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Chazakah: Judaic Law's Non-Adverse Possession

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I. INTRODUCTION

Whose woods these are I think I know.
His house is in the village though;
He will not see me stopping here
To watch his woods fill up with snow.

My little horse must think it queer
To stop without a farmhouse near
Between the woods and frozen lake
The darkest evening of the year.

He gives his harness bells a shake
To ask if there is some mistake.
The only other sound's the sweep
Of easy wind and downy flake.

The woods are lovely, dark and deep.
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.¹

What would have happened if the horseman, instead of keeping his promises, had decided to stay in the woods? Perhaps the story would have gone as follows. First he built a fire to warm up. He then went ice fishing on the frozen lake, cooked his fish on his fire, and took a nap. Eventually, he built a cabin and collected firewood for the cold nights. He also found some oats nearby, so he was able to feed his horse during the long winter.

As the lake began to thaw and leaves began to adorn the naked trees, the horseman realized how truly magnificent really were the woods. He knew he could never leave. So, he stayed through the spring and summer and, as autumn gave way to winter, he was reminded of what drew him to these woods in the first place, the serenity of the woods in winter.

And the cycle continued the next year, and the year after that. Eventually, the horseman grew old; he had been in the woods for close to fifty years. No one had missed him other than one nephew who owned a lumber company and who occasionally visited him and made sure he was alive. Realizing that his health was failing, the horseman wrote a will, in which he bequeathed his horse and *his* woods to his dear nephew. A short time later, the horseman died. On his next trip to see his old uncle, the nephew found the horseman resting peacefully on a tree stump, his body slumped on the remains of a tree he had cut down to build his cabin.

By this time, the true owner's children had buried their father. When they read his will, they learned that he had left them the entire forest. To their utter

¹Robert Frost, *Stopping by the Woods on a Snowy Evening*, <http://www.mit.edu/people/dpolicar/writing/poetry/poems/stoppingByTheWoods.html> (last visited Feb. 4, 2004).

astonishment, when they came to survey their inheritance, they observed the horseman's nephew bringing in bulldozers.

But how should the story end? Who should be entitled to keep the property? How should this dispute be resolved? Under the American law of adverse possession, the horseman's nephew will likely be rewarded for his uncle's decision to remain in the forest. Rather than keeping his promises and traveling all those miles before he slept, the horseman instead acquired property that he was able to leave to his nephew.

This article questions the current doctrine of adverse possession, which would deprive the true owner's children of their inheritance in favor of the horseman's nephew.² Today, all states recognize that when a possessor satisfies the elements of adverse possession, he assumes ownership of the property.³ Currently, adverse possession serves as a mechanism through which property ownership magically transfers from the true owner to the adverse possessor.⁴ By simply satisfying the elements of adverse possession, the possessor becomes the owner of the property in place of the true owner.⁵

Rather than viewing adverse possession as a method of acquiring land, adverse possession should instead create a rebuttable presumption of ownership. The idea that adverse possession should create a rebuttable presumption stems from the Judaic law doctrine of *chazakah*.⁶ To explain why *chazakah* is preferable to the current adverse possession doctrine, this article explains what *chazakah* is, addresses the major justifications and criticisms of adverse possession, and proposes a shift in adverse possession that would resemble *chazakah*. Adopting a method similar to *chazakah* would protect the integrity of adverse possession's justifications while alleviating its strongest criticisms.

Section II of this article describes adverse possession and outlines its elements. Not all states recognize the same elements for adverse possession, but a number of elements are common to all states.⁷ This section, in describing how the doctrine

²This article considers only adverse possession's application to real property, not to personal property. For a discussion of how adverse possession applies to personal property, see Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 (1989). See also *O'Keeffe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980) (holding that in cases of personal property, a discovery rule should replace adverse possession; "the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.").

³Thomas J. Miceli, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. ECON. 161 (1995).

⁴Throughout this article, *chazakah* will be addressed as a type of adverse possession. Therefore, whether discussing adverse possession or *chazakah*, the "adverse possessor" is the person attempting to acquire the property, and the true owner is the titleholder, the party seeking to retain ownership, rather than lose his property to the adverse possessor.

⁵See *Lawrence v. Town of Concord*, 788 N.E.2d 546, 551 (Mass. 2003) (holding that meeting the elements of adverse possession confers title on the adverse possessor).

⁶*Bava Basra* 3:1 (Mishnah).

⁷For example, all states agree that the adverse possessor must display *actual* possession and that his possession must be *hostile* to the true owner's claim of ownership. See, e.g., *Rutland v. Mullen*, 798 A.2d 1104, 1110 (Me. 2002) (requiring actual and hostile possession

works, provides a framework for discussing how and why the law should change. Though the adverse possessor must meet a high burden to successfully assume ownership in property, once he has met that burden, he becomes the owner.⁸ His ownership rests completely on his own actions, not at all on the actions of the true owner.⁹ To obtain ownership, the adverse possessor is not required to pay the true owner for the land or even to claim that he ever did pay for the property. Simply satisfying adverse possession's elements confers ownership on the adverse possessor.¹⁰

Section III of this article describes *chazakah*. This section explains what *chazakah* is and more importantly what it is not. Unlike adverse possession, *chazakah* serves not as a tool by which a person acquires land, but instead creates a presumption of ownership.¹¹ The true owner, however, may rebut that presumption.¹² *Chazakah* evidences a transaction and nothing more. It is not, by itself, a method of obtaining ownership in property. Simply proving the elements of *chazakah* will not result in ownership vesting in the adverse possessor.¹³

A close look at *chazakah* indicates that while *chazakah* and adverse possession share a number of similarities, there is a fundamental difference between them. That difference underscores two entirely different mechanisms for land transfer. Section III concludes with an illustration of the difference between the doctrines by applying the facts from *Nome 2000 v. Fagerstrom*,¹⁴ to both adverse possession and *chazakah*.

Sections IV and V respectively discuss the major justifications for and criticisms of adverse possession. Section VI explains how *chazakah* not only satisfies adverse possession's justifications but also escapes its criticisms, and explains why it is therefore a suitable alternative to adverse possession.

as elements of adverse possession); *Vezev v. Green*, 35 P.3d 14, 20 (Alaska 2001) (including actual and hostile possession as elements of adverse possession); *City of Deadwood v. Summit, Inc.*, 607 N.W.2d 22, 27 (S.D. 2000) ("The traditional elements of adverse possession require the 'actual . . . and hostile' occupation of the property for the statutory period."); *Kimball v. Turner*, 993 P.2d 303, 305 (Wyo. 1999) ("To establish adverse possession, the claiming party must show actual, open, notorious, exclusive and continuous possession of another's property which is hostile and under claim of right or color of title."); *Rice v. McGinnis*, 653 So.2d 950 (Ala. 1995) (requiring actual and hostile possession as elements of adverse possession).

⁸The high burden the adverse possessor faces manifests itself in the number of elements he must prove and, in most states, the burden of proof with which he must prove them.

⁹The adverse possessor's ownership does, however, rely on the true owner's failure to act.

¹⁰*See Gruebele v. Geringer*, 640 N.W.2d 454, 457 (N.D. 2002) (noting that failure to meet any element of adverse possession results in the title not being conferred; by implication, meeting all the elements of adverse possession results in title being conferred).

¹¹*See Bava Basra* 3:3 (Mishnah).

¹²*See id.*

¹³*Id.*

¹⁴799 P.2d 304 (Alaska 1990).

II. ADVERSE POSSESSION

A. Elements: Generally

To acquire land through adverse possession, a possessor must prove a minimum of five elements, though some states require additional elements as part of an adverse possession claim.¹⁵ The basic elements are described as follows:

First, the possession must be *actual*. There must be physical control and use of the disputed property for the statutory period. Second, the possession of the disputed tract must be *hostile* to other competing claims to the property. Third, that possession must be *open and notorious*, such that those individuals having competing claims to the property actually know or should have known of that possession. Fourth, possession must be *exclusive*, such that others with competing claims to the property are wholly excluded from the property. Lastly, the possession must be *continuous*¹⁶

B. Additional Elements

Some states require adverse possessors to prove elements in addition to the five listed above. These other elements include the adverse possessor paying property taxes on the land,¹⁷ possessing the land “under color of title,”¹⁸ and occupying the

¹⁵*Compare* Belotti v. Bickhardt, 127 N.E. 239, 241 (N.Y. 1920) (requiring only the basic five elements to prove an adverse possession claim), with Bradley v. Demos, 599 So.2d 1148, 1149 (Ala. 1992) (requiring, in a case of statutory adverse possession, “that the [adverse] possessor hold [the property] under color of title, have paid taxes on the property for ten years, or have derived his title by descent or devise” and hold the property under claim of right, in addition to “the common elements of actual, exclusive, open, notorious, and hostile possession”).

¹⁶Rodgers v. Thelkald, 80 S.W.3d 532, 534-35 (Mo. Ct. App. 2002) (emphases added) (citations omitted). See also Lewis v. Aslesen, 635 N.W.2d 744, 746 (S.D. 2001) (holding that parties “claiming ownership to land through adverse possession must show that their possession was actual, open, visible, notorious, continuous, and hostile”); Hoffman v. Freeman Land & Timber, LLC, 994 P.2d 106, 109 (Or. 1999) (holding that a successful adverse possession claim requires the purported adverse possessor to establish that the use of the property was actual, open, notorious, exclusive, continuous, and hostile); Grace v. Koch, 692 N.E.2d 1009, 1012 (Ohio 1998) (adopting only the basic five elements as the test for adverse possession, noting specifically that “to acquire title by adverse possession, a party must prove . . . exclusive possession and open, notorious, continuous, and adverse use . . .”).

¹⁷See Unger v. Mooney, 63 Cal. 586, 595 (1883) (requiring the payment of taxes as an element of adverse possession). See also Tidwell v. Strickler, 457 So.2d 365, 368 (Ala. 1984) (holding that for statutory adverse possession, as opposed to adverse possession by prescription, an adverse possessor must have paid taxes for at least ten years to successfully litigate the claim); McKinnon v. Commerford, 88 So.2d 753 at 755 (Fla. 1956) (requiring, for all adverse possession claims that ripened after 1939, adverse possessors to have paid taxes from within one year after entry onto the disputed property to satisfy the elements of adverse possession).

