OWNERSHIP OF PROPERTY AND ADVERSE POSSESSION FROM THE CATHOLIC PERSPECTIVE: YOU'VE GOT TO HAVE (GOOD) FAITH!

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> God destined the earth and all it contains for all men and all peoples so that all created things would be shared fairly by all mankind under the guidance of justice tempered by charity.[1]

The overall concept of property in most people's mind constitutes rights in or to a thing. That is, rights to the thing that can be enforced by the state.[2] The idea that man can own a thing or piece of land is so common to our daily existence that we rarely think about it from a broader perspective and fully consider its origins. Most would think that these rights are positive rights or those fully created and enforced by the state. However, some legal philosophers view property as rights stemming from a higher order of things arising out of natural law.[3]

There is a balance in natural law theory of what can be owned or possessed and how that must be limited by the fact that God created our world for the whole of mankind and not simply for individuals. Property law has developed to memorialize these beliefs but also to allow the "State" to maintain order in society and work toward the common good for all citizens. Out of the developed theory of property rights, the laws of prescription or adverse

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1. COMPENDIUM OF SOCIAL DOCTRINE OF THE CHURCH ¶ 171 (2004) (quoting Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 69 (1966)).

2. Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2420 (2001).

3. *See generally* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. II-II, Q. 66, Art. 1 (Fathers of the English Dominican Province trans., Benziger Bros., 1947) [hereinafter SUMMA THEOLOGICA].

possession have arisen in "positive law."[4] Over time, adverse possession has varied in its application. The question, however, is whether it has remained connected to or consistent with the Catholic faith and Canon Law.

The intent of this Article is to outline the natural law and Catholic perspective on individual ownership of property. More particularly, this Article will explore the legal concept of adverse possession through the lens of Canon Law and Catholic social teaching. To give context, the first part of the Article will outline the concept of universal destination of goods. The second section will provide an historical background of property rights theory grounded in Natural Law and Catholic Social Teaching. Finally, within the context of the Catholic Church's stance on the ability to own private property and the universal destination of goods, this Article will look at the doctrines of prescription/adverse possession. It will take into account Canon Law and God's Commandments in an attempt to reconcile these with the current American law of adverse possession.

I. UNIVERSAL DESTINATION OF GOODS

Universal destination of goods is a truth that the Church has revealed in the area of economics and industry. The universal destination of goods' defining principle is that "the original source of all that is good is the very act of God, who created both the earth and man, and who gave the earth to man so that he might have dominion over it by his work and enjoy its fruits."[5] Pope

4. *Human Positive Law*, CATH. CULTURE, https://www.catholicculture.org/culture/library/dictionary/index.cfm?id=34020 (last visited Oct. 12, 2021). The definition of human positive law:

> Legislation imposed by human authority, implementing the natural law. It may take one of two forms, declarative or specifying. Declarative positive laws simply declare in so many words what the natural law prescribes or draw conclusions deducible from the natural law. Such are laws forbidding murder, theft, or perjury. They differ from natural law only in the manner of promulgation, say the State, and not only by the natural light of reason. Specifying positive laws determine or establish specific ways of acting in accordance with the natural law but not directly concluding from it. Such are traffic laws, ways of collecting taxes, and the conditions for just contracts. No human law that contradicts the natural law is a true law, but it need not merely re-echo the natural law.

Id. Merriam Webster dictionary defines positive law as "law established or recognized by governmental authority." *Positive Law*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/positive%20law (last visited Oct. 12, 2021).

5. COMPENDIUM OF SOCIAL DOCTRINE OF THE CHURCH, *supra* note 1, ¶ 171. *See also* Gen 1:28-29 ("God blessed them and said to them, 'Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground.' Then God said, 'I give you every seed-bearing plant on the face of the whole earth and every tree that has fruit with seed in it. They will be yours for food.'").

John XXIII clarified: "[I]t cannot be denied that in the plan of the Creator all of this world's goods are primarily intended for the worthy support of the entire human race."[6] Pope John Paul II reiterated that "God gave the earth to the whole human race for the sustenance of all its members, without excluding or favouring anyone. This is the *foundation of the universal destination of the earth's goods*."[7] The Church determined that the social and primary function of all property was created for the benefit of all mankind. "[I]nalienable human rights are founded upon the essential relationship of the human person with God . . . ."[8] In essence, the principle of the universal destination of goods "is an affirmation both of God's full and perennial lordship over every reality and of the requirement that the goods of creation remain ever destined to the development of the whole person and of all humanity."[9] This principal comports with the Catholic Social Teaching and natural law concept of "solidarity: a 'union arising from community interests and responsibilities.'"[10] The Catechism of the Catholic Church also speaks to this concept:

> **2402** In the beginning God entrusted the earth and its resources to the common stewardship of mankind to take care of them, master them by labor, and enjoy their fruits. The goods of creation are destined for the whole human race. However, the earth is divided up among men to assure the security of their lives, endangered by poverty and threatened by violence. The appropriation of property is legitimate for guaranteeing the freedom and dignity of persons and for helping each of them to meet his basic needs and the needs of those in his charge. It should allow for a natural solidarity to develop between men.[11]

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6. Pope John XXIII, *Mater Et Magistra* [*Encyclical Letter on Christianity and Social Progress*] ¶ 119 (1961) [hereinafter *Mater Et Magistra*] (emphasis added).

7. Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of* Rerum Novarum] ¶ 31 (1991) [hereinafter *Centesimus Annus*].

8. D. Brian Scarnecchia, *Property Law*, *in* AMERICAN LAW FROM A CATHOLIC PERSPECTIVE 197, 197 (Ronald J. Rychlak ed., 2016).

9. COMPENDIUM OF SOCIAL DOCTRINE OF THE CHURCH, *supra* note 1, ¶ 177.

10. 2 ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SOCIAL SCIENCE, AND SOCIAL POLICY 1010 (Michael L. Coulter et al. eds., 2007). This concept reflects the natural law in society in that it is the "'responsibility' that all share in common because as sons of Adam they are all children of God." *Id.* It is defined as social interdependence where people depend on one another in a reciprocal way. *Id.* at 1011. This aligns with the universal destination of goods "as the right to the common use of goods is the first principle of the whole ethical and social order." *How Church Teachings Can Help Us Build Better Organizations*, CATH. CEO (quoting Pope John Paul II, *Laborem Exercens* [*Encyclical Letter on Human Work on the Ninetieth Anniversary of* Rerum Novarum] ¶ 19 (1981) [hereinafter *Laborem Exercens*]), http://www.catholicceo.net/universal-destination-of-goods (last visited Dec. 13, 2021).

11. CATECHISM OF THE CATHOLIC CHURCH ¶ 2402 (2d ed. 1997).

It is under this guiding principle, founded in natural law,[12] that the Church began to address the question of private property.

II. THE CONCEPT OF PRIVATE PROPERTY

"[M]an, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life."[13]

While this Article is meant to inform on the Catholic perspective, some background from additional legal scholars and philosophers is necessary to contextualize later writings from the Church. In addition, historical events are addressed to understand the economic and political environment as well. Early Christian and Catholic thought did not necessarily provide specifically delineated rules on private property but followed the natural law; "rules ordained by God, to be observed by all his human creations on peril of divine punishment" which address the area of property ownership.[14]

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12. Natural law is "engraved on the mind of every man" in the command to do right and avoid evil; each person will be rewarded or punished by God according to his or her conformity to the law. This is often referred to as the law that is written on the heart of every man. Pope Leo XIII, *Libertas Praestantissimum* [*Encyclical Letter on the Nature of Human Liberty*] ¶ 8 (1888).

The natural law involves the recognition of God as the "supreme legislator." Thomas Aquinas refers to Romans 2:14 of the Bible when he states: "When the Gentiles, who have not the law, do by nature those things that are of the law . . . [a]lthough they have no written law, yet they have the natural law, whereby each one knows, and is conscious of, what is good and what is evil." SUMMA THEOLOGICA, *supra* note 3, Pt. I-II, Q. 91, Art. 2. He details that it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. *Id.* Aquinas states that this is particular to creatures (men) of reason who are imbued with natural law in that "every act of reasoning is based on principles that are known naturally." *Id.*

However, as noted, "what constitutes natural law and natural rights has provoked and continues to provoke different answers." Sukhninder Panesar, *Theories of Private Property in Modern Property Law*, 15 DENNING L.J. 113, 123 (2000). That being said, the natural law from the Christian and Catholic perspective is that there are rights which come "from the law of God, nature or reason." *Id.* Natural law comes "from nature itself" but is "discovered by reason." *Id.*

13. Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), *in* MAX LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 417 (1943). Holmes' wording may derive from Jeremy Bentham who wrote, "our property becomes a part of our being, and cannot be torn from us without rending us to the quick." JEREMY BENTHAM, THEORY OF LEGISLATION 115 (R. Hildreth trans., London, Trübner & Co. 1864).

14. Michael Nicol, The Fiction of Adverse Possession: An Alternative Conceptualization of the Right to Control Land 89 (Sept. 2017) (Ph.D. thesis, Lancaster University) (on file with author) (citing GEOFFREY ROBINSON, CRIMES AGAINST HUMANITY 2 (4th ed. 2012)). Early Christian theory did have a clear perspective on wealth and how one should use wealth. This would then necessarily permeate views on private property. The teachings in the New Testament indicate a negative view of wealth and emphasize

A. *Saint Thomas Aquinas*

One of the first to address the idea of private property as it relates to natural law was St. Thomas Aquinas, a legal and Catholic philosopher.[15] Between the years 1265-1274, Aquinas wrote the *Summa Theologica*. In this work, Aquinas addresses many facets of the Catholic Faith and Catholic Social Thought. His commentary in relation to man's possession of "external things" is steeped in the belief that man has "natural dominion over external things, because, by his reason and will he is able to use them for his own profit . . . [P]ossession of external things is natural to man."[16] This idea extends from his belief that God has "sovereign dominion over all things" and has made it such that these things can be used to "the sustenance of man's body."[17] Aquinas clearly recognizes the uniqueness of humans in creation, and that God intended humans to utilize natural resources for personal benefit. Specifically, Aquinas states:

> The possession of all things in common and universal freedom are said to be of the natural law, because, namely, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly, the law of nature was not changed in this respect, except by addition.[18]

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the virtues of poverty. RICHARD SCHLATTER, PRIVATE PROPERTY 33 (Unwin Bros. Ltd. 1951). Specifically, in Matthew 19:21, 23–24 it states, "If thou wilt be perfect, go and sell that thou hast, and give to the poor[,]" and "it is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God." In fact, it appears that St. Augustine regarded property rights as "creat[ed by] the state and the fruit of sin"—not by the laws of nature. SCHLATTER, *supra*, at 38.

