possession be under a "claim of right" did not, in Stoebuck's view, demand anything more than was required by the element of "hostility;" they merely required acts of possession that are consistent with those of a true owner or that would be objectionable by an actual owner of land.¹⁸⁵

To explain why some courts characterize mere "squatters" as not satisfying the "claim of right" element, Stoebuck visualizes these people as residing in temporary dwellings (a "shack") on the "periphery of undeveloped land . . ."¹⁸⁶ Because they fail to make any "extensive use" of the land and their presence is otherwise unobtrusive and ephemeral, courts presume that squatters possess the land with the permission of the owner.¹⁸⁷ In other words, squatters' lack of good faith does not disqualify them from establishing adverse possession;

180. The section on adverse possession in the hornbook is relatively short, but a number of specific sentences and phrases appear to have been taken directly from Stoebuck's 1960 article, suggesting that Stoebuck may have taken the lead in preparing the section. Compare Stoebuck, *supra* note 178, at 73 ("Hostility is the very marrow of adverse possession"), with CUNNINGHAM, *supra* note 179, § 11.7, at 766 ("Hostility is the very marrow of adverse possession").

181. Stoebuck, *supra* note 178, at 53.

182. *Id.* (noting that adverse possession is "an anomaly in the law" because "a legal right is obtained through conduct which must be wrongful" and commenting that "[c]learly such a strange and drastic doctrine must spring from strong necessity").

183. Washington provided a general ten-year statute of limitations for all actions for the recovery of real property *and* a seven-year statute of limitations that ran in favor of an adverse possessor who had possessed under color of title, who paid all property taxes during that time-period, and who believed in good faith that he has title. Stoebuck, *supra* note 178, at 54–55 (discussing RCW 4.16.020, the ten-year statute, and RCW 7.28.070, the seven-year color-of-title statute).

184. Stoebuck, *supra* note 178, at 73.

185. *Id.* at 73–74.

186. *Id.* at 74–75.

187. *Id.*

instead, the uncertainty and marginality of their actual possession makes them unworthy of title.

Addressing “subjective intent” generally, Stoebuck recognizes the confused state of the law,¹⁸⁸ and clearly would prefer for the issue to be banished from adverse possession doctrine altogether.¹⁸⁹ At one point he throws up his hands and admits quite candidly that the law “is a jungle so tangled and matted that, not only do litigants enter and never emerge, but also this article, while it must emerge, cannot say where it has been.”¹⁹⁰ Finally, after noting that most states and England had eliminated inquiries into either negative or affirmative intent, Stoebuck calls on the Washington Supreme Court to eliminate it as well, observing humorously that “since a man cannot by thoughts alone put himself in adverse possession, why should he be able to think himself out of it?”¹⁹¹ In general, as he calls on courts to streamline and simplify the law of adverse possession, particularly regarding intent, Stoebuck maintains his position of ironic detachment, perhaps also sowing seeds of doubt as to the continuing utility of the entire institution of adverse possession.

First published in 1984, the Cunningham-Stoebuck-Whitman hornbook, *The Law of Property*,¹⁹² generally adopts a view of adverse possession similar to the one Stoebuck advocated in his article. The authors clearly favor the objective approach to the question of hostility and claim of right.¹⁹³ They profess agnosticism toward the justifications for the “‘strange and wonderful’ doctrine of adverse possession,”¹⁹⁴ only hinting vaguely that the objective of inspiring owners to look after their property might be better served through some less drastic means. Yet when it comes to stabilizing boundaries, quieting titles, protecting the reliance interests of third parties, and promoting the productive use of land, they conclude that “[i]f we had

188. *Id.* at 76 (labeling this “the most troublesome problem in all of adverse possession”).

189. *See id.* at 76–78.

190. *Id.* at 78.

191. *Id.* at 80. Stoebuck’s discussion of mistaken boundary cases, which he distinguishes from cases involving “subjective intent,” is rather low key. Although he accepts the theory’s underlying rulings that there is no adverse possession when there has been evidence of a conditional agreement between neighbors to set up a temporary boundary until the true line can be determined at a later date, he acknowledges that courts could mistakenly find an agreement on “nebulous facts.” *Id.* at 75, 80. He also claims, though, that he could cite thirty mistaken-boundary cases for the proposition that if other elements of adverse possession are present, “a mistake as to the true ownership will not prevent adverse possession.” *Id.* at 80.

192. CUNNINGHAM, *supra* note 179.

193. *Id.* § 11.7, at 762. More affirmatively, the authors state: “It is the view here, along with that of most decisions and of nearly all scholars, that what the possessor believes or intends should have nothing to do with it.” *Id.* § 11.7, at 761.

194. *Id.* § 11.7, at 764.

no doctrine of adverse possession, we should have to invent something very like it.”¹⁹⁵

Finally, although Stoebuck and his co-authors acknowledge that title derived from adverse possession is a “new chain of title” and thus “provides a rare instance in which original title may arise in a mature society,”¹⁹⁶ it is noteworthy that they do not place their treatment of the subject at the beginning of their book as many contemporary property scholars do today. Instead, they nestle it deep in Chapter 11 on *Conveyances and Titles*, amid lengthy discussions of deeds, escrows, boundaries, the recording system, curative and marketable title acts, title covenants, title insurance and title registration, among other subjects.¹⁹⁷ Seen in this context, adverse possession appears not as a powerful instrument of social policy or a reflection of the very soul of property, but rather a handy tool in the real estate practitioner’s tool kit. In this sense, Stoebuck and his co-authors link themselves to the inter-war scholars, Ballantine and Bordwell, who early on began to advocate for a transactional approach to adverse possession doctrine.¹⁹⁸

B. *Charles Callahan and High New Criticism*

In March 1960, the same year William Stoebuck published his article on adverse possession in Washington, Charles Callahan gave three lectures at the Ohio State University College of Law. The following year, these lectures were published in a short book titled *Adverse Possession*.¹⁹⁹ Callahan’s book represents perhaps the most skeptical writing about adverse possession that had yet appeared in the United States. It also anticipates many themes of the even more highly critical adverse possession discourse that would bubble up in American legal scholarship beginning in the 1980s.

Callahan himself is an enigmatic figure. After earning a J.D. from the Ohio State University in 1934,²⁰⁰ and then spending a year in private practice, Callahan went east to the Yale Law School where he eventually earned an S.J.D. in 1937 and served as an assistant professor in 1939. In 1943, he returned to Ohio State and became an associate professor, and later full professor. He gave his lectures on adverse possession while serving in that capacity. Callahan’s research interests were diverse. He notably co-authored a lengthy chapter on Powers of

195. *Id.*

196. *Id.* at 758.

197. *See id.* §§ 11.1–11.15.

198. *See discussion supra* Section II.C.1.

199. CALLAHAN, *supra* note 2.

200. *Id.* at viii.

Appointment with W. Barton Leach in the *American Law of Property*.²⁰¹

While working on his S.J.D. at Yale, Callahan served as an assistant to Underhill Moore, one of the most controversial legal realists of his age.²⁰² He worked on Moore's curious studies of parking offenses in New Haven—one of the first attempts at full blown empirical research in the American legal academy—and eventually co-authored with Moore a lengthy, almost unreadable law review article reporting on those findings.²⁰³ Although it would be difficult to determine exactly what Callahan took away from his work with Moore, it is safe to assume that he at least absorbed some of the anti-formalism and social-science skepticism of Moore and the other legal realists still working at Yale at the time.²⁰⁴

Turning to *Adverse Possession*, we can sense the historical and satirical ambition of Callahan's lectures from the very first sentence: "In 1952, halfway between the explosion of the first atomic bomb and the first successful potshot at the moon, the Court of Appeals of New York decided a case entitled *Van Valkenburgh v. Lutz*."²⁰⁵ As this illustrates, Callahan's goal was to explore why, in an age of stunning scientific accomplishments, courts could still be so muddled when called upon to apply the doctrine of adverse possession. His method is partly historical and partly impressionistic. He seeks to raise questions and provide tentative answers, but does not appear particularly dogmatic. His general message is that adverse possession is, in the very long run, likely to become an anachronism of property law as land transactions are subjected to ever more scientific and reliable procedures. Despite this skeptical view of the institution's long-term viability, Callahan does not call for the doctrine's immediate abolition, recognizing that it still serves some useful social and transactional purposes.

Callahan's first lecture, *i.e.*, the book's first chapter, is devoted to "Property, Policy and Possession." Callahan begins by telling the well-

201. See 5 AMERICAN LAW OF PROPERTY, Part 23, 457–657 (A. James Casner, ed., 1952).

202. SCHLEGEL, *supra* note 88, at 131–36.

203. Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L. J. 1 (1943); SCHLEGEL, *supra* note 88, at 131. According to Schlegel, Callahan was not Moore's ideal choice as a research assistant because Callahan had no training as a professional social scientist and was more interested in procedure. *Id.* Callahan, in turn, was not particularly enthusiastic about Moore's parking studies and never did any empirical research of his own after leaving Yale. *Id.* at 325, n.225.

204. For detailed consideration of the attempt to marry the social sciences with American legal education and scholarship, see generally SCHLEGEL, *supra* note 88, and especially 115–146 for an evaluation of Underhill Moore. For a more condensed appraisal of the attempt to integrate law and the social sciences, see STEVENS, *supra* note 76, at 131–54.

205. CALLAHAN, *supra* note 2, at 1.

known story of the *Lutz* case and concludes, like so-many critics in the years that followed, that the court of appeals decision erred in making too much hinge on the claimant's state of mind:

Prowling around in Lutz's head produced a result which, superficially at least, is remarkable. Lutz was not an adverse possessor with respect to Charlie's shack because he knew it was on someone else's land. He was not an adverse possessor with respect to the garage because he thought it was on his *own* land.²⁰⁶

After this disparaging opening, Callahan positions the doctrine of adverse-possession in the broader spectrum of law, noting that it was less popular and dynamic than some areas like international law, administrative law and tax law,²⁰⁷ and, as a part of the wider fabric of property law, was likely to shrink and consolidate through the welcome processes of legal rationalization and law reform.²⁰⁸

Toward the end of this initial chapter, Callahan turns to the question of why we protect possession apart from, and sometimes in competition with, ownership. He admits, following Holmes, that one reason to protect possession is to preserve social peace and to respect people's natural instinct of fighting to protect objects they have brought within their control.²⁰⁹ But, like Pollock and Maitland, Callahan finds this explanation wanting.²¹⁰ Callahan also doubts that the principle of relativity-of-title can explain much. After all, he muses, we probably protect "pure possession" divorced from ownership

206. *Id.* at 10. The only true adverse possessor under the approach in *Lutz*, Callahan pointed out, would thus be someone who "has no views whatsoever." *Id.*

207. *Id.* at 11–12.

