

# Adverse commoning: Tracing contested legal geographies of the urban commons

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## Abstract

Under threat of enclosure in rapidly gentrifying cities, some urban commoners are turning to legal tactics to ward off dispossession. In this article, I explore the contested legal geographies of urban commoning, considering some of the challenges, stakes, and opportunities that emerge in the effort to gain legal recognition. Specifically, I examine the use of the doctrine of adverse possession by Philadelphia gardeners to claim title to the community farm they cultivated as an urban commons for decades. In the context of a neoliberal settler colonial city, I argue that the gardeners' adverse commoning, involving an il/legal counterclaim to property, facilitates consideration of the ways urban commoners are both enrolled in normative property regimes and have the potential to resist these regimes through errant performances of proprietary continuity, exclusivity, notoriety, and hostility.

## Keywords

Property, adverse possession, urban commons, performativity, squatting, legal geography

When gardeners arrived in early 2016 to find themselves locked out of the Philadelphia community farm that they collectively cultivated for decades, they were stunned. Started in 1988, La Finquita represented the efforts of four generations of neighbors who cleared the site of a defunct tire treading company of debris, remediated contaminated soil, and planted and tended crops. The farm not only provided an important source of fresh food and green space in the post-industrial landscape of South Kensington, but also served as a community gathering place. Due to the proliferation of abandoned properties in the area, limited

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resources, and a lack of clarity over the ownership of the land, the gardeners had not initially sought legal title. However, in recent years, fearing displacement due to accelerating real estate development given their proximity to one of the top ten so-called “hipster flipping” zip codes in the U.S. (Blomquist, 2016), the gardeners of La Finquita began conversations about pursuing legal ownership. Now it was clear from the appearance of a new lock and no-trespassing sign that a developer had already obtained the title from the owner of record’s remaining beneficiaries. The gardeners, as put by one volunteer, “needed to find a way to assert their rights immediately.” But what were their rights without legal title to the property? Did decades-long collective investment of time, energy, and resources merit legal recognition of their stake in the land and its future? Provoked by these questions, and supported by pro bono legal advocates, the gardeners filed a quiet title complaint in March 2016 alleging that they had acquired title to the property by adverse possession.

Long seen as an archaic “legal loophole” (Finchett-Maddock, 2016: 9), adverse possession is a contested legal doctrine – alternatively considered to be an elusive means of asserting “squatters’ rights” (Dobbz, 2012; Gardiner, 1997), a way of “legalizing theft” (Sipe, 2014: 853), a justification for colonial appropriation (Peñalver and Katyal, 2010), or simply “a necessary evil” (Swanson, 2011: 334) to clear title and adjudicate property line disputes. Despite nuances across state laws, the standard requirements in the U.S. to pursue title under adverse possession include “actual” possession of property that is open and notorious (easily visible and/or knowable), exclusive (controlled by the adverse possessor), hostile or adverse (used without permission from the owner of title), and continuous for a statutorily designated time period (which varies by state, but the average across 51 U.S. states is about 14 years) (Berkman, 2009; Black, 1979/1891: 49). While adverse possession has occasionally been utilized in U.S. cities by “squatters” seeking title to buildings and single-family homes (Dobbz, 2012; Starecheski, 2016; Vasudevan, 2017), or by homeowners to acquire adjacent side lots, it has rarely been successfully used to preserve forms of collectively managed open land, including forms of urban commons such as community farms and gardens.<sup>1</sup>

In examining a localized case of adverse possession, this paper brings the burgeoning literature on urban commons into conversation with scholarship on legal geographies of property and legal studies of adverse possession in the U.S., in order to consider some of the seeming contradictions, political stakes, and possibilities of tactically drawing on property law to ward off enclosure in a neoliberal settler colonial city. Given recent efforts to categorize and define “urban commons” in relation to their degree of compatibility with or autonomy from capitalism and the state (Eidelman and Safransky, 2020; Huron, 2018; Martínez, 2020a) – including property law (Marella, 2019) – I argue that tracing the contested legal geographies of urban commons allows for consideration not only of how urban commoners regularly navigate and become enrolled in processes of enclosure, but how state and market actors are also forced to negotiate commoners’ claims to urban space.

To trace the contested legal geographies of La Finquita, I draw on participant observation as a volunteer at the farm between 2016 and 2018, including a total of 28 public workdays, workshops, and meetings. I also analyzed court documents, attended legal trainings and activist workshops related to garden preservation in Philadelphia, and conducted 31 formal qualitative interviews with gardeners, other South Kensington residents, lawyers, developers, and city officials.<sup>2</sup> Building on this research, I consider La Finquita gardeners’ use of adverse possession to ward off enclosure. Although theoretically the doctrine has been taken up in recent years as a means of pursuing social justice outcomes, considering the details of a specific case – including “the micro-geographies of legal reasoning”

(Jepson, 2012: 622 quoted in Delaney, 2015a: 100) – offers some complicating insights into the practicalities and stakes of this legal tactic.

In particular, I examine the gardeners' *adverse commoning*, or their affirmation of collective possession and subjectivity while seeking legitimacy through property law, which, in the U.S., is premised on an individual exclusive owner with absolute control (Singer, 2000) and grounded in present "histories of conquest and slavery" (Park, 2021: 5). I suggest that a lens of adverse commoning holds space for tactical intervention in processes of enclosure, while acknowledging important critiques of urban commons in the context of ongoing dispossession and "racial banishment" in settler colonial cities (Coulthard, 2014; Fortier, 2017; Roy, 2017). In other words, by making il/legal counterclaims to urban space – claims that both mobilize and subvert legal norms – commoners are forced to grapple with the ways that commoning is *adverse* to, as well as enrolled in, hegemonic property regimes. Before turning to the case of La Finquita and how gardeners' adverse commoning shifted notions of proprietary continuity, exclusivity, notoriety, and hostility, I first briefly outline recent scholarship on urban commons and adverse possession in order to consider how their convergence raises critical questions of the legal geographies of urban commons. Finally, I conclude by suggesting some of the broader political implications of using property law as a tactic to ward off enclosure of the urban commons.

