



4-25-2024

Gambling on Housing: Is Adverse Possession a Valid Tool for the Reallocation of Vacant Property?

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Kelsey Dunn, *Gambling on Housing: Is Adverse Possession a Valid Tool for the Reallocation of Vacant Property?*, 10 Tex. A&M J. Prop. L. 437 (2024).

Available at: <https://doi.org/10.37419/JPL.V10.I4.1>

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**GAMBLING ON HOUSING: IS ADVERSE POSSESSION A VALID TOOL
FOR THE REALLOCATION OF VACANT PROPERTY?**

By: Kelsey Dunn[†]

Abstract

Adverse possession, a staple of first-year law school property classes, never fails to shock the conscience of unsuspecting law students. Some are surprised to learn that a squatter can acquire legal title to another person’s property by moving in and using it for a period of years. In recent years, housing activists have begun to view the doctrine as an outside-the-box solution to our nation’s housing crisis. There are dozens of vacant homes for every person experiencing homelessness in America. Why not give those properties to people who actually use them?

However, this well-intended impulse does not square with reality. Adverse possession law does not incentivize efficient transfers of property when the adverse possessor is a squatter. In addition, adverse possession is—at best—a niche solution. The vast majority of people experiencing homelessness lack the means to pursue an adverse possession attempt, and American adverse possession law is often incompatible with notions of squatters’ rights.

From this perspective, it is tempting to write off this novel application of adverse possession. However, this Article argues that housing activists cause real harm when they advocate for the use of adverse possession. Their rhetoric opens the door for opportunistic individuals to capitalize on unrealistic dreams of home ownership among vulnerable populations. Additionally, it only takes one squatter to trigger public outcry and the imposition of perverse reforms. Therefore, this Article argues that we should not advocate for a cure that could be worse than the disease. Activists must redirect their efforts to interventions that help rather than hurt. Meanwhile, state prosecutors must intervene to stop opportunistic individuals from profiting on others’ adverse possession attempts.

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DOI: <https://doi.org/10.37419/JPL.V10.I4.1>

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I. INTRODUCTION

In today's real estate market, many homes sit vacant while the population experiencing homelessness continues to grow.¹ As of 2023, there are 28 vacant homes for every one person experiencing homelessness in the United States.² Indeed, this ratio is most extreme in Rust Belt cities experiencing population declines.³ However, the discrepancy persists in hot housing markets as well. New York City has nearly nine vacant homes per unhoused person.⁴ San Francisco has 13 vacant homes per unhoused person.⁵ Seattle has five.⁶ Based on these statistics, the homelessness crisis is not so much an issue of

1. *Vacant Homes vs. Homelessness in Cities Around the U.S.*, UNITED WAY NCA (Mar. 28, 2023), <https://unitedwaynca.org/blog/vacant-homes-vs-homelessness-by-city/> [<https://perma.cc/PX8M-LEF2>].

2. *Id.* Ratio of vacant homes per unhoused person is based on data from the Department of Housing and Urban Development.

3. *Id.* Detroit, Michigan, has the most vacant homes per unhoused person—116 homes per unhoused person. Syracuse, New York and St. Louis, Missouri, follow Detroit with 110 and 99 homes per unhoused person, respectively.

4. *Id.*

5. *Id.*

6. *Id.*

scarcity—but rather one of distribution.⁷ If this is the case, how should society proceed with the reallocation of housing?

Some activists believe that the answer to this question lies in the esoteric law of adverse possession. For the uninitiated, the doctrine of adverse possession allows a person who does not own a piece of property to acquire legal title based on continuous occupation without the owner's permission. In theory, adverse possession can “provide a path to property ownership through moving into an abandoned home without permission, paying taxes on the property, and maintaining the place as an owner would.”⁸ The key to success, however, is making it many years without getting caught.

In 2013, Steven DeCaprio, an Oakland resident, made national headlines when he acquired a home through adverse possession. DeCaprio's adverse possession attempt began by searching his neighborhood block-by-block for houses that looked abandoned.⁹ Once he had identified a target, he did his research and determined that the record owner had been dead for eighteen years. That information gave DeCaprio the confidence to enter the home and begin maintaining the place as a true owner.¹⁰ He replaced the entire electrical system.¹¹ He repaired the plumbing's fire damage.¹² He even paid property taxes.¹³ After five years, DeCaprio sued to become the home's rightful owner—and won.¹⁴ In the years following his

7. This is a rebuttable presumption. Some researchers claim that the vacancies are a red herring and argue that we cannot address the homelessness crisis without building more extremely low-income housing. Ned Resnikoff, *Vacancies Are a Red Herring*, BENIOFF HOMELESSNESS & HOUS. INITIATIVE (Nov. 30, 2021) <https://homelessness.ucsf.edu/blog/vacancies-are-red-herring> [https://perma.cc/AAF9-F985].

8. Sydney Brownstone, *In Times of Housing Crises, Washington's Old Squatters' Rights Law Is Put to the Test*, THE SEATTLE TIMES (Feb. 9, 2021, 7:38PM), <https://www.seattletimes.com/seattle-news/homeless/in-times-of-housing-crises-an-washingtons-old-squatters-rights-law-is-put-to-the-test> [https://perma.cc/UM8Y-XPX3].

9. Jeremy Dalmas, *In Legal Grey Area, West Oakland Resident Discovers Free House*, KALW PUB. MEDIA (Aug. 25, 2014, 5:27PM), <https://www.kalw.org/show/crosscurrents/2014-08-25/in-legal-grey-area-west-oakland-resident-discovers-free-house> [https://perma.cc/4ZKG-W63M].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Marisa Kendall, *From Squatter to Legal Homeowner? In California, It's Possible*, DAILY DEMOCRAT (Jan. 2, 2020, 2:22 PM), <https://www.dailydemocrat.com/2020/01/02/from-squatter-to-legal-homeowner-in-california-its-possible/> [https://perma.cc/Y78E-YCUU].

successful adverse possession attempt, DeCaprio launched a nonprofit in order to help others follow in his footsteps.¹⁵

Like DeCaprio, Naziyr Yishmael, a community leader in Seattle, fiercely believed in the potential of adverse possession as a partial solution to the homelessness crisis.¹⁶ Unlike DeCaprio, however, Yishmael attempted to monetize his idea. Starting in 2013, Yishmael began charging \$7,000–\$8,000 to provide clients advice on how they could adversely possess a home.¹⁷ Unfortunately, his clients ultimately lost thousands of dollars and faced criminal charges for trespass and burglary.¹⁸ Washington State prosecutors eventually convicted Yishmael of several crimes, including theft and the unlawful practice of law.¹⁹

Despite the mixed results, these adverse possession cases are exciting to legal scholars because they mark a return to the extraordinary hypotheticals taught in first-year property class. When introducing the subject of adverse possession, a typical law professor might tell the story of a frontier farmer who plants corn on the railroad's unused land bordering its tracks. Alternatively, they might describe a situation where a homesteader squats on an acre of rural wilderness. Regardless of the hypothetical, however, the professor never fails to astound their class. They tell their students that, under the doctrine of adverse possession, such trespasses can ripen into legal ownership with the passage of time. Taught this way, adverse possession has an extraordinary—and baffling—effect on property rights. Students leave lecture having learned that the law can legitimize the theft of an entire home.

Meanwhile, what does an attorney picture when they think about adverse possession? Bickering neighbors. In practice, the canonical examples of the farmer and the homesteader have little to do with adverse possession's modern niche as a practical tool for the resolution of boundary disputes.²⁰ Today's adverse possession cases involve quarrels over intruding fences, encroaching bushes, and misplaced

15. Steven DeCaprio, *My Squat Law Journey*, FOUND. FOR INTENTIONAL CMTY. (Oct. 21, 2015), <https://www.ic.org/my-squat-law-journey/> [<https://perma.cc/Z4S7-CUHQ>].

16. Brownstone, *supra* note 8.

17. *State v. Yishmael*, 456 P.3d 1172, 1175 (Wash. 2020).

18. Brownstone, *supra* note 8.

19. *Id.*

20. Nadav Shoked, *Who Needs Adverse Possession?*, 89 *FORDHAM L. REV.* 2639, 2643–44 (2021).

driveways.²¹ Professor Nadav Shoked conducted a survey of all reported state court adverse possession decisions from 2019. Only one case out of 87 lawsuits arguably involved a squatter.²² In theory, adverse possession facilitates land theft. In practice, the doctrine settles squabbles over inches and feet of property.

Thus, the efforts of DeCaprio and Yishmael are exciting because lawyers are no longer fighting over inches and feet. Instead, they are trying to help an unhoused person move from their car into a family home. However, the fact that an idea is exciting does not mean that it should be put to practice. Legal scholars must consider whether the use of adverse possession as a tool for the reallocation of vacant property is wise. While the ambitious theories of activists like DeCaprio and Yishmael are not without merit, this Article argues that adverse possession cannot be responsibly touted as means to house unhoused persons.

First, this application of adverse possession does not serve the doctrine's modern niche. One of the few modern justifications for adverse possession is that the doctrine incentivizes efficient land transfers in the event of a market failure.²³ How? Intentional adverse possession functions as a test of two subjective property valuations: that of the adverse possessor and that of the record owner.²⁴ Before proceeding with their adverse possession attempt, a squatter weighs their value of the property against a proxy for the record owner's value of the property: the expected loss that would occur if they got caught.²⁵

However, this logic unravels when the adverse possessor is a squatter. Why? The squatter obtains significant value from having a roof over their head during their adverse possession attempt, even if they eventually end up evicted. Thus, the expected value of a squatter's adverse possession attempt is almost always positive—even when the probability of getting caught is 100%. Alternatively, legislators could appropriately calibrate the squatter's expected value equation by ratcheting up criminal sanctions and imprisoning

21. *Id.* at 2644.

22. *Id.* at 2643, n.21. Shoked notes that *Philadelphia v. Galdo*, 217 A.3d 811 (Pa. 2019) was the one case that arguably involved a squatter. However, he writes that the relevance of *Galdo* is somewhat questionable because it involved the occupation of a city-owned vacant lot and “adverse possession claims against governments have traditionally constituted a separate body of law.”

23. Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1095 (2006).

24. *Id.* at 1073–74.

25. *Id.* at 1075.

judgment-proof adverse possessors.²⁶ However, this reform is neither workable nor desirable.²⁷ Imposing prison for the poor and fines for the wealthy could lead to a legitimacy crisis. Additionally, legal scholars cannot forget that imprisonment would precisely harm those individuals that we seek to help.

Theoretical concerns aside, adverse possession is not a scalable solution. Many Americans live in jurisdictions where adverse possession law is incompatible with notions of squatters' rights. First, some states impose good-faith requirements that preclude intentional adverse possessors from obtaining legal title.²⁸ In these jurisdictions, a squatter's adverse possession claim fails because they know that the home is not theirs. Indeed, the majority of states do not inquire into the adverse possessor's subjective state of mind.²⁹ In these objective jurisdictions, a squatter could theoretically obtain title through adverse possession. However, judges in objective jurisdictions often refuse to grant title to squatters on the grounds of their bad faith.³⁰

If the foregoing legal limits on scalability were not enough, the vast majority of persons experiencing homelessness lack the resources to pursue an adverse possession attempt. To succeed on their adverse possession claim, a squatter would need to maintain the property as a record owner would. This means spending money on improvements, repairs, and, in some jurisdictions, paying property taxes. These expenses add up fast. For example, an adverse possessor in the Bay Area would need to spend at least \$4,080 in property taxes alone during their first year in a \$600,000 home.³¹ While many people who

26. *Id.* at 1082.

27. Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435, 436–37 (1990); U.S. CONST. amend. VIII.

28. *See, e.g.*, N.Y. REAL PROP. ACTS. LAW § 501 (McKinney, Westlaw through L. 2023, chs. 1 to 354) (adverse possessor must demonstrate that they had a reasonable basis for the belief that they owned the property); ALASKA STAT. ANN. § 09.45.052 (West, Westlaw through ch. 26 of the 1st Reg. Sess. of the 33d Leg.) (requiring a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant); OR. REV. STAT. ANN. § 105.620 (West, Westlaw through the 2023 Reg. Sess. of the 82d Legis. Assemb.) (the person entering into possession must have the honest belief that the person was the actual owner of the property).

29. JESSE DUKEMINIER ET AL., PROPERTY 85 (9th ed. 2018).

30. Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 356–58 (1983).

31. California requires the payment of taxes for adverse possession claims. CAL. CIV. PROC. CODE § 325 (West, Westlaw through ch. 211 of 2023 Reg. Sess.). Therefore, Californian adverse possessor would need to pay a minimum of \$4,080 (i.e., 0.68% x \$600,000) to occupy a \$600,000 home. *See Alameda County Property*

experience homelessness have jobs, few have thousands of spare dollars to invest in a property. 75% of unsheltered homeless persons earn less than \$5,000 per year.³² 50% earn nothing at all.³³ Furthermore, mental illness and substance abuse disorders are prevalent among those experiencing homelessness. It is unreasonable to expect those struggling with these challenges to have the capacity to attempt adverse possession. In short, adverse possession is not a viable option for most people who experience homelessness. This reality, combined with the fact that the law is often incompatible with notions of squatters' rights, severely undermines the appeal of adverse possession as a tool for the reallocation of housing.

In summary, adverse possession cannot be touted as a legitimate means to house unhoused persons. The doctrine is—at best—a partial solution because American adverse possession law is often incompatible with notions of squatters' rights, and the vast majority of persons experiencing homelessness lack the means to attempt lawful adverse possession. Meanwhile, this application of adverse possession does not serve the doctrine's modern niche because it does not incentivize efficient land transfers. From this perspective, it is tempting to write off the work of activists like Steven DeCaprio and Nazir Yishmael. After all, who cares if a few unhoused persons try and fail to obtain homes through adverse possession? However, activists cause real harm when they tout adverse possession as a solution to the housing crisis.

First, their rhetoric opens the door for opportunistic individuals to capitalize on unrealistic dreams of home ownership among vulnerable populations. For example, Angela Simmons, a Seattle resident, paid Naziyr Yishmael \$2,500 for his adverse possession “consulting services.”³⁴ Her adverse possession attempt lasted a few weeks and ended when the police entered her home with their guns drawn.³⁵ In all, Simmons lost \$7,500 and had to scramble to find alternative housing.³⁶ Meanwhile, Yishmael made a profit off Simmons's

Tax, TAX-RATES.ORG, http://www.tax-rates.org/california/alameda_county_property_tax [https://perma.cc/3KZE-ZFQG].

32. BRUCE MEYER ET AL., LEARNING ABOUT HOMELESSNESS USING LINKED SURVEY AND ADMINISTRATIVE DATA 67 (2021), https://www.nber.org/system/files/working_papers/w28861/w28861.pdf [https://perma.cc/N7UB-8986].

33. *Id.*

34. Brownstone, *supra* note 8.

35. *Id.*

36. *Id.*

misfortune. Put simply, this application of adverse possession works like a high-stakes gamble.³⁷ The risk? Spend thousands of dollars and put your freedom on the line. The reward? A tiny chance to realize your dream of home ownership. Prosecutors cannot allow opportunistic third parties to make a profit on this losing bet.

Second, from a broader perspective, it takes only one squatter to trigger the imposition of a good-faith requirement. While good-faith requirements sound nice, they can be detrimental to social welfare. The preclusion of knowing adverse possession attempts would eliminate the type of attempts that have the potential to serve the doctrine's modern purpose.³⁸ Additionally, the imposition of a good-faith standard would generate additional administrative costs relative to the objective standard because the good-faith standard requires a subjective inquiry into the adverse possessor's state of mind.³⁹

In short, activists cause harm when they tout adverse possession as a solution to the housing crisis. Therefore, legal scholars must redirect activists to solutions and reforms that have the potential to help rather than hurt. For example, cities such as Boston have used their eminent domain power to seize abandoned units and convert them into affordable housing.⁴⁰ Additionally, research shows that the elimination of single-family zoning could facilitate the development of sufficient levels of affordable housing.⁴¹ Given the availability of effective alternatives, it seems unwise to take a gamble on adverse possession as a solution to the homelessness crisis. In the meantime, state prosecutors must intervene to stop opportunistic individuals from profiting off others' adverse possession attempts.

Part II of this Article provides background on adverse possession law. In particular, it covers the doctrine's origins, compares the doctrine's elements across jurisdictions (typically, one's land use must be "open and notorious, exclusive, hostile and continuous"⁴²), and

37. *Id.*

38. Fennell, *supra* note 23, at 1064–65.

39. Helmholtz, *supra* note 30, at 357.

40. Julie Gilgoff, *Local Responses to Today's Housing Crisis: Permanently Affordable Housing Models*, 20 CUNY L. REV. 587, 615–16 (2017).

41. Jenny Shuetz, *To Improve Housing Affordability, We Need Better Alignment of Zoning, Taxes, and Subsidies*, BROOKINGS (Jan. 7, 2020), <https://www.brookings.edu/policy2020/bigideas/to-improve-housing-affordability-we-need-better-alignment-of-zoning-taxes-and-subsidies/> [<https://perma.cc/6LBU-F9GA>].

42. *Adverse Possession Under Property Law*, JUSTIA, <https://www.justia.com/real-estate/home-ownership/owning-a-home/adverse-possession/> [<https://perma.cc/9384-HA8N>].

establishes the doctrine's modern niche as a means to facilitate efficient land transfers when a market transaction is not available.

Part III evaluates this application of adverse possession from an economic perspective. This analysis shows that this use of adverse possession does not serve the doctrine's modern niche because it does not incentivize efficient land transfers in the absence of a market transaction. Part IV argues that adverse possession is—at best—a niche solution. Part IV further shows that the vast majority of persons experiencing homelessness lack the resources required to pursue an adverse possession claim. Finally, Part IV shows that many Americans live in jurisdictions where adverse possession law is incompatible with notions of squatters' rights.

Part V argues that activists cause real harm when they tout adverse possession as a solution to the housing crisis. Therefore, Part VI encourages activists to pursue alternative solutions and asks prosecutors to crack down on opportunists who seek to profit on others' adverse possession attempts.

II. THE HISTORY OF ADVERSE POSSESSION

A. *Origins and Sources of Adverse Possession Law*

The doctrine of adverse possession traces its roots to England's feudal period.⁴³ In 1275, the Statute of Westminster I, Chapter 39 established the practice of “naming past events beyond which no suitor in an action affecting land could search and retrieve evidence supporting title.”⁴⁴ Three centuries later, a revised statute “adopted the more modern procedure of stipulating a period of years within which various actions had to be commenced by the real property owner.”⁴⁵ Then, in 1623, England's Statute of Limitations solidified this approach by setting a 20-year time limit for property recovery actions.⁴⁶

43. Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL'Y & L. 271, 277 (2012).

44. 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael A. Wolf ed., 2009).

45. *Id.*

46. Stevie Swanson, *Sitting on Your Rights: Why the Statute of Limitations for Adverse Possession Should Not Protect Couch Potato Future Interest Holders*, 12 FLA. COASTAL L. REV. 305, 308 (2011).

