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Christopher H. Meredith

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IMPUTED ABANDONMENT: A FRESH PERSPECTIVE ON ADVERSE POSSESSION AND A DEFENSE OF THE OBJECTIVE STANDARD

Christopher H. Meredith[1]

I. INTRODUCTION

"For true it is that neither fraud nor might can make a title where there wanteth right."[2]

"Thou shalt not steal."[3]

These sentiments have generally characterized the American judiciary's attitude toward that oft-maligned doctrine of property law: adverse possession. Over the past century or so, a disconnect has developed between the hornbook formulation of the law of adverse possession and the way it is actually applied in the courtroom.[4] Many legal scholars and theorists have debated how the doctrine might be modified or recast to comport with modern policy concerns.[5] Invariably, the resulting suggestions involve complex discussions of morality and ethics in reaching their conclusions.[6] Ultimately, the solutions offered vary greatly, sometimes being diametrically opposed.[7]

Against this confusing backdrop, the Tenth Circuit decided *Weyerhaeuser Co. v. Brantley*[8] in 2007. The opinion is itself unremarkable, but it provides an ample testing ground for evaluating the merits of the leading adverse possession reformulations as well as for my own thesis. Some authors have concluded that the hornbook law on adverse possession ought to be changed to reflect the reality of judicial application.[9] Others propose changes both to the law and to its application.[10] In my view, the hornbook law ought to be left unmolested. Rather, we must take another look at the

1. The author gratefully acknowledges Professor Chris Lund for his encouragement and guidance, Professor Alina Ng for planting the seed that grew into this Note, and his wife, Rashell, for nodding and smiling as he droned on and on about legal theory and property law.

2. Edward Altham's Case, 8 Coke Rep. 148, 153, 77 Eng. Rep. 698, 707.

3. *Deuteronomy* 5:19.

4. Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 332 (1983).

5. *See, e.g.*, Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1057 (2006).

6. *Id.*

7. *Compare* Fennell, *supra* note 5, at 1037-38 (suggesting that the adverse possessor be required to show "bad faith" to establish a claim) *with* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1154 (1984) (concluding that "good faith" adverse possessors should be preferred claimants).

8. 510 F.3d 1256, 1259 (10th Cir. 2007).

9. *See, e.g.*, Helmholz, *supra* note 4, at 357-58.

10. *See e.g.*, Fennell, *supra* note 5.

older approach and consider it from another vantage point, one that does not offend our moral sensibilities.

This Note will analyze several leading adverse possession theories using *Weyerhaeuser* as a test case. I will consider the merits and drawbacks of each, ultimately offering a justification for the hornbook law by approaching it in conjunction with the law of abandonment and finder's rights. It is my contention that understanding adverse possession primarily as "imputed abandonment" rescues the doctrine from its supposed moral failings and requires the least modification to this well-historied principle of property law.

II. FACTS AND PROCEDURAL HISTORY

The Brantleys were a family of farmers living in rural southeastern Oklahoma.[11] In 1980 or 1981, Carl Brantley began to graze his livestock on nearby Sherrill Farm, acreage property owned by the Weyerhaeuser Company.[12] Soon thereafter, Carl began to increase his usage of Sherrill Farm, installing a locked gate and constructing and maintaining farm structures such as feeding troughs, fences, and corrals.[13] He cultivated the land by raising crops of wheat, fertilizing the soil, clearing brush, and improving roads.[14] Despite all this, Carl Brantley never paid taxes on Sherrill Farm.[15]

Other members of the Brantley family also had dealings with Sherrill Farm and the Weyerhaeuser Company. In 1983, the elder Brantley, Bobby, obtained a license from Weyerhaeuser allowing Bobby to graze his farm animals on Sherrill Farm.[16] Though Carl asserted that his father had ceased using the license by the winter of 1987, the lower court found Bobby's license expired in 1992.[17] In addition, Ricky and Cindy Brantley, Carl's brother and sister-in-law, also made use of Sherrill Farm without permission from Weyerhaeuser.[18]

While Weyerhaeuser was the record owner of the property, the company never gave Carl Brantley permission to use Sherrill Farm.[19] Weyerhaeuser's own use of Sherrill Farm ended in 1987 when it last harvested a stand of trees on the property.[20] Thereafter, Weyerhaeuser leased portions of the Sherrill Farm property to Oklahoma State University which planted two research sites on the southern part of Sherrill Farm.[21]

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11. *Weyerhaeuser*, 510 F.3d at 1259 (10th Cir. 2007).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 1260.
17. Weyerhaeuser Co. v. Brantley, No. CIV–05-382-RAW, 2006 WL 2551486, at *3 n.5 (E.D. Okla. Aug. 31, 2006).
18. *Weyerhaeuser*, 510 F.3d at 1260.
19. *Id.* at 1259 n.1.
20. *Id.* at 1259.
21. *Id.* at 1260.

The relationship between Carl and the OSU researchers was strained. OSU claimed Carl's livestock damaged its research plantations.[22] But while OSU complained to Weyerhaeuser about the presence of Carl and his livestock, it never sought to have them removed from Sherrill Farm.[23] Instead, OSU built fences around its plantations and installed its own locked gate across the southern entrance to Sherrill Farm.[24]

Then, in 1998, Weyerhaeuser reached an agreement with the Oklahoma Department of Wildlife Conservation to include Sherrill Farm in a preserve called the Three Rivers Wildlife Management Area.[25] The agreement effectively opened Sherrill Farm to the public for hunting, fishing, and general recreation.[26] This development again put Carl Brantley at odds with other users of Sherrill Farm. Carl's gate sometimes prevented a state wildlife officer from entering the premises, and Carl ejected hunters when he found them on the land.[27]

Carl's longtime presence on Sherrill Farm eventually drew the ire of the Weyerhaeuser Company. In 2003, Weyerhaeuser had granted another landowner an easement across Sherrill Farm, but Brantley nonetheless refused that landowner access through his gate.[28] The following year, when Weyerhaeuser's lease with OSU expired, Weyerhaeuser decided to again put Sherrill Farm to use for mining gravel and raising timber as it had last done in 1987.[29]

Finally, in 2005, Weyerhaeuser sued two members of the Brantley family for trespass.[30] The complaint was amended in January 2006 to include Carl, marking the first time Weyerhaeuser had asserted its ownership rights against Carl Brantley.[31] The amended complaint for trespass sought ejectment and declaratory relief.[32] Carl asserted the affirmative defenses of adverse possession and, in the alternative, easement by prescription.[33]