208. *Id.* at 13–15. Among the forces leading to consolidation in property, Callahan notes three in particular. First, there is the financial and practical imperative to save time and resources in accomplishing transactions, as demonstrated by the pressure for simplification in the law of future interests. CALLAHAN, *supra* note 2, at 16–19. One senses here the same instinct that would later appear fully theorized in Merrill and Smith's account of how the need for transactional standardization could produce a limited number of property forms. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L. J.* 1 (2000). Second, there is the general movement to reform property law by way of statute; CALLAHAN, *supra* note 2, at 20 (noting how "[t]he academic law of personal property goes on with its foxes, deer and fish, in blissful disregard of the game laws"). Third, there is "further analysis," by which Callahan meant the work of analytical reconceptualization by judges and academics who gradually identify outdated categories and replaced them with more unified and coherent systems of thought, as exemplified by the gradual unification of personal and real property, the unification of corporeal and incorporeal property, and the consolidation of easements and profits. *Id.* at 22–26.

209. CALLAHAN, *supra* note 2, at 33–36.

210. Many people who have temporary physical control of things (for instance, a servant handling the goods of his employer) are not honored with possessory protection, Callahan notes. CALLAHAN, *supra* note 2, at 37–38. He also acknowledges, though, that in more primitive societies, especially where literacy is limited, possession does serve as a useful proxy for ownership. Thus, possession is "vestigial; it is the tailbone of property." *Id.* at 38.

much less often than we think we do.²¹¹ And, to the extent we do so, it is probably “because we simply haven’t taken the trouble to stop.”²¹² At the end of the day, Callahan suggests that the most plausible rationale for possessory protection is simply to relieve real owners “of the necessity of proving their titles”²¹³ But even this functional advantage, he suggests, is relatively small, at least when compared to the gains that might be achieved by simplifying the law and discarding the whole business.²¹⁴

Callahan presented his own historical description and doctrinal evaluation of American adverse-possession law in his second chapter. The details of this thirty-page account are interesting,²¹⁵ but ultimately less important than his general theme—that the inevitable and salutary movement toward law reduction and simplification would be furthered in adverse possession by remembering that the fundamental question is simply whether the statute of limitation has barred the true owner’s cause of action.²¹⁶ This doctrinal conclusion is quite curious, however, because Callahan also acknowledges throughout his analysis that courts increasingly focus on the opposite side of the coin.²¹⁷ In this sense, Callahan predicts—and to some extent straddles—both sides of the Helmholtz-Cunningham debate that emerged twenty years later.²¹⁸

In his third and final chapter, Callahan subjects adverse possession to a teleological critique, contending that we will only be able to reform the doctrine sensibly if we understand its real purposes.²¹⁹ Here, much like Jeffrey Stake,²²⁰ Callahan disposes of almost all of the traditional rationales for adverse possession. At the same time we also see Callahan acting as a kind of new critic, probing through a series of close readings of the language used to justify the doctrine and expos-

211. *Id.* at 39 (“How may thieves recover for conversion by other thieves? How many adverse possessors actually become successful plaintiffs before the statute has run?”).

212. *Id.* at 39.

213. *Id.* at 40.

214. *Id.*

215. *Id.* at 53–77. Like Lon Fuller, Callahan suggests that most of the traditional elements of adverse possession could be swept away and all that courts really need to ask is whether there has been possession. *Id.* at 64. He is also critical of any attempt to demand a particular state of mind from the claimant. *Id.* at 66–73. Ever witty, Callahan notes how conditional intent rules under the hostility-claim-of-right element have taken what started out as a “claim of right” and turned it into a “claim of wrong.” *Id.* at 72.

216. CALLAHAN, *supra* note 2, at 74–76.

217. *Id.* at 59–66.

218. *See infra* Section IV.A.

219. CALLAHAN, *supra* note 2, at 81–82.

220. Callahan’s critique predicts much of Stake, *supra* note 29, but he lacks Stake’s sophisticated background in behavioral psychology. Perhaps Callahan’s exposure to the social science milieu at Yale when he worked with Underhill Moore also explains how Callahan could arrive at a position similar to Stake.

ing the inherent tautologies in many of the rationales, without committing himself to any moral, philosophical or economic justification.²²¹

Toward the end of this chapter, however, Callahan turns to the broadest “social” purpose traditionally offered in support of adverse possession, that is, to quote the 1623 Statute of Limitation, the purpose of “quieting of men’s estates,” which Callahan takes to refer, not to the interests of a particular defendant in ejectment, but rather “the more specific policy of facilitating transfers of land.”²²² This is an important objective, Callahan admits, as it animated much property law reform over the centuries.²²³ Using a functional approach, Callahan points out that a prospective purchaser wants to know two things: (1) that the prospective vendor really owns the land he purports to sell; and (2) that the vendor owns all of the land he purports to sell, not just part of it.²²⁴ Callahan then asks whether adverse possession is the most efficient “device” to answer those questions.²²⁵ While he was neither the first nor the last property law scholar to use this kind of functionalist critique, Callahan’s analysis is provocative.

First, Callahan acknowledges that if the United States were to adopt a Torrens system of land title registration, “adverse possession would be not only unnecessary but undesirable.”²²⁶ But since we are destined, in his opinion, to struggle on with record title and our recording acts, Callahan recalibrates and observes that adverse possession enters the picture in only three paradigmatic transactional settings and the doctrine actually facilitates land transactions in only one of those settings. In the first situation, a prospective purchaser performs a title examination and discovers that someone other than the purported vendor has been in long-term possession of the land and actually appears to have a perfect chain of title with an accurate description and survey.²²⁷ In the second, a prospective purchase performs a title examination and discovers that record title is in the prospective vendor and “there is no substantial doubt about it”²²⁸ In the third, a prospective purchaser performs a title examination and discovers that the “record itself is not perfect but it looks fairly good for the prospective

221. In this second chapter, Callahan exposes the logical and linguistic fallacies of not only the notion that adverse possession is “designed to protect against stale claims after evidence has become lost, memories have faded and witnesses have disappeared,” CALLAHAN, *supra* note 2, at 83, but also the statute of repose, reliance interest, neglectful owner and developmental rationales of adverse possession with refreshing candor and wit. *Id.* at 84–92.

222. *Id.* at 93 (internal quotes omitted).

223. *See id.*

224. *See id.* at 94.

225. *See id.* at 95–96.

226. *See id.* at 99.

227. *See id.* at 101.

228. *Id.* at 102.

vendor. It has its odd spots, which conceivably may be defects, but perhaps, on the other hand, are not.”²²⁹

Callahan’s useful insight here is to point out that in the first two situations, adverse possession actually either impedes market transactions or makes no real difference. In the first situation, what we might call *complete misalignment of title and possession*, the prospective purchaser certainly will not go forward with the transaction by relying solely on the vendor’s long-term possession beyond the statute of limitations. Instead, if he is well advised at all, he will require that all doubts about title be eliminated through a quiet title action or a quitclaim transfer between the possessor and record owner. In this instance, the existence of adverse possession actually *holds up* transactions until doubts can be resolved by a court or private negotiation.²³⁰

In the second situation, what we might call *complete alignment of title and possession*, Callahan observes that the fact that the vendor has been in possession of the land for longer than the statutory period *generally does not* give the prospective purchaser any greater peace of mind before entering the transaction.²³¹ It is possible that the vendor’s long-term possession might wipe out some errant non-record claims of a true owner, but the doctrine’s pitfalls and doctrinal limits, such as statutory disabilities, mean that the net gain in transactional assurance is “very small, if it exists at all.”²³²

It is only in the third situation, what we might call *probable alignment of title and possession with some tricky spots*, that adverse possession serves to substantially enhance the facilitation of land transactions.²³³ This is not a trivial category. As Ballantine reminded us back in 1918,²³⁴ and as many contemporary real estate practitioners are likely to attest today, many routine real estate transfers will always be plagued by this kind of uncertainty because of innocent conveyancing mistakes made in the past. Here, Callahan admits that adverse possession can be useful precisely because, if the prospective vendor has been in possession for longer than the statutory period, that possession might well cure these identifiable “odd spots” (not to mention even some “unknown unknowns”), even though the doctrine is not a complete guarantee because of the disabilities and other problems associated with proving adverse possession in any case.

To be sure, Callahan is not particularly generous here, suggesting only that the doctrine provides some additional transactional facilita-

229. *Id.*

230. *See id.* at 100–01.

231. *See id.* at 102.

232. *Id.*

233. *See id.* at 102–03.

234. Ballantine, *supra* note 93, at 135.

tion “but not very much.”²³⁵ Although many current transactional lawyers would question his quantification, Callahan is probably right that adverse possession offers its greatest transactional value in these cases where it helps to assure parties that the transferor has title and boundaries are defensible even when, in all likelihood, adverse possession might never be necessary to prove them.²³⁶ In other words, adverse possession provides additional assurance to a prospective purchaser or lender (or, in actuality, to the title insurance company) “of protection against claims which *may* exist, but which probably do not.”²³⁷ Callahan’s analysis is summarized in the figure below.

FIGURE 1

<u>State of Apparent Title</u>	<u>Effect of Adverse Possession</u>
Complete Misalignment of Title and Possession	Negative – Holds Up Transactions
Complete Alignment of Title and Possession	None – No Net Gain or Harm
Probable Alignment of Title and Possession with Tricky Spots	Some Additional Benefit – Mainly Transactional Assurance

All of this analysis from a transactional perspective leads Callahan to an important and counter-intuitive insight; in the last two transactional settings at least, possession is really *unrelated* to our primary concern. What we really want to do, if we take the quiet title rationale seriously, is “to bar claims inconsistent with *the record title* unless they are asserted within a reasonable period.”²³⁸ The extent of the record title holder’s possession should not matter. In these cases, Callahan asks, “[w]hy, then, don’t we just bar the old claims?”²³⁹

Callahan’s answer is one that many contemporary scholars eventually turned to over the years.²⁴⁰ He points out that, notwithstanding adverse possession, most states bar old claims that are inconsistent with at least the more recent transactions found in the chain of title through other means, namely curative acts and marketable title acts. These statutory innovations “wipe out the capacity of certain defects to upset the title after a certain length of

235. CALLAHAN, *supra* note 2, at 103.

236. *Id.*

237. *Id.*

238. *Id.* at 104 (emphasis in original).