¹⁸See, e.g., Sparks v. Douglas & Sparks Realty Co., 166 P. 285, 286 (Ariz. 1917) (recognizing color of title as an element of adverse possession). See also Peters v. Smuggler-

land in “good faith”¹⁹ or “under a claim of right.”²⁰ These additional elements make acquiring land through adverse possession more difficult; they do not, however, change the nature of the doctrine. In addition to the elements, every state has adopted a statute of limitations for adverse possession. These vary from state to state, but range from five²¹ to thirty years for typical cases of adverse possession.²²

C. Burden of Proof

Though the general rule for the burden of proof in civil cases is proof by a preponderance of evidence,²³ most states have adopted a more stringent rule in adverse possession cases.²⁴ In *Grace v. Koch*, for example, the Ohio Supreme Court accepted the clear and convincing evidence standard as the burden of proof on the adverse possessor.²⁵ The higher standard allocates the risk of mistakenly depriving

Durant Mining Corp., 930 P.2d 575, 579 (Colo. 1997) (requiring adverse possessors to prove color of title, but viewing the “color of title and tax payment requirements . . . in an interchangeable manner”). *But see* O’Neal v. Ellison, 587 S.W.2d 580, 581 (Ark. 1979) (“Color of title is not an essential element to a claim of adverse possession if there is actual possession . . .”); Okuna v. Nakahuna, 594 P.2d 128, 132 n.3 (Haw. 1979) (“[S]howing color of title . . . is unnecessary in proving adverse possession so long as the other necessary elements are present . . .”).

¹⁹*See* Erwin v. Miller, 45 S.E.2d 192, 194 (Ga. 1947) (recognizing good faith as an element of adverse possession); Kaneville v. Meredith, 184 N.E. 883, 885 (Ill. 1933) (requiring an adverse possessor to have possessed the disputed property in good faith for the statutory period of time to prove adverse possession). *See also* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1123-24 (1984) (arguing that in all states, judges and juries manipulate the elements of adverse possession to include a good faith requirement).

²⁰*See* Schulz v. Syvertsen, 591 A.2d 804, 810 n.8 (Conn. 1991) (*holding* that an essential element of adverse possession is the adverse possessor holding the disputed property under a claim of right); Smith v. Hayden, 772 P.2d 47, 52 (Colo. 1989) (holding that “one claiming title by adverse possession must prove that his possession of the disputed parcel was actual, adverse, hostile, under claim of right, exclusive and uninterrupted for” eighteen years).

²¹*See* CAL. CIV. P. CODE § 325 (West 1982).

²²*See* LA. REV. STAT. ANN. § 3486 (West 1994) (adverse possession of real property requires thirty years without the need for just title or occupation in good faith). *But see* ARIZ. REV. STAT. ANN. § 12-523 (West 1992) (in some circumstances as few as three years may be sufficient); N.J. STAT. ANN. § 2A:14-30 (West 1995) (for woodlands, an adverse possessor must satisfy a 60 year statute of limitations). Most states’ statutes of limitation range from between ten and twenty years. *See* William G. Ackerman, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 111-12 (1996).

²³*See, e.g.,* Arrington v. Walter E. Heller Intern. Corp., 333 N.E.2d 50, 58 (Ill. App. Ct. 1975).

²⁴*See* Brown v. Gobble, 474 S.E.2d 489, 494 (W.Va. 1996).

²⁵*Grace*, 692 N.E.2d at 1012. *See also* Brown, 474 S.E.2d at 494 (accepting clear and convincing evidence as the requisite burden of proof while recognizing that a minority approach allows title to be transferred when the adverse possessor shows a mere preponderance of the evidence). *See also* Hoffman, 994 P.2d at 109.

the true owner of his property against the adverse possessor in favor of the true owner.²⁶ The Supreme Court of West Virginia, in *Brown v. Gobble*, explained as follows:

The interest at stake in an adverse possession claim is not the mere loss of money as is the case in the normal civil proceedings. Rather, it often involves the loss of a homestead, a family farm or other property associated with traditional family and societal values. . . . Adopting the clear and convincing standard of proof is more than a mere academic exercise. At a minimum, it reflects the value society places on the rights and interests being asserted.²⁷

Though some states do allow a less stringent burden of proof,²⁸ the majority of states favors the higher burden of proof.

The current doctrine of adverse possession and its interpretation and application in contemporary courts indicates the premium that society places on protecting property ownership. That value is reflected not only in the elements required to sustain a claim for adverse possession, but also with the oft insisted upon element of the adverse possessor acting in good faith.²⁹ The states that have adopted the higher burden of proof have likewise furthered the goal of ensuring that property owners do not incorrectly lose their property.³⁰ Nonetheless, even with all the safeguards built into adverse possession, there is still a significant possibility that an innocent true owner will unfairly lose his property to a trespasser. *Chazakah* provides a solution that helps alleviate some of the problems inherent to adverse possession.

Preponderance of the evidence has been described as a fifty-one percent margin in favor of the party that has the burden of proof. See *Coleman v. Anne Arundel Co. Police Dept.*, 797 A.2d 770, 781 (Md. 2002). Stated another way, the preponderance of evidence standard means that something is more likely than not correct. See *Kahn v. East Side Union High School Dist.*, 75 P.3d 30, 37 (Cal. 2003).

“[C]lear and convincing evidence requires more than a mere preponderance of the evidence, but something less than proof beyond a reasonable doubt or undisputed evidence.” *Zander v. Workforce Safety and Ins.*, 672 N.W.2d 668, 672 (N.D. 2003). See also *Attorney Grievance Comm’n of Maryland v. Smith*, 829 A.2d 567, 583 (Md. 2003) (holding that to prove evidence by the “clear and convincing” standard, one must prove more than a preponderance of evidence but less than proof beyond a reasonable doubt); *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1008 (D. Minn. 2003).

²⁶See *Brown*, 474 S.E.2d at 494.

²⁷*Id.*

²⁸See *Gerner v. Sullivan*, 768 P.2d 701, 702-03 (Colo. 1989) (holding preponderance of evidence, not clear and convincing evidence, is the standard of proof for adverse possession).

²⁹See *Merrill*, *supra* note 19, at 1123.

³⁰See *Brown*, 474 S.E.2d at 494. Additionally, even those states that reject the clear and convincing standard might do so because of state constitutional constraints. See, e.g., *Gerner*, 768 P.2d at 702 (indicating that the court’s insistence on the preponderance of evidence standard rather than the clear and convincing standard results from the state constitution’s requirement that *all* civil actions carry the same burden of proof).

III. CHAZAKAH

On its surface, *chazakah* appears to be very similar to adverse possession. In fact, other than *chazakah* always requiring a mere three-year statute of limitations, the doctrines appear to be identical. Nonetheless, a deeper investigation reveals that they are, in fact, very different. Whereas adverse possession is a mechanism of land transfer, *chazakah* is not. First, *chazakah* is only permissibly raised in support of a claim of true ownership.³¹ Second, even if the adverse possessor successfully proves all of the elements of *chazakah*, *chazakah* only results in a presumption of ownership; it does not effectuate a land transfer by itself.³² *Chazakah* appears in the Mishnah and Talmud in Tractate *Bava Basra*.³³ Maimonides explains the Mishnaic and Talmudic texts and formulates *chazakah* as black letter law.³⁴ Maimonides discusses *chazakah* in his compilation of Judaic law called *Mishnah Torah*.³⁵ As the Mishnah, the Talmud, and Maimonides make clear, although they share many similarities, adverse possession and *chazakah* are really two fundamentally different doctrines.

A. Elements: Generally

Judaic law recognizes *chazakah* as a mechanism through which one can assert ownership to property.³⁶ Though not explicitly mentioned in the Bible, the Mishnah and Talmud derive *chazakah* from the verse in Deuteronomy that states, “you shall possess [the land] and you shall settle in it.”³⁷ The Talmud interprets this verse to

³¹*Bava Basra* 3:3 (Mishnah). See also *Bava Basra* 28B (Talmud) (asserting that a *chazakah* without an additional claim of ownership is not a valid legal argument).

³²See *Bava Basra* 3:3 (Mishnah); MOSES MAIMONIDES, *MISHNAH TORAH, Toen V’Nitan*, 11:1, 14:12 [hereinafter *Toen V’Nitan*].

³³The Mishnah and the Talmud represent portions of Judaism’s oral law. There is no real American law equivalent in the type of work that they represent. Tractates are volumes of Judaic law focusing primarily on one area of law. Tractate *Bava Basra* deals with property transfers. The third chapter of Tractate *Bava Basra* discusses *chazakah* and how it applies to real estate. The citations to these works will often refer to scholars who explain the Mishnaic and Talmudic texts. Many of those scholars’ writings do not appear in separate books, but are rather incorporated into the pages of the Mishnah and the Talmud. When studying Mishnah and Talmud, these explanatory sources are studied along with the texts that they explain. Therefore, when citing to the sources that accompany the Mishnah and the Talmud, the cited source will be the text of either the Mishnah or the Talmud, with the commentator in parentheses. Finally, throughout this article all references to the Talmud refer to the Babylonian Talmud as opposed to the Jerusalem Talmud.

³⁴Maimonides lived from 1135-1204 C.E. 11 *ENCYCLOPAEDIA JUDAICA Maimonides, Moses* 754 (1994). He is regarded as the “most illustrious figure in Judaism in the post-talmudic era.” *Id.* One of his most prolific works, *Mishnah Torah*, classifies, by subject matter, the entire Talmudic and post-Talmudic Judaic law literature; it codifies all of Jewish law in a 14 volume black letter law compendium. *Id.* at 767. *Mishnah Torah* is relied upon as a source that provides final rulings of law for many Judaic law questions.

³⁵See MAIMONIDES, *Toen V’Nitan supra* note 32.

³⁶*Kiddushin* 26A (Talmud) (Rabbi Asher Ben Isaac).

