

## MORE ON SUBJECTIVE INTENT: A RESPONSE TO PROFESSOR CUNNINGHAM

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Readers of the lead article in this issue of the *Law Quarterly* will know that in 1983 I published an article examining the cases relating to adverse possession decided between 1966 and that date.<sup>1</sup> The examination led me to conclude that, whereas most hornbooks stated the law in terms of an objective test of physical possession and the consequent accrual to the record owner of an action in ejectment,<sup>2</sup> the cases rarely approached the subject that way. Instead, the courts asked whether adverse possessors had met a series of affirmative tests. One of these tests related to their intent: had the adverse possessors honestly thought of themselves as the owner of the property they were possessing while the statute ran? I concluded that the courts regularly required an affirmative answer to this question before holding that claimants had met the requirements of "hostility" and "claim of right" necessary for an adverse possession claim to succeed. Such an approach seemed fundamentally inconsistent with a "pure possession" approach to the law of adverse possession.

My examination thus suggested that subjective intent and good or bad faith on the part of adverse claimants had played a considerable role in the decision of adverse possession cases. This result, I found, was not normally accomplished by making good faith a positive requirement of the law of adverse possession. It rather appeared implicitly in the interpretation given to the legal requirements for acquisition of title by adverse possession. It appeared also in explicit and frequent judicial statements. And it appeared in the pattern of facts found where both successful and unsuccessful claims had been made. I concluded that

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1. Helmholtz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983).

2. See, e.g., 3 AMERICAN LAW OF PROPERTY §§ 15.2, 15.4 (A. Casner ed. 1952) (hereinafter cited as AM. L. PROP.); W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 112 (3d ed. 1965).

“[s]ubjective factors make a difference in litigation,” and that the “pure possession” approach to adverse possession was out of step with the law applied in practice.<sup>3</sup>

The lead article subjects the conclusions reached in my earlier article to sustained attack.<sup>4</sup> In it Professor Roger Cunningham, a respected writer on the law of property and the co-author of a recent hornbook on the subject,<sup>5</sup> argues that my characterization of the cases was seriously misleading and that my conclusions were false. The editors of the *Law Quarterly* have kindly invited me to respond to Professor Cunningham’s criticism. Both because a fresh review of the evidence shows that the conclusions drawn in the earlier article were correct, and because some important larger issues of legal scholarship are ultimately involved in the dispute, I have agreed to continue the debate with Professor Cunningham.

This response is divided into three parts. The first part discusses what I believe to be the essential difference between the “pure possession” view of adverse possession, which Professor Cunningham endorses, and the law as I believe it has been applied in the majority of recent American cases. The second part covers in detail the criticisms Professor Cunningham makes of the reasoning and the descriptions of the case law in my original article. The third part raises three broader issues relating to scholarship on the law of property. My aim in this response has thus been: first, to vindicate the conclusions of the initial article, and second, to raise some important questions about the legitimate tasks and responsibilities of legal commentators.

## I. THE DISPUTE STATED

The difference between the approach to the law of adverse possession which Professor Cunningham describes as the “accepted views” and my reading of the case law is not hard to state. According to the former, the state of mind of the adverse possessor should be, and in fact is, legally irrelevant in determining whether he will gain title to the land in dispute

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3. 61 WASH. U.L.Q. at 333.

4. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholtz*, 64 WASH. U.L.Q. 1 (1985) (hereinafter cited as *Reply*).

5. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* (1984). This book had not appeared at the time of publication of my initial article and consequently was not cited therein. Professor Cunningham is in no way, therefore, open to the charge of having written in response a direct attack on his own work.

after the statute of limitations has run. According to my reading, most of the recently decided cases contradict this position. Whether for good or for ill, the possessor's state of mind counts in the actual decision of cases, and courts have commonly preferred the claims of good faith adverse possessors to those of possessors who knew they were trespassing while the statute ran.

Professor Cunningham concentrates his *Reply* on my evaluation of the case law relating to adverse possession. He is right to do so, because the dispute between us ultimately comes down to what the cases show. However, an unintended consequence of his concentration, and particularly of his insistence that a possessor's good or bad faith plays no role whatsoever in the cases, is to obscure slightly the essence of the subject under discussion in the first article. It is important to begin with a statement of the view found in the commentaries that seemed inconsistent with the direction of recent cases surveyed in the article. That view has been most fully, forcefully and influentially set out in the *American Law of Property*.

The *American Law of Property* takes an uncompromisingly objective approach to adverse possession. This approach is based on a reasonable and strongly held belief that because the statute of limitations is the basis of the law of adverse possession, the essential question in all adverse possession cases is whether the statute bars the claim of the record owner. Consequently, the inquiry must always be focused on whether the occupant's physical actions would have given rise to an action of ejectment by the property's record owner: "[T]he acquisition of title is merely an incident to the barring of the right of action of the one person who could have evicted the adverse possessor."<sup>6</sup>

In deciding whether the action is barred, this view holds that the adverse possessor's state of mind and knowledge of the ownership of the land are wholly immaterial: "If he has possession in fact, irrespective of his mental attitude toward the title of the true owner, he has a possessory title subject to the owner's right of action in ejectment, and the statute of limitations runs against that action."<sup>7</sup> Unless the adverse possessor oc-

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6. AM. L. PROP., *supra* note 2, § 15.4, at 771. At several points in his *Reply*, Professor Cunningham points out that ejectment has fallen out of ordinary use in favor of actions to quiet title. This is correct, but nothing turns on it for present purposes because the requirements for gaining title by adverse possession do not vary according to the form of action. I have, therefore, not thought it necessary to deal with this aspect of the *Reply*. I confess to some puzzlement as to why he thought it useful to compile the lengthy list of cases found in his *Reply*, *supra* note 4, at 62 n.245.

7. AM. L. PROP., *supra* note 2, § 15.2, at 762.

cupies the land with the record owner's permission, or is estopped to assert title by having caused him to forego pressing an action in ejectment, it does not matter what the possessor thinks or knows:

A claim of title on his part is not essential to the maintenance of ejectment against him. Even positive affirmative evidence that he at all times admitted that he occupied the premises without right or title, in the absence of proof that he occupied as licensee or tenant of the true owner or of notice of such statements to the owner, would not make him any the less a trespasser and disseisor, liable to a suit in ejectment.<sup>8</sup>

It follows, under this view, that "adverse possession must necessarily mean any wrongful possession that subjects the wrongdoer to the action of ejectment."<sup>9</sup>

The appeal of this statement of the law, as I wrote in the initial article, has always been very strong.<sup>10</sup> Indeed, I taught it for more than a few years, trying to induce my students to fix their gaze solely on when a cause of action had accrued and dismissing cases that failed to adopt that clear-headed approach as aberrations from the accepted norm. But as I read more cases, and as I wondered why there were so many,<sup>11</sup> the effort became too great to continue with confidence. What I discovered in the cases was not an unblinking focus on physical acts of occupation and the consequent accrual of a cause of action, but a continuing regard for the occupant's intent and even a concern for honesty on his part. The opinions I read kept stating that adverse possession depended on intent.<sup>12</sup> Rereading those cases, and others besides, only confirms that conclusion. Nothing in Professor Cunningham's *Reply* demonstrates the contrary.

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8. *Id.*

9. *Id.* at 762-63.

10. 61 WASH. U.L.Q. at 331-32.

11. The genesis of my research was a student "challenge" in first year property. While I was endeavoring to convince my students of the importance of the subject, one raised his hand and asked, "Does any of this ever come up in practice?" Not being entirely sure of the answer, I said that I thought so, but suggested (maybe it was a little more than a suggestion) that the challenger do some research and report back to the class. His subsequent report about the abundance of cases is adequately reflected in *Reply, supra* note 4, at 2 n.5. I wish that I could now recall the student's name.

12. See cases cited in 61 WASH. U.L.Q. at 341 nn.44 & 45. For older statements of this oft-repeated principle, see *Lewis v. New York & Harlem R.R.*, 162 N.Y. 202, 220, 56 N.E. 540, 545 (1900) ("The character of the possession depends on the intention with which entry is made and occupation continued."); *Gogel v. Blazofsky*, *Leh. Cty. L.J.* 369, 376 (Pa. 1959) ("[I]t is the element of intention that guides the entry and fixes its character."); *Dingman v. Spengler*, 371 S.W.2d 416, 421 (Tex. Civ. App. 1963) (quoting prior cases) ("No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so.").

Professor Cunningham devotes the major part of his *Reply* to an effort to show the absence from the cases of a distinction between “good faith” and “bad faith” possession. He finds that no American judges have applied a “good faith” requirement in adverse possession cases, and he concludes that therefore the views in the *American Law of Property* and other hornbooks must be a correct statement of the law as applied in practice. This argument both distorts the point of my initial article and supposes that the absence of an express “good faith” requirement must mean that courts take the opposite approach. That is not what the recent cases show.

American courts, I argued in the initial article, do not draw an explicit line between “good faith” and “bad faith” possessors. Instead they deal with the subjective intent of the possessor under the requirements of “claim of right” and “hostility”.<sup>13</sup> These requirements are sufficiently elastic to encompass inquiries into the adverse possessor’s subjective intent. Indeed, they lead naturally to such inquiries. They permit American courts to take account of evidence of the possessor’s state of mind when such evidence exists. And most of the recent cases also evince a general unwillingness to decide in favor of possessors unless they have actually and honestly regarded themselves as the true owners of the property during the statutory period. It is a strong proclivity, but it is not accomplished by application of a black letter rule. The question separating us is not, therefore, whether there is a “good faith” requirement in adverse possession cases, but whether courts treat adverse possession claims differently under the requirements that do exist, depending on the good faith or the bad faith of the claimant.

An obvious first step in answering this question is a definition of terms. Professor Cunningham nowhere defines “good faith” or “bad faith,” and I suspect he does not think they mean very much.<sup>14</sup> However, one may justly object that my initial article did not define these terms either. In the context of adverse possession law, “good faith” means that the claimant believed that the land belonged to him. “Bad faith” means the opposite: continuing trespass the claimant knows to be without right. This

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13. 61 WASH. U.L.Q. at 332 (“It is enough that the question may be raised under the rubric ‘claim of right.’”); *id.* at 357 (“The elasticity of the terms ‘hostility’ and ‘claim of right’ allows them to do so”).

14. He invariably put them into quotation marks, and when a statute expressly requires good faith, he minimizes its importance. *See, e.g., Reply, supra* note 4, at text accompanying 25 n.81 & 37 n.137.

definition is essentially identical with that found in the law of sales,<sup>15</sup> and in most instances it will come down to deciding whether the claimant knew of the superior rights of a third person. "Bad faith" thus has no necessary connection to hardness of heart or design to appropriate wrongfully, although of course it may involve both. "Good faith" need not imply purity of heart or the absence of greed, although it may go along with them. It means an absence of knowledge of the state of the title.<sup>16</sup> To quote from a commentary on the civil law, "Bona fides may be described as belief that the holder had a right to hold it as his. Usually, but not always, . . . it rests on mistake."<sup>17</sup>

Successful adverse possession normally depends upon a mistake. Nothing appears more clearly in the recent cases. Someone purchases property, and a hedge, fence or road is pointed out as a proper boundary. The purchaser makes use of the land up to that boundary, believing that he has every right to do so. However, at some later time, a survey turns up a mistake. The property line was actually somewhere else, and the purchaser had bought less land than he had assumed. The question will then be whether the purchaser had used the property for long enough and with sufficient indicia of actual dominion for title to have accrued. This is the standard sort of good faith possession that makes for successful claims. Thus the frequent emphasis in the case law is on a "mistaken belief" on the part of successful adverse possessors of real property.<sup>18</sup>

Bad faith in adverse possession claims is founded upon occupation of another's land, knowing that the occupation is without right. Sometimes this occurs when one person, learning of the "wonderful land acquisition device" called adverse possession, deliberately seeks to appropriate some land that does not belong to him.<sup>19</sup> More often, it occurs by what might be called a chain of circumstance. A plot of land is vacant, and the

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15. R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 9.6 at 199 (W. Raushenbush 3d ed. 1975).

