

# Articles

## EFFICIENT TRESPASS: THE CASE FOR “BAD FAITH” ADVERSE POSSESSION

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### INTRODUCTION

The “bad faith” adverse possession claimant—the trespasser who knows that the land she occupies is not her own<sup>1</sup>—is an anomalous figure in

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<sup>1</sup> See R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65, 69–70 (1986) (defining “bad faith” in the adverse possession context as “continuing trespass the claimant knows to be without right” and explaining that it has “no necessary connection to hardness of heart or design to appropriate wrongfully, although of course it may involve both”). I will argue that

the law. While not disqualified from gaining title to land in many jurisdictions, the bad faith claimant tends to fare poorly in court<sup>2</sup> and suffers regular drubbings in law review articles.<sup>3</sup> Meanwhile, judicial and scholarly approval is lavished on her “good faith” counterpart, the encroacher who labors under the misimpression that he occupies his own land.<sup>4</sup> In this Article, I challenge this consensus view. Instead of triggering moral condemnation and legal disadvantage, a claimant’s knowledge of the encroachment should be a prerequisite for obtaining title under a properly formulated doctrine of adverse possession. Many courts and commentators have supported an objective standard under which both knowing and inadvertent encroachers can fulfill the “hostility” requirement in adverse possession law.<sup>5</sup> But I go further to argue that *only* the claimant who knew that she was encroaching—and who documented that awareness<sup>6</sup>—should be able to take title to land through adverse possession.

This surprising position follows logically from a wide-lensed look at the appropriate place of adverse possession in the overall framework of modern property law. When considered as part of a system that contains other, superior mechanisms for addressing problems such as innocent improvements and old title defects,<sup>7</sup> adverse possession can best be understood as a doctrine of efficient trespass.<sup>8</sup> It should work in concert with legal

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“bad faith” and “good faith” are inapt labels for the behaviors they have been used to describe in the adverse possession context. See *infra* Part I.C.2. I substitute the more neutral terms “knowing” and “inadvertent” in the text.

<sup>2</sup> See R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 331–32 (1983) (explaining that even though many jurisdictions have adopted a test that purports to ignore the possessor’s subjective intent, the pattern of decided cases reveals that courts privilege good faith claimants over bad faith claimants).

<sup>3</sup> See *infra* notes 49–55 and accompanying text.

<sup>4</sup> See Helmholz, *supra* note 1, at 69 (defining “good faith” to “mean[] that the claimant believed the land belonged to him”).

<sup>5</sup> See *infra* Part I.A (discussing objective and subjective standards of hostility). The hostility requirement, sometimes stated as a requirement that the possession be “adverse,” “under claim of right,” or “under claim of title,” is one of five basic requirements of adverse possession. The other required elements are actual entry (sometimes stated as “actual possession”), continuity, openness and notoriety, and exclusivity. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 139 & nn.12–13 (5th ed. 2002); Helmholz, *supra* note 2, at 334. Some jurisdictions also require that the adverse possessor pay taxes on the land. See DUKEMINIER & KRIER, *supra*, at 139 n.14.

<sup>6</sup> See *infra* Part II.D (describing the documentation requirement and explaining the purposes it serves).

<sup>7</sup> See, e.g., Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419 (2001) (discussing other doctrines that can serve many of the purposes commonly attributed to adverse possession).

<sup>8</sup> Surely someone has used this term before, although I have not located a source doing so. The idea that adverse possession serves efficiency purposes by shifting land from unproductive to productive uses has been discussed in the literature, although this rationale is often downplayed or disavowed in favor of other purposes, such as quieting title. See, e.g., John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 821, 874–75 (1994) (observing that “[l]and utilization is a muted subordinate theme in a doctrine dominated by concern for title possession,” but noting that some

remedies that apply *before* the statute of limitations runs to test the relative valuations of record owners and encroachers and to winnow out those situations in which consensual market transactions cannot accomplish transfers of land to much higher-valuing users.

The approach I take is not entirely unprecedented. Adverse possession's hostility requirement has sometimes been interpreted to disqualify people with an honest but mistaken belief in ownership of the land in question.<sup>9</sup> Yet modern cases and commentary overwhelmingly eschew any requirement that a person realize that the land she occupies does not belong to her.<sup>10</sup> Courts often distance themselves from any doctrinal requirement

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scholars have focused on the possibility that adverse possession might usefully move land to a higher-valuing user); *infra* Part II.A.3 (discussing the idea of punishing "sleeping" owners or rewarding "working" possessors).

<sup>9</sup> See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 142–44; Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746–47 & n.20 (1986); Stake, *supra* note 7, at 2429–30. The so-called Maine rule is sometimes understood as privileging bad faith. This rule, articulated in *Preble v. Maine Cent. R. Co.*, 27 A. 149 (Me. 1893), held that possession was not "adverse" when a possessor had made an honest mistake about his property boundary and had never intended to claim anything that was not his own. *Id.* at 150–52. The *Preble* court's formulation did not disqualify all mistake-makers—only those who coupled the mistake with an intent not to claim any land they did not own. *Id.* at 150 (indicating that possession would be sufficiently adverse if a possessor making a boundary mistake intended to claim the mistaken land absolutely, regardless of whether he owned it); see *infra* note 10 (discussing the current status of this rule and variations on it). The Maine rule's focus on intent illustrates one of several distinctions that the good faith/bad faith dichotomy obscures. See *infra* Part I.B (working through an expanded taxonomy of mental states). The difficulty of making the hypothetical inquiry necessary to apply the Maine rule in cases of "pure mistake" has been noted. See text accompanying *infra* note 69.

<sup>10</sup> In boundary dispute cases, only a shrinking minority of jurisdictions continues to adhere to some version of the Maine rule, which would disqualify those who made good faith mistakes and lacked the subjective intent to claim anything that they did not own. See Helmholz, *supra* note 1, at 83 ("[I]n boundary dispute cases, American courts have in recent years almost uniformly moved away from the 'Maine rule,' which seems to reward knowing trespass."); *supra* note 9. Maine itself has disavowed the rule by statute. ME. REV. STAT. ANN. tit. 14, § 810-A (2003) ("If a person takes possession of land by mistake as to the location of the true boundary line and possession of the land in dispute is open and notorious, under claim of right, and continuous for the statutory period, the hostile nature of the claim is established and no further evidence of the knowledge or intention of the person in possession is required."). Traces of the approach can be found in other jurisdictions, although often accompanied by significant ambiguity. See, e.g., Kara L. Spencer, *Court Clarifies Applicability of Mistaken Belief Rule to Adverse Possession Suits*, 47 S.C. L. REV. 146 (1995) (discussing *Perry v. Heirs of Gadsden*, 449 S.E.2d 250 (S.C. 1994) (per curiam), in which the South Carolina Supreme Court held that mistake and lack of intent will not defeat an adverse possession claim where a full tract of land is involved, although lack of intent will still defeat a claim based on mistaken boundaries); William Hayden Spitler, *Over a Century of Doubt and Confusion: Adverse Possession in Arkansas, Intent to Hold Adversely and Recognition of Superior Title in Fulkerson v. Van Buren*, 53 ARK. L. REV. 459 (2000) (noting uncertainty about Arkansas's position on this issue). Compare *Ellis v. Jansing*, 620 S.W.2d 569 (Tex. 1981) (rejecting adverse possession claim where possessor was mistaken about the extent of his land and did not intend to claim anything he did not own), with *Masonic Bldg. Ass'n v. McWhorter*, 177 S.W.3d 465, 473 n.4 (Tex. App. 2005) (suggesting *Ellis* was limited to its unique facts and that mistake and lack of intent will not always defeat a claim). To the limited extent that the approach persists, it is better understood as an intent requirement than a knowledge requirement as such. See *infra* text accompanying Table 2 (distinguishing intent from knowledge).

that would reward “thieves” over those who acted in good faith.<sup>11</sup> Likewise, modern scholars register amazement that courts would ever *require* bad faith,<sup>12</sup> and overwhelmingly argue that good faith claimants should be favored by the law.<sup>13</sup> At one level, then, the argument presented here offers a belated justification for a now-discredited judicial position.<sup>14</sup> But, more than that, the Article suggests a different way of thinking about adverse possession’s place in the constellation of property doctrines.

Specifically, I explore how state of mind requirements relate to what I view as the niche goal of adverse possession—moving land into the hands of parties who value it much more highly than do the record owners,<sup>15</sup> where markets cannot do so. My analysis distinguishes that goal, which the doctrine is uniquely suited to accomplish, from other socially laudable goals that adverse possession is no longer well suited to advance. In other words, I suggest a division of labor among property doctrines that is based on an assessment of the comparative advantages of each in a modern system of property law. Adverse possession, I contend, should be redesigned and narrowed to effect shifts of land to higher-valuing users only when two conditions are met to a high degree of probability: (1) the difference between the

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<sup>11</sup> See, e.g., *Mannillo v. Gorski*, 255 A.2d 258, 261–62 (N.J. 1969) (discussing criticisms of the Maine doctrine “in requiring a knowing wrongful taking”); *Walls v. Grohman*, 337 S.E.2d 556, 562 (N.C. 1985) (“We have concluded that a rule which requires the adverse possessor to be a thief in order for his possession of the property to be ‘adverse’ is not reasonable.”).

<sup>12</sup> Thomas Merrill reports that “remarkably enough” courts have sometimes tended “toward a subjective standard of *bad faith*” rather than an objective standard or a subjective good faith standard. Thomas W. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. U. L. REV. 1122, 1144 (1985). Similarly, Jeffrey Stake exclaims, “In rare instances, courts have indicated that [an adverse possessor] can gain title only if she knew she did not have an honest legal claim to the land, that is to say, only if she was acting in bad faith!” Stake, *supra* note 7, at 2430. Stake goes on to explain that other courts have more “sensibly” required good faith of an adverse possessor. *Id.* Likewise, in considering a standard that would require the trespass to be intentional rather than inadvertent, Charles Callahan remarks facetiously, “If you want to get along in this world, you have to be a crook.” CHARLES C. CALLAHAN, *ADVERSE POSSESSION* 70 (1961).

<sup>13</sup> See *infra* notes 49–58 and accompanying text. Well-known proposals offered by scholars such as Richard Epstein and Thomas Merrill follow the pattern of privileging good faith claimants over bad faith claimants. See, e.g., Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667 (1986) (proposing a two-tiered adverse possession system with a longer statute of limitations for bad faith claimants); Merrill, *supra* note 12 (advocating a liability rule regime that would require bad faith adverse possessors to pay fair market value for the land, while good faith claimants would receive title free of charge).

<sup>14</sup> Indeed, this Article began as an effort to explain to myself and to my students why a “bad faith” requirement might not be patently absurd.

<sup>15</sup> I will use the terms “record owner” and “true owner” interchangeably to refer to the person who holds legal title to the land at the time of the adverse possession claimant’s entry, setting aside the possibility of factual complications involving recordation.

parties' valuations of the land is very large;<sup>16</sup> and (2) a market transaction is not available.<sup>17</sup>

To accomplish this redesign, I propose adding two requirements to adverse possession doctrine. First, the encroacher must be aware of the trespass. Second, she must document her knowledge of the encroachment at the time of entry—typically through a purchase offer.<sup>18</sup> The knowledge requirement ensures that the encroacher is in a position to weigh the costs and benefits of encroaching, and allows society to fine-tune sanctions in the period before the statute runs to achieve whatever level of property protection is desired. The documentation requirement serves important evidentiary purposes while simultaneously facilitating the use of consensual market processes to effect value-enhancing shifts.<sup>19</sup> Together, the requirements constitute a “documented knowledge” standard that would retrofit adverse possession law for its narrow modern purpose.

To unpack the efficiency case for such an approach, it is necessary to consider how knowing and inadvertent encroachers, respectively, are treated before the statute of limitations runs.<sup>20</sup> Under modern law, the un-

<sup>16</sup> This Article's focus on “very large” differences in valuation between the possessor and the record owner modifies the usual efficiency concern with moving land to (any) higher-valuing user. While I do not attempt to define how great the required disparity must be, this formulation places some additional weight on the side of the record owner in recognition of the societal purposes served by secure property ownership and the difficulty of assessing relative valuations outside of markets.

<sup>17</sup> Adverse possession has been associated with the need to transfer land under these two conditions; however, previous treatments assume that the good faith case presents the paradigmatic scenario in which these criteria will be satisfied. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 83 (6th ed. 2003) (citing Merrill, *supra* note 12). In fact, existing equitable principles already deal successfully with the good faith case, and adding the possibility of title through adverse possession only serves to distort incentives. *See infra* Part II.C.

<sup>18</sup> *See infra* Part II.D (discussing the documentation requirement and the various ways it might be met). “Paperless” documentation might be permitted in the case of a landless encroacher, where the encroacher's lack of any property holdings at all would serve to establish beyond dispute her knowledge of the trespass. *See infra* text accompanying note 169 (discussing this point).

<sup>19</sup> The primary documentation requirements I discuss would also provide heightened notice to the record owner, above and beyond the open and notorious possession of the land required under adverse possession doctrine. *See infra* Part II.D. Throughout this Article, I emphasize “documentation” of the possessor's mental state (in a form that the possessor cannot later disavow) rather than “notice” to the record owner, although the enhanced notice also helps to ensure that adverse possession is confined to the narrow role I define here. The idea of enhanced notice to record owners has received some recent attention. *See* Land Registration Act, 2002, c. 9, § 97 (U.K.) (requiring notice to record owners through a registration system for adverse possessors); *see also* Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act: A Proposal for Reform of the United States Real Property Law*, 12 *BUFF. ENVTL. L.J.* 1 (2004) (discussing the United Kingdom's 2002 Land Registration Act and proposing a uniform state law that would similarly provide notice to record owners of an adverse possessor's claim).

<sup>20</sup> Other scholars writing on adverse possession have noted the importance of considering the law both before and after the statute of limitations has run, but have curiously ignored the differential treatment that good faith and bad faith encroachers receive before the statute runs. *See, e.g.*, Merrill, *supra* note 12, at 1125–27 (asserting that “[t]he assignment of entitlements in the period before the statute of limitations runs need not detain us for long,” and omitting any discussion of the systematic differences

knowing encroacher caught before the statute of limitations runs typically receives lenient treatment,<sup>21</sup> while the knowing intruder is treated harshly.<sup>22</sup>

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in how entitlement to the land is protected in the good and bad faith cases, respectively); Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. & ECON. 161, 165 (1995) (suggesting that the mistaken improver is heavily penalized for mistakes caught during the statutory period, based on the assumption that the record owner "has property rule protection for the statutory period, and hence has the right to eject [the possessor] during that time"). In fact, the true owner's claim during the period before the statute of limitations runs is often protected only by a liability rule against innocent encroachers, but is protected by a property rule against knowing trespassers. See *infra* notes 21–22; *infra* Part II.C.2. The dichotomy between property rule and liability rule protection was pioneered in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>21</sup> Although the specifics vary from jurisdiction to jurisdiction, and exceptions can be found, most modern American courts will deny injunctive relief in good faith encroachment situations where the injunction would impose a disproportionately heavy burden on the encroacher. Similarly, relief is typically available to a party who, acting in good faith, builds valuable improvements on the land of another. See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 152–53 (discussing "the modern tendency . . . to ease the plight of innocent improvers"); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* I-45 to -48, I-67 to -68 (forthcoming 2006) (Fall 2005 draft on file with author) (discussing the rejection of the automatic injunction rule in many jurisdictions and a willingness to balance equities in the "good faith" case, as well as "betterment" statutes that provide relief to good-faith improvers); Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37 (1985) (presenting an extensive analysis of the relief available to mistaken improvers acting in good faith); see also *Pull v. Barnes*, 350 P.2d 828 (Colo. 1960) (granting party who innocently built a cabin on the land of another the right to remove the cabin, if feasible, or to place a lien on the land equal to the value of the cabin); *Golden Press v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) ("Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages."); *Mannillo v. Gorsky*, 255 A.2d 258, 264 (N.J. 1969) (observing that in appropriate cases involving an innocent encroacher who could not remove an improvement without great expense "the true owner may be forced to convey the land so occupied upon payment of the fair value thereof"); *Goldbacher v. Eggers*, 76 N.Y.S. 881, 884, 886 (App. Div. 1902) (explaining that in cases where "the defendant has not willfully or intentionally trespassed, and submits to the equitable jurisdiction of the court a mandatory injunction will not be granted, where its enforcement would work great hardship upon the defendant, with little or no corresponding benefit to the plaintiff, and where the injury to the plaintiff may be fully satisfied by the award of damages"). But see, e.g., *Brink v. Summers*, 227 N.E.2d 476, 476 (Mass. 1967) (holding that plaintiff was entitled to a mandatory injunction where defendant's dwelling encroached by seventeen and a half feet "without regard to the amount of her damage, the cost of removal, or the defendant's good faith"); *Santilli v. Morelli*, 230 A.2d 860, 863 (R.I. 1967) (following the "general rule" that injunctive relief is not barred by the defendant's good faith, the lack of harm to the plaintiff, or the cost of removal, but noting that exceptions may be made to the rule in appropriate circumstances).

<sup>22</sup> See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 153 (explaining that in the case of intentional encroachments, "most courts require removal of the offending structure, no matter how costly that might be"); MERRILL & SMITH, *supra* note 21, at I-47 (emphasizing that the "balancing of the equities approach to building encroachments" applies only in the "good faith" case, and in "bad faith" situations, courts "universally" apply "the strict rule of automatic injunctive relief"); David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 27 (1990) (explaining that punitive damages are available against an intentional trespasser, but only "ordinary damages" are available where a defendant who was taking due care inadvertently built on another's land); see also *Jacque v. Steenberg Homes*, 563 N.W.2d 154 (Wis. 1997)

The law's harsh treatment of knowing trespassers before the statutory period has run amounts to a built-in test of the relative subjective values that the trespasser and the record owner place on the land.<sup>23</sup> In contrast, no such valuation test is involved when a trespasser mistakenly believes that the land is her own. A trespasser who knows she can successfully feign ignorance, or one who chooses to remain ignorant about boundary lines, also faces no meaningful test of valuation, given the law's favorable treatment of those found to be innocently encroaching.<sup>24</sup>

Likewise, a documented knowledge requirement facilitates rather than punishes efforts at consensual dealmaking. One of the most definitive ways of establishing that a possessor knew she was not the owner of the disputed land is to produce evidence of her purchase offer to the record owner.<sup>25</sup> Currently, such an offer often destroys one's chance at adverse possession because it shows one is acting in bad faith if one later trespasses<sup>26</sup>; one does far better to remain in ignorance (or pretend to) and never broach the matter with the record owner. Under my proposal, such offers would go from being fatal in a later adverse possession action to being practically a prerequisite.<sup>27</sup> As a result, it would be much more likely that any resulting adverse possession claim will occur only where a market transaction is unavailable.<sup>28</sup> A documented knowledge requirement would also reduce litigation costs and increase the certainty of land holdings. Actions or records establishing that the trespass was known at the time of entry, necessary if the

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(upholding \$100,000 punitive damages award for an intentional trespass that did not do any damage to the property).

<sup>23</sup> This argument assumes that it is possible to tell the knowing from the unknowing trespasser. Making such distinctions is usually considered very difficult. *See, e.g.,* Miceli & Sirmans, *supra* note 20, at 163. However, these difficulties are largely a function of the present legal regime which unambiguously benefits those who can pretend ignorance. My proposal would require some act contemporaneous with the trespass, such as an offer to the record owner, that would establish that the entry was a knowing trespass.

<sup>24</sup> Even though "willful ignorance" or an unreasonable lack of knowledge would also seem to constitute bad faith, it will be difficult to prove in many circumstances.

<sup>25</sup> *See* Helmholz, *supra* note 2, at 345–46 (explaining that offers to purchase the disputed land "furnish the most manifest evidence that the possessor knew of a conflicting right").

<sup>26</sup> *See id.* ("In virtually every instance where such evidence [of an offer to purchase] has been introduced, it has been held fatal to adverse possession.").

<sup>27</sup> There would be other possible ways of establishing that one was a knowing trespasser, but making an offer to the record owner would be among the simplest. *See infra* Part II.D (discussing mechanics of establishing knowledge of trespass). A purchase offer has the advantage of enabling the would-be possessor to gather information about the record owner's interest in the property before running the risks associated with knowing encroachment. I thank Henry Smith for prompting me to consider this timing issue.