By its terms, England's Statute of Limitations merely terminated the record owner's access to judicial assistance in recovering possession of their land.⁴⁷ As such, the Statute of Limitations did not affect the legal title of the record owner. However, the Real Property Limitation Act of 1874 took the Statute of Limitations one conceptual step further and declared that the passage of the statutory period extinguished the record owner's property rights.⁴⁸ This theoretical shift laid the foundation for the doctrine of adverse possession. Once the statutory period passes, a record owner loses their land to an invader.⁴⁹

Today, American adverse possession law is a synthesis of both statutory and case law.⁵⁰ Every American jurisdiction has at least one statute of limitations that terminates the record owner's access to judicial assistance in recovering the possession of their land.⁵¹ The statutes of limitations are "complemented and amplified by a large body of case law that elaborates on the kind of possession that is sufficient to cause the statutory period to begin to run, and to continue running, against the [record] owner."⁵² Thus, judicial rules supplement the statutes of limitations that make up the "core of adverse possession."⁵³

B. *Elements of Adverse Possession*

To obtain title by adverse possession, the claimant must show that they maintained the right type of possession for the statutory period. The type of possession that is sufficient for the statutory period to run varies across jurisdictions.⁵⁴ That said, legal scholars typically distill the doctrine's essence into five core elements. Adverse possession requires (1) an entry that is actual, (2) exclusive, (3) open and notorious, (4) continuous for the statutory period, and (5) hostile.⁵⁵ In addition to these core elements, some states require that the adverse possessor pay taxes on the property in question.⁵⁶

47. See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2421–22 (2001).

48. Swanson, *supra* note 46, at 309.

49. Shoked, *supra* note 20, at 2641.

50. POWELL, *supra* note 44.

51. *Id.*

52. *Id.*

53. DUKEMINIER ET AL., *supra* note 29, at 74.

54. Cherek, *supra* note 43, at 288.

55. *Id.*

56. See, e.g., CAL. CIV. PROC. CODE § 325(b) (West, Westlaw through ch. 211

To obtain title, the claimant must maintain possession for the statutory period. Some jurisdictions impose general statutory periods that apply across all kinds of adverse possession. Typically, a general statute of limitations is 10–20 years.⁵⁷ In addition to a general statute of limitations, some jurisdictions shorten the statutory period if the claimant had color of title or paid taxes.⁵⁸ For example, in Washington, the requisite statutory period is reduced from ten years to seven years if the claimant had color of title or paid taxes.⁵⁹ Thus, the length of the statutory period depends on the jurisdiction in which the property is located and the facts of the case itself.⁶⁰ In Arizona, an adverse possessor can obtain title in two years—even if they lacked color of title or failed to pay taxes.⁶¹ Meanwhile, in New Jersey, all claimants need to maintain possession for at least 30 years.⁶²

An adverse possession claimant must also show that they maintained the right type of possession for the statutory period. Judicial rules define and describe the five core adverse possession elements. First, to establish the actual entry element, the claimant must show that they “physically possessed and maintained control over the real property in the same manner as a true owner.”⁶³ Second, to

of 2023 Reg. Sess.); MINN. STAT. ANN. § 541.02 (West, Westlaw through 2023 Reg. Sess.).

57. *See, e.g.*, IOWA CODE ANN. § 614.17A (West, Westlaw through the 2023 Reg. Sess.) (ten-year statute of limitations); OR. REV. STAT. ANN. § 105.620 (West, Westlaw through the 2023 Reg. Sess. of the 82d Legis. Assemb.) (ten-year statute of limitations); S.C. CODE ANN. § 15-67-210 (Westlaw through 2023 Act No. 102) (ten-year statute of limitations); KAN. STAT. ANN. § 60-503 (Westlaw through 2023 Reg. Sess.) (fifteen-year statute of limitations); MASS. GEN. LAWS ANN. ch. 260, § 21 (West, Westlaw through ch. 25 of the 2023 1st Ann. Sess.) (twenty-year statute of limitations).

58. Cherek, *supra* note 43, at 297.

59. *See, e.g.*, WASH. REV. CODE ANN. § 4.16.020 (West, Westlaw through the 2023 Reg. and 1st Spec. Sess. of the Wash. Leg.) (general statute of limitations for the recovery of real property is ten years); WASH. REV. CODE ANN. § 7.28.070 (West, Westlaw through the 2023 Reg. and 1st Spec. Sess. of the Wash. Leg.) (statute of limitations for the recovery of real property is seven years if the adverse possessor paid taxes during the statutory period); WASH. REV. CODE ANN. § 7.28.050 (West, Westlaw through the 2023 Reg. and 1st Spec. Sess. of the Wash. Leg.) (statute of limitations for the recovery of real property is seven years if the adverse possessor had color of title).

60. Cherek, *supra* note 43, at 297.

61. ARIZ. REV. STAT. ANN. § 12-522 (Westlaw through the 1st Reg. Sess. of the 56th Leg.).

62. N.J. STAT. ANN. § 2A:14-30 (West, Westlaw through L. 2023) (statutory period is 60 years for woodlands or uncultivated lands and 30 years for all other real estate).

63. Cherek, *supra* note 43, at 289. The extent of physical occupation required by

establish the exclusive entry element, the claimant needs to exercise control in a similar manner as a true owner.⁶⁴ Thus, the use of the property by guests does not vitiate the exclusive entry element.⁶⁵ Third, an entry satisfies the open and notorious element if it would put a reasonably attentive owner on notice that someone is on their property.⁶⁶ Thus, “clandestine occupancy” does not count toward the statutory period.⁶⁷ Fourth, an entry satisfies the continuous element if it is as continuous as the true owner’s use of the property.⁶⁸ In other words, the claimant is “permitted to come and go in the ordinary course given the nature of the property in question.”⁶⁹

The fifth core element—hostility—is a source of controversy among jurists.⁷⁰ All jurisdictions agree that permissive use is not hostile and does not count towards the statutory period.⁷¹ However, jurisdictions are split on the claimant’s requisite state of mind.⁷² The majority of jurisdictions follow an objective standard.⁷³ Under the objective standard, the adverse possessor’s state of mind is irrelevant.⁷⁴ Meanwhile, a minority of jurisdictions follow the good-

the law varies on a case-by-case basis given the nature and condition of the property. *See* *Houston v. U.S. Gypsum Co.*, 652 F.2d 467, 473 (5th Cir. 1981) (“wild and undeveloped land that is not readily susceptible to habitation, cultivation, or improvement does not require the same quality of possession as residential or arable land”).

64. Cherek, *supra* note 43, at 293.

65. *See, e.g.*, *Franklin v. Massillon Homes II, LLC*, 184 Ohio App. 3d 455, 461 (2009) (“[u]se of the property does not have to be exclusive of all individuals”); *Kudar v. Morgan*, 521 P.3d 988, 993 (Wyo. 2022) (claimant established exclusive possession by showing that nobody besides him *or his guests* used or maintained the disputed property); *Graybill v. Lampman*, 332 P.3d 511, 517 (Wyo. 2014) (use of disputed parcel was exclusive even though the parcel was used for family gatherings and functions, including baptisms, confirmations, first communions, birthdays, graduations, holidays, and church functions).

66. *DUKEMINIER ET AL.*, *supra* note 29, at 74..

67. *See* *Wanha v. Long*, 255 Neb. 849, 859 (1998).

68. Cherek, *supra* note 43, at 295.

69. *DUKEMINIER ET AL.*, *supra* note 29, at 75. *See, e.g.*, *Howard v. Kunto*, 477 P.2d 210, 213 (Wash. App. 1970) (rejecting conclusion that summer occupancy only of a summer beach home destroys the continuous entry element).

70. *DUKEMINIER ET AL.*, *supra* note 29, at 76.

71. Cherek, *supra* note 43, at 299.

72. *Id.*

73. *DUKEMINIER ET AL.*, *supra* note 29.

74. *See, e.g.*, *Totman v. Malloy*, 725 N.E.2d 1045, 1048 (Mass. 2000) (“We have long held that the state of mind of a claimant is not relevant to a determination whether the possession of land is nonpermissive”); *Tioga Coal Co. v. Supermarkets Gen. Corp.*, 546 A.2d 1, 5 (Pa. 1988) (“that if the true owner has not ejected the interloper within the time allotted for an action in ejection, and all other elements of adverse possession have been established, hostility will be implied, regardless of

faith standard. Under the good-faith standard, the requisite state of mind is “I thought I owned it.”⁷⁵ In the past, a select few jurisdictions applied the aggressive-trespass standard. Under the aggressive trespass standard, the requisite state of mind is “I didn’t own it, but I intended to make it mine.”⁷⁶ However, courts have largely abandoned or abrogated their use of this approach.⁷⁷

In addition to the five core elements discussed above, some jurisdictions require an adverse possession claimant to pay taxes on the property in question.⁷⁸ For example, in Minnesota, a claimant must pay taxes for at least five consecutive years within the 15-year statutory period.⁷⁹ In California, the claimant must timely pay all property taxes during the five-year statutory period.⁸⁰ There seems to be no clear reason why some states require the payment of taxes.⁸¹

the subjective state of mind of the trespasser”).

75. *DUKEMINIER ET AL.*, *supra* note 29; *see, e.g.*, ALASKA STAT. ANN. § 09.45.052 (West, Westlaw through ch. 26 of the 1st Reg. Sess. of the 33d Leg.) (“The uninterrupted adverse notorious possession...of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title”); OR. REV. STAT. ANN. § 105.620 (West, Westlaw through the 2023 Reg. Sess. of the 82d Legis. Assemb.) (“At the time the person claiming by adverse possession or the person’s predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property”).

76. *DUKEMINIER ET AL.*, *supra* note 29; *see, e.g.*, *Preble v. Maine Cent. R.R. Co.*, 27 A. 149, 150 (Me. 1893), *overruled by Dombkowski v. Ferland*, 893 A.2d 599 (Me. 2006) (“Indeed, the authorities all agree that this intention of the occupant to claim the ownership of land not embraced in his title, is a necessary element of adverse possession”); *Lusk v. Callaham*, 339 S.E.2d 156, 158 (S.C. Ct. App. 1986) (“In this state, as elsewhere, adverse possession requires hostile possession, that is, possession with intention to dispossess the owner”).

77. In 1993, Maine passed a statute which overrode the aggressive trespass standard. Bruce A. McGlauflin, *Some Confusing Things Happened on the Way to Modernizing Maine’s Adverse Possession Law*, 25 ME. BAR J. 38, 41 (2010). Today, South Carolina only requires a showing of bad faith when the case involves a claimant only asserting ownership over a small strip of land on a boundary line. Adam Leitman Bailey & Matthew Eichel, *Analyzing Adverse Possession Laws and Cases of the States East of the Mississippi River*, PROB. & PROP., Jan./Feb. 2016, at 6, 9.