16. *See, e.g., 25 Corp., Inc. v. Eisenman Chem. Co.*, 709 P.2d 164, 172 (Nev. 1985); Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C.L. REV. 37, 59-61 (1985).

17. W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 244 (P. Stein 3d ed. rev. 1963).

18. *See, e.g., Sun Bank of Ocala v. Brennan*, 455 So. 2d 1339, 1339-40 (Fla. App. 1984) ("The true question is whether, *when he acquired possession*, he believed it to be his own.") (*quoting Goodno v. South Florida Farms Co.*, 95 Fla. 90, 116 So. 23 (1928) (emphasis in original)).

19. *See Charlton v. Crocker*, 665 S.W.2d 56, 63 (Mo. App. 1984). The courts have also been less willing to find the outward manifestations of possession sufficient to meet the test of "actual possession" when there has been evidence of intent to appropriate without right. *See, e.g., Pettis v. Lozier*, 217 Neb. 191, 239 N.W.2d 372 (1984) (a revealing end to *Pettis v. Lozier*, 205 Neb. 802, 290

nearby land owner uses it to grow some food, to pasture an animal, or to erect a shed.<sup>20</sup> Alternatively, he may want simply to enhance the value of his own property by beautifying the nearby land.<sup>21</sup> He knows that the land is not his, but supposes that no one would really object. Years pass and the encroachment begins to seem normal. Then some other event, like building plans by a purchaser of the land or even a quarrel with the neighbor over some extraneous matter, triggers a dispute over the land. At that point the adverse possession claim is made. What had begun as a convenience becomes a claim to the land itself, and the indisputable fact of physical occupation buttresses the claim.

My conclusion in reviewing the recent American cases was that courts do not treat these two situations alike. Although exceptions exist and the facts of some cases have been tangled enough to warrant a different result, courts have normally awarded title only to the first sort of claimant, the claimant who has occupied land under a mistaken belief that it was his. They have done so, not by applying a "good faith" requirement, but by holding that the second sort of claimant lacked the necessary "claim of right" or "hostility" that the law of adverse possession requires. What is missing from the bad faith possessor's claim is the "mind of the owner." He cannot have made a "claim of right" because he knew that someone else owned the land. For instance, in a recent Arkansas case, the evidence showed that the claimant had "once told his son that he recognized some interest of the [record owners] in the disputed property."<sup>22</sup> The court held that this was good evidence of a "lack of hostile intent" and that the claim failed for that reason. Such decisions, I concluded, are contrary to a "pure possession" view of the law, and they

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N.W.2d 215 (1980), cited in 61 WASH. U.L.Q. at 348 as one of the exceptional cases in which bad faith possession (as it then seemed) would ripen into title).

20. See, e.g., *Hensz v. Linnstaedt*, 501 S.W.2d 463, 465 (Tex. Civ. App. 1973) (no "claim of right" and therefore no adverse possession when claimant had first entered land to "keep it clean" and had planted crops "to get a little return for the work").

21. See, e.g., *Gerwitz v. Gelsomin*, 69 A.D.2d 992, 992, 416 N.Y.S.2d 127, 128 (1979) ("They entered the land to remedy an eyesore next to their home and use the land as they could." The court held that such entry was "not hostile to the owner and under a claim of right.>").

22. *Dillaha v. Temple*, 267 Ark. 793, 590 S.W.2d 331 (1979). See also Professor Cunningham's treatment of the case in *Reply*, *supra* note 4, at 22 n.74. He claims that the court "did not make clear the significance of the disclaimer," but that a telephone conversation between the record owner and the claimant in which there had been some talk about "working out" the boundary line "might well provide an adequate basis to estop the adverse claimant." This is pure invention. There is not a word about estoppel in the opinion, and it says clearly that the recognition of a better title was what counted. The court emphasized this by stating that "mere possession is not enough to sustain a claim of adverse possession." 267 Ark. at 797, 590 S.W.2d at 333.

show the importance of subjective intent in recent adverse possession cases.

With such cases, which lay stress on the possessor's intent, it is useful to contrast one that does not. There are cases that have applied the "pure possession" test found in the *American Law of Property*. A Massachusetts decision of 1892, printed in Professor Cunningham's casebook, is one example.<sup>23</sup> In that case, the evidence showed that the claimant had erected a fence extending onto his neighbor's land and maintained it for more than 20 years. It also showed that the claimant "did not honestly believe that, by the deed of Hadley, he acquired a title to the land" so enclosed.<sup>24</sup> The court nonetheless held in favor of his adverse possession claim. "[T]he fact that the tenant did not honestly believe that he had title to the land inclosed," the opinion states, "has no material bearing on the case."<sup>25</sup> The statute of limitations and the undisputed physical possession for the statutory period determined the outcome.

If the recent cases followed the approach of this early Massachusetts case, then Professor Cunningham would be right to criticize the conclusions found in my article. But they do not. The majority of recent cases have entered "the murky waters" of the possessor's subjective intent. They have consistently approached the problem under the assumption that "the key element in determining whether the possession is hostile and adverse is the state of mind of the possessor,"<sup>26</sup> and they have consistently held that "naked possession unaccompanied with any claim of right will never constitute a bar."<sup>27</sup>

Professor Cunningham argues that these recent opinions do not draw an express distinction between "good faith" and "bad faith," and asserts that they have "simply held that the adverse claimant failed to establish one or more of the usual elements of adverse possession."<sup>28</sup> The second

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23. *Warren v. Bowdran*, 156 Mass. 280, 31 N.E. 300 (1882), printed in O. BROWDER, R. CUNNINGHAM & A. SMITH, *BASIC PROPERTY LAW* 58 (4th ed. 1984). See also *Patterson v. Reigle*, 4 Pa. 201, 45 Am. Dec. 684 (1846), also printed in *BASIC PROPERTY LAW*, at 61.

24. 156 Mass. at 282, 31 N.E. at 301.

25. *Id.*

26. *Schertz v. Rundles*, 48 Ill. App. 2d 672, 674, 363 N.E.2d 203, 204 (1977) (adverse possession established under the principle that "[p]ossession by one believing that he holds title is hostile even though that person is, in good faith, mistaken, as to his belief.").

27. *Ellis v. Jansing*, 620 S.W.2d 569, 572 (Tex. 1981) (quoting prior Texas cases).

28. *Reply, supra* note 4, at text accompanying 36 n.133. After quoting a statement from a case to the effect that "[i]ntent is the controlling factor," Professor Cunningham adds, "This, of course, merely states the view that a 'claim of right,' not necessarily in 'good faith,' is essential for 'adverse possession'." See also the examples in *id.* at 40 n.151 & 59 n.234.

assertion is the main point of difference between us. Nothing hinges on what exact form of words the courts use. In my view, his assertion amounts to a dismissive device, used to avoid confronting both the facts of the cases and the statements found in them. By stating that the cases “simply hold” that a “usual element” of adverse possession had not been established, Professor Cunningham turns his back on the main task of a commentator: analysis of the reasons the “usual element” was found to be missing. Such analysis would have revealed that when possession is held with knowledge of the state of the title, the element of “hostility” or “claim of right” has normally been found lacking and the adverse possessor’s claim has failed. By stressing repeatedly the absence of an express “good faith” requirement in the cases, he fails to address the real question: the relevance accorded to subjective intent in determining whether the possessor has met the requirement of “hostility” or “claim of right.” Consequently, his analysis fails to describe accurately and fully the nature of adverse possession law as it has actually been applied in practice.

Before moving to a more detailed examination of the evidence itself, I want to stress two points that my initial article did *not* make. Professor Cunningham’s *Reply* shows that there may have been some ambiguity about these points in my presentation, and to the extent possible, I want to clear up what may have been only misunderstanding. First, it was not my contention that *no* recent cases supported the position taken in the *American Law of Property*. There are such cases, as I noted in more than one place.<sup>29</sup> Nor did I argue that all cases come down to a simple question of whether the occupation had been in good or bad faith. Many of the cases are considerably more complex. They sometimes involve *both* objective questions of the sufficiency of physical occupation, and subjective questions of the occupant’s state of mind. Consequently they create real uncertainty of result. This complexity and the resulting uncertainty was meant to be one of the principal points my article made.

When Professor Cunningham professes, as he repeatedly does,<sup>30</sup> to find errors because I have been forced to “concede” a point, he has misunderstood and misrepresented my attempt to account for this complexity in the cases. Perhaps this is my fault. But I want to be clear. I was not describing a black letter rule that courts apply mechanically in ad-

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29. See, e.g., 61 WASH. U.L.Q. at 347 (“a proclivity, not an invariable rule”); *id.* at 348 (recognizing the existence of cases that “truly fit the pure possession model of adverse possession.”).

30. *Reply*, *supra* note 4, at text accompanying 23 n.76, 25 n.82, 45 n.179, & 61 n.243; see also *id.* at 29 n.98.

verse possession cases.<sup>31</sup> I was discussing the adequacy of the “pure possession” standard that dominates academic commentaries. That standard is inadequate to explain the cases because it dismisses as irrelevant the state of mind of the adverse possessor, whereas the cases show that the possessor’s intention is an important fact in establishing adverse possession. But I did not maintain that the possessor’s state of mind is the only element involved, nor did I claim that there was an absolute rule. The recent decisions, I wrote, do not show that the possessor must “plead and prove that he acted in good faith.”<sup>32</sup> But what an adverse possessor knew about title to the land matters in the decision of cases,<sup>33</sup> and “if he knows that he is trespassing [he] stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already.”<sup>34</sup> A rereading of the cases amply confirms this statement.

Second, and equally important, my initial article did not *advocate* the adoption of a “good faith test” in adverse possession cases. Indeed, I expressly stated that adoption of such a test would not be a good idea, a point that Professor Cunningham’s *Reply* does not notice. I wrote, and I meant, that express adoption of such a test would encourage “even more speculative explorations of probable states of mind than is currently possible. Such explorations are not to be wished for.”<sup>35</sup> It would, I said, be *possible* to impose a requirement of good faith in all adverse possession cases. That is generally the rule under legal systems based on Roman law,<sup>36</sup> and many American statutes require it in special situations.<sup>37</sup> But it was never my argument that adoption of such a general rule would be a good idea.

Several people who read my earlier article have asked me whether I “approved” of the case law I tried to describe. Some have said that the cases were simply “wrong.” I have not felt entirely comfortable in answering them. In terms of principles of good statutory construction and of intrinsic desirability, I understand what they mean. In fact I largely agree with them. A standard that focuses only on physical facts of pos-

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31. 61 WASH. U.L.Q. at 332.

32. *Id.*

33. *Id.* at 333.

34. *Id.* at 332.

35. *Id.* at 357 (“very little would be gained and . . . something good might be lost.”).

36. *Id.* There is also a good and accessible discussion in W. BUCKLAND, *supra* note 17, at 243-46.

37. *See id.*, at 356-57 nn.96-98.

session accords much better with the statute of limitations than does one that allows inquiries into subjective intent. It also avoids difficult evidentiary questions and the temptation for adverse possessors to commit perjury regarding their intentions. On the other hand, I hesitate to close my eyes to the evidence and the arguments to the contrary. There *is* something wrong in claiming land when one has known all along that it belonged to someone else. It is impossible not to feel differently about such bad faith possessors than one does about claimants who have made an honest mistake and relied upon it. I tried, therefore, to describe the case law evidence as accurately as I could, without attempting to resolve the question of desirability. It mistakes the point of my article to treat it as if it were a normative argument in favor of the application of a requirement of good faith in all adverse possession cases.

## II. THE DISPUTE AND THE EVIDENCE

This section is devoted to an examination of Professor Cunningham's specific attacks on my earlier article. By nature, it must go into detail at points, and readers who have only a general interest in the subject may wish to skip to the final section which raises some more general issues. Readers who have a serious interest in the law of adverse possession, and those who enjoy controversies among academics, should read on.