239. *Id.* (emphasis in original).

240. See Stake, *supra* note 29, at 2441–49 (arguing that marketable title acts are a superior tool for quieting title, that betterment acts can deal with innocent encroachers, and noting the increasing accuracy of modern surveying techniques); Fennell, *supra* note 137, at 1063–64 (pointing to marketable title acts and title insurance as alternative risk reduction tools).

time.”²⁴¹ From the transactional perspective, Callahan calls curative acts “adverse possession without the possession”²⁴² In Callahan’s view, marketable title acts are potentially even more far-reaching, but are also more complicated in that they provide that “all outstanding interests which may affect the record title, such as easements, future interests, and the like, are invalid unless they are re-asserted on the record once every thirty years, or once every forty years.”²⁴³ Callahan speculates that marketable title acts would spread widely.²⁴⁴

In the long run, Callahan guesses that, at least with respect to issues of title, the increasing adoption of marketable title acts and the extension of curative acts might make adverse possession less and less valuable so that in time it might make sense to jettison the doctrine entirely.²⁴⁵ When it came to boundary disputes, Callahan was more uncertain, willing at least to recognize that adverse possession might still perform a valuable assurance function, especially in smaller and more routine transactions where the stakes involved might not justify new surveys for every transfer.²⁴⁶

Callahan’s final plea regarding adverse possession is decidedly rhetorical. He calls for a change in how we talk about adverse possession:

The question in this whole matter, it seems to me, is not whether I’ve been right in what I’ve said about the purpose of the doctrine of adverse possession, or whether I’ve made proper deductions, or whether I haven’t missed this or that important aspect of the matter. I’ll concede on that. The real question is whether it isn’t better to talk in this way than to purport to solve a problem by an incantation, such as the assertion that disseisin is an intentional act.²⁴⁷

Perhaps this call for a new rhetoric for adverse possession, which Callahan demonstrates throughout his book, is itself Callahan’s most significant accomplishment. In both his skeptical, close reading of traditional rationales and his powerful, functional critique that anticipated much of future law and economics scholarship devoted to ad-

241. CALLAHAN, *supra* note 2, at 105.

242. *Id.*

243. *Id.*

244. *See id.*

245. *See id.* at 106.

246. *See id.* at 106–07. Turning to whether all adverse possession claimants should be required to possess by color of title and claim of right to eliminate so called “mere squatters” from the class of protected claimants, Callahan hedged. On one hand, he acknowledges that to provide additional assurance to a prospective purchaser that the title of a vendor is secure, it might make sense to require color of title and claim of right. On the other hand, he notes that these requirements cause difficulty in boundary disputes because typically the claimant will not have title to the disputed strip of land. On balance, he suggests that, from a transactional perspective at least, it would *not* be worthwhile to add these additional requirements. *Id.* at 108–09.

247. *Id.* at 111.

verse possession, Callahan actually created a new way to talk about adverse possession.

IV. RECONSIDERING THE HELMHOLZ-CUNNINGHAM DEBATE

Richard Helmholz's article, *Adverse Possession and Subjective Intent*, precipitated the end of the first long phase of adverse possession talk in American property law scholarship.²⁴⁸ In this article, Helmholz acknowledges the intellectual elegance of the "dominant view" of American adverse possession law and, in particular, the notion that courts should focus on a "possessor's physical relationship to the land" rather than speculate on the possessor's state of mind.²⁴⁹ The problem, however, based on his research, was that this objective approach was "contradicted by the case law."²⁵⁰ According to his review of the vast majority of cases that were reported from 1966 to 1983, courts were actually deciding cases based on their appreciation of an adverse possessor's subjective intent.²⁵¹ In Helmholz's account, even though courts typically did not require the adverse possession claimant to plead and prove "good faith" as an element of his claim or defense, the knowing trespasser generally stood "lower in the eyes of the law" and was less likely to acquire title than a trespasser who believed he was "occupying what is his already."²⁵² In short, the dominant view that "pure, non-permissive possession and consequent accrual of a cause of action in ejectment provide the determinative test" was unsupported by the case law; indeed, it was a prescriptive fiction perpetrated by academic commentators out of touch with the law in practice.²⁵³

Roger Cunningham, a co-author of William Stoebuck, saw things differently. As most observers of American property law scholarship are aware, Cunningham wrote a long reply to Professor Helmholz in an attempt to show that Helmholz was wrong on almost every count.²⁵⁴ To defend his claims, Helmholz responded to Cunningham.²⁵⁵ In turn, Cunningham offered a final rejoinder.²⁵⁶

Many American scholars stop here. They dutifully acknowledge the controversy but often cite Helmholz's initial article as if it were the

248. See R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. U. L. Q. 331 (1983) [hereinafter Helmholz, *Subjective Intent*].

249. *Id.* at 331. Helmholz also admitted that this view was consistent with the purposes of quieting land titles and promoting land transactions and stressed that it was approved by all the major authorities. *Id.* at 331–32.

250. *Id.* at 332.

251. *Id.*

252. *Id.*

253. *Id.*

254. Cunningham, *Reply*, *supra* note 153, at 2.

255. R.H. Helmholz, *More on Subjective Intent, A Response to Professor Cunningham*, 64 WASH. U. L. Q. 65, 66 (1986) [hereinafter Helmholz, *Response*].

256. Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L. Q. 1167, 1168 (1986) [hereinafter Cunningham, *Rejoinder*].

final word, without much concern for the substance of Cunningham's detailed objections or his motivations.²⁵⁷ Although one could easily write an entire article exploring all of the intricacies of the Helmholz-Cunningham argument and weighing the merits of each scholar's claims, Section A of this Part identifies and analyzes ten primary sources of contention and briefly attempts to assess the impact of those narrow debates on subsequent adverse possession discourse. Section B makes several broader claims about the long-term impact of the Helmholz-Cunningham debate on American property law scholarship more generally.

A. *Ten Specific Bones of Contention*

The following review of ten specific subjects of dispute largely follows the structure of Helmholz's and Cunningham's articles. In addition to analyzing the specific nature of those arguments, it assesses the level of significance of those specific arguments and identifies the elements of the debate that have likely had the most lasting impact on contemporary adverse possession discourse in particular and property law scholarship more generally.

1. Are There Too Many Adverse Possession Cases?

Helmholz initially asserts that an overabundance of reported adverse possession decisions appeared in the eighteen years preceding his article and that too many of these decisions involve "relatively insignificant pieces of land" or "backyard boundary disputes."²⁵⁸ The cause of this litigation explosion, he claims, is the law's failure to achieve clarity regarding the claimants' subjective intent.²⁵⁹

Cunningham disagrees not only with Helmholz's claims about the relative quantity of adverse-possession cases, at least as compared to other areas of property law, but also with Helmholz's assessment of the subject of those decisions. First, Cunningham notes that at least as represented by page counts in the Decennial Digests, the law of adverse possession is only modestly more contested than the law of bail-

257. A chief example is Merrill's seminal article on adverse possession, though to be fair Merrill's piece was published a year before Cunningham's first reply. Merrill, *supra* note 22, at 1122–23 (discussing Helmholz's findings without doubting their accuracy). See also Fennell, *supra* note 137, at 1037–38 (same without noting Cunningham's critique). Stake notes the controversy, but does not delve into the details, observing simply that after "many rounds of argument, readers are left uncertain as to how many cases require good faith." Stake, *supra* note 29, at 2431.

258. Helmholz, *Subjective Intent*, *supra* note 248, at 333.

259. In particular, Helmholz claims that it was the disjunction between the hornbook approach and judges' ethical concern about allowing a "knowing trespasser to gain good title" that causes so much uncertainty and explains the surge in adverse possession litigation he observes. *Id.*

ments.²⁶⁰ Second, many of the 850 reported adverse possession cases collected in the Decennial Digests between 1966 and 1981 that Helmholz examines concern issues other than the claimant's subjective intent, according to Cunningham.²⁶¹ Lastly, Cunningham observes that Helmholz only cites "about 105 cases" as "directly supporting his conclusions"²⁶² *i.e.*, less than 10 reported decisions per year across the United States.

Helmholz's response on this issue is relatively mild. He suggests that when it comes to litigation frequency a better subject of comparison for adverse possession can be found in the law of trespass, observing that, under a Decennial Digest page comparison, adverse possession is about three times as frequently the subject of reported decisions as trespass.²⁶³

Cunningham sticks with his guns in rejoinder, stressing that adverse possession cases constitute a minuscule fraction of all reported appellate court decisions in civil cases.²⁶⁴ Although he admits that one reason adverse possession cases continue to appear with some regularity is the "continuing confusion of the courts as to the meaning of the 'claim of right' requirement,"²⁶⁵ Cunningham contends that the more likely explanation lies in the difficult factual nature of the other elements of adverse possession, particularly the challenge of drawing a line between *permissive* and *adverse* possession.²⁶⁶ It is very difficult to know how important this initial quantitative and qualitative skirmish has been, but one suspects that Helmholz's tone of astonishment at the alleged frequency of adverse possession litigation, his explanation for the surge, and his remarks about the relatively small stakes actually involved may have subtly influenced subsequent property law scholars more than Cunningham's rebuttal.²⁶⁷

2. Do Intermediate Appellate Court Decisions Matter and What About the Texas Court of Civil Appeals?

A second, somewhat related dispute concerns the significance of intermediate appellate court decisions. Cunningham starts this row by

260. Cunningham, *Reply, supra* note 153, at 2, n.5 (noting that the respective volumes of the Decennial Digests contained a total of 169 pages devoted to "Adverse Possession" compared to 112 devoted to "Bailment").

