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Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession

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OUTLAWS OF THE PAST: A Western Perspective on Prescription and Adverse Possession

Years ago when the Cowboy roamed the West, land barons purchased large tracts of land consisting of hundreds of thousands of acres. In part, to prevent stagnation of the land and under-use of natural resources, American courts imported two English doctrines—prescription and adverse possession.[1] The courts believed these two legal devices would provide an incentive to landowners to work all portions of their holdings.[2]

Although these tools remain in effect today, the public policy supporting their usage has long since gone the way of the cattle drive and the chuckwagon.[3] This comment endorses the legislative abolition of prescription and adverse possession primarily because current public policy prefers land and resource preservation versus exploitation.[4] In the past half-

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1. John G. Sprankling, An Environmental Critique of Adverse Possession, 79 CORNELL L. REV. 816, 816 (1994) ("[The American model of adverse possession is] dominated by a pro development nineteenth century ideology that encourages and legitimates economic exploitation — and thus environmental degradation — of wild lands") [hereinafter Sprankling].

2. Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. & ECON. 161 (1995) (policy justification for adverse possession doctrine in the past was that a penalty should inure to a landowner for using land inefficiently) [hereinafter Miceli & Sirmans]; Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77 (1985) (adverse possession viewed as a reward for use of land or useful labor on a property); Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973) (adverse possession stems from a time when an ever-increasing use of land was encouraged); 3 AM. JUR. 2D *Adverse Possession* § 1 (1986) (citing Meyer). *See also* Jeffry M. Netter, Philip L. Hersch, and William D. Manson, *An Economic Analysis of Adverse Possession Statutes*, 6 INT'L REV. L. AND ECON. 217, 219 (1986) [hereinafter Netter] (adverse possession rewards the use of land and punishes those who sit on their rights).

3. Sprankling, *supra* note 1, at 817 (adverse possession is a dusty obscure relic). Early American definitions of property focused on the *use* of land in defining the rights held by a landowner and illustrate one prevailing attitude toward property: "Property is the right to use and consume a thing (*Dominium est jus utendi et abutendi re*)"; "the right of property carries with it the right to make a bad use of things." Bernard Schwartz, *The Law In America*, 164 (1974) [hereinafter Schwartz].

4. Sprankling, *supra* note 1, at 816-18. "The concept of adverse possession is an ancient and, perhaps, somewhat outdated one. It stems from a time when an ever-increasing use of land was to be, and was, encouraged. Today, however, faced as we are, with problems of unchecked over-development, depletion of precious natural resources, and pollution of our environment, the policy reasons that once supported the idea of adverse possession may well be succumbing to new priorities." *Meyer*, 287 So. 2d at 41. The importance of the web of public obligations, otherwise known as the public trust, which accompanies land ownership in America must be recognized. However, the scope and breadth of the public trust is subject to changes with the goals of society. Each landowner should not be treated as a sovereign state, immune from regulations and obligations to the country and the community. "[T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992).

century, many groups have been founded to preserve land and natural resources through land trusts and other devices.[5]

Not only are prescriptive easements[6] and adverse possession relics of the past, they represent a significant imposition on landowner rights. One commentator compared the working of adverse possession to rewarding the theft of land.[7] Landowners now comprise a much higher percentage of society than anytime in the last century in America.[8] Private property ownership represents one of the few bastions of privacy left to American citizens, and thus, landowner rights have become much more important in recent years.[9]

This comment first follows the historic trail of the development of prescription and adverse possession in England and how they later became accepted infringements[10] on landowner rights in America.[11] While journeying past the major landmarks along this trail, this comment examines the underlying political and public policy forces. The second part of this comment will define prescription and adverse possession. It will also

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5. "Land trusts" are usually non-profit organizations organized to promote use of conservation easements and to fund the purchase of lands for preservation. "There are currently over 1100 land trusts throughout the United States with the average of one new organization being founded each week." Telephone interview with Susan Doran, Information Center Manager for the Land Trust Alliance in Washington, D.C. (Sept. 25, 1995). The Land Trust Alliance began in 1984 and currently has 600 land trust members. *Id.* Other similar organizations currently in existence include the Jackson Hole Land Trust based in Jackson, Wyoming (founded in 1980), the Nature Conservancy (founded in 1949), the Rocky Mountain Elk Foundation and the American Farmland Trust. Telephone interview with Dave Neary, Associate State Director of the Nature Conservancy, in Lander, Wyoming (Sept. 25, 1995). Groups concerned with the preservation of landowner rights include Floridians for Property Rights and the League of Private Property Owners (Battleground, Washington). *The New Politics*, September 30, 1995, *available on* World Wide Web, Sierra Club Home Page.

6. A thorough review of cases, treatises, and law review articles revealed that prescription today exists almost exclusively in the form of the prescriptive easement. Most textbooks and courts, it appears, use the terms "prescription" and "prescriptive easements" interchangeably as the authors of this paper intend to do from this point forward.

7. Netter, *supra note* 2, at 219.

8. The increased percentage of land owners in American society is illustrated by a 20% increase in home ownership by resident occupants since 1890. In 1890 47% of all occupied housing units were owned by the residents. In 1990 64.2% of all occupied housing units were owned by the residents. The large increase in owner-occupied units came after World War II. 1990 Housing Highlights, Census of Population and Housing, U.S. Dept. Comm. Bureau of the Census, CH-S-1-1 (July 1991).

9. Although the "property rights movement" existed for several decades in one form or another, it gained momentum during the Reagan Administration and the movement has introduced legislation to bolster landowner rights throughout the United States. David J. Russ, *How the Property Rights Movement Threatens Property Values in Florida*, 9 J. LAND USE & ENVTL. L. 395 (1994).

10. *See infra* notes 143 and 144 and accompanying text.

11. A prescriptive easement has been characterized as "an easement that subtracts from the preexisting rights of the servient owner." 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.10, at 34-111 (1994) [hereinafter POWELL].

briefly discuss several types of easements and licenses that bear a close resemblance to these adversarial doctrines.

The third section of this comment will discuss the advantages and disadvantages of continued use of prescription and adverse possession. The final part of the paper will endorse the "laying to rest" of prescription and adverse possession and advance a legislative program for such a retraction.[12]

BACKGROUND: ORIGIN OF THE PRESCRIPTIVE AND ADVERSE DOCTRINES

England

Prescription is a common-law theory that was initially based on local customs in England.[13] Its genesis is hard to pinpoint because of the presence of "uses," "tenures" and other concepts that serve to muddy historical waters;[14] however, it is doubtful it existed to any great degree before the Norman Conquest or during the reign of feudalism in the British Isles.[15] For the same reasons, germination of adverse possession most likely took place in a post feudalism period.[16]

People held real property during these early times under tenure[17] or loan,[18] meaning the Crown ultimately held the land.[19] With all the land

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12. It is the role of the legislative branch, not that of the courts, to change public policy. Lowe v. Securities and Exchange Comm'n, 472 U.S. 181, 212-13, 105 S. Ct. 2557, 2574 (1985) (concurring opinion) ("The task of defining the objectives of public policy and weighing the relative merits of alternative means of reaching those objectives belongs to the legislature. The courts should not lightly take it upon themselves to state that the path chosen by Congress is an impermissible one."); *See also* Mitchell v Smith, 4 U.S. 269, 270 (Pa. 1803) ("When the legislature pass[es] a law upon a particular subject, it is the duty of the Court to see it carried into execution in the manner described in the law, and in no other."); United States v. Mitchell, 322 U.S. 65, 66 (1944).

13. *See infra* notes 21, 22, 23 and accompanying text.

14. 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 337, at 158 (repl. ed. 1980) [hereinafter THOMPSON].

15. *Id.*

16. *Id.*

17. The basic doctrine of tenure stated that all land whatsoever was held, whether directly or indirectly by the Crown. Few signs of the doctrine of tenure exist today in England. A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 1 (2nd ed. 1986) [hereinafter SIMPSON].

18. Loan was one prominent form of land "ownership" prior to the Norman Conquest in England. A loan created a relationship between lender and holder which closely resembled the feudal relationship between lord and tenant of post Conquest times. *Id.* at 2.

19. Records are clear that after the Conquest in 1066 King William's staff applied the idea of tenure universally. *Id.* at 3. Tenure provided the king with a means to reward his followers and maintain his military strength by granting land to his loyalists in return for knight-service and other types of tenures. Knight-service required the grantee to provide the king with "X" number of knights for a period of time, usually several months, each year. *Id.*

commonly controlled by the Crown, there was little need for doctrines of a prescriptive or adverse nature.[20]

The growth of centralized royal jurisdiction in the post Conquest era created a uniform land law at the expense of local customs and baronial courts.[21] A few customs survived this wave of forced uniformity, including the prescriptive doctrine.[22]

Although its history is hazy, local custom appears to have recognized prescription as a private right in variance with the "national" common law.[23] These earliest cases of prescription did not require the user to show continued use but instead the presence of a local custom that supported such use. The difference between local custom and prescription in these cases was negligible.[24]

Then, a successful claim of prescription had to show use of the property[25] since "time immemorial" or since the year 1189.[26] Some courts recognized the inequity of requiring a party to prove use since "time immemorial" and developed a rule known as the lost grant theory.[27] The theory involved the construction of a legal fiction that supposed the user had received a grant from the land owner but had subsequently lost it.[28] Codification of prescription caused the "lost grant" to disappear into the river of time.[29]

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20. Adverse possession and prescription were unavailable against the Crown. JOHN W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 5.02(4) (1988) (citing Armstrong v. Morrill, 81 U.S. 120, 145 (1871)) [hereinafter BRUCE & ELY] (time does not run against the King).

21. SIMPSON, *supra* note 17, at 20. As the value of services declined due to the parliament's ability to pay for a military force, the usefulness of tenure, and thereby feudalism, began to erode. This decline began in 1290 but tenure was not abolished, for the most part, until the passage of the Statute of Tenures in 1660. *Id.* at 22.

22. *Id.* at 110. Most of these surviving customs remained because they figured highly in the operation of communal agriculture. *Id.* at 108.

23. *Id.* at 109-10. The history of prescription and adverse possession is somewhat confusing and scholars differ as to the origins of the doctrines. *See* THOMPSON, *supra* note 14, § 337, at 158 ("The origin of prescription is clouded by historical fog.").

24. SIMPSON, *supra* note 17, at 108. *See* Abbot v. Weekly, 1 Lev. 176 (K.B. 1665).

25. Most claims of prescription took the form of profits. Profits allowed the holder of the right to take away something of value—turf, wood, grass, fish—from the burdened land. A typical easement of the times (e.g. a right of way) did not have this characteristic nor does it today. Medieval law had little experience dealing with easements. SIMPSON, *supra* note 17, at 107.

26. This date was selected as the time "wherefore the memory of man runneth not to the contrary" which was the year Richard I ascended the throne. 28 C.J.S. *Easements* § 6 (1941) (quoting Johnson v. Lewis, 2 S.W. 329, 330 (Ark. 1886). *See* Stott v. Stott, 104 Eng.Rep. 1119 (K.B. 1812) (use required since time immemorial).

27. SIMPSON, *supra* note 17, at 109-10. *See also* Lewis v. Price, 2 Wms. Saunders 175 (1761) (earliest reported case using the lost grant theory). The term "prescription" comes from the term "prascriptio" meaning prescribing or former writing and presupposes a lost grant. Sparks v. Byrd, 562 So. 2d 211, 214 (Ala. 1990).

28. SIMPSON, *supra* note 17, at 110.

29. *Id.* Although England abolished the lost grant fiction, America adopted its use (Sparks v.