<sup>28</sup> Merrill has suggested that adverse possession, by providing a true owner with an incentive to exercise the right to exclude, works to "flush out" offers to purchase his property." Merrill, *supra* note 12, at 1130. My argument takes that point two steps further. First, I propose a legal regime that encourages rather than discourages outright purchase offers, which should facilitate more efficient land markets. Second, I argue that in some circumstances where market transactions are not successfully "flushed out," differences in valuation can be inferred from the behavior of the parties.

possessor ever wishes to gain title under my approach, would serve to streamline trespass actions that occur before the statute has run. Moreover, an approach that refuses to reward innocent mistakes would be expected to reduce mistake-making.<sup>29</sup>

Puzzlingly, these efficiency arguments have received little attention.<sup>30</sup> This neglect can perhaps be explained by the consensus view that there is a deep, trumping moral objection to any approach that would privilege “bad faith” claimants over “good faith” claimants.<sup>31</sup> By looking at property law as a whole, however, I show that the preferential treatment of knowing trespassers within the confines of adverse possession doctrine need not undermine the law’s moral stance against trespass. I also emphasize the connection—oddly neglected in this context—between the protocol that the law establishes for obtaining and transferring property and what it means to say that someone is a thief. It is inconsistent to view someone as a thief or a bad faith actor for doing nothing more than knowingly employing the law’s own process for acquiring land.

Nonetheless, it is an open normative question whether a legal process for transferring land to knowing trespassers should be available, and reasonable minds can differ on this point. Significantly, my efficiency analysis contains both an argument *against* permitting inadvertent possessors to gain title through adverse possession and an argument *for* allowing knowing trespassers to do so. Because it is possible to accept the former proposition even if one rejects the latter, my analysis holds value even for those who think that knowing trespassers should never be able to receive title through adverse possession. If privileging knowing trespassers is normatively unacceptable, then the appropriate response is to scuttle the adverse posses-

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<sup>29</sup> See Radin, *supra* note 9, at 747 n.22 (describing a utilitarian argument for “mak[ing] people pay the price of failing to check official boundaries, because then they will more often check them before acting and conform their activities to them”); cf. Jeong-Yoo Kim, *Good-Faith Error and Intentional Trespassing in Adverse Possession*, 24 INT’L REV. L. & ECON. 1, 10 (2004) (suggesting that under some conditions it can be efficient to allow the bad faith claimant to take title along with the good faith claimant in order to avoid creating a disincentive to learn about true boundaries).

<sup>30</sup> The puzzle is deepened by the prominence of a roughly parallel doctrine of efficient breach in contract theory. See *infra* note 164 and accompanying text (discussing analogies between efficient breach and “efficient theft”); *infra* note 166 (offering possible explanations for the lack of attention given to the idea of efficient trespass). Even explicitly economic analyses have gone no further than to suggest that an objective standard might be preferable to a standard that denies title to intentional encroachers. See, e.g., Kim, *supra* note 29.

<sup>31</sup> See *infra* text accompanying notes 49–58 (presenting the consensus view disfavoring the bad faith claimant). Hornbook law often makes state of mind irrelevant; hence, it seems to allow the bad faith claimant to take title along with the good faith claimant. Thus, it might seem that the moral objection to a knowledge requirement has more to do with the relative treatment of good and bad faith claimants than with any absolute moral objection to allowing bad faith claimants to succeed. The picture is complicated, however, by empirical evidence suggesting that bad faith claimants tend not to prevail in court, even in jurisdictions where mental state is supposed to be irrelevant. See Helmholz, *supra* note 2, at 342–46.

sion doctrine altogether.<sup>32</sup> The doctrine should not be maintained simply to reward those who misconstrue the extent of their holdings, when other doctrines exist that are better suited for providing appropriate relief to mistake-makers.<sup>33</sup>

The Article proceeds in three parts. Part I explores the role of mental states in adverse possession law, and considers the moral meaning of privileging knowing trespassers through an adverse possession doctrine. Part II contains the efficiency analysis that makes out an affirmative case for a knowing trespass requirement. In working through the analysis, I will use as a frame of reference the prototypical boundary encroachment scenario—a common fact pattern in adverse possession law, and one that is likely to implicate questions about state of mind.<sup>34</sup> Part III addresses a variety of practical concerns, anticipates some primary objections, and considers how differing fact patterns might alter the analysis.<sup>35</sup> Part III also discusses the degree to which the ideas developed here for use in the real estate arena might or might not be transferable to other property contexts, including those involving intellectual property.

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<sup>32</sup> While I am unaware of any modern scholarly treatment advocating a knowing trespass standard, work questioning the continuing wisdom of the adverse possession doctrine has appeared in the literature. See, e.g., William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 79 (1996) (urging “legislative abolition of prescription and adverse possession”); Stake, *supra* note 7, at 2420 (concluding that “the case in favor of adverse possession is not overwhelming”).

<sup>33</sup> Whether discarding adverse possession altogether would produce efficiency gains over the status quo depends in part on the precise interplay between the objective hostility standard nominally in force in many jurisdictions and de facto judicial preferences for good faith claimants. See *infra* notes 42–43 and accompanying text. Efficiency gains would be achieved by eliminating recovery for good faith claimants, but blocking the recovery of knowing claimants (to the extent they are able to recover under the status quo) could entail efficiency losses. See generally *infra* Part II. However, if one reaches the conclusion that knowing adverse possessors must be disqualified on moral grounds, see Part I.C, then it is clear that the more efficient path for carrying out that disqualification is to eliminate the adverse possession doctrine rather than maintain it solely for the benefit of good faith claimants.

<sup>34</sup> See CALLAHAN, *supra* note 12, at 70–71 (observing that “the question of hostility and claim of right—and the whole question of whether we are going to inquire into the intent of the adverse possessor—has been fought out principally in the cases of mistaken boundary lines”); POSNER, *supra* note 17, at 78 (noting that “most adverse possessions are mistakes caused by uncertainty over boundary lines”); Helmholz, *supra* note 2, at 333 (observing, after examining roughly 850 appellate cases from 1966 through 1983, that “[m]any of them involve relatively insignificant pieces of land, backyard boundary disputes being depressingly common”).

<sup>35</sup> See *infra* Part III.A. The importance of recognizing analytic differences in different types of adverse possession cases was cogently suggested by Radin, *supra* note 9, at 746 (suggesting that three “paradigm cases” should be differentiated: “color of title,” “boundaries,” and “squatters”).

## I. MENTAL STATES AND MORALITY

The bad faith adverse possessor is almost universally regarded as a scoundrel.<sup>36</sup> Judicial and scholarly disapprobation goes far beyond the sensible observation that a trespasser who knows she is trespassing is more culpable than one who encroaches accidentally. Rather, the knowing trespasser is condemned as a thief based on the capacity of the adverse possession doctrine to eventually turn her trespass into ownership. This characterization fundamentally misunderstands the relationship between law and property rights. In this Part, I clear the way for the efficiency analysis that follows by discussing the legal and moral status of bad faith adverse possession.

To lay the groundwork, section A provides an overview of mental state requirements in adverse possession law. Section B presents an expanded taxonomy for mental states that separates out the elements of belief, knowledge, and intent. Section C squarely confronts the questions of legality and morality in adverse possession, drawing on the interface between morality and the law's articulation of acquisition protocols; it makes the case for abandoning the labels of "good faith" and "bad faith" in favor of descriptors that focus on whether a trespass is knowing or inadvertent.

A. *Mental States in Adverse Possession Law*

Mental states can enter adverse possession doctrine through the requirement that the possession be "adverse and under claim of right" (sometimes styled as "hostile" or "under claim of title").<sup>37</sup> Three standards for "hostility" are usually suggested.<sup>38</sup> First, ignorance of one's encroachment might be required, disqualifying knowing encroachers.<sup>39</sup> Second, knowledge of one's encroachment or an intent to take what one did not own might be required, disqualifying some or all of those making innocent mistakes.<sup>40</sup> A third alternative, an objective standard, does not attempt to look into the mind of the possessor, but instead assesses hostility based solely on the pos-

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<sup>36</sup> *But see* Eduardo Peñalver & Sonia Katyal, *Property Outlaws* (Fordham Law Legal Studies, Research Paper No. 90, 2006), available at <http://ssrn.com/abstract=745324> (suggesting that intentional lawbreakers, including adverse possessors, have played a role in the evolution of property).

<sup>37</sup> *See, e.g.*, Radin, *supra* note 9, at 746 n.20.

<sup>38</sup> *See id.* at 746–47, discussed in DUKEMINIER & KRIER, *supra* note 5, at 142–44. As the discussion below explains, these three possibilities can be broken up into a larger number of distinct mental states. *See infra* Part I.B.

<sup>39</sup> *See* Radin, *supra* note 9, at 746 (articulating a standard in which "the required state of mind is, 'I thought I owned it'").

<sup>40</sup> *See id.* at 746–47 (articulating an "aggressive trespass standard" in which "the required state of mind is, 'I thought I did *not* own it [and intended to take it]'" (alteration in original)). While the last remnants of the "aggressive trespass" standard are rapidly fading, it is typically the lack of an intent to claim what one did not own that would defeat adverse possession under such a standard, not the lack of knowledge as such. *See supra* notes 9–10 (discussing the Maine rule); *infra* text accompanying Table 2 (distinguishing knowledge from intent).

essor's actions.<sup>41</sup> Under the objective approach, both knowing and mistaken encroachers would be able to obtain title through adverse possession.

The objective standard is usually identified as the majority rule in the United States,<sup>42</sup> but Richard Helmholz's 1983 study showed that good faith adverse possessors tended to fare better than bad faith claimants.<sup>43</sup> Thus, even where good faith is not explicitly required, it may carry considerable weight in influencing judicial assessments. Moreover, Helmholz argues convincingly that courts' adoption of the objective standard was primarily motivated by the desire to avoid disadvantaging the good faith claimant.<sup>44</sup> The standard arguments for an objective standard—that it is easier for courts to administer because it requires no inquiry into state of mind,<sup>45</sup> and that it is doctrinally cleaner in its interaction with the running of the statute of limitations<sup>46</sup>—likewise suggest that any benefits accruing to bad faith claimants are merely incidental, not a motivating force.<sup>47</sup> Overwhelmingly, modern courts shun any *requirement* of bad faith.<sup>48</sup>

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<sup>41</sup> See Radin, *supra* note 9, at 746 (articulating standard in which “state of mind is irrelevant”).

<sup>42</sup> See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 142 (citing 3 AMERICAN LAW OF PROPERTY § 15.4 (A. James Casner ed., 1952)).

<sup>43</sup> Helmholz, *supra* note 2, at 332 (stating that even though claimants are not generally required to “plead and prove” that they acted in good faith, “the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already”). Helmholz's findings were attacked in Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986) [hereinafter Cunningham, *Reply*]. Helmholz defended his work in a response, see Helmholz, *supra* note 1, and Cunningham offered a surrebuttal in Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167 (1986) [hereinafter Cunningham, *Rejoinder*]. While Helmholz's work is now over twenty years old now and should be updated before drawing any definitive conclusions about the modern state of adverse possession law, it provides important insights into the role of state of mind in adverse possession law and suggests that judicial practice can reintroduce subjective inquiries that have been formally blocked by doctrine.

<sup>44</sup> Helmholz, *supra* note 2, at 339–41.

<sup>45</sup> See, e.g., *id.* at 339.

<sup>46</sup> See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 142 (observing that any entry against the true owner triggers a cause of action, and asking why, “[g]iven that, shouldn't the statute of limitations be running, *whatever* the entrant's state of mind” (citations omitted)); William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L.Q. REV. 532, 538 (1939) (arguing 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”).

<sup>47</sup> See, e.g., Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 136 (1918) (“[I]f the exercise of apparent ownership is made conclusive evidence of title, the wholesale method necessarily establishes and quiets the bad along with the good. The trespasser benefits, the true owner suffers, for the repose of meritorious titles generally.”); Epstein, *supra* note 13, at 678 (explaining that when viewed in light of the purposes of statutes of limitations, “protection of the guilty is not an end in itself, but the inevitable and necessary price paid in discharging the primary function of protecting those with property title”).

<sup>48</sup> See *supra* notes 9–10 and accompanying text.

Academia has firmly aligned itself with the angels on this issue as well. Property scholar after property scholar has spoken out against bad faith claimants or has argued that they should be disfavored by the law. These attacks on bad faith are sometimes explicitly moral in tone; at other times they are based on consequentialist arguments. Richard Epstein describes bad faith possessors as “both bad people in the individual cases and a menace in the future.”<sup>49</sup> Thomas Merrill invokes “our shared sense of the greater moral culpability of the bad faith possessor”<sup>50</sup> and describes the hornbook’s objective rule as “pay[ing] homage to vice.”<sup>51</sup> Richard Helmholz observes that “[t]here *is* something wrong in claiming land when one has known all along that it belonged to someone else. It is impossible not to feel differently about such bad faith possessors than one does about claimants who have made an honest mistake and relied upon it.”<sup>52</sup> Margaret Jane Radin has argued that “personhood” considerations are more strongly implicated in the good faith case than in the bad faith case.<sup>53</sup> Richard Posner has similarly asserted that Oliver Wendell Holmes’s famous justification for adverse possession—that people become attached to what they have long held<sup>54</sup>—makes sense only in the good faith case.<sup>55</sup>

This preference for good faith claimants is also reflected in proposals to reform adverse possession law. Thomas Merrill has suggested that bad faith adverse possessors—but not good faith claimants—be made to pay for what they have taken.<sup>56</sup> Richard Epstein has advocated a two-tiered statute of limitations that would require longer periods of adverse possession for bad faith claimants.<sup>57</sup> Robert Ellickson has presented a careful defense, on utilitarian grounds, of Epstein’s two-tiered recommendation.<sup>58</sup> While a re-

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<sup>49</sup> Epstein, *supra* note 13, at 686; *see also id.* at 685–89. Epstein argues that “the intuitive distinction between good and bad faith possessors is backed by powerful utilitarian overtones.” *Id.* at 686.

<sup>50</sup> Merrill, *supra* note 12, at 1126.

<sup>51</sup> *Id.* at 1137.

<sup>52</sup> Helmholz, *supra* note 1, at 75. Helmholz emphasizes, however, that he should not be read as making a normative argument in favor of a good faith standard in all circumstances. *Id.* at 74–75.

<sup>53</sup> Radin, *supra* note 9, at 749. Radin does question Epstein’s assertion that utilitarianism supports a distinction between good and bad faith possessors, however. *Id.* at 747 n.21.

<sup>54</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476–77 (1897) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”).

<sup>55</sup> POSNER, *supra* note 17, at 78 n.3 (contending that Holmes’s argument “implies, does it not, that the adverse possessor believes himself to be the real owner”); *see* Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 734 (1986) (suggesting that “[e]jection demoralizes good faith [adverse possessors] more than bad faith [adverse possessors], who rely less on their continuity of possession”).

<sup>56</sup> Merrill, *supra* note 12, at 1126.

<sup>57</sup> Epstein, *supra* note 13, at 685–89; *see also* Miceli & Sirmans, *supra* note 20, at 167 (suggesting that “the optimal time limit should increase” where a court can determine that an encroachment was intentional).

<sup>58</sup> Ellickson, *supra* note 55, at 733–34.

cent economic treatment has suggested that good faith claimants should not be favored over knowing trespassers<sup>59</sup> and legal scholars have often concluded that an objective hostility standard is preferable to a good faith standard,<sup>60</sup> I have not seen a modern scholarly defense of the idea that bad faith claimants should have a *stronger* claim to adverse possession than good faith claimants. To suggest, as I do, that only the knowing trespasser should be able to prevail in adverse possession represents a significant departure from modern scholarly approaches to the topic.

### B. Expanding the Taxonomy

To show why a documented knowledge requirement should not be ruled out on moral grounds, one must consider some taxonomic complexities that are suppressed by a simple good faith/bad faith dichotomy.<sup>61</sup> First, it is helpful to distinguish between subjective beliefs about ownership and “knowledge” about ownership. As shown in Table 1, what the claimant “knew” depends on the interplay between objective reality and subjective beliefs.

Table 1: *Belief, Fact, and Knowledge*

<b>Objective Fact</b> <b>Subjective Belief</b>	Possessor Actually Owns the Land	Possessor Does Not Actually Own the Land
Possessor Believes She Owns the Land	I. Secure Owner	II. Inadvertent Encroacher [“Good Faith”]
Possessor Believes She Does Not Own the Land	III. Insecure Owner	IV. Knowing Trespasser [“Bad Faith”]
Possessor Is Unsure Whether She Owns the Land	V. Doubting Owner	VI. Doubting Possessor

<sup>59</sup> Kim, *supra* note 29, at 2.

<sup>60</sup> See *supra* notes 42–47 and accompanying text (discussing the hornbook objective rule and reasons offered for it); see also Michael J. Goodman, *Adverse Possession of Land—Morality and Motive*, 33 MOD. L. REV. 281, 288 (1970) (concluding that adverse possession is not immoral and that hostility should not be based on subjective factors).

<sup>61</sup> This point has not escaped notice. See, e.g., Cunningham, *Rejoinder*, *supra* note 43, at 1174 & n.46; Stake, *supra* note 7, at 2427–28 & n.50.

The rows in Table 1 reflect three possible belief states: the possessor of the disputed land might hold a belief in ownership, a belief in nonownership, or uncertainty about ownership. As the columns in Table 1 indicate, the possessor's belief state may or may not line up with the objective facts about the land's ownership. The possessor's knowledge, usually the touchstone for her good or bad faith, depends on the interaction between fact and belief.

Cells II and IV contain the knowledge states that have been associated with good and bad faith, respectively. However, the line between these two knowledge states is less clear than the dichotomous labels might suggest. First, unless the possessor makes an overt move (such as a purchase offer) that signals her knowledge that she does not own the land, it may be difficult to later establish whether her entry was knowing or inadvertent. Second, the fact that possessors can choose whether or not to acquire information makes knowledge an unstable fulcrum on which to make good or bad faith turn.<sup>62</sup> A false belief in ownership may be based on the most extensive efforts available, minimally reasonable efforts, slipshod efforts, no efforts at all, or willful ignorance stubbornly maintained against all signs to the contrary.<sup>63</sup> The label of "good faith" fits less and less well as efforts to inform oneself about one's holdings diminish; clearly, the willfully ignorant or delusional possessor cannot be viewed as acting in "good faith." These two points interact. Even if an ideal line between good and bad faith could be drawn as a conceptual matter based on what the claimant reasonably should have known, proof problems complicate the test's application.<sup>64</sup>

Several other combinations of fact and belief appear in Table 1. Cell I represents the uninteresting case of secure ownership. Much more interesting is the insecure owner represented in Cell III. This individual believes she is encroaching, but it turns out she is wrong—she is actually on her own land. Later I will present an argument that suggests the sort of trespass that ultimately ripens into adverse possession might actually be characterized in

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<sup>62</sup> See Kim, *supra* note 29, at 2–3 (focusing on the possibility "that the possessor's actual belief can be endogenous, rather than exogenous" and arguing that a good faith requirement creates perverse incentives to remain ignorant of true boundary lines); cf. Assaf Hamdani, *The Market for Ignorance* 12–26 (2005) (unpublished manuscript, on file with author) (engaging in similar analysis in assessing the choice between mens rea requirements and strict liability in criminal law).

<sup>63</sup> Cf. Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 15 (1996) (explaining that "[i]t is a major over-simplification to assume that all harms are caused by one of two types of human conduct: accidental or deliberate" and noting that "[t]ort and criminal law scholars delight in noting the many gradations of mental states falling uneasily in between").

<sup>64</sup> To be clear, my case for a documented knowledge requirement does not turn on difficulties distinguishing good faith from bad faith, although these difficulties do add support to my proposal. See *infra* Part II.C.4 (explaining why even a perfectly formulated good faith requirement should be rejected).

this manner, given the doctrine of relation back.<sup>65</sup> For now, Cell III can be treated conventionally as involving an entirely unfounded disbelief in one's ownership. Cell V presents a weaker version of Cell III—the possessor is uncertain about her ownership, but her doubts are not well founded. Cell VI features a possessor who correctly doubts her ownership.<sup>66</sup>

The three possibilities in which the possessor does not actually own the land in question can be further subdivided by bringing in the dimension of intent. A possessor on someone else's land might or might not intend to claim that land as her own. Intent and knowledge are distinct criteria,<sup>67</sup> they can be combined to yield a variety of mental states, as shown in Table 2.