³⁷*Deuteronomy* 11:31.

mean that possession occurs through settlement.³⁸ Initially, it seems that much like purchasing land or receiving it as a gift, *chazakah* is recognized as a valid form of land transfer.³⁹

A successful *chazakah* claim requires the adverse possessor to establish four elements, all of which are reminiscent of adverse possession: Actual Possessor, (2) Notice (Open and Notorious), (3) Hostility, and (4) Continuous Possessor for the Statutory Period.

1. Actual Possession

Essentially, *chazakah* claims arise on three possible grounds. Each situation, though, is a form of actual possession. (1) *Residence*. If a person lives on a plot of land and acts as though it is his, he may qualify for asserting his ownership through *chazakah*.⁴⁰ This scenario requires that possessor to use the property the way owners in that region tend to use their property.⁴¹ In other words, if the property consisted of a house in a city, the possessor would be required to live in the house. If, however, it were a beach house, where people only vacationed during the summer, living there during the summer would be sufficient. (2) *Improvements*. A second scenario where *chazakah* may be appropriate is one where the possessor makes improvements to the property.⁴² If the property were a farm and the possessor can prove that he had fertilized the field or planted crops, he would then be permitted to assert his ownership interests via *chazakah* because his actions clearly indicate that he had improved the land. (3) *Benefits*. Finally, when a possessor benefits directly from property, he may assert *chazakah*.⁴³ If a possessor can prove that he had eaten fruit from trees on the property, or that he had rented a room in a house to a tenant, he may establish that he had physically benefited from the property. He, therefore, would be permitted to assert a valid *chazakah* claim. These grounds all indicate forms of actual possession rather than abstract claims of ownership.

2. Notice (Open and Notorious) and Hostility

Second requirement of *chazakah* is the potential for notice. The requirement not only calls for notice to the true owner that someone is using his property, but also notice to the possessor that the true owner has protested and asserted his ownership rights. The third element of *Chazakah* requires the possessor to be hostile as to the true owner; a protest from the true owner within the statute of limitations destroys a *chazakah* and begins an action for removal. The Mishnah in *Bava Basra* explains the notice and hostility requirements. The territory surrounding and including modern-day Israel is divided into three regions: Israel proper, called Judea; Transjordan, the area on the eastern side of the Jordan River in present-day Jordan;

³⁸*Kiddushin* 26A (Talmud).

³⁹See discussion *infra* Part III.B., rejecting this initial approach to *chazakah*.

⁴⁰13 ENCYCLOPEDIA TALMUDIT *Chazakah* 466 (1972).

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

and the Galilee, land that is today in northern Israel.⁴⁴ The Mishnah explains that the possessor and the true owner must be in the same region for a *chazakah* claim to ripen. “If [the true owner] was in Judea and [the possessor] took possession in the Galilee . . . it is no *chazakah*, until [the true owner] is with [the possessor] in the [same] province.”⁴⁵ By way of explanation, the commentators to the Mishnah provide as follows:

If the owner of a field located in the Galilee was living in Judea, and someone occupied that field for three years, the *chazakah* is not valid. Travel between these two regions was generally so sparse that it could not be assumed that word of a protest lodged in one province would reach the other province, and the situation was analogous to a border which lies between two hostile nations. Accordingly, there was no point for the owner of the field to protest its occupation even if he knew of the situation, since word of his protest would not reach the occupant in any case.⁴⁶

The Mishnah clearly indicates the need for notice; however, notice is satisfied with constructive notice rather than actual notice. If actual notice were required, it would not matter whether the possessor and the true owner were in the same province or in different ones, the possessor would be required to prove that the true owner had knowledge. In fact, all the Mishnah requires is that the parties be located within the same province so that notice is possible.⁴⁷ As long as they are in the same province, notice and hostility are presumed.⁴⁸

3. Continuous Possession for the Statutory Period

The final element of *chazakah* requires actual possession throughout a statute of limitations period.⁴⁹ It is insufficient to simply use land in one of the three above-mentioned ways and then exert a *chazakah* claim. Though Judaic law accepts a three-year statute of limitations for *chazakah* in essentially the same way that American law recognizes adverse possession’s statute of limitations, exactly how the three years is calculated is the subject of some discussion.

The third chapter of *Bava Basra* explains as follows:

⁴⁴*Bava Basra* 3:2 (Mishnah). In Mishnaic times, “the land of Israel was divided into three regions, each of which was considered a separate land in regard to the issue of *chazakah* . . .” ARTSCROLL MISHNAH SERIES: BAVA BASRA 57-58 (Rabbis Nosson Scherman et al. eds.) (Rabbi Matis Roberts trans. 1997) [hereinafter ARTSCROLL MISHNAH].

⁴⁵*Bava Basra* 3:2 (Mishnah).

⁴⁶ARTSCROLL MISHNAH *supra* note 44, at 58 (internal citations omitted). Additionally, in Mishnaic times the borders between the regions were actually closed; there was much more of a separation than just sparse travel. *Id.* It should also be noted that if the possessor would not be on notice that the true owner has protested, in all likelihood, the true owner would not be on notice that someone else was occupying his land.

⁴⁷*Bava Basra* 3:2 (Mishnah).

⁴⁸*Id.*

⁴⁹*Bava Basra* 28A (Talmud).

Possession of houses, pits, ditches, vaults, dovecotes, bathhouses, olive presses, irrigated fields . . . and anything which provides benefit continually – [must be] three years day to day. A field watered by rain must be possessed three years, but not from day to day. Rabbi Yishmael says: Three months in the first, three in the last, and twelve months in between, [for] a total of eighteen months. Rabbi Akiva says: One month in the first, one month in the last, and twelve months in between, [for] a total of fourteen months.⁵⁰

Rabbi Yishmael further limits his calculation to a field of grain.⁵¹ For an orchard with multiple fruit and vegetable trees and plants, which ripen at different times of year, however, if the adverse possessor harvests all of the different species in one year, he will satisfy the three-year requirement.⁵² All, however, agree that possession must be continuous.⁵³ Citing the Talmud, the Mishnaic commentators assert that “[o]ne can establish ownership by virtue of possession only if he retains and uses these properties for three full years. These three years must be consecutive. If they are not, though he uses the property for a total of three years” he has not established a *chazakah*.⁵⁴

At this point it seems that *chazakah* and adverse possession are substantially similar; they require roughly identical elements and they both result in what appears

⁵⁰*Bava Basra* 3:1 (Mishnah).

⁵¹*Id.*

⁵²*Id.* (Rabbi Ovadia Bartenura). The disagreement between Rabbi Yishmael and other rabbis is based on their disparate explanations of how *chazakah* works. All compare *chazakah* to a goring bull; while the other rabbis view the comparison in broad terms, Rabbi Yishmael sees the comparison very narrowly. See ARTSCROLL MISHNAH, *supra* note 44, at 56.

The comparison works as follows: In Judaic law, if a bull gores another animal, courts view it as an unexpected occurrence and require the owner to pay for only half of the damages incurred because of his animal. Once a bull has gored three times, however, courts must rule that this animal’s nature is to gore. *Id.* The owner will, therefore, be required to pay for full damages resulting from his bull from then on. *Id.*

Perhaps this is analogous to a type of negligence standard. When an owner has no way to know that his bull is prone to attacking other animals, courts are reluctant to impose strict liability. When the bull has shown a penchant for disruptive behavior, though, the owner is on notice that reasonable care requires more diligence. Only then, will courts impose full liability.

The majority of rabbis view the bull comparison broadly. *Id.* If for three years a person uses another person’s land, the other person is considered to be on notice. Courts will view the true owner’s passive behavior as recognizing the adverse possessor as the true owner. *Id.* Rabbi Yishmael, however, views the three-year requirement differently. He looks at the act of harvesting. While harvests usually occur once a year, resulting in a three year statute of limitations, in a field with multiple harvests in a year, each harvest puts the true owner on notice. Each time the possessor raises and harvests crops, he is expressing his ownership. In focusing on the number of harvests, Rabbi Yishmael employs a more narrow reading of the comparison to goring bulls. See *Bava Basra* 28A, B (Talmud) (Tosafos).

⁵³*Bava Basra* 3:1 (Mishnah).

⁵⁴ARTSCROLL MISHNAH, *supra* note 44, at 53-54 (citing *Bava Basra* 29A (Talmud)).

to be a change in ownership from the true owner to the adverse possessor.⁵⁵ It is, however, *how* the claims are asserted that indicates that they are of two very different species. While adverse possession results in the actual transfer of property from the true owner to the adverse possessor, *chazakah* works very differently.

B. What Chazakah is Not

1. Companion Claims and Proofs of Ownership

Most importantly, unlike in adverse possession where meeting the elements will result in the adverse possessor becoming the owner of the property, meeting the elements of *chazakah* in a vacuum will not effectuate a change in ownership. To successfully argue that one owns land pursuant to a *chazakah* claim, a possessor must assert an additional claim with his *chazakah* argument.⁵⁶ Even with this additional claim, *chazakah* will be recognized only as a proof of that companion claim of ownership. The companion claim must follow a specific formula to warrant *chazakah* as proof of ownership: The possessor must assert that he bought the property,⁵⁷ at one time had the deed, but has since lost that deed.⁵⁸

2. Mishnaic and Talmudic Approaches

The Mishnah provides as follows: “Any [*chazakah* claim] not accompanied by a claim [of ownership] is not a [valid] *chazakah*.”⁵⁹ The Mishnah continues to explain how a *chazakah* claim actually works by explaining how it does not work. If, when brought to court in an ejectment proceeding, the possessor asserts that he has met the elements of *chazakah* but acknowledges that he lived there “because no one ever said anything to [him],” he will be unsuccessful in his *chazakah* argument.⁶⁰ In other words, if he claims that he met the elements of *chazakah* but that when he originally

⁵⁵Though the Judaic law texts do not expressly discuss an “exclusive” requirement, this element may be inferred from the other requirements. If an owner is using his land together with someone else, he is less likely to actively assert his ownership, thereby rendering moot an exclusive requirement. See *Bava Basra* 3:3 (Mishnah) for a discussion of examples of non-exclusive possessors. The Mishnah says that “craftsmen, partners, sharecroppers, and administrators [may not assert] *chazakah*.” *Id.* (Emphasis added). Clearly the examples of partners and sharecroppers are instances where the possessor’s possession is *not* exclusive, and in those situations *chazakah* is inapplicable. It would seem that, although the text does not state exclusivity as an element, the examples given indicate that it is, nonetheless, required.