I shall try to respond to all the points Professor Cunningham's *Reply* raises and to discuss all the cases that appear in the text of his article, clarifying their meaning, defending their relevance to the question of subjective intent, and confessing error where I have committed error. It will not be possible to discuss in detail every one of the cases that Professor Cunningham says "do not really" support my conclusions, but I shall try to summarize what they show. A few points, such as my allegedly excessive use of intermediate appellate court opinions,<sup>38</sup> I have left for the final section because they raise more general questions about legal scholarship. A few other cases, mostly decided since the original article appeared, are also discussed or cited in the notes, when they help to clarify and amplify the issues.

### A. *Initial Arguments*

Professor Cunningham opens his *Reply* with what seems a minor point. He states that my characterization of the number of recent ad-

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38. *Reply*, *supra* note 4, at 2 n.6.

verse possession cases as “abundant” and indeed “overabundant”<sup>39</sup> is wrong, because the recent Decennial Digests contain almost as many pages devoted to the law of bailments as to the law of adverse possession.<sup>40</sup> What amounts to “overabundance” is a matter of opinion, and Professor Cunningham is certainly entitled to his own views. But the comparison he draws with the law of bailments does not make the point for him. In lack of clear guidelines for the formation of the relationship, in uncertainty about standards of liability, and in difficulty of factual determination when third parties enter the picture, the law of bailments takes a back seat to few areas of the common law in raising problems of application. The test is not whether the principles of the law in question are old. The test is whether they are capable of easy application to the variety of factual situations that occur in human life so that quarrels can be settled without litigation. On that score, bailments and adverse possession stand about the same. The law of trespass would seem to make, and in fact does make,<sup>41</sup> a better contrast.

Next, Professor Cunningham’s *Reply* asserts that I have raised a false “dichotomy”<sup>42</sup> between the cases that invoke the five positive requirements of the law of adverse possession (notoriety, hostility, exclusivity, continuity, and actuality) and the view that adverse possession cases are decided simply by determining when a cause of action accrued. He further argues that I have confused the law of adverse possession with the law of prescription, which he says has depended on the theory of the “lost grant” in the historical development of American case law.<sup>43</sup> From reading only the *Reply*, a reader might suppose that I had invented the “dichotomy” between the two approaches and that I had said that a “lost grant” fiction figured in adverse possession cases.<sup>44</sup> Neither is the fact.

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39. *Id.* at 2 n.5. Professor Cunningham uses the stronger term “excessive,” but I make nothing of this. However, it occurs to me that either characterization would be technically wrong under my own reading because there is about as much litigation as the requirements for adverse possession would predict.

40. *Id.* (169 pages devoted to “Adverse Possession” and 112 to “Bailments” in the 8th Decennial Digest).

41. The same 8th Decennial Digest devotes 48 pages to cases on “Trespass.” Neither of us pretends, I think, that these figures rise to the level of statistics.

42. *Reply, supra* note 4, at 4 (“the dichotomy suggested by Professor Helmholtz’s assertion is false.”).

43. *Id.* at 6-8 nn.16-21.

44. I have not discussed the question of the “lost grant” in the text because I made no use of it in the initial article, because nothing depends on it, and because the point seems trivial to me. As Professor Cunningham rightly says, the fiction of the lost grant was developed in the law of incorporeal hereditaments to permit their acquisition by prescription in the absence of an actual grant. But

The fact is that the “dichotomy” between the two approaches is one of the most salient themes of the *American Law of Property*.<sup>45</sup> Its author argues that the only relevant question is whether a cause of action has accrued, and dismisses common judicial invocation of the five requirements as a wrong-headed approach. He writes,

It is amazing that the courts in declaring these supposed requirements of adverse possession have so completely failed to consider the basic question involved in the acquisition of title by the running of the statute of limitations against the true owner’s right of ejectment, viz., whether the true owner had a right of action against the wrongful possessor.<sup>46</sup>

In other words, the *American Law of Property*, far from arguing that the five requirements are an adequate substitute for the “availability of ejectment” test, as Professor Cunningham believes them to be, in fact takes the opposite position: that there is a crucial difference between them. My article’s treatment of this subject was based on the observation that the recent cases have continued to rely on the five affirmative requirements and have equally continued to ignore the commentator’s approach, which confines attention to the “basic question” of when the record owner’s cause of action accrued. The substantive differences between Professor Cunningham and me on the nature of the case law are therefore not very great on this score. He makes the same observation about the recent cases.<sup>47</sup> His conclusion that the “dichotomy” makes no difference is what separates us.

Initially, one might suppose that there was a good deal to be said for Professor Cunningham’s view. In most cases, either approach will yield the same result. Moreover, the law’s requirement of notoriety seems designed to alert the record owner to the existence of his right of action against someone wrongly occupying his land.<sup>48</sup> Nevertheless, there is a real, and important difference between us on this issue. The *American Law of Property* was right to draw the distinction between the approach

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a system of prescription in no way depends on such a fiction. See, e.g., B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 122-30 (1962). Nor has it figured in much adverse possession litigation. The question is how the law deals with long-time possession of property not founded on record title.

45. AM. L. PROP., *supra* note 2, § 15.4 at 773-74.

46. *Id.* at 774.

47. See 61 WASH. U.L.Q. at 334-35; *Reply, supra* note 4, at 3-4 (“Concededly, these ‘positive’ requirements . . . are the subject of more judicial discussion than the question whether a cause of action against the adverse claimant has accrued to the true owner.”).

48. However, the AMERICAN LAW OF PROPERTY, *supra* note 2, § 15.4, at 769, holds the opposite, rejecting “the implication that there must be notoriety of possession so as to acquaint the owner thereof . . . if possession in fact exists.”

characteristic of prescription and that embodied in the "availability of ejectment" test, and Professor Cunningham is mistaken in supposing that the distinction makes no difference.

It does make an important difference because only the former approach permits courts naturally to take account of the actual intent of the possessor. If courts examined only when a cause of action had accrued to the record owner, they would have little cause to consider whether the possessor had regarded himself as the owner of the land. But if, on the other hand, they ask whether the occupant has met a series of affirmative tests, one of which is "hostility" or "claim of right," then it will be much easier for them to examine the possessor's subjective intent. The "pure possession" test depends solely on what externally verifiable facts the *record owner* knew or could have known; the approach prescription uses depends in part on what the *adverse possessor* knew or could have known.<sup>49</sup>

This is the reason the *American Law of Property* was insistent that the "basic question" in adverse possession cases should always be whether the statute had run, not whether the five affirmative requirements had been met. Also it is why it is significant that the recent cases take the prescriptive approach in virtually all situations. This is what I meant in speaking of the "irrelevance" of the accrual of the cause of action. Not that the moment the statute starts to run is literally without significance—when the elements of adverse possession begin starts the clock. But it *is* irrelevant, and positively misleading, as a descriptive measure of the way most American courts have decided whether the five positive requirements of adverse possession have been met. And this has had important consequences in opening up questions of the possessor's subjective intent.

In discussing the significance of the accrual of a cause of action, Professor Cunningham takes me to task for referring to adverse possessors as "trespassers,"<sup>50</sup> even adding an unflattering "(sic)" to the term's use in a quotation taken from my article.<sup>51</sup> This seems trivial, and I am not sure why Professor Cunningham raised the point, but the usage is entirely defensible. There is, as he states, a real distinction between a single act of

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49. The classic statement is that of James Barr Ames: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." See Ames, *The Nature of Ownership*, in *LECTURES ON LEGAL HISTORY* 192, 197 (1913).

50. *Reply*, *supra* note 4, at text accompanying 8 n.25.

51. *Id.* at text accompanying 23 n.77.

trespass and the continued occupancy that will give rise to an adverse possession claim. It is also correct to say that in most cases the record owner in adverse possession cases will be more concerned with recovering his land than with recovering damages. I never suggested the contrary. But use of the term is not incorrect. A trespass does not become any less a trespass for being continued. American courts have used the term in the same way I used it.<sup>52</sup> Indeed, the *American Law of Property*'s treatment of the subject, whose words Professor Cunningham cites as the "accepted view," itself uses the word "trespassers" to refer to adverse possessors.<sup>53</sup>

Finally, in his opening section Professor Cunningham discusses what courts have meant by the term "claim of right," which is often stated as one of the requirements for acquiring title by adverse possession.<sup>54</sup> This is a more significant question. Arguing that the term does not in fact open up questions of subjective intent, he makes three points. First, its principal function has been to state that the ultimate burden of proof lies on the party asserting adverse possession.<sup>55</sup> Second, "those 'acts of ownership' required to establish the adverse claimant's 'actual, open, notorious, hostile, and exclusive' possession of the land regularly satisfy the requirement."<sup>56</sup> Third, except in unusual situations, the requirement "has little practical significance."<sup>57</sup>

This third assertion, however, ends up being substantially diluted at the conclusion of the *Reply*. There, in assessing why there has been so much adverse possession litigation, Professor Cunningham concludes that probably the quantity "is the result of the continuing confusion of the courts as to the meaning of the 'claim of right' requirement."<sup>58</sup> It is an interesting reversal, which I mention as more than a debater's point. I mention it because it raises the fundamental point of disagreement between us, and it suggests the reason for the failure of his *Reply* to upset

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52. It is the term used, for example, in a case that appears in Professor Cunningham's own casebook and that he here cites with approval: *Patterson v. Reigle*, 4 Pa. 201, 204, 45 Am. Dec. 684, 685 (1846). See O. BROWDER, R. CUNNINGHAM, & A. SMITH, *BASIC PROPERTY LAW* 61 (4th ed. 1984); *Reply*, *supra* note 4, at 22 n.74.

53. *AM. L. PROP.*, *supra* note 2, § 15.2, at 762 & § 15.4, at 771.

54. I agree with Professor Cunningham's statement in *Reply*, *supra* note 4, at 16 n.49, that the terms "claim of right," "claim of ownership" and "claim of title" have been used pretty much interchangeably by American courts.

55. *Reply*, *supra* note 4, at text accompanying 17 n.56.

56. *Id.* at text accompanying 18 n.62.

57. *Id.* at 17.

58. *Id.* at text accompanying 59 n.234.

the conclusions reached in my initial article. Professor Cunningham is unwilling to look at what terms like "claim of right" have meant in the actual case law. He writes them off. At some points he describes them as merely showing "continuing confusion." At others he describes them as having "little practical significance." He is interested in the "correct" rule in the law of adverse possession, and the requirement of "claim of right" has always been an impediment to its attainment. It is necessary therefore to minimize, to stigmatize, and finally to dismiss it.

I believe that this is an inappropriate way to deal with the case law, and that the second of Professor Cunningham's two contradictory conclusions about the importance of the "claim of right" requirement is the more accurate description. The requirement of "claim of right" has been used in recent case law to mean pretty much what it says: a claim by the adverse possessor that he was occupying what was rightfully his. It requires honest belief on his part that the land belonged to him. This creates uncertainty, and consequently litigation, for several reasons, not the least of which is that evidence of a positive claim of right is hard to find, is ambiguous by nature, and often proves very difficult to evaluate. And, of course, if one starts with the premise that subjective intent has no place in the law of adverse possession, the confusion is compounded. Many of the cases then become, as Professor Cunningham suggests in this section of his *Reply*, "confused—and confusing."<sup>59</sup> A part of that confusion, but only a part, disappears if one gives up the notion that subjective intent plays no role in adverse possession cases. That step he is unwilling to take, and hence it is understandable that the cases involving the requirement seem confusing to him.

