

# The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law

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Article abstract

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## THE MORAL PARADOX OF ADVERSE POSSESSION: SOVEREIGNTY AND REVOLUTION IN PROPERTY LAW

*Larissa Katz\**

On what grounds can we justify the transformation of squatters into owners? To understand the moral significance of adverse possession, the author proposes an analogy. Much of the moral analysis of adverse possession has proceeded on the basis that adverse possessors are land thieves. The author first explains why the analogy of adverse possessor to land thief is misleading. Then, she argues that there is a much closer analogy between adverse possession and revolution or, more precisely, a bloodless *coup d'état*. The recognition of the adverse possessor's (private) authority solves the moral problem created by an agendaless object just as the recognition of the existing government's (public) authority, whatever its origin, solves the moral problem of a stateless people. The morality of adverse possession, seen this way, does not turn on any particularized evaluation of the squatter's deserts or her uses of the land. The author thus does not propose that adverse possession is justified in the same way that some argue a conscientious revolutionary is justified in resisting an oppressive or otherwise unjust sovereign. Rather, the morality of adverse possession is found where we might least expect it: in its positivist strategy of ratifying the claims to authority of a squatter without regard to the substantive merits of her agenda or her personal virtue.

Quelle justification peut-on offrir pour transformer des squatteurs en propriétaires? L'auteure propose une analogie pour comprendre l'importance morale de la possession adverse. Elle explique d'abord pourquoi l'analogie entre possesseurs adversatifs et voleurs de terre, qui sert souvent de prémisse à l'évaluation morale de la possession adverse, est trompeuse. Elle soutient ensuite qu'une bien meilleure analogie existe entre la possession adverse et une révolution ou, plutôt, un coup d'État sans effusion de sang. Le problème posé par la chose sans objet est résolu par la reconnaissance de l'autorité (privée) du possesseur adversatif sur ladite chose, tout comme le problème moral posé par un peuple sans État est résolu par la reconnaissance de l'autorité (publique) du gouvernement présent. De ce point de vue, la moralité de la possession adverse ne dépend pas des mérites du squatteur, ni de l'usage qu'il fait du terrain. Ainsi, l'auteure ne suggère pas de justifier le possesseur adversatif comme certains justifient le révolutionnaire conscientieux parce qu'il résiste à un régime abusif ou injuste. La moralité de la possession adverse se trouve plutôt là où l'on s'y attend le moins: dans la stratégie positiviste de ratification des revendications d'autorité du squatteur sans égard ni aux mérites de ses objectifs, ni à sa vertu personnelle.

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## Introduction

Property law is remarkably stable over time. Innovations in the form and content of ownership, for instance, are few and slow to catch on.<sup>1</sup> But that is not to say that property law, through its long history, has produced a clear and unequivocal understanding of what these fundamental concepts are. The idea of ownership around which the law of property is organized is itself a subject of controversy.<sup>2</sup>

Adverse possession is one aspect of property law that is caught in this controversy over the nature of ownership. Our idea of ownership influences how we answer basic questions about what it takes to succeed as an adverse possessor as well as more complicated questions about the morality of adverse possession. Seen one way, the law of adverse possession produces a radical transformation in the position of squatters pre- and post-limitation period, in some cases turning land thieves into owners. This approach, which I associate with the majority of American jurisdictions, sees adverse possession as morally paradoxical and so invites restrictions on deliberate squatting.<sup>3</sup>

Seen another way, the law of adverse possession concerns not the acquisition of new ownership rights by the squatter, but rather the extinction of the original owner's superior right to possess due to her own inaction.<sup>4</sup> The squatter, on this view, does not acquire a new kind of right but is successful by default. This approach, found in current English law, downplays the radical change in the squatter's position pre- and post-limitation period, thus avoiding some of the appearance of a moral paradox. But at the same time, the English approach ignores important conceptual differences between owner and possessor, treating them both simply as holders of rights to possess of differing strengths.

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<sup>1</sup> See e.g. Eduardo Peñalver & Sonia K. Katyal, "Property Outlaws" (2007) 155 U. Pa. L. Rev. 1095 at 1133. Cf. Lee Anne Fennell, "Homeownership 2.0" (2008) 102 Nw. U. L. Rev. 1047 (proposing changes to the form of ownership).

<sup>2</sup> For a conception of ownership as an organizing idea, see Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1991); Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 U.T.L.J. 275 [Katz, "Exclusion and Exclusivity"]. For controversy as to what ownership means, see *ibid.*; J.E. Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L. Rev. 711; Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977). For the English lawyer's perspective on the idea of ownership with respect to land, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

<sup>3</sup> Lee Anne Fennell, "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 Nw. U. L. Rev. 1037 at 1046 [Fennell, "Efficient Trespass"].

<sup>4</sup> See E.H. Burn & J. Cartwright, eds., *Cheshire and Burn's Modern Law of Real Property*, 17th ed. (Oxford: Oxford University Press, 2006) (relativity of title).

There is a third approach to adverse possession that I will argue makes sense of the morality of adverse possession without weakening the concept of ownership at work in the law. A basic component of this third approach is still the law in some Canadian jurisdictions and until recently had currency in much of the common law world, including England and Australia.<sup>5</sup> This is the inconsistent use test, according to which a squatter succeeds in a claim for adverse possession only where she establishes, by acts of possession that are inconsistent with the owner's intended uses of the land, that the original owner lacks effective authority over the land.<sup>6</sup> This standard presents a significant hurdle for most adverse possessors.

A conventional reading of the inconsistent use test reflects our moral intuition that deliberate squatters are land thieves, undeserving of reward.<sup>7</sup> On this reading, the inconsistent use test appears to respond to the same considerations that motivate the current consensus view in the United States. But, I will argue, it would be a mistake to construe the inconsistent use test as just a reflection of our distaste, on moral grounds, for acquisitive squatters. Rather, the inconsistent use test suggests a very different moral foundation for the law of adverse possession. On this approach, the morality of adverse possession is not a particularized morality, concerned with the relative deserts of the owner and squatter or the relative merits of the uses they have for the land. We are evaluating the wrong thing if we look to the nature of the use or the user to establish the morality of adverse possession. Rather, the morality of adverse possession is indirectly established through the role of adverse possession in allowing property law to serve its moral function.

A system of property puts an owner in charge of an object. Where no one has the authority to be in charge of an object, users may manage to avoid conflict in practice. But it is the *potential* for conflict that is avoided when one person (or group, in the case of communal property) has the supreme authority over an object of property.<sup>8</sup> An owner authoritatively co-

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<sup>5</sup> For a Canadian case, see e.g. *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182 (C.A.) [*Keefer* cited to O.R.]. See also *infra* notes 12-13 and accompanying text.

<sup>6</sup> Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Carswell, 2006) at 128-31.

<sup>7</sup> Canadian cases have tended to draw this interpretation from the following cases: *Keefer*, *supra* note 5; *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722, 128 D.L.R. (3d) 59 (C.A.) [*Fletcher* cited to O.R.]. As a result, there is one strand of case law that is increasingly unwilling to allow deliberate squatters to prevail under any circumstances. See *infra* note 67 and accompanying text.

<sup>8</sup> See *infra* note 133. Property systems perform a moral function in this way because they provide the assurances necessary for the owner to assert her own opinion and to ignore the opinions of others, something which one arguably has a moral duty to forbear from doing in a state of nature. See Larissa Katz, "A Jurisdictional Principle of Abuse of

ordinates uses of an object by setting the agenda for it.<sup>9</sup> A squatter's inconsistent use exposes a vacancy in the property system—an object of property over which the original owner no longer has effective authority. The squatter justifiably succeeds insofar as he fills that vacancy.

This study of the law and morality of adverse possession suggests a new analogy for understanding the role of adverse possessor, not as a land thief nor as a deserving labourer, but rather as something akin to the leader of a bloodless *coup d'état*.<sup>10</sup> A successful adverse possessor assumes the mantle of ownership for much the same reason that a successful *coup d'état* produces a government whose authority to rule is undiminished by the initial illegality of its path to power. The possibility of social order requires that someone wield ownership authority in the former case, and public authority in the latter. Adverse possession solves the moral problem of agendaless objects just as the recognition of the existing government (whatever its origins) solves the moral problem of stateless people.

The relationship between adverse possession and the legitimacy of post-revolution government is mostly one of analogy. But it is also more than this. Ownership, I will argue, is also a *part* of the larger system of public authority. It is part of the way that the state orders society. Of all the ways that the state relies on owners, the most important is the owner's function of setting the agenda for an object and so setting a framework that organizes the uses others can make of it.<sup>11</sup> Insofar as the social order is in part constituted by owners, the state needs to ensure

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Right" [unpublished, online: SSRN <<http://ssrn.com/abstract=1417955>>, Katz, "Abuse of Right"] (arguing that in a state of nature there is a duty to forbear from acting unilaterally on one's opinion about how best to distribute goods).

<sup>9</sup> See Katz, "Exclusion and Exclusivity", *supra* note 2.

<sup>10</sup> I will use "*coup d'état*" and "revolution" interchangeably, although by *coup d'état* I mean a special kind of revolution—one in which a powerful elite takes over the government without necessarily acting in the name of the people and without dismantling, but rather taking over, the existing institutions. See also Part II.B (distinguishing the adverse possessor from the conscientious revolutionary who claims to represent the will of the people and who seeks not just to oust the current office holder but to introduce a new order). I am grateful to Arthur Ripstein for suggesting that the analogy of adverse possession to revolution is more accurately described as an analogy to a *coup d'état*.

<sup>11</sup> See *infra* notes 125-26 and accompanying text. This explains what Henry Sumner Maine called the "presumption ... that *everything ought to have an owner*," characteristic of modern property systems: *Ancient Law* (New York: Henry Holt & Co., 1888) at 249 [emphasis in original]. There are many other reasons why a society may not tolerate vacancies, related to the obligations that the state imposes on owners. See e.g. Eduardo Peñalver, "The Illusory Right to Abandon" [unpublished, online: SSRN <<http://ssrn.com/abstracts=1428517>>, Peñalver, "Illusory Right"]. For a different take on the service that owners provide the state, see Larissa Katz, "Governing through Owners" [on file with the author, Katz, "Governing"].

that owners are doing what the state promises they will do (or else face a breakdown in the social order). The adverse possessor, having asserted effective authority over the object and displaced the original owner, assumes an indispensable role in the property system and also the larger system of public authority of which the property system is a part.

This paper proceeds in two parts. In Part I, I will provide an overview of the three models of adverse possession. In Part II, I will develop the analogy between adverse possession and a successful *coup d'état* in order to explain the morality of adverse possession.

## I. Three Models of Adverse Possession

The common law has produced a rich and complex debate about the law of adverse possession and the concepts of possession and ownership on which it is based. I will begin by examining in more detail the models of adverse possession that dominate this debate and the strikingly different conceptions of ownership and possession on which they rely.