### **Cultivating il/legal commons**

Community gardens and farms have long been considered paradigmatic, if complicated, forms of the urban commons U.S. cities (Cahn and Segal, 2016; Eizenberg, 2012; Ela, 2016; Harvey, 2012; Safransky, 2017), involving the production of social relations and forms of possession that in some ways exceed the public–private property binary, and frequently troubling distinctions between legal and illegal land use (for example, where city officials may accept the presence of "squatter" gardens until property values increase). They can also contribute to racialized displacement by preparing the ground – literally and figuratively – for gentrifying development (McClintock, 2018; Safransky, 2014). Cultivated in cities – sites of intense capital accumulation and state regulation (Huron, 2018) – like other forms of urban commons, squatted community gardens and farms are at constant risk of displacement by "private profit-maximizing interests" (Harvey, 2012: 78), which rely on "beautifying" commoning to increase property values. At the same time, serving as sites of "property experimentation" (Ela, 2016) and "actually-existing" forms of counter-hegemonic praxis (Eizenberg, 2012), squatted urban community farms and gardens can involve the emergence, complication, and negotiation of diverse practices that challenge proprietary norms. Under regular threat of displacement, these urban commoners may turn to legalization in an effort to secure their claims to space through property law when they can no longer operate in its interstices. This includes exploring the potential of "exploit[ing] the plasticities and indeterminancies" of dominant legal property regimes (Delaney, 2015b: 269), and recognizing "social obligation" norms in laws governing ownership (Alexander, 2009).

In the U.S. juridical context, which upholds "an individual-based property paradigm" (Marella, 2017: 61), commoning often remains illegible, making legal claims difficult. Against this socio-legal background, in which private property rights are privileged and "highest and best" use is defined by the maximization of market value, from the perspective of city governments, commons are frequently associated with inefficiencies and even "tragedy" (Foster, 2011) – at best, an interim "reactivation" of spaces, preparing the ground for a higher and better use. While there are some legal mechanisms to recognize

and preserve common property (through community land trusts, for example), more often commoning operates on the legal margins – persevering in spite of, rather than because of the law. In other words, it is rare that urban commoning itself can produce a legal right to property given the primacy of the “ownership model,” reliant on a single (white) owner with complete control and a legally legitimized title (Singer, 2000). And even when it can, legalization throws up questions not only of “co-optation,” whereby commoning may lose its radicality in seeking legal legitimacy (Martínez, 2020a, 2020b), but also of existing claims to land within settler colonial cities, including those of Indigenous (Barker, 2018; Coulthard, 2014) and other displaced, often racialized, communities (Safransky, 2014, 2017). To consider the complications of legalizing the commons further, it is worth examining a legal doctrine often held out as a support for “squatters’ rights” (Dobbs, 2012; Finchett-Maddock, 2016), and perhaps commoning more broadly – adverse possession.

### **Squatters’ law?**

The modern doctrine of adverse possession in the U.S. is rooted in English common law and developed in relation to Western justifications for private property, including “actual” possession (exerting “dominion”) (Blackstone, 2016/1765) and labor (defined through productivity or “improvement”) (Locke, 1982/1690: sec 35, 26). As critical legal scholars have shown, these classical property theories and their application in U.S. laws and practices are co-constitutive of historic and ongoing racialized violence of accumulation, enclosure of the commons, and production of (settler) colonial geographies (Bhandar, 2018; Blomley, 2003a, 2003b; Park, 2021). In its exportation to the U.S. from England, adverse possession became a tool for colonial settlement and expansion, relying on the same principles used to legally justify the expropriation of Indigenous peoples’ lands. Some scholars suggest that this expropriation was itself an act of adverse possession, whereby, as legal scholar Stevie Swanson (2011: 310) puts it, “[N]ative lands were taken in an open, notorious, hostile, actual, adverse, and continuous manner.” In the nineteenth century, a “liberalized approach to adverse possession” meant that settlers’ appropriation of land on the Western “frontier” gained legitimacy as courts rewarded their “improvement” of “wasted” resources with legal title (Peñalver and Katyal, 2007: 1112). Federal and local policies of recognizing and defending these illegal occupations of land constituted, as legal scholar K-Sue Park writes, a “strategy of conquest by settlement” (Park, 2021: 60) – where squatters served a key role in making the “frontier” “safer” for white settlement and “hence more valuable” to capital (Kades, 2000: 1154). However, with the concretization of the U.S. land system, a person residing on property they did not legally own came to be considered a “trespasser” in both the legal system and public perception (Peñalver and Katyal, 2010). Initially serving as a cutting edge of legalized conquest, helping to consolidate a settler colonial real estate regime, squatters have become a threat to “the security of ownership” (Katz, 2010: 62), making claims to title under adverse possession more challenging to pursue.