The case was tried without a jury in the Eastern District of Oklahoma and the district court found in favor of Weyerhaeuser.[34] District court Judge Ronald White held that Carl's adverse possession claim failed because Carl had not proved that he had exclusive possession of Sherrill Farm.[35] Judge White cited instances in which hunters accessed Sherrill Farm undetected by Carl, and occasions in which Weyerhaeuser employees entered the premises for surveying purposes.[36] Judge White also rejected

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Weyerhaeuser*, 2006 WL 2551486 at *1.
32. *Weyerhaeuser*, 510 F.3d at 1260.
33. *Id.*
34. *Weyerhaeuser*, 2006 WL 2551486 at *8.
35. *Id.*
36. *Id.*

Carl's claim for prescriptive easement, holding that the requirements for a prescriptive easement are the same as those for adverse possession.[37]

Finding that there was, at best, "mixed possession" of Sherrill Farm, the district court held that the party with better title must prevail and found that Weyerhaeuser, the record owner, had better title.[38] The district court issued a permanent injunction against Carl Brantley, barring him from interfering with Weyerhaeuser's exclusive use and control of Sherrill Farm and awarded Weyerhaeuser costs and fees.[39] Carl appealed.[40]

III. BACKGROUND AND HISTORY OF THE LAW

The doctrine of adverse possession traces its origins to medieval England with primitive antecedents of the doctrine appearing as early as the thirteenth century.[41] Having roots in the concept of statutes of limitation, adverse possession is practically a legal method for transferring title of land from one person to another without or against the consent of the original owner, provided enough time has elapsed.[42] The doctrine has carried over, in one form or another, into every American jurisdiction.[43]

Generally, the law of adverse possession requires the would-be adverse possessor to show that his occupation of the premises at issue has been actual, open and notorious, exclusive, hostile, and continuous over a statutorily-specified time period.[44] Oklahoma's adverse possession case law reflects these general elements, requiring an adverse possessor to show that his possession was "hostile, under a claim of right or color of title, actual, open, notorious, exclusive, and continuous for the full statutory period."[45] In Oklahoma, the statutory period is fifteen years.[46]

Along with the elements of adverse possession, certain other legal principles have developed which courts use to analyze individual adverse possession claims. One such example is the rule that use or occupation of land with the permission of the record title holder can never ripen into adverse possession.[47] In *Zimmerman v. Newport*, the Oklahoma Supreme Court recognized that adverse possession cannot be based on permissive occupation and this is what is meant by the requirement that adverse possession be "hostile" to the record owner.[48]

Additionally, Oklahoma has recognized that the payment of property taxes, while not a controlling factor, does bear on an adverse possession

37. *Id.*
38. *Id.*
39. *Id.* at *9-10.
40. *Weyerhaeuser*, 510 F.3d at 1259.
41. Richard R. Powell, 16 Powell on Real Property § 91.01[1] (Michael A. Wolf ed., rev. vol. 2009).
42. *Id.* at [2].
43. *Id.* at [1].
44. *Id.* § 91.02.
45. Francis v. Rogers, 40 P.3d 481, 485 (Okla. 2001).
46. OKLA. STAT. tit. 12, § 93(4) (2000).
47. Zimmerman v. Newport, 416 P.2d 622, 629 (Okla. 1966).
48. *Id.*

claim.[49] In *Anderson v. Francis*, the Court rejected an adverse possession claim, noting that the claim was weakened by the claimant's failure to pay taxes on the property.[50]

The element of exclusivity has produced several rules for adjudicating the merits of an adverse possession claim. First, if two persons enter upon land, possession will be awarded to the one with better title.[51] However, an adverse possession claim can survive as to a *portion* of land even where another person occupies a different portion of a larger parcel.[52] Under this so-called "partial adverse possession" rule, if the record owner re-enters a part of the property, the "clock" is stopped only for that portion that is re-entered.[53] Thus adverse possession may work to carve up or split tracts into smaller parcels.

These elements, along with the way they have often been applied by courts have raised questions about the underpinnings of the doctrine as well as the ethical and moral justifications for it.[54] Many theories have been advanced to explain the purpose and rationale of adverse possession. The four chief rationales are: (1) to facilitate proving stale claims, (2) the government's interest in quieting title to property, (3) to punish the inefficient use of land, and (4) to preserve the peace.[55]

First, it is recognized that a need arises to limit the amount of time within which a person can bring an action of ejectment or otherwise assert property rights against an intruder.[56] Over time, the evidence needed to sustain such a suit becomes harder to obtain and potential witnesses die or forget.[57] The law of adverse possession provides a necessary time limitation in order to reduce the time and cost of litigating stale property claims.[58]

Second, it has been suggested that adverse possession developed in part to quiet title to land.[59] Even if lost evidence were not a problem, the transaction costs would severely impact the marketability of land if title disputes could arise seemingly from the ashes of ancient history.[60] Title searches would stretch back hundreds of years and would be prohibitively expensive.Adverse possession, then, provides a measure of market security by ensuring that a disposition of property will not be derailed or complicated by a long-lost claimant.[61]

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49. Anderson v. Francis, 57 P.2d 619, 622 (Okla. 1936).
50. *Id.*
51. Sears v. State Dep't of Wildlife Conservation, 549 P.2d 1211, 1213 (Okla. 1976).
52. Macias v. Guymon Indus. Found., 595 P.2d 430, 434 n. 8 (Okla. 1979).
53. *Id.*
54. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).
55. Merrill, *supra* note 7, at 1128-31.
56. Powell *supra* note 41.
57. Merrill, *supra* note 7, at 1128.
58. *Id.*
59. *Id.* at 1129.
60. *Id.*
61. *Id.*

Third, a socio-economic rationale has been offered, suggesting that adverse possession is meant to punish landowners who do not make efficient use of their land.[62] The "absentee landlord" or "passive owner" thereby cedes title to the adverse possessor who has been occupying and using the land in a manner undoubtedly more economically productive and beneficial to society.[63]

Lastly, the moral argument suggests that an adverse possessor is likely to become attached to the land over time and after a certain point, attempting to remove him from it could cause a violent disturbance of the peace.[64] This argument has been eloquently articulated by Oliver Wendell Holmes who wrote:

> A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.[65]

Adverse possession, then, serves the purpose of preventing outbreaks of violence by protecting property that has been held and treasured for a certain amount of time, even without prior legal title.