Table 2: Adding Intent to Knowledge

<b>Intent</b> <b>Knowledge</b> <b>(from Table 1)</b>	Possessor Intends to Claim It Even If It Is Not Hers	Possessor Does Not Intend to Claim Anything That Is Not Hers
Inadvertent Encroacher (Table 1, Cell II)	Aggressive Innocent (Hypothetical Intent)	Deferential Innocent (Hypothetical Intent)
Knowing Trespasser (Table 1, Cell IV)	Aggressive Trespasser	Deferential Trespasser
Doubting Possessor (Table 1, Cell VI)	Passive-Aggressive Trespasser	Deferential Doubter

Courts have sometimes required that an adverse possessor intend to claim the land as her own, although the interaction of this requirement with different knowledge states can produce confusion.<sup>68</sup> Notably, applying the intent element to the inadvertent encroacher requires a fairly elaborate exer-

<sup>65</sup> Through the doctrine of relation back, a successful adverse possessor is granted title as of the date of first entry. See, e.g., *DUKEMINIER & KRIER*, *supra* note 5, at 128–29; see also *infra* Part I.C (discussing the implications of this doctrine).

<sup>66</sup> See, e.g., Lon L. Fuller, *Adverse Possession—Occupancy of Another's Land Under Mistake as to Location of a Boundary*, 7 *OR. L. REV.* 329, 331 (1928) (distinguishing between cases of “conscious doubt” and those of “pure mistake”).

<sup>67</sup> See Stake, *supra* note 7, at 2427–28 & n.50 (noting that “much confusion arises from the courts’ frequent failure to distinguish between two different, and mostly independent, aspects of mental state: intent and awareness” and explaining that a possessor could have “either, neither, or both”).

<sup>68</sup> See, e.g., William Sternberg, *The Element of Hostility in Adverse Possession*, 6 *TEMP. L.Q.* 207, 216–20 (1932) (discussing some of the complexities associated with intent requirements in different jurisdictions).

cise of imagination.<sup>69</sup> Here, the question is whether a party who experienced no subjective doubt about her ownership, but who later turned out to be mistaken, would have intended to take all that she occupied regardless of whether she owned it.<sup>70</sup> Unsurprisingly, some courts that have retained an intent requirement have dropped it in the context of “pure mistake.”<sup>71</sup>

The intent element has more traction in the case of the doubting possessor.<sup>72</sup> Here, we might well ask what the doubter intended to do, if her doubts turned out to be well founded. Did she intend to defer in that case to the record owner, or did she mean to claim the land as her own regardless of how her doubts were resolved? If the former, the doubting possessor somewhat mously conditions her claim of possession on a continued state of doubt as to the true ownership facts, or a resolution of those facts in her favor. If the latter, the doubting possessor represents a passive-aggressive trespasser who does not want to take the affirmative step of becoming a knowing trespasser, but who has no plans to yield to anyone else.

Finally, while it is common to think of the knowing trespasser as a brazen character with expansionistic designs on the land, the claims of some knowing trespassers have failed for lack of intent.<sup>73</sup> In fact, it is not difficult to imagine a trespasser who is trespassing for short-term instrumental ends, and not for the purpose of trying to gain the land through adverse possession.

Given the potential relevance of intent, basing the good faith/bad faith dichotomy solely on knowledge yields results that are difficult to square with moral intuitions. Is the passive-aggressive trespasser who chooses not to resolve her doubts really morally superior to the aggressive trespasser? Should the aggressive innocent be preferred over the deferential but aware trespasser? Yet even if we simplify matters and typecast all innocents as deferential to the true owner’s claims and all knowing trespassers as aggressors who mean to unseat the true owner, it is not clear that a morally relevant distinction exists. To see why, it is important to recognize that acquisitive intentions toward land can only be fulfilled with the law’s consent.

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<sup>69</sup> See Fuller, *supra* note 66, at 333–34.

<sup>70</sup> See *id.*

<sup>71</sup> See, e.g., Walls v. Grohman, 337 S.E.2d 556, 560 (N.C. 1985) (quoting with approval a legal encyclopedia passage, 3 AM. JUR. 2D *Adverse Possession* § 41 (1962) (distinguishing situations of “pure mistake,” in which intent is deemed irrelevant, from cases of “conscious doubt,” in which intent to claim is essential)).

<sup>72</sup> See, e.g., *id.*; Fulkerson v. Van Buren, 961 S.W.2d 780 (Ark. Ct. App. 1998) (applying an intent requirement to defeat the claim of a church which was initially unclear on the state of title).

<sup>73</sup> For example, squatters are sometimes said to lack the requisite intent. However, the disqualification of squatters can also be interpreted as a manifestation of courts’ general disfavor of knowing trespassers. See Helmholz, *supra* note 1, at 89.

### C. What's So Bad About "Bad Faith"?

*Black's Law Dictionary* describes "bad faith" as "generally implying actual or constructive fraud, or a design to mislead or deceive another"—"a state of mind affirmatively operating with furtive design or ill will." Knowing trespass need not involve any of these things.<sup>74</sup> Indeed, if trespass is furtive, it will not ripen into adverse possession at all,<sup>75</sup> if accompanied by fraud, the fraud is punishable on its own. Nonetheless, courts and commentators often regard the bad faith claimant as a thief. In this section, I will challenge that characterization. Further, I will suggest that a government policy that transfers title to the knowing possessor need not be inconsistent with a strong moral stance against property violations.

1. *Law and Theft.*—Given the sophisticated state of property theory, it is surprising that those writing about adverse possession reflexively revert to categorical notions about what it means for something to "belong to" someone, and what is and is not "stealing."<sup>76</sup> Questions of law and morality are conflated in the word "thief," and it is useful to disaggregate them. To begin, consider the relationship between the protocols that law establishes for acquiring property and the legal status of acts directed at obtaining property. Acts that violate the state's established "transaction structure" are categorized as crimes.<sup>77</sup> Conversely, following a procedure that has been designated by the law as a legitimate acquisition protocol is, legally speaking, not stealing.<sup>78</sup> Hence, acquiring title through adverse possession, no less than paying for a product at the cash register, falls outside of the legal category of theft.

To be sure, the state-approved transfer protocol for adverse possession involves an act—trespass—that falls outside the realm of approved transactions. However, this wrinkle does not present a legal problem. Through the

<sup>74</sup> See *id.* at 69–70.

<sup>75</sup> Furtive possession will not qualify as open and notorious. See, e.g., *Houston v. U.S. Gypsum Co.*, 652 F.2d 467, 474 (5th Cir. 1981) ("Of course, a furtive, hidden, or concealed use of the property at odd times is not the kind of exercise of dominion or control that characterizes the use and possession of a reasonable owner in the enjoyment of his property."); *Boyle v. Ball Props.*, No. C.A. 85C-AU-111, 1989 WL 16986, at \*4 (Del. Super. Ct. Feb. 21, 1989) ("'Open and notorious' means that the possession must not be furtive or secret." (citation omitted)).

<sup>76</sup> See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (discussing the disconnect between ordinary or lay understandings of property and the understandings of a "Scientific Policymaker"); JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 6–13 (2000) (contrasting the widely accepted "ownership model" with the "bundle of rights" alternative advanced by the legal realists).

<sup>77</sup> Alvin K. Klevorick, *On the Economic Theory of Crime*, in *NOMOS XXVII: CRIMINAL JUSTICE* 289, 301–03 (J. Roland Pennock & John W. Chapman eds., 1985).

<sup>78</sup> In other words, if "stealing" is defined as "wrongful appropriation," the law must still determine what appropriations are wrongful. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 6 (1999) (observing that while there may be universal moral agreement that "'murder is wrong,' where 'murder' means wrongful killing," there is much less agreement on "what counts as murder"). I thank Fred Bloom for suggesting this parallel.

doctrine of relation back, a successful adverse possessor retroactively receives title good *as of the date of her adverse entry*.<sup>79</sup> In the law's eyes, such land will turn out to have been owned by the trespasser all along, from the date of adverse entry onward. In a sense, the trespass turns out to never have occurred.

Indeed, the doctrine of relation back calls into question what we mean when we say that a bad faith claimant “knows” that the land she is occupying is “not her own.” A trespasser who ultimately gains title through adverse possession maintains a mental state during the running of the statute of limitations that resembles the one denominated “insecure ownership” in Table 1. She believed she was on someone else's land at the time, but she later turns out to have been mistaken—she was on her own land all along. In the ordinary case, we would not think of depriving an owner of her land holdings merely because she held them with subjective insecurity.<sup>80</sup> It is not clear why insecurity that is resolved through the retroactive application of a legal doctrine should be viewed differently from any other form of insecurity about holdings.<sup>81</sup>

Of course, no legal doctrine can turn a moral wrong into a right. The reader might object that, whatever the law may say about it, acquiring property through knowing trespass constitutes theft as a moral matter. If stealing is defined not by reference to legally approved transfer protocols but rather by reference to an external normative framework, then a person might be a thief in the moral sense despite following a legal procedure for acquiring property (and, conversely, might *not* be a thief despite violating the law's acquisition protocols).<sup>82</sup> The open-ended possibility of private moral definitions obviously qualifies any response to this point. But the bulk of moral objections in this context, I submit, flows from reactions to the confluence of three elements: an act that unjustifiably interferes with

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<sup>79</sup> See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 128–29.

<sup>80</sup> Suppose I believe, incorrectly, that my land does not reach all the way to my fence line and therefore feel insecure about the six-inch strip inside my fence. Surely my neighbor (whose land I believe it to be) cannot sue and obtain the land from me merely because of my subjective insecurity about my ownership of it—even if coupled with my aggressive intent to take that area about which I am insecure.

<sup>81</sup> The reader may complain that the doctrine of relation back is merely a legal fiction, a rule of convenience, and that I am engaging in sleight of hand by suggesting that it can retroactively negate an act of knowing trespass in a meaningful sense. See CALLAHAN, *supra* note 12, at 58–59 (observing that the doctrine of relation back cannot itself serve as a reason for the results that it generates). Yet entering land is a neutral act, the legal valence of which depends on whether the land is one's own. Cf. Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 23 (1992) (noting that the same action, such as grabbing an object, “may be injustice in one set of circumstances and not injustice in another”).

<sup>82</sup> The possibility that the moral definition of “stealing” might diverge from the legal one has been raised, for example, in 2 THOMAS AQUINAS, SUMMA THEOLOGIAE 865 (Fathers of the English Dominican Province trans., Christian Classics Press, 1981) (1265) (maintaining that need renders things “common property . . . nor is this properly speaking theft or robbery”). I thank Eduardo Peñalver for suggesting this source.

property interests (trespass),<sup>83</sup> a desire to gain property through that act (acquisitive desire), and an actual gain of property (transfer of title).

Clearly, acquisitive desire and transfer of title cannot combine to create moral difficulties unless there is some interference with the rights or interests of some other party.<sup>84</sup> Moreover, if such an interference exists, the primary moral fault would appear to lie with the party responsible for it. An individual's acquisitive desire does not interfere with property rights simply because the government has set up a transfer in the individual's favor, even where the government has previously interfered with the interests of some third party in acquiring the property that is transferred.<sup>85</sup> The same principle applies to governmentally designed protocols whereby property rights are simultaneously extinguished in one party and vested in another party.<sup>86</sup> Background governmental power, not any acquisitive thoughts in the mind of the new owner, dispossesses the original owner.<sup>87</sup>

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<sup>83</sup> Standard moral objections to "bad faith" adverse possession would appear to define the terms "property interests" and "unjustified interference" largely, although perhaps not exclusively, in terms of established legal categories. For example, I am unaware of any critique of "bad faith" adverse possession that involves an independent assessment of the moral standing of the record title holder's claim to the property; the fact that the person is the legal owner appears to be a sufficient predicate.

<sup>84</sup> In this connection, consider the Homestead Act of 1862, which allowed a homesteader to receive title to government-owned land upon the satisfaction of "proving up" requirements, including building a home on the land and farming the land for five years. See Nat'l Park Serv., What Was the Homestead Act?, [http://www.nps.gov/home/homestead\\_act.html](http://www.nps.gov/home/homestead_act.html) (last visited Feb. 20, 2006). Those "proving up" clearly knew they were on someone else's land (i.e., the government's), intended to acquire the land, and later received title. Yet there is little question that the homesteaders did not act immorally, given that there was no interference with the rights of any third party. Even if we assume that the government obtained the land through previous interference with the rights of a third party, conventional moral views would not appear to extend guilt to the homesteader. Property holdings would look very different in the United States than they do today if the population subscribed to a moral rule against occupying land that had previously been taken wrongly through governmental action. For a discussion of the impact of changed circumstances over time on the moral legitimacy of holdings initially acquired through wrongful appropriation, see generally Waldron, *supra* note 81.

<sup>85</sup> Consider the manner in which ownership rights are extinguished and transferred in stray domestic animals. A dog found wandering loose may be impounded in accordance with applicable state or local law, and after a waiting period (often a week or less), the jurisdiction, through an agent such as an animal shelter or humane society, can dispose of the animal humanely or transfer ownership to another party. See *Lamare v. N. Country Animal League*, 743 A.2d 598, 600–04 (Vt. 1999) (describing this procedure and the practical need for it). A family that visits an animal shelter and applies to adopt a particular stray dog in the event its true owner does not claim it within the statutorily defined waiting period would not be viewed as acting immorally. There might be moral objections (say, to the speed with which the previous owner's claim to the animal was extinguished), but these would ordinarily fall on the government as the direct agent for extinguishing such interests, not on the family that was the beneficiary of the government's transfer.

<sup>86</sup> I am assuming here that the government is an independent actor that extinguishes property interests for its own reasons, rather than an agent that has been "captured" by the party who will benefit from the transfer. If that assumption is relaxed, it is possible to imagine cases in which the intuition in the text would not hold. For example, suppose that a government agency gave an actor a grid of buttons, each corresponding to a household in the community, and informed the actor that pressing any given button would result in a government action to dispossess the family of all of their belongings and trans-

Nowhere is this more obviously the case than where land is involved. Land has the charming characteristic of immobility; it is impossible to steal it in the usual sense of spiriting something away. It is governmental power that, as a matter of property law, extinguishes title in the record owner and vests it in the possessor.<sup>88</sup> Of course, in the adverse possession cases, there are two potential sources of interference with interests—the initial trespass and the transfer of title. The individual adverse possessor is responsible for the first interference, and the government is responsible for the second. The interesting question is whether the acquisitive desire in the mind of the adverse possessor as she carries out the first interference somehow makes her morally responsible for the second interference carried out by the government—that is, whether knowing trespass in the shadow of an adverse possession regime makes her a thief.

To test intuitions, consider the following analogy: suppose the law specified that anyone could acquire a watch from any other person by jabbing the watch-wearer in the watch-arm fifty times with a pointed stick. In this case, an acquisitive jabber would interfere with the rights of the watch-wearer by attacking her person, but the law would add a second interference by transferring the watch's ownership.<sup>89</sup> We might rightly condemn the jabber for engaging in the jabbing; clearly, he is a thug. But is he *also* a thief? While there is room for debate, calling the jabber a “thief” seems to miss the point—the law itself should be denounced for unfairly extinguishing the ownership of innocent victims in their watches and transferring them to jabbers.<sup>90</sup>

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fer them to the button-presser. In such a case, the button-presser would not be absolved of moral responsibility for the resulting dispossession.

<sup>87</sup> The European Court of Human Rights recently emphasized this point in a judgment holding that a transfer of title through adverse possession under the circumstances presented amounted to a human rights violation on the part of the United Kingdom. *J.A. Pye (Oxford) Ltd. v. The United Kingdom*, App. No. 44302/02, slip op. at 15–16 (Eur. Ct. H.R. Nov. 15, 2005), available at [http://www.echr.coe.int/Eng/Press/2005/Nov/ChamberjudgmentJAPye\(Oxford\)LtdvtheUnited\\_Kingdom151105.htm](http://www.echr.coe.int/Eng/Press/2005/Nov/ChamberjudgmentJAPye(Oxford)LtdvtheUnited_Kingdom151105.htm) (“It was the legislative provisions alone which deprived the applicants of their title and transferred the beneficial ownership to the [adverse possessors] and which thereby engaged the responsibility of the State under Article 1 of the Protocol.”). The European Court of Human Rights recently accepted a request to refer this case to its seventeen-member Grand Chamber. See Nikki Tait, *Property Case Goes to Grand Chamber*, FIN. TIMES (London), Apr. 26, 2006, at 4.

<sup>88</sup> This two-part exercise of governmental power could be analogized to a decision to treat property as abandoned under certain circumstances, and to provide an orderly mechanism for distributing that abandoned property to people who value it highly. See POSNER, *supra* note 17, at 83 (referencing the idea of abandonment in explaining adverse possession law).

<sup>89</sup> Assume that a sheriff is responsible for enforcing the acquisition rule; she orders the watch-wearer to remove the watch when the jab-count reaches fifty, and then physically transfers the watch to the jabber with a statement of official congratulations.

<sup>90</sup> The possibility that law may impact normative understandings of morality raises the stakes associated with selecting doctrines. See, e.g., Jeff L. Lewin & William N. Trumbull, *The Social Value of Crime?*, 10 INT'L REV. L. & ECON. 271, 281–82 (1990). Jeremy Waldron has suggested that property rights as defined under the law carry considerable “normative resilience,” even when the moral status of

2. *Morals and Labels in Property Law.*—Suggesting that any moral failings associated with the transfer of property through adverse possession reside in the government rather than in individual claimants merely shifts the inquiry. We still must decide whether the law ought to have such a transfer protocol in its quiver.<sup>91</sup> This is a normative question, and reasonable minds can reach differing conclusions. But allowing certain kinds of knowing trespasses to ripen into title would not be inconsistent with other moral judgments that the law has already made.

First, the law already treats the accidental trespass with solicitude—both before and after the statute of limitations runs. If trespass were an affront to humanity of such enormous magnitude that it constituted the equivalent of a violent personal assault, surely mistakes should not be so readily indulged—especially given the ease with which people can claim to have made a mistake.

Second, the existence of strong sanctions against knowing trespass before the statute of limitations has run provides some assurance that the kinds of knowing trespasses that ultimately ripen into ownership via adverse possession are of a relatively harmless nature (from the perspective of the true owner). We are speaking of a continuing trespass over a period of years, which can be stopped at any time.<sup>92</sup> As a general matter, those who fail to enforce their ownership rights with regard to such a trespass are unlikely to be particularly pained by the trespass itself—the only act that is under the voluntary control of the bad faith adverse possessor.

The fact that the law extinguishes ownership rights is a separate matter that may prove painful to the record owner,<sup>93</sup> but this pain would occur whether or not the trespasser knew that she was trespassing. If we simply believe, as a moral matter, that ownership interests in land should never be extinguished under any circumstances in favor of a trespasser, then that argues for abolishing adverse possession, not for limiting it to the good faith case. In other words, if a protocol for transferring ownership is fundamentally illegitimate as a moral matter, making it available only to those who resort to it by accident makes little sense.

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the underlying property regime is questionable. See Jeremy Waldron, *Property, Honesty, and Normative Resilience*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 10, 12 (Stephen R. Munzer ed., 2001). As a result, the improper delineation of property rights carries the potential for serious social damage. See *id.* at 34 (suggesting that in setting up property institutions, “we should think very carefully about what we do, because the likely resilience of what we are instituting means that it is liable to do much more damage and be much harder to eradicate if we make wrong choices at this stage than would be the case with our setting up a nonresilient institution”).

<sup>91</sup> See *supra* note 90, and sources cited therein.

<sup>92</sup> Nor is the process of stopping a trespass terribly onerous. See, e.g., Merrill, *supra* note 12, at 1150 (observing that “[i]n most cases, the [true owner] will not need to file suit to preserve his right to exclude—he can do so merely by calling the police or erecting a temporary fence”).

<sup>93</sup> Ellickson uses Michelman’s notion of “demoralization costs” to capture this pain. See Ellickson, *supra* note 55, at 727–28.

A legal system that permits knowing trespassers to gain title through adverse possession gains no moral traction by viewing intentional resort to the law's own process as "bad faith." It is more helpful to classify encroachments as knowing, inadvertent, or uncertain, depending on the trespasser's state of knowledge about the then-current ownership status of the land. Through the balance of the Article, I will use three stylized characters, the Knowing Trespasser ("KT"), the Inadvertent Encroacher ("IE"), and the Doubting Possessor ("DP"), to represent these three knowledge states.