15. *See* SUMMA THEOLOGICA, *supra* note 3, Pt. II-II, Q. 66, Art. 1 (stating Aquinas' view did align with Aristotle's theories on property).

16. *See id.* One theory about Aquinas' writings is that St. Thomas makes a clear distinction between "use (*usum*) and administration (*potestas procurandi et dispendsandi*)." Brad Littlejohn, *Aquinas and Legal Realism: The Roots of Private Property*, POL. THEOLOGY NETWORK (July 25, 2014), https://politicaltheology.com/aquinas-and-legal-realism-the-roots-of-private-property. The first relates to the natural law and the right of humankind to make use and "enjoy the fruits of the earth." *Id.* Specifically, this is a common right to all men and not necessarily a private right. "The second is the institution of property rights," presumably an act by the state. *Id.* (also opining that Aquinas errs more on the side of Aristotle in the idea that "[e]ven without sin, property rights might be a good and useful thing"); *see also id.* (quoting SUMMA THEOLOGICA, *supra* note 3, Pt. II-II, Q. 66, Art. 2.) ("[T]hat all things should be possessed in common and that nothing should be possessed as one's own, but because the division of possessions is not according to natural right, but, rather, according to human agreement, which belongs to positive right, as stated above . . . . Hence the ownership of possessions is not contrary to natural right; rather, it is an addition to natural right derived by human reason.").

17. *See* SUMMA THEOLOGICA, *supra* note 3, Pt. II-II, Q. 66, Art. 1.

18. *Id.* Pt. I-II, Q. 94, Art. 5.

It is this recognition of human reason factored into the equation that makes property rights part of natural law. Accordingly, Aquinas states that ownership is not in conflict with the natural law but, instead, a way for man to make life easier.[19] He ultimately determines that it is lawful for man to possess property.

For Aquinas, the possession of property is necessary for several reasons. First, "man is more careful to procure what is for himself alone than that which is common to many or to all."[20] It is best for the common good as man will be more productive and will work to better that which is his and not for the community. Second, order is preserved when each man "is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately."[21] Third, the state of things will be peaceful if each man is content in his own possessions. We will avoid quarrels.[22] In essence, "by avoiding confusion and promoting a sense of personal responsibility, property rights could actually help more effectively bring the fruits of the earth into general circulation."[23]

The limitation or condition placed upon private ownership is that man is afforded the natural control over these things to use them for his own but also for the common good (universal destination of goods).[24] For Aquinas, according to God's law, property would be held for the common good,[25] but that the best and most effective use of land is made under the individual control of man.[26]

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19. Nicol, *supra* note 14, at 92.

20. SUMMA THEOLOGICA, *supra* note 3, Pt. II-II, Q. 66, Art. 2.

21. *Id.*

22. *Id.*

23. Littlejohn, *supra* note 16. This philosophy is in harmony with Aristotle's arguments in favor of private property ownership. First, Aristotle argued that private ownership is simply more efficient than communal ownership. He, like Aquinas, believed that man will fail to make best use if the ownership is communal in nature. They both reason that when people are sharing something, everyone is more likely to assume that someone else is taking care of the situation, instead of taking responsibility themselves. Robert Mayhew, *Aristotle on Property*, 46 REV. METAPHYSICS 803, 804 (1993).

24. *Id.*

25. *See id.*

26. *Id.* Aristotle does not recognize property as private for private use. Aristotle considers three arrangements for property and its use: "(1) property is private, use is common; (2) property is common, use is private; (3) property is common, use is common." *Id.* Aristotle disagreed with the third option (communistic approach). He viewed it as unworkable but, more importantly, unjust. *Id.* at 806–07. Aristotle advocated for a system where "possessions being common in some way, but private generally." *Id.* at 815 (quoting ARISTOTLE, THE POLITICS bk. II, § 1263 (c. 384 B.C.E)).

B. *John Locke*

John Locke, an English philosopher and physician, was extremely influential in American Politics[27] and, in his Second Treatise of Civil Government, Locke addressed property rights from a perspective steeped in natural law similar to that of St. Thomas Aquinas.[28] His theory of private land/property was grounded in his belief that there exists a natural right to private property borne out of man mixing his labor with the land to create something that is fruitful and of value rather than "lying in waste." Locke states:

> Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men. . . .[29]

He indicates that the labor of tilling and planting, etc., does "inclose [the property] from the common."[30] Locke opines that "subduing or cultivating the earth, and having dominion . . . are joined together"[31] and that the

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Aquinas, like Aristotle, would also give the lawmaker the responsibility of administering property rights in a manner that would be for the common good. *See* SCHLATTER, *supra* note 14, at 50, 57. This too was the philosophy of Pope Pius. *See* Pope Pius XI, *Quadragesimo Anno* [*Encyclical Letter on Reconstruction of the Social Order*] ¶ 49 (1931) [hereinafter *Quadragesimo Anno*].

Aegidius, a student of Aquinas, took these ideas further and was able to say that private property was natural and, at the same time, find that specific instances of ownership were instituted by the state. *See* SCHLATTER, *supra* note 14, at 56–57. Aegidius came to the conclusion using the social contract theory: "Property was natural Aristotle had said, but historically it had been instituted by contracts. And that historical process, through which men escaped from the savage state, contracts establishing property preceded those which instituted political authorities." *Id.* at 58.

27. ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SOCIAL SCIENCE, AND SOCIAL POLICY, *supra* note 10, at 643–44.

28. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT §§ 25–27 (Prometheus Books 1986) (1690). This theory was contrary to the early Christian and Catholic Church which viewed property more as a state-created right. *See* SCHLATTER, *supra* note 14, at 39–40.

29. *Id.* § 27 (emphasis added). Locke argued that these rights existed before the state and independent of any laws enacted regarding property rights. *Id. See also* Panesar, *supra* note 12, at 122 (citing LOCKE, *supra* note 28, §§ 25–51).

30. LOCKE, *supra* note 28, § 32.

31. *Id.* § 35.

appropriation of the land does not "prejudice" other men as there is enough land when the person who cultivates uses only what he can maintain and improve.[32] He theorizes that "[p]rivate property rights were acquired by natural, moral and rationale conduct which individuals left to their own devices would perform."[33] This seems to incorporate the true sentiment behind the universal destination of goods[34] as it supposes that making good use of the land is the best for all society and that each man would have the opportunity to do so.[35] Locke writes:

> God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And tho' all the fruits it naturally produces, and beasts it feeds, belong to mankind in common.[36]

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32. *Id.* §§ 32, 36.

33. Panesar, *supra* note 12, at 124. This theory has been called the "sufficiency limitation." C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 211 (Oxford Univ. Press 2011) (1962). Locke states, "[F]or this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is one [joined] to, at least where there is enough and as good left in common for others." Panesar, *supra* note 12, at 127 (quoting LOCKE, *supra* note 28, § 27).

34. LOCKE, *supra* note 28, § 26.

35. This does beg the question: As the world gets more populated and land is taken up with infrastructure, does this theory break down or is there always enough? One author identifies that the Lockean theory works very well in times of abundance as "under conditions of plenty and lack of scarcity this sufficiency limitation will never be violated." Panesar, *supra* note 12, at 128. The paradox is that not all men can own as there is a finite number of things and property in the world. *Id.* Also, the idea that a man during times of scarcity would take and leave less for others could violate natural law and thus, the Church's teachings on the universal destination of goods.

Brian Gardiner notes that the world population is projected to be "approximately 9,368,223,050 by the year 2050." Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMPAR. L. REV. 119, 119 (1997). This is in contrast to the estimated population of between 600,000,000-670,000,000 in 1700 during John Locke's lifetime. *Historical Estimates of World Population*, U.S. CENSUS BUREAU (Dec. 16, 2021), http://www.census.gov/data/tables/time-series/demo/international-programs/historical-est-worldpop.html. Specifically, with the rise in population, "invariably there will be an increase in scarcity and competition for vital resources, including food, fossil fuels, raw materials, shelter, and land." Gardiner, *supra*, at 119. This illustrates the modern problem with the sufficiency limitation.

36. LOCKE, *supra* note 28, § 26. A criticism of Locke's theory from the Catholic perspective is his supposition that nature is without value or "lacking" without the sweat equity of man, implies that "God has not well provided for man." ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SOCIAL SCIENCE, AND SOCIAL POLICY, *supra* note 10, at 644.

C. *Pope Leo XIII*

Pope Leo XIII addressed property rights in *Rerum Novarum* in 1891.[37] These Encyclicals were juxtaposed with the political landscape at the time and the rise of Communism and Socialism. They were meant to comment on and counteract the impact and affect that these political constructs might have.[38] Pope Leo wrote "in an effort to explain why socialism was not the true solution to the evils of laissez-faire capitalism, and to offer the Church's proposal for a just economic order."[39] He memorializes Catholic Social Teaching on current social and political issues, particularly the working class. As noted therein, Pope Leo addresses the right to own or possess property.[40] In fact, these Encyclicals set forth very robust reasoning in favor of private ownership.[41]

Pope Leo recognizes the motivation of man in engaging in labor. It is to "obtain property, and thereafter to hold it as his very own."[42] Pope Leo finds that such possession is justified as "every man has by nature the right to possess property as his own. This is one of the chief points of distinction between man and the animal creation . . . . It is the mind, or reason, which is the predominant element in us as human creatures."[43] Pope Leo clarifies that universal destination of goods does not, in fact, "bar" ownership of private property. He states that:

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37. Pope Leo XIII, *Rerum Novarum* [*Encyclical Letter on the Rights and Duties of Capital and Labour*] (1891) [*hereinafter Rerum Novarum*].

38. Pope Leo XIII indicates that the concepts of socialism and the form of redistribution of property and wealth is "emphatically unjust, for they would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community." *Id.* ¶ 4. The necessity of private ownership in times where concepts of socialism may be taking root is fully acknowledged later by Pope John Paul II:

> This is something which must be affirmed once more in the face of the changes we are witnessing in systems formerly dominated by collective ownership of the means of production, as well as in the face of the increasing instances of poverty or, more precisely, of hindrances to private ownership in many parts of the world, including those where systems predominate which are based on an affirmation of the right to private property.

Centesimus Annus, *supra* note 7, ¶ 6.

39. ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SOCIAL SCIENCE, AND SOCIAL POLICY, *supra* note 10, at 914.

40. The use of both words, "own" and "possess," are key as the idea of possession really comes into play in theories related to adverse possession.

41. John Pullen, *The Pope and Henry George: Pope Leo XIII Compared with Henry George on the Ownership of Land and Other Natural Resources. A Possible Rapprochement?*, 8 SOLIDARITY: J. CATH. SOC. THOUGHT & SECULAR ETHICS, 2018, at Issue 2, Art. 2.