IV. THE INSTANT CASE

Carl Brantley appealed the ruling of the district court, essentially arguing that the district court's fact finding was clearly erroneous.[66] Specifically, Brantley argued that the district court erroneously found that his occupancy of Sherrill Farm was not exclusive for the duration of the statutory period,[67] that he had failed to establish partial adverse possession,[68] and that he had not met the requirements of an easement by prescription.[69] Although the Tenth Circuit indicated that Brantley's claim for a prescriptive easement may have had some merit, it concluded that the district court had not erred in its findings or application of the relevant law, ultimately holding that Brantley had no claim to Sherrill Farm.[70]

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62. Merrill, *supra* note 7, at 1130.

63. *Id.* at 1030-31.

64. *Id.* at 1131.

65. Holmes, *supra* note 54, at 477.

66. *Weyerhaeuser*, 510 F.3d at 1262.

67. *Id.*

68. *Id.*

69. *Id.* at 1263. Carl Brantley also challenged the grant to Weyerhaeuser of damages for trespass and reasonable attorney fees. *Id.* at 1268. Brantley won his challenge to the fees award, but these secondary issues are not the subject of this Note.

70. *Weyerhaeuser*, 510 F.3d at 1269.

A. Adverse Possession

The Tenth Circuit began its discussion with the outright adverse possession claim, noting that one of the elements of adverse possession in Oklahoma is exclusivity of possession.[71] While Brantley's claim was damaged by other factors such as his failure to pay property taxes on Sherrill Farm, his inconsistent demarcation of the boundaries of the land he was claiming, and the general incredibility of his testimony, the court found that the key defect in Brantley's claim was that his use or possession of Sherrill Farm had not been exclusive for fifteen years.[72] The court cited the numerous examples in the record of other parties making use of the contested land throughout the period Carl Brantley claimed to own it, concluding that the district court had not erred in finding Brantley's use not to be exclusive.[73]

B. Partial Adverse Possession

Brantley's claim to partial adverse possession provided the court an opportunity to discuss the exclusivity requirement in more detail. Since the partial adverse possession claim concerned only the portion of the land that Brantley had been using for grazing and farming activities, the key issue was the duration of the license Weyerhaeuser had issued to Carl Brantley's father in 1983.[74]

Since a license cannot ripen into title via adverse possession, determining the length and duration of the license granted to Brantley's father was a critical first step in determining whether Carl Brantley had exclusive possession of Sherrill Farm for fifteen years, as required by statute.[75] Since Brantley asserted his adverse possession defense in early 2006, he needed to demonstrate exclusive possession dating at least as far back as early 1991. However, the district court found that Carl's father had a grazing license from Weyerhaeuser that had not expired until late 1992.[76] While Brantley argued that his father had left Sherrill Farm by 1987, the court noted that other evidence suggested that the land was subject to a grazing license at least until July 1, 1992.[77] The court consequently ruled that the district court had not clearly erred in declining to find that Carl Brantley had maintained exclusive possession of Sherrill Farm for the requisite fifteen years.[78]

71. *Id.* at 1261. *See* Francis v. Rogers, 40 P.3d 481, 485 (Okla. 2001).

72. *Weyerhaeuser*, 510 F.3d at 1261. *See* OKLA. STAT. tit. 12, sec. 93(4).

73. *Weyerhaeuser*, 510 F.3d at 1261-62.

74. *Id.*

75. *Id.*

76. *Weyerhaeuser*, 2006 WL 2551486 at *3.

77. *Weyerhaeuser*, 510 F.3d at 1262-63.

78. *Id.* at 1263.

C. Easement by Prescription

Finally, the court addressed Brantley's prescriptive easement claim and denied the easement on the grounds that, under Oklahoma law, the requirements for a prescriptive easement are the same as for adverse possession.[79] However, the Tenth Circuit noted that the issue required a more nuanced analysis.[80]

The court began its discussion by suggesting that Oklahoma might not even recognize an easement for grazing purposes.[81] Traditionally, an easement is akin to a right-of-way. Here, Brantley's claimed easement encompassed not only access to the land, but also use of the land and its resources. The court noted that many jurisdictions which categorically deny a "grazing easement" instead consider the substantive claim under the doctrine of *profits à prendre* which the court described as "an easement 'plus'."[82] As common examples of profits include the right to enter land and remove from it resources such as oil, gas, game, or timber, the court suggested that the right to enter and graze might better fall under this umbrella.[83]

Turning to the merits, the court pointed out that regardless of whether it was truly an easement or a profit à prendre at issue, these types of servitudes should not be applied so as to operate as the functional equivalent of adverse possession.[84] Since the claimed easement would completely burden the servient estate and leave the title holder with an "empty fee," the claimant should be required to establish all the elements of adverse possession.[85]

The court then addressed the difficulty of requiring exclusivity in order to establish an easement by prescription. In an adverse possession analysis, "exclusivity" requires the adverse possessor to exercise exclusive domain over the premises.[86] However, since it is a right-of-way, a prescriptive easement is by definition non-exclusive.[87] The court crafted a solution by giving "exclusive" a different definition for easement purposes than it has for adverse possession purposes. For a prescriptive easement, a state that requires exclusivity requires that the claimant put the land to a different use than do others on the property.[88]

Unfortunately for Carl Brantley, the grazing license issued to his father again dealt the fatal blow to Carl's claim to Sherrill Farm. Since Carl's

79. *Weyerhaeuser*, 2006 WL 2551486 at *8 (citing Zimmerman v. Newport, 416 P.2d 622, 629 (Okla. 1966)).

80. *Weyerhaeuser*, 510 F.3d at 1263.

81. *Id.*

82. *Id.* at 1264 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 (2) & cmt. b. (2000)).

83. *Id.*

84. *Id.*

85. *Id.* (citing Burlingame v. Marjerrison, 665 P.2d 1136, 1140 (Mont. 1983)).

86. *Weyerhaeuser*, 510 F.3d at 1261.

87. *Id.* at 1265 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (2000)).

