A CONTEXTUAL APPROACH TO CLAIM OF RIGHT IN ADVERSE POSSESSION CASES: ON *VAN VALKENBURGH V. LUTZ*, BAD FAITH, AND MISTAKEN BOUNDARIES

by
Luke Meier[*]

This Article shows that, in adverse possession disputes, a uniform approach to the claim of right inquiry can produce undesirable results. To reach the desired result in one type of adverse possession case, a court might be forced to adopt a particular approach for determining whether the possessor had the required state of mind ("claim of right"). In a different type of adverse possession case, however, using this same approach might produce a result that the court finds objectionable. Thus, to reach the desired outcome for each *type of adverse possession case a court must resolve, a court might be compelled to adopt a different test for measuring the possessor's state of mind. This Article suggests that much of the confusion regarding the claim of right inquiry can be attributed to a failure to recognize the analytical point made herein—namely, that a uniform approach to the claim of right inquiry will often be problematic. Recognizing that adverse possession arises in factually distinct contexts—and accepting that different rules could apply in each of these contexts—should resolve much of the confusion associated with the claim of right inquiry.*

I. INTRODUCTION 47
II. HOW THE CLAIM OF RIGHT REQUIREMENT APPLIES TO DIFFERENT TYPES OF ADVERSE POSSESSION CASES 55
III. EXPLAINING *VAN VALKENBURGH V. LUTZ* 64
IV. CONCLUSION: CLAIM OF RIGHT AS MERELY A JUDICIAL TOOL 69

I. INTRODUCTION

No aspect of adverse possession law has proven more troublesome than the claim of right inquiry.[1] The claim of right inquiry considers the

[*] Professor of Law, Baylor Law School. J.D., University of Texas School of Law. B.S., Kansas State University. Thanks to Jerry Anderson, Jill Lens, and Rory Ryan for their helpful comments and suggestions on this Article. Thanks also to the following students for their research help: Jennifer DeVlugt, Phil Gordon, Jacqueline Hamer, Matthews Myers, Andrea Palmer, and Jeremy Walter.

[1] *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 122 (7th ed. 2010) ("Here the law [with respect to the claim of right inquiry] reflects much contention and confusion . . . ."); ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW:

possessor's state of mind regarding who the possessor believes is the true owner of the land in question.[2] The claim of right analysis involves two

POWER, GOVERNANCE, AND THE COMMON GOOD 652 (2012) ("No element of adverse possession law is more confused and confusing than the rules having to do with the knowledge . . . of the adverse possessor.").

[2] It is important to note at the outset the incredible challenges posed by the confusing, non-uniform, and shifting vocabulary used in adverse possession law. Particular concepts are often identified using a variety of different terms. Moreover, some terms are used to refer to completely different concepts. The concept with which this Article is concerned—the possessor's state of mind as to whom the possessor believes to be the true owner of the land being possessed—is often referred to by the phrase "claim of right." *See, e.g.*, DANIEL B. BOGART & CAROL NECOLE BROWN, INSIDE PROPERTY LAW: WHAT MATTERS AND WHY 23 (2d ed. 2012) ("In most jurisdictions, an adverse possessor must have a requisite state of mind—often called a 'claim of right.'"); A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 126 (5th ed. 2004) (using the term "claim of right" to refer to the requirement that the possessor have the right state of mind regarding who is the true owner of the land being possessed). However, other terms are also used to refer to the possessor's state of mind regarding who is the true owner of the land being claimed in adverse possession. *See, e.g.*, ROGER BERNHARDT & ANN M. BURKHART, REAL PROPERTY IN A NUTSHELL 40–41 (6th ed. 2010) (using the term "hostile" to refer to the possessor's belief as to who is the true owner of the land being possessed); DUKEMINIER ET AL., *supra* note 1, at 122 (equating the term "claim of right" with "claim of title"). Moreover, the term "claim of right" is sometimes used to refer to an altogether different concept than the one with which this Article is concerned. In this instance, the term "claim of right" is usually used to refer to whether the possessor had the intent to assert an adverse possession claim over the land in question. *See, e.g.*, Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 288 (2006) ("[T]he requirement that the possession be under a 'claim of right' simply means that the claimant is possessing the land with the intent to hold it as her own . . . ."); *see also* BARLOW BURKE & JOSEPH SNOE, PROPERTY: EXAMPLES & EXPLANATIONS 85–86 (3d ed. 2008) (discussing the possessor's state of mind with regard to both the possessor's belief as to who is the true owner of the land in question and with regard to the possessor's intent to perfect an adverse possession claim, and stating that the term "claim of right" is synonymous with the term "hostility"). *But see* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1142–43 (1984–85) (associating the term "claim of right" with the question of whether the possessor had permission from the true owner of the land). The question of the possessor's intent in possessing the disputed land, although occasionally associated with the phrase "claim of right," is more commonly identified using different terms. *See* Amie N. Broder, Note, *Comparing Apples to APPLs: Importing the Doctrine of Adverse Possession in Real Property to Patent Law*, 2 N.Y.U. J.L. & LIBERTY 557, 595 (2007) ("Hostile possession . . . speaks to the intent of the adverse possessor."); Kara L. Spencer, Annual Survey of South Carolina Law, *Court Clarifies Applicability of Mistaken Belief Rule to Adverse Possession Suits*, 47 S.C. L. REV. 146, 147 (1995) (using the term "hostile" to discuss the requirement that a possessor have the intent to establish an adverse possession claim). *But see* PAULA A. FRANZESE, A SHORT AND HAPPY GUIDE TO PROPERTY 78 (2011) ("Hostile [means] that the possessor does not have the true owner's permission to be there."); James H. Backman, *The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy*, 1986 BYU L. REV. 957, 970–71 ("Hostility usually means possession without the permission of one legally entitled to possession."). In any event, it is important to emphasize that this Article concerns itself *only* with the issue of the possessor's belief regarding true ownership of the land in dispute and *not* the

distinct questions: A factual determination regarding the possessor's state of mind, and a legal determination as to whether this was the correct state of mind.

Under hornbook law, jurisdictions take one of three different approaches as to the state of mind required of the possessor.[3] Under the good faith approach to claim of right, only a possessor who honestly believes that she owns the possessed land can win an adverse possession claim.[4] Under the bad faith approach to claim of right, only a possessor who knows that she is *not* the true owner of the land being possessed can win an adverse possession claim.[5] Finally, under the objective approach to claim of right, or "Connecticut Approach," the possessor's state of mind is irrelevant, meaning that a possessor is eligible to win her adverse possession claim regardless of her state of mind.[6]

---

separate question of the possessor's intent in possessing the disputed land. *See infra* note 6.

[3] *See, e.g.*, CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES 84 (2012) (stating that there are three approaches to determining whether a claimant has satisfied the claim of right requirement); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 199 (2007) (same); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746 (1986) (same).

[4] *See* Will Saxe, Note, *When "Comprehensive" Prescriptive Easements Overlap Adverse Possession: Shifting Theories of "Use" and "Possession,"* 33 B.C. ENVTL. AFF. L. REV. 175, 180–81 (2006) (listing states that take a good faith approach to the claim of right requirement, which requires the possessor to believe she owns the land being possessed).

[5] *See* COLLEEN E. MEDILL, ACING PROPERTY 358 (A. Benjamin Spencer ed., 2d ed. 2012) ("A few jurisdictions apply a 'bad faith' subjective standard where the adverse possessor must believe that the land belongs to someone else . . . ."); Caroleene Hardee, Note, *This Land Is Your Land:* Tran v. Macha *and the Hostile Intent Standard in Texas Adverse Possession Law*, 64 BAYLOR L. REV. 569, 570–71 (2012) (suggesting that Texas might follow a "bad faith standard, . . . [which] requires a possessor to be aware of other claims of ownership"). For purposes of this Article, I have ignored the interesting point made by Professor Fennell, which is that a possessor might be uncertain as to true ownership of the land being possessed, thus complicating the application of either the good faith or bad faith approach. *See* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1049–50 (2006) (explaining that possessors might often be unsure regarding true ownership of the disputed land).

[6] *See* Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 590 (2010) (stating that the objective approach to claim of right, known as the "Connecticut Rule," "has been adopted by a majority of states"). Under this approach, the factual determination as to the claimant's state of mind becomes unnecessary. *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 6.1.3, at 299 (5th ed. 2010) ("An objective test makes the adverse possessor's state of mind irrelevant . . . .").