⁵⁶*Bava Basra* 3:3 (Mishnah). See also *Bava Basra* 28B (Talmud) (asserting a *chazakah* claim without an additional claim of ownership is not a valid *chazakah*).

⁵⁷This is simply an example; he can likewise claim that he received it as a gift or as an inheritance. Mishnah *Bava Basra* 3:3 (Mishnah). Additionally, if the possessor claims that he had inherited the land, he is not required to make an additional claim; he is not obligated to prove how the person from whom he inherited the land became the owner. *Id.*

⁵⁸See ARTSCROLL MISHNAH, *supra* note 44, at 60 (explaining *Bava Basra* 3:3 (Mishnah)).

⁵⁹*Bava Basra* 3:3 (Mishnah).

⁶⁰*Id.*

began living on the land he believed that it had been ownerless,⁶¹ the true owner would be successful in the litigation and the *chazakah* claim will fail.⁶²

If, however, the possessor claims both that he has met the elements of *chazakah* and that the original owner had sold him the land, but he has since lost the deed, the possessor will be successful.⁶³ The Mishnah creates a dichotomy by identifying two types of *chazakah* claims: Those that are accompanied by a companion claim of true ownership and those without a companion claim, made by squatters.⁶⁴ A claim of *chazakah* is only as strong as its companion claim.⁶⁵ The resulting doctrine is the conceptual antithesis of adverse possession. While adverse possession serves to remove ownership from the true owner and vest it in the adverse possessor, *chazakah* does no such thing. Rather, *chazakah* is merely proof of an independent claim of ownership.

3. Maimonides's Explanation

Maimonides, in his compilation of Judaic law, provides guidelines for asserting a *chazakah* claim.⁶⁶ He begins with a simple rule of law: Any land that *A* owns, even if that land is currently being lived upon by *B*, still belongs to *A*.⁶⁷ Maimonides then provides an example to illustrate how the rule applies. *B* resides on a piece of property in the way that people usually live there. For example, he lives in a house, he rents or lends parts of the property to others, or he seeks restitution if something is stolen from the property.⁶⁸ Eventually, claiming ownership to the land, *A* approaches *B* and initiates an action for ejectment.⁶⁹ Specifically, *A* says to *B*, "This property on which you are living is mine and I had rented it to you."⁷⁰

When *B* is faced with this challenge from *A*, his response will dictate how the case will proceed and who will be awarded ownership of the land.⁷¹ Maimonides describes exactly what a possessor must claim to be permitted to assert a *chazakah*

⁶¹This is a concept called *hefker* in Judaic law. Asserting ownership over land that is *hefker* is essentially asserting ownership based on the theory of discovery. Though it is unlikely that land would be "discovered" today, the scenario refers to one that is analogous to abandonment in the context of personal property. In American law, just as in Judaic law, abandoned personal property may be acquired. See *Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986).

⁶²*Bava Basra* 3:3 (Mishnah).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵For example, the *chazakah* claim will be viewed only as strong as the claim of ownership based on purchase or gift.

⁶⁶See MAIMONIDES, *Toen V'Nitan supra* note 32.

⁶⁷MAIMONIDES, *Toen V'Nitan supra* note 32, at 11:1.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* *A* may likewise claim that he had lent it to *B*. *Id.* Or *A* may claim that *B* had stolen it from him. *Id.*

⁷¹*Id.*

claim. Using language almost identical to the Mishnah's, Maimonides instructs that any *chazakah* unaccompanied by a companion claim is not a valid argument.⁷² If *B* replies that, contrary to *A*'s claim, *A* had actually sold the land to *B* or had given it to him as a gift, the burden of proof rests with *A* to prove that he was the true owner of the land and that *B* was squatting on his land.⁷³ If *A* successfully proves that he is the true owner of the land, he will retain ownership; if not, the court will award the property to *B*.⁷⁴ Maimonides continues by explaining that a *chazakah* is inappropriate in the following scenario: *B* consumes produce from the property for a number of years and *A*, the true owner, approaches *B*, claiming ownership.⁷⁵ If *B* responds to *A*'s claim by saying that he knew of no owner when he first came to the land, or if *B* claims that he has been on the land for a number of years and no one had said anything to him, courts will not accept *chazakah* as proof of his ownership.⁷⁶ Only when *B* asserts an independent claim of ownership⁷⁷ will courts permit him to assert his compliance with the elements of *chazakah*, and then only as proof that he owns the land.⁷⁸

Maimonides clarifies the overarching rule of the *chazakah* doctrine. Rather than *chazakah* creating ownership, it is merely a proof of ownership. Without an independent claim of ownership, satisfying the elements of *chazakah* is worthless. In adverse possession, the only way a true owner can retain ownership is to disprove one of the elements of the adverse possession claim. *Chazakah* is different. For the true owner to be successful in defending his property, he may attack the elements of *chazakah*,⁷⁹ or he may attack the sufficiency of the underlying transaction.⁸⁰ The difference between adverse possession and *chazakah* can be boiled down to one point: Adverse possession is a mechanism through which one obtains ownership in property; *chazakah* merely creates a very strong, but rebuttable, presumption of ownership. It is evidence of a transaction, not the transaction itself.

⁷²*Id.* at 14:12. See also *Bava Basra* 3:3 (Mishnah).

⁷³MAIMONIDES, *Toen V'Nitan supra* note 32, at 11:1. *B* does not automatically take title to the land; rather, he is required to affirm in court that he is not asserting a false claim. *Id.*

⁷⁴*Id.*

⁷⁵*Id.* at 14:12.

⁷⁶*Id.*

⁷⁷That he bought the land or received it as a gift, for example.

⁷⁸MAIMONIDES, *Toen V'Nitan supra* note 32, at 14:12.

⁷⁹He may, for example, establish that the possessor had occupied the land for only two years. Successfully disproving any of the elements would destroy *chazakah* as a proof of ownership.

⁸⁰Even if the possessor successfully satisfied the elements of *chazakah*, if the true owner proves that a transaction never occurred, the true owner would remain the owner of the property. See *Bava Basra* 3:3 (Mishnah); MAIMONIDES, *Toen V'Nitan supra* note 32, at 11:1, 14:12.

C. Nome 2000 v. Fagerstrom: *Illustrating the Difference Between Chazakah and Adverse Possession*

Perhaps the best way to explain how adverse possession and *chazakah* differ is to apply the doctrines to facts that would give rise to the claims. The Alaska Supreme Court, in *Nome 2000 v. Fagerstrom*, presented a classic case of adverse possession.⁸¹ Though the court found that the possessors had established facts sufficient for an adverse possession claim,⁸² those facts alone would not support a *chazakah* claim.

In *Nome 2000*, the adverse possessors established the following facts: The parties disputed the ownership of seven and a half acres of land overlooking the Nome River.⁸³ Nome 2000 was the true owner and titleholder for that property.⁸⁴ The disputed parcel was located in a rural area, which was suitable for seasonal, recreational activities, but at other times was virtually useless.⁸⁵ From as early as 1944, Charles Fagerstrom began using the disputed parcel of land.⁸⁶ Around 1970, the Fagerstroms built a picnic area on the disputed parcel. This area included a gravel pit, beachwood blocks that served as chairs, firewood, and a 50-gallon barrel that they used as a stove.⁸⁷ The Fagerstroms also brought a camper trailer to the area, planted trees, and built an outhouse, fish rack, and reindeer shelter on the property.⁸⁸ Eventually, the Fagerstroms even built a cabin on the land.⁸⁹ They continued to live there, at least in the summers, until Nome 2000 filed suit on July 24, 1987. The Fagerstroms could declare over forty years worth of possession for the disputed property, well in excess of the ten-year statute of limitations required under Alaska law.⁹⁰

The Fagerstroms, however, never claimed that they bought the land. Nor did they ever claim that they received a grant from the government for the disputed parcel.⁹¹ Essentially, all they asserted was that they were the only ones using the land over the last forty years. Prior to that time, it appeared to be abandoned property, seemingly ownerless. The Alaska Supreme Court applied the facts to the elements of adverse possession. The court began by describing the elements of adverse possession: "In order to acquire title by adverse possession, the claimant

⁸¹*Nome 2000*, 799 P.2d 304 (Alaska 1990).

⁸²This was true for the northerly portion of the property in question. *See id.* at 311. For purposes of this example, therefore, this paper will focus only on the evidence established for the northerly portion of the property.

⁸³*Id.* at 306.

⁸⁴*Id.*

⁸⁵*Id.* at 307.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.* at 308.

⁹⁰*Id.*

⁹¹They had, however, received a similar grant for surrounding plots of land. *See id.* at 307.

must prove . . . that for the statutory period ‘his use of the land was continuous, open and notorious, exclusive and hostile to the true owner.’”⁹² The court reasoned as follows:

The disputed parcel is located in a rural area suitable as a seasonal homesite for subsistence and recreational activities. This is exactly how the Fagerstroms used it On the premises throughout the entire year were an outhouse, a fish rack, a large reindeer pen (which, for six weeks, housed a reindeer), a picnic area, a small quantity of building materials and some trees not indigenous to the area. During the warmer season, for about 13 weeks, the Fagerstroms also placed a camper trailer on blocks on the disputed parcel. The Fagerstroms and their children visited the property several times during the warmer season to fish, gather berries, clean the premises, and play. In total, their conduct and improvements went well beyond “mere casual and occasional trespasses” and instead “evinced[d] a purpose to exercise *exclusive* dominion over the property.”⁹³

The court continued, discussing how the Fagerstroms had met the elements of adverse possession:

With respect to the *notoriety* requirement, a quick investigation of the premises, especially during the season which it was best suited for use, would have been sufficient to place a reasonably diligent landowner on notice that someone may have been exercising dominion and control over at least the northern portion of the property. Upon such notice, further inquiry would indicate that members of the community regarded the Fagerstroms as the owners. *Continuous, exclusive, and [open and] notorious possession were thus established.*⁹⁴

Recognizing an objective test, the court held that by acting toward the land as owners, the Fagerstroms met the hostility requirement; the court rejected Nome 2000’s argument that the possessor’s intent matters.⁹⁵ When a possessor acts as though he owns land, he will be deemed to have satisfied the hostility requirement.