42. *Rerum Novarum*, *supra* note 37, ¶ 5.

43. *Id.* ¶ 6. This is directly in line with Thomas Aquinas' theory about man's ability to reason and how it relates to right to property. *See supra* text accompanying notes 15–17.

> For God has granted the earth to mankind in general, not in the sense that all without distinction can deal with it as they like, but rather that no part of it was assigned to any one in particular, and that the limits of private possession have been left to be fixed by man's own industry, and by the laws of individual races.[44]

His thought is that man individually can make the best use of land in the interests of providing for himself. Man's motivation will then bring about the best from the earth, which is in the best interests of all mankind as a whole. This sweat of labor and effect it has on the land is what justifies man's right to private ownership:

> Now, when man thus turns the activity of his mind and the strength of his body toward procuring the fruits of nature, by such act he makes his own that portion of nature's field which he cultivates—that portion on which he leaves, as it were, the impress of his personality; and it cannot be just that he should possess that portion as his very own, and have a right to hold it without any one being justified in violating that right.[45]

Pope Leo reasons that private ownership is also key to family, as it is the "sacred law of nature that a father should provide food and all necessaries" for his family.[46] He argues that there is no other way for a father to accomplish this but through the "ownership of productive property, which he can transmit to his children by inheritance."[47] From these propositions Leo concludes:

> [I]n the careful study of nature, and in the laws of nature, the foundations of the division of property, and the practice of all ages has consecrated the principle of private ownership, as being pre-eminently in conformity with human nature, and as conducing in the most unmistakable manner to the peace and tranquility of human existence.[48]

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44. *Rerum Novarum*, *supra* note 37, ¶ 8.

45. *Id.* ¶ 9.

46. *Id.* ¶ 13.

47. *Id.*

48. *Id.* ¶ 11. This, again, aligns with Aristotle who argued that allowing for private property was the best means of attaining high productivity and use of land. Aristotle stated that "[w]hen everyone has his own separate sphere of interest, there will not be the same ground for quarrels; and the amount of interest will increase, because each man will feel that he is applying himself to what is his own." ARISTOTLE, THE POLITICS bk. II, § 1263, at 49 (Ernest Barker trans., Clarendon Press 1952) (c. 384 B.C.E). Aristotle also recognized that under a system of private ownership "moral goodness . . . will ensure that the property of

Pope Leo not only declares the right of private ownership as a natural right, he calls it an inviolable right.[49] He also indicates that this right brought with it social obligations toward non-landowners. This right to ownership is thus, limited, and conditional on one distributing one's excess wealth to the indigent. [50]

D. *Pope Pius XI*

Pope Pius in *Quadragesimo Anno* reinforces Pope Leo's theories on private property.[51] He then clarifies and reemphasizes the limitation on ownership. He states:

> [N]ature, rather than the Creator Himself, has given man the right of private ownership not only that individuals may be able to provide for themselves and their families but also that the goods which the Creator destined for the entire family of mankind may through this institution truly serve this purpose.[52]

Pope Pius recognizes this balance between private ownership and the common good/universal destination of goods is a delicate balance but emphasizes the importance of this limitation on private ownership.[53] Pius sees

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each is made to serve the use of all, in the spirit of the proverb which says 'Friends' goods are goods in common.'" *Id.* He notes that in some systems, such as those in Sparta, each man uses his property but makes some available to his friends. *Id.* This theory, while not in complete lock-step, follows the overall concept of universal destination of goods.

49. Pullen, *supra* note 41.

50. *Id.* "The universal destination of goods, thus, remains as an important limiting condition on the right use of private property. . . . " W. Bradford Littlejohn, *Recovering the Catholic Doctrine of Private Property, Pt. 2: A Critical Examination of Catholic Social Teaching on the Question of Private Property*, CALVINIST INT'L (Aug. 13, 2014), https://calvinistinternational.com/2014/08/13/recovering-catholic-doctrine-private-property-pt-2 [https://web.archive.org/web/20210514005405/https://calvinistinternational.com/2014/08/13/recovering-catholic-doctrine-private-property-pt-2/].

This is in keeping with Sir William Blackstone who wrote that "[t]he earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Joseph Chitty ed., 1826) [hereinafter BLACKSTONE]. Blackstone noted that the ground was common and no particular part would be permanent property of any man in particular. *Id.* at 3. This again recognizes the natural law right to property but with limitations.

51. *Quadragesimo Anno*, *supra* note 26, ¶ 44.

52. *Id.* ¶ 45.

53. *Id.* ¶¶ 45–46. "Accordingly, twin rocks of shipwreck must be carefully avoided. For, as one is wrecked upon, or comes close to, what is known as 'individualism' by denying or minimizing the social

that "[t]he right of property is distinct from its use."[54] Private property rights exist for the "sake of realizing the goal of the universal destination of goods."[55] It appears that Pius leaves this balance to public authority with the goal of that authority being the common good.[56] Pius determines that:

> To define these duties in detail when necessity requires and the natural law has not done so, is the function of those in charge of the State. Therefore, public authority, under the guiding light always of the natural and divine law, can determine more accurately upon consideration of the true requirements of the common good, what is permitted and what is not permitted to owners in the use of their property.[57]

Pius does clarify:

> That the State is not permitted to discharge its duty arbitrarily is, however, clear. The natural right itself both of owning goods privately and of passing them on by inheritance ought always to remain intact and inviolate, since this indeed is a right that the State cannot take away.[58]

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and public character of the right of property, so by rejecting or minimizing the private and individual character of this same right, one inevitably runs into 'collectivism' or at least closely approaches its tenets. Unless this is kept in mind, one is swept from his course upon the shoals of that moral, juridical, and social modernism. . . ." *Id.* ¶ 46.

54. *Id.* ¶ 47.

55. Littlejohn, *supra* note 50.

56. *Id.*

57. *Quadragesimo Anno*, *supra* note 26, ¶ 49. One author has identified that there are several theories of private property. The first is the natural law where the right exists prior to any intervention of state as the law that is written on the heart of every man. The second is a positive right borne out of community and state. Joshua Getzler, *Theories of Property and Economic Development*, 26 J. INTERDISC. HIST. 639, 641 (1996). Additional stratifications of these theories have added in a theory of possession and a theory of labor. Panesar, *supra* note 12, at 113.

The Catholic Church, by way of Pope Leo and Pope Pius, in particular, marry these theories and recognize that there is a right to property borne out of natural law and duties and limitations imposed under the universal destination of goods. However, as noted earlier, Pope Pius recognizes that it is up to the state to carry these out in a manner for the common good.

Sir William Blackstone writes on the theory of possession and that the "*right* of possession continued for the same time only that the *act* of possession lasted." BLACKSTONE, *supra* note 50, at 3. Possession has been theorized as the root of title. Panesar, *supra* note 12, at 116. The idea of possession involves a "clear act" whereby the world understands that the individual has "an unequivocal intention of appropriating the [thing] to his individual use." Pierson v. Post, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805). However, the theory of possession has been criticized as outdated when you have a much more complex system of resources. Panesar, *supra* note 12, at 118.

58. *Quadragesimo Anno*, *supra* note 26, ¶ 49.

Pius reasons that "when the State brings private ownership into harmony with the needs of the common good, it does not commit a hostile act against private owners but rather does them a friendly service."[59] Pius rests firmly in the faith of the Author of nature that provided all for the support of human life will be carried out and that this ideal "does not destroy private possessions, but safeguards them; and does not weaken private property rights, but strengthens them."[60]

E. Catholic Teachings Post Leo XIII and Pius XI

The Church's teachings by way of Pope John XXIII and John Paul II further the belief of private ownership as supported under natural law. The teachings also fully underscore that these rights are balanced by and limited by the social obligation that also exists in the laws of nature.[61] John Paul II specifically states that Christian tradition has never held the right to ownership was absolute but that this right was "understood . . . within the broader context of the right common to all to use the goods of the whole of creation: the right to private property is subordinated to the right to common use, to the fact that goods are meant for everyone."[62]

The Catholic Church's formal teachings through the Catechism support the notions set forth in this section and detail how private ownership is consistent with natural law. The Catechism specifically addresses how private ownership is harmonious with the concept of universal destination of goods:

> **2403** The *right to private property*, acquired or received in a just way, does not do away with the original gift of the earth to the whole of mankind. The *universal destination of goods* remains primordial, even if the promotion of the common good requires respect for the right to private property and its exercise.

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59. *Id.* The concern would be that the state does not really take into account this idea of common good and universal destination of goods. This is leaving much of the natural law to be interpreted and carried out by the state. It seems that Pius may have had a lot of confidence in the state to maintain the precarious balance and not to fall into the "twin rocks of shipwreck" that would be Communism or Socialism. *Id.* ¶ 46.

60. *Id.* ¶ 49.

61. *Laborem Exercens*, *supra* note 10, ¶ 14; Pope John XXIII, *Pacem in Terris* [*Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*] ¶¶ 28, 30 (1963); *Mater et Magistra*, *supra* note 6, ¶ 19.

62. *Laborem Exercens*, *supra* note 10, ¶ 14.

> **2404** "In his use of things man should regard the external goods he legitimately owns not merely as exclusive to himself but common to others also, in the sense that they can benefit others as well as himself." The ownership of any property makes its holder a steward of Providence, with the task of making it fruitful and communicating its benefits to others, first of all his family.
>
> **2405** Goods of production - material or immaterial - such as land, factories, practical or artistic skills, oblige their possessors to employ them in ways that will benefit the greatest number. Those who hold goods for use and consumption should use them with moderation, reserving the better part for guests, for the sick and the poor.
>
> **2406** *Political authority* has the right and duty to regulate the legitimate exercise of the right to ownership for the sake of the common good.[63]

Clearly, natural law and Catholic Social Teaching recognize the right to ownership of private property limited by the universal destination of goods and the common good. The question becomes how the concept of prescription/adverse possession, whereby one can be dispossessed of private property, is consistent with the Church's perspective regarding individual property rights.

III. PRESCRIPTION/ADVERSE POSSESSION

A. *Brief History*

The laws of prescription developed by legal theorists, Canon Law, and carried out in positive law create the foundation of what is now called adverse possession in American law. The term prescription arose in Roman law to define a lawsuit of either acquisition or extinction.[64] The idea was that Roman

63. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 11, ¶¶ 2403–06 (emphasis added).