88. *Weyerhaeuser*, 510 F.3d at 1266.

use of Sherrill Farm was essentially identical to the uses permitted by the license (grazing), the district court correctly ruled that Carl's use was not exclusive.[89]

V. ANALYSIS

There is an unsettling dichotomy between the law of adverse possession as presented in the treatises and the law of adverse possession as applied by the courts. According to the hornbooks, the mental state of the adverse possessor is technically irrelevant to the merits of his claim.[90] The adverse possessor need only intend to possess the land; it matters not whether the adverse possessor acted in good faith, bad faith, or even apathy.[91] However, while this is what the law generally says, it is not reflected in the way it has been applied.[92]

In 1983, Richard Helmholz published a study in which he found that good-faith adverse possessors were far more likely to succeed in adverse possession claims, regardless of whether the jurisdiction required good faith or not.[93] His study suggested that courts prefer an adverse possessor who has inadvertently occupied the given land over one who has designed to obtain it nefariously via the law of adverse possession.[94] In fact, Professor Helmholz noted that courts tend so much to favor the good faith possessor that they may even find a bad faith possessor's claim lacking by stingily applying one or more of the statutory or common-law elements.[95]

Following the publication of Professor Helmholz's study, the academy has responded over time with various, sometimes diametrically opposed suggestions. Professor Helmholz himself suggested that if the law of adverse possession has indeed evolved to include good faith as an element, the treatises should reflect this change.[96]

In a 1985 article, Thomas Merrill suggested that good faith be required as a prerequisite in order to discourage coercive transfers of land and that bad faith adverse possessors be required to indemnify the record owner in order to succeed with their claim.[97] The following year, Richard Epstein proposed a bifurcated adverse possession system in which bad faith claimants would be required to survive a longer statute of limitations period than their good faith counterparts.[98]

More recently, Lee Anne Fennell has proposed that the law should actually require a claimant to have possessed the land in *bad* faith and be

89. *Id.* at 1266.
90. Powell, *supra* note 41, at § 91.05[2].
91. *Id.* at § 91.05[1].
92. Helmholz, *supra* note 4, at 332.
93. *Id.*
94. *Id.* at 342.
95. *Id.* at 344.
96. *Id.* at 358.
97. Merrill, *supra* note 7, at 1154.
98. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 685-89 (1986).

able to demonstrate this fact with documentation.[99] These opposing viewpoints, along with the traditional (if ignored) view that the adverse possessor's intent ought to be irrelevant, all share common features: they each focus on the mental state of the adverse possessor, not that of the record title holder. This tendency is not new. Oliver Wendell Holmes suggested "that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser."[100]

Adverse possession commentators have generally acknowledged that morality plays an integral role in this area of the law. It must be recognized that a reason is not the same thing as a justification. If a society seeks to be just, it may not be enough to offer pragmatic or utilitarian reasons as a justification for taking someone's property without his permission and conveying it to another. The resolution of such questions will largely depend upon the strength of entitlements and how our system of law wishes to assign and protect them. Thus the moral justification for a system of adverse possession is an important consideration, and this question generally focuses on the mental state of the adverse possessor.

What follows is a review of the various proposed adverse possession systems, their strengths and weaknesses, and their contributions to the larger moral question. I will then offer a defense for the older hornbook rule that the mental state of the claimant is irrelevant. In so doing, I will argue that adverse possession is the law's recognition of abandonment of real property and that the common law elements of adverse possession serve as a proxy for the record owner's subjective intent to abandon. If the law of adverse possession is viewed with both eyes on the record title holder, it then becomes possible to synthesize the traditional rationales, the existing case law, and a moral justification for this oft-maligned doctrine.

A. Competing Theories of Adverse Possession

1. Richard Helmholz – Evidence of Bad Faith Bars the Claim

Professor Helmholz's 1983 article was more an inquiry into the practical application of the doctrine of adverse possession than a theory of how it should work. Helmholz notes that the the traditional hornbook approach, under which the claimant's mental state is irrelevant, is normally thought of in terms of the accrual of a cause of action.[101] In other words, under the objective standard test, the statute of limitations begins to toll as soon as the record property owner has a cause of action (usually for trespass) against the potential adverse possessor.[102]

99. Lee Ann Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 Nw. U. L. Rev. 1037, 1038 (2006).

100. Holmes, *supra* note 54, at 477.

101. Helmholz, *supra* note 4, at 334.

102. *Id.*

Helmholz observes that in many cases, the facts do not lend themselves to such an analysis.[103] Since a great many adverse possession cases arise from boundary disputes between neighbors, it is often absurd to ask when neighbor *A* could have first sued neighbor *B* for ejectment as a result of neighbor *B* mowing a portion of neighbor *A*'s yard.[104] This is because, by and large, living in a community means living in peace with neighbors, not exercising every legal right at the earliest opportunity.

However, Helmholz hits on another point that raises interesting issues. Since it is true that adverse possession cases commonly arise in the context of boundary disputes, the parties are often unaware of the true boundary line until much later, sometimes after the statute has tolled and the adverse possession claim has fully ripened.[105] Helmholz notes that even if the accrual of a cause of action for ejectment is theoretically possible in such a scenario, courts often refuse to entertain it.[106] Instead, the courts seem to favor the unwitting encroacher, awarding contested land to the party who had mistakenly used his neighbor's land as his own for the statutory limitations period.[107] Thus in a case where the encroaching neighbor knows that he is using land not belonging to him, judges often find against the encroacher, holding that his possession was not "hostile."[108]

2. Thomas Merrill – Limited Indemnification

Thomas Merrill took Professor Helmholz's study and synthesized it with an influential article written by Guido Calabresi and Douglas Melamed in 1972.[109] The Calabresi and Melamed article (hereinafter "the Cathedral") describes a paradigm for assigning entitlements through a property law system and describes how these entitlements may be subsequently protected via "property rules," "liability rules," or complete inalienability.[110] In short, property is protected by a property rule when a landowner sues for ejectment and the encroacher is ordered to vacate the premises.[111] Property is protected by a liability rule when a landowner sues an encroacher for damages and receives a monetary award.[112]

Employing the Cathedral paradigm, Thomas Merrill suggested a modified adverse possession scheme which would use an *ad hoc* approach as it does now when the adverse possessor acts in good faith, but a bad faith adverse possessor would be required to indemnify the record owner in order to receive title to the disputed land.[113] According to Merrill, such a

103. *Id.* at 335.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 341.
108. *Id.* at 344.
109. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
110. *Id.* at 1092.
111. *Id.*
112. *Id.*
113. Merrill, *supra* note 55, at 1154.

system would continue to serve the historical purposes set forth for adverse possession[114] but would be morally superior to the hornbook approach by not rewarding the claimant who set out to acquire land he knew he did not own, a transaction Merrill refers to as a "purely coercive transfer."[115]

Merrill argues that such "purely coercive transfers" would diminish the incentive to put land to efficient use and would result in over-investment in security measures to protect the land from potential encroachers.[116] Such a concern tacitly likens an adverse possessor to a common thief, able to steal away with personalty in the blink of an eye.