261. *Id.*

262. *Id.*

263. Helmholz, *Response, supra* note 255, at 76 nn.41–42.

264. Cunningham, *Rejoinder, supra* note 256, at 1168–69.

265. Cunningham, *Reply, supra* note 153, at 59. Like Callahan before him, Cunningham cites *Van Valkenburgh v. Lutz*, 106 N.E.2d 28 (N.Y. 1952), as a prime example of confusion over claim of right. *Id.* at 60–61 n.238 (quoting CALLAHAN, *supra* note 2, at 10).

266. Cunningham, *Reply, supra* note 153, at 61.

267. *See, e.g.*, Fennell, *supra* note 137, at 1077 (identifying the "boundary dispute" as the prototypical adverse possession case); Radin, *supra* note 29, at 746 (identifying three paradigm adverse possession cases, one of which is the modest boundary case).

observing that almost half of the decisions cited by Helmholz in support of his major claim are intermediate appellate court decisions, and thus of only limited precedential value.²⁶⁸ He also notes that Helmholz relies upon an “inordinate” number of decisions from the Texas Court of Civil Appeals, whose panels are reportedly the subject of “humorous comment” among lawyers in Texas and elsewhere.²⁶⁹

Helmholz takes particularly sharp umbrage at these charges and fires off several pages of stinging rebuke in the final section of his Response. He “plead[s] guilty” that he considered many intermediate appellate court decisions in formulating his conclusions, but he defends their relevance by pointing out that his interest was not in describing what “the role of subjective intent in adverse possession cases *should be*,” but rather in describing “what it *is*.”²⁷⁰ In fact, when analyzing a subject like adverse possession, where the rules are old, fairly static, and subject to wide interpretation, Helmholz contends that legal commentators should be more interested in what judges and juries are doing with the rules in specific factual contexts than in the latest pronouncement by a state supreme court.²⁷¹

Interestingly, Helmholz also confesses that he used a “descriptive ‘case bound’ approach” in his initial article,²⁷² but argues in his Response that property law analysis should become more empirically rigorous. An analysis of how trial courts apply the rules and elements of adverse possession would be an even better study.²⁷³ In the end, Helmholz deploys this minor dispute, as he does with several of the more significant doctrinal disputes, to cast himself as a vigorous legal realist, a scholar interested in what courts *actually do*, while casting Cunningham as a tired, prescriptive theorist, “less interested in the realities of the law of adverse possession than in upholding the theoretically ‘correct’ rule.”²⁷⁴ The implications for future property law

268. Cunningham, *Reply*, *supra* note 153, at 2. Cunningham further disparages decisions of the Texas Court of Civil Appeals, noting the “widely varying quality of such panels.” *Id.* at 2 n.6.

269. *Id.* at 2 n.6.

270. Helmholz, *Response*, *supra* note 255, at 100.

271. *Id.* at 100–01.

272. *Id.* at 99.

273. *Id.* at 101. On this point, Cunningham assures his readers that he, like Helmholz, recognizes that an analysis of trial court rulings would be ideal, but admits that he, too, was unwilling to undertake such a task. Cunningham, *Rejoinder*, *supra* note 256, at 1170 n.23.

274. Helmholz, *Response*, *supra* note 255, at 102. Helmholz’s humorous rebuttal to Cunningham on the credibility and influence of the Texas Court of Civil Appeals features his report on telephone calls to lawyers and judges who defended the reputation of the Texas Court of Civil Appeals, and a comparison of the number of times Texas Court of Civil Appeals and the Michigan intermediate appellate courts had been cited by foreign jurisdictions regarding adverse possession. *Id.* at 100 n.149.

scholarship are obvious; many property law scholars would choose to be seen like Helmholz, not like Cunningham.²⁷⁵

3. Is an Inquiry into the Accrual of a Cause of Action for Ejectment “Laughable”?

Another major disagreement between Helmholz and Cunningham restages the dispute that had engaged many previous generations of property scholars: Should adverse possession be conceptualized primarily as a statute of limitations problem *or* should it be viewed as an original means of acquiring of title, *i.e.*, as positive prescription? Helmholz contends that courts rarely ask when a cause of action for ejectment has begun to accrue against the possessor, despite the emphatic endorsement of this approach by the *American Law of Property*.²⁷⁶ Instead, he observes, courts almost always ask whether the claimant has fulfilled the five positive requirements for adverse possession, regardless of whether the state has a prescriptive title statute spelling out such requirements.²⁷⁷ In a phrase that likely galled Cunningham, Helmholz remarks: “To approach that question by asking about the availability of ejectment is to invite laughter.”²⁷⁸

Cunningham responds to Helmholz’s claim on this subject with pages of detailed rebuttal and many lengthy footnotes.²⁷⁹ Although he concedes that many reported decisions did focus on the positive requirements of adverse possession, Cunningham argues that this practice simply reflects judicial attempts to develop criteria to determine when a cause of action had begun to accrue and whether the statute of

275. Cunningham’s response to Helmholz on this point reveals that he was particularly stung by Helmholz’s remarks and concerned about his own reputation. He points out, for instance, that he never said intermediate appellate court decisions were not worthy of *any* consideration and that he gave them lots of consideration in *his* article. Cunningham, *Rejoinder, supra* note 256, at 1169. Adopting a humorous tone, he also stresses that the batting average for the Texas Court of Civil Appeals when their cases were reviewed by the Texas Supreme Court (about .330) was not high for an appellate court, though it might be excellent for a baseball player. *Id.* at 1169–70.

276. Helmholz, *Subjective Intent, supra* note 248, at 334 (citing 3 AMERICAN LAW OF PROPERTY § 15.4, at 774). This portion of the *American Law of Property* was taken verbatim from Walsh’s 1938 article. *Compare* Walsh, *supra* note 139, at 537–48, with 3 AMERICAN LAW OF PROPERTY, *supra* note 122, § 15.4, at 774–85.

277. Helmholz, *Subjective Intent, supra* note 248, at 334–35. The only exceptions to this approach, Helmholz observes, occur when (a) the true owner holds a future interest, (b) the true owner suffers from a disability recognized by statute, or (c) the dispute involves co-tenants. *Id.* at 336. *See also* Helmholz, *Response, supra* note 255, at 67 (emphasizing the contrast between his conclusions and the “uncompromisingly objective approach to adverse possession” taken by the *American Law of Property*); *id.* at 76–78 (reiterating his claim that a positive prescription framework had replaced the accrual of the cause of action framework in American law).

278. Helmholz, *Subjective Intent, supra* note 248, at 335; *see also* Cunningham, *Rejoinder, supra* note 256, at 1170 (noting, in particular, Helmholz’s “to invite laughter” comment).

279. *See* Cunningham, *Reply, supra* note 153, at 3–16.

limitations had run.²⁸⁰ This development was necessary and logical, Cunningham observed, as American courts increasingly recognized that the statute of limitation did not just bar a true owner's recovery and extinguish his title, but also led to a new title created in the claimant.²⁸¹

In response, Helmholz stresses that the difference between him and Cunningham on this conceptual point was important because the positive prescription framework makes it much easier for a court to focus on an adverse possessor's state of mind.²⁸² In other words, Helmholz acknowledges that the evolution of conceptual structures of doctrine can facilitate a more moralistic or policy-oriented approach to a property law dispute.

Although Cunningham does not re-engage with Helmholz again on this issue,²⁸³ it remains a fundamental point of contention between the two scholars. It may seem "academic" today, but it was a matter of considerable pride and, for Cunningham at least, this debate linked his view of adverse possession to many scholars who came before him—particularly William Walsh.²⁸⁴ Helmholz could have—and perhaps did—take comfort in an equally long lineage of scholarship traceable through Ballantine and Bordwell that emphasized how adverse possession had become Americanized into a new form of positive prescription.²⁸⁵

4. Are Adverse Possessors the Same as Trespassers?

One of the less significant disagreements between Helmholz and Cunningham concerns the use of the word "trespasser" by Helmholz to describe adverse possessors.²⁸⁶ Cunningham mildly upbraids Helmholz for this terminological blurring, noting that a cause of action in ejectment serves to put the true owner back in possession, while the objective of a cause of action for trespass is to collect damages or to enjoin future trespasses, and, therefore, adverse possession should be seen as "more than a mere temporary wrongful interference (or a se-

280. *Id.* at 4.

281. *Id.* at 5. Here, Cunningham relies extensively on Ballantine. *Id.* at 5 n.10. In his rejoinder, Cunningham essentially repeats this same argument, but also maintains that Helmholz's claim that the distinction between adverse possession and prescription had blurred is mistaken. For details, see Cunningham, *Rejoinder*, *supra* note 256, at 1171 n.31.

282. Helmholz, *Response*, *supra* note 255, at 78 (observing that if courts focus on accrual, they have "little cause to consider whether the possessor had regarded himself as the owner," but if "they ask whether the occupant has met a series of affirmative tests, one of which is 'hostility' or 'claim of right,' then it will be much easier for them to examine the possessor's subjective intent").

283. Cunningham, *Rejoinder*, *supra* note 256, at 1170–71.

284. See discussion *supra* Section II.C.3.

285. See discussion *supra* Section II.C.1.

286. See Helmholz, *Subjective Intent*, *supra* note 248, at 334–35, 338.

ries of interferences) with the true owner's exclusive right to possession."²⁸⁷

Helmholz acknowledges Cunningham's point here, but he still claims that his use of the term is "not incorrect" because a "trespass does not become any less a trespass for being continued."²⁸⁸ Moreover, as Helmholz notes, many courts and scholars, even the *American Law of Property*, have made the same synonym substitution.²⁸⁹ While this dispute has likely not had much lasting significance on American property law, perhaps it signaled a growing recognition that the distinctions between different kinds of intrusions on a person's property—violations of the right to exclude—were worthy of careful conceptual analysis in their own right.²⁹⁰

5. "Claim of Right": A Useful Tool to Provide Elasticity or a Source of Confusion?

Another technical dispute between Helmholz and Cunningham concerns the term *claim of right*. Helmholz initially argues that courts use this term strategically to evaluate the subjective intentions of an adverse possessor, especially when the statute of limitations or guiding judicial authority in a state do not otherwise clearly indicate whether good faith—or bad faith for that matter—is required.²⁹¹ In short, claim of right is an elastic linguistic placeholder that allows courts to take subjective intentions into account.