78. *See, e.g.*, CAL. CIV. PROC. CODE § 325 (West, Westlaw through ch. 211 of 2023 Reg. Sess.); MINN. STAT. ANN. § 541.02 (West, Westlaw through 2023 Reg. Sess.).

79. MINN. STAT. ANN. § 541.02 (West, Westlaw through 2023 Reg. Sess.).

80. CAL. CIV. PROC. CODE § 325 (West, Westlaw through ch. 211 of 2023 Reg. Sess.).

81. *See Dutton v. Thompson*, 85 Tex. 115, 119 (1892) (“It is not very clear why the legislature made the payment of taxes necessary. . .”).

However, some courts view taxation as a proxy for good faith that is intended to deter the abuse of adverse possession by scheming opportunists.⁸²

What does this mean for a claimant who seeks to obtain title to a vacant home through adverse possession? First and foremost, the hostility element may doom a claimant's adverse possession attempt if they reside in a jurisdiction that follows the good-faith standard. Therefore, for the sake of argument, let us assume that a claimant resides in an objective jurisdiction. In an objective jurisdiction, three of the five elements—exclusive entry, open and notorious entry, and continuous entry—would be satisfied by the act of living in the home.⁸³ Meanwhile, to establish the actual entry element, the claimant would need to improve⁸⁴ or maintain the home as a true owner.⁸⁵ Thus, the actual entry element requires the claimant to invest resources into the home. The magnitude of this investment would be even greater if the claimant lives in a jurisdiction that requires payment of taxes. Therefore, it is theoretically possible for a claimant to obtain title to a vacant home through adverse possession. So long as the claimant resides in an objective jurisdiction, their adverse possession claim could succeed if they live in the home, invest in the home, and remain undetected for the statutory period.

However, clearing the requisite adverse possession hurdles is easier said than done, and one stumble can lead to civil or criminal penalties (or both). Landowners have the power to exclude. Therefore, because an adverse possessor enters the landowner's property without permission, they are, by definition, a trespasser. In turn, the landowner can either report the adverse possessor to law enforcement or file a

82. See Shane P. Raley, *Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law*, 50 ARK. L. REV. 489, 492–96 (1997) (Arkansas imposed tax requirements for adverse possession in response to public outcry after a Jacksonville man's attempt to claim title to 171 lots in a local subdivision); *Rawson v. Fox*, 65 Ill. 200, 206–07 (1872) (reasoning that the act requiring payment of taxes for adverse possession claims was “manifestly intended to protect those who purchase land and pay their money therefor, under the belief that they are acquiring title. And what better evidence of their good faith than the fact that they paid for the land, have paid all taxes assessed against it for seven years”).

83. See Cherek, *supra* note 43, at 292–96.

84. See *Wilson v. Gladish*, 140 Idaho 861, 868 (Ct. App. 2004) (placement of a mobile home on land, efforts to bring the land above the flood plain, and installation of water service constituted improvements for the purpose of the actual entry element).

85. *MacDonald v. McGillvary*, 35 Mass. App. Ct. 902, 903 (1993) (maintenance of suburban lawn is sufficient to establish actual possession).

civil action of ejectment.⁸⁶ In a civil action of ejectment, the appropriate relief may be a judgment for both possession and damages.⁸⁷ Meanwhile, punishments for criminal trespass are not terribly heavy.⁸⁸ Most jurisdictions treat the crime as a misdemeanor, punishable by a fine between \$1,000 and \$5,000 or up to one year of jail time.⁸⁹

C. *Justifications for Adverse Possession*

Adverse possession has an extraordinary effect on property rights—it converts illegal trespasses into rightful ownership with the passage of time. Over the years, legal scholars have struggled to justify the doctrine’s remarkable effect.⁹⁰ That said, purported justifications sort into three core categories: quieting title justifications, reliance justifications, and efficacy justifications.⁹¹ In line with the work of other scholars, this Article argues that the quieting title and reliance arguments lack merit in our modern world. However, for the following reasons, the efficiency arguments withstand scrutiny.

1. Reliance

One of the most infamous justifications for adverse possession comes from the mind of Oliver Wendall Holmes. In a frequently cited quote, Holmes stated that:

The true explanation of title by [adverse possession] seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.⁹²

86. Fennell, *supra* note 23, at 1082; Shoked, *supra* note 20, at 2647–48.

87. ERIC M. LARSSON, *Causes of Action for Possession of Real Property by Ejectment of Possessor*, in 55 CAUSES OF ACTION 2D 65 (2012).

88. Fennell, *supra* note 23, at 1083 n. 172.

89. In California, a squatter could be found guilty of misdemeanor trespass in the first degree and face a fine of up to \$1,000. CAL. PENAL CODE §§ 602(1)(1), (o), (x)(2)(B)–(C) (West, Westlaw through ch. 141 of 2023 Reg. Sess.). In Washington State, a squatter could be found guilty of gross-misdemeanor trespass in the first degree and face a fine of up to \$5,000. WASH. REV. CODE ANN. §§ 9A.52.070(2), 9.92.020 (West, Westlaw through 2023 Reg. and Spec. Sess. of the Wash. Leg.).

90. Shoked, *supra* note 20, at 2649.

91. *Id.*; Fennell, *supra* note 23, at 1059.

92. Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2456 (2001) (citing *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, 417–18 (Max Lerner ed., 1946)).

What do rocks and roots have to do with adverse possession? Consider this translation. Over the course of many years, the adverse possessor invests time and resources into a piece of property. In doing so, they grow to rely on the property. Meanwhile, the record owner is nowhere to be found. Thus, according to Holmes, adverse possession is justified because it vindicates the adverse possessor's relationship with the property and prioritizes their reliance interests over those of an ignorant owner.⁹³

Reliance justifications for adverse possession have intuitive appeal. However, they fail to withstand basic scrutiny. First, reliance justifications only speak to which of the two parties—the adverse possessor or the record owner—is likely to place a higher value on the land.⁹⁴ They provide no basis for the fact that adverse possession transfers title without compensation.⁹⁵ Second, record owners can maintain roots in a piece of property despite physical absence. For example, the owners of a family vacation home might place immense sentimental value in a piece of property even though they rarely use it.⁹⁶ Third, the vast majority of adverse possession claims involve boundary disputes.⁹⁷ It is hard to argue that an adverse possessor establishes inseparable psychological roots when they accidentally plant a tomato bush on the wrong side of a property line.

2. Quieting Title

A “time-honored” justification for adverse possession is that the doctrine simplifies the administration of property law by “curbing litigation and adjusting legal realities to reflect the realities on the ground.”⁹⁸ Investigations into claims regarding a piece of property are costly.⁹⁹ Adverse possession reduces that cost, so the argument goes, by empowering the courts to “announce that certain claims are stale.”¹⁰⁰ In other words, adverse possession uses the passage of time to truncate the cloud of uncertainty that lurks over a piece of property.

93. Shoked, *supra* note 20, at 2649. Today, legal scholars might term this attachment to land in one's possession as an “endowment effect.” Fennell, *supra* note 23, at 1060.

94. Fennell, *supra* note 23, at 1060.

95. *Id.*

96. Stake, *supra* note 92, at 2468 (“It may be a special kind of person that buys land and lives elsewhere, a person that has a special appreciation for land.”).

97. Shoked, *supra* note 20, at 2660.

98. *Id.*; Stake, *supra* note 92, at 2441

99. Shoked, *supra* note 20, at 2660.

100. *Id.*

However, like the reliance arguments, quieting title arguments fail to withstand logical scrutiny. Property law has come a long way since the advent of adverse possession in feudal England. Today, we have other effective means of quieting titles.¹⁰¹ For example, marketable title acts quiet title by “quashing old claims inconsistent with the recent record.”¹⁰² Indeed, adverse possession allows parties to limit their due diligence to a shorter period of years. However, adverse possession is a fuzzy doctrine—it requires a claimant “to establish a variety of elements, each of which is open textured and subject to judicial interpretation.”¹⁰³ In contrast, marketable title acts determine ownership based on “steady and reliable documents.”¹⁰⁴ From this perspective, adverse possession “trades a search for a few specific behaviors over a long period of time for a wider inquiry into fuzzier actions and thoughts over a shorter period of time.”¹⁰⁵ Thus, on balance, adverse possession may be no more efficient than other mechanisms of quieting title.

3. Efficiency

Legal scholars also rely on efficiency arguments to account for adverse possession’s extraordinary effect. The traditional articulation of the efficiency argument draws a distinction between “sleeping” owners and the “working” possessors.¹⁰⁶ Under this framework, adverse possession punishes those who sleep on their rights by failing to make productive use of their property.¹⁰⁷

Of course, the traditional articulation of the efficiency argument lacks merit in a modern world.¹⁰⁸ Unlike the lords of feudal England, contemporary billionaires purchase millions of acres of land for the sole purpose of preservation.¹⁰⁹ Meanwhile, modern property law codifies the value of idle land. For example, the Wilderness Act establishes the importance of an enduring resource of untouched

101. Stake, *supra* note 92, at 2441–42.

102. *Id.* at 2442.

103. Fennell, *supra* note 23, at 1062.

104. *See* Stake, *supra* note 92, at 2439, 2441–42.

105. *Id.* at 2439.

106. Fennell, *supra* note 23, at 1064.

107. Cherek, *supra* note 43, at 282.

108. *Id.* at 283.

109. *Turner Ranches*, TED TURNER ENTERS., <https://www.tedturner.com/turner-ranches/> [<https://perma.cc/AZX4-CEB9>].

land.¹¹⁰ Likewise, conservation easements encourage property owners to avoid putting their land into production.¹¹¹

However, the outdated dichotomy between “sleeping” owners and “working” possessors gestures towards the legitimate social goal of moving property into the hands of those who place the highest value on the property.¹¹² For example, suppose the owner of Blackacre places a value of V_O on his property. Meanwhile, suppose Jane places a value of V_J on Blackacre. The owner should retain Blackacre so long as V_J is less than V_O . However, if V_J is greater than V_O , then it is efficient for the owner to transfer Blackacre to Jane.