Merrill identifies this moral concern as an explanation for the results of Helmholz's study.[117] According to Merrill, the courts have tended to favor the good faith adverse possessor because of the unstated desire to discourage these purely coercive transfers of property.[118] Merrill makes the point explicitly when he states that the bad faith claimant is "clearly more culpable or blameworthy and hence more deserving of punishment" than his good faith counterpart.[119]

Properly understood, the hornbook approach does not require over-investment in security measures. Indeed, such a "purely coercive transfer" as Merrill imagines requires the extended inattention or apathy on the part of the record owner; this is, after all, the purpose of the lengthy statute of limitations. Thus a landowner who makes efficient use of his land (or at least checks on it every few years) need not fear an adverse possession claim. If a landowner is concerned about the prospect of losing his land to adverse possession, he need not overspend on security measures. He may simply eject the encroacher. Adverse possession does not transfer title overnight.

What Merrill implies without arguing is that the ownership rights of a title-holder deserve greater weight than the policy concerns embodied by the traditional rationales for the doctrine of adverse possession. In other words, regardless of the socio-economic benefits that may be realized by allowing land to pass to the hands of a more proactive steward, the right of absolute ownership trumps. This is the source of the moral outrage engendered by a knowing trespasser taking title via adverse possession.[120]

This moral question can be explored using the factual framework of *Weyerhaeuser Co. v. Brantley*. Carl Brantley made use of farm land owned by a lumber company in order to graze his livestock.[121] Suppose that Weyerhaeuser did not make any use of the land for fifteen years but Brantley did. A system which examines the circumstances of Brantley's use and consequently awards him title via adverse possession necessarily values the

114. *See supra* discussion beginning on page 6.
115. Merrill, *supra* note 55, at 1134.
116. Merrill, *supra* note 55, at 1135.
117. *Id.*
118. *Id.*
119. *Id.*
120. Merrill, *supra* note 55, at 1130.
121. *Weyerhaeuser*, 510 F.3d at 1259.

policy factors favoring Brantley's continued ownership above the already-established ownership by Weyerhaeuser. Conversely, a system which makes the same inquiry and declines to vest title in Brantley (as the Tenth Circuit did) values the established ownership rights above any continued beneficial use by Brantley.

These kinds of entitlement assignments are a large part of the Cathedral paradigm[122] from which Merrill borrows heavily. However, the introduction of the adverse possessor's subjective intent as a "wildcard" capable of swinging the balance seems strikingly out of place when discussing how to establish and protect property entitlements. Society places a value on the right of a landowner to hold and use (or not use) his land as he pleases. As a means of balance, value is also placed on the policy issues favoring adverse possession. But subjective intent does not bear on any of these issues. The traditional rationales for adverse possession apply with just as much force regardless of whether the adverse possessor knew from the start that the land was not his. In like manner, the strength of the record owner's rights to his own land cannot seriously be considered somehow dependent upon the motives of an encroacher.

The intent of the encroacher has no bearing on the assignment or protection of legal entitlements. Why, then, is subjective intent such a powerful modifier in adverse possession cases? Why is it able to tip the balance? And why does it seem that concern for the adverse possessor's intent has arisen only recently in a legal doctrine with a medieval pedigree?

3. Richard Epstein – Two-Tiered Adverse Possession System

One possible answer to these questions is suggested by Richard Epstein.[123] Writing about statutes of limitations in the context of the principle of "first in time" and adverse possession, Epstein argues that adverse possession does not exist to promote the efficient use of land.[124] Rather, the purpose of the doctrine is to minimize administrative and transaction costs in property transfers by setting a time period beyond which no claims of superior title can be made.[125]

Though Epstein never makes the point explicitly, one might read Epstein's rejection of Thomas Merrill's thesis as a suggestion that the Cathedral approach is an anachronistic application of the relatively recent "law and economics" movement. In other words, the doctrine of adverse possession does not exist to facilitate economically efficient transfers of land, so to analyze its ability to do so is to miss the point.

Nonetheless, Epstein argues that subjective intent is still a relevant consideration. s a means of extinguishing stale claims and inspiring confidence in both the buyer and seller of land, everyone is equally likely to

122. Calabresi, *supra* note 109, at 1093.

123. Epstein, *supra* note 98.

124. Epstein, *supra* note 98, at 677 (citing Henry Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918)).

125. Epstein, *supra* note 98, at 678.

benefit from the doctrine of adverse possession so long as it is not used in bad faith as a means to acquire land; in a legitimate boundary dispute, the chances of winning or losing on an adverse possession claim are roughly equal. However, Epstein recognizes that in the real world, this roughly equal playing field is skewed by the fact that some "scoundrels" will try to abuse the doctrine to obtain land they know they do not own.[126] However, Epstein recognizes that in the real world, this roughly equal playing field is skewed by the fact that some "scoundrels" will try to abuse the doctrine to obtain land they know they do not own.[127]

As Professor Helmholz observed, courts which desire to punish the bad faith adverse possessor typically do so by strictly applying one or more of the hornbook elements.[128] The problem with this approach, according to Epstein, is that it raises the possibility that the record owner maintains a virtually endless right to recover the property.[129] If the courts will narrowly apply one or more elements in order to find that a valid adverse possession did not occur, it does not matter how long the occupation has been occurring. If this is so, it almost entirely defeats the purpose of the doctrine – the extinguishing of stale claims.

For example, suppose that a man desires to purchase a tract of land. Under normal circumstances, the fact that the current owner has held title for 40 years would instill confidence and assure the purchaser that the title is clear. However, suppose the current owner had acquired his title 40 years ago via adverse possession and as soon as the current transaction is completed, the penultimate owner brings suit, claiming superior title. Since the limitations period is but one element of adverse possession, if the court is inclined to narrowly apply one or more of the other elements in order to find that there had not been adverse possession, the fact that the land had been in the hands of the immediate seller for 40 years becomes irrelevant. For this reason, the apparent judicial trend of inconsistently applying the elements in order to favor good faith adverse possessors actually works contrary to one of the very purposes of adverse possession. If the doctrine is not applied consistently, it undermines the very confidence the doctrine exists to instill.

Epstein suggests instead that those who try to gain land in bad faith via adverse possession be required to withstand an extended statute of limitations.[130] The purpose of the doctrine then is still served and the task of the "scoundrel" becomes more difficult (though still not impossible).

Although Epstein rejects Thomas Merrill's proposed solution, the two authors seem to be in agreement that the law of adverse possession should be designed to discourage its use as a means of obtaining property one knows one doesn't own. In other words, both of these authors concur that

126. Epstein, *supra* note 98, at 679.
127. *Id.*
128. Helmholz, *supra* note 4, at 344.
129. Epstein, *supra* note 98, at 686.
130. Epstein, *supra* note 98, at 687.

the merits of an adverse possession claim depend, at least in part, on the motives of the claimant, and that unwitting encroachers are to be preferred. These assumptions are not shared by all.