In addition to the three approaches to claim of right described in the text, there are some cases in which the claim of right analysis has been described in terms of the possessor's *intent* in possessing the land rather than the possessor's state of mind regarding title to the land being possessed. *See supra* note 2. In the usual case, a possessor who mistakenly believes that she is possessing her own land will be denied adverse possession because she did not have the intent to perfect an adverse possession claim. Case law from the Maine Supreme Judicial Court is the most famous

Despite the relative simplicity of the hornbook "law" described above, lawyers, courts, and commentators continue to struggle with the claim of right requirement. Why? This Article proposes a straightforward answer to that question: The persistent confusion surrounding the claim of right requirement stems from a presupposition that the claim of right requirement should, and does, apply the same to all different types of adverse possession cases. Thus, there has been a tendency to label a jurisdiction as taking either a "good faith," "bad faith," or "objective" ap-

---

example of this emphasis on the possessor's intent. *See* Preble v. Me. Cent. R.R., 27 A. 149, 150–51 (Me. 1893), *superseded by statute*, ME. REV. STAT. ANN. tit. 14, § 810-A (2003) (amended 2009), *as recognized in* Dombkowski v. Ferland, 893 A.2d 599, 605–06 (Me. 2006); John Aycock McLendon, Jr., Note, Walls v. Grohman*: Adverse Possession in Mistaken Boundary Cases*, 64 N.C. L. REV. 1496, 1503 (1986) ("[T]he *Preble* rule . . . necessitates an inquiry into the possessor's intent . . . ."). Thus, the requirement that a possessor have the intent to perfect an adverse possession claim is sometimes referred to as the "Maine Approach" or the "Maine Doctrine." *See, e.g.*, Lynn Foster & J. Cliff McKinney, II, *Adverse Possession and Boundary by Acquiescence in Arkansas: Some Suggestions for Reform*, 33 U. ARK. LITTLE ROCK L. REV. 199, 208 (2011) (explaining that the requirement that the possessor have an intent to perfect an adverse possession claim is referred to as the Maine Doctrine). The Maine Approach is sometimes considered synonymous with the bad faith approach to claim of right, presumably on the belief that only a possessor that *knows* she is in possession of land owned by someone else would ever have the requisite *intent* to perfect an adverse possession claim. *See* Scott Andrew Shepard, *Adverse Possession, Private-Zoning Waiver and Desuetude: Abandonment & Recapture of Property and Liberty Interests*, 44 U. MICH. J.L. REFORM 557, 562 n.7 (2011) ("The intent requirement is therefore essentially a 'bad faith' requirement."); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2430 n.62 (2001) (suggesting that "the Maine doctrine requires bad faith"). Under this view, the emphasis by some courts on the possessor's intent is simply a different way of expressing the view that a possessor cannot win if she merely thinks she is possessing land to which she already holds valid legal title. As such, a possessor who believes that she is possessing her own land will lose, and this result can be articulated in terms of the possessor's belief that the land belonged to her (the bad faith approach to claim of right) or in terms of the absence of an intent to perfect an adverse possession claim.

In a forthcoming article I will show, however, that the Maine Supreme Judicial Court actually introduced the intent inquiry into the analysis so that a possessor who had mistakenly possessed the land of another could *win*—rather than *lose*—an adverse possession claim. Unfortunately for the Maine Supreme Judicial Court (and the numerous courts that have followed its lead), it is nonsense to believe that a possessor who believes she is possessing her own land could ever have the intent to perfect an adverse possession claim; people who believe they are possessing their own land do not consider that their possession could form the basis of an adverse possession claim should their title be defective. As such, I will argue that it was an unfortunate mistake for the Maine courts to inject this intent analysis into the law of adverse possession. Moreover, I will show that the impetus compelling Maine to introduce the intent analysis into the doctrine is related to the topic of this Article; namely, Maine introduced the intent analysis into adverse possession law because of an unwillingness to accept that a uniform approach to the claim of right inquiry might produce results that are unsatisfactory across different types of adverse possession cases.

I mention my forthcoming article here only to assure the reader (1) that I have not overlooked the question of the possessor's intent and (2) that my sole focus on the possessor's state of mind regarding ownership of the land is deliberate.

proach to claim of right, with the assumption that the same legal test applies to all adverse possession cases.[7] This Article advances an alternate hypothesis: Courts might alter the claim of right inquiry depending on the type of adverse possession case involved.

The three different types of adverse possession cases identified in this Article are squatter cases, color of title cases, and mistaken boundary cases. A squatter case involves a trespasser who possesses land that she knows is owned by another.[8] The other two types of adverse possession cases involve a mistake, and thus both involve situations in which the possessor honestly (but mistakenly) believes that she is the true owner of the land in question. In a color of title case, the possessor believes that he is the true owner based on a written document, but is mistaken about the legal effect of the document.[9] A mistaken boundary case involves a mistake about the physical location of a boundary line: A property owner possesses the land of her neighbor under the mistaken impression that the land belongs to her.

Why might courts alter the claim of right inquiry depending on the type of adverse possession case involved? To get the right result in that particular case, of course.

As will be demonstrated in this Article, a *uniform* approach to claim of right, in which the same "test" is applied without regard to the type of adverse possession case involved, produces results that might be unsatis-

---

[7] This conventional wisdom has been the basis of the extensive back-and-forth debate by the commentators as to which approach to claim of right is usually taken by courts. The most famous of these debates is an extensive give-and-take between Professors Helmholz and Cunningham, with Professor Helmholz insisting that courts regularly prefer good faith claimants and Professor Cunningham arguing that courts usually take an objective approach to claim of right. *See generally* R.H. Helmholz, *Adverse Possession and Subject Intent*, 61 WASH. U. L.Q. 331 (1983) [hereinafter Helmholz, *Adverse Possession*]; Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 (1986) [hereinafter Helmholz, *More on Subjective Intent*]; Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167 (1986). The hypothesis of this Article, however, suggests a potential middle ground between the strongly asserted views of Professors Helmholz and Cunningham, which is that it is somewhat disingenuous to characterize courts as uniformly taking either approach to claim of right, because a court's approach to this question might depend on the specific type of adverse possession case involved.

[8] On occasion, the term "squatter" is defined slightly differently than how it is used herein. *See, e.g.*, Per C. Olson, Comment, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 ENVTL. L. 1297, 1301–02 (1993) ("A squatter occupies property in recognition of another's title with no intention of claiming title to it . . . ."). Most frequently, however, the term is simply used to denote possession of land by one with knowledge that legal title is in another. *See* Halpern v. Lacy Inv. Corp., 379 S.E.2d 519, 521 (Ga. 1989) (defining "squatter" as a person who "enter[s] upon the land without any honest claim of right to do so"); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1107–08 (2007) (using the term to refer to a possessor who knows that he is not the title owner).

[9] *See infra* note 18.

factory to a court. For instance, a court might think that adverse possession should be available in the color of title situation, but not in the squatter or mistaken boundary situation. This is a perfectly logical view for a court to have. *There is no way to achieve this desired result, however, with a uniform approach to the claim of right requirement.* Under a uniform good faith approach, the mistaken boundary possessor wins, which is not the desired result. Under an objective approach, the squatter and mistaken boundary possessor win, which is not the desired result. Under a bad faith approach, the color of title claimant loses and the squatter wins, neither of which is the desired result. The only way for a court to reach the desired result is to apply a *different* approach to the claim of right question, depending on the type of case involved.

The objective of this Article is not to prove—through an exhaustive cataloging of the case law—that courts are, in fact, altering their approach to claim of right depending on the type of adverse possession case involved.[10] Nor does this Article endeavor to argue how the claim of right issue should be handled by courts. In this sense, the Article is neither descriptive nor normative. Instead, the primary objective of this Article is to make a straightforward analytical point regarding the three different types of adverse possession cases that have been identified: A uniform approach to claim of right (be it a uniform good faith, bad faith, or objective approach) will produce results that might be unacceptable to the courts. Thus, to reach the result a court desires for each type of adverse possession case, it might be necessary for the court to take a different approach to the claim of right inquiry in different types of adverse possession cases.