Courts simply engage in a matching game, essentially viewing the facts and the elements in two columns. If a fact from column *A* can be matched with an element from column *B* and none of the elements will be left without a matching fact, a court will declare that adverse possession is met. A possessor successfully winning the matching game becomes the proud new owner of a parcel of land. This process was clearly at play in *Nome 2000*; all the court had to do was list the elements, find the facts that supported the elements, and rule in favor of the possessors. Under adverse possession, nothing more is required.

Applying the facts of *Nome 2000* to *chazakah* would require a different result. The analysis should proceed as follows:

⁹²*Id.* at 309 (quoting *Smith v. Krebs*, 768 P.2d 124, 125 (Alaska 1989)).

⁹³*Id.* at 310 (quoting *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826, 830-31 (Alaska 1974)) (emphasis added).

⁹⁴*Id.* (emphasis added).

⁹⁵*Id.*

Though there is no clear evidence that Nome 2000 actually resided in Alaska, there was ample evidence of at least constructive notice.⁹⁶ The facts give no indication that Nome 2000's potential objections to the Fagerstroms' activities would have gone unheard. The court also established that the Fagerstroms satisfied the hostility and continuous requirements far in excess of the three-year *chazakah* statute of limitations.⁹⁷

Nonetheless, under *chazakah*, the court would have been forced to reach a different conclusion. The Fagerstroms never made any claim of rightful ownership. In fact, they all but admitted that they did not buy the land or acquire it through any other acceptable method of acquisition (save meeting the elements of adverse possession). Rather than granting the land to the Fagerstroms, the court would have been required to accept Nome 2000's title as valid and allow Nome 2000 to retain ownership over the land. The facts in *Nome 2000* do not support a finding for the Fagerstroms under *chazakah* because although the Fagerstroms would prove the elements of *chazakah*, they would still lack the most important ingredient necessary to become the owners, which is a claim of ownership.⁹⁸

IV. JUSTIFICATIONS FOR ADVERSE POSSESSION

A. Introduction

Adverse possession is both justified and criticized on a number of grounds. Adopting *chazakah* presents an opportunity to alleviate the major criticisms of adverse possession while retaining many of the benefits of the current system. This section outlines some of the major justifications for adverse possession. The justifications for adverse possession fit into three categories: (1) *Statute of Limitations Arguments*, (2) *Economic Arguments*, and (3) *Moral Arguments*.⁹⁹

B. Statute of Limitations Arguments

The "running of the statute of limitations" justification for adverse possession looks at adverse possession as similar to a defense to any tort. A plaintiff has a certain amount of time within which to bring suit for harms that he has suffered.¹⁰⁰ A party failing to bring suit within that period of time is barred from litigating that cause of action.¹⁰¹ In the case of adverse possession, the rationale goes as follows: A true owner who fails to bring a claim for trespass within the statute of limitations for adverse possession is barred from suing the adverse possessor.¹⁰²

⁹⁶*Id.*

⁹⁷*See id.*

⁹⁸This is not to suggest that all cases of adverse possession would result in findings favoring true owners; rather, *chazakah* would require adverse possessors to modify their claims and assert adverse possession only as a supplement to a claim of true ownership.

⁹⁹Though there may be some overlap in the categories in which some of the arguments fit, they will be presented in the categories that seem most appropriate.

¹⁰⁰*See* RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 90 (5th ed. 1998).

¹⁰¹FED. R. CIV. P. 8(c).

¹⁰²This view of adverse possession works especially well when the adverse possession claim is raised as a defense to a trespass claim rather than as an action brought by the adverse

This view of the statute of limitations prevents true owners from suing to protect against litigation based on “stale evidence.”¹⁰³ The stale evidence factor highlights the concern that adverse possessors will be disadvantaged in defending against trespass claims because evidence proffered will often be many years, if not generations, old.¹⁰⁴ Most adverse possession claims arise out of mistakes caused by uncertainty over boundary lines, mistakes that may take years to even be realized.¹⁰⁵ Simply put, adverse possession prevents a possessor from being penalized by an untimely claim.¹⁰⁶ The statute of limitations, like the statutes of limitations for other

possessor to quiet title. A variation on this view of the statute of limitations argument is that adverse possession serves to punish true owners. CHARLES C. CALLAHAN, *ADVERSE POSSESSION* 43-45, 90 (1961). The punishment is on two grounds: (1) The true owner’s failure to raise his trespass claim in a timely manner and (2) to punish the true owner for not adequately using his land. The first rationale is merely the inverse of the classical statute of limitations argument; by protecting the defendant from having to litigate a stale claim, the plaintiff is necessarily punished.

Unlike in the classical sense of adverse possession, where the suit would be “barred,” here, rather than preventing the suit’s litigation, courts *do* hear cases and, if the elements are met, “give the possessor ‘title’ to the land.” *Id.* at 43. Take, for example, Ohio’s one-year statute of limitations for slander: After that year, a suit for slander will not proceed. *Id.*; OHIO REV. CODE ANN. § 2305.11 (West 2003). In adverse possession, rather than the statute preventing the suit from proceeding, the statute serves as a timeframe: Within the statute of limitations, ownership remains with the true owner; after the statute of limitations, ownership transfers to the possessor.

Rather than simply a device through which suits are barred, “adverse possession is a transfer effected by the statutes of limitations.” POSNER, *supra* note 100, at 90.

¹⁰³See POSNER, *supra* note 100, at 90. See also CALLAHAN, *supra* note 102, at 83. Some have argued that statutes of limitations are “a practical device to spare the courts from litigation of old causes of action; but this has been denied vigorously . . . on the ground that since courts are established to deal with litigation it would be strange to forbid litigation so as not to bother courts.” CALLAHAN at 86. Barring the litigation of “stale claims” serves two purposes. First, it helps minimize the costs inherent in corroborating deteriorated evidence, a natural result of claims that are many years old. Merrill, *supra* note 19 at 1128. Second, preventing “stale claims” assists in creating a system that is fairer for defendants by not requiring them to defend against claims based on old evidence. *Id.*

¹⁰⁴CALLAHAN, *supra* note 102, at 83. “It is said, so frequently as to become monotonous, that statutes of limitations are designed to protect against stale claims *after evidence has become lost, memories have faded and witnesses have disappeared.*” *Id.* (emphasis added). There is an inherent tension in adverse possession questions: On the one hand, states require a relatively long period of time for their statutes of limitations for adverse possession, ostensibly to protect true owners. See *Brown*, 474 S.E.2d at 494. On the other hand, however, the extended period for adverse possession’s statutes of limitations increases the effects of lost evidence, faded memories, and witnesses who have disappeared.

¹⁰⁵POSNER, *supra* note 100, at 90.

¹⁰⁶CALLAHAN, *supra* note 102, at 84. The notion that the statute of limitations protects against untimely claims has a critical limitation: statutes of limitation remedy the concern that evidence will not be preserved. “This concern is with the preservation of a potential defendant’s evidence, not a plaintiff’s; and it is limited to claims which it is assumed [the defendant] could have resisted successfully had the lost evidence been available.” *Id.*

claims, protects defendants by preventing plaintiffs from winning claims based on “stale evidence.”¹⁰⁷

C. Economic Arguments

There are essentially three economic justifications for adverse possession. First, adverse possession encourages the beneficial use of property.¹⁰⁸ Second, adverse possession tends to make the real estate market more efficient.¹⁰⁹ Finally, adverse possession protects the reliance interests accrued during the time of the adverse possessor’s occupation of the property.¹¹⁰

Adverse possession encourages property owners to put their land to productive use rather than allow the property to lie fallow. Putting property to use benefits the economy. Adverse possession has been heralded as “a wonderful example of reward to useful labor, at the expense of the sluggard.”¹¹¹ Rather than looking at the results of adverse possession as penalizing true owners, proponents of adverse possession regard adverse possession as rewarding possessors for positive acts in cultivating land.¹¹² Adverse possession often has the effect of reducing the valuable resources that are left idle for lengthy periods of time; it establishes procedures for productive users to gain ownership over unproductive users.¹¹³ Though this theory refuses to recognize that a productive use of property might be to let it remain unused until a later date, what remains is that adverse possession encourages people, whether true owners or adverse possessors, to use land and reap the valuable economic gains resulting therefrom.¹¹⁴

This justification for adverse possession “seems to rest on a social policy favoring ‘active’ owners of property, who develop . . . land, rather than ‘passive’

¹⁰⁷POSNER, *supra* note 100, at 90. This also has a relationship to the economic arguments. Specifically, there is a cost inherent to mistakes of judgment arising out of stale claims. This point, though, will be discussed in more detail in the section dealing with the economic justifications of adverse possession.

¹⁰⁸CALLAHAN, *supra* note 102, at 91; CAROL M. ROSE, PROPERTY AND PERSUASION 15 (1994).

¹⁰⁹COOTER & ULEN, LAW AND ECONOMICS 156 (1988); Miceli, *supra* note 3, at 161; POSNER, *supra* note 100, at 90, this is essentially the reduction of the error costs.

¹¹⁰POSNER, *supra* note 100, at 90; ROSE, *supra* note 108, at 15.

¹¹¹ROSE, *supra* note 108, at 15.

¹¹²CALLAHAN, *supra* note 102, at 90-91.

¹¹³COOTER & ULEN, *supra* note 109, at 156.