4. Lee Anne Fennell – Efficient Trespass

One of the most recent (and certainly one of the most interesting) contributions to the landscape comes from Lee Anne Fennell, who takes up the task of defending the universally reviled "bad faith" adverse possessor.[131] Arguing that "bad faith" is an inaccurate and pejorative term in this context, Professor Fennell suggests that the goal of adverse possession should be to transfer land to a party who values it more than the record owner,[132] and that courts should require a claimant to produce documented proof that he began his occupation of the land with the knowledge that he was not the rightful owner.[133]

More so than earlier articles, Professor Fennell's thesis addresses the issue of morality self-consciously. Fennell notes the propensity of legal scholars to look with disfavor on the "bad faith" claimant[134] and argues that if fault is to be assigned, it must be assigned to the law, not the claimant.[135] The law states that adverse possession is one mechanism through which property may be acquired,[136] and it is therefore inaccurate to consider someone a "thief" who is consciously making use of such a legal mechanism.[137]

Fennell's article is unique and fascinating from beginning to end; the foregoing summary hardly does it justice. One of the most notable aspects of Fennell's thesis is the moral argument briefly outlined above. Unfortunately, it is predicated almost entirely on an improper arrangement of horse and cart.

While acknowledging that "no legal doctrine can turn a moral wrong into a right," Fennell appears willing to side-step the complaint that "bad faith" adverse possession is immoral by classifying values rooted in an "external normative framework" as "private moral definitions."[138] In other words, Fennell attempts to vindicate the moral character of the bad faith adverse possessor by appealing to the legality of the behavior. If there remains any immorality, she argues, it lies in the system that unjustly transfers ownership, not in the man who seeks to acquire the property.[139]

For one engaged in the task of proposing an adverse possession scheme that serves practical purposes without the appearance of immorality, it is hardly a comfort to vindicate the players by implicating the system.

131. Fennell, *supra* note 5.
132. Fennell, *supra* note 5, at 1040.
133. Fennell, *supra* note 5, at 1038.
134. Fennell, *supra* note 5, at 1048.
135. Fennell, *supra* note 5, at 1056.
136. Fennell, *supra* note 5, at 1056.
137. Fennell, *supra* note 5, at 1044.
138. Fennell, *supra* note 5, at 1054.
139. Fennell, *supra* note 5, at 1056.

It is therefore necessary to consider whether it is possible to have our proverbial cake and eat it too.

B. A Humble Suggestion – Imputed Abandonment

Before I offer my own view, let us pause to take stock of the discussion up to this point. The treatises say that a case for adverse possession is made when certain objective elements are satisfied and that the subjective intent of the claimant is irrelevant.[140] The traditional purposes of this doctrine include helping prove stale claims, quieting title to property, punishing the inefficient use of land, and preservation of the peace.[141] Evidence indicates that, the hornbook law notwithstanding, courts have a tendency to give great weight to the subjective intent of the adverse possessor.[142] Thomas Merrill suggests that claimant who knew the land was not his should be required to indemnify the record owner by paying him fair market value in order to receive title.[143] Richard Epstein agrees that the law should not favor the knowing adverse possessor but suggests that the answer lies in lengthening the statute of limitations for the bad faith claimant.[144] Lee Anne Fennell contends that "bad faith" claimants are not to be discouraged but rather *required* since the goal of adverse possession should be to move property into the hands of a more valuing owner, a fact substantiated by an affirmative act to acquire it.[145]

In contrast to these viable and capable suggestions, I propose leaving the doctrine of adverse possession alone. In my view, the hornbook formulas may be retained, the proposed purposes of the doctrine served, and the morality of the system defended by shifting our analytical focus from the adverse possessor to the record owner. I term this approach "imputed abandonment."

It is generally true that at common law, real property (specifically an estate in fee simple) cannot be abandoned.[146] However, where this principle is stated, it is almost always immediately followed by the observation that real property *can* be lost via adverse possession.[147] Thus, while there may not be a formal doctrinal link between abandonment and adverse possession, there seems at least to be a conceptual one. Indeed, it could be said that adverse possession is *how* property is abandoned.

To begin the task of building our foundation, I note at the outset that the argument that follows is not an attempt to extend the concept of abandonment to include real property. Rather, I am seeking to characterize

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140. Powell, *supra* note 41 at § 91.05[2].

141. *See supra* note 55 and accompanying text.

142. *See supra* note 4 and accompanying text.

143. *See supra* note 113 and accompanying text.

144. *See supra* note 130 and accompanying text.

145. *See supra* note 132 and accompanying text.

146. 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 5 (2008).

147. *See e.g.*, Judon Fambrough, *Abandonment of Property: A Sticky Issue for Both Real and Personal Property* (1999), 13 LETTER OF THE LAW 4 (Sept. 1999), available at http://recenter.tamu.edu/pdf/1334.pdf.

adverse possession as a record owner giving up his rights rather than an encroacher usurping them.

Generally, property that is subject to abandonment is considered to be abandoned when the owner intends to abandon it and that intention is manifested by clear acts or omissions.[148] Once abandoned, such property may be acquired by the first finder who reduces it to possession.[149] It is also important to note that once property is abandoned, the rights and interests of the former owner are entirely extinguished and the former owner, should he change his mind, has no right or claim to the property over the man who subsequently acquires it via the right of finds.[150]

Unlike in the case of adverse possession, it is relatively rare for someone to raise a moral objection to this abandonment/finding scheme when applied to personal property. Not only does the law not inquire into the mental state of the finder, it seems intuitive that it should not matter. If a man owns a pocket watch that he manifests an intent to abandon, the first man to pick it up off the sidewalk and put it in his pocket becomes the new rightful owner of the watch. But suppose the finder had known of this watch and had desired it for a long time. Suppose further that he so wanted the watch, that he followed the original owner around in the hope that one day he would abandon the watch. While we might be concerned about the mental stability of such a person, we would not normally condemn his actions as a form of theft any more than we would if he were a stranger that just happened to be the first to chance upon an abandoned watch.

For the same reasons, the subjective intent of an adverse possessor ought to be legally irrelevant and morally unassailable. Before the applicable statute of limitations runs, a landowner may protect against the possibility of adverse possession merely by asserting his legal rights. He may eject or evict a trespasser or he may negotiate a usage agreement, since permissive possession will never ripen into title by adverse possession.[151] But when land is occupied and used in a manner pervasive enough to satisfy the elements of adverse possession, and the record owner of said land does nothing about it, one of two inferences can be drawn. First, we might conclude that the record owner was aware of the encroachment and elected to do nothing about it. Second, we might conclude that the record owner was never aware of the encroachment at all. We now consider these in turn.