The initial root of adverse possession is easier to identify than the origin of prescription. Original policy supporting the development of adverse possession reflected society's unwillingness to take away a "right" which an adverse possessor thought he had. Similarly, society felt the loss of an unknown right by the title owner was minimal.[30] The Act of 1623 restricted the right of entry to a period of twenty years.[31] Thus, the parturition of adverse possession originated in statute.[32]

America

"Much of the misunderstanding and confusion that surrounds the courts' treatment of prescription comes from the historical fog out of which the doctrine emerged."[33] A review of authorities on the subject does not provide an exact reason why prescription and adverse possession became part of American law; although there is little doubt it was a result of the pro development effect of the doctrines and common law tradition.[34]

In Wyoming, the supreme court provided a glimpse at prescription as applied on North American terra firma.[35] In a dispute over the use of a waterway and an irrigation ditch flume, landowner Gustin averred he had a right by prescriptive easement to use his neighbor's canal and water-diverting mechanism. The court defined "prescription" as use that was "actual, open, notorious, exclusive, and continuous for more than 10

Byrd, *supra* note 27, at 214 (noting most states adopted the lost grant theory in early history)), but now, most states have discarded the theory (Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (Alaska 1985) (citing W. BURBY, REAL PROPERTY § 3 at 77 (1965)).

30. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.10, at 70 (3rd ed. 1986) (citing Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897)) [hereinafter Posner].

31. *Id.* at 150. This statute also prevented the enforcement of stale claims. *Id.*

32. Under early law, 'adverse possession' had a complex meaning that bound an adverse possessor to acquire seisin. *Id.* at 150 n.28. The first adverse possession statute in America took the form of a statute of limitations in North Carolina in 1715. Netter, *supra* note 2, at 218, n.4 (citing Patton's Lessee v. Easton, 14 U.S. 474 (1816)).

33. THOMPSON, *supra* note 14, § 337, at 158.

34. *Id. See supra* note 1. It has been said the doctrine of adverse possession to real property is "very securely embedded in the consciousness of the people," which may provide some insight as to its adoption in America. 3 AM. JUR. 2d *Adverse Possession* § 1 (1986); *see generally* 28 C.J.S. *Easements* § 6 (1941); 3 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 796, at 299-300 (3rd ed. 1939) [hereinafter TIFFANY]; 4 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 1191, at 959-65 (3rd ed. 1975) [hereinafter H. TIFFANY]. "When the English colonists sailed to America, they took the common law with them. Though individual systems and bodies of law evolved in each colony, their bedrock was the common law." Schwartz, *supra* note 3, at 20.

35. Gustin v. Harting, 20 Wyo. 1, 121 P. 522, 524 (1912). *Gustin* provides a look at one approach to prescription, however, many states grappled with the issue in the early years of America. *Gustin* appears to be a case of first impression of adverse possession brought before the Wyoming Supreme Court.

years."[36] This definition is similar to that used in most states[37] and has experienced little change throughout the years.[38]

Another Wyoming case, *Bryant v. Cadle*,[39] 1909, gave a view of the courts' interpretation of adverse possession as a new settler to the 44th State would have experienced it.[40]

> Adverse possession as applied to real estate is described as an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. The possession must be hostile, and under a claim of right, it must be actual, open, notorious, exclusive and continuous.[41]

Thus, adverse possession and prescription became part of the legal fabric of America. All 50 states have embraced one form or another of the prescription and adverse possession doctrines, and the ideas are part of our adoptive consciousness.[42] However, simply because something is

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36. *Id.* at 528. Wyoming statute had recently changed the period for prescription to 10 years by passing a law in 1886 which shortened the period considerably from the prior requirement of 21 years. *Id.* at 527-28.

37. The definition of prescription in *Gustin* included the requirement of "exclusive" use. *Id.* While several states interchange the terms "adverse" and "prescription," most states currently do not require "exclusive" use to achieve an easement through prescription. *See* Appendix 1. However, the "exclusive" requirement is still needed for adverse possession and is one of the differentiating factors between adverse possession and prescription. *Id. See also infra* note 68 and accompanying text.

38. *See supra* note 37. The primary change in the requirements needed to find the presence of a prescriptive right has been the shortening of the prescriptive period and elimination of the reliance on the supposed "lost grant." In the early American cases a 60 year prescriptive period was not uncommon. *See* Gayetty v. Bethune, 14 Mass. 49 (Mass. 1817) (prescriptive period required 60 years adverse use); "Prescription, in the ancient sense of the word, is founded upon the supposition of a grant; and therefore it is, that the use or possession, on which it is founded, must be adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or of any compact, short of a grant." *Id.* at 52. *See also supra* note 36.

39. 18 Wyo. 64, 104 P. 23 (1909); *modified* 18 Wyo. 95 (Wyo. 1910).

40. A homesteader that had abandoned his wife and property later protested the sale of the property to a bona fide purchaser. *Bryant*, 18 Wyo. at 77. The court found the wife and subsequent buyer had satisfied the adverse period to perfect title through tacking. *Id.* at 95. Adverse possession, as it was previously used in the United States, was ill formed and simply required "twenty years interrupted and exclusive possession of the land." Plummer v. Lane, 1 Am.Dec. 395 (Md. G.C. 1797). However, by the mid-nineteenth century, the definition of adverse possession had solidified through the accrual of various court cases and applicable statutes. *See* Armstrong v. Risteau's Lessee, 5 Md. 256, 275, 59 Am.Dec. 115 (1853); Adverse possession is "actual, adverse, and continuous possession for twenty years." *Id.* (citing Cheney v. Ringgold, 2 H.&J. 87 (1807)); Hammond v. Ridgely, 5 H.&J. 245, 5 Ib. 264 (1821).

41. *Bryant*, 18 Wyo. at 86 (citing Ency.Law, at 789 (2nd ed. (date omitted)).

42. *See* Appendix 1 (Prescriptive Laws of the Fifty States), and Appendix 2 (Adverse Possession Statutes of the Fifty States).

legal does not mean lawmakers should ignore the possibility a concept can become outdated and warrant change.[43]

THE CURRENT STATE OF AFFAIRS

Several legal theories resembling prescription and adverse possession exist as part of current land law and add to the confusion of the adversely-related doctrines. For example, the right conveyed by license is very similar to the right realized through a prescriptive easement, although the former usually lacks the adverse nature of the latter.[44]

The continual recognition of new types of easements also contributes to the confusion in this area of the law. The courts acknowledge that although easements must be analogous to the established types, if a claimed right benefits the dominant land *as land*, new breeds of easements will be recognized to fit the changed conditions of society.[45]

Specifically, two derivatives of these legal doctrines should be mentioned: irrevocable licenses, and easements by estoppel. Licenses are usually revocable at the will of the servient landowner, and its duration is subject to the discretion of said landowner.[46] If, however, the user invests his resources to facilitate use of the license, it may become irrevocable.[47]

An action of estoppel can create an easement that closely resembles the right received through irrevocable license. "Generally the owner of the servient estate is estopped from denying an easement exists if he sits by while the dominant estate owner expends funds to improve the servient

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43. Although legal for close to a century in America, slavery is an example of an unjust property law that deserved the abolition it eventually received. DONALD T. PHILLIPS, LINCOLN ON LEADERSHIP, 91 (1992).

44. An easement is a right of use over the property of another. BLACK'S LAW DICTIONARY 509 (6th ed. 1990). Easements may exist "in gross" or "appurtenant to the land." Ordinarily, an easement exists "for the benefit of the owner of some particular land, it belonging to him as an incident of his ownership of the land. TIFFANY, *supra* note 34, vol. 3 § 756, at 203-04. Thus, there is not only a "servient" tenement, land subject to the easement, but also a "dominant" tenement, land in favor of which the easement exists. This type of easement is "appurtenant" to the dominant tenement, "and it must be such that it conduces to the beneficial use of such tenement." *Id.* An easement "in gross" is recognized separately from a particular dominant tenement and is classified as a personal privilege. *Id.*

45. *See infra* note 122. *See also* O'Neill v. Brown, 609 N.E.2d 835 (Ill. App. Ct. 1993) (solar sky space easement).

46. 28 C.J.S. *Easements* § 2 (1941).

47. For example, the building of a bridge across a creek to use a right of way is granted through license. Most courts would consider this an irrevocable license, (*see* Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976)); or an easement by estoppel, (*see* ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A WHITMAN, THE LAW OF PROPERTY § 8.8 (1984)); versus an easement by prescription.

estate."[48] This requires a change in position by the dominant estate holder so that denial of the easement would be a fraudulent act by the servient estate holder.[49]

Prescription: Today's Definition

Prescription is described by some as "the effect of lapse of time in creating or extinguishing property interests."[50] It is based on the theory that if "one makes non-permissive use of another's land, and the landowner fails to prevent such use, such acquiescence is conclusive evidence that the user is rightful."[51] A prescriptive easement[52] is created "by such use of land, for the period of prescription, as would be privileged if an easement existed, provided its use is (1) adverse, and (2) for the period of prescription, continuous and uninterrupted."[53]

A use of land is considered "adverse" to the property owner "when it is (a) not made in subordination to him, and (b) wrongful, or may be made by him wrongful, as to him, and (c) open and notorious."[54] Quite often, the fact that the user bases his use under an affirmative claim of right shows the absence of submission to the landowner.[55] To be adverse a use must be "wrongful as to the owner of the interest affected or must be capable of being made by him wrongful as to him."[56] A use is "open

48. THOMPSON, *supra* note 14, § 315.

49. Vance T. Countryman and Drew A. Perkins, Comment, *Death of the Dark Ages? The Troubled Law of Easements in Wyoming*, 27 LAND & WATER L. REV. 151, 163 (1992) [hereinafter Countryman & Perkins].

50. RESTATEMENT OF PROPERTY ch. 38, Topic A (Introductory Note).

51. TIFFANY, *supra* note 34, § 796, at 300.

52. Rights other than easements may be secured by an adverse user through prescription, however, these instances are infrequent. *Id.* For clarification, some of the types of rights that may be gained through prescription will be listed. A right of way over another's land, the right to appropriate water against riparian proprietors, or against prior appropriators. TIFFANY, *supra* note 34, § 1194, at 973 (citations omitted). The right to dam or obstruct the water of a stream so as to flood the land of another, the right to have water run its natural course, the right to pollute water, or to control or change its flow. *Id.* (citations omitted). Similarly, the right of support for a building by another building or adjacent lot cannot be gained through prescriptive means. *Id.* (citations omitted). The use of a party wall may be prescriptively achieved, but these cases involve the placement of beams or other parts of a building in or on a wall upon another's land. *Id.* (citations omitted). *See Id.* at 973-81 for citations corresponding with the above case situations.

53. RESTATEMENT OF PROPERTY § 457 (1944). "[W]hether the [prescriptive] easement is appurtenant or in gross is to be determined by the consideration whether the user of the servient tenement throughout the prescriptive period was for the benefit of, and in connection with, one particular piece of land, and also of the consideration of its utility in connection with such land or its lack of utility apart therefrom. TIFFANY, *supra* note 34, § 759, at 209.

54. RESTATEMENT OF PROPERTY § 458 (1944).

55. *Id.* at cmt. d.

56. *Id.* at cmt. e.

and notorious" if the owner has actual or inquiry notice of the use. Even if the adverse user consciously tries to conceal such use or prevent knowledge of such use from reaching the owners, the use is "open" and "notorious."[57]

The period of prescription is the period fixed by state statute.[58] Once satisfied, an adverse user may obtain an easement by prescription.[59]

An adverse use is continuous when "it is made without a break in the essential attitude of mind required for adverse use."[60] Continuous use does not require constant use. Use may be continuous through a series of acts or through periods of time (e.g., seasonal use).[61] An adverse use is uninterrupted when "those against whom the use is adverse do not (a) bring and pursue to judgment legal proceedings in which the use is determined to be without legal justification, or, (b) cause a cessation of the use without the aid of legal proceedings."[62]

Actual use during the prescriptive period determines the extent of the easement.[63] "[B]enefit of an easement created by prescription may accrue to the [prescriptive] user alone, or to the [prescriptive] user and others."[64]

Adverse Possession: Today's Definition

Restatement of Property notes that although "prescription" as defined above, once referred to acquisition of both corporeal and incorporeal interests, common law usage has changed the definition. Now, when

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57. *Id.* at cmt. h.