¹¹⁴Merrill, *supra* note 19, at 1130. A policy requiring property owners to use their land “seems dubious, because it ignores the possibility that passive owners, such as land speculators, may perform a valuable social function by preserving the property for use by future generations.” *Id.* Additionally, “there is a potential inefficiency of the rule: if the original owner values *not using* his property more than the adverse possessor values its use, then title should remain with the original owner.” COOTER & ULEN, *supra* note 109, at 156. Even with these drawbacks to economic justifications for adverse possession, it is unclear that courts actually balance the interests of the parties when making determinations in adverse possession cases.

owners” who do not cultivate their property.¹¹⁵ A close look at this justification and its criticisms¹¹⁶ reveals how little a true owner must do to avoid losing his land.¹¹⁷ “The [true owner] does not have to develop his land or even occupy it; all he has to do periodically is assert his right to exclude others.”¹¹⁸ By rewarding those who beneficially use land, adverse possession aids in creating a more economically productive system; this system is brought back to equilibrium to protect true owners by requiring very little of true owners for them to retain ownership of their property.

The second economic justification for adverse possession is that creates a more efficient and less costly real estate market. Again, adverse possession shows a preference for active possessors over passive owners.¹¹⁹

The passive (and presumably absentee) owner will be harder to negotiate with, if only because he will be harder to locate. When the [true owner] is required to assert his right to exclude . . . he is in effect being asked to “flush out” offers to purchase his property, to make a market in the land [T]he sleeping-owner rationale is again *a justification based on the desirability of encouraging market transactions in property rights*.¹²⁰

By transferring title to an adverse possessor, making him into a true owner, adverse possession increases market efficiency. One of the goals of adverse possession is to create certainty in the real estate market.¹²¹ More certainty should equal more efficiency. Adverse possession reduces the “administration costs of establishing rightful ownership claims in the event of a delayed dispute about rightful ownership.”¹²² Assume that *A* is a true owner and *B* is an adverse possessor who has met all the elements of adverse possession. After seventy-five years,¹²³ *B* sells *Blackacre* to *C*. Absent adverse possession, if *A* sues *C* over *Blackacre*, an inefficiency would exist in the real estate market. The administrative costs of litigating suits like these would increase the cost of buying the property. “Adverse possession clears title of the clouds (as they are called) upon it from past wrongs, so buyers need not fear the assertion of third party claims based upon events of the distant past.”¹²⁴ Adverse possession allows purchase prices to reflect land values rather than insurance against suits and costs of researching ownership.

The efficiency argument takes an additional form, one that closely relates to the statute of limitations justifications. Recognizing adverse possession as a method of

¹¹⁵Merrill, *supra* note 19, at 1130.

¹¹⁶See *supra* note 114.

¹¹⁷Merrill, *supra* note 19, at 1130.

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.* at 1130-1131 (emphasis added).

¹²¹JOSEPH WILLIAM SINGER, PROPERTY LAW 226 (3d ed. 2002).

¹²²COOTER & ULEN, *supra* note 109, at 155.

¹²³This period of time would satisfy even the lengthiest of statutes of limitations.

¹²⁴*Id.*

land transfer reduces “error costs” caused by using stale evidence in dispute resolution.¹²⁵ This goes beyond looking simply at the adverse possessor versus the true owner. Adverse possession is a tool that has the effect of clearing up title for generations, for numerous buyers.¹²⁶ Adverse possession requires a vision of the future. Ownership of land affects future buyers and the banks or other institutions that will advance funds for the purchase of that property. Individuals need to know who owns the property they wish to buy or for which they intend to provide a mortgage.¹²⁷ Allowing adverse possession to effect a transfer both reduces search costs of investigating who holds title to property and aids in a system where recorded titles are incomplete indices of ownership.¹²⁸

Oliver Wendell Holmes, writing in 1897, discussed the economic implications and justifications of adverse possession.¹²⁹ We can view the ownership of a piece of property like a scale. On the one side is the adverse possessor. He has lived on the land, used the land, and generally regarded the land as belonging to him. On the other side of the balance is the true owner.¹³⁰ For a long period of time, he has made no indication that he has any ownership stake in the land. During the time when the adverse possessor resides on the property, he builds an attachment to that land. Over the same period of time, the true owner’s attachment to the same piece of land is necessarily reduced.¹³¹ Were the adverse possessor to lose the land in favor of the true owner, the loss, both economic and moral, suffered by the adverse possessor would far outweigh the gain experienced by the true owner.¹³²

This justification for adverse possession can be quantified by the theory of “diminishing marginal utility of income.”¹³³ If a court would award the disputed property to the true owner, the adverse possessor would experience the loss of the property as a diminution in his wealth. The true owner would view the restoration of the property as an increase in his wealth.¹³⁴ This argument asserts that if both the adverse possessor and the true owner have the same wealth, “then probably their combined utility will be greater if the adverse possessor is allowed to keep the

¹²⁵POSNER, *supra* note 100, at 90.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.* This second outcome of adverse possession, allowing adverse possession as a means of remedying an incomplete recording system, however, something of a self-fulfilling prophecy. By recognizing adverse possession as a means of obtaining ownership, the incomplete system is reinforced and perpetuated rather than remedied. Adverse possession, itself, is an institution that validates the unrecorded “ownership” of property.

¹²⁹*Id.* at 89 (citing Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897)).

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.* at 89-90.

¹³⁴*Id.* at 90.

property.”¹³⁵ Clearly, the adverse possessor was *using* the property,¹³⁶ and the true owner was not.¹³⁷ Therefore, by removing property from someone who has relied upon his ownership of the property and is deriving actual benefit from it and giving it to someone who is deriving no actual benefit from it and has not, within the last many years at least, relied upon his ownership, marginal utility of income is reduced.

D. Moral Arguments

The final justification for adverse possession rests on the morality of keeping land in the possession of the adverse possessor. Again, Holmes is instructive. In a letter to William James, Holmes wrote that the adverse possessor “shape[s] his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting at his life.”¹³⁸ Property rights are based on more than formal documents; they are based also on expectations. Those expectations “grow from informal arrangements such as long-standing possession, a course of dealings, oral statements, informal understandings, personal relationships, social practices, and customs of trade.”¹³⁹ The notion that long-standing possession creates an expectation of ownership is exactly the idea that justifies adverse possession. The moral argument justifying adverse possession views “long-standing possession” as equivalent to a written document of ownership. If those are viewed equally, then adverse possession places courts on the moral high ground by favoring the party that stands to lose the most, the adverse possessor. A ruling against the adverse possessor would result in the court “cutting at his life.”¹⁴⁰

Often, the moral justifications are intertwined with reliance justifications. Protecting the reliance on relationships has been deemed a valuable moral justification for adverse possession.¹⁴¹ This theory asserts that over time, in this instance the period of the statute of limitations, the adverse possessor grows to rely on the true owner’s acquiescence that the owner will not interfere with the

¹³⁵*Id.*

¹³⁶This obviously is true because one of the elements of adverse possession is “open and notorious” possession. Without actually using the property, the adverse possessor is unlikely to be able to prove that he openly possessed the property.

¹³⁷This must likewise be true because of the “exclusive” element of adverse possession; if the true owner also uses the land, the adverse possessor’s claim fails.

¹³⁸*Tioga Coal Co. v. Supermkt. Gen. Corp.*, 546 A.2d 1, 5 (Pa. 1988) (quoting Justice Holmes).

¹³⁹JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 45-46 (2000).

¹⁴⁰*Id.* at 46. See also MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993). A theory called *Lockean Entitlement* advocates for land to stay with the possessor who has used the property beneficially over the owner who has been passive in his ownership.

[T]he pure Lockean theory does not countenance adverse possession. But perhaps it colors the theory of adverse possession anyway by lending some sympathy to “squatters.” After all, if property is acquired from the common by a nonowner simply by taking it and using it, can we not sympathize with someone who does likewise with owned but unused property, especially if she does not know it is owned?

Id. at 112.

¹⁴¹SINGER, *supra* note 121, at 229.

possessor's possession.¹⁴² "The possessor comes to expect and may have come to rely on the fact that the true owner will not interfere with the possessor's use of the property . . . and the true owner has fed those expectations by her actions (or her failure to act)."¹⁴³

Professor Margaret Jane Radin suggested another moral argument in favor of adverse possession. Building on Holmes's explanation that taking property away from an adverse possessor results in "cutting at his life," Radin presents an argument based on justice and fairness.¹⁴⁴ Property interests in personal property must be distinguished from property interests in fungible property.¹⁴⁵ Fungible property is property that is capable of being replaced with money, whereas personal property "has become bound up with the personhood of the holder [that it] is no longer commensurate with money."¹⁴⁶ While the adverse possessor's interest is initially fungible, it becomes increasingly more personal over time.¹⁴⁷ Conversely, over the same period of time, the true owner's interest becomes less and less personal, becoming ever more fungible.¹⁴⁸ Adverse possession advocates awarding the property to the party who will be less easily compensated for losing that piece of land. In fact, as Radin's argument goes, justice requires such a result.¹⁴⁹

V. CRITICISMS OF ADVERSE POSSESSION

A. Introduction

Adverse possession, though justified on numerous grounds, is riddled with criticisms. Though a great deal of ink has been spilled to justify adverse possession from an economic point of view,¹⁵⁰ one of the major criticisms of adverse possession rests in the economic havoc that adverse possession wreaks.¹⁵¹ Additionally, and perhaps most importantly, is the criticism that adverse possession is simply unfair.¹⁵²

¹⁴²*Id.*

¹⁴³*Id.* (quoting Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 666-667 (1988)). It would seem that there is a flaw in this argument. If the justification for adverse possession is based on the possessor's reliance on the owner's consent, tacit though it may be, the hostility element of adverse possession is destroyed, thus requiring a finding in favor of the true owner, *not the adverse possessor*.

¹⁴⁴*Id.* at 228 (citing Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 748 n.26 (1986)).

¹⁴⁵*Id.*

¹⁴⁶*Id.* (quoting Radin, 64 Wash. U. L.Q. at 748).

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰See *supra* Part IV.C.

¹⁵¹Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 Geo. L.J. 2419, 2432 (2001).

¹⁵²Carl W. Herstein, *Annual Survey of Michigan Law*, 48 WAYNE L. REV. 815, 889 n.281 (2002).