Typically, we rely on markets to facilitate efficient land transfers. Once again, suppose the owner of Blackacre places a value of V_O on his property. Jane offers to purchase Blackacre from the owner at a price of V_J . The owner will accept Jane’s offer and transfer the property to Jane if V_J is greater than V_O . Thus, the existence of a market transaction would indicate that Blackacre is moving into the hands of someone who values it more highly.¹¹³

In practice, however, transaction costs can impede efficient market transactions. For example, suppose the owner of Blackacre died and left the property to his Australian niece. Jane wants to purchase Blackacre—but she can’t track down the Australian niece. Assuming that Jane places a higher value on Blackacre than the Australian niece, the transfer of Blackacre from the owner to Jane would be efficient. Society wants the exchange to occur. However, transaction costs hinder the formation of a deal because Jane is unable to find the owner and make a purchase offer. As a result, in this scenario, the optimization of social welfare hinges on legal intervention.¹¹⁴

From this perspective, adverse possession is justified as a type of legal intervention that incentivizes efficient land transfers in the event of a market failure.¹¹⁵ This modern articulation of the efficiency argument is best illustrated by a simple model. According to Professor Lee Anne Fennell, the expected value calculation for a knowing adverse possessor can be expressed like this:

110. Cherek, *supra* note 43, at 284.

111. *Id.*

112. Fennell, *supra* note 23, at 1064.

113. *Id.*

114. Shoked, *supra* note 20, at 2656.

115. *Id.*

$$E_{AP} = (P_c \times K_c) + (1-P_c) \times K_a$$

where:

P_c = probability squatter is caught before statutory period transpires.

K_c = payout when squatter is caught before statutory period transpires.

$(1-P_c)$ = probability squatter is caught after statutory period transpires.

K_a = payout when squatter is caught after statutory period transpires.¹¹⁶

Now, consider a concrete example. Suppose Blackacre is worth \$100,000. Once again, Jane wishes to purchase Blackacre—but she cannot track down Blackacre’s owner. In response to this market failure, Jane decides to pursue an adverse possession attempt and face the risk of a \$10,000 fine for trespassing in the event she gets caught. Thus, Jane’s expected value equation looks like this:

$$E_J = P_c \times -\$10,000 + (1-P_c) \times \$100,000.$$

Note that E_J is inversely proportional with P_c . For example, if P_c is a mere 10%, then E_J is a whopping \$89,000 and Jane will gladly proceed with her adverse possession attempt.¹¹⁷ Conversely, if P_c is 95%, then E_J is -\$4,500 and Jane will keep out.

Next, assume that P_c is a proxy for the owner’s valuation of Blackacre.¹¹⁸ This makes intuitive sense. If someone places a high value on a piece of property, they are more likely to notice a trespasser.¹¹⁹ Thus, as the owner’s valuation of Blackacre increases, P_c increases, E_J decreases, and Jane is less likely to proceed with her adverse possession attempt. Here, adverse possession functions as at test of two subjective property valuations: that of the adverse possessor and that of the record owner. An increase in the record

116. Fennell, *supra* note 23, at 1069–70, 1074. This expected equation only holds true when the adverse possessor is knowing—as is the case with a squatter of a vacant home. Thus, the expected value equation does not apply when the adverse possession attempt is inadvertent (e.g., accidentally build driveway on wrong side of property line).

117. $E_J = 10\% \times -\$10,000 + 90\% \times \$100,000 = -\$1,000 + \$90,000 = \$89,000.$

118. Fennell, *supra* note 23, at 1074–75.

119. Indeed, this assumption may not hold true when the property in question is held for purely sentimental value (e.g., heir values the existence of the deceased’s property).

owner's valuation decreases the likelihood that the adverse possession attempt will commence.

In summary, legal scholars have struggled to develop adequate justifications for adverse possession. Reliance justifications fail to account for the doctrine's real-world application. Meanwhile, quieting title justifications fail to account for the existence of equally efficient alternatives. Herein lies adverse possession's "modern niche"—the doctrine can incentivize efficient land transfers in the event of a market failure.¹²⁰

III. ADVERSE POSSESSION DOES NOT FACILITATE EFFICIENT LAND TRANSFERS WHEN THE ADVERSE POSSESSOR IS A SQUATTER.

Adverse possession's modern niche lies in the doctrine's ability to incentivize efficient land transfers in absence of a market transaction.¹²¹ Before proceeding with their attempt, the adverse possessor weighs their value of the property against a proxy for the record owner's value of the property: the expected loss that would occur if they got caught. However, this logic falls apart when the adverse possessor is a squatter because a squatter obtains significant utility from having a roof over their head during their adverse possession attempt.

The expected value calculation for a squatter attempting to obtain title to a vacant home through adverse possession can be expressed like this:

$$E_s = (P_c \times K_c) + (1 - P_c) \times K_a + K_i - K_r$$

where:

P_c = probability squatter is caught before statutory period transpires.

K_c = payout when squatter is caught before statutory period transpires.

$(1 - P_c)$ = probability squatter is caught after statutory period transpires.

K_a = payout when squatter is caught after statutory period transpires.

K_i = value the squatter obtains from having housing during attempt.

120. Fennell, *supra* note 23, at 1059.

121. *See* Fennell, *supra* note 23, at 1066.

K_r = squatter's investment during adverse possession attempt.¹²²

Suppose a squatter seeks to obtain title to an \$800,000 vacant home in Oakland, California through a five-year adverse possession attempt.¹²³ Assume that the penalty for getting caught trespassing is \$1,000.¹²⁴ Additionally, assume that the squatter invests \$787 per month into their adverse possession attempt.¹²⁵ Finally, assume that the squatter obtains a value of \$1,650 per month from having a roof over their head.¹²⁶

Now, suppose that the home's record owner places an incredibly high value on the home. We can model this by setting P_c to 100%. If the efficiency justification for adverse possession held true, then we would expect E_s to be negative and the squatter to keep out. However, this is not what happens. Under the aforementioned conditions, the squatter's expected value for their adverse possession attempt is \$50,800.¹²⁷ Thus, the squatter will proceed with their adverse possession attempt even if it is destined to fail because they obtain significant utility from the roof over their head. In these situations, doctrine cannot incentivize efficient land transfers because the adverse

122. This equation is based on the work of Fennell. However, this paper introduces the variables of utility from a roof over one's head and investment in the property.

123. Statutory period for adverse possession is five years in California when the adverse possessor pays taxes. CAL. CIV. PROC. CODE § 325 (West, Westlaw through ch. 211 of 2023 Reg. Sess.).

124. In California, this trespass would be charged as a misdemeanor. In California, "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both." CAL. PENAL CODE § 19 (West, ch. 211 of the 2023 Reg. Sess.). The record owner could also pursue damages in civil court. However, given that the squatter is investing in the property and maintaining the property, they generate ameliorative waste. Thus, damages from civil suit would probably be nominal.

125. Assume a property tax rate of 0.68% per year. See Alameda County Property Tax, *supra* note 31. Assume adverse possessor spends 0.50% of home value on maintenance and improvements. The general rule of thumb is to budget 1-4% of home value on maintenance. Thus, this article assumes that adverse possessor is budget conscious. Thus, the expenditures per month is $\$800,000 \times (0.68\% + 0.50\%) / 12 = \787 .

126. Median rent for studio in Alameda County is \$1,995. Thus, we are assuming that the squatter would live in a below median apartment. *Alameda, CA Rental Market*, ZILLOW RENTAL MANAGER, <https://www.zillow.com/rental-manager/market-trends/alameda-ca/?bedrooms=0> [<https://perma.cc/8K2E-XLV5>].

127. $E_s = (100\% \times -\$1,000) + (0\% \times \$800,000) + (-\$787 \times 12 \times 5) + (\$1,650 \times 12 \times 5) = \$50,800$.

possessor's expected value doesn't respond to the record owner's high valuation.

Indeed, society could calibrate the squatter's expected value calculation by ratcheting up penalties. After all, legal scholars recognize that punishments for trespass are not terribly heavy.¹²⁸ For example, suppose the penalty for trespass is increased to \$60,000. Now, the squatter's expected value for their adverse possession attempt is -\$8,200.¹²⁹

On first impression, this seems like a great fix. When faced with the threat of a \$60,000 penalty, the squatter keeps out because the expected value of their attempt is negative. However, we cannot forget that the typical squatter is largely judgment-proof. After all, if they lack the resources to pay rent, they likely lack the resources to pay a \$60,000 penalty. For example, suppose the squatter only has \$2,000 in wealth. Under these conditions, the squatter's expected value for their adverse possession attempt is \$49,800 because they can only pay \$2,000 of the \$60,000 penalty. Thus, when we account for the squatter's limited assets, increasing the penalty has little impact on the squatter's expected value.

In response to this critique, some economists might advocate for the imposition of non-monetary sanctions, such as imprisonment. Can't pay a \$60,000 fee? That's fine—you just have to go to prison. This argument should give legal scholars pause.¹³⁰ First, imposing prison for the poor and fines for the wealthy could lead to a legitimacy crisis because the American legal system strives to treat individuals equally.¹³¹

Second, we must seriously question whether the threat of imprisonment serves the needs of those who we are trying to help. This Article argues that the answer to that question is an emphatic no. First, imprisonment has the potential to perpetuate cycles of poverty.¹³²

128. See Fennell, *supra* note 23, at 1082.

129. $E_s = (100\% \times -\$60,000) + (0\% \times \$800,000) + (-\$787 \times 12 \times 5) + (\$1,650 \times 12 \times 5) = -\$8,200$.

130. See Fennell, *supra* note 23, at 1082–83 (“It is neither workable nor desirable to adjust [criminal penalties] too far upward.”).

131. *Equal Justice for the Poor, Too; Far Too Often, Money—or the Lack of It—Can Be the Deciding Factor in the Courtroom, Says Justice Goldberg, Who Calls for a Program to Insure Justice for All Americans.*, N.Y. TIMES (Mar. 15, 1964), <https://www.nytimes.com/1964/03/15/archives/equal-justice-for-the-poor-too-far-too-often-moneyor-the-lack-of.html> [https://perma.cc/5B98-W28H].