The recent cases cited in this section of his *Reply* do not demonstrate the worthlessness of the conclusions reached in my initial survey, as Professor Cunningham maintains. Rather they show their substantial accuracy. They show that the "claim of right" requirement normally requires that the occupant thought that he had a rightful claim to the land. It is not much more complicated than that, and Professor Cunningham's attempt to explain away the requirement as without "practical significance" is both unsuccessful and unnecessary. Either the decisions cited are cases of mistaken belief about the state of the record title, in which the opinion states that the claim of right is established and the possessor's

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59. *Id.* at text accompanying 21 n.69.

mistake should not count against him,<sup>60</sup> or they are cases in which the occupant seems to have known that he had no right to occupy the land, in which the opinion states that he lacks the “claim of right” essential to successful adverse possession.<sup>61</sup> These latter cases often stress that the burden of proof is on the adverse claimant, but the fact that they do so only emphasizes the seriousness with which courts have taken the “claim of right” requirement.

About many of the latter cases, in which adverse possession has failed for lack of a “claim of right,” Professor Cunningham is decidedly unenthusiastic. He states that they “contain no satisfactory rationale” for their result.<sup>62</sup> For him very often, “it is not clear what the court means[s].”<sup>63</sup> Truly analyzed, such cases are wrong and may even be “nonsensical.”<sup>64</sup> Against their confused reasoning, he sets the clear thinking found in “the older cases,”<sup>65</sup> cases which give “the best explanation.”<sup>66</sup> Professor Cunningham may well be right about these “older cases.”<sup>67</sup> But as criticism of an article that professed to describe the American case law between 1966 and 1983, invoking their authority does not add up to much of an indictment. An impartial reader may prefer a description that makes sense of the current case law. And such a description requires taking the use of the “claim of right” requirement that is found in the cases more seriously than Professor Cunningham does.

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60. *Higgenbotham v. Kuehn*, 102 Ariz. 37, 39, 424 P.2d 165, 167 (1967) (“The statement in *Trevillian v. Rais*, 40 Ariz. 42, 9 P.2d 402, controls the disposition of this appeal: “Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another believing it to be his own, . . .”); *Weiss v. Meyer*, 208 Neb. 429, 435, 303 N.W.2d 765, 770 (1981) (“It is obvious from the evidence that Fred and those operating under his direction were mistaken as to the location of the boundary of Fred’s property.”). The exception is *Caywood v. January*, 455 P.2d 49 (Okla. 1969), one of the difficult cases involving a co-tenancy among family members discussed in 61 WASH. U.L.Q. at 354-56.

61. See cases cited in 61 WASH. U.L.Q. at 337 nn.22-23 and in *Reply*, *supra* note 4, at 21-22 nn.70-73.

62. *Reply*, *supra* note 4, at 21.

63. *Id.* at 22 n.73.

64. *Id.* at 21.

65. *Id.* at text accompanying 23 n.75.

66. *Id.* at 21.

67. Whether there has been a change in judicial approach to the law of adverse possession, or whether what Professor Cunningham refers to as “the older cases” actually depends on a winnowing out of older cases that do not support the objective view of adverse possession, seems an open question to me. It might make a good research project.

### B. *Good Faith Possession*

Professor Cunningham's *Reply* reserves its most sustained criticism and its harshest language for my initial article's treatment of the relevance of the adverse possessor's good or bad faith. He states that the cases contain no such requirement, and that they treat good faith occupants just as they do bad faith occupants for purposes of deciding whether their possession will ripen into title after the statute of limitations has run. Therefore, except in special situations, he believes that the possessor's state of mind is legally irrelevant, and the "pure possession" approach to the law of adverse possession is both theoretically correct and practically effective.

Good faith is, of course, relevant when a statute expressly requires it. Professor Cunningham and I agree about this point. The most frequent example involves "color of title," in which a grantee enters under a deed that turns out to be invalid. He may gain title when he possesses for the statutory period, but only if he acted in good faith in taking the deed. Normally this result is reached by express statutory provision, sometimes by judicial decision alone.<sup>68</sup> Professor Cunningham dismisses the latter cases as "impos[ing] only a minimal restriction."<sup>69</sup> Whether good faith constitutes a "minimal" restriction is, I suppose, a question of judgment. But it is certainly the restriction we are discussing, and it is hard to see on what grounds those cases can be dismissed out of hand.

However, the nub of the disagreement does not turn on "color of title" cases. It turns on those cases in which no statute requires good faith, cases in which the statute of limitations provides the basis for the adverse possession claim. Here Professor Cunningham and I view the evidence quite differently. He believes that the honest but mistaken belief of an adverse possessor, although sometimes "mentioned in passing" in the cases, has not been a fact to which courts have attached "any particular weight."<sup>70</sup> I believe that it is relevant and indeed important in the decision of adverse possession cases, and that it demonstrates the inadequacy

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68. Compare, e.g., FLA. STAT. § 95.16 (1982) (no good faith requirement in "color of title" statute) with *Simpson v. Lindgren*, 133 So. 2d 439, 441 (Fla. App. 1961) ("We do not believe that adverse possession under claim of color of title should be established where the title is accepted with knowledge of its invalidity."). See also *Nutting v. Herman Timber Co.*, 214 Cal. App. 2d 650, 29 Cal. Rptr. 754 (1963); *Bonifay v. Garner*, 445 So. 2d 597 (Fla. App. 1984); and other jurisdictions cited in *Reply*, *supra* note 4, at 24 n.80.

69. *Reply*, *supra* note 4, at text accompanying 25 n.81.

70. *Id.* at text accompanying 29 n.100.

of the “pure possession” standard as a description of the cases most modern courts have decided.<sup>71</sup>

My conclusion was based on the prominent role intent and knowledge have seemed to play in the recent opinions of American courts. Judges have consistently noted that the claimants in cases before them had held a “mistaken belief” that the land they possessed truly belonged to them, and that such a belief was perfectly compatible with “hostility” and “claim of right.”<sup>72</sup> Therefore, the cases conclude, the claim to adverse possession should, and in fact does, succeed. Moreover, in boundary dispute cases, American courts have in recent years almost uniformly moved away from the “Maine rule,” which seems to reward knowing trespass, to the “Connecticut rule,” which favors long-time mistaken but innocent use of land lying between neighbors, by allowing adverse possession even when the possessor would not have claimed the land had he known the state of the title.<sup>73</sup>

What is the explanation for this development? And why do American judges lay stress on “mistaken belief” in the recent cases? The simplest explanation is that what the adverse possessor knew about the state of the title makes a difference, and that possession held under an honest but mistaken belief is thought deserving of judicial protection.<sup>74</sup> I thought, and continue to think, that the simplest explanation is also the correct

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71. 61 WASH. U.L.Q. at 337-41.

72. Some more recent cases: *Dick Felix Inc. v. Gillette*, 57 Or. App. 716, 721, 646 P.2d 629, 632 (1982) (“I think he believed that he did *own* up and to the fences,” quoting the trial judge); *Gannon v. Bywaters*, 669 S.W.2d 756, 757 (Tex. Civ. App. 1984) (“Although in error, the Gannons thought that a thick hedge . . . constituted the northern boundary of their property.”), *rev’d on other grounds*, 686 S.W.2d 593 (Tex. 1985). See also *Kimble v. Southern Ready Mix, Inc.*, 480 So. 2d 1199 (Ala. 1985); *Paletsky v. Paletsky*, 3 Conn. App. 587, 490 A.2d 545 (1985); *Sun Bank of Ocala v. Brennan*, 455 So. 2d 1339 (Fla. App. 1984); *Orrick Dehydrating Co. v. Edwards*, 673 S.W.2d 48 (Mo. App. 1984); *Owens v. Bartruff*, 297 Or. 610, 687 P.2d 1072 (1984); *Schlagel v. Lombardi*, 337 Pa. Super. 83, 486 A.2d 491 (1984).

73. For discussion of the differences between these rules, see 61 WASH. U.L.Q. 339-41; *Reply*, *supra* note 4, at 26-28 nn.88-97. I am perfectly prepared to accept that Professor Cunningham is right about the comparative antiquity of the two rules. See *Reply*, *supra* note 4, at 27 n.90. As a part-time student of legal history, it is encouraging to know that the better rule is the older rule, though I wish that Professor Cunningham had given some evidence for his confident assertion.

74. See, e.g., *Schaumburg v. Heafey*, 650 S.W.2d 697, 699 (Mo. App. 1983) (approving the Connecticut rule because it protects “the man who innocently and inadvertently occupies and improves land beyond his true boundary line or, in other words, one who most needs and deserves the protection of the statute,” quoting *Edie v. Coleman*, 235 Mo. App. 1289, 141 S.W.2d 238 (1940), *aff’d*, *State ex rel. Edie v. Shain*, 348 Mo. 119, 152 S.W.2d 174 (1941). See also *Walls v. Grohman*, 315 N.C. 239, 248, 337 S.E.2d 556, 551 (1985) (rejecting Maine rule “as rewarding only the claimant who is a thief”).

explanation. When judges write that "the doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own,"<sup>75</sup> I believe they are telling the truth. Professor Cunningham apparently thinks not, dismissing the repeated judicial stress on the actual belief of claimants as merely "mentioned in passing" but accorded no "particular weight."

In dealing with the cases in which good faith is apparently treated as a positive factor in establishing title by adverse possession, Professor Cunningham stresses that they do not *hold* that good faith possessors should be treated *better* than bad faith possessors.<sup>76</sup> As a matter of logic, this is undeniable. My initial article made this exact point, something that Professor Cunningham's *Reply* overlooks.<sup>77</sup> When good faith exists, there can be no reason for distinguishing the two. The only essential point will be to show that even an innocent trespasser can meet the "hostility" test. No such distinction needs to be made, and in fact the treatises positively discourage it. There will be ample time for dealing with a bad faith possessor when one appears.

What consequently appears in ordinary cases in which an adverse possession is successful is an emphasis on the possessor's "mistaken belief" as a legitimate source of prescriptive title. The initial article quoted parts of several opinions to show the variety of ways in which recent American judges have made this point. Professor Cunningham dismisses these quotations as "snippets" that I have taken "entirely out of context."<sup>78</sup> If what he means is that it is *possible* to reconcile the holdings of the cases with the position that the possessor's intent is legally irrelevant, well and good. This point my first article made. But if he means that the quotations give a misleading impression of what American judges have *said* and apparently found significant about the facts of adverse possession cases, Professor Cunningham's *Reply* is mistaken.

The three cases cited in the *Reply*'s text as the most prominent examples<sup>79</sup> of the supposedly misleading character of my descriptions do not

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75. *Barclay v. Tussey*, 259 Ark. 238, 241, 532 S.W.2d 193, 195 (1976).

76. *Reply*, *supra* note 4, at 26.

77. 61 WASH. U.L.Q. at 341-42 ("[T]he holdings in cases of honest but mistaken belief are formally consistent with the doctrine that pure possession is what starts the statute of limitations running and what permits the possessor eventually to acquire title. The stress laid on the honesty of the possessor's belief in many of those opinions may be uncomfortable for the doctrine, but it is not directly contrary to it.").

78. *Reply*, *supra* note 4, at text accompanying 30-32 nn.102-16.

79. *Id.*

show the contrary, although my earlier description of one of the cases contains an error that I want to acknowledge and correct. I cited the first two of these cases to show “the homeliness of some of the testimony appellate judges have chosen to insert in their opinions.”<sup>80</sup> My belief was that these cases would illustrate the apparent relevance to judges of evidence about an adverse possessor’s subjective intent and show the sort of everyday language that went towards showing good faith on the part of possessors. The cases do that, and *Butler v. Hanson*<sup>81</sup> involved exactly the sort of finding about good faith possession discussed above. What I cited as an example of the kind of evidence judges have found relevant, Professor Cunningham contends is erroneous because the opinion treated it “merely as evidence.”<sup>82</sup> It is hard to see any error, unless by using the word “merely” one can magically create an error.