Altering the claim of right analysis, in order to reach the right result in a particular case, should not be perceived as an instance in which the courts are engaging in a sinister manipulation of the law. There are obvious, valid reasons why courts might conclude that adverse possession should be available for certain types of adverse possession cases (such as color of title cases), but not in others (such as squatter cases). The problem I address in this Article should not be perceived as an attack on the notion that different types of adverse possession can—and perhaps even should—be treated differently. Instead, the problem is that the current understanding of the claim of right doctrine—as a test that applies uniformly to all types of adverse possession cases—might make it *impossible* for a court to achieve the desired result for each type of case. In this instance, a court has no other option but to change the approach to claim of right, depending on the type of adverse possession involved, in order to get the result that the court believes is fair and just.

If, as I suspect, courts are sometimes changing their approach to claim of right depending on the type of case involved, failing to recog-

[10] Although not the purpose of this Article, this sort of extensive review of the case law—while taking care to distinguish between the different types of adverse possession cases—would be a worthwhile endeavor.

nize this fact will result in confusion in this area of the law. The infamous case of *Van Valkenburgh v. Lutz*,[11] I believe, nicely demonstrates the confusion that can occur when commentators fail to appreciate that a court was compelled to change its approach to the claim of right inquiry in order to get to the result that the court believed to be correct. Indeed, *Van Valkenburgh* is perhaps the perfect case for demonstrating this principle, as the case involved *both* a squatter claim and a mistaken boundary claim. In *Van Valkenburgh*, the court used both a good faith analysis *and* a bad faith analysis to reject the claims of the adverse possessor.[12] The court's analysis has been criticized for years[13]: How can a court take a conflicting approach to the claim of right analysis in the same case? The *Van Valkenburgh* court's analysis makes perfect sense, however, once it is recognized that the dispute actually involved two different types of adverse possession claims, and that a uniform approach to the claim of right inquiry would produce a result that the court thought was incorrect. Thus, because *Van Valkenburgh* involved *both* a squatter and a mistaken boundary claim, it is not surprising that the court applied two different approaches to the claim of right analysis in order to reach the desired result for each of those separate adverse possession claims. The persistent confusion surrounding *Van Valkenburgh*, I believe, is simply a byproduct of the presumption that the claim of right inquiry must uniformly apply the same to all different types of adverse possession cases.

Thus, to the extent that courts do, in fact, change their approach to claim of right depending on the context of the adverse possession case involved, the analytical point made in this Article—that a uniform approach to claim of right might produce results that are unsatisfactory to courts—has the potential to clarify this area of the law. There is another benefit, however, to the contextual approach to claim of right taken in this Article: It explains the origin of the much-maligned bad faith approach to claim of right. Students, lawyers, and even law professors have struggled to justify an approach that favors a knowing trespasser over an innocent one.[14] The contextual approach of this Article, however, shows that the bad faith approach to claim of right is the *only* approach that permits a court to reject (under a claim of right analysis)[15] an adverse

[11] 106 N.E.2d 28 (N.Y. 1952).

[12] *See infra* notes 28–44 and accompanying text.

[13] *See infra* note 33.

[14] *See* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q 667, 686 (1986) ("[T]he intuitive distinction between good and bad faith possessors is backed by powerful utilitarian overtones."); Merrill, *supra* note 2, at 1144 (indicating that the preference of some courts for a bad-faith approach is "remarkabl[e]"). *But see* Fennell, *supra* note 5, at 1038 (defending her "surprising position" in favor of the bad faith approach to claim of right).

[15] Of course, a court could conceivably employ different adverse possession elements to reject the adverse possession claim of a mistaken boundary claimant. The most famous example of this approach is the Supreme Court of New Jersey's decision in *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969). In *Mannillo*, the court rejected the

possession claim arising from a mistaken boundary case. While a court can use either the good faith approach or the objective approach to achieve any conceivably desired result in either the squatter or color of title context, a court that wants a mistaken boundary claimant to lose *must* adopt a bad faith approach to the claim of right inquiry. This explains the origin of the bad faith approach: It is a particular test to dispose of a particular type of case—a mistaken boundary case—that some courts think is not worthy of ripening into adverse possession. The use of a bad faith approach to reject a mistaken boundary claimant, however, creates the problem identified in this Article: While a court that wants to reject a mistaken boundary claim must use the bad faith approach to claim of right, that same court is likely to be displeased with the results of applying that bad faith approach to the other types of adverse possession cases that arise.

The organization of the remainder of this Article is as follows:

Part II explains how a consistent approach to the claim of right requirement, across different types of adverse possession cases, can produce unsatisfactory results. Moreover, Part II shows that the bad faith approach was surely adopted by courts as a specific test to dispose of mistaken boundary claimants.

---

prior New Jersey case law holding that a mistaken boundary claimant could not win an adverse possession claim because the claimant did not have the right state of mind to perfect a claim. *See id.* at 262–63. Instead, the court adopted the objective approach to claim of right. *See id.* Nevertheless, the court adopted a new approach for determining whether—under the notoriety requirement—a true owner should be charged with notice of the possession on her land: The court stated that "when the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey," the notoriety element is not met (assuming no actual knowledge by the true owner of the encroachment) and the adverse possession claim must fail. *Id.* at 263–64. The *Mannillo* court's application of the notoriety requirement in the boundary context has not been widely adopted. *See* EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 886 (6th ed. 2011) ("[M]ost adverse possession cases involve boundary line disputes in which the trespass can be discovered only by a survey, yet this rarely defeats the claim of the adverse possessor."); Roger Bernhardt, Special Essay, *Teaching Real Property Law as Real Estate Lawyering*, 23 PEPP. L. REV. 1099, 1122 n.78 (1996) (suggesting that the *Mannillo* rule regarding the notoriety requirement is an outlier). *But cf.* Marengo Cave Co. v. Ross, 10 N.E.2d 917, 922 (Ind. 1937) (holding that a subsurface encroachment is not notorious and thus cannot ripen into an adverse possession claim). Nevertheless, by altering the previous assumption that a true owner should be charged with knowledge of obvious possession—even though the owner was not aware that the possession was on *her* land—the New Jersey court achieved the result of denying adverse possession in the typical mistaken boundary context without employing the bad faith approach to claim of right. *See also* Gilardi v. Hallam, 636 P.2d 588, 593–94 (Cal. 1981) (rejecting the adverse possession claim of a mistaken boundary claimant because the claimant had not paid taxes on the disputed land). The focus of this Article is addressed only to the use of the claim of right inquiry as a method to reject the claim of an adverse possessor.

Part III uses the notorious case of *Van Valkenburgh v. Lutz* to demonstrate the confusion that can occur from failing to distinguish between different types of adverse possession cases.

Part IV concludes by offering some thoughts on the overall perspective employed in this Article, in which the claim of right inquiry is viewed simply as a tool by which courts can achieve the result desired in a particular case.

II. HOW THE CLAIM OF RIGHT REQUIREMENT APPLIES TO DIFFERENT TYPES OF ADVERSE POSSESSION CASES

There are three different types of basic fact patterns which can give rise to an adverse possession claim.[16] In the first, a squatter begins possessing someone else's land with the knowledge that the land being possessed is owned by someone else.[17] The other two types of typical adverse possession cases involve a claimant who honestly, but mistakenly, believed that the land being possessed was actually owned by her. The source of this confusion can be based on two different factors. In a color of title adverse possession case, the claimant thought that she was the true owner because of a deed or other written document that purported to make her

[16] I am not the first to recognize these three different types of adverse possession fact patterns. *See* Fennell, *supra* note 5, at 1077–84 (acknowledging this distinction); Helmholz, *More on Subjective Intent*, *supra* note 7, at 89 (distinguishing between squatter cases and mistaken boundary cases in support of the thesis that courts implicitly prefer possessors acting in good faith); Radin, *supra* note 3, at 746–47 (discussing the distinction between "color of title," "boundaries," and "squatters" as a potentially relevant distinction that was ignored in Professor Epstein's temporal perspective on property law). Although Professor Fennell acknowledged this distinction in her article, she minimized the importance of this distinction by arguing in favor of a bad faith approach to all adverse possession cases. *See* Fennell, *supra* note 5, at 1077–84. Although I part ways with Professor Fennell regarding the importance of the different types of adverse possession cases, I share this in common with her: This Article, like her provocative article, was inspired by an effort to make sense of the claim of right requirement so that I could explain it to my students. *See id.* at 1040 n.14 (explaining the impetus for her article).