64. Charles P. Sherman, *Aquisitive Prescription—Its Existing World-Wide Uniformity*, 21 YALE L.J. 147, 147 (1911). *See also* Charles Sloane, *Prescription in Civil Jurisprudence*, NEW ADVENT, https://www.newadvent.org/cathen/12396x.htm (last visited Oct. 14, 2021) ("Prescription 'in some form and under some name' is said to have existed as a part of the municipal law of [virtually] every civilized nation."). In Roman law there was the concept of *usucapio*, the process where "a Roman citizen's possession of a corporeal thing during a length of time defined by law 'ripened . . . into full ownership.'" *Id.* The exception was that the Roman law did not recognize a right in ownership but more in possession for foreigners and for provincial land. *Id.* The operation of *usucapio* was subject to some restrictions similar to those of Canon Law prescription. A purchaser in good faith and for full value from a thief would not, by

lawmakers and lawyers needed to restrain litigiousness and to "secure existing rights to property in order to encourage its improvement for the benefit of all men, and so maintain prosperity, order, tranquility, and stability in society."[65] In essence, prescription was a means by which legal rights could be obtained or lost "through the passage of time."[66] These laws required that the "adverse possessor begin [the] period of prescription in good faith and with just title."[67]

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usucapio, acquire ownership in the thing stolen, nor would ownership thus accrue to one who acquired possession, knowing that the thing really belonged to another. *Id.*

"Usucapio has the following essential elements: possession, titulus, fides, tempus, res idoneis/habiles." Melanie Reyes, Prescription (Praescriptio) in Roman Law & Canons 197–199, at 3 (unpublished work) (on file with author). "Possession is the actual act or fact of holding with or without rightful ownership but with the intent of owning . . . . " *Id.* "Titulus is configured as a legal transaction or juridical act worth the justification of the acquisition of property." *Id.* at 3–4. This relates to having some justification in a title. "Fides is the conscientious act of not injuring the rights of others." *Id.* at 4. This is the good faith component found in Canon Law. "Tempus" refers to the time limitation to acquire. *Id.* "Res" refers to the idea that not all things can be acquired through usucapion. *Id.* Things acquired by force cannot be substantiated through usucapion. *Id.*

The Canon Laws that govern Prescription read as follows:

> Can. 197. The Church receives prescription as it is in the civil legislation of the nation in question, without prejudice to the exceptions which are established in the canons of this Code; prescription is a means of acquiring or losing a subjective right as well as of freeing oneself from obligations.
>
> Can. 198. No prescription is valid unless it is based in good faith not only at the beginning but through the entire course of time required for prescription, without prejudice to the prescript of can. 1362.

1983 CODE c.197–98. Canon 1268 states that: "The Church recognises prescription, in accordance with cann. 197–199, as a means both of acquiring temporal goods and of being freed from their obligations."

65. Paul Lucas, *On Edmund Burke's Doctrine of Prescription: Or, an Appeal from the New to the Old Lawyers*, 11 HIST. J. 35, 39 (1968). It was presumed that those who lost land by prescription had abandoned or neglected their own property rights. *Id.*

The justifications for prescription and the outcome of these laws have been heavily debated but eventually the conversation honed in on whether acquisitive prescription, *see infra* n. 66, was grounded in natural law. Yaëll Emerich, *Comparative Overview on the Transformative Effect of Aquisitive Prescription and Adverse Possession: Morality, Legitimacy, Justice*, REVUE INTERNATIONALE DE DROIT COMPARÉ, 2015, at 1, 3. For some, it was supported by natural law because the "breach of the right of ownership is justified by the implicit consent of the owner." *Id.* at 3 n.8 (citing S. VON PUFENDORF, ON THE LAWS OF NATURE AND NATIONS 442 (1729)). Other theorists disagreed indicating that "a morally unjustified situation [cannot] find itself transformed through the passage of time." *Id.* at 3 (citing H. GROTIUS, LE DROIT DE LA GUERRE ET DE LA PAIX, TOME I 465 (1867)). The theory is that this is where the natural law crosses over into the operation of positive law. *Id.*

66. Emerich, *supra* note 65, at 2. Professor Emerich describes two types of prescription. The first is acquisitive that creates rights. These rights (in a thing by possession) are acquired by the lapse of time. The other is extinctive which extinguishes rights based on a principle of limitation of action. *Id.* at 3. *See also* Sherman, *supra* note 64, at 148.

67. Lucas, *supra* note 65, at 40.

This civil law is consistent and substantiated by Canonical law which recognizes prescription.[68]

Adverse possession emerged as a legal principle in England in 1275. The first statute of Westminster in 1275 prohibited claims to recover possession of land that arose before the beginning of the reign of Richard I.[69] Thus, anyone whose possession dated back to Richard's reign could not be ejected. The 1275 statute was clarified and refined under policy changes in 1623 with the addition of a statute of limitations.[70] These changes created a twenty-year limitation for acquisition of private property.[71]

"The statute of 1623 was the adverse possession statute that many American colonial jurisdictions used as a prototype for their own laws."[72] "The express goals of [the 1623] statute were the 'avoiding of Suits' and the 'quieting of Man's Estates.'"[73] "This statute reflected an early desire in [English law] to prevent the waste of land resources and to force owners to monitor their lands properly."[74]

As stated, the early American principles of adverse possession tracked closely those of England, but retained a twenty-year limitation.[75]

Adverse possession is essentially a mix of statutory and common law, and it has a long pedigree. Like acquisitive prescription, the statutory foundation

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68. 1983 CODE c.197–99. Canon 197 is a memorialization of the norm found in Canon 22 regarding civil laws that the Church defers to. THE CANON LAW SOC'Y OF AM., NEW COMMENTARY ON THE CODE OF CANON LAW 230 (John P. Beal et al. eds., Paulist Press 2000). Canon 197 adopts prescription in the Canons as part of civil litigation. Canon 198 makes clear that good faith is required "not only at the beginning but through the entire course required for prescription." Thereafter, the Canon Law carves out exceptions to the doctrine of prescription. 1983 CODE c.199.

69. Gardiner, *supra* note 35, at 126–27.

70. *Id.*

71. *Id.* at 127.

72. *Id.*

73. *Id.* (quoting CURTIS J. BERGER, LAND OWNERSHIP AND USE 499 (3d ed. 1983)).

74. *Id.* This was amended in 1833 to "[include] a provision giving title to the possessor after the running of the period," which was lowered to 12 years. *Id.*

75. *Id.* at 128. The first statute was in North Carolina in 1715. *Id.* at 129 (citing William Ackerman, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 81 (1996)). *See also* Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL'Y & L. 271, 279 (2012) ("In fact, some scholars argue that the very foundation of private ownership of real property in the United States—the acquisition of lands from the Native American tribes—was, in itself an act of adverse possession."). As population has grown and land has become increasingly more scarce, the United States' laws have moved toward shorter statutes of limitation. *Id.* This has heightened the responsibility of landowners to "monitor their land." *Id. See also* Stake, *supra* note 2, at 2436 (finding that this justification may be problematic because the notion that it aids buyers to communicate offers is small and tenuous).

for adverse possession is the period of limitations within which the true owner can bring an action for the ejectment of a trespasser.[76]

In early American history, deeds to land were often not recorded in a central location, so it was quite difficult to confirm with any certainty that someone really owned a given piece of property.[77] A primary concern addressed in early American law was that certainty of title could be established to solidify or extinguish an individual's claim. It also was important to erase conflicting claims after a period of time to remove clouds on the title from impeding productive use of land.[78] Like prescription, claims for adverse possession began with the state statutes that established a period of limitations on actions for trespass and ejectment for recovery of possession.

Some scholars argue that adverse possession appears to reward land thievery; however, there are a number of justifications for recognizing the doctrine,[79] including: (1) providing a degree of certainty of ownership to

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76. SANDRA H. JOHNSON ET AL., PROPERTY LAW, CASES, MATERIALS AND PROBLEMS 71 (3d ed. 2006).

> The primary purpose of the statute of limitations is to assure that lawsuits are brought within a reasonable amount of time. The doctrine of adverse possession triggers another result as well. Under this doctrine, a trespasser who meets the requirements of adverse possession over the required period of time (usually the statutory limit for an action in ejectment) may not only bar a suit by the owner, but actually may take title to the property himself.

Id.

77. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 467 (4th ed. 2017).

78. The early American courts reconfigured adverse possession "to promote the development of wilderness land." Cherek, *supra* note 75, at 280. The standard began as Locke envisioned with requirements focusing on working, cultivating, farming, and enclosing the land, but as time progressed, the standards were relaxed some and "measured the sufficiency of the acts . . . based on the nature and character of the land." *Id.* They did so because of the vast nature of the open land and the "societal need for productivity and the development of real property." *Id.*

79. *See* JOSEPH WILLIAM SINGER, PROPERTY 304–05 (3d ed. 2010); 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01(2) (2021); SPRANKLING, *supra* note 77, at 449–51; Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1128–30 (1985). *See also* Cherek, *supra* note 75, at 281–82 (indicating that many of the justifications arise from "social justice theory" and from "utilitarian theory"). These differing theories either focus on efficiency or are aimed at influencing behavior of either landowners or potential adverse possessors. *Id.* Four categories of justifications support adverse possession:

> (1) those that focus on encouraging the productive use of land and punishing the idle landowner; (2) those that focus on improving the marketability of title to real property; (3) those that focus on remedying errors and boundary uncertainties; and (4) social justice arguments that focus on the use of adverse possession as a means of social change.

Id. at 282.

possessors of land by eliminating the possibility of stale claims to land title;[80] (2) encouraging maximum utilization of land;[81] and (3) to remove clouds on title. It also functions as a punishment for absentee owners who have seemingly abandoned their property.[82] This is harmonious with Locke's labor theory, under which one who works to improve property should be entitled to acquire property interests.[83] Consistent with the personhood theory, the longer one occupies property, the more it becomes a part of that person and consequently, the more reluctant we are to force the occupier to part with it.[84]

By promoting the development of property, adverse possession dissuades true owners from sleeping on their rights, or they do so at their own risk.[85] In fact, some scholars "demonize the true owner because the true owner is committing the 'morally wrong' act of allowing the adverse possessor to become dependent on an interest in land" and then taking it away.[86]

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80. *See* Stake, *supra* note 2, at 2441 ("Quieted titles are good because they facilitate market transfers, reduce disincentives to investment, make it easier to obtain credit, and help owners feel more secure."). *See also id.* at 2442 (noting that this reveals the conundrum that adverse possession never did quiet titles and that, because there are now more effective and efficient ways to quiet titles, whether adverse possession is even needed).

81. *See* SPRANKLING, *supra* note 77, at 479–81; Cherek, s*upra* note 75, at 280. However, there are scholars that understand the historical argument of utility but do not see it as viable or constructive in more modern times. For example, one writer notes that there have been times where the United States government paid farmers not to plant crops on some lands. *Id.* at 283–84. *See, e.g.*, Stake, *supra* note 2, at 2435 (citing 11 NEIL E. HARL, AGRICULTURAL LAW § 91.03[L][c]-[d], at 91-24 to 91-26 (1991)). Also, the government protects historical buildings from destruction even when there may be a more profitable use of the land. *Id.* (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)). In essence, Stake notes that the government is recognizing that "less 'productive' uses may be best for society." *Id.*

82. *See generally* Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUS. L. REV. 1385, 1406 (2015). This idea ties into some of the same justifications for prescription that were created from Canon Law. *See* Lucas, *supra* note 65, at 39.