58. Prescriptive period is generally seven years. Jackson v. Stone, 210 Ga. App. 465, 436 S.E.2d 673 (1993) (citing GA. CODE ANN. §§ 44-9-1, 44-9-54); Statutory period of prescription is five years. Brown v. Tintinger, 245 Mont. 373, 801 P.2d 607 (1990) (citing MONT. CODE. ANN. § 70-19-401); To establish title by prescription, there must be adverse possession for a period of fifteen years. Brown v. Mayfield, 786 P.2d 708 (Okla. 1989) (citing OKLA. STAT. tit. 12, § 93 and tit. 60, § 333); Prescriptive period is twenty years when action is brought against "wild land." Henderson v. Cam Dev. Co., 190 Ga. App. 199, 378 S.E.2d 495 (1989) (citing GA. CODE ANN. §§ 44-9-1, 44-9-59); Period of prescription is seven years. Neyland v. Hunter, 282 Ark. 323, 668 S.W.2d 530 (1984) (citing ARK. CODE. ANN. §§ 76-104, 76-105); To establish a prescriptive easement, adverse use must continue for at least ten years. Gregory v. Sanders, 635 P.2d 795 (Wyo. 1981) (citing WYO. STAT. § 1-3-103 (1988)).

59. RESTATEMENT OF PROPERTY § 460. "For the purpose of making out the period of prescription, the periods of use of successive adverse users may be added if privity exists between them." *Id.* at § 464.

60. *Id.* at § 459.

61. *Id.* at cmt. b.

62. *Id.* at § 459.

63. *Id.* at § 461.

64. *Id.* at § 462.

referring to prescriptive acquisition of incorporeal interests, the correct term is "prescription"; and when referring to the acquisition of corporeal interests, the proper term is "adverse possession" or "limitations."[65] Although very similar, several differences exist between adverse possession and prescription.

Corpus Juris Secundum defines "adverse possession" as "open and hostile possession of land under claim of title to the exclusion of the true owner, which, if continued for the period prescribed by statute, ripens into actual title."[66] Some scholars view this adverse concept as "nothing more than [one] taking [another's] property for his own private use."[67]

Differences between a prescriptive easement and adverse possession include:

> *—*Fee simple vs. Easement*: Adverse possession ripens into actual title of the property adversely held while prescription simply conveys the right to use that property in a certain way as defined by the adverse use;
>
> *—*Exclusive possession vs. Non-exclusive:* Adverse possession requires the possession to be exclusive coupled with a claim of possession whereas prescription simply requires non exclusive use accompanied by a claim of use;[68]

The definition of the adverse doctrine and its various factors (i.e., "adverse") have been covered in the previous subsection. Adverse possession and prescription share many common traits of note.

Similarity Between Adverse Possession and Prescription

In comparing prescription and adverse possession, it is noticeable that both doctrines are quite similar.

> While the doctrine of prescription arises from a presumption of a grant arising from a long-continued adverse enjoyment, and differs from the doctrine of adverse possession in this respect and in

65. *Id.* at ch. 38, Introductory Note.

66. 2 C.J.S. *Adverse Possession* § 2, at 645 (1972). *See also* Appendix 2 for a list of adverse possession statutes.

67. *Id.* at 646.

68. *See generally* 2 C.J.S. *Adverse Possession* §§ 1-4, at 645-48 (1972). This is a generalization as states have various definitions of adverse possession and prescription. *See* Appendix 1 and 2.

> the nature of right acquired, both are very similar in that both doctrines are determined in a similar manner and the consequences are the same.[69]

At times, the two ideas have been cross-utilized where a claim of prescriptive easement satisfied the adverse possession requirement of a property.[70] Due to their similarities, these two ideas create similar advantages and disadvantages in the area of property law.

BENEFITS AND DETRIMENTS OF THE ADVERSE CONCEPTS

The Adverse Advantage

"They benefit the community because they work to increase the use of land," a proponent of adverse possession and prescription might say in defense of the doctrines.[71] Although benefits may accrue to an individual,[72] the gain usually flows in one direction—toward the dominant estate and society.[73] The touted benefits of prescription and adverse possession include allowing non-owners to use another's land,[74] requiring landowners to be conscious of the use and composition of their holdings,[75] allowing neighbors to maximize more fully the use of their land,[76] allowing prompt resolution of land disputes,[77] and providing improvements to the servient estate.[78]

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69. 2 C.J.S. *Adverse Possession* § 2, at 649 (1972).

70. *See* United States v. Platt, 730 F. Supp. 318 (D.Ariz. 1990) (The Zuni Indian tribe made a pilgrimage to a sacred mountain region each year for 65 years and the court held the tribe had a valid prescriptive right by virtue of adverse possession by the United States on their behalf.).

71. *See* POWELL, *supra* note 11, § 34.10 ("[Prescription's] continuance has been justified because of its functional utility . . . in stabilizing long continued property uses."); *see also* Chaplin v. Sanders, 100 Wash.2d 853, 676 P.2d 431 (1984) (citing 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY, 1012 (1982) and C. Callahan, *Adverse Possession*, 91-94 (1961)) (doctrine of adverse possession was formulated at law for the purpose of, among other things, assuring maximum utilization of land); Finley v. Yuba County Water Dist., 99 Cal. App. 3d 691, 696-697, 160 Cal. Rptr. 423, 427 (1979) ("[L]and use has historically been favored over disuse, and therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner.").

72. An easement may accrue to a person or a group "in gross" or "appurtenant to" the land. *See supra* note 44.

73. The adverse possessor or prescriptive easement holder gains the use of another's land while the servient estate owner is not compensated. *See infra* text accompanying notes 79 and 80.

74. *See infra* text accompanying notes 79 and 80.

75. *See infra* text accompanying notes 81, 82 and 83.

76. *See infra* text accompanying notes 87, 86 and 88.

77. POWELL, *supra* note 11, § 34.10.

78. *See supra* note 52.

Allows Non-Owner to Use Another's Land

A major benefit of adverse possession and prescription accrues to the adverse possessor or person seeking a prescriptive easement. As adverse possession and prescription are voluntary actions taken by the hostile user or possessor,[79] the user or possessor must benefit, or he would not endure the legal process of perfecting his interest. In an intelligible view, these actions provide a prescriptive user with a "free" property right and an adverse possessor with "free" land.[80]

Requires Owner to Know Composition and Use of Land

Adverse possession and prescription supposedly provide a strong inducement to landowners to become stewards of the land. The ripening of an adverse use or possession would lead to the loss of a few or all of the "bundle of sticks" in a landowner's possession.[81] Presumably, no landowner would want his land to become burdened or to lose part of his holdings.[82] A diligent landowner, therefore, can prevent an adverse possessor or person seeking prescription from gaining part of his holdings.[83] The diligence required of a landowner in managing an estate is a benefit to a community and discourages absenteeism.

Additionally, a landowner may lose land to an adverse possessor or prescriptive easement holder if he is not completely aware of his holdings. To defend against adverse possession and prescription, a landowner must know the "bundle of sticks" he possesses. An owner's knowledge of his holdings provides clarity to the title of the holdings. Clarity of title, in return, streamlines the process associated with real property transac-

79. The "hostile" element illustrates the voluntary nature of adverse possession and prescription. Courts consider permissive use of land as a block to the ripening of an adverse or prescriptive claim. Permissive use is considered voluntary and adverse use is considered involuntary. One of the elements common to adverse possession and prescriptive easements is "adversity." This element is often described as a person's intentionally challenging use of another's land without regard to the rights of the servient owner. *See* Crigger v. Florida Power Corp., 436 So. 2d 937, 944 n.16 (Fla. Dist. Ct. App. 1983); Patch v. Baird, 140 Vt. 60, 64, 435 A.2d 690, 692 (1981).

80. *See* POWELL, *supra* note 11, § 34.10.

81. Adverse possession leads to the loss of the entire bundle of sticks in the land that is adversely possessed. *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 165 (Cl. Ct. 1985).

82. The element of adversity or hostility is concerned with the presumption that it is against the will of the landowner. If the landowner permitted the use then the claim of adverse possession or prescription would fail. *See supra* notes 55, 56 and accompanying text.

83. The doctrines underlying adverse possession and prescriptive easements "reflect the philosophy . . . that a diligent occupant should be rewarded at the expense of a careless owner." BRUCE & ELY, *supra* note 20, ¶ 5.01, at 5-3 (1988).

tions.[84] The fear of adverse possession or prescription encourages the landowner to know his holdings in their entirety.

Allows Neighbors to More Fully Utilize Their Land

Convenience and efficiency are two avowed benefits that inure to the hostile user or possessor. These doctrines allow neighbors to more fully use their land, for instance, by taking advantage of a direct or easier route to a particular point. Easements of necessity would provide relief in most of these instances.[85] However, prescriptive easements differ from easements of necessity as determination of an easement of a prescriptive nature is based on *want*.[86] An easement of necessity is determined based on *need* and equity.[87] Providing an additional benefit of convenience or efficiency forms the primary motivation for a dominant estate owner seeking another's land or use thereof. This benefits both the dominant landowner and society under the rationale of the common law.[88]

Termination of Land Disputes

The swift resolution of land disputes is another asserted benefit of prescription and adverse possession.[89] If hostile use has continued for the period required by law, adverse possession or prescription may bring an end to the dispute through a claim brought by the dominant estate owner. A court grants the dominant estate owner the use and ends the dispute. This may benefit society through functionality and preventing lengthy legal battles.[90]

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84. *See infra* note 191.

85. *See infra* note 139.

86. A person seeking prescription must do so with a claim of right or an attempt to gain the use of property which he does not already have. *See* Luoma v. Donohoe, 588 P.2d 523 (Mont. 1978) (to receive a prescriptive right there must be a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate); *see also* Roberts v. Quisenberry, 242 S.W.2d 26, 28 (Mo. 1951) (an easement by necessity may not be adverse while the necessity continues).

87. *See infra* note 139.

88. The dominant owner gains a property interest, (*supra* note 50) and society gains the increased utilization of land. *See supra* note 71.

89. One commentator holds prescriptive easements out as a way to end disputes of land quickly. *See* POWELL, *supra* note 11, § 34.10.

90. Proponents of the adverse doctrines also mention the advantage that accrues to the servient landowner through improvements made by the adverse user or possessor. This advantage may occur but infrequently. *See supra* note 52.

Disadvantages and Problems Created by Prescription and Adversity

The burdens of prescription and adverse possession fall onto the shoulders of the subservient estate. They represent the forced infringement of a landowner's rights,[91] a decrease in value of the servient estate,[92] and the encouraged exploitation and development of land.[93] In addition, they represent the generation of animosity between neighbors,[94] a source of damages to land or loss of land ownership,[95] and the creation of uncertainty for the landowner.[96]

Forced Infringement of Landowner's Rights

The landowner whose holdings are subject to adverse possession or prescriptive easement always loses something. Some professionals argue that recognition of a prescriptive easement is the recognition of rights in addition to those held by the landowner.[97] It would be hard to convince a servient estate holder of this point each time he looks outside his window and sees a flooded backyard.[98] The right to exclude others is an important property right.[99] Furthermore, adverse actions force a landowner into a legal battle involuntarily.[100] Through these claims, the landowner loses a right once in his possession.[101]

The laws of adverse possession also diminish a landowner's rights as the period of possession shortens. In old England and early America, 20 to 60 years were required before allowing an adverse possession claim to ripen.[102] Recent trends show a shortening of the

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91. *See supra* notes 52, 79 and 80 and *infra* notes 100, 101 and 101 and accompanying text.