### A. A Proceduralist Approach

The first model, recently adopted in England,<sup>12</sup> emphasizes the non-adversarial and procedural nature of adverse possession. On this view, the adverse possessor succeeds where she possesses and intends to possess the land (in the ordinary sense) for the requisite time period. The dispossession of the true owner is simply the result of sufficient acts of possession by the adverse possessor rather than any intentional ouster of the true owner. Possession by the squatter logically entails dispossession by the owner because possession, by its very nature, is exclusive and single.<sup>13</sup> Nothing more is needed: no intent to own, and no “hostility” or conflict with the owner.<sup>14</sup> As a result, an owner can inadvertently lose title to her land even in circumstances where she has not abandoned or forgotten

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<sup>12</sup> Australia has also recently adopted this approach. See e.g. Adrian J. Bradbrook, Susan V. MacCallum & Anthony P. Moore, *Australian Real Property Law*, 4th ed. (Pymont, N.S.W.: Lawbook, 2007) at 688-94. See also Martin Dixon, *Modern Land Law*, 6th ed. (London, U.K.: Routledge-Cavendish, 2009) at 501-503, 510.

<sup>13</sup> *J.A. Pye (Oxford) Ltd. v. Graham*, [2002] UKHL 30, [2003] 1 A.C. 419 at para. 38, [2002] 3 W.L.R. 221 [Pye].

<sup>14</sup> For cases rejecting an intent to own and emphasis on owner's future plans, see *Powell v. McFarlane* (1979), 38 P. & C.R. 452 (Ch.D.) [Powell]; *Laing and Laing v. Moran and Moran*, [1952] O.R. 215, [1952] 2 D.L.R. 468 (C.A.); *Pye*, *supra* note 13; *Beaulane Properties Limited v. Palmer*, [2005] EWHC 817, [2005] 4 All E.R. 461 (Ch.) [Beaulane Properties].

about it.<sup>15</sup> The original owner loses her right to regain possession simply by failing to act on her right in a timely fashion. When the original owner's right to re-enter is extinguished, the squatter by default is left with a right to possess the land that is better than anyone else's.<sup>16</sup> Adverse possession, on this model, is procedural rather than substantive because it sets out the process by which the owner's rights are extinguished to the benefit of the possessor but does not carve out new rights for the possessor.<sup>17</sup>

The introduction of this model of adverse possession in England was a response to an older model of adverse possession based on a version of the inconsistent use test.<sup>18</sup> An English Court of Appeal decision from 1879, *Leigh v. Jack*,<sup>19</sup> set out the basic principle that if an owner has not abandoned or forgotten entirely about the land, the adverse possessor will succeed only by ousting him through inconsistent use.<sup>20</sup> A century later, there were rumblings that perhaps English courts, following *Leigh*, had gotten the law wrong.<sup>21</sup> In 1833, the English had reformed their statute of limita-

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<sup>15</sup> The "new" position on adverse possession raises the possibility of a conflict with the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (20 March 1952, 213 U.N.T.S. 262 at 262, Eur. T.S. 5 [Convention]), which protects against disproportionate interference with property rights. See *Beaulane Properties*, *supra* note 14 (finding a violation of art. 1 of the Convention). But see *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom*, no. 44302/02 (30 August 2007) (Grand Chamber) [*Pye (E.C.H.R.)*] (finding no such violation).

<sup>16</sup> For this interpretation, see e.g. John M. Lightwood, *A Treatise on Possession of Land* (London, U.K.: Stevens & Sons, 1894):

The old Statutes of Limitation of the English law were purely negative. They barred the remedy of the true owner, but they did not touch his title. The possessor, therefore, acquired a title indirectly only, and this might be defeated if the true owner in any way lawfully came to the possession again. The present statutes, too, are negative, but ... they at once bar the remedy and extinguish the right, and practically they create a perfect title in the possessor (at 153).

<sup>17</sup> Thus, in an action by the owners in *Pye (E.C.H.R.)* (*supra* note 15) in the European Court of Human Rights, the lawyers for the government resisted any claim that the state had expropriated or taken the rights of the true owner and transferred them to the adverse possessor.

<sup>18</sup> For my discussion of this development, see Larissa Katz, "Bertha Wilson's Property Jurisprudence" in Kim Brooks, ed., *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 39.

<sup>19</sup> (1879), 5 Exch. Div. 264 [*Leigh*].

<sup>20</sup> Further discussion of the inconsistent use test will be found at *infra* notes 24-38 and accompanying text.

<sup>21</sup> For cases in England following *Leigh* (*supra* note 19), see e.g. *Littledale v. Liverpool College* (1899), [1900] 1 Ch. 19, 16 T.L.R. 44 (C.A.); *Williams Bros. Direct Supply Stores Ltd. v. Raftery*, [1957] 3 W.L.R. 931, [1957] 3 All E.R. 593 (C.A.).



tions.<sup>22</sup> The 1833 statute, on which the modern English, Ontario, and other Canadian statutes are based, stipulated that time starts to run against an owner from the moment that he discontinued possession or was dispossessed.<sup>23</sup> One interpretation of this statute that has become the current English view is that it did away with the requirement of “adversity” or ouster.<sup>24</sup> In 1977, Justice Slade in *Powell* delivered a strong critique of *Leigh’s* requirement of inconsistent use on the basis that it misconstrued the concept of possession.<sup>25</sup> The gist of his view was that an owner is dispossessed where the squatter is able to show that she and she

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<sup>22</sup> See e.g. Percy Bordwell, “Disseisin and Adverse Possession” (1923) 33 Yale L.J. 1 at 7, n. 61 (citing Blackstone to argue that the old English view that there can be no prescription to land was mere semantics; in any case, the reforms of 1833 unequivocally introduced prescription to land). See also Harold Potter, *The Modern Law of Real Property and Chattels Real* (London, U.K.: Sweet & Maxwell, 1929):

The Statutes of Limitation which were in force before 1834, only extinguished the remedy of the person out of possession; they did not confer a right to the land on the person in possession, but the Acts now in force actually create an interest in the land, because the right and title of the real owner are completely extinguished (at 605-606).

<sup>23</sup> *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. IV, c. 27, s. 3. For more recent statutes, see *Limitation Amendment Act 1980* (U.K.), 1980, c. 24, s. 4; *Limitations Act*, R.S.O. 1990, c. L-15, s. 5(1) [*Limitations Act (Ont.)*]; *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, s. 31; *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 11(a). Note that many provinces in Canada have done away with the doctrine of adverse possession. See e.g. British Columbia’s *Limitation Act*, R.S.B.C. 1996, c. 266, s. 12; Saskatchewan’s *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1, s. 21.

<sup>24</sup> See *Teis v. Ancaster (Town of)* (1997), 35 O.R. (3d) 216 at 226, 152 D.L.R. (4th) 304 (C.A.) [*Teis*]. Laskin J. noted that the Ontario statute, based on the 1833 statute, does not contain the phrase “adverse possession”. See also Oliver Radley-Gardner, “Civilized Squatting” (2005) 25 Oxford J. Legal Stud. 727 at 732, citing Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888): “Pollock states that ‘the result, and doubtless the intended result, is greatly to diminish the importance of the character in which and the intention with which acts of apparent ownership are done.’” A rival view is that the 1833 reforms did away with the fiction that a deliberate possessor acts with the implied permission of the owner. Lord Denning tried to resurrect the implied permission theory: *Wallis’s Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd.*, [1974] 3 W.L.R. 387, [1974] 3 All E.R. 575 [*Wallis’s Cayton Bay*]. The effect of the implied permission theory is that deliberate squatters are deemed to be acting non-adversely and so can never succeed. See *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 at 568, 31 R.P.R. 200 (C.A.) [*Masidon Investments*], citing *Leigh*, *supra* note 19 at 273:

Before 1833, some acts of possession were deemed to be acts on behalf of the owner and hence not “adverse”. As a consequence of the reforming statutes of the 1830s, adverse possession is established where the claimant’s use of the land is inconsistent with the owner’s “enjoyment of the soil for the purposes for which he intended to use it.”

<sup>25</sup> *Powell*, *supra* note 14.

alone is in possession, in the ordinary sense of the word.<sup>26</sup> An owner's future plans, which may or may not materialize, do not count as continued acts of possession in the ordinary sense. Justice Slade also thought that the line of cases following *Leigh* wrongly understood *animus possidendi* to mean the intent to oust the true owner: a squatter cannot form the intent to oust the owner because she does not have the authority in law to do so. It would be impossible to require the squatter to intend to do what she is not in a position to do.<sup>27</sup> Thus, the intent to possess, on Justice Slade's view, can mean only the intent to exclude others insofar as it is reasonably practicable and permitted by law.

Justice Slade's decision in *Powell*, it has turned out, was an early sign of discomfort in England with what the inconsistent use test implies about the concept of ownership and its vulnerability. In 2004, the House of Lords in *Pye* overturned *Leigh* and applauded Justice Slade's decision in *Powell*.<sup>28</sup> The House of Lords affirmed that any talk of ouster misconstrues what the law actually requires following the 1833 reforms, finding that ouster "is derived from the old law of adverse possession [pre-1833] and has overtones of confrontational, knowing removal of the true owner from possession."<sup>29</sup>

On the current English model, the squatter does not engineer a takeover of the owner's position and does not acquire a *new* ownership right at the end of the day.<sup>30</sup> This model of adverse possession rests on a particular

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<sup>26</sup> *Ibid.* at 470. This was the approach taken by the House of Lords in *Pye* (*supra* note 13). Note that the intent to possess can be inferred from the fact of possession and of course, on this view, no intent to own is necessary.

<sup>27</sup> It is possible to wish for what one cannot do but it is not possible to decide or intend to do what one cannot do. This basic distinction is found in Aristotle's *Nicomachean Ethics* (Book III, c. 3, 1112a18-33).

<sup>28</sup> *Pye*, *supra* note 13. See also *Buckinghamshire County Council v. Moran*, [1989] 3 W.L.R. 152, [1989] 2 All E.R. 225 (also endorsing Slade J.'s approach in *Powell* (*supra* note 14)); Martin Dockray, "Adverse Possession and Intention" (1982) Conv. & Prop. Law. (N.S.) 256 at 257.

<sup>29</sup> *Pye*, *supra* note 13 at para. 38. The "old" statute of limitations (pre-1833) clearly required adversity. See also Lightwood, *supra* note 16 at 160: "[The statute] ran so soon as there was an adverse possession, and this was defined to mean a possession inconsistent with the title of the true owner ... or a possession taken with intention to claim title" (citing *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1 at 164, 37 E.R. 527 at 586 and other sources).

<sup>30</sup> Brian Bucknall, "*Teis v. Ancaster*: Knowledge, the Lack of Knowledge and the Running of a Possessory Title Period", Case Comment, (1998) 13 R.P.R. (3d) 68 at 68; Mark Wonnacott, *Possession of Land* (Cambridge: Cambridge University Press, 2006) at 162; Pollock & Wright, *supra* note 24 at 91. Historically, the title that the adverse possessor acquired post-limitation period was called "parliamentary title" but this was not meant to indicate that any statute confers on the adverse possessor a new right. Rather, the adverse possessor's right becomes indefeasible once the owner's right is extinguished

understanding of ownership and its place in the common law. It fits with the old (feudal) view that the English common law does not have a concept of ultimate ownership of land.<sup>31</sup> Instead of ownership, on this view, there is just a hierarchy of rights to possess that are, relative to one another, either stronger or weaker.<sup>32</sup> To own is just to wield a right to possess that is good against all others.<sup>33</sup> A squatter who takes possession of land has a right to possess that is good against all others except someone with a prior and better right, such as the true owner and those claiming through him. Even though the squatter is a trespasser, the law will protect him from dispossession by anyone other than the true owner.<sup>34</sup> What is more, third parties cannot challenge his right on the grounds that someone other than he is the true owner.<sup>35</sup> Relative to the owner, the squatter's right to possess is weak and defeasible until the limitation pe-

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(*ibid.* at 95). The English historically distinguished and continue to distinguish between rights acquired by prescription and the extinguishment of rights on the one hand, and remedies by the statute of limitation on the other. The quality of the squatter's possession is of course crucial to the former, but not really relevant to the latter. See Wonnacott, *supra* at 136. See also Bordwell, *supra* note 22 at 7. The introduction of the requirement that the possession be open, notorious, and non-violent emphasizes the acquisition of ownership through adverse possession and not merely the extinguishment of the original owner's right.