83. *See* LOCKE, *supra* note 28, § 27; *see also supra* Section II.B. on Locke's theory.

84. In the United States, "the emphasis is not on the one out of possession but on the one in possession." Percy Bordwell, *Disseisin and Adverse Possession*, 33 YALE L.J. 1, 10 (1923).

85. Richardson, *supra* note 82, at 1406. Thus, as to the true owner, adverse possession serves two functions: (1) it deters the true owner from ignoring her property; and (2) it punishes the lazy owner who fails to engage in reasonable custodial practices over a protracted period. *Id.*

86. *Id.* Joseph Singer writes: "The [adverse] possessor has come to expect continued access to the property, and the true owner has fed those expectations by her actions (or her failure to act). It is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party. The legal steps necessary to protect the true owner's interests are relatively clear [action in ejectment], so she could have protected her own property interests if she had wanted to do so." Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 667 (1988). This idea was the same under prescription historically. "And any owner of property who lost his estate to another man by operation of prescription was either presumed to have abandoned his property or deemed to be worthy of punishment for having neglected his own rights." Lucas, *supra* note 65, at 39. "[O]ld lawyers . . . justified the existence of prescription not on the grounds of divine, eternal, and immutable truths, or even of equity, but for considerations of public utility and as fit punishment for individuals." *Id.*

Oliver Wendell Holmes best articulates the value of possession as justification for adverse possession:

> I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. . . . It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time . . . takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask for no better justification than the deepest instincts of man.[87]

At common law, adverse possession was the functional equivalent of acquisitive prescription.[88] Canon Law speaks of *praescriptio* as a means of acquiring property rights and of freeing oneself from an obligation.[89] Like adverse possession, claims for prescription have historically begun with the period of limitations for bringing claims for trespass and ejectment.[90] "There is a classic justification for all kind of prescriptions which is expressed through the Latin maxim: it is in the interest of the whole republic that disputes should come to an end."[91]

B. *Adverse Possession/Prescription Elements Under American and Canon Law*

As defined under American law, adverse possession is "[a] method of acquisition of title to real property by possession for a statutory period under

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87. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HAR. L. REV. 457, 476–77 (1897).

88. Emerich, *supra* note 65, at 8.

89. THOMAS O. MARTIN, ADVERSE POSSESSION, PRESCRIPTION AND LIMITATIONS OF ACTIONS: THE CANONICAL "PRAESCRIPTIO" 3 (1944).

90. *See* Emerich, *supra* note 65, at 2.

> For this reason, prescription of claims is founded upon the ground that, if a man does not think more of his claim than to allow it to grow stale, he shall not have the state's aid to enforce it; the prescription is in the nature of a penalty for his indifference; there must be an end to litigation. But acquisitive prescription is founded upon the economic conception that all things should be used according to their nature and purpose. The man so using a thing, and using and preserving it for a certain length of time, has done a work beneficial to the community. He deserves well of the state, and his reward is the conferring upon him of the title to the thing used.

Axel Teisen, *Adverse Possession—Prescription*, 3 A.B.A. J. 126, 127 (Apr. 1917).

91. Emerich, *supra* note 65, at 23.

certain conditions."[92] Generally, the recognized elements for adverse possession are: (1) actual, (2) exclusive, (3) open and notorious, (4) continuous for the statutory period, (5) hostile (or adverse) to the true owner's interests.[93] All of these elements "must coexist [for the statutory period] to enable one to acquire title by adverse possession."[94] Adverse possession claims are necessarily fact specific. The burden of proving each of the elements for adverse possession is on the adverse possessor.[95] However, "[o]nce the adverse claimant has introduced evidence of his . . . wrongful possession for the statutory . . . period, the burden of producing evidence to rebut the adverse claimant's case shifts to the holder of the paper title."[96]

Under Canon Law Code, "in the interest of good order, . . . issues related to prescription" are referred to the civil law in each country.[97] Essentially, for the most part, it is left to the laws of each country to determine the rights and obligations gained and lost under prescription and under what time period.[98] Most of the elements found in the jurisprudential history of the United States' laws fully align with principles of Canon Law; however, it is the element of "hostility" that warrants further discussion.

1. Actual

Actual possession or use is physical occupation of the property in some fashion.[99] The adverse possessor must treat the property as if it were their own in a way that is consistent with the "ordinary use to which the land is

92. Gardiner, *supra* note 35, at 122 (quoting *Adverse Possession*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

93. *See id.* (citing Annotation, *Adverse Possession of Landlord as Affected by Tenant's Recognition of Title of Third Person*, 38 A.L.R.2d 826 (1995)); MARY J. CAVINS, 56 A.L.R. 3D 1182 § 2[b] *Use of Property by Public as Affecting Acquisition of Title by Adverse Possession* (1974); *see also* Stake, *supra* note 2, at 2443.

94. HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 58 (6th ed. 2001). Therefore, the statutory period appears as its own element but is also required of all other elements as well.

95. ITT Rayonier, Inc. v. Bell, 774 P.2d 6, 8 (Wash. 1989).

96. Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. UNIV. L. REV. 1, 17 (1986).

97. THE CANON L. SOC'Y OF GR. BRIT. & IR., THE CANON LAW LETTER & SPIRIT: A PRACTICAL GUIDE TO THE CODE OF CANON LAW ¶ 408 (1995). *See also* THE CANON L. SOC'Y OF AM., THE CODE OF CANON LAW: A TEXT AND COMMENTARY 112 (1985).

98. THE CANON L. SOC'Y OF GR. BRIT. & IR., *supra* note 97, ¶ 408. This deference is limited by Canons 198 and 199. *Id.*

99. POWELL, *supra* note 79, § 91.03 ("As a starting point, there must be physical possession of some type in order to meet the actual possession requirement.").

capable."[100] What qualifies as actual possession is "the degree of actual use and enjoyment of the parcel of land involved which the average owner would exercise over similar property under like circumstances."[101] This "standard . . . allows for differences due to topography, character of the land, location, and any other relevant variables."[102] Evidence of actual use is essential because it is conduct that typifies possession.[103]

From the Catholic perspective under Canon Law, "actual civil possession was required, so that one who did not actually hold in this manner could not claim adverse possession, especially against one who had so held."[104] Therefore, the current American doctrine is consistent with Canon Law and Catholic teaching on this element.

2. Exclusive

Under American law, an "adverse possessor must hold exclusive possession," which means that the "possession must not be shared with the true owner or the general public."[105] The degree of exclusive possession, "must be of such an exclusive character that it will operate as an ouster of the owner of the legal title."[106] This exclusive use need not be absolute, but it must be as exclusive as would be expected of a reasonable owner given the type of land in question.[107] As such, "isolated visits by third parties do not

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100. SINGER, *supra* note 79, at 147. The acts sufficient to meet this requirement vary from parcel to parcel, depending on the nature, character, and location of the land, and how the land is best used. *Id. See also* SPRANKLING, *supra* note 77, at 468.. "The ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take." *ITT Rayonier, Inc.*, 774 P.2d at 9. Some activities that have been recognized as fulfilling this element are: "residence, cultivation, improvement, grazing, pasturing, hunting, fishing, timber harvesting, and mining . . . . " SPRANKLING, *supra* note 77, at 468. While it appears that the actual possession must cover the entire piece of property claimed, there is an exception when occupation is under a color of title that would justify the adverse possessor's claim to a larger portion. This becomes relevant in situations where there may be a faulty deed or survey. This then would support a claim of ownership to the entire parcel identified in the faulty deed. *Id.* at 469.

101. EDWARD E. CHASE & JULIA PATTERSON FORRESTER, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 75 (2d ed. 2010).

102. *Id.*

103. *See ITT Rayonier, Inc.*, 774 P.2d at 8.

104. MARTIN, *supra* note 89, at 72.

105. SPRANKLING, *supra* note 77, at 469 (citing *ITT Rayonier, Inc.*, 774 P.2d at 6).

106. Marengo Cave Co. v. Ross, 10 N.E.2d 917, 921 (Ind. 1937) (stating that the owner of a cave entrance, who took possession of a cave and operated it as a tourist attraction for forty-six years, cannot gain adverse possession title to a portion of a cave lying under neighbor's land).

107. SINGER, *supra* note 79, at 147. Joseph Singer does note that "[t]wo adverse possessors who possess property jointly may acquire joint ownership rights as co-owners." *Id.* at 148. *See also* SPRANKLING, *supra* note 77, at 469.

destroy exclusivity. . . . An adverse possessor must exclude third parties only to the extent that a reasonable owner would do so." [108]

> The element of "exclusive possession" means that the claimant must show that he held possession of the land for himself, as his own, and not for another. . . . To meet this burden, a claimant must prove that he wholly excluded the owner from possession for the required period. . . . This does not mean that mere sporadic use, temporary presence, or permissive visits by others (including the title holder), will defeat a claim of exclusive possession.[109]

Consistent with how American courts interpret this element, Canon Law similarly holds that the possession or occupation must be exclusive of others.[110]

3. Open and Notorious

For this element, mere possession by the adverse possessor is not enough. Rather, the possessory acts must be sufficiently visible and obvious to put an owner on notice of the occupation and potential claim to the land.[111] The adverse possessor is not required to prove that the true owner actually made an inspection of the property, or that the owner had actual notice of the trespass; constructive notice is sufficient.[112] To satisfy this element, the adverse possessor's occupation "must be visible and open to the common observer so that the owner or his agent on visiting the premises might readily see that the owner's rights are being invaded."[113] Consequently, possession that is "actual" will likely satisfy the open and notorious element as long as

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108. SPRANKLING, *supra* note 77, at 470.

109. Machholz-Parks v. Suddath, 884 S.W.2d 705, 708 (Mo. Ct. App. 1994) (citations omitted).

110. Canon Law interpretations indicate: "Hence two persons could not hold adversely in common . . . . " MARTIN, supra note 89, at 76. This seems to be an inconsistency with the America law as noted above by Joseph Singer, *supra* note 107.