92. *See infra* notes 104, 105 and accompanying text.

93. *See infra* notes 109, 110, 111 and 112 and accompanying text.

94. *See infra* notes 114 and 115 and accompanying text.

95. *See infra* notes 116, 117, 118 and 119 and accompanying text.

96. *See infra* note 122.

97. Interview with Dean Arthur R. Gaudio, University of Wyoming at Laramie, Wyoming (August 28, 1995). This view contends that the servient estates subordination to the dominant estate is exercised through rights which were always present but not previously exercised.

98. *See supra* note 52.

99. The right to exclude others from one's land is held to be a significant part of a landowner's rights. *See* Dolan v. City of Tigard, 114 S. Ct 2309 (1994) (The court held that the infringement of the public on the land of an owner was significant enough to raise a takings claim.).

100. If a landowner agreed to an "adverse" use, the claims for prescription or adverse possession would lose the necessary element of adversity. The claim of right is brought by the dominant estate owner. *See supra* note 79.

101. *See* Dolan v. City of Tigard, *supra* note 99.

102. *See supra* notes 31 and 38 and accompanying text. In 39 states, the statutory period of adverse possession did not change between 1876 and 1982. Netter, *supra* note 2, at 224. However, of the remaining states, most reduced the period for the ripening of an adverse possession claim: Florida

period, which lessens the landowner's opportunity to discover the adverse possessor.[103]

Diminished Value of the Servient Estate

With an actual burden of a prescriptive easement or adverse possession comes a decrease in the value of the servient estate.[104] When a landowner sells his property, the buyer often requests a guarantee of the property to be free from unseen encumbrances.[105] Prescriptive easements and adverse possession obviously concern potential buyers otherwise a guarantee would not be requested.[106] "The greater the uncertainty as to the true ownership of land, the lower will be the transaction price."[107] If the property is of less value due to an adverse claim, the servient estate has lost value, which may or may not be quantifiable.[108]

Encouraged Exploitation and Development of Land

This argument is the mirror image of the "benefits of increased use of land" assertion discussed above.[109] Contrary to the past, society no longer supports the over use of lands and resources.[110] Because of over-

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from 20 years to 7 years, Iowa from 20 years to 17 years, Maine from 21 years to 20 years, Massachusetts from 21 years to 20 years, Nebraska from 21 years to 10 years, New York from 20 years to 10 years, and Washington from 10 to 7 years. *Id.* at n.32. *See also supra* note 36.

103. Netter, *supra* note 2, at 220 (shorter statutory period gives a landowner less opportunity to monitor his property and discover an adverse possessor).

104. The Supreme Court notes that an easement or the right to exclude others carries a value. Dolan v. City of Tigard, *supra* note 99, at 2321. "An easement subtracts from the preexisting rights of the servient owner." POWELL, *supra* note 11, § 34.10.

105. *See generally* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 59 (1988) [hereinafter Bostick].

106. Several servitudes are now recognized by the courts, to which the owner of the land had never agreed and usually are not part of the public record. These five theories include: implication, necessity, implied reciprocity, estoppel *in rem* and prescription. RICHARD H. CHUSED, A PROPERTY ANTHOLOGY, at 240 (1993) (quoting Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S.CAL. L. REV. 1179 (1982)).

107. Netter, *supra* note 2, at 219. "It is true the buyer can decrease his risk in some ways. First, he can require the conveyance be made by a warranty deed. In this way the buyer has a cause of action for damages against the seller if the title is not good. This is of course not much security if the seller disappears. Also, the buyer could purchase title insurance, but the price of that insurance will reflect the inherent risk." *Id.* at n.14.

108. "It is not an overstatement to suggest that problems relating to matters of title assurance have affected directly the pocketbook of every American who has bought or sold land in this century. Any practitioner who has had to explain to a client the astonishingly high 'closing costs' related to title search and title insurance, and any client who has had to pay these costs, is painfully aware of the shortcomings of title assurance under the existing American practice." *See* Bostick, *supra* note 105, at 56 (noting part of the problem is due to the complexities of the substantive American law of real property).

109. *See supra* note 71.

110. *See generally* Charles F. Wilkinson, CROSSING THE NEXT MERIDIAN (1992). *See also*

population, pollution and depletion of precious resources—which includes natural habitats—societal values have shifted from "use and abuse" to "preserve and conserve."[111] Thus, often the increased use of land would not be a benefit.[112]

Creation of Division and Animosity Between Neighbors

Many adverse possession and prescriptive easements arise nearby or between adjoining estates.[113] Proximity between an adverse neighbor and a servient landowner would commonly prove to be a source of personal hard feelings and division. Some courts recognize this disadvantage and have held in favor of neighborliness.[114] Other courts refuse to recognize this doctrine and allow neighbors who use another's land to gain a prescription.[115]

Damages and Loss of Ownership of Private Property

Adverse possession allows someone to take another's land without payment that seems strangely out of place in America's free market economy. A good work ethic forms the American foundation and a person gaining title via adverse possession or the use of another's land without paying for it[116] rewards the wrongdoer and is contrary to the American way of life.[117] Adverse possession "[i]s nothing more than a person taking someone else's private property for his own private

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Sprankling, *supra* note 1, at 816-18.

111. *Id.* ch. 1.

112. *See infra* notes 130, 131 and 132 and accompanying text. It should be noted that some courts have found the use of unenclosed or open land not to be adverse use. *See* Fiest v. Steere, 259 P.2d 140 (1953); *See also* Parker v. McGinnes, 842 S.W.2d 357 (Tex. Ct. App. 1992) (cattle grazing on unenclosed land insufficient to meet the "actual, open and notorious" requirement for adverse possession); *But see* Carpenter Union Hills Cemetery v. Camp Zoe, Inc., 547 S.W.2d 196 (Mo. Ct. App. 1977).

113. The most common form of prescriptive easement is the right-of-way. BRUCE & ELY, *supra* note 20, ¶ 5.02(3). The nature of most right-of-ways secured through prescription—being appurtenant to the land—requires that the easement be attached to land. Thus, most prescriptive easements are attached to lands adjacent to the servient estate.

114. *See* Tacke v. Wynia, 853 P.2d 87 (Mont. 1993).

115. *See generally Gustin*, *supra* note 35 and accompanying text.

116. *See* Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 199 Cal. Rptr. 773, 676 P.2d 584 (1984).

117. Taking someone's land without paying for it could be considered stealing. "[Adverse possession] has been called a means of obtaining title by theft." Netter, *supra* note 2, at 217. Taking or "coveting" your neighbor's land goes against the Judeo-Christian ethic (Exodus 20:17.) on which America was founded. *See* Reynolds v. United States, 98 U.S. 145 (1947) (America was founded as a Judeo-Christian nation). However, one could argue that the adverse user "earned" the right to the easement or property through his own labor.

use."[118] It is hard to imagine a notion more in contravention of the ideals set forth in the U.S. Constitution protecting life, liberty and *property*.[119]

Creation of Uncertainty for the Landowner

The nature of prescriptive easements and adverse possession creates an atmosphere of uncertainty for landowners. Both laws project a right of another onto the servient estate that may exist invisibly for years before it congeals.[120] Common law requires a landowner to be diligent.[121] While diligence could be a benefit in some circumstances, it may turn out that a landowner may never be attentive enough to suppress all adverse claims.[122] To ward off possible adverse claims, a landowner may have to employ a property expert—which is another expense borne by the servient estate holder. The easiest remedy for a landowner finding the presence of an adverse user or possessor is to give them permission to continue the use or possession. This effectively eliminates the adverse individual's claim immediately.[123]

However, in the end, even with the help of a specialist, the intent of another may escape the review of experienced eyes.[124] This forms the basis of an uncertainty that can never be cured while adverse use reigns in the land.

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118. 2 C.J.S. *Adverse Possession* § 2 (1972) (citing Lang v. Colonial Pipeline Co., 266 F. Supp 552 (E.D. Pa. 1967)). Surface rights taken by adverse possession are not the only loss to the original owner. *See* Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992) (adverse possession of surface rights carries with it adverse possession of unsevered mineral rights).

119. The Fourteenth Amendment says that a State shall not "deprive any person of life liberty, or property, without due process of law." U.S. CONST amend. XIV, § 1.

120. Adverse possession and prescription claims are not a part of the public record during the prescriptive period. *See infra* notes 137, 138 and 191.

121. BRUCE & ELY, *supra* note 20, ¶ 5.04 (citing Kaupp v. City of Hailey, 715 P.2d 1007, 1010 (Id. Ct. App. 1986)).

122. The various methods by which an adverse possession or prescriptive easement may come about are overwhelming. *See* MacDonald Properties, Inc. v. Bel-Air Country Club, 72 Cal. App. 693, 140 Cal. Rptr. 367 (Cal. 1977) (the court found a prescriptive easement by a country club from the use of members of the servient estate's lawn - the members hit stray balls onto the servient estate for the prescriptive period and gained an easement to do so in the future without the servient owner's consent) Note—would the court have held differently if the servient owner kept the golf balls? *See also* Kroulik v. Knuppel, 634 P.2d 1027 (Colo. Ct. App. 1981) (the court found a prescriptive easement to fish from the servient estate - the prescription was from the continued use of a sand bar on the estate by a fisherman).

123. The "adverse" or "hostile" element is required to perfect a claim of adverse possession or prescriptive easement in all 50 states. *See infra* Appendix 1 and 2.

124. Due to the vast array of easements that may be created through prescription, it makes it virtually impossible for a land owner to completely prevent all adverse uses. *See supra* note 52.

Private-property rights are the soil in which our concept of human rights grows and matures.[125]

This comment recommends the abolition of prescription and adverse possession. Prior courts have limited the common law doctrines in certain circumstances as have many legislatures.[126] With the exception of limiting the common law or expressing disfavor to the adverse laws,[127] no legal proposal or law is known to have suggested the complete abolition of the common laws.[128]

In the past, legislative bodies have resorted to codification to simplify a convoluted law existing in common law.[129] This, in concert with policy arguments of conservation, certainty, landholder rights and norms in modern society, support abolition of adverse possession and prescription.

A policy of maximum or increased use of the land supporting adverse possession and prescription,[130] is in direct opposition to conservation.[131] Incentives to render an increased use of land are no longer needed to open frontiers and provide for society.[132] If the needs of society

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125. Charles E. Wittaker, *A Former Justice Warns: Return to Law or Face Anarchy*, U.S. NEWS AND WORLD REPORT, Apr. 25, 1966, at 60.

126. *See* Appendix 1. For instance, Arizona and Texas statutes limit adverse possession claims to 160 acres in many instances. *See* Appendix 2. *See also* OR. REV. STAT. § 105.620 (1989) (the Oregon legislature severely limited the adverse possession doctrine by requiring a belief in ownership element); *See generally* Per C. Olson, Comment, *Adverse Possession In Oregon: The Belief-In-Ownership Requirement*, 23 ENVLT. L. 1297 (1993).

127. *See* Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc., 643 P.2d 468, 471 (Wyo. 1982) (prescriptive easements are not favored in law).

128. Extensive review of law review articles, treatises, cases, statutes and legislative documents, failed to locate one paper endorsing the abolition of adverse possession and prescription.

129. *See infra* note 193 and accompanying text.

130. *See supra* note 71.

131. A recent trend in property law has been use of the conservation easement where a land owner agrees to leave land relatively undeveloped in exchange for consideration of some kind. *See* MONT. CODE ANN. §§ 76-6-201-211 (1995); *see also* City of Olympia v. Plazer, 728 P.2d 135 (Wash. 1986). The basis of the conservation easement is contrary to the nature of prescriptive easements' inherent promotion of increased land use.