Despite its grounding and enrollment in settler colonial appropriation – and the subsequent juridical privileging of private property rights – since the 2008 foreclosure crisis, U.S. legal scholars as well as housing activists have been reconsidering adverse possession as a means of addressing property abandonment (De Biasi, 2019; Dobbs, 2012; Richardson, 2015; Schneider, 2015), and of contributing to a social justice framework of property (Davis, 2010). There are a number of ongoing debates about the continued relevance of the doctrine. On the one hand, some scholars contend that the need for adverse possession has “diminished” since “laws now aim to preserve and protect – rather than encourage development of – real property” (Cherek, 2012: 303, 304), and that it should be abolished

(Brown and Williams, 2010), or at least limited to adjudicating disputes over ownership to improve economic efficiency (Sipe, 2014). On the other hand, given the seeming potential of adverse possession to contribute to social justice outcomes, some legal scholars and advocates argue for increasing the applicability of the doctrine and making this application more equitable (Berkman, 2009; Gardiner, 1997; Peñalver and Katyal, 2007; Richardson, 2015). As officials in U.S. cities deliberate about how to best manage the future of “vacant” properties, some policymakers are also contemplating adverse possession as a possible tool.<sup>3</sup> And finally, facing the threat of enclosure, urban commoners are drawing on adverse possession in efforts to ward off displacement.

The ongoing debates around the continued use of adverse possession and legalization of the commons in the U.S. point to a set of critical questions related to the interdependence of law, private property, and the urban commons – questions that are negotiated and recast in the case of La Finquita, as illustrated in the following sections. First, given that the legal doctrine of adverse possession rests on liberal justifications of private property and historically functioned as a tool of colonial expropriation, does its application to squatted urban commons simply reify a normative ownership model of property – making urban “frontiers” safe for capital accumulation – or can it also offer a challenge to this model by re-valuing errant or “parodic” (Clarke, 2005) performances of property? This question speaks to broader discussions in legal geographies about the performativity and materiality of property (Blomley, 2003a, 2003b, 2013; Brown, 2007), recognizing the “mutual constitutivity of the legal and the spatial” (Delaney, 2015a: 98), and slippages in the legality and illegality of property (Finchett-Maddock, 2016; Keenan, 2015; Nichols, 2020). Second, within the context of ongoing debates on the legalization and institutionalization of the commons in the face of enclosure (Chatterton and Pusey, 2020; Huron, 2018; Jeffrey et al., 2012; Marella, 2017; Martínez, 2020a; Thompson, 2015), does adverse possession offer a means of countering speculative real estate practices and preserving – and perhaps even expanding – forms of urban commons? And relatedly, what are the stakes of *adverse commoning* – of affirming collective possession and subjectivity while seeking legitimacy through property law, which is grounded in racialized expropriation and has generally been used to privatize the commons? In order to begin to address these questions, I turn to analyze the adverse commoning of La Finquita’s gardeners who, while required to act “as if” they were private property owners to ward off enclosure (Clarke, 2005), also acted “as if” urban commons were broadly valued and recognizable, reorienting notions of continuous, exclusive, notorious, and hostile possession.

## Continuous commons

In 1988, the Philadelphia Catholic Worker (PCW), a group associated with the national Catholic Worker Movement, which is dedicated to pursuing social justice in part by providing localized social services, established a community garden on an abandoned lot near the house they operated in Kensington. Formerly the site of a tire treading company, the lot had become a dumping site for trash. After cleaning up the site, petitioning the city for a fire hydrant as a source of water, and obtaining donated topsoil, tools, and compost, PCW volunteers and residents in the largely Latinx neighborhood collectively cultivated a garden. While seeking title as an incorporated nonprofit, throughout its existence PCW operated as a loose, non-hierarchical association of volunteers who’s involvement in the garden “waxed and waned” over the years (Philadelphia Interest Law Center, 2018). Garden volunteers changed over time as people moved on, in, or away. When the original garden organizer became sick, she recruited a neighborhood resident to manage the space. As expressed by

one of their legal advocates, it was “a bit of an anarchist set up.” At the time of the legal action, there was only one remaining active gardener – a nearby neighbor – who had been involved since the early years of the garden.

One of the requirements of seeking legal title through adverse possession in most U.S. states is to prove “actual,” continuous possession for a legally designated time period, reflecting ideas within classical liberal property theory that “without actual possession, no title can be completely good” (Blackstone, 2016/1765: 196). This possession involves exerting “dominion over the property” (*Bride v. Robwood Lodge*, 713 A.2d 108, 112, Pa. Super. 1998), demonstrated through exclusive use and “improvement.” In Pennsylvania, “squatters” can acquire title after their continuous adverse possession of property for twenty-one years. Since La Finquita was started in 1988, it seemed to satisfy that requirement. However, in the court case, the performances of “continuous” possession were contested.

In practice, La Finquita gardeners’ possession was not uniform even if it was continuous. It was defined in relation to an evolving collective of commoners rather than an individual “legal and determinate owner” (Blackstone, 2016/1765: 10), who’s labor justifies ownership. The use of La Finquita’s space changed over time as new gardeners joined, transitioning from a community garden with individual plots, to primarily a collectively cultivated community farm to “enhance participation at the garden and step-up food production,” although some individual plots were also maintained (*Centro Incorporated v. Mayrone*, 2016). After 2012, the gardeners of La Finquita focused on providing produce to Philadelphia Catholic Worker’s neighborhood soup kitchen, local food pantries, and to neighbors at a weekly farm stand. While maintaining their links to PCW, the newer volunteers formed their own nonprofit corporation, La Finquita Inc., in order to apply for grants for the farm. Throughout its history, La Finquita was arguably cultivated as a “long-held, long-relied-upon, and invaluable community resource” (*Centro Incorporated v. Mayrone*, 2016: 7), managed by and for neighbors, even as the commoners and commoning varied over time.