111. *See* SINGER, *supra* note 79, at 146; *see also* SPRANKLING, *supra* note 77, at 470 (some acts that are listed as sufficiently open and notorious are residing on the land, making improvements, and cultivating crops); *Marengo Cave*, 10 N.E.2d at 920–21. One scholar indicates that fences are "pretty good indicators that someone is possessing the enclosed land." Singer, *supra* note 86, at 146. These activities are very similar to the list of activities for the "actual" element. "Other acts deemed sufficient include building a structure, clearing the land, laying down a driveway, mowing grass, and using the strip for parking, storage, garbage removal, and picnicking, and planting and harvesting crops." *Id.* at 147. Consistent with the idea that the character, location, and nature of the land is considered, this element requires more activity in urban areas. *Id.*

112. *Marengo Cave*, 10 N.E.2d at 920–21.

113. *Id.* at 920.

the adverse possessor's activities on the land are not hidden, furtive, or secret.[114] Rather, the adverse possessor "must unfurl his flag on the land, and keep it flying so that the owner may see it, if he will, that an enemy has invaded his dominions and planted his standard of conquest."[115]

The open and notorious element is also recognized in Canon Law.[116] The Canon Law requires that the "quasi-possession of a right had to be certain, unequivocal and public."[117] Consequently, under Canon Law the limitations period for adverse possession would not run against an owner that had no notice of the trespass.[118] Again, the requirements for this element are consistent with how American courts apply this element.

4. Continuous for the Statutory Period

An adverse possessor must occupy the land continuously for the statutory period of limitations without significant interruption,[119] however, it does not require that the claimant never leave the property.[120]

> Brief and ordinary absences, while the possessor goes to town, is gone overnight, or is away working or on vacation, for instance, would surely not break any adverse possession. With land that is, by its nature, suitable and

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114. *Id.* at 921 (claimant's use of subterranean cave was not open and notorious).

115. Darling v. Ennis, 415 A.2d 228, 230 (Vt. 1980); Robin v. Brown, 162 A. 161, 161 (Pa. 1932); Willamette Real–Estate Co. v. Hendrix, 42 P. 514, 517 (Or. 1895).

116. This requirement was "indicated in the *Glossa* which stated that if the chapter knew of the alienation the alienee was immediately safe." MARTIN, *supra* note 89, at 80 (citing In c. 10, C. XVI, q. 3, ad v. *Si Sacerdotes*). *Glossa* is defined as "[a] designation given during the Middle Ages to certain compilations of 'glosses' on the text of a given manuscript." J.M. Buckley, *Glossa Ordinaria*, NEW CATH. ENCYCLOPEDIA (2021), https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/glossa-ordinaria. The *glossa ordinaria* of the 12th century was the "most important and influential treatises of the classical period of Canon Law." *Id.*

117. MARTIN, *supra* note 89, at 81.

118. *Id.* at 81–82.

119. *See* SPRANKLING, *supra* note 77, at 476–77 (For a claimant to acquire title by adverse possession, the requisite possession varies from state to state. A majority of states have limitations periods that range from ten, fifteen, or twenty years.); JOHNSON ET AL., *supra* note 76, at 83.

> All state statutes of limitations contain provisions to toll or extend the period for persons under specific disabilities when the cause of action accrues. Insanity, minority of age, imprisonment, and absences due to military duty are typical disabilities. Disabilities that arise after the statute of limitations begins to run will not stop the running of the clock.

Id.

120. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 859 (3d ed. 2000).

> normally used for seasonal pursuits, then seasonal adverse possession is usually continuous enough.[121]

Under Canon Law, continuity is also required.[122] To establish that property was being adversely held, the claimant was required to establish possession "by proof of the beginning, middle and end of the possession . . . ."[123] Therefore, an entry upon the land by a third party would destroy continuity if it "caused the holder to lose possession."[124] Canon Law and American law are consistent in requiring that the continuous use extend over a limitations period.

5. Hostile or Adverse to the True Owner's Interests

The last element for adverse possession is that the claimant's possession must be "hostile" or "adverse" to the interests of the true owner.[125] It is universally agreed that hostile or adverse use means that the "adverse possessor must treat the property as her own and the use must not result from the title holder's permission."[126] That is to say that the adverse possessor's possession "is held against the whole world including the true owner."[127]

When it comes to the requisite intent to satisfy hostility under American law, there are generally three recognized approaches: (1) the majority of states follow an objective standard which looks to the conduct not the subjective intent of the adverse possessor; (2) a minority of states require that the adverse possessor occupy the property under a good faith – yet mistaken belief that she is the true owner of the property; and (3) a smaller minority of states require

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121. *Id.*

122. MARTIN, *supra* note 89, at 78.

123. *Id.*; *see also* Sherman, *supra* note 64, at 151 (requiring "a continuous uninterrupted possession of the property for the period of time fixed by law" in order to gain title by prescription under Roman law).

124. MARTIN, *supra* note 89, at 78 ("This was called 'interruptio naturalis,' running for all, not merely for the one interrupting.").

125. "While the word 'hostile' has been held not to mean ill will or hostility, it does imply the intent to hold title against the record title holder." Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 3 (Pa. 1988) (citing Vlachos v. Witherow, 118 A.2d 174, 177 (Pa. 1955)). This "element goes by a variety of names, including 'adverse,' 'hostile,' 'under claim of title,' 'under claim of right,' and 'hostile under a claim of right.'" Stake, *supra* note 2, at 2426; SPRANKLING, *supra* note 77, at 471 ("Adding to this semantic chaos, many courts also formally insist that the adverse possessor have a *claim of right* or *claim of title* . . . [h]owever most authorities agree that these terms have the same meaning.").

126. SINGER, *supra* note 79, at 149.

127. HOVENKAMP & KURTZ, *supra* note 94, at 58. The adverse possessor must claim "to be the owner whether or not there is any justification for her claim . . . ." *Id.*

that the adverse possessor know that she does not own the property, yet occupies it with the intent to claim it as her own.

5.i. The Objective (Majority) Approach

Most states follow the objective approach (also known as the "Connecticut rule"[128]), that the adverse possessor's subjective belief about who owns the land is of no legal moment. Rather, the question under the majority approach is: "[h]as the adverse possessor so acted on the land in question as to give the record owner a cause of action in ejectment against him for the period defined by the statute of limitations?"[129] However, if the adverse possessor is occupying the property with the title holder's permission, then the possession is no longer hostile to the title holder's interest.[130]

The focus under the majority approach is on the adverse possessor's conduct while occupying the land because it is the possessor's conduct that "affords notice to the true owner that triggers the running of the statutory period for filing suit [for ejectment]."[131] Thus, under the majority approach, an adverse possessor whose non-permissive possession of real property is actual, exclusive, open and notorious, and continuous for the statutory period *has* satisfied the hostility element whether that occupation is under a mistaken

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128. Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. UNIV. L.Q. 331, 339 (1983). The standard adopted in Connecticut was that the possession is hostile even though the possessor would not have used the land had he known the location of the record boundary. *Id.*

129. *Tioga Coal*, 546 A.2d at 3 (quoting Helmholz, *supra* note 128, at 331). "It matters not what the motives or the state of mind of the possessor are. What matters is the possessor's physical relationship to the land over a sufficient length of time." *Id.*

130. *Id.*

131. SPRANKLING, *supra* note 77, at 473. This objective approach focuses instead on the conduct of the adverse possessor and is "securely tied to the statute of limitations . . . which defines the period after which the record owner will lose his cause of action to recover the land from the [adverse possessor]." Helmholz, *supra* note 128, at 331. "By excluding inquiry into the possessor's state of mind, it confines attention to external and verifiable facts." *Id.*

One justification for the objective standard is that it ties the claim directly to the statute of limitations and whether the adverse possessor's conduct provided sufficient, reasonable notice of the trespass to the title holder for the entirety of the statutory period. *See generally* SPRANKLING, *supra* note 77, at 473. Establishing the hostility element "is not determined by the subjective intent or the motives of the adverse possessor. . . . Rather[,] the acts of the adverse possessor's entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action." Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 917 A.2d 1221, 1227 (N.H. 2007) (citations omitted); Richard H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. UNIV. L.Q. 65, 67 (1986).

belief that the property is hers, or whether the adverse possessor occupies the property with a bad faith intent to claim against the title holder.[132]

A second justification is that it provides courts with easier administration of adverse possession claims.[133] However, critics of the objective approach correctly point out that it rewards a trespasser who knowingly enters property owned by somebody else with the intent to dispossess the true owner and gain title to the property.[134] It was for this very reason that the state of Colorado amended its adverse possession statute to remove the objective standard and require "good faith" following the intentional acquisition of a neighbor's vacant land by a retired judge and his wife (a lawyer) in a much publicized case.[135]

5.ii. The "Good Faith" Approach

A minority of states require that the adverse possessor must be trespassing in good faith. Jurisdictions that follow the good faith approach hold that an adverse possessor cannot establish title unless she takes possession with the good faith, but mistaken, belief that she has a valid title.[136] Under this approach, "only innocent possessors, those who mistakenly occupy property

132. SINGER, *supra* note 79, at 151; Cunningham, *supra* note 96, at 45–46.

133. SPRANKLING, *supra* note 77, at 473. "[D]iscerning the mental state of an adverse possessor is, at best, an exercise in guess work; and at worst, impossible." *Id.* at 473 & n.37 (citing Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 4 (Pa. 1988)).

134. "Why in this area are we treated to the odd spectacle of the law doing virtue while it pays homage to vice?" Merrill, *supra* note 79, at 1137.

135. McLean v. Dk Trust, No. 06 CV 982, 2007 Colo Dist. LEXIS 3, at *2–23 (Boulder Cnty. Dist. Ct. October 17, 2007). Plaintiffs, a retired judge and his wife (a lawyer), knowingly trespassed upon an adjoining vacant lot owned by their neighbors, the Kirlins, by creating walking paths, stacking firewood, and holding an occasional political fundraiser. *Id.* at *2. They used the property for twenty-five years knowing that it belonged to the Kirlins. *Id.* When the Kirlins attempted to build a fence cutting off the plaintiff's access to their property, the plaintiffs sued to enjoin them and to quiet title to the property through adverse possession. *Id.* The plaintiffs prevailed because the court determined that they had demonstrated that they had a stronger attachment to the land than had the Kirlins. *Id.* at *23. The trial court used the following test for hostility: "For use to be 'hostile,' the adverse possessor must demonstrate an intention to claim exclusive ownership of the property occupied. . . . The possessor need not have the specific intent to take property from the owner . . . . " *Id.* at *16 (citations omitted). In finding hostility, the trial court noted: "Plaintiffs knew that the disputed property was owned by someone else, and Mr. McLean testified that neither he nor Ms. Stevens asked for permission from [the] Defendants to use the disputed property." *Id.* at *22. The public outcry over the outcome led to the "Colorado 'Land Grab' Bill" which became effective on July 1, 2008, and required that an adverse possessor have a good faith belief that the land is actually his or her own. *See* Geoffrey P. Anderson & David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW. 73, 73 (2008).