This more neutral taxonomy need not dilute the moral force of property law. The law speaks to the blameworthiness of trespass not only through the adverse possession doctrine but also, much more powerfully and immediately, through the body of law governing trespass. Notably, the notions of good and bad faith might still be meaningfully employed in discussing the culpability *of the trespass itself*. When facing an action for punitive damages or an action for injunctive relief that would require extremely onerous corrective measures, defendants may certainly point out that they have acted in good faith, crossing the property line only by accident. Likewise, harsher penalties are available when it is clear that the trespass was intentional and committed without regard for the true owner's interests in exclusion.

Because penalties for intentional trespass can be made very harsh indeed, any reward implicit in adverse possession doctrine for knowing trespassers can be effectively counterbalanced by harsher treatment of trespasses detected before the running of the statute of limitations. Such counterbalancing is unavailable in the accidental case; principles of equity and the mental state requirements necessary for punitive damages constrain remedies against the accidental encroacher. To the extent that knowing encroachments masquerade as accidental ones, and to the further extent that carefully cultivated uncertainty passes for innocence, an adverse possession doctrine that grants title to these "innocents" follows lenient treatment before the statute of limitations runs with free land after it runs. Counterintuitively, a knowledge requirement can strengthen property law's antitrespassing message by making sure encroachers pretending innocence at least pay for what they took. A repayment requirement also fits well with moral intuitions about the appropriate response to a truly honest mistake.<sup>94</sup>

These ideas will be developed from a different perspective below when I turn to the affirmative efficiency case for a knowing trespass requirement. The discussion in this Part has sought only to open up space for debate by

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<sup>94</sup> In ordinary life, we do not grant bonuses to people who accidentally pick up the wrong coat or briefcase, nor would people making these sorts of mistakes hope for such a windfall. Such accidental conduct deserves neither punishment nor reward; the focus should be on settling up with the true owner in a manner that minimizes costs all around. This is in fact roughly the approach that courts take upon discovering an innocent encroachment—quite apart from any operation of adverse possession doctrine. See *supra* note 21.

challenging reflexive notions of “theft,” and suggesting that a knowledge requirement should not be rejected out of hand on moral grounds.

## II. ADVERSE POSSESSION AS A DOCTRINE OF EFFICIENT TRESPASS

One cannot say how adverse possession should work without first establishing what it is meant to do.<sup>95</sup> Section A builds the groundwork for a knowing trespass requirement by isolating what I view as the appropriate modern goal of adverse possession. Section B refines the notion of efficient trespass that underlies that niche purpose. Two doctrinal prescriptions flow from the specification of the ends of adverse possession: first, that the law should not encourage inefficient trespasses, and second (and more controversially) that the law should selectively encourage a certain class of very efficient trespasses. In section C, I explain how barring recovery in adverse possession to good faith mistake-makers will reduce inefficient encroachments, and in section D, I explain how the documented knowledge requirement could facilitate transfers to much higher-valuing land users where markets cannot do so.

### A. Adverse Possession's Modern Niche

Discussions of adverse possession usually begin with a recitation of the purposes that have been advanced to justify this counterintuitive doctrine. Although variously stated, there seem to be three main clusters of justifications: (1) those that focus on protecting the expectations or investments of the possessor; (2) those that focus on procedural values such as neatening up titles, reducing litigation, and generally increasing the security of land holdings; and (3) those that focus on prodding the sleeping owner or rewarding the productive possessor.<sup>96</sup>

In this section, I will argue that the first two rationales do not justify a doctrine of adverse possession in modern times, given the availability of other property law devices to achieve the same ends. The third rationale comes closer to stating a purpose that adverse possession is uniquely well suited to serve, but it is often presented in a manner that makes it appear worthy of scorn. I will suggest that this third rationale imperfectly gropes toward the true niche goal of adverse possession: moving land into the

<sup>95</sup> See CALLAHAN, *supra* note 12, at 77. Callahan identifies in adverse possession law “a fundamental difficulty: how can a particular question be answered intelligently without some fairly explicit assumption as to the more general task to be accomplished? How can I sensibly consider whether to take Route 40 or Route 23 when I don’t know where I’m going?” *Id.*

<sup>96</sup> See, e.g., Merrill, *supra* note 12, at 1127–33 (listing four justifications: avoiding “stale claims,” “quieting titles,” punishing those who “sleep on their rights,” and protecting “reliance interests” of the adverse possessor and third parties); Jeffrey M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT’L REV. L. & ECON. 217, 219 (1986) (listing as adverse possession’s possible purposes the reduction of risk associated with transferring title, the reduction of litigation costs, and a desire to “reward the use of land and other real estate and punish those who sit on their rights”); Stake, *supra* note 7, at 2434–55 (enumerating and discussing fifteen rationales for adverse possession).

hands of a (much) higher-valuing user, where ordinary markets cannot accomplish that task. The modern approach to the hostility requirement, far from pursuing this goal, directly sabotages it.

*1. Endowment, Expectation, Extortion.*—Oliver Wendell Holmes suggested that an attachment to things in one’s possession—what we would term an “endowment effect” today—explains the doctrine of adverse possession.<sup>97</sup> But such a psychological phenomenon<sup>98</sup> speaks only to which of two claimants (the possessor or the record owner) is likely to be the higher valuer of the land. The endowment effect might, therefore, justify a rule that allows possessors to obtain the things that they already hold by paying fair market value. Such a liability rule approach would prevent a lower-valuing record owner from effectively blocking a transfer to a higher-valuing possessor by strategically standing on her rights and refusing to sell.<sup>99</sup> The endowment effect does not itself imply any normative prescription, least of all one that would entitle people to obtain for free the things to which they have become attached.

It is sometimes suggested that the adverse possession doctrine is necessary in order to protect inadvertent encroachers from “extortion” by the record owner who delays suing in order to gain a strategic advantage.<sup>100</sup> For example, the story runs, one neighbor could watch another build over the property line in the hopes of later using the threat of injunctive relief to extract huge payments from the building neighbor. This line of reasoning suffers from two flaws. First, the sorts of construction activities that would give rise to such extortion would typically be completed many years before the running of the statute; hence, adverse possession doctrine could not provide even theoretical relief from any but the most dilatory of would-be extorters.<sup>101</sup> Second, and more fundamentally, extortion of a good faith encroacher is often not a realistic threat even in the absence of adverse possession. As Jeffrey Stake has noted, an owner waits to sue at his peril given

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<sup>97</sup> Holmes, *supra* note 54, 476–77; see Stake, *supra* note 7, at 2459–63 (connecting Holmes’s argument to the literature on the endowment effect).

<sup>98</sup> An “endowment effect” is one explanation for observed gaps between what one is willing to pay for an entitlement and what one would require in order to give it up. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 194. But see Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay/Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005) (presenting experimental work indicating that gaps between willingness to pay and willingness to accept depend on experimental conditions and challenging the “endowment effect” explanation).

<sup>99</sup> A strategic refusal to sell would represent an effort to get a higher asking price and hence capture more of the surplus associated with the transfer of the entitlement. If the strategizer were incorrect about the valuation of the possessor, it is possible that a mutually beneficial deal could be blocked through bluffing behaviors. See, e.g., A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1092 & n.37 (1980) (noting this risk).

<sup>100</sup> See, e.g., Merrill, *supra* note 12, at 1131; Miceli & Sirmans, *supra* note 20, at 164.

<sup>101</sup> See Merrill, *supra* note 12, at 1131 n.38.

the existence of a variety of equitable doctrines that provide protection to innocent encroachers.<sup>102</sup> Hence, an injunction that would serve as the prelude to extortionate bargaining will usually be unavailable against a good-faith encroacher.<sup>103</sup>

I do not mean to suggest that doctrines outside of adverse possession always perfectly protect inadvertent possessors from all harm. But if we were to find that the existing doctrines do too little under some circumstances to protect the innocent, then the appropriate response would be to reform the doctrines in the direction of providing liability-rule levels of protection to record owners.<sup>104</sup> Adding free land to the mix through adverse possession is both ineffective and unnecessary. It dilutes the encroacher's incentives to pay attention to true boundaries by reducing her expected liability to somewhat less than the value of what she has taken.<sup>105</sup> If the ignorance that yields innocence in this context is socially costly, we ought not adopt policies that provide unnecessary incentives in the direction of further ignorance.<sup>106</sup>

2. *Quiet Titles in Repose.*—Another set of goals, variously stated, revolves around making titles more stable and secure, and less prone to challenges arising out of the past.<sup>107</sup> Here, the focus is on establishing clear,

<sup>102</sup> Stake, *supra* note 7, at 2438.

<sup>103</sup> See Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 9–10 (discussing the use of liability rules in the case of accidental encroachments to avoid strategic injunction-seeking); *supra* note 21 (collecting cites).

<sup>104</sup> Merrill notes this possibility, but suggests there would be some additional element of “unfairness” associated with making the encroacher pay anything in the good faith case. See Merrill, *supra* note 12, at 1131–32 n.38.

<sup>105</sup> Stake suggests that the reduced incentive for accuracy is “hardly worth noting” because of the length of time that the statute must run before land can become that of the mistaken possessor. Stake, *supra* note 7, at 2434. This connects to a larger critique of this Article’s approach—that people discount the future so heavily that an adverse possession rule can have little or no impact on behavior. Yet it is commonly assumed that permitting bad faith claimants to gain title would have large effects on incentives, even though the “discounting” rationale should apply with even more force in that situation, given the severity of the penalties that apply before the statute of limitations runs. As long as we assume that people are not completely insensitive to payoffs that occur after the passage of a certain period of time, then changes in adverse possession law would be expected to have some impact at the margin, although the magnitude of the effect is open to question. I thank David Dana for prompting me to consider this point.

<sup>106</sup> See Kim, *supra* note 29, at 10. Whether or not ignorance is socially costly depends on the relative costs of gaining information ex ante and sorting out disputes ex post. See *id.* at 9–10 (comparing costs of information acquisition with the social costs of investments that become valueless after the encroacher is ejected); *supra* Part III.B.1 (explaining why disqualifying good faith claimants would not be expected to produce inefficiently high levels of information-gathering).

<sup>107</sup> See, e.g., Ballantine, *supra* note 47, at 135 (stating that “the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing”); Epstein, *supra* note 13, at 676–77 (analogizing the effects of the passage of time on litigation to the random elements introduced into a game of tennis by playing it in a junkyard or on a cliffside).

unambiguous, and easily administrable rules that foster a predictable, well-ordered system of real property.<sup>108</sup> This goal is most consistent with an objective hostility requirement that examines only whether the statute of limitations has run after a cause of action accrued against the encroacher.<sup>109</sup> If the function of adverse possession is to stabilize holdings, there is no reason to introduce the complexity and uncertainty that accompanies a mental state requirement—at least in the absence of an indication that doing so serves some additional purpose.<sup>110</sup>

Despite the emphasis that title-stability purposes receive in the literature on adverse possession, building the doctrine around these purposes cannot be justified. A review of the law of adverse possession reveals it to be a stunningly weak vessel for delivering repose. It is a complicated doctrine that requires the successful adverse claimant to establish a variety of elements, each of which is open textured and subject to judicial interpretation.<sup>111</sup> Most significantly for our purposes, the tendency of judges to take state of mind implicitly into account undoes whatever benefits of simplicity and administrability an objective standard might be thought to foster.<sup>112</sup> Moreover, even if a possessor can establish all of the required elements to a court's satisfaction, the record owner's characteristics, such as sovereignty or disability, may thwart her claim.<sup>113</sup> It is also worth emphasizing that ad-

<sup>108</sup> See Ballantine, *supra* note 47, at 135.

<sup>109</sup> See *id.*; Helmholz, *supra* note 1, at 67–68; Walsh, *supra* note 46, at 538–39.

<sup>110</sup> For example, Bob Ellickson has suggested that a two-tiered statute of limitations for good and bad faith claimants might allow for finer-grained balancing of the costs of adverse possession, given a weightier concern with the demoralization of good faith possessors and the fact that “preying costs” are mostly incurred in the bad faith case. See Ellickson, *supra* note 55, at 733–34. Ellickson’s cost curves do not take into account the way that pre-statute treatment differentially affects the preying and demoralization costs of bad faith and good faith claimants, respectively; as a result, Ellickson’s model produces different results than those indicated under my analysis. However, both approaches suggest that the consideration of mental states may be appropriate in order to minimize the costs introduced by an adverse possession regime.

<sup>111</sup> See, e.g., Sprankling, *supra* note 8, at 877–79 (discussing uncertainty surrounding adverse possession elements as applied to wild lands); Stake, *supra* note 7, at 2439 (noting the indeterminacy of the elements of adverse possession).

<sup>112</sup> See Helmholz, *supra* note 2, at 336 (explaining that judges “have not hesitated to enter into the murky waters of determining the possessor’s state of mind, his subjective intent” even though this is “the one thing advocates of the objective test of pure possession have most hoped to avoid”).

<sup>113</sup> See CALLAHAN, *supra* note 12, at 73 (referencing the issues presented by “kings, convicts, and remaindermen—that is, instances in which, because of some peculiar situation of the owner, the statute either does not run or its running is prolonged”). Adverse possession does not run against governmental entities, unless an exception has been made by state law. See DUKEMINIER & KRIER, *supra* note 5, at 162; Walter Quentin Impert, *Whose Land Is It Anyway?: It’s Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 450 (2001). But see Paula R. Latovick, *The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939–40 (1996) (suggesting that state law exceptions are more extensive and significant than has been commonly realized). Instances in which long-held pieces of land were later found to belong to the government, and for which adverse possession doctrine provided no relief, are not unknown. See, e.g., Kate Clements, *UI Fights Urbana Man for Property*, NEWS-GAZETTE (Champaign-Urbana, Ill.), Nov. 10, 2004, at A1 (discussing parcel purchased in 1972 which

verse possession *itself* introduces unrecorded interests in land and hence constitutes a source of clouds on titles as well as a mechanism for clearing them.<sup>114</sup>

Modern property law has other devices that are better able to serve the goal of providing security and protecting against stale claims.<sup>115</sup> Marketable title acts offer one approach, albeit an imperfect one.<sup>116</sup> Under the typical act, a party who has held clear title for a period of years, or who can trace clear title back that number of years to a “root of title,” will thereby gain title clear of most competing interests.<sup>117</sup> Title insurance provides another source of assurance against clouds on titles.<sup>118</sup> It might be said that adverse

was revealed in 2001 to belong, in part, to the University of Illinois); Janet Jacobs, *Wait Continues for Families in Elgin Land Title Dispute*, AUSTIN AMERICAN-STATESMAN, Nov. 11, 2001, at B2 (discussing a 150-year-old surveying error with respect to land long possessed by thirty families in Elgin, Texas that could only be cleared up through a constitutional amendment because the land in question belonged to the state). Disability statutes provide extra time on the statute-of-limitations clock where the record owner suffered at the time of adverse entry from a specified “disability” such as minority, mental illness, or imprisonment. See *DUKEMINIER & KRIER*, *supra* note 5, at 161; Radin, *supra* note 9, at 748 (noting “the costs to the system of having a possible ‘disability’ lurking behind every case where there may be unknown persons on the side of the old titleholder, which greatly prolongs clouds on the title”). Finally, adverse entry against the holder of a lesser estate than a fee simple absolute does not start the statute of limitations running against the holders of future interests. See *Cunningham, Reply*, *supra* note 43, at 8 (explaining that this rule follows from the fact that holders of a future interest have no right to possession, and hence no right to recover possession from a trespasser).

<sup>114</sup> See *CALLAHAN*, *supra* note 12, at 101, 106 (noting the possibility that adverse possession doctrines can introduce as well as resolve uncertainty and suggesting that the day may come “to raise the question whether, in relation to land titles, adverse possession isn’t doing more harm than good”).

<sup>115</sup> See *Stake*, *supra* note 7, at 2441–44 (noting that title insurance and marketable title acts deliver more certainty and better serve other purposes attributed to adverse possession); see also *Ballantine*, *supra* note 47, at 143 (opining that “[i]f we had a scientific system for the registration of titles, adverse possession would be of far less importance” and suggesting the superiority of the Torrens system over “our crude conveyancing and recording systems”).

<sup>116</sup> See, e.g., *CALLAHAN*, *supra* note 12, at 105–06; *Stake*, *supra* note 7, at 2441–44. Marketable title acts should not be regarded as a perfect solution. They suffer from a variety of shortcomings and inconsistencies, some of which are generated by their interaction with cumbersome land recording systems, and others consisting of exceptions built into them. See generally *Walter E. Barnett, Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967). Most of the difficulties in the former category could be resolved through better land record practices, such as tract indexes. See *id.* at 84. However, the exceptions built into marketable title acts present a more fundamental problem—one that may be endemic to property law. See *Carol M. Rose, Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 589 n.70 (1988) (noting that marketable title acts share a tendency seen throughout property law: to introduce “muddy” rules into systems that initially promised clarity). The important question is not whether marketable title acts resolve all difficulties, but rather whether they do a better job than adverse possession. See *Barnett*, *supra*, at 85 (comparing adverse possession and marketable title acts).

<sup>117</sup> See, e.g., *DUKEMINIER & KRIER*, *supra* note 5, at 722; *Barnett*, *supra* note 116, at 1179; *Stake*, *supra* note 7, at 2441–42. The exceptions built into marketable title acts reduce their ability to deliver certainty. See *Charles B. Allott, The New Marketable Title Act: Will It Chase the Clouds away in Rhode Island?*, 44 R.I. B.J. 7, 8–9 (1995); *Barnett*, *supra* note 116, at 67–81.

<sup>118</sup> See *Stake*, *supra* note 7, at 2444. Title insurance directly addresses the concern that a person holding land under “color of title”—that is, pursuant to an invalid instrument—would lose the value of

possession helps to make title insurance more affordable by permitting possessors to become true owners over time, but this is questionable, given the difficulties mentioned above.<sup>119</sup>

3. *Sleeping, Working, Valuing.*—The dual notion of punishing a “sleeping owner” and rewarding a “working possessor” sometimes makes an appearance in discussions of adverse possession—but often as a straw man worthy of ridicule. The reasons for scorn are clear enough. Obviously, an owner does not have to do violence to the land in order to use it in a socially valuable way; passive uses that might look to the untutored like “sleeping” may actually increase overall societal value.<sup>120</sup> Indeed, ownership importantly encompasses the prerogative to use *or not use* the land as one pleases. Nor do most onlookers suppose that a possessor deserves the land merely for having possessed it in a more aggressive fashion than the true owner could muster. Indeed, modern intuitions often run in the opposite direction.

As misguided as the “sleeping versus working” rationale may seem, it gestures, however clumsily, in the direction of a much more legitimate social goal—that of moving scarce resources into the hands of those who place the highest value on them. Typically, we rely on markets to accomplish that allocational task. In the ordinary course of business, a seller parts company with a parcel of land when a buyer expresses a higher monetary valuation of the property. The market makes no moral judgment about the buyer’s and seller’s respective uses of the land. The buyer might use the land more intensively or less intensively than the seller. The fact that the transaction takes place merely indicates that the entitlement is moving into the hands of one who values it more highly.

The same neutral theory of movement to a higher-valuing user should animate adverse possession. However, the involuntary nature of the transaction presents problems on grounds both epistemic (an inability to confidently identify the higher valuer) and normative (an interference with autonomy in alienating resources).<sup>121</sup> Adverse possession doctrine should, therefore, be tailored to address those concerns. Where markets are avail-

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her investments if she were later challenged by the record owner. *See infra* Part III.A.3 (discussing the “color of title” factual scenario).

<sup>119</sup> *See* Stake, *supra* note 7, at 2443–44 (noting Merrill’s observation on this point and questioning whether adverse possession “actually reduces the kinds of financial losses covered by insurance” (citing Merrill, *supra* note 12)); *see also* Matthew J. Keller, Jr., *Adverse Possession: A Title Insurer’s Perspective*, 11 CHI. B. ASS’N. REC. 28 (1997) (suggesting a general reluctance to base insurance on adverse possession absent a court decree establishing title).

<sup>120</sup> *See, e.g.,* Netter et al., *supra* note 96, at 219 (observing that “optimizing behavior does not require that land be continuously in service”); Stake, *supra* note 7, at 2434–35 (suggesting that the idea of punishing “sleeping” owners is out of step with modern policy and suggesting that in some cases “less ‘productive’ uses may be best for society”).