<sup>31</sup> See generally *infra* notes 38-47 and accompanying text.

<sup>32</sup> Pollock & Wright, *supra* note 24 at 93 (the adverse possessor has a "right in the nature of property which is valid against every one who cannot show a prior and better right"). The notion of ultimate ownership slipped into the common law through the availability of the *jus tertii* defence in limited circumstances; that is, if the defendant did not forcibly dispossess the plaintiff, she can raise the existence of a third party's better title to defeat the plaintiff's action to eject. See Sir William Holdsworth, *A History of English Law*, 2d ed. (London, U.K.: Methuen & Co., Sweet & Maxwell, 1966) vol. 7 at 65-68, cited in McNeil, *supra* note 2 at 50.

<sup>33</sup> Any loss of rights by the owner, on this view, is due to the owner's own inaction, not to a "taking" by the state or another. See *Pye (E.C.H.R.)*, *supra* note 15 at para. 65.

<sup>34</sup> Even the owner is limited in what she can do to regain possession: the owner has the right to enter and repossess her land only before the statutory period expires and only without violence. See A.H. Oosterhoff & W.B. Rayner, eds., *Anger and Honsberger Law of Real Property*, 2d ed. (Aurora, Ont.: Canada Law Book, 1985) vol. 2 at 1497. See also Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* (New York: Foundation Press, 2007) at 198; Jesse Dukeminier & James E. Krier, *Property*, 5th ed. (New York: Aspen, 2002) at 125-26. The owner cannot force the squatter but, if she meets resistance, must bring an action to reject. See Anne Warner La Forest, ed., *Anger & Honsberger Law of Real Property* (Aurora, Ont.: Canada Law Book, 2008) (the right to enter and retake possession independent of court action but any violence might amount to assault). See also Powell, *supra* note 14 at 476: "Until the possession of land has actually passed to the trespasser, the owner may exercise the remedy of self-help against him. Once possession has actually passed to the trespasser, this remedy is not available to the owner."

<sup>35</sup> Ziff, *supra* note 6 at 139-40 (discussing *jus tertii* defence); Merrill & Smith, *supra* note 34 at 226-27; Dukeminier & Krier, *supra* note 34 at 110.

riod runs. But relative to third parties, the squatter has a right to possess that is no different from that of the owner. When the owner's right to regain possession is extinguished with the passage of time, the squatter simply enjoys a more robust protection of his own right to possess: he no longer faces the threat of re-entry by the owner.

A significant conceptual shortcoming of this approach is that it relies on an unsatisfactorily weak conception of ownership. The emphasis on relativity of title to explain the owner's position suggests a parity between the position of the adverse possessor (as holder of a right to possess good against the whole world except someone with a superior right to possess) and the position of the owner (as holder of a right to possess that is good against the whole world including the possessor).<sup>36</sup> Of course, this model does, in a limited sense, distinguish between owner and possessor. For one thing, the model picks up on differences in the mode of acquisition. Thus, the adverse possessor has an *original* right to possess, acquired through the fact of possession, whereas the owner, in the usual case, has *derivative* title acquired through transfer or inheritance. This model also picks up on differences in the vulnerability of the owner's and the squatter's respective rights. The owner's right to possess is good against all comers whereas the squatter's right has more limited exigibility, good against all but the true owner. But the model fails to acknowledge the essential differences in the *nature* of the owner's and the squatter's rights, in keeping with the view that English law, unlike civilian law, gets by without the idea of ownership.

The perception that our system of property works without the concept of ownership is the product of property law's roots in feudalism. The feudal origins of English property law produced a system of estates in which the legal rights in land were always held of someone higher up the feudal chain and ultimately held of the Crown. As Professor J.W. Harris wrote, "[s]ince what is conveyed is always an estate in the land, it has been widely assumed that 'ownership' of land, as such, is not a conception internal to English land law."<sup>37</sup> But it would be a mistake to conclude that Anglo-American law has not produced a robust concept of ownership, al-

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<sup>36</sup> This emphasis on relativity of title is motivated by the view that ownership is not really a legal concept, and that all anyone can have is a right to possession. See *supra* notes 30-33 and accompanying text.

<sup>37</sup> J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 69. See also Bernard Rudden, "Notes Towards a Grammar of Property" (1980) *Conv. & Prop. Law* (N.S.) 325; A.D. Hargreaves, "Modern Real Property" (1956) 19 *Mod. L. Rev.* 14. See also McNeil, *supra* note 2 at 8-9, 74-75; Dixon, *supra* note 12 at 501; Burn & Cartwright, *supra* note 4 at 114-15; William L. Prosser, *Handbook of The Law of Torts*, 3d ed. (St. Paul, Minn.: West, 1964) at 68 (early English common law blurred the conceptual distinction between ownership and possession).

beit one that we need to glean from a wide array of property rules and doctrines.<sup>38</sup> It is of course true that the idea of ownership in the common law is rarely defined or directly discussed in property jurisprudence.<sup>39</sup> But this on its own should not lead us to overlook the concept of ownership within our legal system. We have, for instance, no evidence that Roman law, touted as the source of the civil law idea of dominium or complete ownership, contained any explicit articulation of the idea of ownership.<sup>40</sup> As one scholar of Roman law put it, “[i]t is well known that no ancient legal text contains a Roman definition of ownership.”<sup>41</sup> As I discuss elsewhere, the concept of ownership in Anglo-American property law emerges from the way in which various property doctrines, taken together, establish and preserve the special position of the owner as the agenda-setting authority.<sup>42</sup> Harris similarly locates the concept of ownership in the common law, arguing that ownership is quite simply an *incident* of legal estates in land.<sup>43</sup> As earlier property writers like H.W. Challis wrote, “[a fee simple] confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination ... and, for all practical purposes [the right] of ownership.”<sup>44</sup> Of course feudalism complicates the idea of ownership that we find in English law,<sup>45</sup> but even in that

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<sup>38</sup> See Harris, *supra* note 37 at 69-72 (arguing that the idea of ownership of land is internal to the common law and has been so since at least the medieval period). See also Sir Frederick Pollock & Frederic William Maitland, *The History of English Law: Before the Time of Edward I*, 2d ed. (Cambridge: Cambridge University Press, 1923) vol. 2 at 2-6 (noting that medieval jurists like Bracton “ascribed to the tenant in demesne ownership and nothing less than ownership” at 6). Holdsworth, on narrower doctrinal grounds, thought that modern property law does contain the idea of ownership. His argument was that the law permits a qualified *jus tertii* defence, a limited appeal to the existence of a true owner in circumstances where the defendant did not forcibly dispossess the plaintiff. For a discussion, see McNeil, *supra* note 2 at 50-51.

<sup>39</sup> An important exception is in the context of U.S. takings cases, where the Supreme Court of the United States has struggled to define property rights coherently. See Michael A. Heller, “The Boundaries of Property” (1999) 108 Yale L.J. 1163 at 1202-17.

<sup>40</sup> For the argument that the idea of unfettered ownership picked up by civilians in the nineteenth century is not found in Roman law but in Byzantine law (Justinian’s Code), see Alan Rodger, *Owners and Neighbours in Roman Law* (Oxford: Clarendon Press, 1972) at 1-37.

<sup>41</sup> *Ibid.* at 1.

<sup>42</sup> See Katz, “Exclusion and Exclusivity”, *supra* note 2 at 290.

<sup>43</sup> Harris, *supra* note 37 at 70-71.

<sup>44</sup> See Charles Sweet, ed., *Challis’s Law of Real Property: Chiefly in Relation to Conveyancing*, 3d ed. (London, U.K.: Butterworths, 1911) at 218.

<sup>45</sup> The complexity of the real action encouraged owners to assert their rights *qua possessor* (and to use the much simpler action of ejectment, through which conflicting claims to possession were resolved). See Maine, *supra* note 11 at 282-83.

context, the law understood and protected ownership. This is what Professor Baker meant when he wrote, “by the thirteenth century the tenant was in reality the owner of the land.”<sup>46</sup> The Crown by that point had created the safeguards that enabled tenants to exercise agenda-setting authority with respect to the land without interference by their overlords.<sup>47</sup>

The weakness of the current English approach to adverse possession is that it overlooks the existence of a robust conception of ownership in the common law; it suggests in its place a difference more of degree than of kind between the position of owner and possessor. This apparent symmetry between the positions of the possessor and owner, on this model, accounts for why the squatter need not aim to take over from the owner or intend to acquire a position other than the one she occupies already. A right to possess is all the possessor has to start with and all that she or anyone can have at the end of the day.

As we have seen, the recent English approach to adverse possession sidesteps the moral paradox by emphasizing the relativity of title. There is, on this view, no usurpation—no “private taking”—but simply the natural defeasibility of the owner’s right to possess where he fails to take action, thus leaving the adverse possessor’s right to possess that much stronger.<sup>48</sup> On the English view, as we saw above, we do not have a thief one minute and an owner the next, but rather someone whom the law recognizes as having a right to possess before the statutory period expires, and an even stronger right to possess thereafter. With respect to the owner himself, the squatter maintains a right to possess until the owner

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<sup>46</sup> J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London, U.K.: Butterworths, 2002) at 237. See Harris, *supra* note 37 at 70, citing Pollock & Maitland, *supra* note 38 at 2-6.

<sup>47</sup> It is worthwhile pointing out that civilians, facing a similar challenge, came up with the distinction between *dominium directum* and *dominium utile* to explain ownership in the context of feudalism. See Robert Feenstra, “*Dominium* and *ius in re aliena*: The Origins of a Civil Law Distinction” in Peter Birks, ed., *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford: Oxford University Press, 1989) 111 at 112-13.