While this change is consistent with conceptualizations of the urban commons, involving a diverse set of actors commoning within the constraints and opportunities of dense social, economic, and political relations (Bresnihan and Byrne, 2015; Huron, 2015), it conflicts with legal conceptualizations of property ownership in the U.S. that are tied to a rigid “self-owning, earth-owning individual” (Harney and Moten, 2017: 83). In the legal action, the “differential commoning” of La Finquita, where individuals understood and participated in collective possession in variable ways (Noterman, 2016), provoked questions in legal proceedings about their “continuous” possession. The lawyers representing the developer argued that due to the change in use and users, there was no consistent possessor with legal right to seek title. In part, this is what made the case particularly unique. Rather than an individual “trespasser” or a group operating as a single legal entity, it was a shifting collective of commoners, using the space in variable ways, that pursued title. For their part then, the legal advocates for Philadelphia Catholic Worker (PCW) made the case that volunteers associated with PCW had been continuously involved in the garden even if the specific individuals changed over time, and thus the right to possession was “tacked on” or passed along<sup>4</sup> from volunteer to volunteer. In practice, this transfer was informal, with multiple individuals taking on various responsibilities related to the space (acquiring water, organizing events) at different times with varied relationships to PCW. From the perspective of the gardeners, this commoning – even if differential – justified legal ownership.

Ownership was not clearly defined by La Finquita gardeners until undertaking legal action. As one gardener put it, “it’s not something we [thought] about a whole lot until we were presented with all these weird aspects of ownership [in the court case].” Rather, she suggested, in La Finquita “we all agree[d] that it’s a shared space that we’re using together.” Another volunteer argued that the very idea of something being “owned” went against the philosophy of PCW, which maintained a “sharing ethic.” These considerations of “ownership,” which reflect a collective right to continued use based on evolving collective labor practices, conflict with those of the settled individual subject presumed in property law and rights-based justifications for adverse possession – traditionally “able-bodied, Anglo-European men of a particular class” (Keenan, 2015: 67). They also go beyond progressive property scholarship’s recognition of an owner’s social obligation by suggesting that *collective* labor should justify *collective* rights to property (Harvey, 2012). In other words, rather than simply asserting a right to property, the gardeners of La Finquita were also *affirming the commons*, in ways that exceeded and troubled proprietary norms. This commons is both a form of collective labor and, as put by Gigi Roggero (2010: 360), a “source of new social relations,” involving “the production of subjectivity” that resists the alienated subject of private property. Thus, actual possession here – involving the labor and subjectivity of gardeners – was continuous, even if collective and mutable, grounded in a “sharing ethic.”

By requiring the continuous performativity of property, adverse possession reflects the unstable nature of property in practice (Clarke, 2005) – that despite our titling system, property continues to be a realm of conflict, depending on the regular re-enforcement of the law (Derrida, 1989) as well as regular “rearticulations of property and subjectivity” (Blomley, 2013: 37). A common justification for the continued use of adverse possession is that it improves the marketability of property by smoothing out property law’s “jagged edges” (Sipe, 2014) – such as settling border disputes and clearing “clouded” titles. From this perspective, adverse possessors serve a crucial role in property regime maintenance by resolving uncertainty in ownership and ultimately preserving an equilibrium in the law (Peñalver and Katyal, 2007). However, the continuous performativity of property allows not only its resettlement, but the emergence of “errancy” where, as put by Judith Butler (2010: 153), “breakdown is constitutive of performativity” so that “performativity never fully achieves its effect.” The adverse commoning of the gardeners – involving an affirmation of alternative enactments of possession – arguably represented an “errancy” in normative proprietary performances. As legal scholar Jessica Clarke (2005) suggests, while adverse possession is a doctrine of “performance reification” – demanding continuous conformity to private property norms – in ultimately recognizing performances that may “parody” these norms (such as commoning), it also creates openings for localized subversion. Given that these parodic performances take place within the realm of the law may even allow for what Davina Cooper (2020: 894) calls “institutional prefiguration,” whereby “acting as if the legal and political conditions necessary were already in place” could bring these very conditions into being. Thus, errant performances that may parody “continuity” – and, as discussed in the next sections, exclusivity, notoriety, and hostility – might allow for broader (legal) recognition of commoning possession.

## Exclusive commons

In La Finquita’s early years, gardeners erected a three-sided wooden fence around the garden to demarcate the area of cultivation. This was replaced in the 1990s with an eight-foot chain-link fence surrounding the property, including a locked gate to “keep out unwanted trespassers” – particularly those that dumped trash in the garden

(*Centro Incorporated v. Mayrone*, 2016). Shortly after purchasing title to the property in 2016, the developer cut the gardeners' lock, replacing it with their own. This instigated a series of un/locks as the gardeners and developer removed and replaced each other's padlocks several times. As one gardener put it, "once we started to piece together what was happening, [that a developer had purchased the property], we were like really indignant – how dare you – it's like very clear that this is a functioning community garden space." The gardeners experienced the actions of the developer as trespassing on both collective and personal space. Another long-term gardener described the moment of finding the developer's lock on the garden: "[It's] like if someone came and put a lock on your house!"

As reflected in these comments, gardeners felt a deep sense of collective and personal possession related to their prolonged labor and commitment to the space, which informed their desire to control access to the farm. A frequent legal justification for adverse possession is the argument that "[t]he longer one is in possession of an object, the greater the potential for development of subjective value based on the wealth of the possessor's experiences" (Bell and Parchomovsky, 2005: 594). As put forward by U.S. Justice Oliver Holmes (1997/1897: 1008):

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.

This line of argument reflects not only a utilitarian perspective on adverse possession, where those that care for "abandoned" property value it more than an absentee owner – especially if they are willing to break the law to do so – but also arguably a rights-based perspective where an individual and land become inextricably linked through labor (Davis, 2010). Both perspectives, however, are traditionally grounded in an idea of exclusivity that is framed in terms of a bounded individual legal subject, which as discussed in the previous section, did not align with commoning of La Finquita, involving multiple shifting "commoners" with different relations to each other and the farm. Before taking legal action, the gardeners discussed the possibility of taking down the fence and making space for other types of use besides gardening, recognizing the multiple social as well as use values of the land. However, in pursuing title under adverse possession the gardeners had to perform proprietary exclusivity and define "the community" in limited terms – as PCW-associated volunteers – to be legible to the court.