132. "The marginal benefit of development of land from an economic standpoint has probably diminished considerably since the frontier days of America. For example, envision a 100 acre parcel. The marginal benefit of developing the first acre is very high, but the marginal benefit of developing each subsequent acre is diminishing. When the land has been highly developed, as in most industrialized countries today, the marginal benefit of developing an additional acre is probably less than the marginal benefit of leaving that acre undeveloped." Telephone interview with Thomas J. Miceli, Professor of Economics at the University of Connecticut, Storrs, Connecticut (Oct. 11, 1995). *See generally*, Sprankling, *supra* note 1.

change, the common law should follow—something that has not occurred in the present circumstance.

Some commentators have argued that adverse possession and prescriptive easements add to the certainty of title in land by "stabilizing long continued property use."[133] To the contrary, the scope of adverse possession and prescriptive easements is ever increasing,[134] making the presence of prescriptive easements and adverse possession another hurdle for landowners.[135]

Certainty or stabilization is offered as one of the benefits or functional uses of prescriptive easements and adverse possession offered.[136] This assumption does not perform well when weighed against the functionality of other stabilizing instruments and laws used in real property law. The recording statutes offer a more proficient tool in stabilizing land titles and uses. The recording laws provide a centralized location for title searches to quickly obtain the rightful owner of land.[137] Adverse possession and prescription erode the effectiveness and useful utility of both recording and marketable title statutes by *creating* uncertainty.[138]

The rights of landowners provide a strong argument against the use of adverse possession or prescriptive easements. Other remedies more conducive to societal values are available should the *need* for an easement arise, including easements by necessity.[139] The rights of a landowner should not be subject to the uses of another without his consent—without

133. POWELL, *supra* note 11, § 34.10.

134. *See supra* notes 45, 52, 122 and *infra* note 163.

135. One commentator has referred to prescriptive easements as the most difficult easement to define in regards to the extent of the easement when created. *See* POWELL, *supra* note 11, § 34.13. "In order to facilitate the transfer of resources from less to more valuable uses, property rights, in principle, should be freely transferable." The presence of adverse possession acts as a burden to the transferability of property. *See* POSNER, *supra* note 30, § 3.10.

136. *See supra* note 133.

137. Unfortunately, the efficiency of the recording statutes, generally, have been eroded by undetectable claims (e.g. prescription) and a property law overwrought with complexities too numerous to mention. "A rural Georgia lawyer who began his practice during the depression once [said], 'Son, I never began searching a title unless I was starving to death, and I never finished one without wishing I had.'" *See generally* Bostick, *supra* note 105, at 61-62 (quoting his father).

138. Although a recording system would seem a cure-all, adverse possession illustrates one example of a practice which degrades the system. *See* Posner, *supra* note 30, § 3.10 ("The recording system is not a panacea [in part, due to] the doctrine of adverse possession.").

139. An easement by necessity is one in which the easement is indispensable to the enjoyment of the dominant estate. BLACK'S LAW DICTIONARY 510 (6th ed. 1990); *See also* Establishment of Private Roads, WYO. STAT. § 24-9-101 (1977). The Wyoming statute provides for landlocked landowners to gain a right-of-way across private land. The receiving landowner is required to pay fair compensation to the other landowner, as determined by the assessors. *Id.*

his permission.[140] Adverse uses take away the rights of a landowner[141] that is inequitable when not coupled with compensation.[142]

Sometimes proponents argue that adverse uses create a right in the dominant estate that was never in existence in the servient estate, thus expanding the amount of recognized rights.[143] However, the fiction in this argument is illustrated in the example of a servient estate owner losing prescriptive easements to one person as opposed to one hundred persons.[144] The latter situation is far more intrusive to the owner and his power to exclude greatly diminishes with the increased number of easements.[145]

Modern society strives for a peaceful and livable world.[146] Adverse concepts cause friction between people.[147] In order for a modern society to function, it needs to manage the relationship between landowners.[148]

Recently, some cases have used adverse possession and prescriptive easement as a vehicle for the public to gain rights or access in land for public benefit.[149] Many courts have realized that the grant of a prescription to the public is a difficult idea. The public is too broad a group to receive a

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140. *See supra* notes 85-88 and accompanying text.

141. *See supra* notes 99, 117, 118 and accompanying text.

142. Many courts hold adverse possession and prescription are "not favored in the law." 3 Am. Jur. 2d *Adverse Possession* § 1, at 93 (rev. 1986). Additionally, the burden of proof for adverse possession or prescription is laid on the adverse user or possessor. 2A C.J.S. *Adverse Possession* § 267, at 25 (rev. 1972). *See* Edward G. Mascolo, *A Primer on Adverse Possession*, 66 CONN. B.J. 303, 305 (1992) (every presumption runs in favor of the holder of legal title and none against him). This leads to the conclusion that equity does not favor adverse possession or prescription.

143. This theory is explained as the successful claim only recognizes a limitation on the servient estate but expands the right of the dominant estate. *See supra* note 97.

144. The same prescriptive easement may be claimed by different people as long as the individuals distinguish their use from the use of others. *See* Palisades Sales Corp. v. Walsh, 459 A.2d 933 (R.I. 1983).

145. One may note that in regard to public easements the number of individuals is so large as to maintain a full abrogation of rights in the servient estate owner. The servient estate owner can not possibly resist the publics' use of part of his land and still retain a right in the land used by the public. *See* Concerned Citizens of Brunswick Co. Taxpayers Ass'n v. State, 404 S.E.2d 677 (N.C. 1991).

146. *Id. See also* Shumway v. Sanford, 637 P.2d 666, 670 (Wyo. 1981) (finding no prescriptive easement because "prescriptive rights and easements are not favored in the law and neighborliness and accommodations to the needs of a neighbor are landmarks of our western lifestyle.").

147. Instances where a landowner threatens an adverse user to terminate the prescription are not needed in a peaceful society. *See* Lorang v. Hunt, 693 P.2d 448, 450-51 (Id. 1984) (relating that "there is a public interest in encouraging friendly relations among neighbors"); *see also* Thomas v. Barnum, 684 P.2d 1106, 1111 (Mont. 1984); Smith v. Bixby, 242 N.W.2d 115 (Neb. 1976).

148. The doctrine of neighborliness is a step in the right direction. *See supra* note 114. If landowners are peaceful and allow others to use their land, adverse possession and prescription should not allow the user or possessor to take advantage of such neighborliness and gain rights over the landowner. *See supra* notes 114 and 115.

149. *See* Koontz v. Town of Superior, 746 P.2d 1264 (Wyo. 1987).

grant.[150] When granted, who exactly receives the right? Some courts have held that municipalities may hold prescriptive rights.[151] Other courts have awarded prescriptive easements to the public,[152] which appears to be the modern legal trend.[153] Many states that endorse access rights of the public over private lands have enacted statutes to deal with public prescription.[154]

The use of land by the public was not part of the underlying basis for the old common law.[155] Such acts should provide a landowner with a "takings" claim under the 5th Amendment—not give a claim of adverse possession or prescriptive easement to the public.[156] A public adverse use transfers a benefit or right from a private individual to the public as a whole—not just certain portions of the public.[157] This transfer should provide the basis for an action in condemnation or a claim of takings.[158] Using adverse mechanisms to benefit the public illustrates an example of an outdated idea becoming more convoluted the longer it lives.[159]

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150. *See infra* note 159.

151. *See* Daley v. Town of Swampscott, 421 N.E.2d 78, 82 (Mass. 1981).

152. *See Dillingham Commercial Co.*, *supra* note 29 at 416.

153. *See* BRUCE & ELY, *supra* note 20, ¶ 5.09.

154. WYO. STAT. § 24-1-101 (1977) (prescriptive use of a roadway allows the state to secure a right in the roadway); ME. REV. STAT. ANN. tit. 14, § 812 (West 1980) (statute treats public and private prescription in the same manner); IDAHO CODE § 40-202 (Supp. 1987) (public use of road is deemed to create a highway).

155. The basis for prescriptive easements is the lost grant and adverse use. *See supra* notes 23, 24, 25, 26, 27 and 28 and accompanying text. The public is too broad a group to apply these rationales. A landowner may face a difficult task in trying to stop the public at large from entering or using his land as opposed to an individual. *See* Mihalczo v. Borough of Woodmont, 400 A.2d 270, 272 (Conn. 1978) (noting the public was unorganized and any grant resulting from prescription was void for uncertainty); *see also* State ex rel. Hamman v. Fox, 594 P.2d 1093, 1098 (Idaho 1979).

156. Under the Constitution the prescription would be a physical intrusion. Unlike regulatory takings which would require the total economic loss of the property, any physical intrusion by the government leads to a takings. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (concluding that the permanent physical occupation authorized by government is a taking without regard to the public interest which it may serve—the court added that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property"). A takings claim is tolled by the statute of limitations, but a private individual may recover from the government for any physical intrusion still within the term of the statute of limitations. *See* Reppel v. U.S., 41 F.3d 627, 632-33 (Fed. Cir. 1994). One may argue the statute of limitations is in order because it tolls a taking; but a takings claim arises when the land owner's right is taken (i.e. the court's grant of an easement to the servient owner) not at the beginning of the intrusion (i.e. the beginning of the adverse use). *See* U.S. v. Dickinson, 331 U.S. 745, 748-49, 67 S. Ct. 1382 (1947).

One commentator has suggested that all prescriptive easements, whether gained by a private individual or the public, is a takings. The court's grant of the easement would serve as the requisite state action to satisfy the takings claim. Countryman & Perkins, *supra* note 49, at 168.

157. *See* BRUCE & ELY, *supra* note 20, at ¶ 5.09(1) (citing Burks Bros. of Va., Inc., v. Jones, 349 S.E.2d 134, 141 (Va. 1986)) (distinguishing general public from landowners, residents, and guests use).

158. *Id.*

159. *See generally* Carl C. Risch, Comment, *Encouraging the Responsible use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the use of Adverse Possession Against*

To the contrary, other cases held that use by the public did not lead to adverse possession or prescriptive easements.[160] The courts held that land used by the public lacked the "exclusive"[161] element necessary for a claim under the common law.[162] A prescription by the public makes no sense as no identifiable group holds the easement grant and such an action seems to more resemble an act of the sovereign.[163]

With this result some courts still argue the private landowner may not recover compensation from the public or sovereign due to an "adverse taking."[164] In *Petersen v. Port of Seattle*,[165] the court held that the statute of limitations runs on a prescriptive use by a local government on a private estate.[166] Further, the *Petersen* court held that the owner of the land may not claim a constitutional right against the government after the adverse use reaches prescription.[167] This leads to a constitutional right of inverse condemnation being quashed by common law.[168] The denial of a constitutional right by the workings of a rule based in common law is in direct violation of rudimentary public policy.[169]

The Remedy: Abolition

The suggestion made in this comment endorses the abolition of prescription and adverse possession. Although this could be achieved through the

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Municipal Land Owners, 99 DICK. L. REV. 197 (1994) (government lands were traditionally beyond the reach of adverse possession but now the concept has broadened and some municipal land owners are subject to the doctrine).

160. *See* Gore v. Blanchard, 118 A. 888 (Vt. 1922); State ex rel. Haman v. Fox, 594 P.2d 1093 (Id. 1979); Ivons-Nispel, Inc. v. Lowe, 200 N.E.2d 282 (Mass. 1964); Smith v. Kraintz, 201 Cal. App. 696, 20 Cal. Rptr. 471 (1962).