However, there was an error in my discussion of *Miller v. Fitzpatrick*. Although the case illustrates the same sort of evidence of subjective intent, its decision actually rested on the question of the adequacy of the claimant’s physical possession of the land. The court held that acts like “the mowing of lawn, [and] cutting of weeds, . . . evidenced a casual and incomplete use of the premises”<sup>83</sup> and hence were insufficient to constitute “actual” possession that would give sufficient notice of an adverse claim to the record owner. My subsequent description of the case as one of successful adverse possession was therefore wrong; the ultimate holding of the case had nothing to do with the problem of subjective intent.<sup>84</sup>

The most important case of the three, dealt with at more length both in my initial article and Professor Cunningham’s *Reply*, is *Reeves v. Metropolitan Trust Co.*<sup>85</sup> In *Reeves*, two parcels of land were in dispute. The first was awarded to the claimants, Mr. and Mrs. Reeves, “who enclosed and possessed the tract for twenty years in the good faith belief that they owned it.”<sup>86</sup> That was the holding at the first part of the case. Professor Cunningham contends that my description creates “a misleading impres-

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80. 61 WASH. U.L.Q. at 341.

81. 455 S.W.2d 942 (Tex. 1970).

82. *Reply*, *supra* note 4, at 32.

83. 418 S.W.2d 884, 888-90 (Tex. Civ. App. 1967).

84. Professor Cunningham’s statement that the reason given for the claimant’s failure to establish adverse possession was “because he acted in ‘good faith’” is also not accurate. *Reply*, *supra* note 4, at 30.

85. 254 Ark. 1002, 498 S.W.2d 2 (1973).

86. *Id.* at 1003, 498 S.W.2d at 3.

sion” because I did not mention the record owner’s defense.<sup>87</sup> Metropolitan argued that it “followed a practice of allowing its neighbors to use its land permissively,” and that the possession was insufficient because “the encroachment was not readily visible from the street.”<sup>88</sup> The court rightly rejected both defenses, and a full discussion of the case would certainly have had to note the existence of these subsidiary issues. But neither issue has anything to do with the initial and necessary showing of possession under claim of right, a showing the court held the Reeves adequately made. The court simply held that the defenses proffered were legally insufficient to overcome that showing. How this renders my treatment “misleading” is mysterious to me.

The second parcel in *Reeves* was awarded to Metropolitan, holder of the record title. The adverse possession claim here failed. The state supreme court reversed a lower court decision in favor of Mr. and Mrs. Reeves, although the physical possession involved was legally indistinguishable from that of the other parcel. Professor Cunningham contends that my characterization of this part of the case was wrong, because I included one sentence from the opinion and omitted the immediately following sentence. The passage at issue is short, and can be given in full:

In 1961 the city passed a dog leash law. Reeves built an enclosed pen outside the hedge, because he had to have a place to keep his dogs. He admits candidly that he knew the land did not belong to him. Both he and his wife testified that they did not mean to claim the land that they did not own. In the circumstances their use of their neighbor’s land was not adverse and did not ripen into title.<sup>89</sup>

From this passage, I quote the sentence beginning “he admits candidly . . .,” using it to show that, as to this enclosed pen, the Reeves lost because they knew they were encroaching upon Metropolitan’s land when they built the pen. Their claim to this land was made belatedly, at the time of litigation. While the statute was running, they could not make a claim of right, as they were honest enough to admit, because they were aware that the record title was in Metropolitan. The Reeves were not “bad faith” trespassers in the sense of being evil people. Their honesty at trial demonstrates this. But they were in “bad faith” in the sense the law means it; they knew they had no title to the land. They labored under no

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87. *Reply, supra* note 4, at 30.

88. 254 Ark. at 1003, 498 S.W.2d at 3.

89. *Id.* at 1003, 498 S.W.2d at 3-4.

“mistaken belief” about ownership of the land they were using for the dog’s pen, and hence, I concluded, they lost this part of the case.

My reading of this case’s holding was, and is, that it depended on the possessor’s knowledge and his consequent subjective intent. To treat this characterization as “inaccurate and misleading” I find very hard to understand. To treat the use of Mr. Reeve’s statement that he knew the land did not belong to him as an “egregious” case of misquotation, I find astonishing. But Professor Cunningham’s *Reply* does both. It would have been even more astonishing, of course, had he gone on to maintain that the case was compatible with the “pure possession” and “availability of ejectment” test. To have done this would have required him to argue that what the Reeves knew about the state of the title was actually irrelevant. Professor Cunningham scarcely attempts that hopeless task.<sup>90</sup>

### C. *Bad Faith Possession*

The second part of *Reeves* is a relatively straightforward example of the cases used to support the conclusions within the next section of my article, that devoted to the effect of bad faith on the part of adverse possessors. Professor Cunningham finds my treatment “organized in a peculiar way”<sup>91</sup> and concludes that the cases do not give “any substantial support”<sup>92</sup> to the conclusion that knowing trespassers are less likely to gain title through adverse possession than those who have occupied property under an honest mistake. In reality the cases do give substantial support for that proposition, though Professor Cunningham’s *Reply* is right to point out an error in the statement of one case’s holding.<sup>93</sup>

Aside from that case, his criticisms do not hit the mark. Some of them mention only enough of the initial article’s treatment of a case to make it

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90. Professor Cunningham does suggest, however, that it was “doubtful” that sufficient actual possession existed in the case. *Reply, supra* note 4, at 31 n.110. This is a good example of the kind of imaginative reconstruction of the cases necessary to maintain the position that subjective intent is irrelevant in the cases. The opinion contains not the slightest suggestion of any distinction between the levels of actual possession on the two plots. It clearly states that the missing element was lack of a “claim of right.” Moreover, on any reading, an “enclosed pen” used to house dogs would be sufficient to give rise to an action at law in favor of the record owner. For Professor Cunningham’s similar treatment of other Arkansas cases, see that accorded *Dillaha v. Temple*, 590 S.W.2d 331 (Ark. App. 1979) in *Reply, supra* note 4, at 22 n.74, and *Massey v. Price*, 252 Ark. 617, 480 S.W.2d 337 (1972) in *Reply, supra* note 4, at 41 n.155.

91. *Reply, supra* note 4, at 32-33.

92. *Id.* at 35.

93. *Hoppe v. Sauter*, 416 S.W.2d 912 (Tex. Civ. App. 1967), cited in *Reply, supra* note 4, at 34 n.124, and in 61 WASH. U.L.Q. at 344 n.59.

appear erroneous, whereas an examination of the full treatment would have shown it to be correct.<sup>94</sup> Others distort the purpose for which a case was used, suggesting error where none existed.<sup>95</sup> Still others dismiss cases supporting the conclusions of the initial article with no more justification than that they were wrongly decided.<sup>96</sup> And some misstate the state of decisional law.<sup>97</sup> Though couched in strident and conclusory language, the detailed criticisms in this part of Professor Cunningham's *Reply* do not overthrow the conclusions drawn from the cases cited in my initial article.

However, details aside, the most pervasive and important dispute between us has to do with what we regard as the meaning of the cases. This division underlies our disagreement about the majority of the cases cited

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94. See, e.g., *Hansen v. National Bank of Albany Park*, 59 Ill. App. 3d 877, 376 N.E.2d 365 (1978), cited in *Reply*, *supra* note 4, at text accompanying nn.125-26; Professor Cunningham notes that the specific language quoted was "disapproved" by the Illinois Supreme Court three years later. In fact, my initial article specifically noted this disapproval in the immediately following sentence of the text, something that Professor Cunningham's *Reply* does not mention. See 61 WASH. U.L.Q. at 345. The same, in a different context, is found in the next case cited: *SSM Inv. v. Siemers*, 291 N.W.2d 383 (Minn. 1980). Professor Cunningham describes it as holding merely "the possession of a tenant or vendee of the adverse claimant to be the possession of the claimant." *Reply*, *supra* note 4, at text accompanying 35 n.127. The actual case was a complicated one, but clearly shows the importance of good faith and subjective intent. It involved possession by the record owners of land they mistakenly believed had been conveyed to the claimants. The record owners continued to use the property under an oral lease, and the court held that, despite their record title, their possession actually inured to the benefit of the adverse possessor because the current owner "testified that he had never heard his parents or anyone else in his family claim any interest in the strip until the title defect was discovered." 291 N.W.2d at 385.

95. See, e.g., *Howard v. Kunto*, 2 Wash. App. 393, 477 P.2d 210 (1970), from which I quoted the dictum that there was an "early American belief that the squatter should not be able to profit by his trespass." 61 WASH. U.L.Q. at 343. Professor Cunningham attacks my use of that quotation, which I cited as a succinct statement of a widely held judicial belief, because the case went off on other grounds. *Reply*, *supra* note 4, at text accompanying 38 n.140. He also omits the part of the opinion that states: "We start with the oft-quoted rule that: [T]o constitute adverse possession there must be actual possession which is *uninterrupted*, open and notorious, hostile and exclusive, and under a *claim of right* made in good faith for the statutory period." (quoting *Butler v. Anderson*, 71 Wash. 2d 60, 64, 426 P.2d 467, 470 (1967) (emphasis in original)). See also *Moss v. James*, 411 S.W.2d 104 (Mo. 1967), cited in *Reply*, *supra* note 4, at text accompanying 38 nn.142-43. Compare citation of the same case in 61 WASH. U.L.Q. at 342 n.48 where it is identified as dictum, and was so used in the text of the article. Compare also the treatment of *Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1 (Mo. 1970), in *Reply*, *supra* note 4, at text accompanying 44 nn.168-70, with that in 61 WASH. U.L.Q. at 347 n.66.

96. See *Reply*, *supra* note 4, at 21 n.70, 28 n.97, & text accompanying 36 n.133.

97. See the treatment of the law of the state of Washington in *Reply*, *supra* note 4, at 23 n.75 & 32 n.116. The misstatement is shown most succinctly by *Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2d 431 (1984), see *infra* note 164; see also Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960).

in this section. When Professor Cunningham sees a court holding that mere "squatter's rights" are never sufficient to acquire title,<sup>98</sup> he believes that the holding must rest on lack of "actual" possession on the part of the squatter.<sup>99</sup> I see no difference, in purely physical terms, between what many squatters do on the land and what honest, but mistaken, adverse possessors do. However, I do see a large difference in what the squatter knows about the state of the title, and what the good faith claimant knows. And I see a large difference between the consequent subjective intent of the two. To quote from an older case Professor Cunningham cites, squatters can never gain title because they "simply squatted upon the land for present convenience; [and] have no color of title or claim of right to it in any sense whatever."<sup>100</sup> Such judicial treatment of "squatter's rights" is entirely inconsistent with a view of adverse possession that looks only to objective facts of physical possession.<sup>101</sup> I think that squatters lose because they lack the "mind of the owner."

When Professor Cunningham sees a case in which one person has used a neighbor's land, knowing that it belonged to the neighbor but under circumstances that courts have characterized as "friendly" or "neighborly", and hence insufficient to establish adverse possession, Professor Cunningham is content to describe this as a case of "tacit permission."<sup>102</sup> The fact that there is very often not the slightest evidence of the record

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98. A classic statement is found in *Parkersburg Indus. Co. v. Schultz*, 43 W. Va. 470, 472, 27 S.E. 255, 255 (1897): "Where one man has actual possession of land of another, if he makes no claim to own it, he is merely an intruder, called commonly a 'squatter,' and, no matter how long he may continue there, the statute of limitations will confer no right upon him." See also *Conway v. Shuck*, 203 Ark. 559, 562, 157 S.W.2d 777, 778 (1942) ("[A] 'squatter' can never gain prescriptive title to land, regardless of how long he holds possession, since his possession is never considered as adverse.") (quoting prior cases).

99. See *Reply, supra* note 4, at text accompanying 38 nn.141-43.

100. *Blake v. Shriver*, 27 Wash. 593, 599, 68 P. 330, 332 (1902). See *Reply, supra* note 4, at 39 n.145, where Professor Cunningham states that there is a "close relation" between lack of claim of right and lack of actual possession. He does not attempt to show the irrelevance of subjective intent to the court's decision.