The gardeners contested the "intrusions" of the developer by maintaining spatial indicators of exclusive possession, including signs and the (re)locked fence. As Nick Blomley (2007: 4) has pointed out, "[p]roperty does not just rule through signs, but enrolls things" and "also requires that bodies behave and move in particular ways." Considered to be trespassers under the law, in putting up a locked fence, the gardeners performed exclusive property by differentiating between themselves and "unwanted trespassers." And yet, in controlling access to the space, the gardeners trespassed upon the legal owner's right to exclude. Even while reifying exclusivity, the fence represented a spatio-legal limit to the classical notion of ownership as "that sole and despotic dominion which one [person] claims and exercises [...] in total exclusion of the right of any other individual in the universe" (Blackstone, 2016/1765: 2). Locks can be cut, and fences climbed – they can also trespass.<sup>5</sup> As put in the injunction to avoid the ejection of the gardeners, the developer's removal and subsequent addition of a new lock "constitute[d] a trespass on Philadelphia Catholic Worker's property" (*Centro Incorporated v. Mayrone*, 2016: 6). But what does it mean to perform exclusivity in the context of the commons?



A critical point of contention in the series of legal actions seeking to preserve La Finquita was the question: “Can an *inherently* inclusive space ever be an exclusive space?” (Philadelphia Interest Law Center, 2018, added emphasis). As reported by one of La Finquita’s legal representatives, the initial injunction to prevent the displacement of La Finquita was not a favorable decision for the gardeners in part because the judge deemed that a community garden as a “commons” – even if fenced – could not be exclusive, reading the commons as “open access.” The judge’s decision reflects the legal illegibility of shared forms of tenure, where exclusivity – considered to be “the most important characteristic of private property” (Rose, 1994: 105) – is deemed incompatible with the commons. A number of scholars, including the political economist Elinor Ostrom (1990), have challenged the conflation of the commons with open access, pointing to examples of commons around the world that involve defined, exclusive communities with shared governance structures. In other words, commons are not necessarily contrary to exclusion, but rather do not define exclusivity in relation to an individual owner. Rather than representing a “free for all,” commoning entails “the collective organization of use” (Fournier, 2013: 447). In La Finquita there was no formalized set of rules for use of the space, but there were informal guidelines set by the loosely defined community of volunteers that organized and cultivated the space.

However, when considering exclusivity and the commons – especially in a settler colonial city that continues to be shaped by racial capitalist proprietary logics – it is also important to consider how this “community” (both in a limited and expansive sense) may exclude existing claims to space. Assertions of a right to the commons within settler colonial spaces can overlook Indigenous sovereignty (Barker, 2018; Coulthard, 2014; Fortier, 2017), ignore claims to the space of former residents who may have been displaced due to gentrifying development, and, more generally, elide the racialized legacies of U.S. proprietary regimes where “whiteness and property share a common premise [. . .] of a right to exclude” (Harris, 1993: 1714). As put by Glen Coulthard (2014: 12), in ignoring colonial dispossession, a claim to the commons “risks becoming complicit in the very structures and processes of domination that it ought to oppose.” In the context of an ongoing effort by the Lenape Nation to gain formal recognition by the State of Pennsylvania, La Finquita was making a claim to land that was traditionally Lenape territory. In addition, the current community of what is now called “South Kensington” has changed dramatically in recent years, and the demographics of those involved in La Finquita shifted with changes in the neighborhood. Once a largely low-income Latinx neighborhood – reflected in the farm’s name, “La Finquita” or “Little Farm” – the area has increasingly become home to young, white professionals who made up a significant proportion of recent gardeners. While these gardeners spoke of grappling with “new” gentrifying forces in the neighborhood that threaten commons like the farm with displacement, they also reflected on their enrollment in this process of neighborhood change. In explicitly asserting and performing exclusivity as they pursued title under adverse possession, the gardeners were confronted with the ways that their commoning both differed from and resonated with proprietary exclusion.

Despite the gardeners’ performance and materialization of exclusivity, the failure of the court to recognize it underlines the continuity of the “brutal, brittle crystallization” of an exclusive individual owner (Harney and Moten, 2017: 89), considered at odds with the commons. And yet the gardeners’ “parodic” performances of exclusivity served a practical purpose, temporarily warding off enclosure, and in doing so, forcing them to reframe to themselves and to the court, exclusivity beyond the individual proprietary subject and to, at least in part, confront the enrollment of the commons in dispossessive exclusion.

## Notorious commons

Over the years, La Finquita gardeners sought to improve the property – remediating the soil, obtaining a direct water line, and constructing a tool shed, a farm stand for weekly produce sales, and a brick patio for communal gatherings. The gardeners also cultivated multiple kinds of rotating vegetables, producing pounds of fresh produce every week during the growing season. These improvements not only benefited the gardeners and the surrounding neighbors who gained access to a free or low-cost source of healthy food, but along with the fence, they also communicated possession of the property. In line with the requirements for pursuing title through adverse possession, gardeners’ use of the property was open and “notorious,” visible to the wider public and made explicit through farm signs. However, disagreements over the legibility of this possession appeared in the court case – both in the initial injunction by the gardeners to prevent displacement and the subsequent ejectment proceedings instigated by the developer to remove the “squatters.” Recalling their first visits to the property, the broker and developer reportedly found a “fairly vacant” lot that “looked kind of run down” (*Centro Incorporated v. Mayrone*, 2016). While they noticed the fence and a “shack,” in court documents they reported being unaware of garden plots, pathways, the patio, farm stand, and any signs with the name “La Finquita.” Nonetheless, when the developer filed an insurance claim prompted by the gardeners’ quiet title action, the company found exclusion from coverage in part because a “visual inspection” showed clear evidence that the property was in use as “an urban garden” (*Centro Incorporated v. Mayrone*, 2016).