1. The Apathetic Landowner

If we suppose that the record owner knew of the encroachment and never asserted his rights, whatever his reasons, we may deduce that he did not desire the land enough to do what was necessary to protect and retain

148. 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 7 (2008).
149. *Id.* at § 24.
150. *Id.* at § 26.
151. Helmholz, *supra* note 4, at 342.

it. In some situations, this can be as easy as talking with the encroacher and reaching even an informal agreement in which the owner allows the encroacher to use the land for whatever purposes the parties find agreeable.[152]

In other situations, the owner might need to resort to legal process. Professor Epstein suggests that some owners might not initiate suit against an encroacher because of cost concerns.[153] While it is certainly true that a trespass suit carries a significant price tag, a summary eviction proceeding is far less costly in terms of money and time and will safeguard the premises against an adverse possession claim. In fact, the relative speed and ease with which a landowner may make use of the various statutory eviction proceedings is one of the reasons for the majority rule that landlords may not use self-help measures to remove tenants in default.[154]

If the statute of limitations expires and the record owner has demonstrated an apathy toward the property as manifested by his inaction, we may impute to him an intent to abandon the property. This idea is not novel.[155] Oliver Wendell Holmes wrote, "if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."[156] Indeed, the concept is immortalized in one of the maxims of equity: *vigilantibus non dormientibus aequitas subvenit.*[157]

This is not to say that the purpose of adverse possession is to punish dormant owners. Rather, the point is that the doctrine of adverse possession cannot be implicated as unjust for taking the same attitude toward the property as does its owner of record. Similarly, we cannot fault the adverse possessor, regardless of his intentions and motives, because the record owner had ample time and opportunity to prevent the transfer had he desired to do so.

Suppose John is walking down a road when he encounters a man sitting at a table. On the table is a twenty-dollar bill. The man looks at the bill and looks at John. Without a word, John approaches the table and picks up the bill. The man takes no action and says nothing. He merely smiles. Even as John walks away, the man never raises a protest.

Just as we would not inquire into John's subjective intent or that of the finder of abandoned personalty, so ought we not consider the subjective intent of the adverse possessor where the record owner has failed to assert his rights. Through his knowing inaction, abandonment of the property is imputed to him and title passes to the possessor.

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152. While informal agreements are certainly sufficient to create a license, the wise attorney always counsels his client to "get it in writing."

153. Epstein, *supra* note 98, at 675.

154. 49 AM. JUR. 2D *Landlord and Tenant* § 840 (2008).

155. Indeed, the concept of ratification by silence has a biblical antecedent. Numbers 30:1-16 provides that in certain cases, a legal right to cancel or overrule the vow of another may be lost through knowing silence.

156. Holmes, *supra* note 54, at 476.

157. "Equity aids the vigilant, not those who slumber on their rights." This phrase is typically used in connection with the equitable doctrine of laches, equity's version of the statute of limitations, of which adverse possession is a type.

2. The Ignorant Landowner

Let us now consider the landowner who endured the limitations period without being aware of the presence of the adverse possessor. At first blush, one might expect an analogy between the unknowing landowner and the owner of mislaid (rather than abandoned) personal property. Instead, we will see that ignorance of an adverse possessor is another situation in which we can impute an intent to abandon.

At common law, there is a presumption that a landowner is aware of the state of his land. This is one of foundations for the concept of quasi in rem jurisdiction, whereby a court could obtain personal jurisdiction over a defendant by executing a writ of attachment against the defendant's land located within the jurisdiction.[158] If the court attached the land, the absent defendant would soon appear to find out why his land had been attached to a judicial proceeding, at which point his personal appearance would be entered and the suit underway.[159]

On a more pragmatic level, when one considers the elements an adverse possessor must satisfy, it is difficult to imagine how a non-apathetic landowner could be ignorant of such activity taking place on his own land for six years or more. To put it another way, the elements of adverse possession serve as a proxy for actual notice to the owner of record.[160] This is no small consideration. Indeed, Powell informs us that there can be no adverse possession without actual or constructive notice to the record owner.[161]

The proxy function of the elements of adverse possession ensure that the ignorant landowner has no excuse for his ignorance. An adverse possessor must have "actual" physical possession of the property which is consistent with the way an owner would possess it, taking into consideration the nature of the property.[162] The "open and notorious" requirement is perhaps the most noteworthy in this regard, as it requires the possession to be so obvious that a reasonably prudent landowner would have to know of it.[163] Possession must also be "hostile," which means that it must be a claim as against the world.[164] Another requirement that was central to the title case is "exclusivity," which requires the possessor to possess the land to the exclusion of all others, even the record owner.[165] Since the right to exclude is perhaps the most fundamental feature of property law, the exercise of this right is often one of the most effective ways of identifying competing

158. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.2 (4th ed. 2005).

159. *Id.*

160. Merrill, *supra* note 55, at 1142.

161. Powell, *supra* note 41, at § 91.02.

162. *Id.* at § 91.03.

163. *Id.* at § 91.04[1].

164. *Id.* at § 91.05[1]. It bears mentioning that under the older "Maine view," the hostility requirement was not considered satisfied unless the adverse possessor intended to dispossess the true owner. *See, e.g.*, Preble v. Maine Cent. R.R., 27 A. 149 (Me. 1893). Professor Fennell could therefore be considered a proponent of the Maine view, at least in this very limited respect.

165. Powell, *supra* note 41, at § 91.06.

property claims. Finally, adverse possession must be "continuous," meaning that the possessor must exercise "palpable and continuing acts of ownership" consistent with the nature of the property for the duration of the statutory period.[166]

Clearly, these elements are intended to ensure that the activity of the possessor be sufficient to put a reasonably prudent landowner on notice that someone is staking a claim to his land. Suppose X owns a parcel of land and Y subsequently takes possession of it. Y builds a fence around the parcel, erects structures, and cultivates the land. He occupies the land continuously and treats it as his own. He holds it out as being his and everyone in the neighborhood believes it is his. He even guards against trespass by ejecting encroachers. Suppose this situation continues for fifteen years, at the end of which X learns for the first time that Y is in possession of the land. Would we not impute the same apathy to X as we would to the owner who knew of the trespass and chose to do nothing? The abject disinterest in the property that would be required for the owner not to know of the adverse claim supports the imputation of an intent to abandon.