101. Several recent English cases reach substantially this result, although not in quite the same way as American courts, because the "claim of right" requirement has not worked its way into English case law. See *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.*, [1974] 3 W.L.R. 387, 392 ("The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser."); *George Wimpey & Co., Ltd. v. Sohn*, [1966] 1 All E.R. 232, 239 ("I agree that the fencing of the road was on the face of it an act of exclusion, but the garden remained a garden and it was in my judgment to protect their rights over this and not to exclude the freeholders that the fencing was done."); see also *Williams Bros. Direct Supply Ltd. v. Raftery*, [1958] 1 Q.B. 159.

102. *Reply, supra* note 4, at text accompanying 40 n.150 & 41 n.154.

owner's actual permission does not deter him. I think the term "permissive" has been stretched in these cases, and that the subjective intent of the claimant while he was using the neighbor's land is what actually has made the difference in the outcome.<sup>103</sup> The occupant's intention is what has rendered the possession "neighborly."

When Professor Cunningham sees a knowingly wrongful possessor's offer to pay money to the record owner, he finds a clear line between offers to purchase and offers to settle doubtful claims, maintaining that the real, though unstated, reason for denying title to the adverse possessor is the doctrine of estoppel.<sup>104</sup> I think that what the cases generally state to be the important reason is in fact the important reason: the offer shows that the adverse possessors knew the state of the title and therefore lacked the "claim of right" required to establish an adverse possession claim.<sup>105</sup> I believe that the reason the cases do not mention the doctrine of estoppel is that they do not depend on the doctrine of estoppel.

Above all, when Professor Cunningham sees the courts treating possession known to be without right as lacking "hostility" or "claim of right" and hence as insufficient to establish adverse possession, he is content to conclude that the "adverse claimant had failed to establish one or more of the usual elements of adverse possession."<sup>106</sup> I think that what the claimant knew about the state of the title had a great deal to do with

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103. See cases cited in 61 WASH. U.L.Q. 343, n.54-58. See also *Marino v. Smith*, 454 So. 2d 1380 (Ala. 1984); *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984); *Gadd v. Stone*, 459 So. 2d 773 (Miss. 1984); *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983); *Susquehanna Realty Corp. v. Barth*, 108 A.D.2d 909, 485 N.Y.S.2d 795 (1985); *Hassinger v. Kline*, 91 A.D.2d 988, 457 N.Y.S.2d 847 (1983); *Bynum v. Hollowell*, 656 S.W.2d 400 (Tenn. App. 1983).

104. *Reply, supra* note 4, at 22 n.74 & 41-43 nn.157-62; AM. L. PROP., *supra* note 2, § 15.4, at 775 (arguing that the disclaimer must be made "in so public a way as to lull [the record owner] into a feeling of security, inducing him to refrain from action to protect his interest, estopping the possessor from claiming title.").

105. See cases cited in 61 WASH. U.L.Q. at 346 nn.63-65. For other cases in which such offers have been held to amount to recognition of lack of title and to defeat an adverse possession claim, see, e.g., *Sanders v. Baker*, 217 Ark. 521, 231 S.W.2d 106 (1950); *Taranto v. Peoples Bank of Biloxi*, 136 So. 2d 213 (Miss. 1962); *Fitch v. Slama*, 177 Neb. 96, 128 N.W.2d 377 (1964); *Singleton v. Southwestern Settlement & Dev. Corp.* 322 S.W.2d 677 (Tex. Civ. App. 1959). There is virtually no support to be found in recent opinions for the notion that these cases rest on estoppel. What they say is that "the possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other." *Lazoff v. Padgett*, 2 Conn. App. 246, 250, 477 A.2d 155, 158 (1984) (quoting *Paton v. Robinson*, 81 Conn. 547, 551, 71 A. 730, 732 (1909)). Indeed, it is not even necessary that the recognition be made to the record owner. See, e.g., *Charlton v. Crocker*, 665 S.W.2d 56 (Mo. App. 1984); *Independent School Dist. No. 40, Nowata County v. Allen*, 446 P.2d 282 (Okla. 1968); *Hidalgo County v. Pate*, 443 S.W.2d 80 (Tex. Civ. App. 1969).

106. *Reply, supra* note 4, at text accompanying 36 n.133.

showing a lack of “hostility” or “claim of right.”<sup>107</sup> In other words, I think that the question of whether the adverse possessor labored under a mistaken belief that he had title, or instead knew that he had no right to the land while the statute was running, has been a consistent concern of the courts, and that it shows up in their decision as to whether the possessor made the requisite “claim of right.”

One might suppose from Professor Cunningham’s strictures about the cases cited in my initial article that my characterization of the recent cases was pure invention. The fact is that concern for what the possessor knew about the state of the title is found consistently in the cases themselves. One example that both of us have dealt with is *Barnes v. Milligan*.<sup>108</sup> The claimant, Milligan, argued that his physical possession of land bounded by a fence that his grantors erected, tacked to the possession of his grantors, was sufficient to give him prescriptive title. But the court held that the law required a “claim of ownership” and that it was absent from his claim.

Why was the “claim of ownership” missing? The court tells us in at least four places in the opinion. The president of the claimant’s predecessor in title “was under no misapprehension as to where the true line was and he did not intend the fence as a boundary line fence.”<sup>109</sup> He “did not own or claim to own the Deer Creek land.”<sup>110</sup> Again, the officers of the predecessor in title “did not believe in 1967 that they had acquired title to the Deer Creek land.”<sup>111</sup> Finally, “Milligan acknowledges that he was informed by [the officers] that they could not sell the property to him because they did not own it.”<sup>112</sup> In support of his claim, Milligan invoked the *American Law of Property*’s treatment of adverse possession to show that subjective intent was legally irrelevant. The court was unimpressed, dismissing this commentary’s authority as a purely “historical treatment.” The court concluded instead: “A long line of cases make it evident that intent has always been an element in Nebraska.”<sup>113</sup>

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107. This difference, I think, accounts for the overwhelming majority of the cases cited in 61 WASH. U.L.Q. 345 n.62. See also *infra* note 128.

108. 200 Neb. 450, 264 N.W.2d 186 (1978).

109. *Id.* at 457, 264 N.W.2d at 191.

110. *Id.* at 458, 264 N.W.2d at 191.

111. *Id.* at 459, 264 N.W.2d at 191.

112. *Id.* at 459, 264 N.W.2d at 192.

113. *Id.* at 456, 264 N.W.2d at 190 (“Notwithstanding the historical discussion in III American Law of Property, sections 15.2 and 15.4, tending to show that ‘claim of ownership’ or ‘hostility’ is not a necessary element of adverse possession, it is clear that this element has, in Nebraska law, always been required.”).

Professor Cunningham dismisses *Barnes*<sup>114</sup> and similar cases<sup>115</sup> as providing no “substantial support” for the argument that the “pure possession” position that the *American Law of Property* adopts is out of harmony with the recent case law for two stated reasons. First, the case does not state that Milligan lost because he was “in bad faith.”<sup>116</sup> Second, the opinion states that it is possible for a knowing trespasser to gain title through adverse possession.<sup>117</sup> But no one denies this. My initial article in fact noted both features of the case law, a point Professor Cunningham’s *Reply* overlooks.<sup>118</sup> The result in the case was not reached by application of a black-letter requirement of good faith. The inescapable fact, however, is that the knowing trespasser lost this case, and he lost it because his knowledge of the true state of the title precluded the requisite “claim of ownership.” That is what lack of “good faith” means in the context of adverse possession. Professor Cunningham may be happy to turn his face the other way, explaining the case as simply another instance in which “one or more of the usual elements of adverse possession” was missing, or in which “no satisfactory explanation” was given for the decision.<sup>119</sup> I am not. I think the commentator must actually look at the facts of the case and admit that, like it or not, subjective intent counted in the decision. If he does that, he will be obliged to admit that bad faith in the sense of knowingly wrongful possession of the land, was what defeated Milligan’s claim.

The common judicial reaction to bad faith on the part of an adverse possessor is also epitomized in a Missouri case decided since my initial

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114. *Reply, supra* note 4, at 36 n.133.

115. For a single jurisdiction, compare, e.g., *Bartels v. Anaconda Co.*, 304 N.W.2d 108 (S.D. 1981) (no adverse possession when occupant had several times admitted the lack of any ownership rights) with *Taylor v. Tripp*, 330 N.W.2d 542, 545 (S.D. 1983) (adverse possession established despite three-time use of legal descriptions of the property indicating the true boundary because “appellee mistakenly believed the legal description included the disputed strip of land.”). See also cases cited *infra* note 128.

116. *Reply, supra* note 4, at 36 n.133. In the event, however, Milligan seems to have been guilty of more than knowledge of the state of the title. Despite being told by the grantors that they had no title, he required them to give him a quit claim deed to the land in dispute “to lay a clear ground for a claim of adverse possession.” They agreed to this, they said at trial, as “an accommodation” to him. See 200 Neb. at 459, 264 N.W.2d at 192.

117. See *id.* at 457, 264 N.W.2d at 191.

118. 61 WASH. U.L.Q. at 342 (“It has seldom been by direct adoption of a requirement of good faith.”); *id.* at 347 (“Courts thus admit the possibility of a truly hostile claimant acquiring valid title.”).

119. *Reply, supra* note 4, at text accompanying 36 n.133.

article appeared.<sup>120</sup> At issue were contiguous lots in a platted subdivision over which the claimants had made an “ostensible exercise of dominion” for the statutory period.<sup>121</sup> However, as the court saw it, on at least three occasions the claimants had shown that they knew they had no title to the land. They had once asked permission from someone, but not the record owner, to use the land; they had sold a mobile home on their own adjacent land because it was too close to the true boundary line; and they had filed a mechanic’s lien for work done on the property. None of these actions could have “lulled [the record owner] into a feeling of security, inducing him to refrain from action to protect his interest,”<sup>122</sup> because the owner’s permission was neither sought nor given,<sup>123</sup> because the record owner had known nothing about the mobile home’s movement, and because the mechanic’s lien was actually filed *after* the statute had run.<sup>124</sup> It was thus a good case for applying the “availability of ejectment” test.

The Missouri court, however, refused to apply that test, though it noted that good faith was not a requirement of law in adverse possession cases. What the court did was to stress that adverse possession must rest on an “*unequivocal* claim of right”<sup>125</sup> and that the claimants’ actions provided a sufficient “window on the minds”<sup>126</sup> of the claimants to show that they had not made such an unequivocal claim. The actions were, the court said, “collectively something of a Pinocchio’s nose on the otherwise ingenuous countenance of defendant’s claim.”<sup>127</sup> Hence there was no adverse possession in the case. Again, the subjective intent of the possessor was what counted in the court’s decision. There is no way to square this decision with a “pure possession” view of adverse possession except by declaring it “wrong.” It will not do to paper over the facts by asserting blandly that “one or more of the usual elements of adverse possession” was lacking or by pretending that the opinion provides “no convincing explanation” for the result.

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120. *Charlton v. Crocker*, 665 S.W.2d 56 (Mo. App. 1984).

121. *Id.* at 58.

122. *AM. L. PROP.*, *supra* note 2, § 15.4, at 775.

123. The court devoted a footnote to making this point: 665 S.W.2d at 60 n.6 (“[I]n the instant case permission was not sought from those to whose interest the claim in question was adverse. As explained in the textual discussion, the requests for permission in this case are relevant only to the extent they betrayed a belief on defendants’ part that the lots in dispute were not theirs to occupy.”).

124. 665 S.W.2d at 63.

125. *Id.* (“The numerous cases requiring an *unequivocal* claim of right on the part of an adverse possessor make it clear that such mugwumpery is fatal to an adverse possession claim.”).

126. *Id.* at 62.

127. *Id.* at 63.