Finally, unlike all other land transfers and methods of acquiring property, adverse possession allows acquisition with nothing more than unilateral actions taken by adverse possessors.¹⁵³ Every other method of land transfer is bilateral in nature, requiring actions taken by both parties to the transaction. What *chazakah* provides is the ability to reduce the economic costs of adverse possession through a more just system, which relies on the classical bilateral actions that typically create land transfers.

B. Economic Costs of Adverse Possession

There are a number of costs associated with adverse possession. First, a result of adverse possession is the diminished utility in property.¹⁵⁴ Diminished utility results because under adverse possession true owners are less inclined to allow people to use their property.¹⁵⁵ This occurs even, if not especially, when the true owner is not himself using the property and may not even be bothered by the trespasser.¹⁵⁶ Rather than risk losing his land to an adverse possessor, a true owner is more vigilant about removing trespassers.¹⁵⁷ This fear of losing property results in a net loss in the value derived from the land. Instead of the land giving benefit (albeit to the trespasser), that benefit is lost. This loss illustrates a deficiency in adverse possession.¹⁵⁸

There are other costs resulting from adverse possession. To protect their land from the possibility of losing it to adverse possessors, true owners are forced to spend money to monitor their property.¹⁵⁹ Assets that could be otherwise spent must now be devoted to continually traveling the metes and bounds of one's property, or finding some other method of ensuring that trespassers do not spend extended periods of time on a true owner's property. It is not entirely clear that society benefits from this duty imposed on landowners. In all likelihood, the time and money expended on monitoring the land results in nothing more than a waste of resources.¹⁶⁰

¹⁵³Perhaps the one exception to this is discovery. Nonetheless, discovery differs from adverse possession, in that no one loses land as a result of discovery; it is simply not a land transfer. Even abandonment, another example of a party acquiring land where no one loses anything, requires an affirmative act by the original owner. Adverse possession does not require any such act by the true owner. To the contrary, an act of abandonment would alleviate the need for the adverse possessor to prove the elements of adverse possession. Finally, prescriptive easements do not result in the transfer of property ownership, only the right to use. The right to use is only one stick in the "bundle of rights" associated with property ownership. Adverse possession, in contrast, transfers the entire bundle of sticks.

¹⁵⁴Stake, *supra* note 151, at 2432.

¹⁵⁵*Id.* at 2432-33.

¹⁵⁶If the true owner were using the property, the "exclusive" element of adverse possession might be destroyed.

¹⁵⁷Indeed, vigilance, or rather the lack thereof, is cited as a justification for adverse possession.

¹⁵⁸Stake, *supra* note 151, at 2432-33.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

In addition to the losses experienced by the reduced incentive to allow people to use otherwise unused property and the wasted funds spent on increased monitoring of land, there is another potential cost to adverse possession. Adverse possession, it is said, encourages people to productively use land.¹⁶¹ It is possible, however, that the best use of land is not “using” it at all.¹⁶² Sometimes allowing land to remain unused is an investment for the future. In such an instance, not using the land might be the best “use” the owner can put it to at a given time. Trespassers are encouraged to make changes to the land, if only to become adverse possessors. Land that a true owner intends to set aside to remain in its pristine, natural state, undeveloped, and unharmed by human contamination, may fall prey to the whims of an opportunistic trespasser, who sees this oasis of natural splendor as the perfect site to build a garbage dump or an aluminum reduction facility. Adverse possession has the side effect of encouraging land development, even in instances where doing so might not be putting the land to its optimal use.¹⁶³ By rewarding adverse possessors for destroying natural landscapes, adverse possession detracts from the overall utility of the property.¹⁶⁴

C. Adverse Possession's Unfairness

When the doctrine of adverse possession is taught in law school property classes, it is often met with hostility from students who prefer a system that respects the autonomy of property owners. That autonomy, they believe, should include the right not to use one's land. This is essentially an invocation of the “unfairness” criticism of adverse possession. Adverse possession all but ensures that there will be instances where “poor, unsuspecting, innocent owners lose all or part of their land without having done anything wrong.”¹⁶⁵ Even in instances where a true owner has been less than vigilant in overseeing his property, adverse possession still seems unfair. At the end of the day, when evaluating the competing claims for the property, adverse possession ignores the reality that the true owner paid for the property, whereas the adverse possessor, by definition, did not.¹⁶⁶ This doctrine also appears to reward an individual for essentially stealing another's property.¹⁶⁷

¹⁶¹This has been cited as a justification for adverse possession. See Cooter & Ulen, *supra* note 109.

¹⁶²Stake, *supra* note 151, at 2433.

¹⁶³*Id.*

¹⁶⁴The immediate benefits resulting from encouraging people to use land should at least be balanced with the foregone benefits that the land might have produced in the future. It is quite possible that those benefits would far outweigh any benefits possibly reaped by using land simply for the purpose of showing ownership over it, whether that use is done by the true owner to protect his rights, or by the adverse possessor to secure an interest in someone else's land.

¹⁶⁵*Id.* at 2434. It would likewise seem unfair that a court could require a person to monitor his land just to retain ownership over it.

¹⁶⁶Herstein, *supra* note 152, at 889 n.281.

¹⁶⁷*Id.* Even in instances of good faith occupations by adverse possessors, the truth of the matter is that the adverse possessor was using something that did not belong to him. The result of adverse possession is unjust; we reward trespassers for continuously trespassing.

Adverse possession essentially becomes state-sponsored trespassing, rewarding a trespasser with the property on which he has violated another's ownership interests.

D. Bilateral Nature of Other Land Transfers vs. Unilateral Nature of Adverse Possession

Finally, when addressing *how* adverse possession occurs, it becomes clear that it is simply the result of unilateral acts. Typical property transfers, by contrast, occur through bilateral methods. In the case of property acquired through sale, there must be a buyer and a seller. Likewise, a gift requires a donor and a donee, an inheritance needs bequeathor and an inheritor, and conquest requires a conqueror and a vanquished. In each instance, there is a party giving and a party receiving. Even when looking to personal property, for a finder to become an owner, the original owner must abandon the property.¹⁶⁸ Never does one acquire something without someone else giving it up.¹⁶⁹

¹⁶⁸See *supra*, note 2.

¹⁶⁹Even in the most unilateral-looking methods of acquiring land, a bilateral aspect still exists. In American history, the example of the squatters looks like a unilateral act. On its surface, it seems that the squatters of America's early years would move onto a plot of land, work the land, and eventually own the land; seemingly, their actions alone created their ownership rights in the land. A closer look at the forces at play in the squatters example, however, indicates that there really was another party to the acquisition; not only did the squatters act, but the government also acted. In the case of those squatters and others after them, but for the eventual government acquiescence, the squatters' rights were only as strong as their protests. Essentially, before the U.S. government gave in, the squatters were successful only by frightening off potential buyers at government auctions.

From the survey Ordinance of 1785 on, squatters settled large areas of the public lands in defiance of law . . . without color of title other than that created by the impact of popular feeling that would not be denied. At government auctions, they assembled in force unlawfully to frighten off free outside bidding and prevent competition from forcing any of their company to pay the public land office more than the legal minimum Often unlawful in origin, settlement nevertheless quickly brought effective demand for law.

SINGER, *supra* note 121, at 27 (quoting JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3-5 (1956) (discussing the squatters of Pike Creek, Wisconsin)). "A whole continent was sold *or given away* – to veterans, settlers, *squatters*, railroads, [and] states . . ." SINGER, *supra* note 121, at 26 (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 231 (2d ed. 1985) (emphasis added)). Clearly, squatters owned nothing without some government action. When the government eventually gave in to the squatters, the other half of bilateralism occurred.

Compare the experience of the squatters with that of the freed slaves in the post-Civil War era. "When planters had fled, abandoning their properties, the freed slaves had in numerous instances seized control and they gave little indication after the war of yielding their authority to the returning owners." LEON LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 399-407 (1980). Nonetheless, although some of the freed slaves were able to acquire land through the Homestead Act of 1861, state governments refused to allow them to claim ownership of the land of the former slaveholders. *Id.* Though one could argue that the former slave owners' abandonment of the property provided the second half of the bilateral action, courts refused to accept that argument in light of President Andrew Jackson's Proclamation of Amnesty on May 29, 1865. *Id.* Unlike in the case of the squatters, where the government claimed ownership of the land in question, and were thus in a position to grant the

It appears that in all instances of acquiring property, ownership results from bilateral activities. Adverse possession, however, requires a different conclusion. Adverse possession is the poster-child for unilateral activities resulting in claims of ownership. Unlike theft, where ownership based on unilateral actions is not recognized, adverse possession allows the actions of the adverse possessor to vest title in him at the expense of the non-acting true owner.

VI. CONCLUSION: LESSONS FROM CHAZAKAH

Chazakah satisfies adverse possession's justifications. The analysis of how *chazakah* satisfies the "statutes of limitation" justification for adverse possession begins with a recognition that unlike the statutes of limitation for other torts, which prevent a case's litigation, the statute of limitations for adverse possession does not.¹⁷⁰ Statutes of limitation are designed to prevent plaintiffs from taking advantage of lost or otherwise damaged evidence, which naturally occurs over time.¹⁷¹ *Chazakah* is a doctrine that not only recognizes the potential for lost evidence, but is also based on that potential. *Chazakah* claims arise because an adverse possessor claims ownership but cannot document ownership *because* of the passage of time, the very "stale evidence" contemplated by a statute of limitations.¹⁷²

Under *chazakah*, once the adverse possessor proves the elements of adverse possession, the burden of proof shifts to the true owner. While the adverse possessor might have difficulty defending against a trespass claim simply because of the passage of time, *chazakah* provides him an escape hatch. If the adverse possessor claims rightful ownership and proves the elements of adverse possession, the true owner will have the burden of disproving the ownership. The potential for a defendant having to defend against a claim where his evidence has been lost is rectified by a system that requires the one attempting to take the land, the true owner, to have preserved evidence. *Chazakah* requires no more instances of litigation than does adverse possession. It is a system that gives true owners the ability to regain what was taken from them without compensation,¹⁷³ while still protecting an adverse possessor from a claim based on stale evidence.