While there are a number of reasons that the developer might not have recalled noticing clear indicators of active use, the account of a “fairly vacant” lot points both to the illegibility of “illegal” use under the law and to differing ideas of the kinds of improvement that communicate possession. First, a presumption of vacancy on paper – due to decades of tax delinquency by the owner of record – elides the possibility of ongoing use, despite the presence of material evidence to the contrary. Long-term tax-delinquent properties are typically considered – at least in city policy – to be abandoned by their owners and therefore “vacant” and open for new development. This is not only due to associations between vacancy and waste (as expressed in the doctrine of *terra nullius*), but also the law’s principal orientation toward property as a social relation – where title is upheld over physical possession, with space considered to be a stage for (legally legible) human activity (Blomley and Bakan, 1992). From this perspective, without title, the gardeners’ possession of the land is “legally invisible to the formal property registration system” and can thus be ignored (Cahn and Segal, 2016: 215). However, adverse possession, as frequently interpreted by U.S. courts in the twentieth century, resists such efforts to separate legal title from physical possession. Adverse possessors must notoriously communicate their “hostile” possession – in other words, demonstrate through forms of improvement their “intent to hold title against the record title holder” (*Vlachos v. Witherow*, 1955 referenced in *Tioga Coal Co. v. Supermarkets General Corp.*, 1988), “acting as if” they were the only “reasonable owner” (Clarke, 2005: 622). As underlined in the case *Tioga Coal v. Supermarkets* (1988), contemporary U.S. courts tend to look to see if the “physical facts of possession” put the owner on notice. While the “physical facts” of decades of farming should have made the developer aware of the ongoing use of the land, different perceptions about proprietary improvement raised further questions about whether the commoning of La Finquita constituted a challenge or simply a precursor to a “higher and better” use.

An “ideology of improvement” (Bhandar, 2018: 36) has long undergirded legal justifications for appropriation of Indigenous land and the consolidation of the liberal property

regimes, drawing distinctions between “wasted” and cultivated land, where the former represented “the wild state of common tenancy” (Bentham, 1987/1931: 196) and the latter was fashioned through the “civilizing” forces of European private property laws and capitalistic “monocultural productivity” (Harney and Moten, 2017: 85). In the notorious case of *Johnson v. M’Intosh* in 1823, which is considered “at the root of title for most real property in the United States” (Bobroff, 2001: 521), the Supreme Court found that “discovery” gave title to the U.S. government – title “consummated by possession” – and that the government had “an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest” (*Johnson v. M’Intosh*, 21 U.S. at 573, 587). This legalized seizure was justified in part by assertions of the need to “improve” the land through “higher and better” use. As Chief Justice Marshall stated: “To leave [tribes] in possession of their country, was to leave the country a wilderness” (*Johnson v. M’Intosh*, 21 U.S. at 590). Thus, acts of possession “necessary to lay the basis for rights in property,” were, as pointed out by legal scholar Cheryl Harris (1993: 1721), defined “to include only the cultural practices of whites,” specifically those in line with imported European agrarian capitalism. In his *Second Treatise*, for example, John Locke (1982/1690: sec 36, 37, 42) argued that the “vacant places of America” that were “without any improvement, tillage or husbandry” were merely “waste” and thus “might be the possession of any other” – in this case, European colonists. This formulation of proprietary possession, predicated on narrowly defined “improving” labor and the diminishment of Native possession, helped to justify the dismissal of Native Nations’ claims to property rights under U.S. law and ground property in iterative performances of “whiteness” (Harris, 1993: 1721, 1716).

In contemporary neoliberal settler colonial cities, discourses of urban improvement in land use policies and planning decisions continue to be framed in terms of addressing “waste,” where there is slippage between managing devalued land and often racialized land users seen to threaten or impede normative “highest and best use” (Blomley, 2017; Wideman, 2020).<sup>6</sup> This “highest and best” use is primarily defined in terms of maximizing economic value through “sequential ‘improvement,’” (Blomley, 2003b: 84), and grounded in the maintenance of “racial regimes of ownership” (Bhandar, 2018), which continue to facilitate uneven “[dis]possession-by-improvement” (Harney and Moten, 2017: 85). From this perspective the improvements made by the gardeners are temporary, constituting an adequate but not the most “efficient” (i.e., lucrative) use of land in a hierarchical urban development schema. As put Amy Laura Cahn, one of La Finquita’s former legal advocates, “[t]he term ‘vacant’ from the city’s perspective is really about something that is not built upon, something to their minds [that] is surplus and waiting on the highest and best use.” This orientation equates community farms and gardens with vacancy, shaping city policies that only value “illegal” urban commons as provisional solutions to “blight” – “beautifying” neighborhoods but easily uprooted when the land becomes more economically valuable (Cahn and Segal, 2016; Drake and Lawson, 2014). Thus, urban commoners may become enrolled in processes of racialized displacement, even as they ultimately face enclosure by a higher and better use.