132. Jaboa Lake, *Criminal Records Create Cycles of Multigenerational Poverty*, CTR. FOR AM. PROGRESS (Apr. 15, 2020), <https://www.americanprogress.org/article/criminal-records-create-cycles->

Second, anecdotal evidence indicates that many squatters have children.¹³³ Imprisonment would shatter families and force children into the foster care system. This shock would not only generate tremendous emotional costs for families but also additional administrative costs for the state. Finally, imprisonment is expensive. In California, for example, imprisonment for six months can cost upwards of \$50,000.¹³⁴ This remarkably high figure begs a simple question: why not use that money to help the person obtain housing? For the cost of imprisoning one person for six months, we could rent them an apartment for two and a half years.¹³⁵

In short, adverse possession's modern niche lies in its ability to incentivize efficient land transfers in the absence of a market transaction. However, as shown above, adverse possession does not incentivize efficient land transfers when the adverse possessor is a squatter because the squatter obtains significant utility from having a roof over their head as they conduct their attempt. Indeed, we could counteract this positive utility by inflating the penalties for trespass. However, this solution is neither workable nor desirable—squatters are largely judgment-proof and imprisonment would likely harm those we seek to help.

IV. ADVERSE POSSESSION IS NOT A SCALABLE SOLUTION.

Theoretical concerns aside, adverse possession is not a viable solution to the housing distribution problem because this application of the doctrine (i.e., squatting) is not scalable. The overwhelming majority of people experiencing homelessness lack the means to pursue an adverse possession attempt. Additionally, many Americans live in jurisdictions where adverse possession law is incompatible with notions of squatters' rights. Thus, even if this application of adverse

multigenerational-poverty/#:~:text=If%20a%20person%20with%20a,for%20essential%20resources%20or%20caretaking [https://perma.cc/5KPP-TRGS].

133. See e.g., Brownstone, *supra* note 8; Bryan Schatz, *California's Housing Crisis Is So Bad, Families Are Squatting Abandoned Homes Just to Survive*, MOTHER JONES (Mar./Apr. 2018), <https://www.motherjones.com/crime-justice/2018/04/retake-the-house/> [https://perma.cc/NE8F-6P9N].

134. *How Much Does It Cost to Incarcerate an Inmate?*, LEGIS. ANALYST'S OFF., https://lao.ca.gov/policyareas/cj/6_cj_inmatecost#:~:text=It%20costs%20an%20average%20of,%2457%2C000%20or%20about%20117%20percent [https://perma.cc/D88L-9EE3].

135. Assuming \$1650 for apartment rental.

possession was theoretically justified, it would not be a scalable solution that could solve our nation's housing crisis.

A. *Practical Limits on Scalability*

To succeed on an adverse possession claim, a squatter must maintain possession as a true owner would.¹³⁶ They need to spend money on improvements, repairs, and, in some jurisdictions, taxes.¹³⁷ These expenses add up fast. For example, during her short adverse possession attempt, Angela Simmons repaired a roof, updated a kitchen, painted a wall, installed an alarm, and hired a landscaper.¹³⁸ In all, Simmons sunk \$5,000 into a property over several weeks.¹³⁹

While many people who experience homelessness have jobs, few have thousands of spare dollars to invest in a piece of property.¹⁴⁰ In 2021, the National Bureau of Economic Research ("NBER") published a report on the economic well-being of people experiencing homelessness.¹⁴¹ Unsurprisingly, these income estimates revealed "a highly impoverished population."¹⁴² Of the unsheltered adults experiencing homelessness, 65% earn nothing.¹⁴³ Of the sheltered adults experiencing homelessness, 54% earn nothing.¹⁴⁴ The numbers are still dire among the housed and impoverished population. There, 39% of single-adult households earn nothing.¹⁴⁵

136. *Wilson v. Gladish*, 140 Idaho 861, 868 (Ct. App. 2004); *MacDonald v. McGillvary*, 35 Mass. App. Ct. 902 (1993).

137. *See, e.g.*, CAL. CIV. PROC. CODE § 325 (West, Westlaw through ch. 211 of 2023 Reg. Sess.); MINN. STAT. ANN. § 541.02 (West, Westlaw through 2023 Reg. Sess.).

138. *Brownstone*, *supra* note 8.

139. *Id.*

140. A 2021 study from the University of Chicago estimates that 53% of people living in homelessness shelters and 40% of unsheltered homeless people were employed. Julie Pagaduan, *Employed and Experiencing Homelessness: What the Numbers Show*, NAT'L ALL. TO END HOMELESSNESS (Sep. 10, 2023), <https://endhomelessness.org/blog/employed-and-experiencing-homelessness-what-the-numbers-show/> [<https://perma.cc/GB64-72AD>].

141. MEYER ET AL., *supra* note 32.

142. *Id.* at 9.

143. *Id.* at 67.

144. *Id.* at 65.

145. *Id.* at 67.

2015 Earnings Data for by Housing Status ¹⁴⁶			
	Single-Adult Households in Poverty ¹⁴⁷	Sheltered Adults Experiencing Homelessness ¹⁴⁸	Unsheltered Adults Experiencing Homelessness ¹⁴⁹
50 th Percentile Earnings	\$4,518	\$0	\$0
75 th Percentile Earnings	\$19,983	\$11,348	\$4,682
Share With Any Earnings	0.612	0.464	0.354

Consider the following hypothetical. Suppose that Jane, an unsheltered person experiencing homelessness, seeks to obtain title to an \$800,000 vacant home in Oakland, California, through a five-year adverse possession attempt.¹⁵⁰ To establish the requisite adverse possession elements, Jane must invest around \$787 per month into the property.¹⁵¹ Now, for the sake of argument, assume that Jane can allocate 100% of her earnings toward her adverse possession attempt.¹⁵² Even with this generous assumption, it is very unlikely that Jane has the means to pursue her adverse possession attempt.

146. This article uses earnings as a measure of funds available to be used on adverse possession claim rather than income because NBER's measure income includes restricted benefits (e.g., food stamps). NBER defines earnings as the sum of wage and salary income and positive estimated self-employment income on a 1040, plus deferred compensation from any linked W2s minus a PIKed cofiler's W2 wages and tips. *Id.* at 46. When an individual did not file a 1040, NBER defined earnings as W2 wages and tips plus deferred compensation. *Id.* For individuals who did not file a 1040 or receive a W2, earnings are zero. *Id.*

147. *Id.* at 69.

148. *Id.* at 65.

149. *Id.* at 67.

150. Statutory period for adverse possession is five years in California when the adverse possessor pays taxes. California Code, Code of Civil Procedure §325.

151. *Supra* note 125.

152. This assumption is not as bold as it sounds. For example, the bulk of Jane's remaining expenses could be covered by food stamps and other safety net programs.

According to the NBER research, it is more likely than not that Jane has zero earnings to invest.¹⁵³

Poverty is not the only factor that limits the scalability of adverse possession as a solution. While precise percentages are hard to pinpoint, a large proportion of people experiencing homelessness struggle with substance abuse and mental health disorders.¹⁵⁴ Research suggests that these challenges can prevent individuals from maintaining stable housing.¹⁵⁵ This instability is incompatible with the doctrine of adverse possession—which requires dedicated focus and investment over a long period of time. Nazyir YismaEl told his adverse possession clients that “the process wouldn’t be easy” and that they would need to be prepared to “fight.”¹⁵⁶ Likewise, during his adverse possession attempt, Steven DeCaprio became an expert in property law and prepared for the California Bar Exam under the apprenticeship of another attorney.¹⁵⁷ Put simply, an adverse possession attempt of a vacant home is anything but simple. It requires money, knowledge, and years of consistent determination. It is not reasonable to expect those struggling with substance abuse and mental health disorders to have the capacity to pursue an adverse possession attempt.

153. MEYER ET AL., *supra* note 32, at 65.

154. See, e.g., Douglas Polcin, *Co-occurring Substance Abuse and Mental Health Problems Among Homeless Persons: Suggestions for Research and Practice*, 25 J. OF SOC. DISTRESS AND THE HOMELESS 1, 2 (2016) (“Although studies vary, research consistently shows over a third of individuals who are homeless experience alcohol and drug problems and up to two-thirds have a lifetime history of an alcohol or drug disorder.”); Julie Streeter, *Homelessness in California: Causes and Policy Considerations*, STAN. INST. FOR ECON. POL’Y RSCH. (May 2022), <https://siepr.stanford.edu/publications/policy-brief/homelessness-california-causes-and-policy-considerations> [<https://perma.cc/8PGY-K6CC>].

155. Cilia Mejia-Lancheros et al., *Longitudinal Interrelationships of Mental Health Discrimination and Stigma with Housing and Well-Being Outcomes in Adults with Mental Illness and Recent Experience of Homelessness*, 268 SOC. SCI. & MED., 2021, at 1, 1. (“Persistent mental health-related discrimination and stigma trajectories are...interrelated with housing and well-being outcomes in persons experiencing mental illness and recent homelessness”).

156. Brownstone, *supra* note 8.

157. DeCaprio, *supra* note 15 (“I learned that there couldn’t be a conviction of trespassing without a property owner requesting enforcement beforehand or occupying the property at the time of the entry. I learned that the law states that anyone occupying a property is presumed to be the owner until proven otherwise. I learned that there are a number of ways for a squatter to establish in the public record they are occupying land for the purpose of making a claim of adverse possession later. I learned that a burglary prosecution against a squatter isn’t valid and that “breaking and entering” is not a crime outside of burglary.”).