136. R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 188 (3d ed. 2011).

owned by someone else, can acquire ownership by adverse possession."[137] The adverse possessor's "good faith" can be evidenced by "color of title" (where the adverse possessor relies upon a defective written instrument (deed or survey)) or by evidence that the adverse possessor believed herself to be the true owner.[138] As noted above, Colorado began by adopting the majority objective approach and amended to require good faith.[139] In addition to

137. SINGER, *supra* note 79, at 153.

138. Cherek, *supra* note 75, at 301–02. Professor Helmholz has recognized that application of a subjective approach invites speculation because "[i]n a great many adverse possession cases, there is simply no evidence of the possessor's intent, nothing to show one way or another whether he honestly thought the property belonged to him." Helmholz, *supra* note 128, at 357.

139. COLO. REV. STAT. ANN. § 38-41-101(3)(b)(II) (West 2021). The statute reads in pertinent part:

> (a) In order to prevail on a claim asserting fee simple title to real property by adverse possession in any civil action filed on or after July 1, 2008, the person asserting the claim shall prove each element of the claim by clear and convincing evidence.
>
> (b) In addition to any other requirements specified in this part 1, in any action for a claim for fee simple title to real property by adverse possession for which fee simple title vests on or after July 1, 2008, in favor of the adverse possessor and against the owner of record of the real property under subsection (1) of this section, a person may acquire fee simple title to real property by adverse possession only upon satisfaction of each of the following conditions:
>
> > (I) The person presents evidence to satisfy all of the elements of a claim for adverse possession required under common law in Colorado; and
> >
> > *(II) Either the person claiming by adverse possession or a predecessor in interest of such person had a good faith belief that the person in possession of the property of the owner of record was the actual owner of the property and the belief was reasonable under the particular circumstances.*

Id. (emphasis added).

Colorado, other states like Alaska,[140] Georgia,[141] New Mexico,[142] and Oregon,[143] have included "good faith" as a statutory requirement.

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140. ALASKA STAT. ANN. § 09.45.052(a) (West 2021) (ten-year period of time to establish adverse possession for "good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant").

141. GA. CODE ANN. § 44-5-161 (West 2021) (statute that does not allow adverse possession when there is fraud). Under the case law in Georgia, the adverse possessor must show "possession that is in the right of the party asserting possession and not another." Kelley v. Randolph, 763 S.E.2d 858, 860 (Ga. 2014).

142. N.M. STAT. ANN. § 37-1-22 (West 2021). The statute reads in pertinent part:

> In all cases where any person or persons, their children, heirs or assigns, shall have had adverse possession continuously *and in good faith* under color of title for ten years of any lands, tenements or hereditaments and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten years, then and in that case, the person or persons, their children, heirs or assigns, so holding adverse possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in some writing purporting to give color of title to such adverse occupant, in preference to all, and against all, and all manner of person or persons whatsoever . . . .

Id. (emphasis added).

143. OR. REV. STAT. ANN. § 105.620 (West 2021). The statute reads in pertinent part:

> (1) A person may acquire fee simple title to real property by adverse possession only if:
>
> (a) The person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;
>
> (b) At the time the person claiming by adverse possession or the person's predecessors in interest, first entered into possession of the property, the person entering into possession *had the honest belief that the person was the actual owner of the property and that belief:*
>
> *(A) By the person and the person's predecessor in interest, continued throughout the vesting period;*
>
> *(B) Had an objective basis; and*
>
> *(C) Was reasonable under the particular circumstances*; and
>
> (c) The person proves each of the elements set out in this section by clear and convincing evidence.

Id. (emphasis added).

5.iii. The "Bad Faith" Approach[144]

An even smaller minority of states require bad faith occupation of property to acquire title by adverse possession. "This test . . . requires proof of intent [by the adverse possessor] to dispossess a rightful owner to obtain title by adverse possession (making this proof an element of the claim)."[145] Under this test, a claimant never intending to acquire property that she does not own would be unsuccessful.[146] The rationale for this approach is that an occupant who does not know that she is trespassing "cannot harbor the specific intent to oust the other out of his land."[147] This approach has been widely criticized by courts and scholars alike because "it protects the wrongdoer while failing to provide repose to the one who occupies land in good faith believing it belongs to her."[148]

5.iv. Canon Law on the Hostility Element

While the United States has varying approaches to the "hostility" element, under Canon Law, "good faith" is an absolute requirement for a claim of prescription/adverse possession. "It has never been the purpose of prescription to reward unethical behavior such as theft or the wresting of rights or release from obligations by violent means. Good faith has always been an essential element."[149] Not only does Canon Law require good faith, but, in fact,

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144. This is also called the Maine Rule. Preble v. Maine Cent. R.R. Co., 27 A. 149, 150 (Me. 1893) (setting forth the "Maine rule" that requires a person to be aware that he is trespassing), *overruled by* Dombkowski v. Ferland, 893 A.2d 599, 605–06 (Me. 2006).

145. SINGER, *supra* note 79, at 152.

146. *Id.*

147. Schlagel v. Lombardi, 486 A.2d.491, 494 (Pa. Super. Ct. 1984) (quoting Lyons v. Andrews, 313 A.2d 313, 316–17 (Pa. Super. Ct. 1973)).

148. SINGER, *supra* note 79, at 153; *see also* SPRANKLING, *supra* note 77, at 474 ("This 'land piracy' approach to adverse possession effectively rewards intentional wrongdoers, while offering no protection to good faith occupants."). Professor Epstein describes a "bad faith" possessor as "both bad people in the individual cases and a menace in the future." Lee Anne Fennell, *Efficient Trespass: The Case for 'Bad Faith' Adverse Possession*, 100 NW. UNIV. L. REV. 1037, 1048 (2006) (quoting Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. UNIV. L.Q. 667, 686 (1986)).

149. THE CANON LAW SOC'Y OF AM., *supra* note 68, at 230. *See also* Lucas, *supra* note 65, at 42. In footnote 14, Lucas substantiates this prerequisite of good faith for adverse possession and underscores the "close connexion between good faith and conscience, and between bad faith and sin." *Id.* at 42 n.14 (citing Peter J. Huizing, *Corpus Juris Canonici*, BRITANNICA, https://www.britannica.com/topic/canon-law/The-Corpus-Juris-Canonici-c-1140-c-1500 (last visited Dec. 21, 2021) (the *Corpus Juris Canonici* is a collection of significant sources on Canon Law from 1140–1500)).

> the Church requires positive good faith, that is, a judgment . . . that one possesses property, or exercises a right, or withholds payment of a debt or fulfillment of other obligation, justly, that is, without violating any right of another. One who acts in good conscience acts in good faith.[150]

Under Canon Law, the possessor has to enter the land believing that the property belonged to or might rightfully be taken by him, and there has to be some "colour of legal right to his possession."[151] Scholars interpreting Canon 198 indicate that "good faith may be defined as a conviction in conscience that one possesses a particular right as one's own without detriment to the rights of others . . . . This conviction must be certain, although it may be erroneous."[152] St. Thomas Aquinas touches on the idea of prescription with a good faith requirement during a discussion of marriage wherein he states: "That which cannot be done without sin is not ratified by any prescription . . . ."[153] Under natural law, prescription was allowed but under the insistence "that society (for whose convenience prescription existed) was based on good faith and mutual trust."[154] Therefore, great care was taken to ensure that good faith and just title was always present under a claim of prescription.[155] Without good faith one could never obtain title to land by prescription/adverse possession.[156]

Good faith is an honest belief that the thing or land is the individual's own, as opposed to bad faith where the individual knows that what she possesses belongs to someone else.[157] From a Catholic faith or theological perspective, "good faith was good conscience . . . one without sin."[158] According to Canon Law, good faith "could arise from a just reason for believing that one had a

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150. THE CANON LAW SOC'Y OF AM., *supra* note 68, at 231. "The Church . . . has required good faith throughout the entire running of the prescribed time . . . ." *Id. See also* MARTIN, *supra* note 89, at 30. The "*Glossa* teaches that good faith is generally required because under Canon Law good faith in the one acquiring by adverse possession is necessary whether in spiritual or civil things." *Id.* at 38.

151. Lucas, *supra* note 65, at 40.

152. THE CANON L. SOC'Y OF GR. BRIT. & IR., *supra* note 97, ¶ 410.

153. SUMMA THEOLOGICA, *supra* note 3, Q. 55, Art. 9. *See also* Lucas, *supra* note 65, at 41.

154. Lucas, *supra* note 65, at 41.

155. *Id.*

156. MARTIN, *supra* note 89, at 31 ("[O]ne who knew that the thing belonged to another could not acquire it by adverse possession, and knowledge, no matter how induced, was held sufficient to prevent adverse possession . . . .").

157. *Id.* at 38 ("This good faith is understood to exist when one believes that the one delivering is the owner or had the right to alienate, although he errs as to the fact.").

158. *Id.* at 31.

right to possess."[159] Bad faith, on the other hand, could come from proofs that could cause the possessor to understand he is not, in fact, entitled to the property, or by way of injury done by the possession.[160]

CONCLUSION

Originally, the Roman operation of prescription/*usucapio* did comport with the Canon Law and Catholic perspective. As noted, under Roman law and Canon Law there was an absolute requirement of good faith for a person making a claim by prescription.[161] However, unlike Canon Law, where the claimant was required to be occupying in good faith throughout the prescriptive period, under Roman law, good faith was only required at the beginning of the prescription.[162] Under Roman law, property stolen, or taken by violence cannot "be acquired by adverse possession by the thief or wrongful ejector, who are forever barred from obtaining a prescriptive title no matter how long . . . their possession."[163] Moreover, the Roman laws were consistent with the spirit of universal destination of goods in that by adopting prescription/*usucapio* the Romans had the goal of making the best use of the resource of land for the good of all its citizens.[164]

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159. *Id.* at 33 (In this instance, the author refers to an "assertion of a ruler or of a person of note." Also, for the purposes of inheritance, if the "deceased [adverse possessor] was not in bad faith[,] the heirs could acquire by adverse possession through him.").

160. *Id.* at 34.

161. Emerich, *supra* note 65, at 3.

> The amount of time which had to run in order that prescription be achieved was a mere matter of positive law . . . . But, for all the theorists of law, the manner in which possession was originally acquired did indeed matter; for prescription had to begin in a certain way if it was to be right and legal. . . . Roman [law] had required that an adverse possessor begin his period of prescription in good faith and with just title . . . . Good faith, just title—these generally constituted honest possession not only in Roman antiquity, but also in . . . Catholic Canon and Western natural law.

Lucas, *supra* note 65, at 40.

162. CODE OF CANON LAW ANNOTATED 158–59 (Ernest Caparros et al. eds., 2d ed. 2004); *see also* Sherman, *supra* note 64, at 152.