Cunningham strongly objects. He chastises Helmholz for failing to appreciate that the term emerged from the New York Revised Statutes of 1828, which required *claim of title*. Early New York cases only required a showing of non-subordination by the adverse possessor to the true owner's title and shifted the burden of proof to the paper title owner as soon as an adverse possession claimant introduced evidence of wrongful possession.²⁹² More generally, Cunningham attributes most of the judicial confusion over *claim of right* to the doctrine of disclaimer, which, though once an important part of adverse possession law, misled courts in many cases.²⁹³ Like his treatise co-author William Stoebuck, Cunningham acknowledges that the term *claim of*

287. Cunningham, *Reply*, *supra* note 153, at 9.

288. Helmholz, *Response*, *supra* note 255, at 79.

289. *Id.* at 79 n.53 (citing 3 AMERICAN LAW OF PROPERTY § 15.2, at 762, § 15.4, at 771).

290. See, e.g., Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEG. STUDIES 13 (1985); Merrill, *supra* note 22. Both of Merrill's groundbreaking articles were published in 1985, two years after Helmholz's first article on adverse possession, and one year before Cunningham's *Reply*.

291. Helmholz, *Subjective Intent*, *supra* note 248, at 332, 357.

292. Cunningham, *Reply*, *supra* note 153, at 16–18. Cunningham also notes that an adverse possession claimant could always do or say something to cloak his possession with a permissive character, thus negating a claim of right. *Id.* at 18–20.

293. *Id.* at 21–22.

right adds little value to adverse possession analysis and often just leads to confusion in certain contexts.²⁹⁴

In response, Helmholz argues that the mutability of terms such as “hostility” and “claim of right” is precisely his point. They permit courts to “take account of evidence of the possessor’s state of mind when such evidence exists.”²⁹⁵ Although he acknowledges that a fair amount of adverse possession litigation arising under the heading of *claim of right* simply concerns whether a claimant’s possession was initially permissive and not whether the claimant’s subsequent conduct made that possession *adverse*, Cunningham maintained his basic position.²⁹⁶ In the end, this dispute was highly technical but nevertheless intense, revealing a sharp divide over the proper interpretative approach to adverse possession cases with Helmholz focusing on how courts manipulate terms to achieve instrumental ends and Cunningham insisting on doctrinal tradition, logic, and identifying unwarranted judicial deviations from that tradition and logic.

6. Are Statutory and Jurisprudential Requirements of Good Faith Significant?

Helmholz is careful to acknowledge that in some states good faith is either a statutory or express common law requirement.²⁹⁷ He also notes that in some states, the statutory period for adverse possession is shorter if the claimant can prove entry under “color of title,” that is, under “an apparently valid muniment of title,”²⁹⁸ which necessarily requires proof that the claimant honestly believed the purported title was valid.

Despite these concessions, Cunningham still claims that in too many of the cases Helmholz cites to support his contention that honest possession had become an important consideration, good faith was actually a mandatory element of proof under the relevant statutes.²⁹⁹ Further, in some of these instances, Cunningham suggests that the

294. *Id.* at 17–18 n.58 (noting potential for confusion in cases involving claims to an estate less than fee simple and in mistaken boundary cases); Stoebeck, *supra* note 178, at 73 (contending that *claim of right* simply means “hostile”). Stoebeck, in fact, called for elimination of any consideration of subjective intent in adverse possession. *Id.* at 80.

295. Helmholz, *Response*, *supra* note 255, at 69.

296. Cunningham, *Rejoinder*, *supra* note 256, at 1172 (quoting Cunningham, *Reply*, *supra* note 153, at 61).

297. Helmholz, *Subjective Intent*, *supra* note 248, at 337. Helmholz cited N.M. STAT. ANN. § 37-1-22 (1978) as an example of a statutory requirement of good faith, and Washington as an example of judicial imposition of a good faith requirement. Helmholz, *Subjective Intent*, *supra* note 248, at 337 n.21.

298. *Id.* at 337.

299. Cunningham, *Reply*, *supra* note 153, at 23–24 (discussing Michigan, Washington, and New York statutes, among others, and noting that such statutes either require color of title to gain title more quickly or to gain the benefit of constructive possession beyond the bounds of title).

good faith requirement imposes only a “minimal restriction” in color of title cases.³⁰⁰ Finally, and perhaps most important to him, Cunningham stresses that in some states, most notably Iowa, the common law rule requiring good faith dates back to the late nineteenth century, thus negating Helmholz’s detection of a significant recent judicial movement favoring good faith claimants.³⁰¹

Helmholz did not re-engage Cunningham on this point except to note that sometimes the highest court in a state will, as had recently happened in Washington, explicitly excise considerations of subjective intent from adverse possession analysis.³⁰² This was a revealing point to make because in some sense it conceded the appeal of Cunningham’s objective approach to adverse possession.

7. When Good Faith is not Required, Why Do Courts Still Address the Possessor’s Honest or Mistaken Belief?

Perhaps the most hotly contested disagreement in the entire Helmholz-Cunningham debate concerned cases in which good faith was not an enumerated element of a claim or defense, yet courts would still, in Helmholz’s words, “cite the existence and the relevance of good faith.”³⁰³ These cases prove, according to Helmholz, that good faith really matters even when it is not supposed to matter.

As evidence, Helmholz first turns to what he calls the “normal case” of adverse possession—a boundary dispute between two neighboring landowners—and argues that courts in these cases routinely reward mistaken, good faith possessors and punish knowing trespassers.³⁰⁴ According to Helmholz, *Reeves v. Metropolitan Trust Company*,³⁰⁵ a boundary dispute case concerning two parcels of land that had been used and enclosed by the claimants, illustrates this phenomenon. In *Reeves*, the Arkansas Supreme Court awarded the claimants ownership of the parcel they possessed in a good faith, albeit mistaken belief they owned, but it rejected their claim to the second parcel, which the claimants “admit[ted] candidly” they knew did not belong to them.³⁰⁶ In further support, Helmholz cites developments in New Jersey and several other states, where courts rejected older judicial authorities following the *Maine* rule (that required an intent to claim property beyond one’s property line in mistaken boundary cases) and instead adopted the *Connecticut* rule (under which “the possessor’s

300. *Id.* at 25.

301. *Id.* at 37 n.136.

302. Helmholz, *Response*, *supra* note 255, at 106 (discussing *Chaplin v. Sanders*, 676 P.2d 431, 436 (Wash. 1984)).

303. Helmholz, *Subjective Intent*, *supra* note 248, at 337.

304. *Id.* at 337–38; *see also* Helmholz, *Response*, *supra* note 255, at 70 (reiterating that a paradigm successful adverse possession case involves a purchaser who mistakenly possesses more land than actually described in the property description of deed).

305. *Reeves v. Metro. Tr. Co.*, 498 S.W.2d 2 (Ark. 1973).

306. *Id.* at 3–4.

lack of actual hostility or desire to appropriate his neighbor's property is irrelevant.")³⁰⁷ To Helmholz, this evolution reflects growing judicial preference for the interests of an innocent, mistaken adverse possessor and disapproval of the intentional wrongdoer.³⁰⁸

Cunningham, of course, disagrees. In general, he characterizes most of the judicial references to a possessor's good faith or honest mistaken belief in these cases as meaningless dicta, while also suggesting that many of the cases cited by Helmholz do not actually support his claim.³⁰⁹ To start, Cunningham notes that in many of the boundary cases cited by Helmholz, the true owners had actually invited courts to assert the *Maine* rule, only to ultimately have the courts reject that invitation and instead follow the *Connecticut* rule.³¹⁰ Drawing on Bordwell and others, Cunningham aptly articulates the many reasons why courts had rejected the *Maine* rule and adopted the *Connecticut* rule.³¹¹ Further, Cunningham points out that Helmholz erred in attempting to argue that the shift from the *Maine* to the *Connecticut* rule was a recent development, as it actually dated back to the first half of the nineteenth century and continued to gain steam throughout the twentieth century.³¹² According to Cunningham, the most significant problem with Helmholz' reliance on these cases is that the consolidation of judicial opinion around the *Connecticut* rule in mistaken boundary cases only reflects that judges came to see good faith possessors *as equally worthy* of prevailing as bad faith possessors, not *more worthy*.³¹³

Cunningham's charge that Helmholz was taking judicial comments out of context to show that good faith possession was increasingly important was founded on his analysis of three cases: (1) *Miller v. Fitzpatrick*,³¹⁴ a 1967 Texas Court of Civil Appeal decision; (2) *Reeves v. Metropolitan Trust Company*,³¹⁵ the 1973 Arkansas Supreme Court

307. Helmholz, *Subjective Intent*, *supra* note 248, at 339.

308. *Id.* at 339–41 (citing *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969), along with cases from New Hampshire, New York, Colorado, Oregon, Connecticut, Illinois, and Indiana).

309. *See generally* Cunningham, *Reply*, *supra* note 153, at 25–32.

310. *Id.* at 25–27 & nn.84–86 (observing that, in most of these cases, the true owner had attempted to defeat the adverse possessor's claims *not* by asserting that the claimant was acting in bad faith, but rather by asserting that the claimant's possession was *not adverse* because the claimant *actually believed* he owned the land in dispute).

311. *Id.* at 27–28.

312. *Id.* at 27 nn.90 & 98.

313. *Id.* at 29. *See also* Cunningham, *Rejoinder*, *supra* note 256, at 1175 (asking why Helmholz "did not acknowledge that the Connecticut rule cases are inconsistent with his views about both bad faith and subjective intent, while the Maine rule cases, though inconsistent with his views on either good faith or bad faith, are perfectly consistent with his views about subjective intent," and noting that "many jurisdictions . . . still adhere to the Maine rule").

314. *Miller v. Fitzpatrick*, 418 S.W.2d 884 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.).