In requiring “notorious” possession, the doctrine of adverse possession underlines the reliance of property regimes on an accepted communication of proprietary rights, involving continual persuasion (Rose, 1994) and material enactment (Blomley, 2003a). In other words, “whether or not the claimant’s act of communication is successful as a performative act” (Clarke, 2005: 628), depends on legal interpretation, regardless of whether or not a community understands and supports such a proprietary claim. Despite many neighbors and local businesses accepting La Finquita’s possession of the space and publicly supporting the gardeners in their legal action, from the perspective of the developer, the value of La

Finquita's improvements simply rested in "how easy it [was] to dig the property out" (*Centro Incorporated v. Mayrone*, 2016). As put by Cahn, while "the city has tacitly accepted Philadelphia gardeners as its land stewards for decades," they have failed to create "supportive policies that promote any sort of preservation or long-term land tenure." In turn, developers rely on urban commons like La Finquita to not only make room for gentrifying development, but also to signal its approach. The case for ejectment was settled before there was a ruling on whether the gardeners' performance of possession justified legal recognition. However, historically, the successful use of adverse possession in the U.S. reveals a tendency toward a "prodevelopment [...] ideology" (Sprankling, 1993: 816), where courts have largely decided that legalizable possession involves economically valuable improvement.

However, in making an il/legal counterclaim of collective possession, La Finquita gardeners communicated a re-valuation of their "improvements" – from removing trash and remediating contaminated soil, to cultivating multiple varieties of plants and creating a community gathering place to share food, childcare, cultivation and culinary advice, and maintain a repository for shared memory, including memorials for deceased neighbors and perennial plants that continued to thrive long after their original cultivators moved on. In the local media and in legal proceedings, La Finquita gardeners and legal advocates emphasized that the destruction of the garden would "take[] from the neighborhood a space that has fostered relationships and brought the community together over a period of almost three decades," and that "such spaces are few and far between" in the neighborhood (*Centro Incorporated v. Mayrone*, 2016: 6). They thus emphasized not only the benefits of the garden to the gardeners and Philadelphia Catholic Worker, but also to "the general public" (6). Through their adverse commoning, La Finquita gardeners were not only communicating a collective right to common property to the developer and the court, but also to the broader community – provoking localized discussions in zoning meetings, city media, neighborhood organizing committees, and with policymakers and legal advocates about both contextualizing and expanding notions of "highest and best use."

### **Adverse commons?**

When the gardeners' preliminary injunction to avoid displacement was denied by the judge, their lawyers successfully filed an "injunction pending appeal" to prevent the developer from "unilaterally destroy[ing] the garden," which they had threatened (*Centro Incorporated v. Mayrone*, 2016: 6). In their argument, the gardeners' lawyers suggested that the initial denial left "this matter in a precarious and potentially volatile condition," that could result in a confrontation not just with Philadelphia Catholic Worker, but with "an extended community of all ages, which relies on and actively participates in the garden" (3). They put forward that an injunction pending appeal would prevent any "vigilant[ism]" on the part of the developer while they sought to resolve the dispute over the title "in an orderly fashion through the court system – not through conflict on the streets in Kensington" (6–7).

Given the conflictual nature of urban commons – often existing on the edge of legality and under regular threat of enclosure – some urban commoners, like those of La Finquita, seek preservation through institutionalization or legalization rather than (or in addition to), "conflict on the streets." In doing so, they make il/legal counterclaims to urban space – including a right to collective possession – that are contrary to the existing owner's rights, and arguably, to proprietary norms. "Hostile" or "adverse" use as required in adverse possession, does not refer to "ill-will" or "hostility," but rather relates to the demonstration that a squatter's possession is an "infringement" on the owner of record's property rights

(Black, 1979/1891: 49). While “subjective intent” of an adverse possessor matters in some jurisdictions,<sup>7</sup> in Pennsylvania, adverse possessors only need to demonstrate that they actively trespassed, meaning that they did not receive permission for property use. This seeming contradiction whereby “hostile” possession produces a right to property – with the possessor acting “as if” they are the only “responsible” owner (Clarke, 2005) – makes explicit the ways that, as put by political theorist Robert Nichols (2018: 21), liberal ownership law is comprised of “[a] system of organized theft and a system of property,” which are “related in a distinctly recursive, rather than a strictly unilinear, manner.” Adverse possession and its enrollment in the ongoing U.S. settler colonial project reveal liberal-capitalist property as a form of self-justifying autogenic theft, where certain proprietary performances allow for the reframing of the “productive thief” as a legal owner (Nichols, 2020; Swanson, 2011: 314). In other words, while not requiring “ill-will,” adverse possession is an important reminder of the hostility and insecurity undergirding private property regimes.

In the Fall of 2017 gardeners arrived at La Finquita to find that the ground beneath the tool shed, which was on one of the borders of the property, had been scooped out, leaving the structure resting precariously on the edge and the garden’s plum tree at the bottom of a gaping hole. A developer had purchased the adjoining lot and in the process of digging the foundations for condos, had “inadvertently” crossed over the property boundary line. Despite prior conversations with this developer about their construction plans, many in the farm felt that the developer was taking advantage of the uncertainty over the land’s ownership and the gardeners’ limited grounds for legal recourse: La Finquita’s proprietary boundaries were literally collapsing. In Spring 2018, in consultation with their lawyers, the gardeners decided to make a deal with the title-holding developer and move La Finquita to another lot with money received from the settlement. From the perspective of La Finquita’s legal advocates, the “exacting standard” in cases of adverse possession made their “burden no easy task,” especially in Pennsylvania courts where “[a] lot of case law . . . is really archaic” (Philadelphia Interest Law Center, 2018). As previously discussed, the main points of contention in the case were related to “errancy” in proprietary practices of exclusivity, legibility, and continuity, where commoning was deemed adverse to private property. Despite drawing on case law regarding the consideration of ownership in relation to the particular type of land use (in this case community gardening) and making arguments about “tacking” ownership from several successive “owners,” this errancy was seen by the legal advocates to make it a difficult case to win. The gardeners worried about a long, drawn out court case and that if they did not win title the developer would sue for damages since the legal actions had delayed planned construction.