<sup>48</sup> *Pye (E.C.H.R.)*, *supra* note 15. Note the parallel in the way that a surviving joint tenant experiences an enlargement of her rights on the other tenant’s death. Joint tenants do not acquire *new* rights or *more* rights on the death of the joint tenant; rather, they are simply in a stronger position insofar as the rights of their former joint tenant do not survive death. Contrast this with the common view, in the American context, that adverse possession is a kind of “takings” or transfer of rights by the state from one person to the next. See e.g. Fennell, “Efficient Trespass”, *supra* note 3 (“Background governmental power, not any acquisitive thoughts in the mind of the new owner, dispossesses the original owner” at 1055). See also Richard A. Epstein, “One Step Beyond Nozick’s Minimal State: The Role of Forced Exchanges in Political Theory” (2005) 22 *Social Philosophy and Policy* 286 at 305-307 (statutes of limitations produce forced exchanges, but are justified because they also produce Pareto improvements).

extinguishes it by re-entry.<sup>49</sup> And vis-à-vis the rest of the world, the law not only treats the squatter as having a right to possess but forbids mention of the better right of the true owner in a dispute with a third party.<sup>50</sup> Thus, although the adverse possessor is clearly a trespasser in English law before the statutory period expires, he occupies a position in law that is not at such a distance conceptually from the owner's own. By emphasizing the relativity of title, the English do not treat the squatter as wholly damned as a wrongdoer one minute and wholly embraced by the law the next. However, the English view avoids the moral paradox in the law of adverse possession only by weakening the concept of ownership and setting up the fiction that the adverse possessor does not take over the owner's position, but simply continues on in his own.

### *B. A Legal Moralist Approach*

American approaches to adverse possession reveal a much greater concern with the *effect* of adverse possession in transforming squatters into owners.<sup>51</sup> Adverse possession in American case law and commentary is commonly described as a form of private "taking" or land theft, with the apparently anomalous result that the law through adverse possession sanctions theft.<sup>52</sup> This perceived shift in the law's attitude to the squatter

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<sup>49</sup> There is a debate about whether the adverse possessor has a right to possess depending on material fact of possession or a form of seisen that continues until the dissee terminates it by re-entry. See McNeil, *supra* note 2 (discussing Holdsworth).

<sup>50</sup> For a discussion of the *jus tertii* defence, see McNeil, *supra* note 2 at 50-51. See also Pollock & Wright, *supra* note 24 at 91. It is not unwaveringly the case that the common law forbids a defence based on the better right of a third party: where the defendant has not forcibly dispossessed the plaintiff (for instance, the latter's right to possess is not founded on actual possession), the defendant can defeat the plaintiff's claim by raising a *jus tertii* defence. Holdsworth took this as evidence that the modern common law has an idea of (absolute) ownership that is distinct from (relative) possession: McNeil, *supra* note 2 at 50-51.

<sup>51</sup> See Bordwell, *supra* note 22 at 12-13 (emphasizing the acquisition of new rights by the squatter). This is so notwithstanding the fact that the law of adverse possession in the U.S. is grounded in statutes of limitation that, as in England, technically produce this effect by extinguishing the original owner's ability to bring an action to eject the squatter. Many U.S. scholars of property law have decried this characterization of adverse possession (quite rightly as I will argue below) and have argued in favour of the proceduralist, non-adversarial approach that I have described above. See e.g. H.W. Ballantine, "Title by Adverse Possession," (1918) 32 Harv. L. Rev. 135 at 141-42. See also Jesse Dukeminier *et al.*, *Property*, 6th ed. (New York: Aspen, 2006) at 115.

<sup>52</sup> See e.g. Jeffrey Evans Stake, "The Uneasy Case for Adverse Possession" (2001) 89 Geo. L.J. 2419 at 2420 ("The doctrine effects a transfer of state-sanctioned rights in land from owners to nonowners without the consent of the owner"). See Ballantine, *supra* note 51 at 141 (identifying and then disagreeing with the view that adverse possession

pre- and post-limitation period has led American courts and commentators increasingly to view the law of adverse possession primarily as a tool to correct the mistakes of good faith squatters:<sup>53</sup> deliberate squatters are, on this view, morally undeserving of the disproportionate reward that adverse possession is seen to deliver.<sup>54</sup> This has had an impact on the way in which the law of adverse possession has evolved in the United States. Few jurisdictions require that squatters deliberately challenge the title of the original owner in order to succeed, and some have gone so far as to limit the availability of adverse possession to good faith squatters.<sup>55</sup>

Historically, this was not the case. American approaches to adverse possession—and property generally—were and remain strongly responsive to utilitarian concerns. There was a time, particularly when the West was being settled, when it was seen as socially beneficial to encourage land-hungry locals to take over from absentee paper title holders.<sup>56</sup> As a result, many U.S. jurisdictions historically either did not inquire into the mental state of the squatter or even required that squatters have a hostile intent in order to prevail.<sup>57</sup> Over time, as unsettled land became increas-

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amounts to the statutory confiscation of property or a parliamentary taking). For more sources, see Fennell, “Efficient Trespass”, *supra* note 3 at 1053-56.

<sup>53</sup> R.H. Helmholz, “Adverse Possession and Subjective Intent” (1983) 61 Wash. U.L.Q. 331 at 332-33 (showing the negative reaction of judges to deliberate squatters, even in jurisdictions where good faith is not required); Fennell, “Efficient Trespass”, *supra* note 3; Thomas W. Merrill & Henry E. Smith, “The Morality of Property” (2007) 48 Wm. & Mary L. Rev. 1849 at 1876.

<sup>54</sup> See Thomas W. Merrill, “Property Rules, Liability Rules, and Adverse Possession” (1984-1985) 79 Nw. U.L. Rev. 1122 (arguing for a liability rule protection for owners in the case of bad faith squatters to reduce the size of the reward).

<sup>55</sup> See Dukeminier & Krier, *supra* note 34 at 127. Fennell, “Efficient Trespass”, *supra* note 3 at 1047 (describing “bad faith” requirements for adverse possession as a minority approach that is increasingly losing favour and describing the dominant objective approach).

<sup>56</sup> Peñalver & Katyal, *supra* note 1 at 1106-107, 1109. A supporting rationale was that a squatter grows attached to the land she possesses and comes to consider it her own. See Oliver Wendell Holmes, Jr., *The Common Law* (New Brunswick, N.J.: Transaction, 2005) c. 6 at 206ff.; Lightwood, *supra* note 16 at 152-53 (noting a policy to “[withhold] from one who has slept upon his right ... [rather] than to take away from the other what he has long been allowed to consider as his own, and on the faith of which the plans in life, habits, and expenses of himself and his family may have been unalterably formed and established”). Of course, attitudes toward adverse possession are cyclical. Henry Sumner Maine wrote in 1861 that “[p]rescriptions were viewed by the modern lawyers, first with repugnance, afterwards with reluctant approval” (*supra* note 11 at 276).

<sup>57</sup> See Peñalver & Katyal, *supra* note 1 at 1110-11 (explaining how the doctrinal developments supporting bad faith adverse possession was one way in which the courts sided with squatters against absentee landlords in the West). The common law approach in the state of Maine is the best example of this approach: adverse possessors had to show a hostile intent, and good faith squatters were thus often disqualified if they could not



ingly scarce, deliberate squatting came to be seen in a different light, namely, as an attack on the security of ownership and as morally reprehensible.<sup>58</sup> The deliberate squatter came to be cast in the judicial imagination as a land thief to whom protection is offered only reluctantly, with a utilitarian's eye to the larger ills avoided by doing so.<sup>59</sup> On this view, the apparent windfall enjoyed by a deliberate squatter who is transformed into the owner at the end of the day is justified, if at all, on the basis that adverse possession (1) prompts lazy owners to use their land or sell it off; (2) roots out stale claims while the evidence is still fresh so that title searches are simpler and less costly; and (3) respects the expectations of third parties who have relied on appearances.<sup>60</sup>

American instrumentalism held the moral paradox of adverse possession at bay for some time. So long as adverse possession performed an important service (e.g., rooting out stale claims, third party reliance, or the improved efficiency of land use), we suffered the moral incoherence of adverse possession.<sup>61</sup> Recently, however, American commentators have suggested that many of the supposed benefits of adverse possession are either not sufficiently valuable to offset the costs of rewarding theft, or better

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show an intent to own what was not theirs. See Dukeminier & Krier, *supra* note 34 at 142-44; Margaret Jane Radin, "Time, Possession, and Alienation" (1986) 64 Wash. U.L.Q. 739 at 746-47; Fennell, "Efficient Trespass", *supra* note 3 at 1039, n. 9.

<sup>58</sup> See e.g. Merrill, *supra* note 54 at 1876 (adverse possessors are seen as bad people according to the simple moral code that underlies property law). For the views of property scholars on the morality of deliberate squatting, see Fennell, "Efficient Trespass", *supra* note 3 at 1048 (citing Richard Epstein, Thomas Merrill, Richard Helmholz, Richard Posner, and others on the immorality of deliberate squatting).

<sup>59</sup> Richard A. Epstein, "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 Wash. U.L.Q. 667 at 679-80, 685; Stake, *supra* note 52 (a cost of the doctrine of adverse possession is that it "creates an opportunity to steal land, a behaviour we do not want to encourage" at 2433). See also *Walls v. Grohman*, 337 S.E.2d 556 (N.C. 1985) ("We have concluded that a rule which requires the adverse possessor to be a thief in order for his possession of the property to be 'adverse' is not reasonable" at 562), cited in Fennell, "Efficient Trespass", *supra* note 3 at 1040, n. 11.

<sup>60</sup> Merrill, *supra* note 54 at 1128-33. See also Dixon, *supra* note 12 at 502.

<sup>61</sup> The idea that adverse possession is inconsistent with the idea of ownership rights and yet justified for instrumental reasons is an old one, and one to which Hegel and others felt obliged to respond. See G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. by Allen W. Wood, trans. by H.B. Nisbet (Cambridge: Cambridge University Press, 1991) at 94:

Prescription, therefore, has not been introduced into right merely because of an external consideration at variance with right in its strict sense—that is, in order to terminate the disputes and confusions with which old claims would threaten the security of property, etc. On the contrary, prescription is based on the determination of the *reality* of property, of the will's need to express itself in order to possess something [emphasis in original].

achieved through other legal mechanisms.<sup>62</sup> For instance, as Professor Fennell has argued, the interests of third parties are adequately protected by tort action for detrimental reliance, and land registries and recording systems now preserve evidence of title and so ensure the marketability of title previously threatened by old claims.<sup>63</sup> Others point out that it is no longer self-evident that adverse possession leads to more efficient uses of land because our society no longer straightforwardly prefers development and active uses of land over conservation and passive uses.<sup>64</sup> Not being able to locate the benefits of adverse possession for deliberate squatters in utilitarian terms, American courts and commentators have become increasingly responsive to what they see as the moral paradox of adverse possession.<sup>65</sup> As a result, judicial practice increasingly favours inadvertent or good faith squatters even in jurisdictions where adverse intent is formally no bar to a successful claim based on adverse possession.<sup>66</sup>

### C. *An Inconsistent Use Model*

There is a third approach to adverse possession that acknowledges this radical transformation of squatters into owners without collapsing into a moral paradox. Although this approach is not perfectly articulated in any jurisdiction, its crucial component—the inconsistent use test—was once found throughout the common law world and is still the law in Canada. It is, however, increasingly under attack and wrongly so, as I think this paper will show.<sup>67</sup> According to the inconsistent use test, adverse pos-

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<sup>62</sup> Cf. Fennell, “Efficient Trespass”, *supra* note 3 at 1084 (arguing that, while the conventional utilitarian arguments in favour of adverse possession are not convincing, it is efficient to allow deliberate squatters to acquire property rights through adverse possession in some circumstances).