<sup>121</sup> *See, e.g.,* Ellickson, *supra* note 55, at 724 (discussing the appeal of “property rules” on these grounds).

able and functioning, we would prefer to rely on them to effectuate the movement of resources. The doctrine of adverse possession produces social surplus when it effectuates moves to much higher-valuing users where markets cannot do so.

### B. Refining the Meaning of Efficient Trespass

Every adverse possessor is first an encroacher. To analyze adverse possession as a doctrine of efficient trespass means focusing not on which *encroachers* seem most deserving of free land, but rather on which *encroachments* the law should seek to encourage and discourage.<sup>122</sup> This might seem at first like an absurd question, one to which the law has already provided a clear answer. The availability of strong “property rule” protections against land encroachments might seem to suggest that the optimal number of encroachments is zero. However, a closer look reveals that the law substitutes liability rules in a number of property contexts.

An often-cited example of a liability rule in property law is the doctrine of private necessity, which allows private parties to trespass upon the payment of damages under certain exigent circumstances. The legal dispensation to “trespass and pay” occurs in lieu of an actual bargain to that effect, on the supposition that the result is an efficient one that would have been arrived at (or at least *should* have been arrived at) had the parties bargained about it explicitly.<sup>123</sup> So here, at least, we have an efficient encroachment that the law encourages.

Another example is eminent domain, where the government has the power to take outright upon payment of “just compensation.” Here too, the results might be justified on efficiency grounds, if they would be impossible to reach through ordinary bargaining. For example, the landowner might have property that is uniquely well located, such that she enjoys a monopoly position with respect to it.<sup>124</sup> Or perhaps there are many land-

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<sup>122</sup> The distinction I draw here amounts to a shift from an *ex post* evaluation of the blameworthiness of parties who have already encroached to an *ex ante* analysis of the circumstances under which we would want encroachments to occur.

<sup>123</sup> Some treatments appear to ground the necessity doctrine on the lack of bargaining *opportunities* between the parties. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 62–63 (1981). However, some of the justifications for the doctrine suggest that necessity would justify a take-and-pay approach even where the opportunity to bargain was available, given the potentially large bargaining range at issue in such cases and the ability of the party in control of the property to hold out for an extraordinarily high price as a result of the other party’s dire need. See Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 577 (1993) (explaining that in private necessity cases “the bargaining range is so large that there is some risk that no deal will be struck as each side campaigns for the larger fraction of the contested domain”).

<sup>124</sup> See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74–77 (1986) (discussing “thin-market” problems).

owners whose holdings must be assembled together in order to make up a usable site, triggering holdout problems.<sup>125</sup>

A third set of examples has direct relevance to the present discussion and has been introduced already: Unintentional encroachments often receive relatively lenient treatment that is consistent with liability rule protection.<sup>126</sup> For example, if someone accidentally builds over her property line in the good faith belief that she is on her own property, she will probably not be required to go to the expense of destroying her structure in order to cure the encroachment. Instead, a variety of equitable doctrines will come to her aid, and she will likely only have to pay the fair market value of the encroached-upon land. The reason for such leniency is obvious: It is efficient that the trespass continue. Once the structure is in place, a bilateral monopoly exists that may prevent the efficient result from obtaining through consensual market transactions.

Adverse possession, as it exists today, should be understood as fulfilling a similar purpose in permitting nonmarket transfers under limited circumstances involving much higher-valuing possessors. Such a view implies not only that adverse possession should facilitate certain kinds of efficient trespasses, but also that it should *not* interfere with property rule levels of protection in other instances. In other words, the doctrine should encourage a narrow category of efficient trespasses without encouraging inefficient trespasses. To compare the impacts of different adverse possession doctrines on incentives to undertake efficient and inefficient trespasses, respectively, it is necessary to consider how adverse possession operates in tandem with remedies that apply before the statute of limitations expires.

### C. Discouraging Inefficient Trespass

A trespass is inefficient if it harms the owner (“O”) more than it benefits the trespasser (“T”). Whatever a reader may think about the merits of fostering certain kinds of efficient trespasses, it seems clear that *inefficient* trespasses ought not to be encouraged. Of course, a rule that has the side effect of encouraging inefficient trespasses might be tolerated if it generates other benefits, such as administrative ease, or the efficient quieting of title. These possibilities and others will be taken up later in the paper. The project of the current section is simply to establish that the current approach to adverse possession encourages inefficient trespasses to the extent it departs from a requirement of knowing entry onto another’s lands.

*1. Ignorance and Social Value.*—To begin, notice that the encroachments made by the Inadvertent Encroacher (“IE”) have no special claim to efficiency. This point becomes obvious when we consider the lack of any positive correlation between ignorance about the trespass and the social

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<sup>125</sup> See, e.g., *id.*

<sup>126</sup> See *supra* note 21.

value of the trespass. There is no reason to think that people who are making *honest* mistakes are necessarily also making *efficient* mistakes. When an obliviously innocent *T* builds her garage over *O*'s property line, it would be absurd to suggest that *T*'s ignorance of the true location of the property line establishes that she is acting efficiently.

Consider a different activity: driving over the speed limit. Sometimes the activity of speeding creates very little risk relative to the social value generated by that activity—call this “efficient speeding.” Other times, the activity of speeding creates risks for pedestrians, other motorists, and roving fauna that are dramatically out of proportion to the social benefits of the activity—call this “inefficient speeding.” There is no reason to believe that a driver who is ignorant of the true speed limit (a “good faith” speeder, as it were) is more likely to be speeding efficiently than a speeder who knows full well the true speed limit and chooses to exceed it. As a result, no efficiency purposes would be served by treating ignorant speeders better than knowing speeders (by, say, forgiving the tickets of anyone who can believably claim she did not know what the speed limit really was, or by doubling the fines of speeders who admit knowing what the true speed limit was). Far from ensuring efficient results, a speeder's ignorance of the applicable speed limit precludes her from comparing the net private benefits from speeding with the externalized social costs of the activity (as captured in the applicable penalty).<sup>127</sup> Only the knowing speeder is in a position to make that comparison.

The same principle applies in the case of land encroachments. A true IE makes no calculation about the encroachment because, by definition, she does not believe herself to be entering the lands of anyone else.<sup>128</sup> There is no particular reason to believe that such an encroachment is efficient.<sup>129</sup> It is possible, of course, that the benefits to the inadvertent encroacher will happen to outweigh the costs to the record owner, just as it is possible that a polluting factory generates benefits that outweigh costs it is permitted to ex-

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<sup>127</sup> The speeder can, of course, compare the internalized benefits she reaps from driving at a high speed with the costs that she internalizes by risking tort liability, personal injury, or damage to her own property. In this regard, a speeder ignorant of the speed limit is in a much better position to make a useful comparison of costs and benefits than is an encroacher who is unaware that his conduct generates any social costs at all.

<sup>128</sup> However, she may make an antecedent calculation, at least implicitly, in deciding how much effort to expend in ascertaining boundaries and confirming the extent of her holdings. *See infra* Part II.C.3.

<sup>129</sup> We might view the fact that the inadvertent encroacher was using rather than attempting to sell the encroached-upon land as evidence that she values it above its fair market value. But in the typical boundary dispute, indivisibilities produce markets that are thin to the point of nonexistence. Zoning regulations also bundle land into parcels that cannot be subdivided. *See infra* text accompanying note 181 (discussing some additional implications of this point). Thus, the fact that an encroacher “holds” rather than attempts to sell a one-foot wide landlocked swath where her backyard meets her neighbor's tells us little to nothing about how highly she values it—and nothing at all about whether she values it more highly than does her neighbor (the record owner of the land).

ternalize on others.<sup>130</sup> But the fact that an actor is not taking into account the full costs of her actions makes efficient choices less rather than more likely.

My point here is simple but foundational: Slicing the universe of encroachments along the dimension of ignorance does not magically and cleanly separate efficient encroachments from those that are inefficient. Instead, we must examine the effects of different adverse possession regimes on the incentives of those who have some inkling they are trespassing, as well as on the incentives to become informed about boundary lines. The next two subsections take up those topics in turn.

2. *Calculating Encroachers.*—Consider the calculations that the Doubting Possession (“DP”) and the Knowing Trespasser (“KT”) would make in deciding whether or not to enter the lands of another. To reconstruct their respective calculations, we must start by considering how the law treats different sorts of encroachments under different knowledge states. Table 3, below, illustrates the consequences of “inadvertent” and “knowing” encroachments both before and after the running of the statute of limitations. The column marked “before statute runs” incorporates the equitable doctrines that provide for lenient treatment of inadvertent encroachments, and harsh treatment of knowing trespasses.<sup>131</sup> The next three columns refer to three possible adverse possession rules. Regime 1 is an objective standard, Regime 2 has a “good faith” rule that disqualifies the knowing encroacher, and Regime 3 requires knowing entry (what has been termed “bad faith”). Each of these columns contains the applicable payoffs for encroachments deemed to be inadvertent or knowing, respectively.<sup>132</sup>

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<sup>130</sup> See James M. Buchanan & William Craig Stubblebine, *Externality*, 29 *ECONOMICA* 371, 380–81 (1962) (distinguishing Pareto-relevant externalities from externalities generated in situations in which “[t]he internal benefits from carrying out the activity, net of costs, may be greater than the external damage that is imposed on other parties”); see also DUKEMINIER & KRIER, *supra* note 5, at 51–52 (discussing the possibility that externalities will not generate inefficiencies); David D. Haddock, *Irrelevant Internalities, Irrelevant Externalities, and Irrelevant Anxieties* (Northwestern Univ. Sch. of Law, Law & Economics Research Paper No. 03-16, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437221](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437221) (discussing irrelevant externalities).

<sup>131</sup> Not every inadvertent encroacher will fare as well as I am suggesting, nor will every knowing trespasser fare so poorly. Nonetheless, the table works to illustrate the broad pattern of divergent treatment of good and bad faith trespassers before the statute of limitations runs, and can usefully demonstrate the incentive structure those patterns tend to produce. It also provides a template for possible reform of the intersecting set of property laws surrounding trespass, encroachments, and adverse possession. For example, if good faith encroachers suffer in a given jurisdiction, modifying the law surrounding accidental encroachments would be a more targeted, sensible, and uniform alternative than relying on adverse possession to improve the lot of these encroachers.

<sup>132</sup> The payoffs contained in Table 3 suppress a good deal of detail and variation among jurisdictions and fact patterns. I use the term “payoff” here to refer generically to legal consequences; these consequences may be negative or positive.

Table 3: Encroachment Consequences

Encroachment Type (as determined by court)	If Caught Before Statute Runs	Regime 1 Objective Standard	Regime 2 Knowing Entry Disqualifies	Regime 3 Knowing Entry Required
Inadvertent	Give Back (FMV)	Free Land	Free Land	Give Back (FMV)
Knowing	Heavy Penalty	Free Land	Heavy Penalty	Free Land

Consider how these payoffs factor into the calculations that encroachers make. An encroacher will not know at the time of entry whether she will be able to gain the land through adverse possession or whether the trespass will be terminated before the statute runs (so that the “before statute runs” payoff applies). She can, however, calculate an expected value based on her predictions about the likelihood of these two possibilities. Given difficult proof problems, she may also be unsure whether a court will find her encroachment to be knowing or inadvertent. Thus, her expected value calculation must also incorporate the chances of her encroachment being deemed knowing or inadvertent. To maximize their expected payoffs, KT and DP may dissemble about their knowledge state or refrain from taking particular actions (such as obtaining knowledge or making purchase offers).

The expected value calculation facing a DP or KT can be expressed like this:

$$[p_i(i_c(p_c) + i_a(1 - p_c))] + [1 - p_i(k_c(p_c) + k_a(1 - p_c))]$$

where:

$p_i$  = probability an encroachment will be deemed “inadvertent”

$(1 - p_i)$  = probability an encroachment will be deemed “knowing”

$p_c$  = probability that the trespass will be caught before the statute runs<sup>133</sup>

$(1 - p_c)$  = probability that the statute will run before trespass is caught

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<sup>133</sup> The probability of getting caught during the statutory period might be influenced by the effects of the legal rule on the calculations and monitoring behavior of the record owner. However, at least within the range of possibilities suggested in Table 3, the legal rule is unlikely to permanently alter owner behavior enough to change the analysis. For example, adding a state of mind requirement makes adverse possession somewhat more difficult to achieve, as compared with an objective standard, but if owners “let up their guard” as a result and collectively began to lose more land to adverse possession, a countervailing behavioral adjustment would be expected.

$i_c$  = payoff when an encroachment classified as inadvertent is caught before the statute runs

$i_a$  = payoff when an encroachment classified as inadvertent is not caught until after the statute runs

$k_c$  = payoff when an encroachment classified as knowing is caught before statute runs

$k_a$  = payoff when an encroachment classified as knowing is not caught until after the statute runs

Consider first the case where a DP or KT can perfectly impersonate an IE in court, so that the probability of the encroachment being classified as inadvertent is 100%. This simplifies her expected value calculation to:

$$i_c(p_c) + i_a(1-p_c)$$

That is, she gets the pre-statute “inadvertent” payoff with a probability that corresponds to the probability of being caught before the statute runs, and the post-statute “inadvertent” payoff with a probability that corresponds to that of not getting caught during the statutory period. We can see that the encroacher faces a positive payoff in Regimes 1 and 2, as long as she benefits from the encroachment to the extent of fair market value and has a non-zero probability of making it through the statutory period without being caught (when she will receive the encroached-upon land for free). Thus, the payoff structure of Regimes 1 and 2 could encourage inefficient trespasses if it is very difficult for courts to tell IEs from DPs and KTs.

This result is driven by the generally lenient treatment that an inadvertent encroacher will face. In many cases, she will be merely asked to stop trespassing, or, if she has erected a structure, she may be able to gain the underlying land at fair market value, or at least get back the value of her improvements.<sup>134</sup> Having to give back what she has taken, or the monetary equivalent, might be expected to leave her indifferent between encroaching or not. To be sure, if the process of being made to give back the land or reimburse its owner is somewhat costly, or if there is some risk that she may suffer a harsher penalty, there could be a mild disincentive. However, the chance for free land in the event that the encroachment is not caught during the statutory period sweetens the payoff considerably to provide a positive incentive in cases where the land is valuable and the chances of getting caught are significantly less than one. Notably, it is impossible to affect the expected value calculation by making the payoff harsher where the encroachment is caught within the statutory period, given the law’s lenient treatment for encroachments categorized as unknowing.

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<sup>134</sup> See *supra* note 21.

If a DP or KT cannot pass as an IE with 100% certainty, then the payoff structure becomes more complex; it will be partly a function of the payoffs for inadvertent encroachments and partly a function of the payoffs for knowing encroachments (both before and after the statute runs). In this situation, the expected value calculation *can* be influenced at the margin by increasing the penalties for knowing trespasses, but only rather clumsily and indirectly. The greater the chance that a DP or KT can successfully feign ignorance, the better the payoff under Regimes 1 and 2, and the less any such adjustment in the payoff for knowing trespasses would matter to the expected value calculation.

The incentive effects on market processes created by a good faith or objective requirement also deserve emphasis. A DP or a KT attempting to pass as an IE under a good faith regime will recognize that the worst thing she can do is offer to purchase the property from its true owner. This will indelibly mark her as a bad faith trespasser, consigning her not only to harsh penalties in the pre-statute period, but forever foreclosing to her any realistic possibility of gaining the land through adverse possession.<sup>135</sup> Even under an objective regime, there is a strong incentive to avoid presenting any offers to the true owner. By laying low and playing (or staying) dumb, one does immensely better before the statute runs, and at least as well after it runs. In other words, the good faith and objective adverse possession regimes discourage the very market processes that we would want to encourage not only on grounds of efficiency but also on grounds of autonomy and fairness.

3. *Overly Blissful Ignorance.*—Where ignorance is real (that is, the encroachment is truly inadvertent), the calculation above will not be performed. But an antecedent calculation will be at least implicitly performed by the IE, and perhaps more explicitly by the DP—the question of whether it is worth becoming educated about the true state of ownership. This depends, in part, on the costs associated with being wrong. Those costs are typically low for inadvertent encroachers. But they are lowered even further when free land looms at the end of the statutory period. Indeed, the chance at title can present positive incentives in favor of continued ignorance. Encouraging (or failing to discourage) ignorance about boundaries generates inefficiencies, at least where the costs of obtaining knowledge are relatively low and the social costs of building beyond one's boundaries are relatively high.<sup>136</sup>

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<sup>135</sup> See Helmholtz, *supra* note 2, at 345–46. A qualification is suggested by *Murray v. Bousquet*, 220 P. 935 (Wash. 1929). There, the possessor entered the land under the belief that he owned it, and over a decade later made an offer to purchase or lease the land when he discovered that he did not own it. *Id.* at 938. Although the possessor lost on other grounds, the court viewed the offer itself as evincing good faith. *Id.*

<sup>136</sup> See Kim, *supra* note 29, at 9–10.

Simply choosing an objective standard for the requirement that possession be “adverse and under claim of right” does not address the problem of perverse incentives in favor of ignorance.<sup>137</sup> While an objective standard treats the IE no better than the KT after the statute runs, the inferior treatment that the KT receives *before* the statute of limitations runs provides sufficient incentive to remain in the dark about ownership. Moving to Regime 3 in Table 3, where one must establish that one’s entry was knowing in order to obtain land through adverse possession, would reduce the inefficiencies generated by an objective standard or a “good faith” requirement. People would have comparatively less to gain by remaining ignorant, and would also have less to gain by encroaching under conditions where it is feasible to pretend ignorance. Whether before or after the statute runs, the IE—or any encroacher pretending innocence—would have to either end the encroachment or at least pay fair market value for what had been taken.

Of course, good faith encroachers would still enjoy lenient treatment as they do currently before the statute runs, and this treatment might insufficiently deter some encroachments (that is, intrusions onto land for which the record owner holds a higher subjective valuation than is represented by fair market value).<sup>138</sup> Yet the requirement that IEs pay for what has been taken would help to at least roughly align incentives to avoid mistakes with the cost those mistakes impose on others.

4. *Can Good Faith Be Saved?*.—Much of the discussion in this subsection has focused on the difficulties involved in distinguishing good faith from bad faith. If possessors can cultivate or feign a no-knowledge state with impunity, then a property system that rewards that mental state will create perverse incentives. This focus naturally suggests a question: If the problems presented by feigned and unreasonable ignorance about boundaries could be addressed successfully, would my case for disallowing recovery by the good faith adverse possessor dissolve? The answer is no. Although the practical difficulties in cabining good faith do strengthen the case against allowing unknowing encroachers to recover through adverse possession, the efficiency case remains even if we assume that courts can perfectly determine in every case whether a given claimant is being honest about her knowledge state and whether her ignorance, if honest, is justified under the circumstances.

The reason is simple: No benefits are provided by allowing the good faith claimant to prevail in adverse possession that cannot be better achieved through other means. By stipulation, the truly honest and reason-

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<sup>137</sup> Permitting the intentional encroacher to take title along with the good faith encroacher removes the disincentive to become informed in models that do not take into account the differential treatment of knowing and unknowing encroachers before the statute of limitations runs. *See id.*

<sup>138</sup> *See* Miceli & Sirmans, *supra* note 20, at 165 (observing that liability rule protection for the true owner does not penalize the encroacher’s “initial error and thereby offers inadequate incentives for him to avoid it in the first place”).

able claimant without knowledge of her encroachment is incentive-proof. Adverse possession has no effect on her one way or the other. Yet adverse possession would make a nonconsensual distributive change in her favor under circumstances in which we have no reason to think that the shift is efficient. If the title-quieting and expectation rationales can be better fulfilled through other means, then there is no efficiency justification for this redistribution. In short, good faith adverse possession is not worth saving.

#### D. Encouraging (Very) Efficient Trespass

We need not adopt a knowing trespass requirement to address the perverse incentives in favor of inefficient trespasses that I have been complaining about—abolishing adverse possession altogether would do the trick.<sup>139</sup> However, the knowing trespass requirement has the added benefit of encouraging a certain category of highly efficient trespasses. In this section, I will put forward the basic efficiency case for a knowing entry requirement.