These cases represent a consistent pattern in recent adverse possession cases.<sup>128</sup> Analyzed seriously, even analyzed at all, they show a divergence between the "pure possession" view of adverse possession and the nature of the recent case law. However, let it be said that the pattern has variations. Nor are the facts of many cases straightforward. Even if desirable, fitting the results neatly into a hornbook rule would be difficult, because there are clearly cases in which claimants have successfully established title through adverse possession even though they must have known the true state of the title. Professor Cunningham points out this fact, as did my initial article.<sup>129</sup> What I noticed in the cases in which this had happened, however, was how many of them involved extenuating circumstances or "equitable factors" in favor of the adverse possessor. Factors like the passage of many years, substantial improvements made by the claimant, and obvious carelessness on the part of the record owner very often existed in such cases. I concluded that their meaning was "not so clear"<sup>130</sup> as it might otherwise be, and that principles of fairness may have come into play in such cases.

Professor Cunningham contends that my discussion of these cases is "mere speculation."<sup>131</sup> That it is based on more than the transcription of a test found in them, there is no doubt. But it is wrong to suggest that judges make nothing of the equities of such cases. They do.<sup>132</sup> Even if they did not, however, my conclusions would rise higher than "mere speculation." The facts of these cases are not in serious dispute. Extenu-

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128. See cases cited in 61 WASH. U.L.Q. at 345 n.62; see also *Lazoff v. Padgett*, 2 Conn. App. 246, 477 A.2d 155 (1984); *Eakins v. Sedler*, 683 S.W.2d 303 (Mo. App. 1984); *Heide v. Sheeks*, 682 S.W.2d 877 (Mo. App. 1984); *Paasch v. Brown*, 217 Neb. 761, 351 N.W.2d 74 (1984) (semble); *Risi v. Interboro Indus. Parks, Inc.*, 99 A.D.2d 466, 470 N.Y.S.2d 175 (1984); *Publishers Paper Co. v. Thomas*, 68 Or. App. 426, 682 P.2d 814 (1984). *Contra* *Poole v. Corwin*, 447 N.E.2d 1150 (Ind. App. 1983) (semble).

129. 61 WASH. U.L.Q. at 347-49.

130. *Id.* at 347.

131. *Reply*, *supra* note 4, at 46.

132. See, e.g., *Hirsch v. Patterson*, 269 Ark. 532, 534, 601 S.W.2d 879, 880 (1980) ("Although there is no 'hard and fast' rule by which the sufficiency of an adverse claim may be determined, courts generally look to the totality of the circumstances."); *Keen v. Dismuke*, 690 S.W.2d 822, 824 (Mo. App. 1985) ("In the typical case where the [parol] gift has been upheld, the donee, . . . , has taken exclusive possession of the land and made valuable and permanent improvements, thereby rendering it inequitable for the donor to deny the gift."); *Nugget Properties, Inc. v. County of Kittitas*, 71 Wash. 2d 760, 767, 431 P.2d 580, 584 (1967) (Claimants "have sunk their roots and maintained both their homes and the community sense of their village. . . . Equity and fairness require that the principles of equitable estoppel and laches, . . . , be applied to prevent an injustice."). The boldest (or most extreme) use of equitable principles as a means of deciding adverse possession claims is found in *Manillo v. Gorski*, 34 N.J. 378, 255 A.2d 258 (1969).

ating circumstances have existed with great frequency when “bad faith” possession has ripened into title.<sup>133</sup> Professor Cunningham is right to state that American courts have not adopted a simple “balance the equities” test. I did not suggest that they had. But that those equities counted in the outcome, though not provable with absolute certainty, seems very likely on any reading of the cases. It makes sense of a great many cases that otherwise do not fit the pattern of most adverse possession claims.

One point about the cases involving “bad faith” possession that Professor Cunningham discusses remains. Does the evidence show that American judges have been dishonest in deciding adverse possession cases? Professor Cunningham thinks that on my reading of the cases, dishonesty on their part would have to be involved. He maintains that I have portrayed a world of “disingenuous”<sup>134</sup> judges who regularly indulge in “mere subterfuge”<sup>135</sup> in order to “conceal [their] determination not to

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133. An example, representative insofar as these diverse cases can be adequately represented, is *Gates v. Roberts*, 350 S.W.2d 729 (Mo. 1961). The opinion recounts this story: In 1937, the claimant, his wife and four children were about to be evicted from their home in Kansas City because they could not keep up their mortgage payments. In search of a place “for his family to go,” the claimant found a vacant and partially completed “shell of a house” on a 25-foot lot nearby and moved into this land with his family. It was “an answer to a prayer” for them. They regarded it as “a miracle,” and “no one in the family seemed to know who the owner was.” In fact, it turned out that the record owner “lived nearby, within sight of and not more than 150 or 200 feet distant.” However, so far as the opinion reveals, she did nothing about the use being made of her land, then or afterwards. After moving onto the land, the claimant quickly began to improve the property; he “cleared the property of underbrush, cut the grass, and planted fruit trees.” The judge wrote, “He was an industrious, hard-working man. Slowly, by degrees, and as he could afford it [he] installed flooring, ceilings, partitions, windows, doors, electricity, water, plumbing fixtures, and built two large additional rooms and a bathroom. [He] and his family devoted all available funds to the repair and additions to the house.” They lived there continuously for twenty-two years, paid delinquent taxes on the property, and secured a tax deed (admittedly invalid) to the property. In 1959, the record owner conveyed her interest in the property to someone else, who initiated a suit to recover possession after the original record owner had died.

In that suit, the new record owner argued that the usage had always been permissive in character, and certainly the objective evidence of permission was as strong as that found in most such cases which “neighborly accommodation” has been found to be sufficiently permissive to negate the element of hostility. The court, however, held that adverse possession had been established. It did not base the decision on equity *eo nomine*, but it is impossible to read the opinion without concluding that the very strong equities in the occupant’s favor counted for a great deal in the outcome of the case. It was upon such cases that the conclusions Professor Cunningham describes as “mere speculation” were based. It was not, however, my argument that these cases are normally based on the doctrine of equitable estoppel, as Professor Cunningham suggests. *Reply, supra* note 4, at 53.

134. *Reply, supra* note 4, at 39.

135. *Id.* at text accompanying 41 n.155.

allow a 'bad faith' possessor to acquire title by adverse possession."<sup>136</sup> He characterizes my article as describing judges who are determined not to admit what they are actually doing.<sup>137</sup> He then argues that, because he finds no such "subterfuge" in the opinions, my conclusions must be wrong.

This is a caricature of my reading of the cases. If one were to string together a collection of judicial statements on the legal effects of knowing trespass by adverse possessors, the result might not be a precise or elegant formulation of the law, but there would be no "subterfuge" in the collection. My initial article used no language even resembling that quoted. Nor do I think that American judges have indulged, or been required to indulge, in any sort of dishonesty in these cases. The formal requirement of the law of adverse possession caught in terms like "claim of right," "hostility," or "claim of ownership" leads courts naturally and without pretense of any kind to consider questions of the possessor's subjective intent and to prefer the honest but mistaken adverse possessor over the claimant who knew he had no right to be on the land in question. To require that an adverse possessor meet the "claim of right" requirement by having a claim of right is not a subterfuge.

Of course, if one takes the position that a claimant's intent is irrelevant in adverse possession and that "claim of right" does not mean what it says, then it *would* seem that judges were ignoring the law in deciding the cases described in the initial article. If one assumes that the "pure possession" test, which the *American Law of Property* advocates and Professor Cunningham endorses, is the law, then some "subterfuge" would appear to be required for judges to consider the possessor's subjective intent. But this is not the fact. American courts do not accept the "availability of ejectment" test as the standard. They do not conceive that they owe obedience to the "pure possession" view of adverse possession. The rarity with which American courts have cited the *American Law of Property's* treatment confirms this.<sup>138</sup> The discontinuity is not between what judges say and what they do. It is between what they do and what Professor Cunningham says they should do. If any normative

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136. *Id.*

137. *Id.* at 41.

138. To test my impression of this infrequency, I undertook a LEXIS search. The entire data base of the service was searched for references to the AMERICAN LAW OF PROPERTY (or a variant) within one hundred words of "adverse possession." The total was a pitiful 58. A similar search was run for AM. JUR., an encyclopedia that merely repeats what the cases say. The total was 884.

argument was advanced in my initial article, it was that commentators on the law of property should pay attention to the former.

#### *D. Special Situations*

Professor Cunningham devotes the last part of his *Reply* to what he sees as errors in my treatment of three "special situations." They are: possession under an invalid tax deed; continued possession of property alienated by deed; and ousters by one cotenant of another. Much of what he writes here simply reiterates his theme that the cases do not apply a "good faith test" to decide adverse possession cases. But his *Reply* also gives a misleading impression of what I believe these situations show about the role as subjective intent in the decision law. It is therefore important to make that meaning clear. My view is that most of what Professor Cunningham says in describing these situations is entirely right, but that it in no way undermines the conclusions drawn in my initial article.<sup>139</sup>

The reason for dealing with these three special situations is that each of them *seems* to be a case in which knowingly adverse possession is involved, yet in which prescriptive title is possible.<sup>140</sup> The occupant under a tax deed, the grantor who retains possession of land he has alienated, and the cotenant who ousts his cotenants, by definition must know that someone else has a competing claim to the property in dispute. To the extent that they can gain title by adversely possessing it, the law would seem to be rewarding knowingly wrongful possession and using a strict "pure possession" approach. Therefore, these cases provide a good test of the conclusions derived from the more straightforward cases.

In fact, examination of cases arising in these special situations confirms these conclusions. Virtually all cases in which adverse possession is successful do not involve knowingly wrongful possessors. The law requires purchasers of tax deeds to have acted in good faith. It allows grantors who have remained in possession to gain title through adverse possession only when they have done so by an honest mistake. And it allows adverse possession by a cotenant only when his ouster is unmistakable and when it is coupled with an honest misunderstanding on his part or with other "equitable factors." Thus, these special situations, which appear at

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139. The discussion is at 61 WASH. U.L.Q. at 349-56.

140. Perhaps the initial article did not make this as clear as it should have; Professor Cunningham, *Reply*, *supra* note 4, at text accompanying 47 n.183, says that "it is unclear why Professor Helmholtz devoted almost two pages of his article to these [tax deed] cases."

first blush to support the purest sort of "pure possession" approach to the law of adverse possession, do not in fact do so. They are quite compatible with the conclusions reached in the main part of my initial article. Professor Cunningham's description of various aspects of these situations is not wrong—it is just beside the point.

One example will suffice: grantors who have remained in possession of land they have alienated. Professor Cunningham supposes that I have "conceptual problems"<sup>141</sup> with the situation and that I find the strength of the presumption against the grantor "incomprehensible."<sup>142</sup> In fact, I expressly noted in the earlier article that any "conceptual problems" inherent in the situation are more apparent than real,<sup>143</sup> and that the presumption against the grantor quite comprehensibly rests on the strong ethical notion that it would be unfair to allow a grantor to derogate from his own deed.<sup>144</sup> The concordance between that ethical notion and the presumption against the grantor is one reason it is important that virtually all the cases permitting adverse possession in such a situation have been cases of honest mistake on the part of the grantor. Even then, the presumption is very hard to overcome.

Professor Cunningham supposes that the cases in which the possessing grantor has not overcome the presumption rest on the existence of the grantee's permission for the grantor to remain in possession of the property granted. "Otherwise," he says, "the conduct of the parties is incomprehensible."<sup>145</sup> Even if one leaves aside the inconvenient fact that there is not the slightest evidence of actual permission in most of these cases, does not the existence of the presumption of permissiveness show that the law looks further than "pure possession" to decide the adverse possession claim? If courts looked only at whether the grantee could have ejected the grantor, surely title would accrue to the grantor once the statute of limitations had run. In every sense, the grantor who retains possession would have been subject to an action at law for continued wrongful occupation of the property. At the very least, the burden would be on the grantee to show the fact of permission.

However, this is not what actually happens. The cases do not allow

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141. *Reply, supra* note 4, at 49.

142. *Id.* at 50.

143. 61 WASH. U.L.Q. at 352.