<sup>63</sup> See *ibid.* at 1063-64 (articulating other areas of law that protect against detrimental reliance, etc.). See also Stake, *supra* note 52 at 2448.

<sup>64</sup> See e.g. Abraham Bell, “Private Takings” (2009) 76 U. Chicago L. Rev. 517.

<sup>65</sup> Fennell’s response is that there *are* benefits of deliberate adverse possession that have gone unnoticed. See Fennell, “Efficient Trespass”, *supra* note 3 at 1073-76. On Fennell’s functionalist approach, we bracket questions about the morality of adverse possession so long as there are efficiency-based reasons for adverse possession.

<sup>66</sup> Helmholtz, *supra* note 53 at 332-33; Fennell, “Efficient Trespass”, *supra* note 3 at 1046.

<sup>67</sup> For cases applying the inconsistent use test, see *Mueller v. Lee* (2007), 59 R.P.R. (4th) 199, 158 A.C.W.S. (3d) 827 (Ont. Sup. Ct. J.) [*Mueller* cited to R.P.R.] (recognizing, in *obiter*, that the inconsistent use test applies to advertent squatters and is an element of the intent requirement). See also *Laurier Homes (27) Ltd. v. Brett* (2005), 42 R.P.R. (4th) 86, 144 A.C.W.S. (3d) 46; *Masidon Investments*, *supra* note 24. For cases criticizing the inconsistent use test, see *Beaudoin v. Aubin* (1981), 33 O.R. (2d) 604 at 609, 125 D.L.R. (3d) 277 (holding that no subjective intent to own or to exclude the true owner is required and that where acts of possession are unequivocal, the requisite *animus possidendi* is to be inferred). See also *Fazio v. Pasquariello* (1999), 23 R.P.R. (3d) 157, 93

session is successful only when the possessor has used the land in a manner inconsistent with the original owner's agenda for it.<sup>68</sup> The inconsistent use test requires the squatter to show that she has in effect ousted and intended to oust the true owner.<sup>69</sup> A friendly or amicable relationship between the adverse possessor and the owner will tend to rule out adverse possession.<sup>70</sup> The inconsistent use test thus preserves a wide scope for the owner to pursue the ends of her choosing insofar as she is immune from all but the most direct and confrontational challenge to her authority (which in a way limits, rather than introduces, "overtones of confrontation"<sup>71</sup> into the law).<sup>72</sup> The effect of the inconsistent use test is that an owner is quite secure in her position even if her plans for the land do not include present uses of it, so long as the possessor does not make use of

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O.T.C. 99 (Ct. J. (Gen. Div.)); *Raso v. Lonergan* (1998), 114 O.A.C. 335, 83 A.C.W.S. (3d) 494, (C.A.); *Gorman v. Gorman* (1998), 110 O.A.C. 87, 16 R.P.R. (3d) 173 (C.A.) (affirming the *animus possidendi* requirement set out in *Keefer* (*supra* note 5) and upheld in *Masidon* (*supra* note 24)). Cf. *Bradford Investments (1963) Ltd. v. Fama* (2005), 77 O.R. (3d) 127, 34 R.P.R. (4th) 16 (Sup. Ct. J.) [*Bradford Investments* cited to O.R.]. This case considered the criticisms in *Pye* (*supra* note 13) approvingly but was precedent-bound to follow *Keefer* (*supra* note 5). *Gibbins v. Gibbins* (1977), 18 O.R. (2d) 45, 1 R.F.L. (2d) 352 (S.C.(C.A.)) (showing how the "old" approach to adverse possession, in which we look to the quality of the possession, was reintroduced into Canadian case law notwithstanding that the modern limitation act was meant to avoid a discussion of adverse versus non-adverse possession).

<sup>68</sup> *Tecbuild Ltd. v. Chamberlain* (1969), 20 P. & C.R. 633 (C.A.) (distinguishing between an "intent to exclude the true owner" and "an intent merely to derive some enjoyment from the land wholly consistent with such use as the true owner might wish to make of it" at 643).

<sup>69</sup> *Keefer*, *supra* note 5 at 692.

<sup>70</sup> *Ibid.*; *St. Clair Beach Estates Ltd. v. MacDonald* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650 (Ont. H.C.J.). But note the mutual and unilateral mistake cases in Ontario, which create a different set of requirements responding to the befuddled neighbour paradigm of adverse possession. See e.g. *Teis*, *supra* note 24; *Key v. Latsky* (2006), 39 R.P.R. (4th) 160, 206 O.A.C. 116; *Wood v. Gateway of Uxbridge Properties* (1990), 75 O.R. (2d) 769, 14 R.P.R. (2d) 262 (Ct. J. (Gen. Div.)).

<sup>71</sup> *Beaulane Properties*, *supra* note 14 at para. 91.

<sup>72</sup> See Bucknall, *supra* note 30 at 71-72:

Should the holder of paper title be forced into an aggressive, and potentially litigious, position (with all the expense that it might entail) when the holder sees no harm being done? Should the holder [of] paper title instead be allowed to assume that its rights are unimpaired until a genuine conflict develops?

See also *Pye (Oxford) Ltd. v. Graham*, [2001] 2 W.L.R. 1293, [2001] 2 E.G.L.R. 69 (C.A.), Neuberger J. (asking why we should expect an owner to spring into action if he has no real use for the property). This approach limits the requirement to "keep on speaking" or lose title: Carol M. Rose, "Possession as the Origin of Property" (1985) 52 U. Chicago L. Rev. 73 at 79 [emphasis in original].

the land in a manner that is inconsistent with her plans for it. Possession is not adverse where it does not defeat the owner's plans for the property.

The inconsistent use test construes adverse possession as a bid to oust the owner from his position of authority.<sup>73</sup> The squatter's acts of possession are sufficient for this purpose, only when they are inconsistent with the owner's intended use and so pose a true challenge to the owner's position. This understanding of "possession" may be at odds with the current English view of the ordinary meaning of the word, but it has deep roots. There are some similarities between the kind of possession required to defeat ownership on the inconsistent use test, and the idea of possession found in Roman law. On the Roman law conception, possession means roughly to "[sit] in power" or to "hold in the manner of an owner."<sup>74</sup> Thus, the Romans distinguished between detention, which is occupation without the intention to own, and possession.<sup>75</sup> Possession, on the Roman view, requires both acts of possession and intention, *animus possidendi*. If possession means to hold in the manner of owner, then it follows that *animus possidendi* means the intent to own for oneself.<sup>76</sup> This understanding of possession complicates the position of deliberate squatters. For a deliberate possessor to "sit in power" or to "hold in the manner of owner," he must in effect set out to displace the existing owner. Perhaps to avoid encouraging intentional ouster, Roman law limited the availability of adverse possession to good faith squatters.<sup>77</sup> The inconsistent use test takes

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<sup>73</sup> *Fletcher, supra* note 7.

<sup>74</sup> For the distinction between ownership and possession, see Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) at 105, 107-108. Relativity of title still matters in that possession is protected by the fact that a person who has possession has an action against a dispossessor (*ibid.* at 108). Romans understood possession to mean "the holding of a thing in the manner of an owner, the exclusive holding of a thing" (*ibid.* at 111). Nicholas explains the etymology of the word "possession" and notes that the literal translation could be "sitting in power" (*ibid.* at 111, n. 1). Thus, the lessee "does not *hold in the manner of an owner*. His holding acknowledges the superior right of the lender. Conversely if ... he ceases to acknowledge that right and attempts to hold adversely to the lender, he then acquires possession" (*ibid.* at 111 [emphasis added]).

<sup>75</sup> *Ibid.* See also Maine, *supra* note 11 at 281 (possession signifies "physical detention coupled with the intention to hold the thing detained as one's own").

<sup>76</sup> For a discussion of German jurists' interpretation of the act and intention requirements in the Roman law of possession, see Radley-Gardner, *supra* note 24 at 734-39.

<sup>77</sup> *Justinian's Institutes*, trans. by Peter Birks & Grant McLeod, (London, U.K.: Duckworth, 1987) Inst. 2.6. This excludes those who have an *animus furandi* but enables good faith purchasers who assert ownership over land they believe to be their own, but who are mistaken as to the validity of their title, to prevail in some circumstances. See also Maine, *supra* note 11 at 278 (stating that good faith is required for usucaption, in keeping with the view that the function of adverse possession was to cure defects in title).

the same bold understanding of what it means to possess but omits the moral safeguards that we find in Roman law against ouster by “bad faith” squatters.<sup>78</sup> On the inconsistent use approach, adverse possession is not restricted to good faith squatters but, on the contrary, is most readily achieved by deliberate squatters who challenge the owner’s claim of authority. The inclusion of deliberate squatters in the law of adverse possession makes good sense, given what I will argue below is the special function of adverse possession in property law: ensuring that everything capable of being owned is in fact effectively owned by someone.<sup>79</sup>

The inconsistent use approach suggests that there is a distinction in kind (and not just in degree of exigibility) between a possessor and an owner. From the perspective of the “layman”,<sup>80</sup> the special status of owners seems so obvious that we should expect nothing less from the law than its recognition as such. The key to understanding the distinction between owner and mere squatter is to understand the role of possession in establishing and maintaining their respective rights. Ownership does not depend on physical possession.<sup>81</sup> A person can own without ever having taken possession of the land in a physical sense. Actual possession, by contrast, *is* the underlying material manifestation of the squatter’s right to possess.<sup>82</sup> This is not to say that ownership is a matter purely of formal right. The owner’s position also depends on a material manifestation. But the material fact on which ownership depends is not actual possession but rather the effective authority to control the agenda.<sup>83</sup> The importance of effective authority as the basis for ownership explains why in *Keefe*, the

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<sup>78</sup> See Part II, “Revolution and Rehabilitation”, below.

<sup>79</sup> *Infra* note 124 and accompanying text (explaining the function of adverse possession).

<sup>80</sup> Ackerman, *supra* note 2 at 97-100.

<sup>81</sup> See e.g. Bordwell, *supra* note 22 (“It is common knowledge that the owner of land does not cease to have legal possession by his moving off the land and allowing it to lie idle” at 2).

<sup>82</sup> For the Roman law distinction between ownership and possession, see Nicholas, *supra* note 74 (possession is a fact in the sense that there is and must be a material manifestation of it, whereas ownership is “not a fact but a right. Ownership exists whether or not there is any material manifestation of it” at 115).

<sup>83</sup> See Katz, “Exclusion and Exclusivity”, *supra* note 2 at Part III (arguing that ownership is a special position of agenda-setting authority). This is true of all forms of ownership, including a commons. See Larissa Katz, “Red Tape and Gridlock” (2010) 23 Can. J.L. & Jur. 99 (distinguishing between use-rights and an ownership stake in the commons and citing Elinor Ostrom’s example of irrigation systems, where owners of “dry land” have rights to use water but are not co-owners of the water insofar as they are not represented in the decision-making process about how it is used and allocated).

owner is secure against the possessor so long as her agenda for the land is unaffected by her rival's acts of possession.<sup>84</sup>

Because the underlying material manifestation of ownership is not ordinary possession but rather effective authority, mere acts of possession by a squatter that are not otherwise inconsistent with the owner's plans do not present a sufficient challenge to the owner's position. In order to take over as owner, an adverse possessor must not only exclusively occupy the land but must also defeat the owner's agenda, which may or may not itself involve a physical presence on the land.<sup>85</sup> Thus, on this approach, an adverse possessor ousts the owner from her position of authority not by "merely squatting" but by taking possession in the manner of an owner and establishing that the original owner lacks effective authority. What this approach requires of the adverse possessor is both the intent to own and acts of ownership.<sup>86</sup> The possessor, to meet the inconsistent use test, must aim to take over from the true owner and to step into her shoes. It is not enough for him simply to intend to carry on in his own shoes as possessor, as it is on the current English approach.<sup>87</sup>

The importance of effective authority to the owner's position continues the analogy between ownership and sovereignty.<sup>88</sup> Just as a ruler's position primarily rests on authority and not coercion, the owner's position rests on authority and not the brute fact of possession.<sup>89</sup> Ownership does

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<sup>84</sup> *Keefer*, *supra* note 5 at 691.