161. The exclusive element does not mean "to the exclusion of others," but simply the use must be independent and not contingent upon other's rights. *See* Ritter v. Janson, 224 N.E.2d 277, 280 (1967); Confederated Salish & Kootenai Tribes v. Vulles, 437 F.2d 177, 180 (9th Cir. 1971); *but see* Applegate v. Ota, 146 Cal. App. 3d 702, 710, 194 Cal. Rptr. 331, 335 (1983) (contra where the court held exclusiveness is not an essential element of prescription).

162. *See* Poulos v. Dover Boiler & Plate Fabricators, 76 A.2d 808, 811-12 (N.J. 1950).

163. *See* BRUCE & ELY, *supra* note 20, at ¶ 5.09(1) (citing Mihalczo v. Borough of Woodmont, 400 A.2d 270 (Conn. 1978)). The grant to the public through prescription of a road leads to the road being maintained by the state. Miller v. Grossman Shoes, Inc., 440 A.2d 302, 305 (Conn. 1982); Speir v. Town of New Utrecht, 24 N.E. 692, 693 (N.Y. 1890), (the state must accept the prescription and the maintenance of the road.).

164. *See* Weidner v. State of Alaska, Dep't of Transp. and Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993) (prescription by the state is not a takings after the prescription term had been satisfied).

165. 618 P.2d 67, 70-71 (Wash. 1980). *See also* Beach v. City of Fairbury, 301 N.W.2d 584, 586 (Neb. 1981).

166. Petersen v. Port of Seattle, 618 P.2d 67, 70-1 (Wash. 1980).

167. *Id.*

168. *See supra* note 160.

169. *Id.*

courts, statutory action in state legislatures is more conducive to this initiative.[170] Legislatures are more adept at dealing with public policy changes and courts are less able to deal with such issues.[171] While courts make policy changes, such changes *should* be made by elected officials.[172]

To effect the endorsed change, a statute abolishing the common law and the statutory definitions of prescription and adverse possession should be created. The statute should include a grandfather clause to observe the adverse rights already matured by the effective date of the statute. The grandfather clause would have a period of two years in which adverse claimants may claim any existing right not on record. In addition, the statute should extinguish all future adverse claims by notifying "in progress" adverse users with statutory notice. An example statute follows:

§ 10-1-100. ABOLITION OF ADVERSE POSSESSION AND PRESCRIPTION

(a) On and after January 1, 1997, all common law and statutory rights of adverse possession and prescription are hereby and forever abolished. This includes, but is not limited to the repeal of STATE STAT. §§ 20-1-100 through 20-2-110 (19XX). This repealing action will in no way invalidate any statutes that are peripheral to the adverse possession or prescription statutes.

(b) This statute does not create any new rights of action in any person or group.

(c) Any person or group that has satisfied the requirements to a claim of adverse possession or prescription has a recognized right. This statute, coupled with the notice provision provided herein, will serve as notice to all such persons or groups that they have two (2) years and one (1) month from the date set forth in section (a) of this statute to perfect their interest and claim their right of easement or fee simple under prescription or adverse possession. Notice by the county clerk will be posted in one local or area newspaper, once a week for three consecutive weeks within one (1) month of the implementation of said statute. Procedures for perfecting such a right is set forth in section (d) of this statute. If such persons or groups fail to perfect their right by February 1, 1999, they will forever lose

170. *See supra* note 12.

171. *Id.*

172. *Id. See also* License Tax Cases, 72 U.S. 462, 469 (1886) ("This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here.").

their ability to bring any type of claim based on adverse possession or prescription.

(d) In order for a person or group to perfect an adverse interest that has satisfied either the common law or statutory requirements of adverse possession or prescription by the date set forth in section (a) of this statute, said person or group must file claim to such property in the appropriate county court(s). The location of the adversely possessed or used property will determine the appropriate county court(s) where the claim should be filed.

Opposition to Abolition of Adverse Possession and Prescription

A question that appears with the abolition of prescription and adverse possession relates to "in progress" adverse uses. The common law has always required a requisite term of use or possession to find an easement through prescription or land transfer through adverse possession.[173] Statute defines the period in most states,[174] and completion of the period finds recognition of the right.[175] Therefore, before satisfaction of the adverse term, no right has accrued to the adverse possessor or person seeking prescription. Some inequity may result from such a holding, but the adverse possessor and person seeking prescription would have notice upon passage of any repealing statute.[176] Thus, the state would replace a landowner and deny the claims before the right accrues.[177] If an adverse possessor or prescription seeker has no definable right, no problems should arise from an abolishing statute.

However, an existing claim may need separate treatment. If an adverse claim has already reached the specified term, a right has accrued.[178] The

173. SIMPSON, *supra* note 17, at 105-15. *See* Appendix 2.

174. Some states have statutes where the term is defined for adverse possession and/or prescription. Other states use the statutes of limitations to define the term of adverse use or possession. *See* Appendix 2.

175. The owner may terminate the prescriptive use or adverse possession through permission, court action or action. Silverstein v. Byers, 845 P.2d 893, 842 (N.M. Ct. App. 1992) (permission cannot ripen); Margoline v. Holefelder, 218 A.2d 227 (Pa. 1966) (interruption by obstruction); Workman v. Curram, 89 Pa. 226 (1879) (court action lawsuit); Miller v. Grossman Shoes, Inc., 440 A.2d 302 (Conn. 1982).

176. Some states have enacted statutes giving the landowner the ability to notify the adverse user or possessor through a written notice, thereby terminating the prescriptive claim. *See* CONN. GEN. STAT. ANN. § 47-41 (West 1986); R.I. GEN. LAWS § 34-7-7 (1984). These statutes would be similar in action to the state notifying the adverse users through statute.

177. *See supra* note 180.

178. Permission given by the landowner after the term has run is not considered to terminate the adverse use or possession claim. This leads to the conclusion that the right of the adverse user has accrued, and the adverse user may still claim the easement or land. *See* Community Feed Store, Inc. v.

party seeking possession or prescription may already have a legally supportable claim in court. The statute would put the adverse possessor of prescriptive user on notice and require some action within a specified period.[179]

Thus, because some right exists in the adverse possessor or person seeking prescription,[180] the statute abolishing adverse possession and prescriptive easements will need a grandfather clause. It should allow a period of protection to the existing rights of unperfected adverse interests. Such a clause would not pertain to "in progress" rights. It would only apply to those rights that have run the specified term before enactment of the abolishing statute.

The clause would allow the adverse possessor or person seeking prescription a term to perfect the adverse interest. A simple recording of the right under the statute would suffice. The term should be short in relation to the old term for prescription or adverse possession, such as two or three years.[181] Failure to abide by the statutes' terms for perfecting an adverse right will affect the loss of the right forever. The term would serve equity by creating an opening for existing rights and wiping the slate of any unidentified adverse uses.

Admittedly, a real need exists for adverse possession in cases of boundary disputes.[182] This narrow area of the common law may require some replacement action in a statute that acts to abolish prescription and adverse possession. However, the simple, clear approach of complete elimination of adverse possession is preferred.[183] Then, in boundary disputes, the courts can assess damages for lost rents, etc., instead of issuing injunctions. This al-

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Northeastern Culvert Corp., 559 A.2d 1068 (Vt. 1989); Gault v. Bahm, 826 S.W.2d 875 (Mo. Ct. App. 1992); Behen v. Elliott, 791 S.W.2d 475 (Mo. Ct. App. 1990).

179. Observation of due process for persons with a vested right is of utmost importance. *See supra* note 119. For that reason, the suggested statute provides public notice for three consecutive weeks in local newspapers throughout the subject state. It should be noted that as a state is able to expand or contract the period of prescription as it sees fit—for the same reason, the state has the right to eliminate the right if it is supported by public policy. *See supra* note 50 and accompanying text.

180. *Id.*

181. A tenet to the abolition of adverse possession and prescription is eliminating the problem of uncertainty. The term should not continue the uncertainty for the property in question. *See supra* notes 120-24 and accompanying text.

182. Boundary disputes are on the rise because of increasing real estate values and the explosive growth in the secondary mortgage market. Deirdre Fanning, *This land is my land . . . or is it? (New England Boundary Disputes)*, FORBES, Jan. 23, 1989, at 62. The authors of this comment argue that adverse possession is only justified when an adverse user truly mistakes his property boundary line—not when a neighbor or "squatter" intentionally trespasses to secure an adverse right. *See* Miceli & Sirmans, *supra* note 2, at 161-62 ("What this argument overlooks . . . is that [a] good faith error [is] difficult . . . to distinguish from intentional boundary encroachment."). Public policy should not reward the trespasser simply because he is good at it.

183. *See infra* note 193 and accompanying text.

ready occurs in disputes arising between adverse possessors/prescriptive users and landowners prior to satisfaction of the statutory period.

Opponents may contend abolition will resurrect the problem of "old" or "stale" evidence.[184] This argument is invalid considering current methods of record storage on microfiche, computer disks and data tapes.

Instead of broadening the use of the antiquated common law to cover an increasing array of situations,[185] the various states should abolish the common law. Many states have already acted to limit the doctrines.[186] The abolition of the adverse doctrines will not only serve to clarify titles to land by eliminating adverse claims,[187] but will also simplify property law.[188]

Legislatures have resorted to statute several times to remedy the nebulous and convoluted nature of the common law.[189] It is time for those same governmental institutions to update the law of adverse concepts as they have done in other areas of the law.[190]

CONCLUSION: A WELCOME UPDATE TO PROPERTY LAW

To update and elucidate land law in America, this comment has endorsed the burial of adverse possession and prescription through legislation.

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184. *See supra* note 31. *See also* Chaplin v. Sanders, *supra* note 71; Netter, *supra* note 2, at 219 ("After a certain period litigation become inefficient . . . and there is a depreciation in the availability of the evidence.").

185. *See supra* note 52.

186. Arizona has passed a statute to limit all adverse possession claims to a maximum of 160 acres per claim. *See* Appendix 2. The Texas adverse possession statute has a similar limitation to 160 acres. *Id.* Wyoming's "Public Road Statute" limits any road taken by prescription under the act to a maximum width of 66 feet. Steplock v. Taylor, 894 P.2d 599 (Wyo. 1995).

187. Adverse claims are often not recorded when gained. *See* POWELL, *supra* note 11, at § 34.21 ("When an easement has been acquired by prescription, the recording acts cannot function, since they relate only to priorities among instruments affecting land ownership."). The search of land titles would be more reliable when claims to land, not in the records, are reduced.

188. A good deal of property law is dedicated to the attempted unraveling of the adverse doctrines discussed in this paper. *See generally* Thompson, *supra* note 14. *See also infra* note 193.

189. People v. Brengard, 191 N.E. 850, 853 (N.Y. 1934) ("The design of the Penal Code and the Penal Law was to make definitions of crime as nearly certain as possible and, in the execution for this plan for clarity, the abolition of all common-law crimes."); Miles v. Caldwell, 69 U.S. 35, 43 (1864) (some states uphold many common law rules of land conveyancing which are complicated while some states have enacted conveyancing statutes which are exceedingly simple and effectual); Atchison, Topeka and Sante Fe R.R. Co. v. People, 5 Colo. 60, 61 (1879) (code was enacted by the legislature to abolish common law forms of action and simplify the law); Angus v. Fair, 132 Cal. 523, 552, 64 P. 1000, 1005 (1901) (repeal of common law meant simplification of the law); In re Peck, 136 Misc. 294, 295, 240 N.Y.S. 634, 635 (1930) (purpose of codification reform from the common law included simplification).

190. *See supra* note 193.

These two ideas are "dusty, obscure relics" of the past[191] and finish one bullet short in a showdown with modern public policy.[192] Perhaps in the days of creaky wooden sidewalks these two doctrines appeared as shiny as the sheriff's badge: At high noon today the adverse uses look as rusty as an old pair of spurs.