Although the three types of adverse possession cases identified herein are, I believe, rather intuitive, it is possible that additional—or different—categories of adverse possession cases could be recognized. Regardless, the point that is made with regard to the three types of cases identified in this Article—that a uniform approach might not work across all three types of cases—would apply to subsets of the categories used herein, and could potentially apply to different classifications of types of adverse possession cases.

[17] The typical fact pattern that is associated with a squatter case is a case in which the possessor is not a true owner of any land adjacent to the land being claimed in adverse possession. Another type of squatter case is one in which the possessor knows that he is encroaching over a property boundary onto the land of his neighbor. For the purposes of this Article, I do not believe that there is any reason to distinguish between these two fact patterns; both are squatters.

so.[18] The problem, though, is that the deed is legally ineffective; typical color of title cases involve deeds from grantors who have no property interest in the land or deeds executed without the requisite formality.[19] In a mistaken boundary case, the claimant *is* the true owner of a piece of land, but is simply mistaken as to the precise location of the boundary be-

[18] "Color of title" is sometimes defined slightly differently than how it is defined herein. Often, the existence of the document, rather than the subjective belief in the validity of that document, will be emphasized. *See, e.g.*, DUKEMINIER ET AL., *supra* note 1, at 134–35 ("*Color of title* . . . refers to a claim founded on a written instrument (a deed, a will) or a judgment or decree that is for some reason defective and invalid (as when the grantor does not own the land conveyed by deed or is incompetent to convey, or the deed is improperly executed)."); MASSEY, *supra* note 3, at 87 ("Color of title describes a claim that is based on a written transfer of title—a deed, will, or court judgment—that happens to be defective and thus not valid."). Usually, however, the statements suggesting that the mere existence of the defective document is alone sufficient to qualify as color of title are made in situations in which the adverse possession claimant did, in fact, believe the defective document to be legally effective. There is very little authority addressing the situation in which a possessor (1) has a document that purports to make her the true owner of a piece of land but (2) knows that the document is defective; the limited authorities do suggest (consistent with the definition used herein) that color of title does not exist if the possessor is aware of the deed's defect. *See* Searl v. Sch. Dist. No. 2, 133 U.S. 553, 563 (1890) ("[W]hile defects in the title might not be urged against it as destroying color, they might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the vendee, if they were known to him, and he therefore believed the title to be fraudulent and void."); Wright v. Mattison, 59 U.S. (18 How.) 50, 57 (1855) ("It is not necessary to decide whether these conveyances were fraudulently made by [the grantor,] or not. The important point is to know whether [the grantees] had knowledge of the fraud if committed, or participated in it. . . . [T]he fraud of [the grantors] rendered the deeds void, and consequently they could give no color of title to an adverse possession." (quoting Gregg v. Lessee of Sayre, 33 U.S. (8 Pet.) 244, 253 (1834)) (internal quotation marks omitted)); Oneida Indian Nation v. Cnty. of Oneida, 217 F. Supp. 2d 292, 302 (N.D.N.Y 2002) (acknowledging "some interplay . . . between color of title and good faith"); Eddings v. Black, 602 S.W.2d 353, 358 (Tex. Civ. App. 1980) (holding that the shorter statute of limitations applicable to those with color of title was not applicable when the claimant knew of the deed defect); JAMES CHARLES SMITH ET AL., PROPERTY: CASES AND MATERIALS 185 (3d ed. 2013) ("Many courts, even in states that generally reject a good faith requirement for adverse possession law, require subjective belief that the colorable title is valid."); Helmholz, *Adverse Possession*, *supra* note 7, at 337 ("'Color of title' is held to require a title the possessor honestly thinks to be a good title."). In any event, because the discussion herein involves the claim of right requirement, and *not* the separate set of rules pertaining to the advantages afforded a party with color of title, I have adopted a definition of color of title that assumes the party has a good faith belief in the legal validity of the document purporting to make her the true owner of the land being possessed. A party who has a document purporting to make her the true owner of the land being possessed, but who knows that this document is ineffective, is a squatter under my terminology.

[19] *See* Price v. Tomrich Corp., 167 S.E.2d 766, 770 (N.C. 1969) ("Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance.").

tween her land (to which she is the true owner) and that of her neighbors (to which she is not the true owner).[20]

Consider how these different types of fact patterns correlate with the claim of right analysis. First, suppose a court thinks the possessor should be able to win each of these three types of cases.[21] The court can accom-

[20] The infamous case of *Howard v. Kunto*, 477 P.2d 210 (Wash. Ct. App. 1970), provides an interesting fact pattern for testing the difference between a color of title case and a mistaken boundary case. The *Howard* case involved an adverse possession claim by an individual who was the true owner, by deed, of one parcel (Parcel A) but had mistakenly possessed an entirely different parcel (Parcel B). *Id.* at 211–13. According to the terminology used in this Article, the *Howard* case involved a mistaken boundary situation; the mistake involved in *Howard* did not involve the legal validity of the deed, but rather involved a misunderstanding regarding the actual, physical land covered by a deed. The *Howard* case is interesting, though, because in most instances a mistaken boundary adverse possessor will have actually possessed some of the land to which the possessor was the true owner, by virtue of the deed. In *Howard*, however, the possessor had not possessed any of the land to which he was the true owner. *See id.* In this respect, *Howard* was not so much a mistaken boundary case as a "mistaken-lot" case. Regardless, the fundamental point is that a mistaken boundary case is one in which there is a disconnect between the land that is actually described in a valid deed and the land that is interpreted (erroneously) as being described in that deed.

Another interesting case testing the distinction between color of title cases and mistaken boundary cases is *Brittain v. Correll*, 335 S.E.2d 513 (N.C. Ct. App. 1985). In some respects, the *Brittain* case is the analytical opposite of *Howard*. The *Brittain* case involved a boundary dispute between two owners, both of whom had a deed describing the disputed strip of land. *Id.* The two parcels had been conveyed by a previous common owner, and the previous grantor had included the disputed strip of land in both the first conveyance and the second conveyance. *Id.* The recipient of the second conveyance had actually been in possession of the land. *Id.* It was determined that the first conveyance was effective to convey true ownership of the disputed strip, making it necessary to resolve whether the recipient of the second conveyance had perfected an adverse possession claim. *Id.* at 514. The court addressed whether the possessor was entitled to take advantage of North Carolina's shorter statutory period for those having color of title. *Id.* at 515. The court concluded, consistent with the definition used in this Article, that the possessor did have color of title to the disputed strip of land. *Id.* The possessor, after all, *did* have a document that purported to make the possessor the true owner of the land being claimed in adverse possession. *Id.* at 514. The deficiency in the deed, however, was its legal validity, not a misunderstanding of the land described in the deed. *Id.* Thus, while the *Howard* case is a mistaken boundary case even though the mistake in that case did not involve the location of a particular boundary line, the *Brittain* case involves a color of title case even though the dispute in that case did involve, roughly speaking, a dispute over a boundary location.

[21] Of course, an adverse possessor does not win her claim simply because she meets the claim of right analysis; the claim of right analysis is merely one of the five or six elements that must be proven to perfect the adverse possession claim. Thus, a court's decision to adopt a particular approach to claim of right for a particular type of case does not mean that those types of claims will always be successful. It is necessary that a claim satisfy the claim of right requirement, but it is not sufficient. Therefore, when this Article refers to a court's approach to claim of right as permitting a particular type of adverse possession claim, it is subject to the caveat that

plish this result by taking an objective approach to the claim of right analysis. Under an objective approach, the adverse possessor's state of mind is irrelevant, meaning that it is not a reason to deny an adverse possession claim. This result is depicted below:

Figure 1

Type of Case	**Result Desired by Court**	**Result Under Objective Approach**
Color of Title	Possessor Wins	Possessor Wins
Squatter	Possessor Wins	Possessor Wins
Mistaken Boundary	Possessor Wins	Possessor Wins

Somewhat counterintuitively, however, a court that wanted to *deny* adverse possession for *every* type of case could not do so by one particular approach to the claim of right analysis. As depicted in Figures 2 and 3 below, a court that is inclined to reject adverse possession in every case will not be able to do so through the adoption of either a uniform good faith approach or a uniform bad faith approach; the uniform adoption of either approach results in at least some instances where the result desired by our hypothetical court (the adverse possessor loses) is *not* achieved.

Figure 2

Type of Case	**Result Desired by Court**	**Result Under Good Faith Approach**
Color of Title	Possessor Loses	Possessor Wins
Squatter	Possessor Loses	Possessor Loses
Mistaken Boundary	Possessor Loses	Possessor Wins

a claimant would of course have to satisfy the remaining elements of the adverse possession analysis.