<sup>85</sup> The obvious weight given to an owner's agenda-setting function, as opposed to the owner's present use and occupation of the property, generated some of the criticism we see of the inconsistent use test that I discuss below. See *infra* note 96 (discussing the concern that the inconsistent use test insulates investors from adverse possession).

<sup>86</sup> *Hughes v. Griffin*, [1969] 1 All E.R. 460 at 464, [1969] 1 W.L.R. 23; *Booker v. Palmer*, [1942] 2 All E.R. 674 at 677 (C.A.) (holding that the trespasser must intend to become an owner, and cannot become an owner without intending to); *Ricard v. Williams*, 20 U.S. 59, 5 L. Ed. 398 (1822) (where possession under a lease that turned out to be void cannot ripen into title under adverse possession because possession must be adverse; there is a distinction between mere squatting and possession qua owner, with an intent to own).

<sup>87</sup> On this view, adverse possession is acquisitive. See e.g. Feenstra, *supra* note 47 at 121. The adverse possessor does not derive her right from the former owner (as would be the case in a transfer of rights by sale or gift, but rather acquires a new right). See e.g. Potter, *supra* note 22 at 606 (squatter does not take "the estate of the former owner; on the contrary he acquires a new estate").

<sup>88</sup> Katz, "Exclusion and Exclusivity", *supra* note 2 at 278.

<sup>89</sup> The expression "possession is nine-tenths of the law" refers to a presumption that a possessor is also the owner. As an evidentiary matter, it helps to sort out title in the absence of land titles systems. See *Cambridge Idioms Dictionary*, 2d ed., s.v. "possession is nine-tenths of the law". This expression does not, however, refer to the importance of possession itself to the concept of ownership.

not normally require that an owner actively possess the land; what it means to take charge as owner is to exercise the authority to set the agenda for a resource.<sup>90</sup> Authority, however, must be effective or its very legitimacy will be undermined.<sup>91</sup> This is true of a sovereign but also of an owner. Ordinarily, an owner's authority to set the agenda for her land will be effective even in the absence of physical acts of possession. Where others accept her as owner, they accept also that her plans for the future use of the land, as well as her present uses, deserve deference.<sup>92</sup>

But this is not to say that possession in the ordinary sense has no role to play in preserving ownership. The role of possession in preserving agenda-setting authority is analogous to the importance of coercion to preserving the state's effective authority. Generally, the state exercises its power by making laws or rules that people have reason to obey. The state's power is primarily a function of its authority and not of its coercive force.<sup>93</sup> But where people disobey the law and so challenge the state's authority, the state will need to resort to coercion to bolster the effectiveness of its authority.<sup>94</sup> Similarly, where others disregard an owner's authority by challenging his agenda through inconsistent use, an owner may have to resort to actual possession to remain in power with respect to his land.<sup>95</sup>

The inconsistent use test is typically applied in resolving a contest between a deliberate squatter and an owner-occupier. There has been some confusion in the case law about how to extend this approach in two other contexts: where the owner is an investor or speculator who does not make present use of the land, and where the adverse possessor acts in good faith. One complaint often levelled against the inconsistent use test is that investors with plans to develop land in the future are, vis-à-vis an adverse possessor, in a better position than an owner who is making pre-

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<sup>90</sup> Insofar as it is possible to abandon land, an owner abandons where she fails to take charge. Thus, where she forgets about the land or simply fails to form any plans for it, she stands to lose her property to a squatter. This would amount, in the context of adverse possession, to a discontinuance of possession by the owner. See Peñalver, "Illusory Right", *supra* note 11 at 21, n. 57; McNeil, *supra* note 2 at 70-71.

<sup>91</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 9, 28.

<sup>92</sup> Waldron, *supra* note 2.

<sup>93</sup> See Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988) at 71-75.

<sup>94</sup> See Raz, *supra* note 91 at 86.

<sup>95</sup> An owner can bring an action to eject within the statutory time period rather than actually repossessing the land herself, which is just to say that she has the option of calling on the state to exercise its coercive powers on her behalf: *Keefer*, *supra* note 5 at 692.

sent use of her land.<sup>96</sup> An investment-driven agenda, it is thought, is less likely to be threatened by a squatter's present acts of possession because few present uses will be inconsistent with plans to sell or to develop the land in the future. The concern is that the inconsistent use test protects rather than discourages absentee ownership.<sup>97</sup> This would of course be problematic because absentee owners fail to discharge the most basic obligation of ownership: the duty to assume fully the position of owner.<sup>98</sup> But the inconsistent use test, properly understood, is not a mechanism for protecting absentee owners. There is, first of all, a distinction between a speculator and an investor with actual plans to develop property in the future. An owner with actual investment plans is subject to the discipline of the threat of adverse possession just as much as the owner who is presently using the land.<sup>99</sup> If I, for example, plan to erect a building on vacant land, my development plans require that the land remain vacant. An adverse possessor who occupies the land and, in particular, who erects a structure on it interferes with my plans to keep the land vacant until such a time as I begin construction. The developer is not relieved of the burden to occupy his position fully as owner on the inconsistent use test. It is just that what it means to occupy the position of owner is to maintain agenda-setting *authority* rather than to engage in an immediate, active use. A developer is forced to pay attention to her holdings and to exercise her authority with respect to them just as much as an owner-occupier is. But this obligation is fulfilled by establishing the agenda for the land, even if that entails postponing active use of it. A developer who has set an agenda for it—one that a squatter can indeed interfere with—is not an absentee owner. By contrast, the speculator who has no plans for the land herself, but rather holds on to it in anticipation of its value to others, *is* a kind of absentee owner. But the inconsistent use test need not be interpreted as providing greater protection to the speculator than to the investor-developer or owner-occupier. One approach found in the case law is to impute to the speculator, who has no intended use, the intention that no

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<sup>96</sup> Objections to the inconsistent use test are often triggered by the protection that it offers to investors or other speculators who leave the land vacant. See e.g. *Bradford Investments*, *supra* note 67 at para. 89.

<sup>97</sup> See Jeffrey W. Lem, Annotation of *Murray Township Farms Ltd. v. Quinte West (City of)* (2006), 50 R.P.R. (4th) 266 at 268-69, 28 M.P.L.R. (4th) 148.

<sup>98</sup> On the recent English view, owners have a positive duty to possess the land. In *Pye (E.C.H.R.)* (*supra* note 15), the government argued that the owner's loss of rights was due to their own *inaction*. The Irish government, as a third party intervenor, argued that "ownership of land brings duties as well as rights, and the duty to take some action to maintain possession was not unreasonable" (*ibid.* at para. 51).

<sup>99</sup> See *Keefer*, *supra* note 5 at 691; *Masidon Investments*, *supra* note 24 at 572-73; Ziff, *supra* note 6 at 129 (describing how a developer's agenda can be foiled by present use).



one use the land.<sup>100</sup> A better approach, which does not rely on a distortion of the facts, is simply to treat the speculator as having in effect discontinued possession by failing to exercise agenda-setting authority—a state of affairs that makes her formal title vulnerable to an adverse possessor who does exercise actual authority in her place.

Let me now turn to the problem of the good faith squatter. The good faith squatter honestly but mistakenly believes that he owns the property and so is unaware of the existence of a true owner. Some courts have found the inconsistent use test difficult to apply in these cases. The good faith squatter cannot form an intent to oust the owner and to assert authority in her stead if he is unaware of the owner's existence. And in cases of mutual mistake, the good faith squatter cannot have been said to have acted inconsistently with the true owner's agenda because the true owner would not, in that case, have been in a position to form one. The obstacles that the inconsistent use test presents for the good faith squatter are hard to explain if we see adverse possession through the lens of legal moralism, which demands that there be some connection between the reward of ownership through adverse possession and the individual desert of the squatter. As a result, jurisdictions that have adopted the inconsistent use test in the context of deliberate squatters have subjected good faith squatters to a much less rigorous test for adverse possession than deliberate squatters.<sup>101</sup>

There is, however, a way of extending the inconsistent use test in the context of the good faith squatter that neither disqualifies her in every case nor treats her good faith as a count in her favour. An approach based on inconsistent use need not be read as requiring that a squatter oust the owner in every case. The inconsistent use test simply resolves, as between two contenders, the question of who in fact has authority. The inadvertent squatter should be able to succeed in the limited circumstances where adverse possession can proceed *without* ouster because the true owner does not claim authority over the land but rather has discontinued possession.<sup>102</sup> This is one way to resolve cases of mutual mistake, where the true

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<sup>100</sup> See e.g. *Georgco Diversified v. Lakeburn Land Capital* (1993), 31 R.P.R. (2d) 185 at para. 17, 40 A.C.W.S. (3d) 340 (Gen. Div.) (rejecting the claim that an owner is insulated against adverse possession simply by having *no* intended use of the land). In that case, rather than finding the owner has discontinued use, the court read in an intention on the part of the owner that *no one* use the land, and found that the squatter's uses were necessarily inconsistent with such an agenda.

<sup>101</sup> The standard for good faith squatters is an intent to exclude the whole world, including the true owner. See *Teis*, *supra* note 24 at 225-26.

<sup>102</sup> Dispossession "is where a person comes in and drives out the others from possession" and discontinuance is where "the person in possession goes out and is followed into possession by other persons": *Rains v. Buxton* (1880), 14 Ch. D. 537 at 539-40.

owner fails to claim agenda-setting authority because she is unaware that she is in fact the owner.<sup>103</sup> Where the owner has no intended use of the land because she does not know it is hers, she has, in a sense, vacated the position, leaving it open to the inadvertent squatter to assume the position in her place.<sup>104</sup> This analysis would apply equally in cases where the owner is unilaterally mistaken about her rights: by failing to exercise her authority, she has created a vacancy that may be exploited by either a knowing or inadvertent squatter.

Where, however, the owner has not discontinued use, a squatter must establish that he has ousted the owner and has effective authority. In cases of unilateral mistake, where a good faith squatter believes he is the owner but where the true owner continues to exercise effective authority over the land, the squatter has not taken over the position of owner. It is true enough that the good faith squatter in cases of unilateral mistake will find it next to impossible to satisfy the inconsistent use test. But this is problematic only if we think that there ought to be some connection between the virtue of the squatter and the reward of adverse possession. It is precisely this kind of legal moralism that I challenge in the discussion that follows, where I will argue that it is not on the merits of the use or the user that adverse possession is justified, but rather on the imperative in any property system to guard against vacancies in the position of owner.