Chazakah likewise maintains the status quo on the economic justifications of adverse possession. *Chazakah* encourages the beneficial use of property and protects reasonable reliance interests. It does so, not by creating a system that dictates that the beneficial use of property is to build on it, but rather by creating a system that rewards *any* use of property, even a use that seems to be no use at all. This makes

land to the squatters, the government did not claim that it owned the land of the former slave owners, and could not, therefore, give anything to the freed slaves.

¹⁷⁰See *supra*, note 104. This is necessary because *chazakah* requires litigation. Nonetheless, *chazakah* does not require more litigation than adverse possession.

¹⁷¹See Callahan, *supra* note 102, at 83; Merrill, *supra* note 19, at 1128; Posner, *supra* note 100, at 90.

¹⁷²Were that not the case, and the adverse possessor capable of producing the deed, the *chazakah* claim would be irrelevant; the deed, rather than the occupation, would prove ownership.

¹⁷³See *supra* note 102. Statutes of limitation are designed to protect defendants from claims based on stale evidence, but if the evidence has not been lost, perhaps a different result makes sense.

economic sense; what today might be worth \$1,000 if one were to build on it, might just as well be worth \$10,000 five years from now. Imagine that *A* owns *Blackacre*, which might be worth only \$24 worth of trinkets today. It may, however, be worth many billions if not trillions of dollars many years later.¹⁷⁴ Nonetheless, it is possible that actually using the land might be beneficial and that does not go unrewarded.¹⁷⁵

An adverse possessor under *chazakah* who uses the land does not walk away empty handed. If he proves the elements of adverse possession, he retains a presumption of ownership. An adverse possessor's work is rewarded with a presumption of ownership, but not with the rights to continue to occupy property that he stole, if that is in fact the case. *Chazakah* provides the adverse possessor with an opportunity to retain ownership, but only if he is adjudged to have a rightful claim of ownership. It does not punish a true owner for owning land but not wanting to "use" the land in the active sense.

The efficiency argument may seem to be lost in *chazakah* because there is the potential that one who buys land from an adverse possessor will be required to return it to the true owner, but that is not quite the case. The efficiency argument seems to be significantly overstated because it relies heavily upon the assumption that adverse possession creates greater predictability in the real estate market. Undoubtedly, there will be instances where one who buys land from an adverse possessor will be required to relinquish that property back to the true owner, but this is true under both adverse possession and *chazakah*. If a court were to find that the adverse possessor failed to prove one of the elements of adverse possession, then an otherwise legitimate buyer would be buying land from a trespasser rather than an owner. *Chazakah*, while creating a system that is more protective of true owners, places only the trespasser in a more costly position than he would otherwise be under adverse possession.¹⁷⁶

Shaping one's roots to his surroundings does not create ownership, buying land does. Morality dictates that people who have claims of ownership should own land. Having merely a claim of occupation does not create ownership. But even under *chazakah*, Holmes should be satisfied. The occupier enters court with a presumption

¹⁷⁴According to legend, Peter Minuit bought Manhattan Island from the Manhattan Indian Tribe for trinkets worth about \$24 and the United States bought the Louisiana Purchase from France for nearly \$15 million. Britannica Concise Encyclopedia, *Minuit, Peter* (2003) at <http://www.britannica.com/ebc/article?eu=397555> (last visited Feb. 4, 2004).

¹⁷⁵Remember that the adverse possessor in *chazakah* still leaves with a presumption of ownership.

¹⁷⁶But even under *chazakah*, the adverse possessor is not in a bad position. Assume that an adverse possessor sells land for \$1,000. If the true owner successfully proves that the adverse possessor had no ownership interest in the land under *chazakah*, the buyer would be forced to relinquish the land back to the true owner. But all is not lost for the buyer; he can still bring an action against the adverse possessor to recover his losses. Doing so does not put the adverse possessor in a worse position than before the transaction, it restores him to where he was at that point. By selling land that does not belong to him, the adverse possessor experienced a gain at the expense of the true owner. Now, equilibrium is restored: The true owner has not lost his property, the buyer has regained what he lost in buying the property, and the adverse possessor has neither gained nor lost anything, he is right where he started, a trespasser who comes into the relationship with nothing and leaves with nothing as well.

of ownership, which is a presumption that must be rebutted before the occupier is asked to leave the property. Though the adverse possessor's interest might be personal rather than fungible, if he indeed bought the property or came to it in some legitimate way, he will retain his personal rights. If, however, he came to the land mistakenly or as a trespasser, *chazakah* looks at the morality of awarding ownership over the property. If a trespasser, *chazakah* dictates that the adverse possessor lose the property, if a rightful owner, *chazakah* requires his vindication.

Up to this point, it appears that *chazakah* would merely replace adverse possession with a doctrine that is only slightly different, perhaps only by changing its focus. Nonetheless, *chazakah* really provides much more than that. Not only does *chazakah* maintain adverse possession's justifications, but it also remedies adverse possession's shortcomings. *Chazakah* should be accepted because it provides an institution that is less costly and fairer than adverse possession.

The most important feature of *chazakah* is that it evidences a transaction and ownership; it is *not* the transaction itself. *Chazakah*, therefore, does not have the necessary costs or fairness issues that plague adverse possession. Forcing adverse possession to resemble *chazakah*, forces adverse possession to recognize bilateral actions as effectuating transfer. This pushes adverse possession to fall in line with all other methods of land transfer.

For a true owner to successfully defend against an adverse possession claim under *chazakah*, he can attack the adverse possessor on two fronts. First, he can attack the elements of adverse possession; by disproving any one of those elements, the true owner retains ownership over his property.¹⁷⁷ Alternatively, the true owner could attack the claim of ownership itself. The true owner would be just as successful in retaining ownership over his property by proving that the adverse possessor never bought the land in the first place, as he would be by disproving any of the elements of adverse possession. The result of this two-tiered system is that the costs of adverse possession are reduced, if not completely removed.¹⁷⁸ Were a true owner permitted to retain ownership in light of an adverse possession claim by merely proving that no transaction divesting him of his property occurred, he would be less inclined to prevent others from using his otherwise unused portion of his property. The costs that currently plague adverse possession would cease to exist in the *chazakah* framework.

Unlike adverse possession, which views the adverse possessor as a trespasser turned owner, *chazakah* views the adverse possessor as a true owner. A system that rewards someone for buying property and using his possession as proof of such purchase is far more palatable than a system that rewards a trespasser who just

¹⁷⁷This would work much the same way that the adverse possession doctrine currently works.

¹⁷⁸Surely, the true owner who fears that he will be hauled into court in a suit to quiet title *could* monitor his land, but he is no longer required to in order to prevail. In that case, the owner who monitor's his land does so voluntarily, rather than as a mechanism to keep his property. He would be akin to the homeowner who installs a security system; he is not required to do so to keep his home, but he does so to voluntarily protect his interests. The true owner could, instead, keep good records of his ownership and the taxes he has paid on the property. Should he be forced to defend himself in an action to quiet title, or litigate a trespass suit against an adverse possession defense for that matter, he could provide his records of ownership as proof of that no transaction took place.

avoided being caught in time for the true owner to bring a claim. Under *chazakah*, courts would be expected to weigh the adverse possessor's claim that he bought the land but lost the deed, against the true owner's claim that no such sale took place. Courts would look at the elements of adverse possession only as evidence that such a transaction took place. If the adverse possessor proves the elements of adverse possession, he gains a presumption of ownership to be rebutted by the true owner. Clearly, this puts the true owner in a better position than under the current system of adverse possession. Rather than simply losing his property because the adverse possessor satisfactorily proves the elements, the true owner still has the ability to retain ownership if he can prove that no sale took place. Ruling against the true owner suggests that a transaction *did* take place. There is no question that if a transaction took place, it is not *unfair* for the adverse possessor to be deemed the true owner.

A system that is fairer for the true owner must be less fair for the adverse possessor. Nonetheless, while the adverse possessor would be forced to do more than just prove the elements of adverse possession, he would not be required to prove his ownership. The rebuttable presumption of *chazakah* shifts the burden of proof to the true owner to disprove the adverse possessor's ownership. If, in fact, no transaction occurred, the adverse possessor is no worse off than when he was a trespasser. If, however, the true owner fails to prove that a transaction did not occur, the adverse possessor is neither better nor worse off than under adverse possession.

Finally, if *chazakah* were to replace adverse possession, adverse possession would resemble other land transfers. Unlike a doctrine that allows a transfer simply based on the actions of one party, proving the elements of adverse possession in light of *chazakah* proves that a bilateral transaction occurred. Where adverse possession currently leaves us grasping for the other half of the transaction, *chazakah* provides that other half. Viewing the elements of adverse possession as proof of a transaction, assumes a bilateral transfer; it assumes that there was a "seller" or a "donor," not just a trespasser.

Where adverse possession fails, *chazakah* thrives. By taking the elements of adverse possession and looking at them not as a means of acquiring ownership, but rather as creating a presumption of ownership, *chazakah* provides an opportunity to overhaul a system that is riddled with criticism. *Chazakah* takes the benefits of the current adverse possession doctrine while simultaneously reducing the areas of criticism. It is a system that values land ownership and the productive use of that land. It does not, however, reward trespassers for being productive users. Under *chazakah*, Robert Frost's horseman should, as Frost suggested, continue on his journey back to the village. His nephew will not inherit the forest, the horseman's productivity notwithstanding. The uncle never had a legitimate claim to the property, so the nephew has no claim to the property.

Though adverse possession would likely reward the nephew for the toil of his uncle, *chazakah* would do no such thing. Rather than simply looking at the facts on the ground, i.e., who is on the property, who has been on the property, and how the property has been used, *chazakah* attempts to get to the truth of the ownership dilemma. It rewards property to rightful owners, those who have bought it, even if they cannot prove it, rather than those who look at seemingly unused property as an opportunity to enrich themselves, not caring who loses in the process. The horseman had no rightful claim to the forest so his nephew has no claim to the forest. The

children of the man in the village, though, do have a legitimate claim of ownership. They are the rightful owners, and *chazakah* protects them.

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