Taken together, the common law elements of adverse possession amount to conduct that would put even a minimally conscientious landowner on notice of such activity. In the case of the knowing landowner, we can infer an intent to abandon the property from his failure to exercise his rights. In the case of the unknowing landowner, we can infer an intent to abandon the property from his complete ignorance of what is taking place on his land. This inference is strengthened by the fact that the various limitations periods are codified in statute. It does not strike this author as too burdensome a task for an absentee landowner concerned by the spectre of adverse possession to check in on the land at least once in a fifteen-year period. Once again, I note that if one views the transfer from this "imputed abandonment" perspective, inquiry into the subjective intent of the adverse possessor seems out of place. If the landowner is so unconcerned about his land that he is unaware of the possession, why should it matter what the possessor intended? Through his extended disinterest, abandonment of the property is imputed to him and title passes to the possessor.

3. The Case for Imputed Abandonment

There are numerous advantages to this approach, in my opinion, over the other approaches summarized in section V-A *supra*. First, the imputed abandonment paradigm can accommodate any of the proposed purposes ascribed to the doctrine of adverse possession. If one shares the opinion of Professor Epstein that adverse possession exists to eliminate remote claims, the imputed abandonment approach fits the bill.[167]

166. *Id.* at § 91.07[1].

167. In fact, it may even do so more effectively as there is one uniform statute of limitations, removing the need of land purchasers to inquire into the possessor's state of mind to determine whether the *right* statute of limitations has expired yet.

On the other hand, if one agrees with Professor Fennell that adverse possession should be designed to facilitate efficient transfers of property where market forces are ineffective, the imputed abandonment paradigm works just as well. In fact, it is not at all difficult to see the conceptual similarity. Professor Fennell's efficient trespass model is centered around the goal of transferring land to a higher-valuing owner where a market transaction is not available.[168] Under the imputed abandonment scheme, this is *necessarily* what is happening; we impute abandonment because it is evident that the record owner places a very low valuation on the property. Where the imputed abandonment model is better, I believe, is in the fact that it does not mark a distinction between the good and bad faith possessors. The efficient trespass model seems to disadvantage the inadvertent encroacher who would have made the same overtures as his "bad faith" counterpart had he only known the land was not his to begin with. The imputed abandonment model can serve the purpose of facilitating such transactions without marking such a distinction.

A second advantage of the imputed abandonment model is its relatively low cost of adjudication and lesser risk for abuse. Professor Helmholz recognized that an inquiry into a party's subjective intent requires much more judicial resources than would an analysis based on objective criteria.[169] Furthermore, where subjective intent is an element, there is always the possibility (perhaps even the probability) that mistakes will be made. In fact, Professor Fennell points out that a system that treats "good faith" adverse possessors more favorably than those who act in "bad faith" actually encourages guile and deceit.[170] If someone desires to acquire land and is not sure whether the owner would be willing to sell it, why risk making a purchase offer which could later be used as evidence of bad faith when he can simply take possession and feign ignorance later, knowing that the law will be lenient? Under the imputed abandonment approach, there is no incentive to maintain this sort of plausible deniability.

A third advantage is a pragmatic one: it requires the least change. Imputed abandonment, unlike the other proposals discussed here, is not a suggestion for how to modify the law of adverse possession. The hornbooks and treatises already teach the elements and remedies. The advantage of this approach is exactly that: it is an *approach*, not a systematic overhaul.

Lastly, and perhaps most importantly, I believe the imputed abandonment paradigm rescues the doctrine of adverse possession from charges of immorality. As the foregoing discussion has indicated, the courts are concerned about sanctioning a form of theft. Although the objective elements focus on the *conduct* of the adverse possessor, by remembering that these merely serve as a proxy for actual notice to the record owner, the overall focus remains on the inaction of the record owner and the conclusions that

168. Fennell, *supra* note 5, at 1064.
169. Helmholz, *supra* note 4, at 357.
170. Fennell, *supra* note 5, at 1072.

can be drawn from it. Even where the adverse possessor *is* acting in bad faith, he cannot profit from it apart from the implied consent of the record owner. Adverse possession still remains a time consuming, difficult, and extremely risky way to set out to acquire land.

4. Back to *Weyerhaeuser Co. v. Brantley*

We shall now return to our case to apply the thesis. The Tenth Circuit held that Carl Brantley had failed to make out a case for adverse possession primarily because he shared use of the land with other parties, including his father who actually had a grazing license from the record owner, the Weyerhaeuser Company.[171] According to the court, Brantley therefore failed to establish the element of "exclusivity."

The exclusivity element requires a claimant to hold the claimed land as the sole possessor to the exclusion of all other parties, including the record owner.[172] This requirement is met when the adverse possessor essentially treats the land the way a landowner would, even to include ejecting the record owner himself.[173] It is not difficult to see how this element meshes with the imputed abandonment approach. If an adverse possessor co-exists on the land with the record owner, or with licensees or invitees of the record owner, this behavior could not be said to put the record owner on notice of conduct inconsistent with the record owner's rights. In other words, non-exclusive possession does not say to the world "this is mine." Such a declaration is necessary to put the owner on notice of the rival claim. Without it, we could not infer from the record owner's inaction that he does not intend to enforce his rights.

In *Weyerhaeuser*, the record owner had made use of its own land in a manner consistent with a non-apathetic landowner. Weyerhaeuser granted licenses to numerous third parties, including to Carl Brantley's father for grazing purposes, and performed upkeep on the premises.[174] Thus the decision of the court is consistent not only with the hornbook law but the imputed abandonment principle developed in this Note.

VI. CONCLUSION

The doctrine of adverse possession is a fertile field for legal scholarship. With the evolution of Western civilization over the past five hundred years, the advent of trends such as the law and economics movement, and deeper inquiries into issues of legal ethics, adverse possession is ripe for controversy. But sometimes the simplest approach is the best.

Viewing adverse possession as an application of an imputed abandonment paradigm breathes new life into the treatises and frees the judiciary from complicated ethical questions. The imputed abandonment approach

171. *Weyerhaeuser*, 510 F.3d at 1262-63.
172. *Id.* at 1261; Powell, *supra* note 41, at § 91.06.
173. Powell, *supra* note 41, at § 91.06.
174. *Weyerhaeuser*, 510 F.3d at 1261-62.

is broad enough to encompass the various asserted objectives of adverse possession, the old and the new. It requires fewer judicial resources because it is based on objective criteria. It does not invite judicial manipulation to avoid the appearance of immorality. Last but not least, it is firmly rooted in established principles of law and equity.

> English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it.[175]

This is the backbone of imputed abandonment. By returning to the roots of the doctrine of adverse possession, we might avoid the uncertainties and ambiguities that have since developed. There is elegance in its simplicity and justice in its history.

175. JAMES B. AMES, *The Nature of Ownership*, *in* LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 192, 197 (1913).