If we define an inefficient trespass as one that harms the record owner more than it benefits the trespasser, then it follows that an encroachment becomes increasingly efficient (or increasingly less inefficient) as the trespasser's valuation of an entitlement in the land grows relative to that of the record owner. Comparing subjective values of different parties is always a tricky business. Moreover, there are strong societal interests that weigh in favor of discouraging most trespasses, efficient though they might appear. It is appropriate to rely, for the most part, on consensual market transactions to move land from lower-valuers to higher-valuers. A normative theory of property might suggest that we rely exclusively on such transactions, so that no involuntary transfers are ever permitted.<sup>140</sup> However, I know of no property scholars who are willing to take this stand as an absolute matter.<sup>141</sup> Departures from purely consensual transfers appear most justifiable when the divergence between the valuations of the possessor and the record owner is great and a market transaction is unavailable to effect the transfer.

The first condition, certainty that the acquiring party is the higher valuer, can only reliably be satisfied if the law offers some way to test the relative subjective valuations of the parties. Ideally, the applicable legal rules provide a structural mechanism for harnessing private valuations, so that it becomes possible to draw conclusions about valuations based on voluntary acts of the parties. The doctrine of adverse possession, where accompanied

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<sup>139</sup> People would still have an incentive to pretend ignorance, given the favored treatment that innocent encroachers receive relative to knowing trespassers. However, the incentive to encroach in the first place would be greatly reduced. At best, an encroacher would have to pay fair market value for the encroached-upon land, and would face a harsher penalty if found to be a knowing trespasser.

<sup>140</sup> See, e.g., Ellickson, *supra* note 55, at 724 (“Libertarians (and economists who abide by the Pareto Superiority principle) are . . . suspicious of any ‘efficiency’ justifications for legal rules that allow forced exchanges for compensation, much less rules that legitimize uncompensated expropriations.”).

<sup>141</sup> See *id.* at 725 (observing that Richard Epstein appears willing to allow “dents” in his libertarian approach to property where adverse possession is concerned).

by a requirement of knowing entry, sets up just such a test of relative private subjective valuations. We can see this if we consider the calculation that confronts a knowing trespasser in a regime that requires that she establish her knowledge of the fact of trespass in order to gain title through adverse possession.

Table 4 reproduces the incentive structure associated with Regime 3 in Table 3, which incorporates a knowledge requirement.

*Table 4: Incentives Under a Knowledge Requirement*

Encroachment Type (as determined by court)	If Caught Before Statute Runs	<u>Regime 3</u> Knowing Entry Required
Inadvertent	Give Back (FMV)	Give Back (FMV)
Knowing	Heavy Penalty	Free Land

Under Regime 3, the IE is required to give back what has been taken, both before and after the running of the statutory period. Only the KT receives title to land free of charge through the operation of adverse possession. At first blush, this rule might seem to move in exactly the wrong direction, in that it sweetens the payoffs for a KT relative to an IE. But notice that a knowing trespass can still be heavily punished in the period preceding the running of the statute of limitations.<sup>142</sup> This provides considerable policy flexibility to tweak the expected value calculation of the KT. Consider the calculation facing a KT who knows with 100% certainty that her trespass will be deemed knowing:

$$k_c(p_c) + k_a(1 - p_c)$$

This calculation turns on how likely it is that the encroachment will be challenged before the statute runs. That percentage is multiplied by the “caught” payoff (a heavy penalty); its complement, the chance of making it through the statutory period unscathed, is multiplied by its payoff (here, free land). If the penalty is made severe enough (that is, the  $k_c$  payoff is made into a large enough negative number) then a positive payoff will only be available when the probability of getting caught is low and the value placed on the land is high.

Here we can see how a knowing trespass might constitute a test of relative subjective valuations. This thesis requires that we make two primary assumptions, each of which might be fairly debatable, but both of which seem quite plausible: First, the likelihood that the record owner will inter-

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<sup>142</sup> See *supra* note 22 (discussing judicial treatment of bad faith trespasses).

rupt the trespass correlates positively with the record owner's valuation of the property. Second, the trespasser's willingness to take on the risk of getting caught correlates positively with the trespasser's valuation of the property. The two assumptions interact to make the trespasser's calculation a comparison of relative subjective valuations. The record owner's valuation of the property, as translated into her willingness to defend it, provides the probability term in the trespasser's calculation of the expected net benefit from trespassing.<sup>143</sup> Significantly, the "caught" payoff can be adjusted societally to increase or decrease the margin by which the trespasser's valuation must exceed the record owner's to make the trespass worthwhile from the trespasser's perspective.<sup>144</sup> Viewed in this light, the adverse possession doctrine offers a useful mechanism for identifying those instances in which the record owner's valuation is much lower than that of an encroacher.

I have been assuming to this point that the adverse possessor knows with 100% certainty that her entry will be found to be knowing. It is only in this state of certainty that the costs associated with knowing trespass can be balanced against the gains in the manner just suggested. From the point of view of an adverse claimant operating under Regime 3, the best possible results would be obtained if she could impersonate an inadvertent encroacher during the pre-statute period (thus minimizing her exposure to any trespass action) and then suddenly claim to have been a "knowing trespasser" as soon as the statute runs (so as to collect the prize of free land). Plainly, some safeguards must be put into place to keep this result from undoing the built-in test of subjective valuation that the pre- and post-statute treatment together provide.

The simplest safeguard would be to require that an adverse claimant establish proof of her knowledge of wrongful entry contemporaneous with the entry itself. One failsafe way of doing this would be to deliver a purchase offer to the record owner. Other alternatives would include obtaining a survey or otherwise obtaining documentary proof of the true boundary lines before breaching them. Any document upon which the adverse claimant later relies to establish knowing entry must be either publicly recorded at the time of entry or delivered to the record owner.

A documented knowledge requirement would also tend to ensure the presence of the second factor justifying a nonconsensual transfer—the unavailability of a market transaction. It is clear that the knowing entry rule helps to remove the barriers to market transactions that presently exist under a good faith requirement. A purchase offer, far from disqualifying a claimant, would serve as definitive proof of knowing entry. If the record owner cannot be located in order for the possessor to deliver a purchase of-

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<sup>143</sup> The accuracy of the calculation obviously depends on the ability of the trespasser to estimate the likelihood that the record owner will prosecute for trespass before the statute of limitations runs.

<sup>144</sup> There are some limits on the ability to adjust nonmonetary penalties upward, however. *See infra* note 173 and accompanying text.

fer, the possessor could instead execute a recorded instrument memorializing her knowing entry onto the land.<sup>145</sup> Where the record owner is unavailable or unresponsive, the unavailability of a market transaction would be established.

It is also possible, of course, that contact between the record owner and the possessor would not result in a transaction. This might happen either because the possessor's offer is lower than the record owner's reservation price, or because the record owner is holding out for a larger share of the available surplus from trade. In such a case, the purchase offer would stand as documentation of knowledge that the land is not the possessor's, and the possessor would have to make a judgment about whether to proceed with encroaching on the land. Having put the record owner on notice as to her interest in the land, and having received a reply from the record owner, the possessor's perceived odds of being caught encroaching before the statute runs would be expected to rise dramatically. Only in the rarest of instances could we imagine a rational possessor moving forward with the encroachment. If she did so, the record owner would have the entire statutory period to take action, and the possessor could be treated quite harshly given the existence of documentary evidence of her knowledge of the trespass.

The rare instances in which the rational possessor would move forward with an encroachment would be those in which her valuation of the land is extremely high and the perceived chances of being ejected are very low. If the record owner failed to pay any attention to the land during the entire statutory period and the possessor gained title as a result, this would ordinarily suggest that the owner's actual valuation of the land was not nearly as high as his stated reservation price, and that the encroachment was an efficient one. To be sure, it would not be definitive proof. But obvious categories of problem cases could be addressed through appropriate modifications of the basic rule or other existing doctrines.<sup>146</sup>

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<sup>145</sup> State recording statutes already permit recordation of a *lis pendes*—notice of a pending legal action involving the land. See DUKEMINIER & KRIER, *supra* note 5, at 662. It would be a simple matter to permit an adverse possessor likewise to record notice of the claim she is initiating through her entry. Cf. Land Registration Act, 2002, c. 9, sched. 6 (U.K.), available at <http://www.opsi.gov.uk/acts/acts2002/20020009.htm> (allowing possessors to register their claims after ten years in possession, with notice of same provided to record owners).

<sup>146</sup> For example, the odds of ejection might be low because the record owner is incarcerated or institutionalized, but disability statutes already provide relief in such instances and could continue to do so under the documented knowledge standard. See, e.g., DUKEMINIER & KRIER, *supra* note 5, at 161. Likewise, special difficulties surrounding wilderness lands, in which monitoring costs are atypically high and monitoring lapses fail to correspond to low valuations, could be addressed by altering details surrounding tax payments and the like. See *infra* Part III.A.1 (addressing factual scenarios involving wild lands).

### III. PRACTICALITIES, OBJECTIONS, EXTENSIONS

The idea sketched above—using a “documented knowledge” requirement to transform adverse possession into a doctrine of efficient trespass—introduces a variety of practical considerations and may elicit a variety of objections. In this final Part, I will address what I believe to be the most significant of these issues. Section A considers concerns and opportunities raised by different kinds of adverse possession situations; section B considers the impact of my approach on the costs associated with determining boundaries, monitoring land, and litigating disputes; and section C considers the degree to which the ideas developed in this Article might apply in other property contexts.

#### A. Different Fact Patterns

The “boundary dispute” type of adverse possession case has served as the implicit backdrop for the development here of the documented knowledge requirement. The discussion to this point has largely abstracted away from other kinds of fact patterns, some of which may introduce special concerns.<sup>147</sup> Wild lands, property occupied by squatters, and land held under color of title represent some of the most important alternative factual templates. I will consider each in turn.<sup>148</sup>

1. *Wild Lands*.—Applying the reasoning of efficient trespass to settings involving wilderness areas is likely to elicit objections from environmentalists and others devoted to low-intensity uses of land. John Sprankling faults adverse possession doctrine for hewing to a cultural vision of land that privileges development over nondevelopment.<sup>149</sup> Explicitly incorporating the notion of efficient trespass might appear to exacerbate that bias.

In theory, adverse possession could move land to either a higher-intensity or lower-intensity user, just as a market transaction might. Moreover, nothing in adverse possession doctrine requires a record owner to develop her land in order to retain title.<sup>150</sup> However, there are two reasons

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<sup>147</sup> Adverse possession cases fall into a variety of different factual patterns with potentially differing implications. See Radin, *supra* note 9, at 746 (identifying three categories of cases—“color of title,” “boundaries,” and “squatters”—and suggesting that the analysis may depend in part on which factual paradigm one has in mind); Stake, *supra* note 7, at 2421 (noting that “[a]dverse possession applies in both title and boundary disputes, but the rationale might not be the same for the two kinds of cases”).

<sup>148</sup> Some of the considerations raised here in particular factual contexts will be revisited more systematically *infra* Part III.B.

<sup>149</sup> Sprankling, *supra* note 8; John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 538–40 (1996); see Alexandra Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283 (2006) (updating and extending Sprankling’s arguments).

<sup>150</sup> See, e.g., Merrill, *supra* note 12, at 1130 (explaining that the true owner “does not have to develop his land or even occupy it; all he has to do periodically is assert his right to exclude others”).

why adverse possession doctrine could disproportionately facilitate shifts of land to more intensive uses. First, the monitoring efforts required to block an adverse claim might be particularly burdensome for owners who are committed to keeping the land in a low-intensity or “natural” state.<sup>151</sup> Second, adverse possession doctrine typically favors possessors who “take control” of the land in some tangible way, as through fencing, cultivating, or improving it, although these requirements are usually relaxed where wild lands are concerned.<sup>152</sup> These two effects partially counteract each other. The more that possessors are required to do on the land in order to establish a claim, the easier monitoring should become for the record owner. Still, it seems fair to observe that shifts to more intensive uses are relatively easier through adverse possession than shifts running in the other direction.<sup>153</sup>

Significantly, neither factor producing this asymmetry has any direct connection to state of mind or knowledge requirements. Surveying errors in wild and unsettled land could lead to inadvertent possession as well as knowing possession, and the same concerns about monitoring and claiming the land would apply in either case. Making adverse possession unambiguously available to knowing possessors might increase the number of such claims—perhaps disproportionately in wilderness areas that are difficult to monitor—but a documentation requirement would be expected to reduce monitoring costs. The possibility remains, however, that monitoring lapses might correlate imperfectly with low valuations. For example, a wilderness area may hold “existence value”<sup>154</sup> for an owner who finds it prohibitively

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<sup>151</sup> In most contexts involving developed land, ordinary use by the owner would be sufficient to defeat the “exclusivity” requirement of an adverse claimant; hence, monitoring as such would not even be required. Noneconomic uses of the sort that a preservationist landowner might engage in would usually be insufficient to defeat exclusivity, making monitoring necessary to ensure against the loss of title. See Sprankling, *supra* note 8, at 837–38.

<sup>152</sup> See, e.g., *id.* at 827–37 (discussing the various ways in which adverse possession standards are relaxed in the context of wild lands and collecting cases that suggest minor or sporadic uses of wild lands can support adverse possession).

<sup>153</sup> See *id.* at 853 (suggesting this asymmetry).

<sup>154</sup> Discussions of “existence value” often involve policy choices about conservation and public lands, rather than privately owned (but never-visited) parcels. See, e.g., David Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343 (2004). Existence value is a controversial factor in setting public policy because it is often thought to be difficult or impossible to measure. See, e.g., *id.* at 345, 367–74 (discussing this objection). Private land is not generally thought to suffer from this measurement problem because it is traded in markets in which owners express a willingness to pay for it. However, adverse possession doctrine introduces the question by requiring certain “in kind” payments in the form of monitoring efforts to keep one’s claim to the land. While monitoring usually requires little or no marginal effort for those already making use of the land as an owner, the marginal cost of monitoring might be very high if primary value is derived remotely through the property’s mere existence, rather than through any on-site viewing of or interaction with the property. See Sprankling, *supra* note 8, at 869–70 (discussing value derived from existence of the land in a preserved condition). Significantly, much of the wilderness land that holds existence value for the population is government owned. I do not contemplate altering the special status of government land, which typically lies beyond the reach of adverse possession unless a statutory exception has been made. Difficulties in inferring society’s valuation of public lands from the acts of present agents offer one justification for

costly to monitor the land.<sup>155</sup> Relatively minor modifications of the adverse possession doctrine, such as tax payment requirements or remote enforcement alternatives<sup>156</sup> could address these possibilities if they are deemed sufficiently worrisome.

The remaining concern involves the level of activity required to establish adverse possession. Courts have adjusted requirements such as those for “open and notorious” and “continuous” possession to take account of the land’s character and its typical usage.<sup>157</sup> But reducing the “claiming” requirements in this way also increases monitoring burdens on record owners by allowing less obvious encroachments to succeed.<sup>158</sup> Another way to approach the problem would be to expand the range of activities that can give rise to adverse possession when coupled with other documented acts of

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exempting such land from the operation of adverse possession. *But see* Impert, *supra* note 113, at 459–65 (arguing that government cannot be successfully distinguished from other corporate or collective bodies that are vulnerable to adverse possession).

<sup>155</sup> Monitoring might involve excessive intangible costs if it required a form of human contact with the land inconsistent with the owner’s preservation goals. *See* Sprankling, *supra* note 8, at 839, 861–62 (noting this possibility and suggesting that it might force a preservationist owner to choose between damaging the land through monitoring and running the risk that the land will be damaged by an adverse possessor who gains title). Of course, undetected trespassers might despoil the land in various ways even in the absence of any adverse possession doctrine; it is logically impossible for an owner to guarantee that land stays in a pristine condition if that condition cannot be observed without being simultaneously destroyed. *Cf.* Impert, *supra* note 113, at 455–56 (arguing that without an incentive for the government to monitor its undeveloped lands, those lands may not be preserved in the manner intended).

<sup>156</sup> Tax payments are already a required element of adverse possession in some jurisdictions. *See* DUKEMINIER & KRIER, *supra* note 5, at 139 n.14. Such a requirement could be coupled with notice or remote enforcement rights for the record owner. For example, a record owner who was current on tax payments might automatically receive notice of the possessor’s concurrent tax payments so that he could promptly eject the possessor. A record owner current on tax payments might even be given the option of interrupting the running of the statute of limitations by redirecting to the possessor any tax payments the possessor had made, thus minimizing enforcement costs. *See, e.g.,* Rio Grande W. R.R. v. Salt Lake Inv. Co., 101 P. 586, 590–91 (Utah 1909) (explaining that where two parties make tax payments on the same parcel, the first to pay is deemed to have paid the tax for adverse possession purposes). Another approach, suggested by Klass, *supra* note 149, at 323–24, would allow the owner to establish “use” sufficient to interrupt the exclusivity requirement of a possessor by documenting a “conservation intent.” Such a system might work well if periodic updating were required to show that conservation efforts were ongoing and to provide any would-be purchasers with the owner’s current contact information.

<sup>157</sup> *See, e.g.,* Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 832 (Alaska 1974) (concluding that in making use of a semiwilderness area, the possessor “acted toward the land in question as would an owner, taking into account the geophysical nature of the land and the reasonable uses for which it is suitable”); Ray v. Beacon Hudson Mountain Corp., 666 N.E.2d 532, 535 (N.Y. 1996) (quoting with approval sources suggesting that the acts required of the possessor vary with the nature of the land); Sprankling, *supra* note 8, at 827–37 (surveying state approaches that apply a lower standard for adverse claimants of wild lands based on the character of the property).

<sup>158</sup> *See* Sprankling, *supra* note 8, at 827–37. This was the concern of the court in *Murray v. Bousquet*, which held that the possessor’s intermittent use of grazing lands was not sufficiently open and notorious to put the owner on notice, even though it was the only use to which the land was suited. 280 P. 935, 938 (Wash. 1929) (stating that a contrary decision “would be to announce a rule under which a man might be disseised without his knowledge, and the statute of limitations would run against him when he had no reason to believe that his seisin had been interrupted”).

dominion, such as paying taxes or recording documents indicating one's knowing occupation of land not one's own. A category of "constructive improvement" might be recognized that counts properly documented and publicized conservatory acts as constituting actual possession.<sup>159</sup> The documentation requirement in my proposal would offer a handy administrative vehicle upon which such requirements might piggyback.

2. *Squatters*.—The term "squatter" is sometimes used in a conclusory fashion (often as part of the phrase "mere squatter") to designate a type of claimant whose adverse possession claim should not be allowed to prevail.<sup>160</sup> Although a variety of reasons are given to defeat squatters' claims, it seems likely that the squatter's "bad faith"—that is, her knowledge of the encroachment—explains much of the disfavor with which she is regarded.<sup>161</sup> While squatters introduce some special considerations, allowing their recovery through adverse possession is fully consistent with the basic idea of efficient trespass presented here.

The goal I have posited for adverse possession is the movement of property to much higher-valuing users where markets cannot serve that purpose. The discussion to this point has focused on a narrow category of impediments to market transactions—the inability to locate or meaningfully negotiate with the record owner. Adverse possession could also respond to a more fundamental shortcoming of markets. Wealth disparities present well-known challenges to the reliance on willingness to pay as a proxy for transactions that advance social welfare.<sup>162</sup> A knowing entry requirement could provide those who lack conventional resources with which to express their valuations of land an opportunity to use other sorts of currency available to them.<sup>163</sup> People without resources who are willing to take on risk, to

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<sup>159</sup> Cf. Klass, *supra* note 149, at 323–24 (allowing such acts on the part of the true owner to interrupt adverse possession). By applying such requirements to adverse possessors, the law might distinguish possessors with true commitments to conservation from those who strategically engage in low-intensity uses during the statutory period to minimize the chances of detection.

<sup>160</sup> Peñalver and Katyal offer an illuminating account of legal and popular reactions to squatters and emphasize their role in influencing property law and entitlement patterns. See Peñalver and Katyal, *supra* note 36, at 11–19 (discussing squatters and adverse possessors in the American West); *id.* at 28–34 (discussing the impact of modern urban squatters in the United States).

<sup>161</sup> See Helmholz, *supra* note 1, at 89 & nn.101–04 (discussing and citing cases involving claims by squatters, and suggesting that the squatters' state of mind explains the results).

<sup>162</sup> See, e.g., Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105, 1122 (2000) (discussing distortions associated with wealth disparities, where willingness-to-pay fails to track effects on well-being).