Figure 3

Type of Case	**Result Desired by Court**	**Result Under Bad Faith Approach**
Color of Title	Possessor Loses	Possessor Loses
Squatter	Possessor Loses	Possessor Wins
Mistaken Boundary	Possessor Loses	Possessor Loses

In Figure 2, a uniform *good faith* approach to claim of right means that the color of title and mistaken boundary claimant wins, which is not the hypothetical desired result. In Figure 3, a uniform *bad faith* approach means that the squatter wins, which is not the hypothetical desired result.

Of course, it is unlikely that a court would want to deny adverse possession for every type of case (the effect of which would be to eliminate the adverse possession doctrine). The important point to draw from Figures 2 and 3, however, is that a court that wanted to achieve this result could *not* do so by taking a uniform approach to measuring claim of right.

The picture becomes more complicated once one considers that a court might take a nuanced view regarding the worthiness of particular types of adverse possession cases.[22] Some of these combinations can be discounted as being far-fetched and unlikely (similar to the court that wants to deny adverse possession in every instance). For instance, it is unlikely that a court would be inclined to believe that *only* squatters should win.[23] Others combinations, however, are plausible. Consider the results of a uniform good faith approach, reproduced (from Figure 2) in Figure 4 below. Under this approach, color of title claimants and mistaken

[22] There are eight possible combinations of views a court might take regarding the merits of the three different types of adverse possession cases:

	Color of Title Claimant	Squatter	Mistaken Boundary Claimant
1.	W	W	W
2.	W	W	L
3.	W	L	L
4.	W	L	W
5.	L	W	W
6.	L	W	L
7.	L	L	W
8.	L	L	L

[23] *But see* Fennell, *supra* note 5, at 1038 (arguing that only those possessors who know the land is owned by someone else should be able to perfect an adverse possession claim, but acknowledging that this position has little support or intuitive appeal).

boundary claimants win, while squatters lose. *This* result is certainly intuitive and supportable.

Figure 4

Type of Case	**Result Under Good Faith Approach**
Color of Title	Wins
Squatter	Loses
Mistaken Boundary	Wins

While is it conceivable that a court might be inclined to like the result from a uniform good faith approach, it is doubtful that any court would ever accept the results of a uniform bad faith approach. As depicted below in Figure 5 (reproduced from Figure 3), a uniform bad faith approach results in squatters winning, while color of title and mistaken boundary claimants lose. This result (as mentioned above) seems counter intuitive:

Figure 5

Type of Case	**Result Under Bad Faith Approach**
Color of Title	Loses
Squatter	Wins
Mistaken Boundary	Loses

Any approach that results in a squatter winning, while a color of title claimant loses, seems unsupportable. My own impression is that almost all lawyers, judges, law professors, and law students would think that, *if* those two claimants are to be treated differently, the color of title claimant should win while the squatter loses.[24] Some support can be mustered

[24] I believe that most modern lawyers, judges, law professors, and law students believe that squatters should be precluded from perfecting an adverse possession claim. Law professors have expressed their view in numerous writings. *See id.* at 1048 ("Academia has firmly aligned itself with the angels on this issue as well. Property scholar after property scholar has spoken out against bad faith claimants or has argued that they should be disfavored by the law."). *But see id.* at 1049 (arguing that only squatters should be able to win adverse possession). Although hardly scientific, the informal votes I have conducted in my property classes have always come down

for the view that *both* squatters and color of title claimants should win or that *both* should lose. To say that the squatter should win, while the color of title claimant loses, however, is hard to defend.

Yet, that is the result that occurs under a uniform bad faith approach to claim of right. If the results in the color of title and squatter cases are nonsensical under a bad faith approach, one can deduce that the bad faith approach is an approach that is adopted for the specific result that occurs in the mistaken boundary case. A mistaken boundary claimant loses under a bad faith approach to claim of right. In fact, the bad faith approach is the *only* approach to claim of right under which the claimant loses; under either the good faith approach or the objective approach, the mistaken boundary claimant wins.

Thinking that a court might believe that a mistaken boundary claimant should lose (the result under a bad faith approach only) is not a far-fetched proposition. There are a host of compelling reasons why a court might conclude that a mistaken boundary claimant should not win an adverse possession claim,[25] even if that same court believes that a color of

---

almost unanimously against the squatter's adverse possession claim. Apart from my perspective on the contemporary normative views as to whether squatters should be able to win an adverse possession claim, my own sense of the current state of the law is that squatters win much less frequently than one might expect, given the ubiquitous assertion that the objective approach to claim of right is the predominant modern view. *Compare* JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 518 n.3 (6th ed. 2007) ("It has proven difficult for squatters to make effective claims of adverse possession."), Helmholz, *Adverse Possession*, *supra* note 7, at 332 ("But the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already."), *and* Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 148 (1997) (discussing and criticizing the "adversarial attitudes toward legitimate residential squatters"), *with* SMITH ET AL., *supra* note 18, at 178 ("A large majority of states . . . embrace the Connecticut doctrine . . . ."). On the other hand, the possessor who has color of title seems to have the best argument in favor of adverse possession, which explains the favorable treatment often afforded this type of possessor. *See* Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. RES. L. REV. 703, 721–22 (2013) (explaining that color of title claimants do not need to possess the entire parcel being claimed in adverse possession and that such claimants are often subject to a shorter statute of limitation).

[25] Denying adverse possession in mistaken boundary cases provides an incentive to a possessor to ascertain the true, legal boundary separating his lot from his neighbor's. If a possessor is not allowed to profit from a mistake, there is less incentive to make this "mistake," particularly if the trespassing possessor must remove (and rebuild) any encroaching enclosures. Moreover, denying adverse possession in mistaken boundary cases facilitates the goal of matching record title with legal title; recognizing adverse possession injects additional uncertainty into this process, as legal title will be different than record title. Lawrence Berger, *Unification of the Doctrines of Adverse Possession and Practical Location in the Establishment of Boundaries*, 78 NEB. L. REV. 1, 1–2 (1999) (stating that the preference in favor of the "written

title claimant should win an adverse possession claim. Of course, there are also compelling arguments supporting the view that a mistaken boundary claimant should *win* an adverse possession claim.[26] A court holding this view (that a mistaken boundary claimant should win) can achieve this result under either an objective or good faith approach to claim of right. Moreover, when the court believes that a mistaken boundary claimant should win, the court can apply a uniform approach to claim of right in a way that produces sensible results. For the court that believes the squatter, like the mistaken boundary claimant and the color of title claimant, should *win*, the court can achieve this result by applying an across-the-board objective approach to claim of right. (This result is depicted in Figure 2.) For a court that believes the squatter should *lose* while the mistaken boundary claimant and color of title claimant should win, the court can achieve this result by applying an across-the-board good faith approach to claim of right. *For the court that believes the mistaken boundary claimant should lose, however, the bad faith approach is the* ***only*** *way to achieve this result under the claim of right element of adverse possession.* Moreover, the court is probably not going to want to apply this bad faith approach in a uniform fashion, as a uniform bad faith approach produces the odd result of squatters winning and color of title claimants losing.

The best understanding of the bad faith approach to claim of right, then, is as a specific tool by which a court can preclude a mistaken boundary claimant from winning an adverse possession claim. This becomes even more apparent when one considers how the good faith and objective approaches are sufficient to achieve almost any other conceivable result that a judge might want to reach in an adverse possession case. A court that wants to allow adverse possession in a mistaken boundary case can do so under either the good faith or objective approach to claim of right. A court that wants to allow a squatter to perfect an adverse possession claim can do so under an objective approach; a court that wants

evidence of title" should only be disregarded if there is "a powerful countervailing policy").