163. Sherman, *supra* note 64, at 150.

164. Lucas, *supra* note 65, at 39.

> [A]cquisitive prescription is founded upon the economic conception that all things should be used according to their nature and purpose. The man so using a thing, and using and preserving it for a certain length of time, **has done a work beneficial to the community.** He deserves well of the state, and his reward is the conferring upon him of the title to the thing used.

Teisen, *supra* note 90, at 127 (emphasis added).

Over time, determining intent of a claimed good faith adverse possessor became difficult and the requirement was either modified or removed.[165] One scholar noted:

> This tendency to separate legal from natural obligation, to emphasize social order rather than moral rules and thus permit prescription in less than "positive good faith" or in downright bad faith, eventually became the "better opinion" and was so reflected in the *Code civil*, whose authors were careful to distinguish the conscionability from the legality and social utility of prescription.[166]

As indicated, the majority of states in the United States now review the element of hostility objectively, not taking into account whether the adverse possessor was occupying the property with good or bad faith. One justification for adopting an objective approach was for ease of administration with the focus on the conduct of the adverse possessor, and not her state of mind. "By excluding inquiry into the possessor's state of mind, it confines attention to external and verifiable facts. It may even promote the settling of land titles and the alienability of land by more easily resolving disputes over title."[167]

From the Catholic perspective, however, Canon Law clearly requires good faith to ensure that prescription is administered in good conscience and without sin.[168] While governance was recognized as necessary to maintain order in society, ultimately, this authority comes from God and must be exercised according to certain principles.[169] This authority is only legitimated

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165. *See* Lucas, *supra* note 65, at 44.

166. *Id.* at 44 n.15.

167. Helmholz, *supra* note 128, at 338.

168. *See* Lucas, *supra* note 65, at 43.

> [P]ositive laws which permit prescription in bad faith do not justify the possessor in point of conscience; for . . . "it is most certain that the length of time does not secure unjust possessions from the guilt of sin, and that on the contrary their long possession is only a continuation of their injustice."

Id. (quoting Jean Domat who was echoing the words of St. Thomas Aquinas).

169. *See* Panesar, *supra* note 12, at 123. There is a higher order that governs how any positive law is created and administered. *Id.* There are certain moral principles which depend on the nature of the universe and which are discovered by reason. It is these principles, such as the right to life, liberty, and pursuit of happiness, which form natural rights and are protected by natural law. Such laws are not prescribed by state, they exist before the state and are higher laws which all states and legal systems therein are subject to. *Id.*

In addition, Heinrich Pesch addressed this exact concept, stating:

when it truly seeks the common good.[170] For this reason, states that do not require "good faith" adverse possession apply law that is contrary to Catholic Social Teaching and Canon Law because, absent good faith, states would be rewarding "bad faith" or behavior that equates to theft.[171] This violates Canon Law by causing harm to another which is an unacceptable consequence of an adverse possession claim. The Colorado case is a prime example of how the objective approach to adverse possession rewards theft and does not follow God's Commandments nor Canon Law. [172]

> In the process, however, the obligation of the legislative [law making] parties remains, to the effect that all legislation must first also be tested according to the law. They have by no means a blanket power for legislation, because God cannot contradict Himself and He cannot obligate the citizens to observe a law of the state whose content is undoubtedly opposed to the natural law.

4 HEINRICH PESCH, LIBERALISM, SOCIALISM AND CHRISTIAN SOCIAL ORDER: THE CHRISTIAN CONCEPT OF THE STATE 87 (Rupert J. Ederer trans., The Edwin Mellen Press 2001) (1898).

170. Alexander Laschuk, *The Role of Canon Law in the Catholic Tradition and the Question of Church and State*, CARDUS (Jan. 14, 2019), https://www.cardus.ca/research/law/reports/the-role-of-canon-law-in-the-catholic-tradition-and-the-question-of-church-and-state.

171. According to Heinrich Pesch, a devout Catholic and an ethicist who wrote in the area of economics,

> [w]hat violates the moral law will never, under any circumstances, be proven by reason to be correct. What is immoral can never end up being economically correct. Therefore, ethics serves as a test of the propriety of economic theses and as a kind of beacon-light for economic research. Anyone who disregards this beacon-light will end up ship-wrecked in the vast, rocky sea of error.

HEINRICH PESCH, ETHICS AND THE NATIONAL ECONOMY 65 (Rupert Ederer trans., IHS Press 2004) (1918).

It may well be the case as a practical matter, even in jurisdictions that do not expressly require good faith, that few adverse possessors who have not acted in good faith can gain limitation title in a contested judicial proceeding. Helmholz, *supra* note 128, at 332–33. Professor Helmholz reviewed over 850 adverse possession cases and noted that even though the jurisdictions followed an objective approach, courts rarely allowed adverse possession claims when the adverse possessor occupied the land in bad faith. *Id.*

On the other hand, other legal scholars have a differing view of adverse possessors as an example of intentional property outlaws who engage in "acquisitive lawbreaking." Eduardo Moises Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 UNIV. PA. L. REV. 1095, 1102 (2007).

172. The Seventh Commandment directs: "You shall not steal." Catholic Church teachings state:

> **2408** The seventh commandment forbids theft, that is, usurping another's property against the reasonable will of the owner. There is no theft if consent can be presumed or if refusal is contrary to reason and the universal destination of goods. This is the case in obvious and urgent necessity when the only way to provide for immediate, essential needs (food, shelter, clothing . . .) is to put at one's disposal and use the property of others.

CATECHISM OF THE CATHOLIC CHURCH, *supra* note 11, ¶ 2408.

As it stands now, the Canon Law's requirement of good faith adverse possession cannot be reconciled in most jurisdictions in the United States. The majority "objective" approach—while perhaps allowing for easier administration of claims—still permits the bad faith possessor to acquire title following a knowing trespass. The "bad faith" approach outright endorses it. Consequently, in those jurisdictions that either (a) tolerate, or (b) require bad faith occupation, acquisition of property via a knowing trespass will never be in harmony with Canon Law.

However, one way to morally reconcile adverse possession under bad faith with Catholic teaching is to require the "bad faith" adverse possessor to compensate the title holder for the theft of her property.[173] This approach would not require that an adverse possessor necessarily have "good faith" intent to acquire property through adverse possession; however, it *would* require that the adverse possessor pay for the land acquired in "bad faith."

Under either approach, courts should be required to make determinations of intent on the part of the one claiming adverse possession. While a theoretical argument could be made that requiring courts to inquire into the mindset of the trespasser would lead to speculation and complicate the administration of claims, in practice that has not been the case—at least not in Colorado.[174] Indeed, since Colorado amended its adverse possession statute

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173. *Id.* ¶ 2412 ("In virtue of commutative justice, reparation for injustice committed requires the restitution of stolen goods to their owner . . . . Those who directly or indirectly, have taken possession of the goods of another, are obliged to make restitution of them, or to return the equivalent in kind or in money . . . .")

The Church also addresses "satisfaction":

> Many sins wrong our neighbor. One must do what is possible in order to repair the harm (e.g., return stolen goods . . . pay compensation for injuries). Simple justice requires as much. But sin also injures and weakens the sinner himself, as well as his relationships with God and neighbor. Absolution takes away sin, but does not remedy all the disorders sin has caused. Raised up from sin, the sinner must still recover his full spiritual health by doing something more to make amends for the sin: he must 'make satisfaction for' or 'expiate' his sins.

Id. ¶ 1459. See also Sherman, supra note 64, at 151 (explaining that if the bad faith adverse possessor restores the property to the rightful owner, the possession will be "purge[d] . . . of its taint," and the property will "again [be] capable of prescription").

174. *See* Merrill, *supra* note 79, at 1143 (explaining that a possibility outlined to help evaluate subjective good faith is "color of title" which is "a requirement that the [adverse possessor] enter the property pursuant to a deed or other presumptive evidence of title which later turns out to be invalid"). Merrill claims though that the true color of title claim cannot be satisfied by the typical case of mistaken boundaries. *Id.*

in 2008, and required findings of "good faith" intent, "[t]he effect has been to severely limit the amount of adverse possession claims [filed]."[175]

Arguments in favor of requiring the bad faith adverse possessor to compensate the dispossessed title holder for land knowingly taken have been recommended by several scholars over the years;[176] however, none have addressed this issue from the Catholic perspective. Requiring good faith, or, in cases of bad faith, that the knowing trespasser pay for the land, underscores the sense of right and conscience that underpins the natural law and is written on the heart of every man. For "right and justice [are] ultimately . . . laws of the moral world order which flow from the qualities of God, which make themselves known as such by the organ of conscience . . . as the will of God and as a power which transcends the human being."[177]

A good example of claim of right without color of title that could fall under this as a legitimate adverse possession claim is often between neighbors where there is a mistaken belief as to the boundary line. This is evidenced by the use for the statutory period and that the adverse possessor had a true mistaken belief that the property was hers. *See* Helmholz, *supra* note 128, at 338 (describing Reeves v. Metro. Tr. Co., 498 S.W.2d 2 (Ark. 1973)).

175. Jennifer Hiatt & Johnathan Hladik, *Adverse to Change: A Modern Look at Adverse Possession*, CTR. FOR RURAL AFFS., Jan. 2019, at 1, 7.

176. *See* Merrill, *supra* note 79, at 1145. Merrill suggests that this solution would, in operation, change a property rule into a "liability rule." Merrill explains that it converts by "requiring the [adverse possessor] to pay the [true owner] fair market value of the property in order to retain possession and obtain a new title." *Id.* Merrill, who addressed this as a potential solution, has suggested that the date for measuring the market value to determine restitution should be the date that the adverse possession commences, because, in adverse possession claims, title relates back to the date of the original entry. *Id.* at 1147 n.78. *See also* Cherek, *supra* note 75, at 320–21.

Kristine Cherek opined that:

> States should also consider whether to follow the Colorado approach, which grants the authority to assess damages against the successful adverse possession claimant and award compensation to the owner who lost title to his or her real property. Specifically, states should consider whether to require adverse possession claimants to pay fair value for the real property acquired and/or reimburse the owner who lost title for other expenses (such as the amount of any real estate taxes paid during the statutory period of adverse possession, as provided in the revised Colorado statute). Lastly, states should consider whether such payments should be required in every case or whether that determination should be left to the discretion of the courts, as is the case under the revised Colorado statute.

Id.

177. 3 HEINRICH PESCH, LIBERALISM, SOCIALISM AND CHRISTIAN SOCIAL ORDER: PRIVATE PROPERTY AS A SOCIAL INSTITUTION 149 n.36 (Rupert J. Ederer trans., The Edwin Mellen Press 2001) (1900).