<sup>163</sup> I do not mean to suggest that adverse possession represents a satisfactory alternative to larger societal efforts designed to make housing available to low-income families. Squatting carries obvious risks and disadvantages for the squatters, but allowing squatting to ripen into title offers a modest advance inasmuch as it removes those risks and disadvantages over time. Cf. HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 55–57 (1989) (suggesting that informal settlements in Lima, while highly imperfect, represented an advance). I thank Peter Schuck for discussions on this point and for suggesting the relevance of de Soto's work.

put effort into developing land, and to scout out those parcels of land that have fallen into the most egregious disuse, could effectively outbid people who already hold money and land.<sup>164</sup>

Consider the interaction of mental state requirements with the squatter fact pattern. The prototypical squatter is poor and landless. People who own no land cannot mistakenly believe that the land they are occupying is their own.<sup>165</sup> In this regard, a good faith requirement is distributively conservative, designed to benefit only the already-landed.<sup>166</sup> While an objective standard appears to offer claimants without resources a chance at title, judicial application of such a standard in a manner that disfavors bad faith claimants can easily nullify any such possibility.<sup>167</sup> If the legal rule were modified so that only knowing claimants could succeed, the judicial move of implicitly disqualifying knowing claimants would no longer be viable.<sup>168</sup>

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<sup>164</sup> It bears emphasis that I am not advocating a generalized normative theory of “efficient theft.” See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 4 & n.8 (1989) (discussing idea of “efficient theft” (citing Calabresi & Melamed, *supra* note 20, at 1124–26; Ian R. MacNeil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 963 (1982))). Land has several unique characteristics, perhaps most notably its immobility, that drive down monitoring costs and make inferences about relative valuations of possessors and record owners feasible. See *infra* Part III.C.

<sup>165</sup> Radin raises the possibility that a squatter might not realize that property was owned by someone else, and hence might be analogized to a person who takes property out of the common in accordance with Lockean theory. Radin, *supra* note 9, at 750. However, it is difficult to imagine that many modern-day squatters harbor the illusion that property on which they are living is literally unowned. In any case, it would be pointless and counterproductive to require squatters to maintain such misconceptions in order to be able to gain title through adverse possession. A more difficult question is whether squatters who hold an objectively unreasonable belief that they have some legitimate right to the property should be treated as IEs or KTs under my schema. The answer would seem to depend in part on how the law would treat such squatters during the period before the statute of limitations runs—if they are charged with knowledge during the early stages of their possession, consistency would seem to require the same treatment after the statute runs. Such an approach would implicitly concede that the expected value calculation imputed to KTs above need not be subjectively appreciated by each and every KT, so long as the law’s system of penalties and rewards makes that calculation the operative one. Taking that logic a step further, if it were possible to apply the KT set of penalties and rewards to *all* claimants, a plausible argument would exist for dispensing with the mental state requirement altogether. The rub, of course, is that equitable considerations preclude applying harsh penalties to IEs during the period before the statute runs.

<sup>166</sup> Persons unsympathetic to the law and economics enterprise might speculate that this distributive conservatism explains why the efficiency case for bad faith that I present here has been so long neglected. However, it strikes me as far more likely that bad faith’s longstanding bad rap is attributable to the cognitive tendency to view problems in the frames in which they are originally packaged—here, the frame of “adverse possession law”—rather than to aggregate different parts of the same problem together. Cf. Edward J. McCaffery & Jonathan Baron, *The Humpty Dumpty Blues: Disaggregation Bias in the Evaluation of Tax Systems* (Univ. S. Cal. Law Sch., Olin Research Paper No. 02-1, 2002), available at <http://ssrn.com/abstract=298648> (discussing disaggregation bias).

<sup>167</sup> See Helmholz, *supra* note 2, at 340–45.

<sup>168</sup> Of course, judges might still disfavor particularly bad examples of bad faith claimants. Cf. Helmholz, *supra* note 2, at 347–48 (noting that some bad faith claimants fared better in court, often because of special factual considerations that made them more sympathetic or made the record owner less

An additional question raised by the squatter scenario is whether documentary proof of knowing entry should constitute a strict adverse possession requirement, or whether it instead should be treated as evidence that is presumptively required (but not always essential) in order to establish the hostility element. The latter approach seems appropriate for two reasons. First, there will be some instances in which knowledge of the trespass will not be in doubt, and in which such evidence would be superfluous. For example, a squatter's landlessness might itself serve as sufficient proof of knowing entry. Second, placing decisive weight on any particular legal form could produce unwanted effects, given the differential access to legal advice of different possessors.<sup>169</sup>

Of course, I have emphasized some additional advantages of documentation—it not only serves an evidentiary function but also helps to facilitate market transactions and reduce the record owner's monitoring costs by providing extra notice.<sup>170</sup> Even if the evidentiary function is unnecessary in light of a squatter's landlessness, the notice-giving functions of documentation might remain important. Alternative means of achieving those additional objectives might be sought, although difficult tradeoffs must be confronted in at least some instances. Where a squatter takes up residence on "wild lands," for example, the advantages of a completely paperless adverse possession must vie against the arguments for requiring tax payments and other features designed to reduce the owner's unusually high monitoring costs.

A final issue relating to squatters is whether the test of value typically presented by the "risky" intentional trespass would be epistemologically valid, given that squatters typically have little to lose in financial terms. Significantly, trespass can be punished through the criminal law.<sup>171</sup> However, punishments for criminal trespass are not terribly heavy compared to those for other crimes,<sup>172</sup> and it is neither workable nor desirable to adjust

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sympathetic). To the extent that squatters are viewed with special disfavor, their chances at recovery might remain slim.

<sup>169</sup> I thank participants in the faculty workshop at St. Louis University School of Law for a discussion that led me to consider this point.

<sup>170</sup> Cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (discussing the various interrelated functions served by particular legal forms). I thank Larry Garvin for suggesting this parallel.

<sup>171</sup> See Epstein, *supra* note 63, at 15 (observing that the potential for loss of liberty can provide deterrence even where a perpetrator lacks resources to compensate the victim).

<sup>172</sup> See, e.g., MODEL PENAL CODE § 221.2 (1962) (classifying knowing trespass "committed in a dwelling at night" as a misdemeanor and indicating that other trespasses rise to the level of a petty misdemeanor only where occupation of a building or occupied structure is involved or where the trespasser enters property from which intruders are manifestly excluded by fencing, posting, or actual communication, and then "defies an order to leave personally communicated to him by the owner of the premises or other authorized person"); Alon Harel, *Efficiency and Fairness in the Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1222 (1994) (noting the "comparatively forgiving attitude of the Model Penal Code (as well as many other criminal codes) towards

them too far upward.<sup>173</sup> One way to address this concern while simultaneously alleviating the previous concern about the form of documentation would be to require a squatter to make some nontrivial permanent improvement to the property before the statute of limitations would begin to run. Valuable improvements would not only place something at risk and hence attest to the squatter's valuation, but would also provide unambiguous, visible notice of occupation to the record owner. Some activity on the land would be required in any event in order to satisfy the requirement of "open and notorious" possession; a modest refinement of the requirement would be sufficient to address many of the concerns associated with squatters as adverse claimants.

3. *Color of Title*.—Possessors who hold land under "color of title" represent perhaps the most sympathetic "good faith" claimants imaginable.<sup>174</sup> These are individuals who believe that they purchased the land that they hold, and they have a document that purports to show as much. Unlike people who might be blamed for misjudging a boundary line, the beliefs of these claimants as to their holdings have the official imprimatur of a formal instrument. Because my documented knowledge requirement would withdraw the protection of adverse possession law from these claimants, it is worth explaining how the legal change would affect them.

The most important fact about possessors under color of title is that they (or their predecessors in interest) have engaged in a transaction of some sort that has placed a land deed into their hands. That transaction offers the most useful focal point for addressing problems with the faulty deed. While it is not always possible to uncover all clouds on titles, improved title searching coupled with title insurance, marketable title acts, and recording acts can provide better alternatives than can adverse possession. Significantly, adverse possession does nothing to help a person holding under color of title if the problem is detected before the statute of limitations runs or if the record owner is one that the statute does not run against.<sup>175</sup>

Moreover, the transaction that generates the faulty instrument features a grantor who can select among a menu of possible warranties to offer in connection with the deed. These different levels of warranty might be viewed as signaling degrees of confidence about the underlying claim to the

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criminal trespass"). Of course, the punishment for criminal trespass is only "light" relative to that for other crimes; even a short term of imprisonment is likely to be very costly to the trespasser.

<sup>173</sup> See, e.g., Epstein, *supra* note 63, at 17 (noting that "social norms place serious upper bounds on the amount of allowable punishment for any offense" (citing Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435, 436–37 (1990))). Even if norms did not rule out extremely harsh punishments, they would appear indefensible from the standpoint of marginal deterrence. *Id.* at 17–18 (discussing the logic of marginal deterrence and the constraints that it places on available punishments).

<sup>174</sup> See Sprankling, *supra* note 8, at 881–82 (noting that color of title presents the "most sympathetic case" but suggesting several factors that should qualify our concern).

<sup>175</sup> See *supra* note 113 and accompanying text.

land. Empirical evidence suggests that discounts are associated with deeds that provide less protection than the general warranty deed.<sup>176</sup> The buyer who obtains a general warranty deed has recourse against the grantor, in addition to any other protections that may be available through title insurance or marketable title acts.<sup>177</sup> The buyer who accepts a deed with limited recourse against the grantor may be getting just what she bargained for—a somewhat less certain holding to land.

### *B. Weighing Objections and Balancing Costs*

The previous discussion has suggested that adverse possession may not be the best instrument for achieving several of the goals that have historically been attributed to it. Yet even if adverse possession can be understood as serving the ends of efficient land use, we must pay attention to the impact of the doctrine on litigation costs and other systemic costs. If increases in the volume or complexity of litigation or in monitoring or boundary determination costs wipe out the efficiency gains of a particular adverse possession rule, then nothing has been gained through the reformulation. On the other hand, if a reformulation generates cost savings in these areas, in addition to its benefits in promoting efficient land use, then this would provide an additional justification for it. Several sets of objections deserve attention.

*1. Measuring and Worrying.*—The clearest break that my proposal makes with the status quo is in removing adverse possession as an avenue of relief for people who make honest mistakes in occupying land that they do not own. Hence, we might fear that honest folk will devote too much effort to measuring and re-measuring their boundary lines to avoid mistaken encroachments, or will spend too much time worrying about whether the land they have long possessed is really theirs. As emphasized above, those who accidentally encroach on the land of others would continue to enjoy solicitous treatment through a variety of equitable doctrines, and those who mistakenly take land under color of title would have access to other legal mechanisms for recovery. Nonetheless, the elimination of adverse possession from these factual settings does alter the expected payoffs that people will receive when undertaking a reasonable amount of title and boundary checking. We would not want to create a system that encourages people to expend more effort checking and double checking title chains and boundary

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<sup>176</sup> See David Brasington & Robert F. Sarama, House Prices, Mortgage Interest Rates, and Security of Legal Claim: An Investigation of Deed Types 11–12, 22 & tbl. 4 (Apr. 26, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=719805> (presenting study results showing that house prices are correlated with the type of deed used to convey the property, with limited warranty and special warranty deeds reflecting 19% and 14% discounts, respectively, compared with a warranty deed; quitclaim deeds reflected a 51% discount).

<sup>177</sup> See Sprankling, *supra* note 8, at 883 (observing that the good faith claimant holding under color of title may be able to recover from a variety of other parties).

lines than those efforts yield in reducing mistakes and litigation.<sup>178</sup> It does not seem likely, however, that eliminating adverse possession recovery for good faith claimants would have these negative effects.

First, we would not expect inefficiently high levels of accuracy to stem from such a reformulation. A rational actor would not spend more to avoid encroaching than the expected cost associated with the encroachment. But there is another concern. Landowners might refrain from building improvements or incurring other costs to occupy land if the gain associated with these activities is too low relative to the liability risk involved. Recall, however, that the liability risk for honest mistake-makers does not contain any punitive or supercompensatory component, and is unlikely to involve costly injunctive relief.<sup>179</sup> If the landowner would only end up paying fair market value for the land she encroached upon accidentally, then liability worries in the face of prohibitively expensive boundary determination costs would only cause her to curtail activities on land that she values at less than its fair market value.<sup>180</sup> This behavioral change should not trouble us much, since land valued below its fair market value should be sold, not improved upon in ways that may not be value maximizing for the next owner.<sup>181</sup>

The problem of generalized insecurity about land holdings is also unlikely to be exacerbated by withdrawing the possibility of recovery in adverse possession from the good faith situation. As explained above, adverse possession does not reliably increase certainty; any increase it provides in subjective security about one's holdings is in large measure a false security. Mortgage companies require title insurance to protect their interests, even in

<sup>178</sup> If we posit the extreme prototype of a good faith possessor, who has absolute (but incorrect) subjective certainty about the extent of her holdings, then the liability regime should make no difference to her. She is, by assumption, incentive-proof; she will not expend costs to become more certain about boundaries or titles because she is "certain enough" already. However, it is not realistic to suppose that very many people fall into this category.

<sup>179</sup> See *supra* note 21 (discussing treatment of innocent improvers and other unintentional intruders).

<sup>180</sup> It is true that "fair market value" may not represent the worst case liability scenario, given variation in judicial treatment of innocent improvement. On the other hand, if the possessor's good faith is reasonable, the expected value of the liability should be discounted by the (presumably large) probability that she is on her own land and will incur no liability at all. If landowners are risk averse, insurance can be used to pool the risk that remains after reasonable efforts have been undertaken.

<sup>181</sup> In the presence of zoning that requires artificially large minimum lot sizes, however, the marginal value of a particular sliver of land may be below its pro-rata share of the fair market value of the parcel as a whole. See Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, REGULATION, Fall 2002, at 24, 30 (presenting the results of their hedonic model studying the relationship between lot size and prices); see also ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 185–88 & fig. 8.1 (2005) (discussing Glaeser & Gyourko's work and graphically depicting the distortions introduced by zoning that requires large lots). Such effects would simply require a more precise definition of what "fair market value" means in this context when providing relief in inadvertent encroachment cases. If a sliver of land cannot be sold separately and is legally required for the enjoyment of a larger housing bundle, then its value should be adjusted downward to reflect that reality.

cases where the previous owner has occupied the land beyond the statutory period. If individuals are relatively bad at bearing the risk of faulty titles, they should shift that risk to financial actors who are better able to bear it. If the cost of providing title insurance becomes too high as a result of stale claims, marketable title acts offer more categorical and targeted protection.<sup>182</sup>

2. *Preying and Monitoring.*—A second set of objections relates to the prospect of making adverse possession doctrine friendlier to knowing claimants. As noted at the outset, hornbook law in most jurisdictions *already* permits knowing claimants to recover along with good faith claimants. Indeed, it is important to keep in mind that my proposal treats knowing claimants *less* favorably than does the current black-letter majority rule in the United States, by requiring them to fulfill a documentation requirement of some sort. However, it is possible that limiting recovery to the documented knowledge case would introduce a shift in adverse possession law as it is actually applied by judges.<sup>183</sup>

Two mirror-image concerns are associated with treating knowing claimants more warmly: first, that would-be adverse possessors will devote too much effort to “preying” on landowners;<sup>184</sup> and second, that landowners will be saddled with crippling monitoring burdens as they seek to stave off hordes of intruders. To begin, it is helpful to note that attempts at adverse possession can be either successful or unsuccessful, and that successful attempts can be classified as either socially valuable or socially harmful.

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<sup>182</sup> See Stake, *supra* note 7, at 2441–44 (discussing advantages of marketable title acts and questioning whether adverse possession actually helps to keep down the costs of title insurance). Of course, as noted above, marketable title acts contain some imperfections of their own, including exceptions that render their protection incomplete. See *supra* note 116.

<sup>183</sup> A doctrinal realignment that transforms knowing possessors from disfavored members of the claimant class to the *raison d'être* of adverse possession law would not inevitably increase the demand for encroachments, given society's ability to make countervailing adjustments in the penalties that apply before the statute of limitations runs. In theory, demand would be unchanged if those adjustments maintained the existing price of encroachments in expected value terms. However, factors like risk aversion and overoptimism could cause behavior to vary even if expected value remained constant. See Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998) (discussing the impact of optimism on perceptions of the likelihood of uncertain events); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979) (highlighting the role of risk aversion in expected value calculations and noting its implications for trading off the probability and magnitude of fines).

<sup>184</sup> See Ellickson, *supra* note 55, at 729 (including in his discussion of “preying costs” the possibility that “[t]he squatter might, for example, spend time and money scouting the countryside for easy pickings, or inefficiently alter the use of adversely possessed lands solely to manufacture more favorable legal evidence”).

Table 5: Classifying Adverse Possession Attempts

	Successful Attempt	Unsuccessful Attempt
Socially Valuable	Valuable AP	N/A
Socially Harmful	Harmful AP	Deadweight Loss

Consistent with the thesis of this Article, I will consider a successful adverse possession attempt to be socially valuable if and only if it meets the two conditions emphasized in this Article—the record owner values the land far less than the possessor, and a consensual market transaction is not available. Costs incurred to bring about the success of a socially valuable adverse possession claim appear no different from any transaction cost that is required to bring about value-enhancing shifts in resources.<sup>185</sup>

An adverse possession attempt might succeed without meeting the two stated criteria if the rules for success produce monitoring requirements that are too expensive or possession costs that are too inexpensive relative to the true valuations of the record owner and the possessor, respectively. Adjustments in the penalties before the statute of limitations runs can fine-tune the costs of possession, but if monitoring is made too expensive, some successes may still occur where they should not. Monitoring costs can be reduced by lengthening the statute of limitations,<sup>186</sup> refining documentation requirements, adding tax payment requirements, and so on. In addition,

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<sup>185</sup> At first blush, the possessor’s efforts might appear to involve the inefficient production of purely “redistributive information.” See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 281–82 (4th ed. 2003) (distinguishing “productive information” from “redistributive information”). But movement of property into the hands of higher valuers is not merely redistributive; it also involves an efficiency gain much like that which would be achieved in a market. The fact that obtaining title in this way costs something seems no different from the fact that going to the store or completing a real estate transaction costs something—the cost must be understood in the context of the larger efficiency gain that it enables. I thank Larry Garvin for prompting me to consider these points.

<sup>186</sup> I have said nothing thus far about the appropriate length of the statute of limitations. If adverse possession is no longer used to provide security in land holdings, then the tradeoffs that have been framed with that goal in mind would no longer be operative. See, e.g., Ellickson, *supra* note 55 (presenting a model in which uncertainty about holdings plays a role in the analysis); Netter et al., *supra* note 96, at 219 (setting up a framework for analysis based on the assumption “that adverse possession is primarily a device that reduces uncertainty about who holds title that may arise from inaccurate property descriptions”). My approach treats statute length as an additional variable that, along with pre-statute penalties, operates to appropriately price encroachments. Given that there are some limits on how high pre-statute penalties can be raised, see *supra* note 173, statute length provides an alternative means of adjusting the price. In addition, statute length is negatively correlated with the cost of monitoring; it is much cheaper to monitor under a twenty-year statute of limitations than under a three-year statute. See, e.g., Ellickson, *supra* note 55, at 725–34. The optimal statute length depends on several factors, including how large one believes the disparity should be between possessor valuation and record owner valuation, how costly monitoring is, the permissible range of pre-statute penalties, and the discount rates of would-be possessors.

disability statutes provide relief for those landowners for whom even minimal monitoring burdens are likely to be prohibitively expensive.

Unsuccessful attempts at adverse possession generate a deadweight loss—the possessor has undertaken a losing proposition, the record owner has incurred costs to rebuff him, and no one is any better off for the interaction. First, consider the possessor's costs. Knowing possessors have an incentive to make only those incursions that have a positive expected value. To be sure, not all claimants will always get it right. But it is not clear why misguided efforts to obtain land through adverse possession—considered on their own—are different from or more troubling than other misbegotten efforts to engage in trade, such as shopping at unsuitable stores or entering into unhappy business partnerships.<sup>187</sup>

What is different, of course, is that instead of a potentially consenting party on the other end of the would-be transaction stands a property owner who must engage in monitoring to avoid losing her property. Any adverse possession doctrine will place some monitoring burdens on landowners, although these monitoring costs can be adjusted somewhat through the design of the adverse possession doctrine. It does not seem likely, however, that my proposal would increase monitoring burdens above the status quo level. Under the objective hostility standard, landowners must monitor against encroachments by knowing and inadvertent encroachers alike. Even if we suppose that only inadvertent encroachers have a reasonable chance at recovery in court under current law in most jurisdictions, the landowner still must monitor against such encroachments. From the standpoint of the record owner, the threat to one's land holdings as a result of knowing action is no different in kind from the threat that results from mistaken encroachments.<sup>188</sup>

If the probability of losing land increased through an expansion of the eligible claimants, and all else remained equal, one would expect owners to incur additional monitoring costs. But at least two factors cut against any such increase in connection with a documented knowledge requirement. First, fewer good faith encroachments would be expected, and those that occurred would have lighter consequences for record owners since the claimants would be made to pay fair market value. Second, greater atten-

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<sup>187</sup> Even if we thought that would-be adverse possessors as a group were more likely to be subject to particular cognitive biases that would make them systematically more mistake prone, it is not clear that blocking them from adverse possession opportunities will yield more productive uses of their energies. Presumably, the factors that cause them to dissipate time and effort in ill-fated adverse possession bids would cause them to misallocate time and effort to other misguided endeavors. Of course, systematic mistake-making of this sort by would-be adverse possessors could have other harmful effects, such as driving up litigation rates. *See supra* Part II.B.3.