[26] Allowing a mistaken boundary case to ripen into an adverse possession claim encourages true owners to be diligent in recognizing encroachments onto their property. It also avoids upsetting the parties' expectations in the frequent case in which a series of possessors and true owners have been mutually mistaken regarding the true boundary between their lots. *See generally* Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. & ECON. 161, 161–70 (1995) (offering an economic analysis of the competing interests involved in a mistaken boundary adverse possession case); Judson T. Tucker, Comment, *Adverse Possession in Mistaken Boundary Cases*, 43 BAYLOR L. REV. 389, 400–01 (offering a policy argument in favor of adverse possession in mistaken boundary cases). Moreover, to the extent that adverse possession is available to a color of title claimant, there are persuasive reasons for similar treatment to a mistaken boundary claimant. A color of title claimant has made a mistake about the legal efficacy of a title document, while a mistaken boundary claimant has made a mistake about the physical boundaries described in a deed. It is logical to conclude that both types of mistakes should be treated similarly. *See supra* note 20 (discussing the similarity and distinction between color of title cases and mistaken boundary cases).

to preclude a squatter from perfecting an adverse possession claim can do so under the good faith approach to claim of right. Both the good faith and objective approaches to claim of right result in a color of title claimant winning, and it seems doubtful that a court would want to deny adverse possession in the color of title context. Thus, the correlation between mistaken boundary cases and the bad faith approach to claim of right is really two-fold: The bad faith approach to claim of right is the *only* approach that allows a court to reject the adverse possession claim of a mistaken boundary claimant. Moreover, the bad faith approach to claim of right is not *necessary* in any other context besides the context of rejecting the adverse possession claim of a mistaken boundary claimant; in any other situation, a court could use either the good faith approach or the objective approach to reach any result a court would likely want to reach.[27] The bad faith approach to claim of right, then, is best viewed as a byproduct of the desire by some courts to reject adverse possession in the mistaken boundary context.

[27] Of the eight conceivable combinations of views a court might take with regard to the three different types of adverse possession cases, I believe it is safe to eliminate as unlikely any combination in which a color of title claimant loses. The argument in favor of adverse possession is strongest when an individual has possessed the disputed land for the statutory period based on an honest belief in a document that purports to make that individual the true owner of the land being possessed. *See supra* note 24. I am not familiar with a case in which a court precluded adverse possession in this situation through a claim of right analysis (which would be achieved through the bad faith approach to claim of right). Thus, by eliminating the four combination in which the color of title claimant loses, the four combinations still remaining are as follows:

	Color of Title Claimant	Squatter	Mistaken Boundary Claimant
1.	W	W	W
2.	W	W	L
3.	W	L	L
4.	W	L	W

Combination #1, in which the adverse possessor wins every type of case, can be achieved under a uniform objective approach. Combination #4, in which a color of title and mistaken boundary claimant win while a squatter loses, can be achieved under a uniform good faith approach. Combinations #2 and #3, however, present the difficulty identified in this Article. A court that believes that a mistaken boundary claimant should lose can only achieve this result through a bad faith approach to claim of right, and this is inconsistent with a color of title claimant winning. Thus, the real difficulty is when a court believes that a mistaken boundary claimant should lose. The bad faith approach to claim of right is the only way to secure this result, but applying the bad faith approach outside of the mistaken boundary context produces unsatisfactory results. Notice that when a court believes that a mistaken boundary claimant should *win* (combinations #1 and #4 above), the court can adopt either a uniform good faith or objective approach, depending on whether the court believes the squatter should win (uniform objective approach) or lose (uniform good faith approach).

III. EXPLAINING *VAN VALKENBURGH V. LUTZ*

The New York case of *Van Valkenburgh v. Lutz*[28] is an old chestnut[29] of adverse possession law. The *Van Valkenburgh* case is often used to teach adverse possession law in first-year property casebooks,[30] and is frequently included in law review articles[31] and other secondary materials.[32] Almost all of the attention that *Van Valkenburgh* has received, however, has consisted of disparaging comments regarding the New York court's analysis of the claim of right element.[33] The criticism that has been leveled against the *Van Valkenburgh* decision, however, all proceeds from the assumption that courts must take a uniform approach to claim of right. Once one realizes that this need not be so, the *Van Valkenburgh* opinion

---

[28] 106 N.E.2d 28 (N.Y. 1952). The *Van Valkenburgh* decision has been altered by subsequent New York case law and statutory law, which is addressed *infra* at note 44.

[29] I have admittedly "stolen" (in good faith!) this term from the Dukeminier property casebook, where it is used to describe the famous case of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805). *See* DUKEMINIER ET AL., *supra* note 1, at 22. Although the *Van Valkenburgh* case has not achieved the status of *Pierson v. Post*, I believe that the "chestnut" description is nevertheless still appropriate, in part because of its inclusion in the hugely popular and influential Dukeminier casebook.

[30] *See, e.g.*, DUKEMINIER ET AL., *supra* note 1, at 122 (primary case); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 107 (2009) (primary case); *see also* R.H. Helmholz, *The Saga of* Van Valkenburgh v. Lutz*: Animosity and Adverse Possession in Yonkers*, *in* PROPERTY STORIES 57 (Gerald Korngold & Andrew P. Morriss eds., 2004) (stating that the *Van Valkenburgh* decision "is well known to students of the law of real property").

[31] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 55 n.188 (2002) (citing *Van Valkenburgh*); Keith H. Hirokawa, *Three Stories About Nature: Property, the Environment, and Ecosystem Services*, 62 MERCER L. REV. 541, 547 n.23 (2011) (same); Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 226 n.4 (1995) (same).

[32] *See, e.g.*, ROGER BERNHARDT & ANN M. BURKHART, PROPERTY 82 (5th ed. 2006); Helmholz, *supra* note 30, at 57–69 (discussing the *Van Valkenburgh* decision); HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 68 n.13 (6th ed. 2005) (same); CHRISTOPHER SERKIN, THE LAW OF PROPERTY 61 (2013) (same).

[33] *See, e.g.*, SERKIN, *supra* note 32, at 61 (describing the decision as relying upon "two internally contradictory holdings"); JAMES L. WINOKUR, R. WILSON FREYERMUTH & JEROME M. ORGAN, PROPERTY AND LAWYERING 180 (2002) (citing *Van Valkenburgh* as an example of "the confusion to which some courts have fallen prey" in considering the claim of right analysis within adverse possession law); Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 BUFF. ENVTL. L.J. 1, 33 n.143 (2004) (describing *Van Valkenburgh* as an "odd case"); Bernhardt, *supra* note 15, at 1118 n.67 (stating that *Van Valkenburgh* is a "good case to avoid" in teaching adverse possession to students); Helmholz, *supra* note 30, at 66–67 (discussing the negative reaction to the case by New York commentators); Lila Perelson, Note, *New York Adverse Possession Law as a Conspiracy of Forgetting:* Van Valkenburgh v. Lutz *and the Examination of Intent*, 14 CARDOZO L. REV. 1089, 1089, 1117 (1993) (describing the *Van Valkenburgh* opinion as creating "a major contradiction in the requirement . . . as to the intent required of the possessor in taking possession," calling the result "absurd," and calling for the case to be overruled).

makes perfect sense: The New York court thought that neither mistaken boundary claimants nor squatters should win an adverse possession case. The only way to achieve this sensible result under the claim of right analysis is to take a *different* approach to claim of right for each of these types of cases.

The *Van Valkenburgh* case involved a colorful fact pattern evincing a bitter dispute between the litigants.[34] For present purposes, however, the facts can be reduced to the following essentials: The Lutz family had been in possession, for decades, of the tract now owned by the Van Valkenburghs.[35] The Lutzes had cultivated a garden on the Van Valkenburgh tract and had also erected a small, one-room structure as a sort of residence for Mr. Lutz's mentally handicapped brother.[36] In addition, the Lutzes had erected a garage on their own parcel that mistakenly encroached on the Van Valkenburgh lot by a few inches.[37] Based on the Lutzes' various uses of the Van Valkenburgh lot, the Lutzes asserted an adverse possession claim.[38]

The New York Court of Appeals's majority decision rejected the Lutzes' adverse possession claim.[39] According to the court, the improvements (both the one-room structure and the encroaching garage) could not be the basis of an adverse possession claim because both improvements failed the claim of right analysis. With regard to the one-room structure, the court stated that "Lutz himself testified [that] he knew at the time it [was built that it] was not on his land and, his wife, a defendant here, also testified to the same effect."[40] With regard to the garage encroachment, the court reasoned that "Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his

[34] The litigation in which the adverse possession claim of the Lutzes was denied was actually just one of several between the Lutzes and the Van Valkenburghs. The Lutzes had previously won a suit for a right-of-way easement over the Van Valkenburgh property. *See* Lutz v. Van Valkenburgh, 81 N.Y.S.2d 161 (N.Y. App. Div. 1948). After the Lutzes lost their adverse possession claim, the Van Valkenburghs attempted (unsuccessfully) to get a judicial sale of the Lutzes' lots so as to recover the costs from the principal case. *See* Van Valkenburgh v. Lutz, 175 N.Y.S.2d 203, 203–04 (N.Y. App. Div. 1958) (mem.). The Lutzes then asserted a subsequent adverse possession claim against the Van Valkenburghs through Lutz's mentally handicapped brother Charlie, who had not been joined in the previous litigation. This claim was rejected. *See* Lutz v. Van Valkenburgh, 237 N.E.2d 84 (N.Y. 1968). Moreover, William Lutz was convicted for criminally assaulting a Van Valkenburgh child. *See* Helmholz, *supra* note 30, at 63. *Cf.* LISA ALTHER, BLOOD FEUD (2012) (describing the feud between the Hatfields and the McCoys).