B. *Legal Limits on Scalability*

The law also limits the scalability of adverse possession as a solution to the housing distribution problem. Many Americans live in jurisdictions where adverse possession law is incompatible with notions of squatters' rights. First, some jurisdictions impose good-faith requirements that preclude intentional adverse possessors from obtaining title¹⁵⁸ Second, adverse possession law in objective jurisdictions can still be incompatible with notions of squatters' rights because judges in objective jurisdictions may refuse to grant title to squatters.¹⁵⁹

1. Squatters Cannot Succeed in Good-Faith Jurisdictions

To begin, some jurisdictions impose good-faith requirements that preclude intentional adverse possessors from obtaining title.¹⁶⁰ In these jurisdictions, a squatter's adverse possession claim will fail because they know that the home is not theirs. Some good-faith requirements are the product of judicial interpretation. For example, in *Halpern v. Lacy Investment Corp.*, the Georgia Supreme Court held that

The correct rule is that one must enter upon the land claiming *in good faith* the right to do so. To enter upon the land without any honest claim of right to do so is but a trespass and can never ripen into prescriptive title . . . such person is called a squatter.¹⁶¹

Most good-faith requirements, however, appear in the texts of the statutes of limitations. For example, in Oregon, a person may only acquire title through adverse possession if they had an objective and

158. See, e.g., N.Y. REAL PROP. ACTS. LAW § 501 (McKinney, Westlaw through L. 2023, chs. 1 to 354) (adverse possessor must demonstrate that they had a reasonable basis for the belief that they owned the property); ALASKA STAT. ANN. § 09.45.052 (West, Westlaw through ch. 26 of the 1st Reg. Sess. of the 33d Leg.) (requiring a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant); OR. REV. STAT. ANN. § 105.620 (West, Westlaw through the 2023 Reg. Sess. of the 82d Legis. Assemb.) (the person entering into possession must have the honest belief that the person was the actual owner of the property).

159. DUKEMINIER ET AL., *supra* note 29, at 86.

160. See, e.g., N.Y. REAL PROP. ACTS. LAW § 501; ALASKA STAT. ANN. § 09.45.052; OR. REV. STAT. ANN. § 105.620.

161. 259 Ga. 264, 265 (1989) (emphasis added).

reasonable belief that the property was theirs at the time of entry.¹⁶² In New York, an adverse possessor must show that they had a “reasonable basis for the belief” that the property was theirs.¹⁶³ In Colorado, an adverse possessor must show that they “had a good faith belief that [they] were the actual owner of the property.”¹⁶⁴ The Alaska statute of limitations arguably imposes the most stringent good-faith requirement. There, an adverse possessor must show that they had “a good faith but mistaken belief that the . . . property lies within the boundaries of *adjacent* . . . property” that they own.¹⁶⁵ Of course, legislators in good-faith jurisdictions are free to eliminate good-faith requirements. However, this reform is unlikely because legislators typically impose good-faith requirements in direct response to public outcry over squatters.¹⁶⁶

2. Squatters Can Lose in Objective Jurisdictions

Indeed, the majority of states do not inquire into the adverse possessor’s actual state of mind.¹⁶⁷ However, adverse possession law can still be incompatible with notions of squatters’ rights in these jurisdictions because judges may still refuse to grant title to squatters based on their bad faith.¹⁶⁸ Professor Richard Helmholz conducted a survey of “the bulk of cases dealing with adverse possession” between 1966 and 1983.¹⁶⁹ According to Helmholz, the majority of jurisdictions purported to apply an objective test.¹⁷⁰ However, the surveyed cases clearly showed that the knowing trespasser “[stood] lower in the eyes of the law and [was] less likely to acquire title by adverse possession.”¹⁷¹

Steven DeCaprio experienced this dynamic during his Californian adverse possession attempts. In an interview, DeCaprio stated:

I have established all the elements of adverse possession, and I am currently petitioning the court to

162. OR. REV. STAT. ANN. § 105.620.

163. N.Y. REAL PROP. ACTS. LAW § 501.

164. COLO. REV. STAT. ANN. § 38-41-101 (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).

165. ALASKA STAT. ANN. § 09.45.052.

166. See discussion *infra* Part V(b).

167. DUKEMINIER ET AL., *supra* note 29.

168. Helmholz, *supra* note 30.

169. *Id.* at 333.

170. *Id.* at 331–32.

171. *Id.* at 332.

grant me full ownership rights of the property. I know that I have all the evidence I need to support my case, but I am still nervous because I know that there is no law requiring the judges to follow the law.¹⁷²

Yes, DeCaprio's comments are inflammatory. Judges do have to follow the law. However, DeCaprio's lived experience confirms Helmholtz's findings—the good-faith requirement continues to play a role in objective jurisdictions.

In some cases, courts in objective jurisdictions use the equitable doctrine of unclean hands to prevent a knowing trespasser from obtaining title through adverse possession. In *Aguayo v. Amaro*, Sofia and Jesus Aguayo attempted to obtain title by adverse possession of a single-family home in Los Angeles, California.¹⁷³ At the time, the Aguayos purported to be in the business of adverse possession. However, the California Court of Appeals held that the doctrine of unclean hands barred the Aguayos from obtaining title.¹⁷⁴ According to the judge, Sofia Aguayo engaged in a “deceitful act” that precluded any equitable relief when she filed a wild deed with the intention of diverting tax bills away from the property's true owner.¹⁷⁵

Indeed, the California Court of Appeals noted that the clean hands doctrine does not bar recovery by a plaintiff who is a trespasser.¹⁷⁶ If that were the case, the doctrine of adverse possession would cease to exist. However, the court did draw a line between trespassing and “deceitful” conduct when it comes to adverse possession. Activists risk crossing that line as they attempt to scale the use of adverse possession. For example, Steven DeCaprio formed a collection of limited liability corporations to act as titleholders to shield squatters until their paperwork cleared.¹⁷⁷ Thus, while the doctrine of unclean hands doesn't prevent all squatting attempts, it may prevent the

172. DeCaprio, *supra* note 15.

173. *Aguayo v. Amaro*, 213 Cal. App. 4th 1102, 1105 (2013).

174. *Id.* at 1113.

175. *Id.* at 1114.

176. *Id.* at 59 (“It is correct that the wrongful act of trespass cannot be the basis for an unclean hands defense to adverse possession by claim of right. This is because if such a defense existed, adverse possession by claim of right would not be possible.”).

177. Christine Hernandez, *RETAKE THE HOUSE: Squatters Are Pioneering a Bold—and Possibly Legal—Way to Combat the Housing Crisis*, MOTHER JONES (Mar. 1, 2018), [https://www.thefreelibrary.com/RETAKE+THE+HOUSE%3A+Squatters+are+pioneering+a+bold—and+possibly. . .-a0531466940 \[https://perma.cc/DSE2-C6CL\]](https://www.thefreelibrary.com/RETAKE+THE+HOUSE%3A+Squatters+are+pioneering+a+bold—and+possibly. . .-a0531466940 [https://perma.cc/DSE2-C6CL]).

application of the doctrine at scale. This principle applies whether we are in an objective jurisdiction or not.

In summary, adverse possession law is often incompatible with notions of squatters' rights. First, a squatter's adverse possession attempt is destined to fail if they reside in a jurisdiction that imposes a good-faith requirement. Next, while objective jurisdictions do not conduct explicit inquiries into the adverse possessor's state of mind, the knowing trespasser may fare worse in courts—particularly if they employ sophisticated tactics to avoid detection. These legal limits are amplified by the reality that the overwhelming majority of people experiencing homelessness lack the means to pursue an adverse possession attempt.

V. ACTIVISTS CAUSE HARM WHEN THEY TOUT ADVERSE POSSESSION AS A SOLUTION TO THE HOUSING CRISIS.

This Article has shown that adverse possession cannot be touted as a legitimate means to redistribute vacant homes. Indeed, this novel approach fails to withstand basic scrutiny. First, this application does not serve the doctrine's modern niche because it does not incentivize efficient land transfers. Theoretical concerns aside, adverse possession is—at best—a niche solution. From this pragmatic perspective, it is easy to write off the work of activists like Steven DeCaprio and Nazir Yishmael. After all, who cares if a few unhoused persons try and fail to obtain homes through adverse possession? No harm, no foul.

This Article challenges this intuition. Activists cause real harm when they tout adverse possession as a solution to the housing crisis. First, their rhetoric opens the door for opportunistic individuals to capitalize on unrealistic dreams of home ownership among vulnerable populations. Second, from a broader perspective, one squatter's adverse possession attempt can trigger the imposition of good-faith requirements that are detrimental to social welfare.

A. *Potential Harm to Vulnerable Populations*

Opportunistic individuals may view adverse possession as a means to profit from unrealistic dreams of home ownership. Consider the adverse possession story of Seattle resident Angela Simmons. While Simmons worked a decent job in city government, her prospect of homeownership looked far away.¹⁷⁸ Therefore, in 2013, Simmons

178. Brownstone, *supra* note 8.

exchanged emails with Naziyr Yishmael, a community leader who taught a program on financial self-empowerment.¹⁷⁹ Yishmael sent Simmons information on adverse possession and a spreadsheet of vacant homes in the area.¹⁸⁰ Lured by her dream of homeownership, Simmons took the gamble and began her adverse possession attempt.¹⁸¹

Under the guidance of Yishmael, Simmons moved into a foreclosed suburban four-bedroom home.¹⁸² The home was in “dire need of repair.”¹⁸³ Therefore, Simmons got to work like a true owner. She repaired a roof, updated a kitchen, painted an accent wall, installed an alarm, and hired a landscaper. Simmons sunk \$5,000 into a property over several weeks. Her investment of \$5,000 was in addition to the \$2,500 that she had paid Yishmael for his adverse possession services.

However, Simmons’s dream of homeownership was short-lived. Shortly after she moved in, a neighbor called the police.¹⁸⁴ In turn, the police entered Simmons’s home with their guns drawn.¹⁸⁵ Luckily for Simmons, the police chalked her adverse possession attempt up to a civil matter and left.¹⁸⁶ However, the encounter put the property owner on notice, and shortly thereafter, the home was put up for auction.¹⁸⁷ In all, Simmons lost \$7,500 and had to scramble to find alternative housing.¹⁸⁸ Meanwhile, Yishmael made a profit off of Simmons’s misfortune.