315. *Reeves v. Metro. Tr. Co.*, 498 S.W.2d 2 (Ark. 1973).

decision; and (3) *Butler v. Hanson*,³¹⁶ a 1970 Texas Supreme Court decision. Cunningham first shows that Helmholz misrepresented the holding in *Miller* because the court held that the claimant failed to acquire title by adverse possession despite his professed good faith.³¹⁷ To his credit, Helmholz confesses this mistake regarding *Miller*, acknowledging that the court's holding did not concern subjective intent.³¹⁸ However, Cunningham does not let go of *Miller*. In his rejoinder, he notes that one reason the adverse possession claimant failed to acquire title in that case was *because* he believed the disputed land belonged to him. In other words, he proposes that the *Miller* court actually required bad faith intent—in direct opposition to Helmholz's argument.³¹⁹

Reeves is a more complicated matter, however, as the two scholars simply disagree about what happened. Cunningham argues repeatedly that the real reason the court ruled in favor of the true owner with respect to the second parcel concerned the quality of their actual possession and direct admissions that they did not have any claim *at all* to the land.³²⁰ Meanwhile, Helmholz fervently contends that *his* reading of the decision is the more accurate one and characterizes Cunningham's charges of misquotation as "astonishing."³²¹

In response to Cunningham's accusation of selective quotation in *Butler v. Hanson*,³²² Helmholz defends with considerable force, arguing that the case "involved exactly the sort of finding about good faith possession discussed above."³²³ For his part, Cunningham does not yield on *Butler* either, maintaining that a "careful reading . . . indicates that the principal issue on appeal was whether there was at least some evidence of adverse possession to support the jury's verdict in favor of the adverse claimant."³²⁴ Cunningham observed that the opinion "contains no mention whatever of good faith or honest mistake" and

316. *Butler v. Hanson*, 455 S.W.2d 942 (Tex. 1970).

317. Cunningham, *Reply, supra* note 153, at 30.

318. Helmholz, *Response, supra* note 255, at 85.

319. Cunningham, *Rejoinder, supra* note 256, at 1176–77 (offering a lengthy discussion of *Miller* with many sentences in italics).

320. Cunningham, *Reply, supra* note 153, at 31 (emphasizing a second quotation provided by the court in *Reeves*: "Both he and his wife testified that they did not mean to claim any land that they did not own." *Reeves*, 498 S.W.2d at 4); *see also* Cunningham, *Rejoinder, supra* note 256, at 1181–83 (reiterating same).

321. Helmholz, *Response, supra* note 255, at 85–87.

322. *Butler v. Hanson*, 455 S.W.2d 942 (Tex. 1970); Cunningham, *Reply, supra* note 153, at 31–32. The testimony of the successful adverse claimant in *Butler* that Helmholz originally cited for its attractive "homeliness" was this: "I figured it was mine, it was in my fence line." *Butler*, 455 S.W.2d at 951 (Smith, J., dissenting) (full text of transcript relied upon by majority), *cited in* Helmholz, *Subjective Intent, supra* note 248, at 341.

323. Helmholz, *Response, supra* note 255, at 85.

324. Cunningham, *Rejoinder, supra* note 256, at 1177.

that, moreover, it was not even clear that the claimant possessed in good faith.³²⁵

Of all the disputes, this one seems to call into question the academic honor of the two participants more than any of the others. But, from today's vantage point, we can perhaps recognize why both parties were so upset. From Cunningham's perspective, Helmholz appeared to be cherry-picking a relatively small sample of reported decisions to support the primary contention of his initial argument and, moreover, had made some significant mistakes in describing those decisions. Further, with respect to decisions adopting the Connecticut rule for mistaken boundaries, Helmholz appeared to be reading more into them than a narrow doctrinal description would properly permit. From Helmholz's perspective, Cunningham was blind to plain statements of judicial favoritism on behalf of good faith claimants. In this instance, time simply cannot heal real conflict.

8. What Happens to Bad Faith Possessors and What Explains Their Fate?

Helmholz and Cunningham also disagree profoundly about the meaning of cases in which there is clear evidence "that the adverse possessor knew he was trespassing on the land of another at the time of the initial appropriation."³²⁶ These cases are just as important as good faith cases to Helmholz's general theory about the intrusion of ethical considerations into adverse possession law. Helmholz admits that "[t]he stress laid on the honesty of the possessor's belief in many of those opinions [cases involving good faith claimants] may be uncomfortable for the doctrine, but it is not directly contrary to it."³²⁷ Accordingly, an essential element of his argument is that willful trespassers are often denied title precisely because of their bad faith.³²⁸ Helmholz thus turns to cataloguing the ways in which courts manage to achieve this end without formally adopting a good faith requirement.

Putting aside "all cases involving permissive possession,"³²⁹ Helmholz observes that courts most often punish bad faith possessors by manipulating the elastic rubric "claim of right" to distinguish "knowing trespass from honest, but mistaken, appropriation."³³⁰ According to Helmholz, courts also frequently use this term to deny title to claimants who they view as merely asserting "squatters rights."³³¹ Helmholz further notes that in several cases, courts characterize a

325. *Id.*

326. Helmholz, *Subjective Intent*, *supra* note 248, at 342.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 343.

“knowing trespasser’s possession” as “neighborly,” “friendly,” or “peaceable” and thus insufficiently hostile, even in the absence of an explicit agreement or understanding suggesting that the possession is clearly permissive.³³² In other cases, Helmholz observes, courts do not bother to disguise their unease with bad faith possession in the language of permissiveness, preferring simply to declare that such possession cannot fall under a claim of right.”³³³ Finally, Helmholz cites numerous cases as supporting the proposition that, regardless of whether affirmative proof of trespassing is present or circumstances are just suspicious enough for courts to infer bad faith, courts will often “refuse to find adverse possession,” strengthening their holdings by referencing the rule that the burden of proof in adverse possession lies with the claimant.³³⁴

Turning to cases in which bad faith possessors do succeed in acquiring title,³³⁵ Helmholz contends that their success can usually be attributed to a cluster of four “equitable” factors: (1) the claimant himself is a “sympathy-inducing possessor”; (2) “an unsympathetic record owner . . . knowingly slept on his rights”; (3) “the passage of a considerable period of time”; and (4) “improvements made on the land by the hostile possessor.”³³⁶ Moreover, Helmholz claims, in only a small handful of cases does a “truly hostile possessor” acquire title or obtain a favorable ruling.³³⁷ In sum, in bad faith cases, just as in good faith

332. *Id.* at 343–44. Helmholz admits his own sympathies lay with the courts in these cases. When two neighbors get along, one neighbor allowing the other to use his property informally, it would be unfair, Helmholz suggests, to allow the possessor to “change his mind” and suddenly take advantage of the owner’s previous goodwill or timidity. *Id.* at 344 n.58 (listing many examples of such cases).

333. *Id.* at 344–45 (listing many cases at notes 58 and 62). For example, when a claimant offers to purchase the land in dispute from the record owner before the statute of limitation has run, courts invariably seize on this evidence to show that the claimant knew of a conflicting right and therefore cannot be said to have possessed under a claim of right. *Id.* at 346. Confusingly, though, Helmholz appears to be discussing the problem of permissive possession here, which he says we must put aside at the outset. *Id.* at 342; *see also* discussion *infra* note 353.

334. *See id.* at 345 (stating that these cases “represent a clear majority of recent cases where knowing trespass on the part of the possessor has been shown”); *id.* at 345 n.62 (listing decisions).

335. In his response to Cunningham, Helmholz describes the typical bad faith case as involving “a chain of circumstance,” which may initially involve some relatively understandable but still knowing encroachment, perhaps motivated by convenience or a desire to eliminate an eyesore, and which only later grows into an actual claim. Helmholz, *Response, supra* note 255, at 70–71.

336. Helmholz, *Subjective Intent, supra* note 248, at 347–48. *See also* Helmholz, *Response, supra* note 255, at 94–95 nn.132–33 (citing additional cases to support his theory that when bad faith possessors prevail it is often because additional equities have weighed in their favor). Helmholz gives a particularly striking account of the sympathetic bad faith possessor in his discussion of *Gates v. Roberts*, 350 S.W.2d 729 (Mo. 1961), discussed in Helmholz, *Response, supra* note 255, at 95 n.133.

337. Helmholz, *Subjective Intent, supra* note 248, at 348–49. For example, in a Nebraska case, *Pettis v. Lozier*, 290 N.W.2d 215 (Neb. 1980), the state supreme court merely reverses a grant of summary judgment against a knowing adverse possessor,

cases, Helmholz sees “equitable considerations” infiltrating an area of law supposedly governed by a mechanistic title-shifting rule.³³⁸

Once again, Cunningham dissects Helmholz’ arguments and authorities, finding them all unpersuasive.³³⁹ He begins by blasting Helmholz for factual mistakes reporting cases cited to demonstrate that sometimes courts do not even bother “to resort to any special characterization to deny the claim of a bad faith possessor”³⁴⁰ For example, in a 1967 Texas Court of Civil Appeals case, *Hoppe v. Sauter*,³⁴¹ Cunningham notes that the court held that the unabashed bad faith possessor had acquired title,³⁴² even though Helmholz had cited it for the exact opposite proposition.³⁴³ Cunningham also upbraids Helmholz for quoting judicial statements from a 1978 case, *Hansen v. National Bank of Albany Park*,³⁴⁴ that purportedly demonstrates the salience of a claimant’s knowledge that his deed did not describe the land in dispute. Helmholz erred by not noting that these comments were subsequently “disapproved” by the Illinois Supreme Court in *Joiner v. Jansen*,³⁴⁵ when the court reaffirmed the long-settled “pure possession” approach to adverse possession in Illinois.³⁴⁶ On this point, Helmholz could retort that he had initially acknowledged the subsequent disapproval by the higher court.³⁴⁷

One of Cunningham’s broadest objections is that in most of Helmholz’ bad faith cases, courts had actually held that the adverse claimant “failed to establish one or more of the usual elements of adverse possession,”³⁴⁸ thus rendering good or bad faith immaterial to the holding. Even the one case that does provide substantial support for Helmholz’s assertion that bad faith dooms an adverse claimant (the

thus only “holding that the possibility of his acquiring title was not foreclosed.” Helmholz, *Subjective Intent*, *supra* note 248, at 348.

338. Helmholz, *Subjective Intent*, *supra* note 248, at 347.

339. Cunningham, *Reply*, *supra* note 153, at 31–32. Cunningham here is referring to the core argument in Helmholz, *Subjective Intent*, *supra* note 248, at 341–49.