Acquisition of land or easement by adverse use encourages land development and penalizes conservation. It creates uncertainty in land titles and produces a chilling effect on the real estate market. Further, adverse use takes rights or property from the landowner without compensation and cuts against the grain of neighborliness. Public policy has opened a resting place on Boot Hill for the adverse uses—hopefully we will have the fortitude to pick up the shovel and finish the job.

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191. *See supra* note 3.

192. *See generally* Bostick, *supra* note 105, at n.4. America allows many antiquated doctrines to exist long after abolition in their country of origin. England abolished the Rule in Shelley's Case in 1924; the Doctrine of Destructibility of Contingent Remainders in 1925; and the Doctrine of Worthier Title in 1833.

APPENDIX 1

PRESCRIPTION LAWS OF THE FIFTY STATES

Alabama: *Apley v. Tagert*, 584 So. 2d 816, 817 (Ala. 1991) (citing *Hereford v. Gingo-Morgan Park*, 551 So. 2d 918 (Ala. 1989)) (20 years adverse use continuously and uninterrupted); *Alaska*: *Fairbanks North Star Borough v. Lakeview Enters., Inc.*, 897 P.2d 47, 53 (Alaska 1995) (citing ALASKA STAT. § 09.10.030) (expiration of 10-year statute of limitations is precondition for prescriptively acquiring property without color of title); *Arizona*: *Inch v. McPhereson*, 859 P.2d 755, 757 (Ariz. 1992) (quoting *Rorebeck v. Criste*, 398 P.2d 678, 681 (Ariz. App. 1965)) ("To prove adverse possession for an easement [it must be shown] by clear and convincing evidence that [the adverse user's] use was 'actual, open and notorious, hostile, under a claim of right, continuous for the statutory period [here, 10 years], and exclusive.'"); *Arkansas*: *Neyland v. Hunter*, 668 S.W.2d 530, 531-32 (Ark. 1984) (7 year period); *California*: *Zimmer v. Dykstra*, 39 Cal. App.3d 422, 430 114 Cal. Rptr. 380, 385 (1974) (citing CAL CIV. CODE § 1007) (5 year period); *Colorado*: *Whinnery v. Thompson*, 868 P.2d 1095, 1098 (Colo. 1993) (18 years of continuous, open and adverse possession of a right-of-way required to establish an easement by prescription); *Connecticut*: *O'Brien v. Coburn*, 664 A.2d 312, 314 (Conn. 1995) (citing CONN. GEN. STAT. ANN. § 47-37; *Gioielli v. Mallard Cove Condominium Ass'n, Inc.*, 658 A.2d 134 (Conn. App. 1995)) (15 years of open, visible, continuous and uninterrupted use made under claim of right); *Delaware*: *Berger v. Colonial Parking, Inc.*, 1993 WL 208761 (Del. Ch. 1993) (citing *Lickle v. Frank W. Diver, Inc.*, 238 A.2d 326, 329 (Del. Super. Ct. 1968) ("[E]lements necessary to establish a prescriptive easement are a continuous, uninterrupted and adverse use . . . for a period of 20 years."); *District of Columbia*: *Chaconas v. Meyers*, 465 A.2d 379, 381 (D.C. 1983) (citing D.C. CODE ANN. §§ 12-301(1), 16-3301 (1967); 12-301(1) (1981)) (prescriptive easement requires open, notorious, exclusive, continuous, and adverse use for a statutory period of 15 years); *Florida*: *Florida Power Corp. v. McNeely*, 125 So.2d 311, 314 (Fla. Dist. Ct. App. 1961) (citing common law and FLA. STAT. ANN. § 95.18) (20 years); *Georgia*: *Henderson v. Cam Dev. Co.*, 190 Ga.App. 199, 378 S.E.2d 495 (1989) (citing GA. CODE ANN. §§ 44-9-1, 44-9-59) (7 years generally, or 20 years for "wild land"); *Hawaii*: *The Nature Conservancy v. Nakila*, 4 Haw.App. 584, n.17, 671 P.2d 1025, n.17 (1983) (citing HAW. REV. STAT. §§ 657-31 (1976)) (20 years uninterrupted and continuous adverse use); *Idaho*: *Sinnett v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961) (citing IDAHO CODE § 5-203) (5 years); *Illinois*: *Daniels v. Anderson*, 252 Ill.App.3d 289, 307, 624 N.E.2d 1151, 1163 (1993) (adverse, exclusive,

continuous and uninterrupted under a claim of right for 20 years) (citing *Healy v. Roberts*, 440 N.E.2d 647 (Ill. App. Ct. 1982)); *Indiana*: *Bauer v. Harris*, 617 N.E.2d 923, 927 (Ind. Ct. App. 1993) (citing *Powell v. Dawson*, 469 N.E.2d 1179, 1181) ("A prescriptive easement is established by actual, open, notorious, continuous, uninterrupted, adverse use for 20 years under a claim of right, or by continuous adverse use with the knowledge and acquiescence of the servient owner."); *Iowa*: *Heald v. Glentzer*, 491 N.W.2d 191, 193 (Iowa Ct. App. 1992) (quoting *Simonsen v. Todd*, 261 Iowa 485, 489, 154 N.W.2d 730, 732 (1967) (quoting *Webb v. Arterburn*, 246 Iowa 363, 379, 67 N.W.2d 504, 513 (1954); *see also* IOWA CODE § 564.1 (1991))) (one way a prescriptive easement may be created is by adverse possession, under claim of right or color of title, openly, notoriously, continuously, and hostilely for 10 years or more); *Kansas*: *Chinn v. Strait*, 173 Kan. 625, 630, 250 P.2d 806, 809 (1952) (easement by prescription may be acquired by exclusive and uninterrupted use and enjoyment of the right for a period of time sufficient to acquire title to soil by adverse possession, which is 15 years); *Kentucky*: *Jackey v. Burkhead*, 341 S.W.2d 64, 65 (1960) (quoting *Riley v. Jones*, 295 Ky. 389, 174 S.W.2d 530, 531 (date omitted)) ("To establish title to an easement by prescription, adverse possession must be actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force . . . for at least 15 years."); *Louisiana*: LA. CIV. CODE. ANN. art. 742 (West 1980) (prescriptive easement created after 10 years of use in good faith and under just title or after 30 years uninterrupted possession without just title or good faith); *Maine*: *Davis v. Mitchell*, 628 A.2d 657, n.5 (Me. 1993) (quoting *Jost v. Resta*, 536 A.2d 1113, 1114 (Me. 1988) (quoting *Dartnell v. Bidwell*, 115 Me. 227, 230, 98 A. 743 (1916))) ("[T]o prove the existence of a prescriptive easement, a party must prove 'continuous use for at least 20 years under a claim of right adverse to the owner, with [the owner's] knowledge and acquiescence, or by use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.'"); *Maryland*: *Forrester v. Kiler*, 98 Md.App. 481, 484, 633 A.2d 913, 915 (1993) (citing *Shuggars v. Brake*, 234 A.2d 752 (Md. 1966)) (a prescriptive easement is established when a party proves that the use was adverse, exclusive, and uninterrupted for a period of 20 years); *Massachusetts*: *Brooks, Gill and Co., Inc. v. Landmark Properties, 217 Ltd. Partnership*, 23 Mass.App.Ct. 528, 530, 503 N.E.2d 983, 985 (1987) (20 years); *Michigan*: *Goodall v. Whitefish Hunting Club*, 208 Mich.App. 642, 645, 528 N.W.2d 221, 223 (1995) (citing *Marr v Hemenny*, 297 Mich. 311, 297 N.W. 504 (1941)) ("[A]n easement by prescription arises from a use . . . that is open, notorious, adverse, and continuous for a period of 15 years."); *Minnesota*: *Lindquist v. Weber*, 404 N.W.2d 884, 886 (Minn. Ct. App. 1987) (citing MINN. STAT. § 541.02) (15 years and must also prove that the use was open, continuous, actual, hostile and exclusive.); *Mississippi*:

Rutland v. Stewart, 630 So. 2d 996, 998 (Miss. 1994) (10 years); *Missouri*: *Umphres v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 89 (Mo. Ct. App. 1994) (quoting *Hermann v. Lynnbrook Land Co.*, 806 S.W.2d 128, 131 (Mo. Ct. App. 1991) (open, adverse, visible, continuous and uninterrupted use under claim of right for 10 years required); *Montana*: *Brown v. Tintinger*, 245 Mont. 373, 801 P.2d 607 (1990) (citing MONT. CODE. ANN. § 70-19-401) (5 years); *Nebraska*: *Kimco Addition, Inc. v. Lower Platte S. Natural Resources Dist.*, 232 Neb. 289, 294, 440 N.W.2d 456, 460 (1989) ("A party claiming a prescriptive easement must show that its use was exclusive, adverse, under claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period."); *Nevada*: *Michelsen v. Harvey*, 107 Nev. 859, 863, 822 P.2d 660, 663 (1991) (citing *Wilfon v. Hampel 1995 Trust*, 105 Nev. 607, 608, 781 P.2d 769, 770 (1989) (citing *Stix v. LaRue*, 78 Nev. 9, 11, 368 P.2d 167, 168 (1962))) ("A prescriptive easement is created through 5 years of adverse, continuous, open and peaceable use of land."); *New Hampshire*: *Vigeant v. Donel Realty Trust*, 130 N.H. 406, 408, 540 A.2d 1243 (1988) (quoting *Page v. Downs*, 115 N.H. 373, 374, 341 A.2d 767, 768 (1975)) ("The [prescriptive] claimant [must prove] '20 years adverse continuous, uninterrupted use of the land . . . claimed in such a manner as to give notice to the record owner that an adverse claim [is] being made to it."); *New Jersey*: *Leach v. Anderl*, 218 N.J.Super.App.Div. 18, 28, 526 A.2d 1096, 1101 (1987) (quoting *Baker v. Normanoch Ass'n, Inc.*, 25 N.J. 407, 419, 136 A.2d 645 (1957)) ("The nature of the user necessary for the creation of an easement by prescription is the same as that for the acquisition of title by adverse possession, i.e., it must be adverse or hostile, exclusive, continuous, uninterrupted, visible and notorious for a period of 20 years."); *New Mexico*: *Southern Union Gas Co. v. Cantrell*, 56 N.M. 184, 241 P.2d 1209 (1952) (citing N.M. STAT. ANN § 27-121 (1941)) (10 years); *New York*: *Alexy v. Salvador*, 630 N.Y.S.2d 133, 135 (1995) (citing N.Y. REAL PROP. ACTS. LAW § 311 (McKinney (1979); *Led Duke v. Sommer*, 205 A.D.2d 1009 (1994)) (clear and convincing evidence required to show prescriptive use was adverse, open and notorious, continuous and uninterrupted for the 10-year prescriptive period); *North Carolina*: *Pitcock v. Fox*, 119 N.C.Ct.App. 307, 309, 458 S.E.2d 264, 266 (1995) (citing *Potts v. Burnett*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)) (a prescriptive claimant must prove by a preponderance of the evidence (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least 20 years; (4) that there is substantial identity of the easement claimed throughout the 20-year period."); *North Dakota*: *L.A. Gajewski v. Taylor*, 536 N.W.2d 360 (N.D. 1995) (quoting *Nagel v. Emmon Co. Water Resource Dist.*, 474 N.W.2d 46, 48 (N.D. 1991)) ("A use of land creates a prescrip-