<sup>188</sup> *See French v. Pearce*, 8 Conn. 439, 446 (1831) (“Of what consequence is it to the person dis-seised that the disseisor is an honest man?”), *quoted in Fuller, supra* note 66, at 339.

tion to market processes and to boundary lines by would-be encroachers will generate information that will ease the monitoring task for owners.<sup>189</sup>

More generally, the connection between measuring (to avoid encroaching on the land of others) and monitoring (to avoid the encroachments of others onto one's own land)—and the connections between both of these phenomena and the security of land holdings—has not received adequate attention. Indeed, monitoring costs are usually regarded as a deadweight loss.<sup>190</sup> But costs incurred at property boundaries have spillovers that reduce the need for other efforts on those same boundaries. These private efforts cumulatively produce a public good—a more stable and well-defined system of land holdings. To be sure, monitoring costs can be excessive relative to the savings they produce, but it would be a mistake to suppose that all monitoring is wasteful and without social value.

3. *Litigation Costs.*—The costs associated with litigation are a function of both the number of actions and their complexity.<sup>191</sup> Requiring the successful adverse possessor to establish knowing entry potentially reduces litigation costs in two ways. First, by encouraging greater attention to true boundary lines (both by removing an incentive for ignorance and by providing a positive incentive for knowing the truth), the documented knowledge requirement would be expected to reduce the sorts of mistakes capable of spawning litigation.<sup>192</sup> Second, the proof that the encroacher must amass if she plans to obtain land through adverse possession will serve to simplify actions in trespass that occur before the statute runs. In other words, inadvertent encroachments would be expected to occur less often, and knowing encroachments would be simpler to litigate.

The flip sides of these advantages require attention, however. Inadvertent encroachments may occur less often under my proposal, but what about

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<sup>189</sup> Requiring proof of knowing entry through either a recorded document or a purchase offer would further reduce the need for on-site monitoring during periods in which no encroachment is contemplated. As discussed above, this level of proof would not be required in all circumstances, but would be presumptively required in order for a party who already owns land in a given area to establish knowing entry. See *supra* text accompanying notes 169–170.

<sup>190</sup> See Netter et al., *supra* note 96, at 220 (“Monitoring costs incurred only to prevent the loss of title through adverse possession are wasted from a social standpoint.”); see also Ellickson, *supra* note 55, at 727 (explaining that landowners aware of the risk of losing land through adverse possession “must bear either uncertainty costs or additional monitoring costs,” where “uncertainty costs are the disutilities they suffer from the prospect of losing their lands” and “[m]onitoring costs are expenditures they choose to incur to police against intruders in order to reduce these uncertainty costs”).

<sup>191</sup> Ellickson, *supra* note 55, at 732.

<sup>192</sup> Cost savings would only be realized, of course, if the cost of attaining certainty about boundary lines *ex ante* is lower than the costs that flow from mistaken investments on another's land followed by the later discovery of breached boundary lines. That cost comparison depends on many factors, including how costly it is to gain good information about boundary lines, how likely people are to discover and sue about boundary breaches, and how socially costly the resulting litigation and remedy will be. See Kim, *supra* note 29 at 9–11; see also Stake, *supra* note 7, at 2448–49 (suggesting that the costs of ascertaining boundary lines are falling and may drop further with improvements in technology).

the frequency of *intentional* trespasses? For example, suppose that trespassers as a group are overly optimistic about their prospects of making it unscathed through the statutory period, and that large numbers of them embark on trespasses that are, in fact, detected and prosecuted. These unsuccessful attempts at adverse possession would not only be socially wasteful, as discussed previously, but would also contribute to litigation caseloads. Even if these cases are relatively simple to process, an influx of them would generate significant deadweight losses.

Likewise, even if the litigation of knowing trespasses may be simplified before the statute runs, we must also consider the impacts on litigation after the statute of limitation runs. My proposal would, of course, incorporate a mental state requirement, which might be expected to complicate the litigation of adverse possession claims. To the extent that judges insert mental state considerations even when an objective standard is formally adopted, however, explicitly adopting a mental state requirement would not increase costs very much from the present baseline. Moreover, requiring knowing trespass is a much simpler matter, proof-wise, in the presence of a documentation requirement. While it is not possible to require that litigants “prove” their ignorance (one cannot be made to prove a negative),<sup>193</sup> it is a relatively simple matter to require that a claimant produce documentary proof of contemporaneous knowledge of the trespass.

Where a knowing entry cannot be established in accordance with applicable documentation requirements, other property law principles governing trespasses, encroachments, and improvements would kick in. In such cases, the adverse possession inquiry would be replaced with the inquiries presently employed to decide cases before the statute of limitations runs. It is not clear that these inquiries are any more or less complex than those that generally attend adverse possession determinations.<sup>194</sup>

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<sup>193</sup> Merrill suggests the alternative of requiring the true owner to prove that the encroachment was in bad faith. See Merrill, *supra* note 12, at 1146. While it is true that this approach would relieve the encroacher of a difficult burden, it would also make it quite easy for KT's and DP's to impersonate IEs, thus gutting the claimed advantages of a good faith requirement. It would also firmly steer KT's away from making purchase offers—one of the very few ways that the true owner might be able to establish the possessor's knowledge of the trespass.

<sup>194</sup> Adverse possession litigation commonly implicates these other property questions already; where adverse possession fails on any of the enumerated requirements, other property doctrines come into play. See, e.g., *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969) (remanding for consideration of the treatment of a boundary encroachment under equitable principles, where adverse possession claim failed on the “open and notorious” prong). To be sure, litigation under other property principles could entail a second inquiry into mental state. Those who do not qualify for title through adverse possession because they fail to meet the “documented knowledge” requirement comprise at least two groups: those who did not know they were encroaching and those who knew they were encroaching but failed to establish that fact as required under the documentation requirement. Members of these two groups would be treated differently under equitable principles, as might subsets of each. However, any such inquiries are not a function of the documented knowledge requirement and would be required in any event in the period before the statute of limitations runs (or, if adverse possession were abolished, would be employed across the board).

### C. Limitations and Extensions

Although I have advocated understanding adverse possession as a doctrine of “efficient trespass,” I do not mean to advocate a generalized theory of “efficient theft.”<sup>195</sup> Land has unique characteristics that are not present in most other forms of property. In this section, I will spell out some of those characteristics, and discuss how they serve both to cabin the analysis contained here and to suggest extensions of these ideas.

First, land is immobile. Immobility dramatically reduces monitoring costs for record owners. Because land stays put, owners can check up on it at their convenience as infrequently as the statute of limitations allows. Immobility also makes land an obvious target of taxation, and property taxes offer a ready avenue for reducing monitoring costs even further where this is deemed desirable. Other forms of property can be moved, making monitoring more difficult, and are rarely tracked through taxation in a way that would facilitate a reduction in monitoring costs.

Second, at least in the absence of natural boundaries, land connects seamlessly with other land in a way that does not occur with other forms of property. Because of this contiguity, the boundaries of parcels of land require attention, regardless of the relevant adverse possession rule. Without some specification of where one person’s property ends and another’s begins, the benefits of ownership are lost and transactions become impossible.<sup>196</sup> The background boundary-maintenance efforts incidental to a secure property system keeps the marginal cost of watching for boundary en-

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<sup>195</sup> In the usual case, theft is inefficient because any gains that might be associated with moving property to a higher-valuing user would be swamped by the deadweight loss of protective measures by the owner and aggressive countermeasures by the thief. See, e.g., Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT’L REV. L. & ECON. 367 (1997); Fred S. McChesney, *Boxed in: Economists and Benefits from Crime*, 13 INT’L REV. L. & ECON. 225, 227–28 (1993); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228–30 (1967). Another costly response would be to refrain from holding property that might be stolen. See Hasen & McAdams, *supra*, at 372; McChesney, *supra*, at 230–31 n.16 (quoting Bob Dylan, *Like a Rolling Stone*, HIGHWAY 61 REVISITED (Columbia Records 1965), for the proposition that one who has nothing can lose nothing); Tullock, *supra*, at 229 n.11. I thank Eduardo Peñalver for citations on this point.

Those arguments assume, however, that monitoring is costly and that shifts to higher-valuing users can occur through markets. See Hasen & McAdams, *supra*, at 370 (discussing circumstances in which theft might be efficient). In the case of land, it is not clear that monitoring imposes significant marginal costs, given the nature of beneficial use. Likewise, the knowing trespass requirement is designed to winnow out only those rare instances in which market transactions are unavailable to move property to a higher-valuing user.

<sup>196</sup> See, e.g., Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1379 (1989) (“In the law of real property, physical boundaries are essential to organizing transactions. To have a market, the objects to be bought, sold, and licensed must be clearly identified.”); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002) (noting the relevance of boundary demarcation to the owner’s right of exclusion).

croachments by would-be adverse possessors relatively low.<sup>197</sup> Most other sorts of property are physically set apart as belonging to particular individuals, so that continual efforts at individuation are not required. As a result, the marginal cost of monitoring for appropriations is much higher for other forms of property, which do not already require differentiation efforts.

Third, unlike most other forms of property, land has an endless useful life. The fee simple is often conceptualized as an estate of infinite duration. Yet because human foresight is imperfect, decisions about land use cannot be made once and for all, never to be revisited.<sup>198</sup> Adverse possession represents one manifestation of that principle. Given adverse possession, one's purchase of a fee simple does not automatically secure the property for oneself and one's heirs and assigns for all eternity. Rather, it is better understood as purchasing an estate that is limited in time to the length of the statute of limitations, along with an option to renew for an identical time span at a nominal price—the effort required to interrupt possession, if necessary.<sup>199</sup> If the option is exercised, it carries with it a right to the property for the ensuing statutory period as well as another option to renew on the same terms.<sup>200</sup>

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<sup>197</sup> Livestock offers an interesting analogy. Unbranded livestock would be susceptible to accidental as well as purposeful takings in areas shared by several herds of physically similar animals. In such a context, the costs associated with branding livestock would be necessary to keep ownership straight even if people were entirely honest. Branding for identification purposes lowers the marginal cost of monitoring for intentional appropriations.

<sup>198</sup> See, e.g., Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426–27 (2005).

<sup>199</sup> The idea of using the options template to understand legal rules has recently received attention. See, e.g., IAN AYRES, *OPTIONAL LAW* (2005). One question that this mode of analysis suggests is whether an owner should be able to purchase at an additional price a longer (or perhaps infinite) absolute time span of ownership, effectively reducing the exercise price for the renewal option by pushing it further out into the future. Standardized statutes of limitations have the advantage of allowing possessors to make calculations about the costs and benefits of encroachment without having to inquire as to the length of the custom statutory period put in place by each individual owner. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (suggesting that the in rem nature of property rights leads to greater standardization in property law than in contract law). However, it might not be infeasible to vary statutes of limitations based on different land types or even to permit some limited customization based on idiosyncratic circumstances. Disability statutes, for example, offer some customization of statutory periods. A more important constraint is the fact that people have limited temporal horizons that are likely to make them poor predictors of the strength of their future attachment to the land many decades or centuries hence.

<sup>200</sup> Cf. Sprankling, *supra* note 8, at 853 (asserting that “[i]n a broad sense, the owner of wild lands never holds absolute title” but rather “must continually perfect his title”). Sprankling’s discussion suggests that this need to reassert ownership periodically is a lamentable departure from an otherwise “absolute” level of ownership. See *id.* But understanding land ownership to be contingent on minimal monitoring efforts over time is no different conceptually than understanding land ownership to be contingent on paying property taxes over time. Just as property taxes may be justified by their efficacy in advancing important social objectives, so too is it possible to justify what amounts to an “attention tax” by reference to such social objectives. I thank Will Baude for discussions that led me to draw this paral-

Fourth, land is unique. Even land that is physically undistinguished occupies a unique location relative to other parcels of land.<sup>201</sup> Nearby parcels may be close substitutes, but land is not perfectly fungible. This uniqueness raises the stakes associated with locking up land in suboptimal uses, especially given the infinite useful life of land. Indeed, problems associated with the nonfungibility of land, couched as “thin market” or monopoly power concerns, are a principal justification for eminent domain.<sup>202</sup> These same concerns help make the case for adverse possession as a vehicle for moving property into the hands of higher-valuing users.

Finally, real property is subject to a complex web of law, including mechanisms such as marketable title acts, recording acts, and title insurance, as well as a panoply of doctrines that apply to trespasses and encroachments of various sorts. Adverse possession occupies a narrow niche in this network of law, and its optimal design depends in large part on the other pieces of the legal framework. Because most other forms of property lack this pervasive infrastructure, the prescriptions suggested here could not be transplanted to those other contexts.

The first two factors, immobility and seamlessness, stabilize monitoring costs at a very low marginal level, making it possible to draw inferences about valuation from lapses in monitoring. The third and fourth factors, longevity and uniqueness, suggest that the gains from transferring property involuntarily may be very large. A documented knowledge requirement works within the framework of the fifth feature, the surrounding legal structure, to narrow the class of adverse possession transfers to those in which the gains are large and markets are unavailing. Because no other form of property shares all of these features, an efficiency rationale for adverse possession of real property does not translate readily into other contexts, and the arguments presented here are logically cabined.

However, identifying the special features of real property offers some guidance in adapting these ideas to other contexts. For example, some interesting potential extensions are found in intellectual property. Consider the problem of “orphan works”—works for which it is extraordinarily difficult or impossible to identify or locate the author.<sup>203</sup> The third and fourth features—infinite useful life and uniqueness—are present, raising the stakes for market failures. Creative works are also “seamless” in important respects, requiring the establishment of legal boundaries that mark out the scope of the creator’s rights, the line between fair use and infringement, and

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lel. It is true and relevant, of course, that wild lands may require higher monitoring costs than other land, thus raising the effective “exercise price” of the renewal option. *See supra* Part III.A.1.

<sup>201</sup> The historical principle that even unexceptional land is considered unique is manifested in the remedies available in disputes involving land. *See, e.g.,* Dickinson, *supra* note 21, at 71.

<sup>202</sup> *See* Merrill, *supra* note 124, at 74–77.

<sup>203</sup> *See, e.g.,* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (Jan. 2006), available at <http://www.copyright.gov/orphan-report-full.pdf>.

so on.<sup>204</sup> In addition, copyright is subject to a complex legislative scheme into which any prescriptions about orphan works must be fitted, much as adverse possession doctrines applicable to real property must be fitted within a larger framework for protecting interests in real property.

The analogy with real property breaks down on the factor of immobility, of course—copyrighted material, unlike land, can be moved about almost effortlessly. Indeed, unlike tangible personal property (which advertises its appropriation by its absence), copyrighted work can be appropriated without any notice to the copyright holder that an appropriation has taken place.<sup>205</sup> Accordingly, the monitoring costs required to detect infringements and enforce copyright are very large. Yet perhaps another mechanism, such as a centralized electronic registry, could perform the same function as immobility in reducing monitoring costs.<sup>206</sup> If so, a doctrine like adverse possession might be adapted to address the efficiency problems presented by orphan works.<sup>207</sup> Just as with land, the goal would be to identify those instances in which a nonowner's valuation was much larger than that of an owner and a market transaction is unavailable. These intellectual property issues are complex ones that have been treated extensively by others; these brief comments are meant only to suggest the broader potential applicability of the ideas in this Article.

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<sup>204</sup> See Gordon, *supra* note 196, at 1380–84 (discussing three sets of “substitute boundaries” that copyright law establishes in place of tangible boundaries).

<sup>205</sup> See *id.* at 1346 (noting that in the case of a copyright violation, “[t]here is no perceptible loss, no shattered lock or broken fencepost, no blood, not even a psychological sensation of trespass”).

<sup>206</sup> The idea of a central registry has been discussed in connection with the problem of stolen artwork—another form of property that is unique and long lived, yet mobile. See, e.g., O’Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (observing that an “efficient registry” might provide a better solution to the problem of stolen art than the uncertain law of adverse possession); Paulina McCarter Collins, Comment, *Has the “Lost Museum” Been Found?: Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 146–48, 150–53 (2002) (discussing the advantages of a central registry for Holocaust-era cultural property); Julia A. McCord, Note, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 999–1001, 1004–05 (1995) (discussing the advantages of a central registry).

<sup>207</sup> Such an approach bears some important similarities to the proposal that copyright holders be allowed to renew copyright on a periodic basis an unlimited number of times. See William M. Landes & Richard Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). Indefinite renewal makes explicit the “limited term plus option” idea discussed above by creating a default rule in which copyright lapses if renewal does not occur. See *supra* notes 199–200 and accompanying text. With adverse possession, ownership does not lapse in this way absent a possessor who is interested in the land (although land does arguably contain an automatic-lapse renewal requirement in the form of property taxes). A renewal requirement tests the valuation of only the copyright holder, while a variation on adverse possession could potentially compare the valuations of two actors. Both approaches have the tremendous advantage of simplifying the costs of market transactions by making trading partners easier to locate. See Landes & Posner, *supra*, at 477–78 (discussing how a central registry system might be administered to reduce “tracing costs” through a periodic renewal requirement).

## CONCLUSION

My project here has been only partly about touting the merits of a documented knowledge requirement. It has also been about finding adverse possession's modern niche in the system of property rules. That process of niche-finding has been in significant part about pulling adverse possession off jobs it is no longer good at doing, relative to other property doctrines. Even those who cannot countenance the possibility of a bad faith requirement may find it worthwhile to consider what adverse possession is good for these days. Other doctrines are better suited for tidying up land records, providing security to buyers, and protecting innocent improvers.

I submit that there is only one goal that adverse possession uniquely serves—facilitating certain classes of very efficient transfers where markets cannot do so. In my view, this is a useful, albeit limited, niche. But pruning back adverse possession to the documented knowledge case does more than recognize this niche goal: It provides a measured way of shrinking the doctrine over time, and allowing other property doctrines to step into the breach to do more effectively what adverse possession once did. Whatever a reader may think of a notion of efficient trespass, it is hard to justify doctrines that encourage *inefficient* trespasses. Yet this is what good faith or objective adverse possession standards do, and they do so without generating significant countervailing benefits in terms of providing repose, protecting inadvertent encroachers, or reducing litigation costs.

The moral tone taken by courts and commentators towards various sorts of encroachers has clouded the issue, and has left us with an adverse possession doctrine that is neither forthright nor useful. A well-intentioned eagerness to treat good faith claimants as well or better than bad faith claimants has obscured what adverse possession is uniquely designed to accomplish in modern times. Adverse possession cannot and should not be made to bear the moral weight associated with providing differential treatment to knowing and accidental interferences with property rights. The law of trespass, and the body of equitable doctrines applicable to innocent mistake-makers, is fully capable of performing this task.

It is, of course, possible to conclude that allowing knowing trespass to eventuate in title through adverse possession is a morally defunct idea. If so, then the entire doctrine of adverse possession should be eliminated, not nursed along to provide additional incentives for making mistakes (or for pretending to make mistakes). The analysis here suggests that adverse possession is well positioned to serve, at most, one modern purpose. A doctrine that serves one good purpose should be shaped according to that purpose, and a doctrine that serves no good purpose should be discarded.

As I established at the outset, my defense of a bad faith requirement constitutes a dramatic break with the carefully articulated views of leading property scholars, as well as with the modern approaches of courts. I will leave it to the reader to judge whether that break is a foolhardy or justified

departure. But whether or not one ultimately agrees with my position, I hope that the analysis contained here will contribute to the discussion surrounding the possible futures of adverse possession.