The inconsistent use approach avoids the conceptual blandness of the English approach but risks being mired in the moral paradox to which the American approach is so sensitive. As we have seen, there is a current model in English law that distinguishes between owners and possessors not in kind, but in degree, primarily in terms of the exigibility of the right (exigible against all others in the case of the owner, and against all but those with a superior right to possess in the case of the possessor).<sup>105</sup> The inconsistent use test, by contrast, sets up a much sharper distinction between owners and possessors. At the same time, it presents a startling shift in the law's attitude toward the adverse possessor pre- and post-

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<sup>103</sup> This appears to have been the thinking in *Mueller* (*supra* note 67 at para. 26). It is easier for a squatter to prevail in cases of mutual mistake because the owner who is not aware of her rights lacks *animus possidendi*.

<sup>104</sup> In this regard, we can distinguish the inconsistent use test from the implied permission test, which was developed by Lord Denning and abolished by statute. *Wallis's Cayton Bay* (*supra* note 24) is the case in which Lord Denning tried to resurrect the implied permission test. On the implied permission test, adverse possession is impossible if the landowner has no plans for the land. The squatter is deemed to possess with the permission of the owner in that case.

<sup>105</sup> See Harris, *supra* note 37 at 81-84 (ownership and possession as concepts in the common law). See also McNeil, *supra* note 2 at 74-77.

limitation period from a mere possessor (with no legal right to oust the owner) to owner with full protection.<sup>106</sup>

## II. Revolution and Rehabilitation

On what grounds can we justify the transformation of squatters into owners? To understand the moral significance of adverse possession, we need to begin with the proper analogy. Much of the moral analysis of adverse possession has proceeded on the basis that adverse possessors are land thieves. I will begin here by explaining why it is inapt to think of adverse possessors as land thieves. Following that, I will present an analogy between adverse possession and revolution or, more precisely, a bloodless *coup d'état*, which better illuminates the nature of the adverse possessor's claim and also what justifies the law's recognition of it. The recognition of the adverse possessor's (private) authority solves the *moral* problem created by an agendaless object, just as the recognition of the existing government's (public) authority, whatever its origin, solves the moral problem of a stateless people. The morality of adverse possession, seen this way, does not turn on any particularized evaluation of the squatter's deserts or her uses of the land. I am thus not proposing that adverse possession is justified in the same way that some argue a conscientious revolutionary is justified in resisting an oppressive or otherwise unjust sovereign.<sup>107</sup> Rather, the morality of adverse possession is found where we might least expect it, in its positivist strategy of ratifying the claims to authority of a squatter without regard to the substantive merits of her agenda or her personal virtue.

What distinguishes theft or robbery from adverse possession? Consider for a moment the characteristic *modus operandi* of the thief: the thief achieves his goals—permanent control of someone else's property—either by force or by stealth.<sup>108</sup> The thief's method tells us something about the character of his claim to the object. The thief takes physical possession of the object with intent to deprive the owner permanently of possession without making a counterclaim of authority. The thief does not enter into a contest for legitimate authority over the object, but rather, as the robber's resort to force or the thief's secrecy reveals, it is an assertion of control *in spite of* their recognition of the owner's superior authority

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<sup>106</sup> I will discuss this in Part II.A below.

<sup>107</sup> See e.g. John Locke, *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press, 1960) at paras. 222, 225. This concept has been adopted into the constitutions of several American states. See e.g. N.H. Const. Pt. 1, art. 10; Tenn. Const. art. I, § 2.

<sup>108</sup> George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co., 1978) at 38 (the core of theft, common law larceny, was "a forcible or stealthful taking").

over the object. The thief aims to get away with wrongful possession in spite of someone else's acknowledged authority. What is significant about this is that the thief is not inviting an evaluation of a competing claim to authority nor is he demanding to be judged the owner as a result of his actions. Insofar as the thief controls the object of property, his aim is to dupe society into thinking he is the owner, which is something quite different from trying to elicit a judgment that he is in fact the owner.

Contrast the character of the thief's claims with the character of the adverse possessor's claims. The adverse possessor demands public recognition of her authority as owner, which she achieves only where she manifestly has authority over the land in place of the original owner. Thus, adverse possession is successful only where it is peaceful, open, and notorious.<sup>109</sup> Stealth or force undermines the adverse possessor's claims because by sneaking or forcibly removing the original owner, she in effect reveals that she herself lacks effective authority.

The character of an adverse possessor's claim is much more like that of a new government following a *coup d'état* than that of a thief. An adverse possessor does not merely circumvent the authority of the original owner but rather displaces it by asserting his own claim to authority. The adverse possessor claims exclusive and supreme authority, as does a new government, whatever its origins. This explains the public nature of an adverse possessor's authority. His claim amounts to a challenge to the owner's position of authority through the assertion of his own authority, which is necessarily a public act. (By contrast, in a model in which the squatter is not cast as a challenger to the owner's position, public claims of this sort are not a significant feature of adverse possession.)<sup>110</sup> The nature of an adverse possessor's claim as a public assertion of authority also explains why an offer to purchase land or other written acknowledgments of the true owner's status has the effect that the squatter's possession, up until the acknowledgement or offer, is deemed to be possession on behalf of the owner.<sup>111</sup> The significance of such a written acknowledgement is not that it reveals the squatter's awareness of the original owner's claims and

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<sup>109</sup> See *Teis*, *supra* note 24 at 221: "Possession must be open and notorious, not clandestine, for two reasons. First, open possession shows that the claimant is using the property as an owner might." See also Dukeminier & Krier, *supra* note 34 at 139-44; Rose, *supra* note 72 at 79-80. For more on "open and notorious", see *Sherren v. Pearson* (1887), 14 S.C.R. 581 at 585; *Powell*, *supra* note 14 at 478.

<sup>110</sup> On the possibility of clandestine adverse possession, see Wonnacott, *supra* note 30 at 127. See also *Beaulane Properties*, *supra* note 14 at para. 109 (dispossession is possible even where the squatter's acts are consistent with the owner's plans and not readily apparent to the owner).

<sup>111</sup> See Merrill & Smith, *supra* note 34; Oosterhoff & Rayner, *supra* note 34; Ziff, *supra* note 6 at 128 (noting the effect of an offer to purchase on adverse possession).

so his bad faith. Of course, a deliberate squatter knows that someone else has paper title to the land in question, just as the leader of a *coup d'état* knows that there is a government with a right to rule (perhaps because it was democratically elected). Rather, an acknowledgment or offer to purchase is significant because it amounts to acceptance of the true owner's claims to legitimate authority inconsistent with the possessor's own public assertions of authority (made notwithstanding the owner's formal title).<sup>112</sup>

The analogy between adverse possession and a *coup d'état* helps to clarify the significance of the retroactive nature of the claim that the squatter makes. An adverse possessor and the leader of a *coup d'état* undergo a transformation once they succeed in displacing the existing authority. The adverse possessor becomes owner, and the leaders of a *coup d'état* become the new government. This transformation is retroactive: just as a new government's legitimacy is immune from challenge on the ground that it came to power illegally, so too is an owner immune from challenge on the ground that she once was an adverse possessor.<sup>113</sup> We look back and retroactively construe the squatter as the owner from the outset just as we construe the leaders of the *coup* as the government from the moment they have acquired effective authority.<sup>114</sup> The difficulty in ascertaining the original owner's and the former government's loss of authority (but also the importance of so doing) explains why there is a time lag in the law's validation of the squatter's and the new government's authority.<sup>115</sup> The squatter must establish that the owner lacks effective authority on day one but then must still wait out the time period set by the statutory period before the law recognizes that she has taken over from

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<sup>112</sup> La Forest, *supra* note 34 at 1542-46. See also Matthew Noah Smith, "Rethinking Sovereignty, Rethinking Revolution" (2008) 36 Phil. & Publ. Aff. 405 at 408 (describing revolution as necessarily a public spectacle).

<sup>113</sup> For the doctrine of "relation back" in adverse possession, see Dukeminier & Krier, *supra* note 34 at 128-29. See also Fennell, "Efficient Trespass", *supra* note 3 at 1051, n. 65, 1054. The legal claim that an adverse possessor's or the new government's law is the law of the land, has a close analogue in Kant's view that there is a moral duty not to inquire into the pedigree of a state: Christine M. Korsgaard, "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in Andrews Reath, Barbara Herman & Christine M. Korsgaard, eds., *Reclaiming the History of Ethics: Essays for John Rawls* (Cambridge: Cambridge University Press, 1997) 297 at 306-307.

<sup>114</sup> H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 118.

<sup>115</sup> Property theorists have long been puzzled by the importance of the lapse of time to the success of a squatter's claim. See e.g. Maine, *supra* note 11 ("why it was that lapse of time created a sentiment of respect for his possession ... are questions really deserving the profoundest examination" at 248). My account shows why it is not the adverse possessor's reliance established over a long period of possession, nor the expectations of third parties so much as systemic reasons that explain the time requirement. See notes 56, 60 and accompanying text (discussing reliance as a rationale for adverse possession).

the original owner. This period is necessary to determine whether the original owner has in fact failed to exert effective authority from day one. The loss of authority cannot be, as Hart put it, “verified or falsified ... in short spaces of time.”<sup>116</sup> It is difficult to pin down precisely when *de facto* authority actually ceases to exist simply because authority survives *some* resistance or interruption.<sup>117</sup>

The retroactive nature of adverse possession confirms that ownership authority is conclusive and not provisional. The adverse possessor’s *de facto* authority does not compete with the owner’s *de jure* authority during the statutory period. Rather, as we confirm after the waiting period, there was all along but a single person whose decisions about the object are authoritative. The retroactive nature of adverse possession also explains why the successful squatter, like the leaders of a successful *coup d’état*, cannot be held to account for wrongdoing. The adverse possessor is recognized as owner from day one even though, had he not succeeded, he would have been liable for trespass, just as the leaders of a failed *coup d’état* would have been liable for treason.<sup>118</sup>

### A. *Justifying Adverse Possession*

What justifies adverse possession on this approach? At first glance, the analogy of adverse possession to a *coup d’état* appears to raise as many moral worries as the analogy of adverse possession to land theft. The positivist’s answer—that the adverse possessor, like the new ruler, in fact wields authority—does not seem to provide an answer to why we ought to recognize the adverse possessor’s (or the new ruler’s) claims to authority. There are, however, good justificatory reasons for the attention that the law pays to facts on the ground in the case of adverse possession, just as there are good justificatory reasons for recognizing the new government’s post-revolution rule.

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<sup>116</sup> Hart, *supra* note 114 at 119-20.

<sup>117</sup> *Ibid.* See also Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009) at 387.

<sup>118</sup> Thus, a former adverse possessor (one who has succeeded in taking over as owner) is immune from any claims by the ex-owner for rents or damage arising from her pre-limitation period trespass: *Beaulane Properties*, *supra* note 14 at paras. 70-71. See *Limitations Act (Ont.)*, *supra* note 23, s. 5 (the owner’s right is deemed to have arisen from the moment of dispossession by the squatter). When this right is extinguished, the squatter is not liable for rent or damages from the moment of dispossession onwards, even though she is liable before the statutory period expires. In the United States, this is known as the doctrine of “relation back” (Dukeminier & Krier, *supra* note 34 at 128-29).