tive easement if 'the use is (1) adverse, (2) continuous and uninterrupted, and (3) for the period of prescription [of 20 years].'"); *Ohio*: *Nice v. City of Marysville*, 82 Ohio Ct.App. 109, 113, 611 N.E.2d 468, 470 (1992) (*citing J.F. Gioia, Inc. v. Cardinal Am. Corp.*, 23 Ohio App.Ct. 33, 491 N.E.2d 235 (1985)) ("The party claiming a prescriptive easement must prove that the property is being used in a manner that is (a) open, (b) notorious, (c) adverse to the landowner's property rights, (d) continuous, and (e) for at least twenty-one years."); *Oklahoma*: *Brown v. Mayfield*, 786 P.2d 708 (Okla. Ct. App. 1989) (citing OKLA. STAT. tit. 12 § 93 (1981), tit. 60 § 333 (1981)) (15 years); *Oregon*: *Johnson v. Becker*, 1995 WL 600331 (Or. Ct. App. 1995) (citing *Thompson v. Scott*, 270 Or. 542, 546, 528 P.2d 509 (1974); OR. REV. STAT. § 12.050) (To establish a prescriptive easement, one must show, by clear and convincing evidence, open and notorious use of land adverse to the rights of another for a continuous and uninterrupted period of 10 years.); *Pennsylvania*: *Martin v. Sun Pipe Line Co.*, 1995 WL 553909, 2 (Pa. 1995) (citing *Boyd v. Teeple*, 460 Pa. 91, 94, 331 A.2d 433, 434 (1975)) ("A prescriptive easement is created by adverse, open continuous, notorious, and uninterrupted use of land for twenty-one years."); *Rhode Island*: *Altieri v. Dolan*, 423 A.2d 482 (R.I. 1980) (prescriptive easement requires adverse use (that which is held openly, notoriously and hostilely under claim of right), and must be continuous and uninterrupted for 10 years); *South Carolina*: *Horry County v. Laychur*, 434 S.E.2d 259, 261 (S.C. 1993) (citing *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977)) ("[To establish a prescriptive easement, the following must be shown:] (1) There must be continued and uninterrupted use or enjoyment of the right for a period of 20 years. (2) The identity of the thing enjoyed must be proven. (3) The use must have been adverse or under a claim of right."); South Dakota: *Travis v. Madden*, 493 N.W.2d 717, 720 (S.D. 1992) (citing *Kougl v. Curry*, 73 S.D. 427, 432, 44 N.W.2d 114, 117 (1950); S.D. CODIFIED LAWS ANN. § 15-3-1) ("To claim the benefit of an easement by prescription, a person must show open, continued, and unmolested use of the land in the possession of another [for 20 years]."); Tennessee: *Fugate v. McConnell*, 1995 WL 309991, 1 (Tenn. Ct. App. 1995) (quoting *House v. Close*, 48 Tenn.App. 341, 345 (1961)) ("[To establish a prescriptive easement,] the use and enjoyment which will give title by prescription to an easement or other incorporeal right must be adverse, under claim of right, continuous, uninterrupted, open, visible, exclusive, and with knowledge and acquiescence of the owner of the servient tenement, and must continue for the full [20-year prescriptive period.]"); *Texas*: *Wiegand v. Riojas*, 547 S.W.2d 287 (Tex. Civ. App. 1977) (10 years); *Utah*: *Green v. Stansfield*, 886 P.2d 117, 120 (Utah 1994) (citing *Marchant v. Park City*, 778 P.2d 520, 524 (Utah 1990)) ("A prescriptive easement may be granted when a use is (1) open, (2) notorious, (3) adverse, and (4) continuous for at least twenty

years."); *Vermont*: *Buttolph v. Erikkson*, 160 Vt. 618, 648 A.2d 824, 825 (1993) (*quoting Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 155, 559 A.2d 1068, 1070 (1989)) (easement by prescription is established by open, notorious, hostile and continuous possession of property for a period of 15 years); *Virginia*: *Chaney v. Haynes*, 250 Va. 155, 158, 458 S.E.2d 451, 453 (1995) (proof of a prescriptive easement requires the showing by clear and convincing evidence that use was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owners of the land for 20 years); *Washington*: *The Mountaineers v. Wymer*, 56 Wash. 721, 355 P.2d 341 (1960) (citing WASH. REV. CODE § 4.16.020) (10 years); *West Virginia*: *Moran v. Edman*, 460 S.E.2d 477 (W.Va. 1995) (three levels of quotes omitted) ("The open, continuous and uninterrupted use of a road over the land of another, under bona fide claim of right, and without objection from the owner, for a period of ten years, creates in the user of such road a right by prescription to the continued use thereof."); *Wisconsin*: *Draeger v. Gutzdorf*, 465 N.W.2d 204, 205 (Wis. Ct. App. 1990) (quoting *Mushel v. Town of Molitor*, 365 N.W.2d 622, 626 (Wis. Ct. App. 1985)) ("One must show the following elements to establish an easement by prescription: '(1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights; (2) which is visible, open, and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years.'"); *Wyoming*: *Shumway v. Tom Sanford, Inc.*, 637 P.2d 666, 669 (Wyo. 1981) (citing *Auchmuty v. Chicago, Burlington & Quincy R.R. Co.*, 349 P.2d 193 (Wyo. 1960); *See also Gregory v. Sanders*, 635 P.2d 795 (Wyo. 1981) (citing WYO. STAT. § 1-3-103 (1977)) (a prescriptive easement arises from hostile and adverse use which is open, visible, continuous and unmolested for 10 years).

APPENDIX 2

ADVERSE POSSESSION STATUTES OF THE FIFTY STATES

Alabama: ALA. CODE § 6-5-200 (1975) (10 years on record with adverse possessor coupled with payment of taxes by adverse party); *Alaska*: ALASKA STAT. §§ 09.10.030, 09.45.052 (1994) (10 years adverse possession required for all adverse possession claims except those against the state or United States, which only requires 7 years adverse possession); *Arizona*: ARIZ. REV. STAT. ANN. §§ 12-523, 12-525, 12-526 (1992) (3 years adverse possession under color of title, 5 years under duly recorded deed, 10 years adverse use and enjoyment with a limitation to 160 acres); *Arkansas*: ARK. CODE ANN. § 18-5-61 (Michie 1987) (5 years adverse possession bars ejectment by land owner); *California*: CAL CIV. PROC. CODE tit. 2, § 325 (West 1982) (generally requires 5 years adverse possession); *Colorado*: COLO. REV. STAT. ANN. § 38-41-101 (West 1990) (18 years adverse possession is conclusive evidence of absolute ownership, but not allowed against governmental entities); *Connecticut*: CONN. GEN. STAT. ANN. § 52-575 (West 1991) (statute of limitations of 15 years on the right of entry to land owner as against an adverse possessor). *Delaware*: DEL. CODE ANN. tit. 10, § 7901 (1974) (twenty years); *District of Columbia*: D.C. CODE ANN. §§ 16-1113, 12-301 (1981) (15 years required for adverse possession and prescription); *Florida*: FLA. STAT. ANN. §§ 95.12, 95.16, 95.18; (West 1982 & West Interim Update 1995) (7 years required whether under color of title or not); *Georgia*: GA. CODE ANN. §§ 44-5-161, 44-5-163, 44-5-164 (Michie 1995) (20 years required except where claim is made under written evidence of title, whereby a period of 7 years is required); *Hawaii*: HAW. REV. STAT. § 657-31 (1988) (20 years); *Idaho*: IDAHO CODE § 5-210 (1990) (5 years required to ripen an adverse possession claim if the adverse possessor has paid the property taxes); *Illinois*: ILL. ANN. STAT. ch. 735 para. 5/13-105, 5/13-107, 5/13-109 (Smith-Hurd 1995) (20 years required unless the adverse action is taken under claim of title or the adverse user has paid the property taxes, whereby the time is reduced to 7 years); *Indiana*: IND. CODE. ANN. § 34-1-2-2 (Michie 1986) (10 year statute of limitations); *Iowa*: IOWA CODE ANN. §§ 614.17, 614.17A (West Cumm. Supp. 1995) (10 years); *Kansas*: KAN. STAT. ANN. § 60-503 (1994) (15 years); *Kentucky*: KY. REV. STAT. ANN. § 413.010 (Baldwin 1995) (15 years); *Louisiana*: LA. CIV. CODE ANN. art. 3473, 3486, 3490, 3491 (West 1994) (30 years or 10 years under good faith and title); *Maine*: ME. REV. STAT. ANN. tit. 14, § 801 (West 1980) (20 years); *Maryland*: MD. CODE ANN., CTS, & JUD. PROC. § 5-103 (1995) (20 years); *Massachusetts*: MASS. GEN. LAWS ANN. ch. 260, § 21 (West 1992) (20 years); *Michigan*: MICH. COMP. LAWS ANN. § 600-5801 (West 1987)

(15 years); *Minnesota*: MINN. STAT. ANN. § 541.02 (West 1988) (15 years); *Mississippi*: MISS. CODE. ANN. § 15-1-13 (1993) (10 years); *Missouri*: MO. ANN. STAT. § 516.010 (Vernon 1995) (10 years); *Montana*: MONT. CODE ANN. § 70-19-411 (1995) (5 year if taxes were paid by the adverse user); *Nebraska*: NEB. REV. STAT. § 25-202 (1989) (10 years); *Nevada*: NEV. REV. STAT. § 40.090 (1993) (15 years with 5 years of taxes paid required prior to filing of a claim); *New Hampshire*: N.H. REV. STAT. ANN. § 508:2 (1994) (20 years); *New Jersey*: N.J. STAT. ANN. § 2A:14-30 (West 1995) (30 years, 60 years for woodlands or uncultivated tracts); *New Mexico*: N.M. STAT. ANN. § 37-1-22 (Michie 1995) (10 years with a writing purporting to give color of title and the payment of taxes for a period by the adverse possessor); *New York*: N.Y. REAL PROP. ACTS. LAW § 501, 511, 512 (McKinney 1979) (10 years); *North Carolina*: N.C. GEN. STAT. § 1-38, 1-40 (1994) (20 years or 7 years under claim of title); *North Dakota*: N.D. CENT. CODE. § 47-06-03 (1995) (10 years with the payment of taxes); *Ohio*: OHIO REV. CODE. ANN. § 2305.04 (Baldwin 1995) (21 years); *Oklahoma*: OKLA. STAT. ANN. tit. 12, § 93 (West 1994) (15 years); *Oregon*: OR. REV. STAT. § 105.620 (1993) (10 years); *Pennsylvania*: 68 PA. CONS. STAT. § 81 (1994) (21 years); *Rhode Island*: R.I. GEN. LAWS § 34-7-1 (1984) (10 years); *South Carolina*: S.C. CODE ANN. § 15-67-210 (Law. Co-op. 1976) (10 years); *South Dakota*: S.D. CODIFIED LAWS ANN. §§ 15-3-1, 15-3-15 (1984) (20 years unless taxes paid and claim made under color of title, whereby the period is reduced to 10 years); *Tennessee*: TENN. CODE ANN. §§ 28-2-101, 28-2-103 (1980) (7 years under color of title); *Texas*: TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024, 16.025, 16.026, 16.027, 16.028 (West 1986) (25 years unless held under title and/or taxes, whereby the period is reduced to 10, 5, or possibly 3 years and a limitation of 160 acres); *Utah*: UTAH CODE ANN. §§ 78-12-7, 78-12-7.1 (1953) (7 years with a legal title); *Vermont*: VT. STAT. ANN. § 12-501 (1973) (15 years); *Virginia*: VA. CODE ANN. § 8.01-236 (Michie 1950) (15 years); *Washington*: WASH. REV. CODE ANN. §§ 4.16.020 (West Cumm. Supp. 1995), 7.28.050 (West 1992) (10 years unless adverse possessor has a title of record, whereby the period is reduced to 7 years); *West Virginia*: W. VA. CODE. § 55-2-1 (1994) (10 years); *Wisconsin*: WIS. STAT. ANN. § 893.25 (West 1983) (20 years); *Wyoming*: WYO. STAT. § 1-3-103 (1988) (10 years).