[35] Van Valkenburgh v. Lutz, 106 N.E.2d 28, 29 (N.Y. 1952).

[36] *Id.* at 29–30.

[37] *Id.* at 30.

[38] *Id.* at 29.

[39] *Id.* at 30.

[40] *Id.*

own property, which certainly falls short of establishing that he did it under a claim of [right]."[41]

The court's claim of right analysis is the primary basis of the criticism associated with the decision. This criticism is probably best captured by the discussion of the case in the popular Dukeminier casebook. After introducing the case as a "notorious case" that "cannot possibly mean what it says," the casebook provides the following note immediately after the case:

> 1. Huh? We noted earlier that the majority decision in [Van Valkenburgh] can't really mean what is says. According to the decision, the Lutzes lost, among other reasons, because they did not meet the requirement . . . of occupation "under a claim of [right]" . . . . The court then concluded that the structure built for [Mr. Lutz's brother] didn't count because "Lutz knew at the time it was not on his land," and that the garage encroachment didn't count because "Lutz thought he was getting it on his own property, which certainly falls short of establishing that he did it under a claim of [right] . . . ." Putting these bits together, the decision amounts to saying, nonsensically, that in New York you can only adversely possess land that is already yours! Do you see that?[42]

The "problem," as the commentators see it, is that the New York court used a different approach to claim of right with respect to the garage encroachment and the one-room structure. With regard to the one-room structure, which the Lutzes knew was on the Van Valkenburgh property, the court took a good faith approach to claim of right: "You knew it was not your land, which is not the correct state of mind; you have to think it is your land in order to win an adverse possession claim." With regard to the garage encroachment, however, the court used a bad faith approach to claim of right: "You thought it was on your land, but you have to think it is *not* your land in order to win an adverse possession claim." The two different approaches to the claim of right analysis in *Van Valkenburgh* seem to be part of a calculated effort by the court to defeat the Lutzes' adverse possession claim.[43] According to the popular view of the *Van Valkenburgh* court's analysis, the court essentially told the Lutzes: "Tails you lose, heads the Van Valkenburghs win."

But the result in *Van Valkenburgh* is perfectly logical if one accepts that a court need not take the same approach to the claim of right analysis for different types of adverse possession cases. The unique facts of *Van Valkenburgh* nicely demonstrate this concept, because the case actually involves two different types of adverse possession cases. With regard to the

[41] *Id.*

[42] DUKEMINIER ET AL., *supra* note 1, at 122, 131 (quoting *Van Valkenburgh*, 106 N.E.2d at 30).

[43] *See* Stake, *supra* note 6, at 2430 n.62 (stating that "it looks more like the [*Van Valkenburgh*] court was trying to find some excuse for holding against the adverse possessor").

one-room structure, the Lutzes were squatters. With regard to the garage encroachment, however, the Lutzes' claim was based on a mistaken boundary.

Is it logical for a court to conclude that neither a squatter nor a mistaken boundary claimant can win an adverse possession claim? Absolutely. Under this view, a court would recognize adverse possession only in the color of title situation. Permitting adverse possession for color of title cases, but rejecting it in squatter cases and mistaken boundary cases, is definitely a defensible position.

The only way for a court to reject adverse possession in both the squatter and mistaken boundary contexts, however, is to take a different approach to the claim of right analysis in each type of case. A uniform approach to the claim of right question, as depicted below, does not permit the court to reach the result it desires of rejecting the adverse possession claim in the squatter and mistaken boundary context:

Figure 6

Type of Case	**Result Under Objective Approach**	**Result Under Good Faith Approach**	**Result Under Bad Faith Approach**
Color of Title	Win	Win	Lose
Squatter	Win	Lose	Win
Mistaken Boundary	Win	Win	Lose

Taking a uniform approach to claim of right will preclude a court from getting to the desired result of rejecting the claim of both a squatter and a mistaken boundary claimant. Under a bad faith approach, the squatter wins. Under a good faith or objective approach, the mistaken boundary claimant wins.

Thus, the only way for a court to reach the desired result of rejecting both a mistaken boundary and squatter claim is to take a different approach to claim of right for each claim. I would submit that this is precisely what the New York court did in *Van Valkenburgh*: It took a good faith approach when discussing the structure that had been erected by the Lutzes as squatters, while it took a bad faith approach when discussing the encroaching garage.

This mixed approach to claim of right can appear contradictory if one does not distinguish between different types of adverse possession cases, and that has been the fate (thus far) of the *Van Valkenburgh* decision. That result, though, has been a byproduct of an attempt to force uniformity and cohesion into the claim of right analysis. If one assumes that a uniform approach to the claim of right analysis is required, the *Van*

Valkenburgh opinion *is* confusing and contradictory. Considering the case from a contextual perspective however, as involving both a squatter adverse possession claim and a mistaken boundary adverse possession claim, the opinion and ultimate decision of the New York court make perfect sense.[44]

---

[44] The commentators are not the only ones to struggle with the *Van Valkenburgh* opinion. In *Walling v. Przybylo*, the New York Court of Appeals considered how *Van Valkenburgh* applied to a case in which it was factually unresolved whether the possessor had knowingly used his neighbor's land (as a squatter) or had used his neighbor's land because of a mistake regarding the legal boundary (as a mistaken boundary claimant). 851 N.E.2d 1167 (N.Y. 2006). Under the analysis employed in this Article, faithful adherence to the *Van Valkenburgh* decision would have compelled a summary judgment for the defendant, regardless of the resolution of this factual question. If the possessor was a squatter, the good faith test from *Van Valkenburgh* applied, thus defeating the claim. If the possessor was a mistaken boundary claimant, the bad faith test from *Van Valkenburgh* applied, also defeating the possessor's claim. (Recall that the Lutzes were both in *Van Valkenburgh*, and had lost under either theory.) The *Walling* court, however, before describing the *Van Valkenburgh* decision as resting on "mistaken dictum," stated as follows: "[A]n adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim." *Id.* at 1170. Technically speaking, the quoted language from *Walling* would have overruled the *Van Valkenburgh* decision only with regard to the good faith approach the court had used for the Lutzes' squatter claim involving Charlie's house. The quoted language from *Walling* does not appear to address the *Van Valkenburgh* decision with regard to the Lutzes' garage encroachment, thus meaning that the bad faith approach would still operate to preclude adverse possession in a mistaken boundary context. Under this reading of *Walling*, the *true owner* in that case would have been entitled to summary judgment *if* the possessor had been a mistaken encroacher but the *possessor* would have been entitled to summary judgment *if* the possessor was a pure squatter. The *Walling* court, however, granted summary judgment to the plaintiff without resolving the factual question as to whether the possessor had known that the land being possessed was his neighbor's. *See id.* Thus, despite the more narrow language in *Walling*, the court's decision seems to employ an objective approach to claim of right—overruling *Van Valkenburgh* in both the squatter and mistaken boundary context—as this is the *only* approach under which both a squatter and a mistaken boundary claimant can win. *See* Jerry L. Anderson & Daniel B. Bogart, Property Law: Practice, Problems, and Perspectives 128 (2014) (describing *Walling* as employing an objective standard).

The story of claim of right in New York, however, does not end with the *Walling* decision. New York passed a law in 2008 defining the claim of right requirement as follows: "A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be." N.Y. Real Prop. Acts. Law § 501(3) (McKinney 2009). Despite the seemingly clear intent to adopt a uniform good faith approach to claim of right (thus precluding adverse possession in the squatter context while permitting it in the mistaken boundary and color of title context), there are still some doubts as to whether the legislation achieved this objective. *See id.* § 501 Practice Commentaries (McKinney 2009) ("It remains for the courts to determine if the new legislation accomplishes the Legislature's goals. It is possible that [the statute] may be read to be circular. A party possessing property may be found to not initially have had a claim of right but having possessed the property for the statutory period may acquire a claim of right and mature into an adverse possessor.").