Simmons was not alone. Yishmael’s advice led others to pursue adverse possession attempts and suffer similar consequences.¹⁸⁹ According to court records, “Yishmael charged \$7,000-\$8,000 for his advice and assistance in adversely possessing homes. His clients also spent thousands of dollars repairing and improving the properties. Some lost almost everything they owned.”¹⁹⁰ Before advocating for adverse possession as a solution to the housing crisis, legal scholars must consider the fact that most squatters lack the resources to develop

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *State v. Yishmael*, 456 P.3d 1172, 1175 (Wash. 2020).

190. *Id.*

a personal understanding of the doctrine. This lack of information opens the door for opportunistic individuals to use adverse possession to capitalize on others' unrealistic dreams of home ownership.

That said, states have the power to prevent opportunistic individuals from profiting on others' adverse possession attempts. In 2016, Washington State charged Naziyr Yishmael with "one count of unlawful practice law and several counts of theft, attempted theft, conspiracy to commit theft, and offering false instruments for filing or record."¹⁹¹ The jury acquitted Yishmael of the theft and theft-related charges.¹⁹² However, the jury found Yishmael guilty on the unlawful practice of law charge.¹⁹³ Yishmael appealed his conviction on both constitutional and procedural grounds. However, in 2020, the Supreme Court of Washington declined to reverse.

B. *Potential Harm to Broader Social Welfare*

History shows that squatters can trigger public outcry, corporate lobbying, and the imposition of good-faith requirements. While good-faith requirements sound nice, they can harm social welfare because they do not incentivize efficient adverse possession attempts and generate excessive administrative costs.

Consider the following example. Before 2003, Alaskan adverse possession law applied the objective standard—courts did not conduct an inquiry into the adverse possessor's state of mind.¹⁹⁴ This approach to adverse possession frustrated Alaskan landowners, and Sealaska, a for-profit corporation, led the charge on reform. Sealaska's executives were frustrated that they were spending time and money to protect their vast landholdings from the threat of squatters. Russell Dick, the Natural Resource Manager for Sealaska, complained that the company "had to go through a lengthy legal proceeding to get a trespasser evicted from [the corporation's property] before the adverse possession claim kicked in."¹⁹⁵ At Sealaska's request, Alaska Senator

191. *Id.*

192. *Id.*

193. *Id.*

194. Jennie Morawetz, *No Room for Squatters: Alaska's Adverse Possession Law*, 28 ALASKA L. REV. 341, 354 (2011) (citing *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990)).

195. *Senate Labor and Commerce Standing Committee*, ALASKA STATE LEGISLATURE (Mar. 11, 2003), <https://www.akleg.gov/basis/Meeting/Detail?Meeting=SL%26C%202003-03-11%2013:32:00>.

Thomas Wagoner introduced a bill that precluded “bad faith” trespassers from obtaining title via adverse possession.¹⁹⁶ Senator Wagoner campaigned on Sealaska’s behalf. In a statement to the press, he stated that Alaska’s adverse possession law “endorsed legal thievery.”¹⁹⁷ Legislators agreed with Wagoner, and on July 17, 2003, the governor signed his bill into law.¹⁹⁸

This story is not unique. The New York state legislature also imposed a good-faith requirement in response to judicial recognition of squatters’ rights.¹⁹⁹ In 2006, the New York Court of Appeals confirmed that the state’s adverse possession law permitted bad faith claims of ownership.²⁰⁰ This holding made headlines. In a *New York Times* article, a Manhattan real estate attorney complained that “there was little in the law as it stands now to stop the unscrupulous from claiming title to property, they know full well is not theirs.”²⁰¹ Two years later, in response to mounting public pressure, the New York state legislature revised its adverse possession statute and imposed a good-faith requirement.²⁰²

Legislators in states like Alaska and New York may have had good intentions. That said, their good-faith reforms are arguably perverse. Recall that the modern justification for adverse possession is that the doctrine can incentivize efficient land transfers in the absence of a market transaction.²⁰³ However, the doctrine can only promote efficiency when the adverse possessor weighs their valuation of the property against the probability of getting caught—which is a proxy for the record owner’s valuation of the property.²⁰⁴ Thus, adverse possession only incentivizes efficient land transfers when the claimant has knowledge of their actions.²⁰⁵ After all, an adverse possession claimant who accidentally encroaches on another’s property cannot

196. Morawetz, *supra* note 192, at 359.

197. *Id.*

198. *Id.*

199. Cherek, *supra* note 43, at 313–17.

200. Walling v. Przybylo, 7 N.Y.3d 228, 230 (2006) (“Because actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor, we affirm the order of the Appellate Division awarding summary judgment to plaintiffs.”); Bailey & Eichel, *supra* note 77, at 10.

201. Jay Romano, *Adverse Possession, Mind Your Property*, N.Y. TIMES (Nov. 11, 2007), <https://www.nytimes.com/2007/11/11/realestate/1/home.html> [<https://perma.cc/WB74-UES5>].

202. S.B. 7915, 231st Leg., Reg. Sess. (N.Y. 2008).

203. Fennell, *supra* note 24, at 1059.

204. *Id.* at 1075.

205. *Id.* at 1069.

weigh the consequences of their actions. Thus, the reformation of adverse possession to preclude knowing attempts would eliminate the type of attempts that have the potential to serve the doctrine's modern purpose.

Meanwhile, from a pragmatic perspective, the imposition of a good-faith standard would generate additional administrative costs relative to the objective standard because the good-faith standard requires a subjective inquiry into the adverse possessor's state of mind.²⁰⁶ After surveying many adverse possession cases, Professor Richard Helmholz found that

In a great deal of adverse possession cases, there is simply no evidence of the possessor's intent, nothing to show one way or another whether he honestly thought the property belonged to him. The possessor may be dead at the time of litigation. Even if he is alive, no one can read his secret thoughts.²⁰⁷

Given these observations, Helmholz concluded that imposing a subjective good-faith standard would inevitably "call for more speculative explorations of probable states of mind than is currently possible."²⁰⁸ Put simply, there is no free lunch. Legislators can impose a good-faith requirement—but it would come at the cost of additional judicial resources.

Furthermore, this sweeping reform does not make sense given the actual use of adverse possession today. The vast majority of adverse possession cases involve boundaries disputes, not squatters.²⁰⁹ Framed this way, the imposition of good-faith standards to prohibit squatting appears to be a gross overreaction. It is neither efficient nor wise to overhaul a legal doctrine to account for the fear generated by a small minority of cases.

In short, it only takes one squatter to trigger the imposition of a good-faith requirement. This reform is not harmless. It generates excessive administrative costs and precludes the type of adverse

206. Christopher H. Meredith, *Imputed Abandonment: A Fresh Perspective on Adverse Possession and a Defense of the Objective Standard*, 29 MISS. COLL. L. REV. 257, 277 (2010).

207. Helmholz, *supra* note 31, at 357.

208. *Id.*

209. Shoked, *supra* note 22, at 2644.

possession attempts that have the potential to serve the doctrine's modern niche.

VI. WHAT SHOULD BE DONE INSTEAD?

Activists cause harm when they tout adverse possession as a solution to the housing crisis. Their rhetoric opens the door for opportunistic individuals to profit from others' unrealistic dreams of homeownership. Additionally, one squatter's adverse possession attempt can trigger the imposition of good-faith requirements that are detrimental to social welfare.

Given this reality, legal scholars must redirect housing activists to solutions and reforms that have the potential to help rather than hurt. For example, some cities are using the power of eminent domain to seize vacant homes for public use.²¹⁰ Once the homes are seized, cities can either retain ownership and manage the land through a land bank or turn the property over to a nonprofit organization.²¹¹ Both options allow the city to preserve the affordability of the property.²¹² In particular, Massachusetts has shown how eminent domain power can be used to redistribute property. Under Massachusetts state law, the government may delegate its eminent domain power to urban redevelopment organizations such as the Dudley Street Neighborhood Initiative ("DSNI").²¹³ DNSI developed a long-term plan for a Boston neighborhood—focusing on the development of an "urban village" with a park, retail shops, community centers, and affordable housing.²¹⁴ The city donated the land that was needed.²¹⁵ However,

210. Gilgoff, *supra* note 40.

211. *Id.* Land banks are "nonprofit corporations designed to convert tax-delinquent and vacant properties into affordable housing." See OFF. OF THE N.Y.C. COMPTROLLER, BUILDING AN AFFORDABLE FUTURE: THE PROMISE OF A NEW YORK CITY LAND BANK 4 (2016), https://comptroller.nyc.gov/wp-content/uploads/documents/The_Case_for_A_New_York_City_Land_Bank.pdf [<https://perma.cc/6LFW-HAL5>] (Land banks are . . . nonprofit corporations designed to convert tax-delinquent and vacant properties into affordable housing.").

212. Gilgoff, *supra* note 40; OFF. OF THE N.Y.C. COMPTROLLER, BUILDING AN AFFORDABLE FUTURE: THE PROMISE OF A NEW YORK CITY LAND BANK 4 (2016), https://comptroller.nyc.gov/wp-content/uploads/documents/The_Case_for_A_New_York_City_Land_Bank.pdf [<https://perma.cc/6LFW-HAL5>].

213. MASS. GEN. LAWS ANN. ch. 121A, § 11 (West, Westlaw through ch. 25 of the 2023 1st Ann. Sess.).

214. Gilgoff, *supra* note 40, at 616.

215. *Id.*

the city land was interspersed with private property.²¹⁶ Thus, DNSI used its eminent domain power to seize this property, complete the urban village, and build permanently affordable housing.²¹⁷

Eminent domain is just one of many viable alternatives to adverse possession. For example, research shows that eliminating single-family zoning could facilitate the development of sufficient levels of affordable housing.²¹⁸ The strengths and weaknesses of these alternatives remain up for debate and fall outside the scope of this Article. However, one thing is clear: the answer to America's housing crisis does not lie in the doctrine of adverse possession. Thus, housing activists must redirect their efforts to other effective strategies. At the same time, prosecutors cannot turn a blind eye when adverse possession is touted as a tool to realize the prospect of homeownership. Instead, they must follow the lead of states like Washington and crack down on those seeking to use adverse possession to capitalize on the dreams of vulnerable populations.

216. *Id.*

217. *Id.*

218. Shuetz, *supra* note 41.