For their legal advocates, the settlement represented at least a partial win for La Finquita since it delayed the displacement of the farm, gave the opportunity to preserve the urban commons (even if not in the same site), instigated broader discussions about land use, and would hopefully encourage developers in the future to more thoroughly investigate if “vacant” properties are actually in use. For the gardeners, however, the displacement of La Finquita not only meant the loss of the particular parcels of land, but also the labor, nutrient-rich soil, perennial plantings, memories and memorials, knowledge, microorganisms, and social relations that sustained the farm for 30 years. In their final meetings on the future of La Finquita, the gardeners reflected on the challenges of having to mimic an exclusive and individualistic possession in their pursuit of legal title, questioning their maintenance of the locked fence and the relation of the farm to rapid gentrification in the neighborhood. There was a general sense that a cash settlement could not fully account for what would be lost, nor would it be enough to purchase a similar parcel in the area where land prices had skyrocketed. Since the settlement, the gardeners decided to turn La Finquita

into a land trust in order to pursue the development and preservation of collective green spaces in the area going forward. For the gardeners, the land trust offers a sense of security and sustainability for their project going forward by providing legal protection for future holdings, but also an adherence to their commoning project by removing land from the speculative real estate market. Thus, despite the fact that they did not obtain title through adverse possession, by taking legal action, they were able to mobilize resources to preserve future urban commons.

As put by Amy Laura Cahn, following her representation of La Finquita's gardeners, adverse possession is a legal "tactic" – just as finding the last remaining beneficiaries of a defunct tire treading company is a tactic of real estate investors. While it is a tactic that has the potential to preserve individual instances of urban commons, it does not address uneven community-level disinvestment or property's legacy of racialized dispossession. As Cahn suggests: "[Adverse possession] is a doctrine in equity, but it does not necessarily make the situation equitable from a socio-economic perspective." First of all, the bar for obtaining title through adverse possession remains very high in most U.S. states, requiring years of overt trespassing, when it is unclear whether courts will ultimately recognize collective claims. The "onerous conditions" required to make claims under adverse possession "ensure its application will be radically underinclusive" (Peñalver and Katyal, 2007: 1170) – available only to those that can demonstrate a certain kind of prolonged proprietary performance (which is incompatible with many forms of commoning) and those able to acquire legal assistance. Adverse possessors not only face ejection from a property, but also charges of criminal or civil trespass (Dobbs, 2012). The potential legal conversion enabled through the doctrine of adverse possession requires years – often decades – of illegal activity, which has different stakes for people depending on their race, class, gender, ability, and sexuality. It is only if an adverse possessor is ultimately successful in court that she "retroactively receives title good as of the date of her adverse entry," virtually erasing her trespass (Fennell, 2006: 1052). Second, it reveals the extent to which, "[p]roperty provides both a rationale for dispossession and a ground for its opposition" (Blomley, 2016: 594), where adverse possession in the U.S. "represents a contradictory resource for forms of resistance to enclosure" (Jeffrey et al., 2012: 1257). Legal claims to the commons raise important questions about how errant and parodic performances of property, and the cultivation of "counterlegalities," might serve as "form[s] of resistance to colonial capitalist modes of governance" (Bhandar, 2018: 184).

Without a more generalized property regime-change, the potential of legal tactics – like adverse possession – to preserve and expand the urban commons is limited. However, they may still serve a role in intervening in specific processes of enclosure. Adverse commoning may allow for "smaller-scale redistributive deconstructions" (Clarke, 2005: 629) by affirming forms of commoning that are in some ways adverse to normative regimes of property. For example, given the number of "actually existing commons" (Eizenberg, 2012) that lack formal ownership in a city with an increasingly "hot" real estate market – including around half of Philadelphia's 470 community gardens (Jaramillo, 2019) – adverse possession is being used to delay if not prevent immanent displacement of urban commons, especially when connected with collective forms of ownership such as community land trusts (Schneider, 2015). La Finquita's case has inspired other urban commoners in the city to look to adverse possession as a means of preserving not just garden space, but cultural and recreational commons – and of affirming their value to the broader public and legal system. Ultimately, despite real limitations, il/legal counterclaims to urban space through adverse commoning may allow for the refiguration of proprietary performance, communicating highest and best use in terms of socially and ecologically inflected use values, labor as collective and

differential, and improvement as tied to racial and economic justice. In other words, this prefigurative moment of “perform[ing] new economic worlds” (Gibson-Graham, 2006: 3), involves acting “as if” the institutional conditions required to *common* property already exist.

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### Notes

1. The first case where adverse possession was successfully used in Philadelphia to preserve a community organized space was in 2007 when the Central Club for Boys and Girls gained title to lots *before* they could be purchased by a developer (Cahn and Segal, 2016).
2. The names of interviewees are not included – except with explicit consent – in order to protect anonymity.
3. See Pa H.B. 1808, 2013-2014 Gen. Assembly, Reg. Sess. and Pa H.B. 773, 2015, proposed legislation to make it easier in Pennsylvania to seek title for single-family homes through adverse possession by reducing the statutory period from 21 to 10 years.
4. In other words, the “rights of successive owners may be ‘tacked’ together to constitute a total of 21 year, as long as there is privity (some sort of chain or link [...]) between the successive owners” (Philadelphia VIP, 2019: 25).
5. As explicitly demonstrated by the settler colonial occupation of Indigenous lands.
6. Resonating with discourses of (post)colonial urban improvement (see Gidwani and Reddy, 2011).
7. Some U.S. states require adverse possession in “good faith” (where claimant believed they owned the property), while others require possession in “bad faith” (where claimant is aware that a property belongs to someone else) (Bailey and Eichel, 2016).

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