In the same way that a contextual approach to the claim of right inquiry makes sense of *Van Valkenburgh*, I suspect that a substantial portion of the contemporary confusion associated with the claim of right inquiry might similarly be eliminated through this contextual approach. The ultimate question, of course, is whether courts—in determining how adverse possession cases should be decided—actually distinguish (subconsciously, at least) between the different types of adverse possession cases identified in this Article. It is, I believe, a question that is worthy of future consideration. For too long, the academic assumption has been that courts must—and do—take a uniform approach to the claim of right inquiry; the *Van Valkenburgh* case is a perfect example of this assumption. Although *Van Valkenburgh* is often considered a case to avoid in teaching the law of adverse possession, it might just be the *perfect* case for demonstrating that courts distinguish between different types of adverse possession cases, and that the desired result in each case might not be possible under a uniform approach to claim of right. Perhaps, with regard to the claim of right requirement, one size does not fit all; the long-standing confusion associated with this aspect of adverse possession law might simply be a byproduct of the incorrect assumption that it does.

IV. CONCLUSION: CLAIM OF RIGHT AS MERELY A JUDICIAL TOOL

This Article's contextual approach to adverse possession and the claim of right inquiry has tended to generate the same initial response when I have discussed it with fellow academics, practitioners, and law students.[45] The common reaction is discomfort with the notion that courts might "manipulate" the claim of right to reach the "right" result in a particular type of case. What about the rule of law? And the benefits of a uniform rule? Are not courts compelled to apply *the* law of adverse possession?

This reaction, I believe, is probably a product of the way in which most of us have been introduced to the law of adverse possession. Our introduction to the doctrine of adverse possession usually occurs in law school, where it is presented as an established and cohesive body of law turning on whether the possessor can satisfy the five or six required elements. A few cases are probably included in this instruction (for the multitude of students using the Dukeminier casebook, the *Van Valkenburgh* opinion would probably have been one of two or three assigned decisions[46]), but overall the introduction to adverse possession law, for most

---

[45] The perspective in this Part is decisively legal realist. *Cf.* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973) (discussing the academic cliché that "we are all legal realists now" (internal quotation marks omitted)); *see also* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (stating that the phrase "we are *all* realists now" has been repeated so frequently that "it has become a cliché to call it a 'cliché'").

[46] *See* DUKEMINIER ET AL., *supra* note 1, at 122.

of us, is—necessarily—doctrinally driven.[47] Learning adverse possession law thus means that we learn the "test" to be applied.

Because our introduction to adverse possession usually involves learning the supposedly well-established black-letter rules, a suggestion that courts might deviate from—or "manipulate"—this pristine doctrine to get the "right" result in a particular case can appear unsavory. Because we start with the doctrine, our natural inclination is that a court's decision should conform to this doctrine.

This sentiment, though, is an instance of the tail wagging the dog. The hornbook, black-letter law of adverse possession is only useful to the extent that it describes the way in which actual cases are being received and decided by the courts; the "doctrine" should have no existence outside of its role in explaining actual case decisions.[48] To say that a court's decision is wrong because it does not conform to the doctrine mixes up this cause-and-effect relationship. If a court's decision is inconsistent with the conventional doctrine, it is the doctrine—and not the judicial decision—which needs to be altered.[49]

I believe there is probably a disconnect between conventional adverse possession doctrine and the ways in which courts currently analyze adverse possession cases.[50] The conventional view holds that courts take a

---

[47] *See, e.g.*, BURKE & SNOE, *supra* note 2, at 82 ("Thus, to assert a successful adverse possession claim, an adverse possessor must show that the adverse possession met each of the following common law elements . . . .").

[48] *See* O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928) ("To state the matter more concretely, the decision of a particular case by a thoughtful scholar is to be preferred to that by a poorly trained judge, but the decision of such a judge in a particular case is infinitely to be preferred to a decision of it preordained by some broad 'principle' laid down by the scholar when this and a host of other concrete cases had never even occurred to him.").

[49] *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1930) ("'Paper rules' are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—what the books there say 'the law' is. The 'real rules' and rights—'what the courts will do in a given case, and nothing more pretentious'—are then predictions." (quoting Holmes, *supra* note 48, at 461)); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 36 (1910) ("In a conflict between the law in books and the national will there can be but one result. Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings. For the written word remains, but man changes.").

[50] It is worth reiterating, at the end of this Article, that the primary objective of this Article is to prove—as an purely analytical matter—that a uniform approach to the claim of right inquiry might produce results that courts find unacceptable. Although this analytical point *suggests* that courts might then take a different approach to claim of right depending on the type of case involved, the analytical point *does not prove* that this is how courts are deciding actual cases. I have offered a guess on this descriptive point in the text above, but a thorough cataloging of the contemporary case law is the only way to actually resolve this point. I hope that a

uniform approach regarding the test by which the claim of right question will be measured. I think this is likely incorrect; I suspect courts view the merits of an adverse possession claim differently depending on whether it involves a color of title, squatter, or mistaken boundary claim. And, as alluded to at the start of this Article, there are compelling reasons why a court might view the merits of each type of case differently. Getting the desired result in each of those three types of cases, however, might sometimes require a court to apply a non-uniform analysis regarding claim of right. *If* courts do indeed distinguish between different types of adverse possession cases, the doctrine should reflect the factual distinctions that are important to courts in deciding how to resolve the actual cases. The confusion regarding the claim of right analysis, I believe, is simply an instance in which the black-letter law that is recited in the hornbooks and casebooks (and, to be sure, in many judicial opinions) has not cut finely enough to describe the factual distinctions that are truly important to the courts in deciding the actual cases.

This Article treats the claim of right analysis as nothing more than a tool by which courts can reach the result desired in a particular case. I believe this approach to the claim of right inquiry is both warranted and necessary. The claim of right analysis—indeed, the entire law of adverse possession—is not a byproduct of deductions from first principles (like a mathematical proof), nor is it manna sent from heaven. The claim of right analysis is simply the reason given by courts as to why they either deny or accept adverse possession in a particular case.[51] If, as suggested in this Article, courts react differently to different types of adverse possession cases, it might be better for courts to simply state the true basis of the decision rather than to dress up its conclusion in a claim of right analysis. Thus, for instance, a court that believed a mistaken boundary claimant should lose while a color of title claimant should win could simply state this straightforward conclusion and skip the entire song and dance of justifying this result in terms of the possessor's state of mind. Doing so would eliminate the need to create different approaches to claim of right for different types of cases so that the "right" result in each case was reached.

I have little hope, however, that courts will ever resolve adverse possession cases without articulating a specific reason or rule for their decisions. There is a deep-felt need by courts to give reasons (in the form of

---

survey of the adverse possession case law—while distinguishing between the different types of adverse possession cases identified in this Article—occurs in the near future.

[51] *See* Jerome Frank, Law and the Modern Mind 100–01 (1930) ("As the word indicates, the judge in reaching a decision is making a judgment. . . . The process of judging . . . seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. . . . Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.").

rules) for their decisions.[52] Thus, the claim of right analysis is probably here to stay as part of adverse possession doctrine. As currently conceptualized, though, the claim of right analysis is a tool that is too dull to perform the precise cutting that I believe is necessary given the different types of adverse possession cases that arise and the differing results that courts legitimately want to reach in those respective cases. Accepting that the claim of right analysis need not apply the same to all types of adverse possession cases would be, I believe, a major step towards clearing up the persistent confusion that has accompanied this doctrine for decades.

[52] *See id.* at 102–03 ("But the conception that judges work back from conclusions to principles is so heretical that it seldom finds expression. Daily, judges, in connection with their decisions, deliver so-called opinions in which they purport to set forth the bases of their conclusions. Yet you will study these opinions in vain to discover anything remotely resembling a statement of the actual judging process. They are written in conformity with the time-honored theory. They picture the judge applying rules and principles to the facts, that is, taking some rule or principle (usually derived from opinions in earlier cases) as his major premise, employing the facts of the case as the minor premise, and then coming to his judgment by processes of pure reasoning." (footnote omitted)); Holmes, *supra* note 48, at 465–66 ("The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.").