Let me start by explaining the positivist's claim that a new government has legitimate authority in spite of the wrongfulness of its route to power and in spite of the existence of another organization with the right to rule but without effective authority. The existence of authority is not purely a question of law but also one of fact. Of course, international law or the law of a given nation may recognize or validate a new government's assertion of authority, but this has no effect on the new government's status in relation to its people. Hart made this point when he argued that an English law declaring Tsarist laws to be the law of Russia would in no way change the fact that the Communist Party was the government of Russia.<sup>119</sup> It simply would mean that, in cases decided by English law that bear on Russian events, English courts would apply Tsarist law. We cannot resolve the question of whether a legal system continues to exist purely as a question of law.<sup>120</sup>

There are also moral reasons for recognizing the fact of the matter when a new government claims authority (and has effective authority). The moral quality of our relations with others depends on our ability to work out collectively what justice requires and to implement policies that reflect these collective decisions.<sup>121</sup> Seen in one way, the state provides an indispensable moral service: it provides authoritative solutions to coordination problems that otherwise would lead to disagreement and factionalism.<sup>122</sup> Through law, the state helps us to achieve what we have reason to achieve better than if we were to act on the balance of reasons that otherwise apply to us.<sup>123</sup> It does so in part by providing good answers to common problems (for instance when the government regulates dangerous substances) but even more importantly, it does so simply by providing a single answer when we might, in exercising our individual practical reasoning, come up with many reasonable but diverging answers. A state of

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<sup>119</sup> Hart, *supra* note 114 at 119-20.

<sup>120</sup> But see Smith, *supra* note 112 (arguing that there is the possibility of decentralized authority).

<sup>121</sup> Some have attributed a similar view to Kant. See e.g. Jeremy Waldron, "Kant's Legal Positivism" (1996) 109 Harv. L. Rev. 1535 (arguing that there is a "need for a single, determinate community position on the matter—one whose enforcement is consistent with the integrity and univocality of justice" at 1540).

<sup>122</sup> This is the Razian view that the legitimacy of the state rests on its contribution to solving the problems presented by disagreement about how social actors ought to coordinate and cooperate: Raz, *supra* note 91 at 50-52. See also Jeremy Waldron, "Kant's Theory of the State" in Pauline Kleingeld, ed., *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (New Haven: Yale University Press, 2006) 179 at 192 (the coordination aspect of Raz's normal justification thesis for authority is "also the key to the Kantian theory of the state").

<sup>123</sup> Raz, *supra* note 91 at 24-25.

nature is marked by a plurality of opinion, some of which may prove especially influential but there is no authority that can provide a single answer that is final. It is only a state that speaks for all of us that can close the debate on how to conduct our common affairs. To deny the authority of the new government is to deprive the people of this mechanism for coordination and, in effect, to thrust them back into a state of nature.

Adverse possession can be justified on analogous grounds. Adverse possession solves the moral problem of agendaless objects just as the recognition of a new government post-revolution solves the moral problem of a lawless people. The moral significance of adverse possession thus plays the role of ensuring that ownership serves its primary function.<sup>124</sup> The owner's primary function in a system of property is to take charge of an object by setting the agenda for it. Within the constraints set by the government's own agenda, owners have the authority to ignore the interests and opinions of others and to set what they think is a worthwhile agenda for the object in light of their own interests. The exclusive agenda-setting authority of owners does not require that others exclude themselves entirely from an object but rather that they act in harmony with the owner's agenda or at least the agenda that the law imputes to her.<sup>125</sup> Ownership resolves conflicts not by keeping everyone except the owner out, but rather by ensuring that others defer to the owner's decisions.<sup>126</sup> The effect of ownership is to provide a hierarchical structure for decision making about a thing: the owner, within the constraints set by government, makes the ultimate decisions about the agenda for an object and others—non-owners and subordinate rights-holders—must fall in line.

Ownership as a supreme position of agenda-setting authority thus avoids the potential for conflict among users that exists when there is no one clearly in charge of an object. If the original owner were to lack effective authority and the adverse possessor were denied *de jure* authority, there would be no authoritative resolution to questions about use with respect to that object. The function of ownership to coordinate uses of an object would be unfulfilled in that case. When there is a vacancy in the position of owner (because there is no one with effective authority), we are thrust back into a mini "state of nature" in our relations with respect to that object. The law of adverse possession is just one way of ensuring that there is always someone in charge in the eyes of the law, and thus no destabilizing vacancies. This is why the law validates the adverse posses-

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<sup>124</sup> It is not just the law of adverse possession that accomplishes this. The law of abandonment also restricts the ability of an owner to divest herself of responsibility for land. See Peñalver, "Illusory Right", *supra* note 11.

<sup>125</sup> Katz, "Exclusion and Exclusivity", *supra* note 2 at 278.

<sup>126</sup> For a fuller development of this point, see *ibid.*



sor's claims only where the owner can be shown actually to have lost effective authority. This is also why the owner defeats the squatter's claims by showing that he continues to be in charge of an object. Ultimately, the law's most pressing concern is not *who* is owner but rather that the office of owner is filled.<sup>127</sup>

### ***B. Imperfect States, Imperfect Owners***

The legitimacy of adverse possession, on this account, is not tied to the relative merits of the agenda that an adverse possessor sets for the object any more than the legitimacy of a government depends on the merits of each of its directives.<sup>128</sup> The aim of adverse possession is not to ensure that the most deserving user of the object owns it any more than a system of property generally guarantees that any particular owner has the best moral claim to own that particular thing. The morally relevant aspects of a squatter's claim concern not the abuses of the original owner or her failure to set a sufficiently valuable agenda, but rather the original owner's failure to occupy fully the role of owner.

I thus make no attempt to vindicate the adverse possessor on the basis of her moral standing as a conscientious revolutionary, one who stands outside the legal system to resist the bad exercise of authority by others. There are cases outside the law of adverse possession where squatters or others who challenge the owner's authority do so in the manner of a revolutionary.<sup>129</sup> These are property outlaws: e.g., civil rights leaders organizing sit-ins in segregated restaurants,<sup>130</sup> squatters taking over vacant pub-

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<sup>127</sup> A similar point explains the importance of the rule against perpetuities. See *ibid.* at 306. There are other benefits to guarding against vacancies in the property system. I discuss elsewhere the advantages to the state in having a system of private ownership in place: the power that a state that defines property rights has to press owners into its service. See Katz, "Governing", *supra* note 11.

<sup>128</sup> See Raz, *supra* note 91 at 31-32 (authority does not depend on perfectly guiding our action in all cases).

<sup>129</sup> This is the strategy that Eduardo Peñalver and Sonia Katyal take in "Property Outlaws" (*supra* note 1 at 1170, 1172) to justify resistance to the formal property system. Lee Fennell points out the difficulties in distinguishing between "good" and "bad" outlaws: Lee A. Fennell, "Order With Outlaws?", Response, (2007) 156 PENNumbra, online: PENNumbra <<http://www.pennumbra.com/responses>>. See also Korsgaard, *supra* note 113 at 320 (notwithstanding the absence of a right to revolt, the conscientious revolutionary is justified by her success on the grounds that she has in fact "promoted the cause of justice on earth").

<sup>130</sup> *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122 (1963); *Gober v. City of Birmingham*, 373 U.S. 374, 83 S. Ct. 1311 (1963); *Avent v. North Carolina*, 373 U.S. 375, 83 S. Ct. 1311 (1963); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 83 S. Ct. 1130 (1963); *Bell v. Maryland*, 378 U.S. 226, 84 S. Ct. 1814 (1964).

lic housing en masse in London,<sup>131</sup> and environmentalists chaining themselves to trees in British Columbia.<sup>132</sup> The demands of a property outlaw, like those of the revolutionary, are not just to be put in the place of the owner but rather are for institutional change—change to what can be owned privately, change to how we define the scope of an owner’s authority, and change to the way in which entitlements are distributed. In the case of the property outlaw, the attack goes much deeper than a disagreement about the use to which the current owner puts the land. It is an attack on the very institutions that support the owner’s authority to do as she does. The property outlaw appeals to moral reasons to justify her attack on the system of property much as the conscientious revolutionary does for her attack on existing government.

The property outlaw, however, is not the paradigmatic case of the adverse possessor, and we need not justify adverse possession on similar moral grounds. We do not throw the original owner over for the adverse possessor on the grounds that the latter will do a better job any more than we reject the authority of the state on the grounds that it has not provided perfect guidance in all cases. Whether or not we allow for the possibility of revolutionaries to assert their own opinions of what is just and right, it would be much harder to make the case for the moral standing of a non-owner to act on her extralegal judgment about the quality of an individual owner’s tenure and his own suitability as a replacement. One reason is that this extralegal stance would undermine the function of a property system, which is to provide the assurances that allow a person to set the agenda for an object of property *without* attending to the opinions of others.<sup>133</sup> It would be quite another matter if a system of property were meant to guarantee the best possible agenda for a resource or to direct objects to their highest-value user.<sup>134</sup> The conscientious adverse possessor might then declare that he is morally justified in helping along the ends that justify the system of property, assuming that he can get a judge or some other official to agree that his agenda for the land represents a more valuable use than that of the original owner. Owners who have exercised their authority badly, by failing to select the highest-value use of land,

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<sup>131</sup> *London Borough of Southwark v. Williams* (1970), [1971] 2 W.L.R. 467, [1971] 2 All E.R. 175 (C.A.).

<sup>132</sup> *MacMillan Bloedel Ltd. v. Simpson* (1994), 92 B.C.L.R. (2d) 1, 88 C.C.C. (3d) 148 (B.C.C.A.).

<sup>133</sup> There are of course important constraints on the exercise of this authority, the most important of which is the principle of abuse of right. An owner exercises her authority abusively where she selects her agenda for a reason other than her subjective determination of the best use of the object in light of her interests. See Katz, “Abuse of Right”, *supra* note 8.

<sup>134</sup> See Katz, “Red Tape and Gridlock”, *supra* note 83 at 46-50.

ought not to be (and in law are generally not treated as) more vulnerable to adverse possessors than those who have exercised their authority well. The adverse possessor thus looks very little like the conscientious revolutionary on my account and much more like the leader of a *coup d'état*, whose reasons for assuming power may well be opaque to those from whom it demands recognition as the new government.

## Conclusion

Immanent in a model based on inconsistent use is both the conceptual basis for distinguishing between owners and adverse possessors (lacking in the recent English approach to adverse possession) as well as the theoretical basis for overcoming the moral paradox of deliberate adverse possession (missing from the consensus American view). Rather than land theft, adverse possession is more akin to a bloodless *coup d'état*, in which a new ruler ousts the old office holder and steps into her place. Just as the leaders of a successful *coup d'état* turn into a new government that has authority over its subjects, so too is a successful adverse possessor retroactively transformed into an owner and immunized on this basis from liability for her initially wrongful invasion of another's land. The rehabilitation of the adverse possessor avoids vacancies in the property system just as the rehabilitation of the new ruler following a *coup d'état* maintains the possibility of political authority and so civil society.

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