340. Cunningham, *Reply*, *supra* note 153, at 34 (quoting Helmholz, *Subjective Intent*, *supra* note 248, at 344).

341. *Hoppe v. Sauter*, 416 S.W.2d 912, 914–15 (Tex. Civ. App.—Texarkana 1967, writ ref’d n.r.e.).

342. Cunningham, *Reply*, *supra* note 153, at 34.

343. Helmholz, *Subjective Intent*, *supra* note 248, at 344–45. Helmholz later admitted in an aside and a footnote his mistake regarding *Hoppe*. Helmholz, *Response*, *supra* note 255, at 87 n.93.

344. *Hansen v. Nat’l Bank of Albany Park* in Chi., 376 N.E.2d 365, 367 (Ill. App. Ct. 1978), *discussed in* Helmholz, *Subjective Intent*, *supra* note 248, at 345.

345. *Joiner v. Jansen*, 421 N.E.2d 170, 173–74 (Ill. 1981).

346. Cunningham, *Reply*, *supra* note 153, at 34.

347. Helmholz, *Response*, *supra* note 255, at 88 n.94. Helmholz could have also pointed out that he had drawn attention to *Hansen* merely to argue that the lower court’s view about a claimant’s knowledge and disregard of a true boundary line “represents the more common judicial approach.” Helmholz, *Subjective Intent*, *supra* note 248, at 345. Helmholz, however, does not cite any specific support for this particular proposition in his initial article. *Id.*

348. Cunningham, *Reply*, *supra* note 153, at 36.

1982 Iowa Supreme Court decision in *Carpenter v. Ruperto*)³⁴⁹ merely recapitulates Iowa's long-standing common law rule requiring good faith as an express element, and thus does not demonstrate a new judicial trend.³⁵⁰ The list of Helmholz's bad faith cases that Cunningham challenges in this manner continues, but the pattern remains the same.³⁵¹ Cunningham also strongly counters Helmholz's assertion that courts often reject adverse possession claims by characterizing the possession of claimants as "permissive" *only to conceal* their actual moral disapproval of bad faith possession.³⁵² In most of these cases, Cunningham notes, there actually were serious issues of permissive possession.³⁵³

Finally, Cunningham rejects Helmholz's suggestion that in nine cases in which an obvious bad faith claimant prevails, the outcome depends on judicial weighing of the equities.³⁵⁴ In Cunningham's reading, these cases more often emphasized the irrelevance of subjective intentions and their holdings turned on other factors—in particular, the all-important permissive versus hostile distinction.³⁵⁵ Further, Cunningham notes that many of the cases Helmholz relies upon for his weighing of the equities claim originated as quiet title actions—a form of action deeply rooted in equity.³⁵⁶ Thus, it stands to reason that courts would consider equitable factors.³⁵⁷ What is most surpris-

349. *Carpenter v. Ruperto*, 315 N.W.2d 782 (Iowa 1982).

350. Cunningham, *Reply*, *supra* note 153, at 37. Cunningham traced Iowa's good faith rule back to 1896. *Id.* at 37 n.136.

351. See e.g., *Howard v. Kunto*, 477 P.2d 210 (Wash. Ct. App. 1970); *Miller v. Fitzpatrick*, 418 S.W.2d 884 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *Moss v. James*, 411 S.W.2d 104 (Mo. 1967); *Wilton Boat Club v. Hazell*, 502 S.W.2d 273 (Mo. 1973), cited and discussed in Helmholz, *Subjective Intent*, *supra* note 248, at 342–43. For Cunningham's objections regarding these decisions, see Cunningham, *Reply*, *supra* note 151, at 38–39.

352. Cunningham, *Reply*, *supra* note 153, at 39.

353. *Id.* at 40. Cunningham returns to this point in his rejoinder, countering what he perceives as Helmholz's charge that courts are often "disingenuous" in focusing on permissive possession when, in fact, express or tacit permission has often been given by the owner, creating a perfectly valid reason to deny an adverse possession claim. Cunningham, *Rejoinder*, *supra* note 256, at 1179. For instance, see Cunningham's discussion of *Spring Branch Indep. Sch. Dist. v. Lilly White Church*, 505 S.W.2d 620 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ), in which "the inference that express permission was given is practically inescapable." Cunningham, *Reply*, *supra* note 153, at 40 n.149. Cunningham also objects to Helmholz's reliance on a number of cases in which courts rule against adverse possession claimants because of evidence showing that the claimant offered to purchase or lease the land in dispute. *Id.* at 41–44 (suggesting such cases are far more complicated than Helmholz is willing to acknowledge). See also Cunningham, *Rejoinder*, *supra* note 256, at 1179–80 (arguing that cases cited by Helmholz relating to offers to pay money to the true owner do not support his claims).

354. Those nine cases are discussed in Helmholz, *Subjective Intent*, *supra* note 248, at 348 nn.69–72. Cunningham's critique begins at Cunningham, *Reply*, *supra* note 153, at 46.

355. Cunningham, *Reply*, *supra* note 153, at 46 nn.178–79.

356. Cunningham, *Reply*, *supra* note 153, at 62–63.

357. *Id.* at 62–63.

ing, Cunningham exclaims, is the actual *infrequency* of judicial concern about the equities in these cases.³⁵⁸

9. Are the Exceptions Really that Exceptional?

In the final part of his article, Helmholz addresses three special categories of adverse possession cases (tax sale cases, grantor remaining in possession cases, and co-tenancy cases) and finds that they either (1) do not conflict with or, (2) in fact, support his general theory that courts are becoming increasingly conscious of the subjective intent of the possessor.³⁵⁹ Although Cunningham disagrees with Helmholz's reading of many of these cases,³⁶⁰ the disagreement between the two scholars on this ground is, comparatively speaking, not quite as intense. Some of the disagreements, for example with regard to tax sales, are highly technical in nature.³⁶¹ Others, for example with regard to grantors in possession, reflect the scholars' fundamental conflict over the role of ethical considerations in adverse possession disputes.³⁶² However, when it comes to co-tenants claiming adverse possession, Helmholz and Cunningham actually find some common ground, agreeing that successful claimants often do have some honest, plausible reason to believe they own the disputed land.³⁶³

358. *Id.* at 63.

359. See generally Helmholz, *Subjective Intent*, *supra* note 248, at 349–56.

360. See generally Cunningham, *Reply*, *supra* note 153, at 46–58.

361. Compare Helmholz, *Subjective Intent*, *supra* note 248, at 349–50 (contending tax sale cases reveal a judicial tendency to prefer tax deed purchasers who can show good faith at the time of purchase), with Cunningham, *Reply*, *supra* note 153, at 46–48 (noting that many of these cases involve statutory requirements of color of title or good faith and thus do not reveal any judicial tendency). See also Cunningham, *Rejoinder*, *supra* note 256, at 1183 n.104 (expressing extreme dissatisfaction with Helmholz's "egregiously" misleading reading of *Brylinski v. Cooper*, 624 P.2d 522 (N.M. 1981)).

362. Compare Helmholz, *Subjective Intent*, *supra* note 248, at 351–52 (asserting that courts routinely express concern about the unfairness of allowing a grantor to remain in possession in derogation of his own deed unless the grantor can show some unusual countervailing equity such as a mistaken understanding about the property boundary), with Cunningham, *Reply*, *supra* note 153, at 49–50 (asserting that Helmholz is insufficiently attentive to the relational context of grantor in possession disputes and fails to distinguish between cases where (1) the grantor and grantee are arms-length strangers or the grantor and grantee are related by blood or marriage and the conveyance is often gratuitous and thus a strong presumption of permissive possession explains most outcomes and (2) cases involving grantors in possession of boundary strips due to apparent mistake where the outcome is simply explained by application of the Connecticut rule).

363. Helmholz, *Subjective Intent*, *supra* note 248, at 354–56; Cunningham, *Reply*, *supra* note 153, at 58 (noting that it is unsurprising that many successful co-tenant claimants are characterized as good faith possessors because, after all, "one must recognize that a cotenant will seldom, if ever, deliberately undertake in 'bad faith' to acquire, by adverse possession, sole ownership of land held in cotenancy"). As Cunningham observes, a story usually explains occupation in these co-tenant cases—perhaps an oral agreement or family understanding, perhaps a grantee not aware that he was acquiring a deed from a co-tenant, or perhaps just a co-tenant who occupies and takes care of the land for so long that he reasonably assumes that the out-of-posses-

10. What is the Job of a Legal Commentator?

At one point, Helmholz strategically reframes the entire debate as one about the proper role of the legal commentator. In this staging, Cunningham plays the dark knight, the defender of formalism and Helmholz stars as the clairvoyant legal realist, revealing the underlying reasons that courts decide cases.³⁶⁴ Helmholz then counsels other legal academics to be more attentive to the distinction between descriptive and prescriptive scholarship, suggesting that Cunningham allows his prescriptive ideals to distort his descriptive representation of adverse possession case law whereas he (Helmholz) is content merely to tell the truth about courts' actions, regardless of whether those actions are consistent with hornbook law.³⁶⁵

In what must have been a particularly painful jab at Cunningham, Helmholz contrasts Cunningham's account of adverse possession with William Stoebuck's 1960 article addressing adverse possession in the State of Washington.³⁶⁶ According to Helmholz, Stoebuck, unlike Cunningham, carefully distinguishes between his own normative preference for an objective approach to adverse possession and the confusing "jungle" of case law he found in Washington.³⁶⁷

Surprisingly, Cunningham does not engage Helmholz on this subject.³⁶⁸ Instead, he reiterates that Helmholz's primary argument (that ethical considerations had come to pervade adverse possession law) is descriptively inaccurate because courts' actual practice is to determine objectively whether a claimant has satisfied the "positive requirements" for adverse possession.³⁶⁹ For Cunningham, the absence of overt references to ethical values by the courts does not require a legal commentator to unearth those considerations lying beneath the surface of a decision in a judge's psyche because those considerations do not exist in the first place.

B. *The Role of Ethical Values*

One meta-question that looms over the entire dispute between Helmholz and Cunningham emerges out of the final bone of contention discussed above. That meta-question is whether law itself should

sion co-tenants have relinquished their rights. *Id.* at 53–57. This characterization matches up well with Helmholz's description of co-tenant cases. *See* Helmholz, *Subjective Intent*, *supra* note 248, at 354–56 (noting three ways co-tenants come to believe they have an ownership interest).

364. Helmholz, *Response*, *supra* note 255, at 104–06.

365. *Id.* at 104–05.

366. *See generally* Stoebuck, *supra* note 178; *see also* discussion *supra* Section III.A.

367. Helmholz, *Response*, *supra* note 255, at 105–06. Helmholz even credits Stoebuck for having influenced the Washington Supreme Court's 1984 decision that ultimately adopted an objective approach to adverse possession. *Id.* at 106 (citing *Chaplin v. Sanders*, 676 P.2d 431, 436 (Wash. 1984) (en banc)).

368. Cunningham, *Rejoinder*, *supra* note 256, at 1183–85.

369. *Id.* at 1184–85.

prioritize objective standards—like the pure possession approach favored by the *American Law of Property*—or welcome the consideration of ethical values. Given the discussion above, there is little doubt that Cunningham probably favors the former position, although he never overtly addresses the question beyond the realm of adverse possession.

Helmholz's stand on this meta-question is more complicated because it modulates over the course of the debate. In his initial article, despite finding that courts often do take subjective intent into account, Helmholz quite emphatically states that the law of adverse possession should *not* incorporate an explicit good faith requirement. He acknowledges that good faith was a requirement in Roman law and asserts that it remains a requirement for acquisitive prescription in modern civil law.³⁷⁰ He also notes that good faith is statutorily required in a number of common law states.³⁷¹ Despite this, he still worries that “very little” would be gained by requiring good faith in adverse possession cases elsewhere and “something good might be lost.”³⁷² A universal good faith requirement, he warns, might encourage courts to engage in “even more speculative explorations of probable states of mind,” especially when evidence of a possessor's intent is already difficult to locate.³⁷³ When reliable state of mind evidence *is* available, Helmholz believes that courts can and do take it into account in evaluating the hostile and claim of right requirements—thus properly rewarding good faith possessors and disallowing claims of intentional trespassers.³⁷⁴ At the end of his first article, Helmholz calls on other academic commentators merely to recognize, as he does, that the “objective view” or “pure possession” approach to adverse possession, though perhaps normatively preferable, is not used as rigorously as its proponents would want because cases are complex and, perhaps more importantly, when judges and juries confront human beings they sometimes cannot help but “prefer the claims of an honest man over those of a dishonest man.”³⁷⁵

Towards the end of his response to Cunningham, however, Helmholz reverses himself. He aligns the pure possession approach to adverse possession to a more general view of the law that favors “objective standards” over “moral considerations,” a view he links

370. Helmholz, *Subjective Intent*, *supra* note 248, at 356. Helmholz fails to acknowledge, however, that in France, as in Louisiana, immovables can be acquired by thirty-year acquisitive prescription without just title or good faith. See CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 2262 & 690 (Fr.); LA. CIV. CODE ANN. art. 3486 (1983); 5 G. BAUDRY-LACANTINERIE & ALBERT TISSIER, CIVIL LAW TRANSLATIONS: PRESCRIPTION § 25, at 14–15 (La. St. L. Inst. & Jaro Mayda trans., West Publ'g Co. ed. 1972) (4th ed. 1924).

371. Helmholz, *Subjective Intent*, *supra* note 248, at 357.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 358.

with Justice Holmes and Dean Ames.³⁷⁶ Focusing on Holmes in particular, Helmholz stresses that Holmes' "predilection for objective standards in all areas of the law" had become something of "an *idée maitresse*, something of an obsession."³⁷⁷ However, Helmholz claims that the evolution of the law had not borne out Holmes' preferences, and adverse possession law was a perfect example of this failure to maintain a focus on objective standards. Indeed, Helmholz appears to grow more and more sympathetic to the tendency of judges to integrate ethical norms into decision-making, whether they overtly stress the ethical foundations of private law principles from the outset or use ethical norms to reinterpret and apply facially neutral principles.³⁷⁸ Helmholz admits that academic writers like himself, who enjoy "theoretical analysis of legal principles," might find this movement toward moral decision-making to be "unsettling," but then he advises fellow academics to become more sympathetic to "judges and juries[']" desire "to do right," at least in describing the law.³⁷⁹

V. CONCLUSION

In tracing the evolution of adverse possession discourse in the legal academy from 1881 to the middle of the 1980s, this Article has revealed at least five consistent themes. First, from the early conversations between Holmes, Pollock, and Maitland and the aphoristic debate between Langdell and Ames, through the learned explorations of English and American case law carried on by Ballantine, Bordwell, and Walsh, and finally, as displayed in the sharp debate between Helmholz and Cunningham, American property scholars (and occasionally their English interlocutors) consistently argued about the fundamental structure of the doctrine. Most of the scholars whose work is analyzed in this Article were deeply concerned with whether adverse possession should be understood primarily as a statute of limitations designed to cut off ejectment claims of negligent owners or as a positive method for a possessor to acquire a new title. Although there were some exceptions (most notably the legal realist inspired commentary of Charles Callahan and perhaps to a lesser extent Lon Fuller and William Stoebuck's state-specific studies), the scholars that are the subject of this Article argued incessantly about this fundamental question, seeing it as a crucial battle ground for adverse possession scholarship. However, in more recent decades, this question increasingly receded to the background and came to be seen as purely academic (for reasons that will be explored in the sequel to this Article.)

376. Helmholz, *Response*, *supra* note 255, at 102.

377. *Id.* (quoting Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1830 (1983)).

378. Helmholz, *Response*, *supra* note 255, at 103.

379. *Id.* at 103-04.

A second theme is the regular, but not quite as constant, engagement with identifying the social, economic, and systemic purposes of adverse possession. Does adverse possession primarily serve to cut off stale claims and quiet titles? Does it punish neglectful owners? Does it reward active, agenda-setting possessors who develop land they possess and put it to socially beneficial purposes? Does it honor and accommodate the psychological connection between a person and the object of his possession in a way that preserves social peace and prevents potentially dangerous resorts to self-help? In the decades that followed the Helmholtz-Cunningham debate, these questions assumed center stage in adverse possession discourse, as it took an increasingly theoretical turn in the wake of law and economics scholarship as well as other theoretical innovations.³⁸⁰ But, during the long century of scholarship this Article has reviewed, these inquires frequently bubbled to the surface—first in the early conversations between Holmes, Pollock, and Maitland, somewhat less often in the interwar period, and then with more intensity in William Stoebuck and Charles Callahan’s musings about adverse possession.

A third theme, which was clearly most present during the interwar period dominated by the scholarship of Ballantine, Bordwell, and Walsh, but which also appeared in other scholars’ work, is the nationalization of adverse possession law by American law professors. Almost all of the scholars conceded that the American institution of adverse possession had its roots in English common law (and hardly any acknowledged its roots in Continental Civil Law). But, many of the scholars noticed that in the evolution of the rules of adverse possession, there was a perfect illustration of the tendency of American law to distance itself from its English roots and to adapt English law to the needs of a new democratic republic with vast amounts of relatively undeveloped land and different social, political, and economic structures than England. This tendency to celebrate the Americanization of adverse possession law reached its apotheosis in the work of Percy Bordwell, who looked forward to the day when American adverse possession law would fulfill its “destiny as a true prescription,”³⁸¹ and in the scholarship of William Walsh, which laid the foundation for the mid-century objective approach toward adverse possession cemented in the *American Law of Property*. After the Helmholtz-Cunningham debate, this concern about the national identity of adverse possession

380. See generally Merrill, *supra* note 22 (introducing a law and economics and transactions costs perspective to adverse possession scholarship); Radin, *supra* note 29 (introducing Hegelian personality theory); Sprankling, *supra* note 51 (subjecting adverse possession doctrine to an environmentalist critique); Stake, *supra* note 29 (questioning many rationales and emphasizing importance of endowment effect and loss aversion theories drawn from modern psychology); Fennell, *supra* note 137 (using sophisticated efficiency analysis).

381. Bordwell, *Disseisin*, *supra* note 116, at 9.

as an institution would largely disappear as scholars became more interested in free-floating, universal property theory.

A fourth theme is the constant, and finally unresolved, debate over the role of a possessor's subjective intent in adverse possession law. Should courts privilege good faith possessors, possessing under color of title, or bad faith possessors, as some courts did in mistaken boundary cases? Or should courts adopt a pure possession or objective approach? Scholars throughout the century debated this fundamental question. Unlike some of the other themes, this question continued to fascinate, and sometimes divide, scholars in the next several decades.³⁸²

A final theme that emerges from the vantage point of today is the degree to which most of the adverse possession scholarship during this long century was endogenous; that is to say, the property scholars were engaged in a debate with themselves in a largely self-referential manner. At times, their debates were primarily descriptive in nature. Other times, and less frequently, their debates were prescriptive. But, the material and phenomenon that formed the subject of their debates were their own writings and, of course, the work of state court appellate judges deciding adverse possession cases. It is primarily in the curious, elliptical reflections of Charles Callahan (and to a lesser extent in Henry Ballantine's work and perhaps in Holmes), that we find an adverse possession scholar who seems particularly interested in trying to reconcile what was happening in adverse possession case law and scholarship with social, economic, and technological phenomena outside of that body of law. In the scholarship that came after the Helmholtz-Cunningham debate, however, American adverse possession law became more much concerned with exogenous forces and often attempted to visualize how adverse possession law fit into broader social, environmental, and political phenomena. Scholarship also began to speculate about how adverse possession could be modified to achieve a variety of desirable social or economic ends.³⁸³

Although a full discussion of the achievements and limitations of the last three decades of American adverse possession scholarship must await another day, our understanding of that work will hopefully have been deepened and sharpened by the analysis of adverse possession discourse of the preceding 100 years undertaken in this Article.

382. Compare Merrill, *supra* note 22 (arguing that adverse possession doctrine should be modified to privilege good faith possessors), with Fennell, *supra* note 137 (suggesting adverse possession should only reward intentional bad faith possessors).

383. See, e.g., Sprankling, *supra* note 51 (linking adverse possession to the destruction of wild lands); Stake, *supra* note 29 (addressing adverse possession in the context of other title clearing tools and risk aversion theory); Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUS. L. REV. 1385 (2015) (arguing that adverse possession should be modified to address the problem of vacant and abandoned structures in American cities).