144. *Id.* at 351 ("It stems from the principle that a grantor should not in fairness be allowed to claim in derogation of his own deed."). At least Professor Cunningham and I can agree on this point. See *Reply, supra* note 4, at text accompanying 50 n.195.

145. *Reply, supra* note 4, at text accompanying 50 n.196.

the grantor to gain title by showing that he would have been subject to an action of ejectment at any time. The mechanism for assuring that it does not happen is a presumption that rests on the unfairness of allowing a grantor to take inconsistent positions by derogating from his own deed. Professor Cunningham himself points this out, and I agree with him that the cases do not reach this result by applying a “good faith/bad faith test.” But the principles of law applied here rest on common sense ethical notions that do not contradict what one finds in simpler adverse possession cases. That is, they show a strong legal presumption erected to make sure that a possessor who knows he has no title does not become the owner simply by possession continued long enough. The case law on this subject thus cannot fit a “pure possession” view of adverse possession. Professor Cunningham’s treatment scarcely pretends that it does. His discussion shows in fact that the law operates on an assumption that is inconsistent with that view. The same can be said for the other two “special subjects” at issue between us.

### III. IMPLICATIONS OF THE DISPUTE

This section raises three questions about the nature of legal scholarship that underlie the specific disagreement about the law of adverse possession. There is a real gulf between us here, larger perhaps than perusal of the two articles themselves might suggest. I want to concede at the outset that there is something to be said in favor of Professor Cunningham’s position. I believe that he has entirely misinterpreted the recent case law and have said so above. However, I admit to some hesitation about the larger implications of our disagreement. The implications have consequences for the kind of research that commentators ought to undertake, and I am far from believing that the descriptive “case bound” approach taken in my initial article is the best sort of legal research. But, whatever hesitations I may have, at least the assumptions about legal scholarship that we have brought to this specific quarrel ought to be set out.

#### A. *Intermediate Court Opinions*

At several places in his *Reply*, Professor Cunningham takes me to task for “inordinate” use of the opinions of intermediate appellate courts. As he points out, they have “limited significance as precedents.”<sup>146</sup> Because of the presumably lower quality of judges serving on them, he states that

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146. *Id.* at text accompanying 2 n.6.

their opinions must be viewed with "considerable skepticism."<sup>147</sup> Particularly suspect are the decisions of the Texas Courts of Civil Appeals, which (he says) "have become a subject of humorous comment among lawyers both in Texas and elsewhere."<sup>148</sup> Therefore, an article built upon cases, about half of which come from such intermediate courts of appeals, must necessarily be equally suspect in its conclusions.

To the charge of using intermediate appellate court opinions, I must plead guilty. I am also guilty of taking what they say seriously, even of having done so when the words come from the pens of judges on the Texas Courts of Civil Appeals.<sup>149</sup> The only open question is whether my usage was "inordinate". To this charge I can only say that it depends upon what one regards as important, and that I have regarded what happens in ordinary litigation as more important, or at least more relevant to the subject, than development of the "correct" rule. The subject of this disagreement is not about what the role of subjective intent in adverse possession cases *should be*. It concerns what it *is*. For that purpose, the opinions of intermediate appellate courts have considerable value.

For some questions of law, of course, Professor Cunningham would be right. Were this a matter of establishing a new rule of law or of giving an authoritative pronouncement on a matter of first impression, then there might be good reason to look to supreme court opinions in preference to those of the lower courts. However, the law of adverse possession does not present that kind of situation. The rules are old. They are unlikely

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147. *Id.* at 2 n.6.

148. *Id.*

149. Trying to discover the truth of this assertion has given me rare moments of pleasure in preparing this response. Professor Cunningham makes the assertion as if it were common knowledge, but it has proved remarkably hard to find support for it. Telephoning Texas lawyers and law professors produced only indignant defenses of their appellate courts. "Absolute and utter nonsense" was a typical response to hearing Professor Cunningham's comments read. Three of my respondents actually went out of their way to compare the Texas Supreme Court unfavorably to the courts of appeals, though there was also general agreement that some of the intermediate courts were better than others. Another of my respondents, a former judge who had sat both on the court of civil appeals and on the Supreme Court, told me that he had more time to prepare good opinions while on the former than he did while serving on the higher court.

Perhaps, I thought, this response merely represents Texas chauvinism, though Professor Cunningham does say that the opinion is widely held *within* the state. I thought to gauge "out-of-state" response by looking at the number of times Texas intermediate court opinions on adverse possession have been cited outside the state, and comparing it with the comparable number of times the opinions of the Michigan intermediate courts have been cited. The result of the LEXIS search is not discreditable to the Lone Star state. Courts of a foreign jurisdiction since 1970 cited Texas opinions 72 times; those from Michigan a lowly 14. My "gauge," I confess, is not very scientific, and I remain open to further instruction (or suggestion for testing mechanisms) on this point.

to change very much. Authoritative legal pronouncements are apt to get lost, or at least stretched, in the stresses and strains of actual litigation. The meaning judges and juries commonly give durable terms like "hostility" and "claim of right" will be more important than the latest supreme court opinion. In other words and to use a fancy term, the legal requirements in the law of adverse possession are apt to be "fact specific." For this, intermediate court opinions serve as well as state supreme court opinions.

In some ways, they actually serve better. In virtually every state that has intermediate courts of appeals, they decide a much larger percentage of total litigation than do the supreme courts. In Professor Cunningham's home state of Michigan, for instance, the courts of appeal decided 6,605 cases in 1984; the supreme court decided only 2,495.<sup>150</sup> In Texas, where Professor Cunningham tells us we must pay no attention to the courts of appeal, the contrast is even more dramatic. In 1983, the courts of appeal disposed of 8,038 cases; the supreme court of only 1,005.<sup>151</sup> These figures are rough no doubt, but they illustrate what every lawyer knows: the intermediate courts are the courts of last resort for the great majority of cases. If one wants to discuss the application of legal rules, the appellate courts make a better laboratory than do the supreme courts.

Had Professor Cunningham chosen to criticize my initial article for weighing intermediate court opinions equally, not with those of the supreme courts, but with those of trial courts, then I would have had a harder time replying. The numerical imbalance between appellate and supreme courts is dwarfed by that between appellate and trial courts,<sup>152</sup> and if one wants to get at the realities of litigation, the best place to look would naturally be the records of actual trials. Had he made such a charge, I would have had to make excuses about the time and materials at my disposal, and to suppose that intermediate court opinions were likely to be closer to the realities of litigation than supreme court opinions. But it would not have been an entirely satisfactory answer. Happily for me, that is not the criticism Professor Cunningham chose to make.

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150. See 1984 REPORT OF THE OFFICE OF THE STATE COURT ADMINISTRATOR; MICHIGAN 7, 12.

151. See TEXAS JUDICIAL SYSTEM: ANNUAL REPORT OF STATISTICAL AND OTHER DATA FOR CALENDAR YEAR 1983 92, 113 (1984).

152. For instance, in Texas in 1983, a total of 441,954 cases were disposed of by the district courts. *Id.* at 126.

Professor Cunningham obviously could have thought of this criticism. His failure to make it, however, is one indication of where his interest in this subject lies. He is less interested in the realities of the law of adverse possession than in upholding the theoretically "correct" rule. Thus, when he takes my article to task for using the opinions of intermediate appellate courts, he is doing so on the basis of a belief that what those courts say should count for much less than do "the accepted views," by which he means the treatments found in academic commentaries.<sup>153</sup> I think the contrary: what intermediate courts do, and what they say, represents a legitimate foundation for any study of the role of subjective intent in adverse possession cases. The law of adverse possession, at least as it currently stands, is one area of the law in which the commentators' attempts to prescribe the correct rule have failed.

### B. *Objective Standards and Ethical Values*

The "pure possession" approach to the law of adverse possession designedly excludes moral considerations. Holding that the statute of limitations alone settles the question and that all possessors must therefore be treated alike, this view is concerned only with objective evidence, not with subjective intent or with right and wrong. This preference for objective standards is, of course, part of a proud heritage in legal scholarship, extending back in the American tradition to the work of Dean Ames and Justice Holmes.<sup>154</sup> Professor Cunningham can claim the highest intellectual pedigree for his views of what the law of adverse possession should be.

The difficulty with this preference for outward manifestations and the consequent dislike of "considerations of inner blameworthiness," as we are increasingly coming to see, is that it has rested more on the preferences of the commentator than on observation of what courts do. Recent work on Justice Holmes well shows this. Justice Kaplan, commenting on the great Justice's predilection for objective standards in all areas of the law, has described how the idea "became an *idée maitresse*, something of an obsession" with Holmes.<sup>155</sup> However, the facts have not borne out

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153. See *Reply*, *supra* note 4, at text accompanying 2 n.7.

154. See O.W. HOLMES, *THE COMMON LAW* 162-94 (Howe ed. 1963); *supra* note 49, at 197.

155. Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1830 (1983) (quoting H.L.A. Hart). See also J. NOONAN, *PERSONS AND MASKS OF THE LAW* 65-110 (1976); R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 58-59, 179-81 (1982); Atiyah, *The Legacy of Holmes through English Eyes*, 63 BOSTON U.L. REV. 341, 357-59 (1983); Elliott, *Holmes and*

the objectivity theme Justice Holmes preached.<sup>156</sup> In virtually every area of the law, Justice Kaplan writes, "Holmes would have been nettled by the degree to which subjective factors have a way of creeping back."<sup>157</sup> Courts simply have not been willing to close their doors to subjective factors and to ethical norms. The elegant formulations of Justice Holmes did not fully describe the law at the time he wrote, and they have not carried the day since then.

The law of adverse possession in recent times tells much this same story. Professor Cunningham dismisses it, writing that "equitable considerations" are seldom mentioned in the cases.<sup>158</sup> If what he means is that courts do not apply a simple test by which the "equities" in favor of each claimant are weighed, the statement is clearly correct. But if he means to describe the considerations that apparently figure in judicial opinions, it is not. American judges in recent years have looked more favorably on honest but mistaken possessors than they have on squatters or purposeful wrongdoers.<sup>159</sup> They have taken care to stress the equity of the principles they have put into practice.<sup>160</sup> They have applied rules based on ethical norms strictly, and they have interpreted apparently objective rules equitably.<sup>161</sup> Considerations of fairness have apparently influenced them when they have decided in favor of the claims of knowing trespassers.<sup>162</sup> All this means that considerations of morality come into the minds of judges to a much greater extent than the "pure possession" view of adverse possession allows.

Academic writers, like myself, are bound to find this a little unsettling. We are used to, and indeed like, theoretical analysis of legal principles. We are routinely separated from the messy facts of actual litigation. We

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*Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUDIES 113 (1984); Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U.L.Q. 681 (1983); Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343 (1984).

156. Justice Kaplan notes in passing that in the law of possession, "[A]n objectivity theme must face a terrible struggle." 96 HARV. L. REV. at 1834 n.44.

157. *Id.* at 1833.

158. *Reply, supra* note 4, at text accompanying 63 n.248.

159. 61 WASH. U.L.Q. at 341-49.

160. This is perhaps most striking in the cases justifying adoption of the Connecticut rule that announce the apparent exclusion of subjective considerations. *See, e.g.*, *Taylor v. Tripp*, 330 N.W.2d 542, 544 (S.D. 1983) ("the only sensible, safe and really equitable rule").

161. *Compare e.g.*, the strict treatment of the rule requiring notice for there to be ouster by one cotenant of another, 61 WASH. U.L.Q. at 533, with "color of title" cases, *supra* note 68.

162. *See* 61 WASH. U.L.Q. at 347-48. *See also* *Krell v. Davidson*, 694 S.W.2d 774, 778 (Mo. App. 1985) (holding in favor of knowing adverse possessor's claim as "the only result possible under the equities of the case.").

are uncomfortable with, perhaps slightly embarrassed by, serious talk about morality. How different is the situation of most judges and juries. They are apt to be impatient with legal theory. They are more directly concerned with the facts and the parties involved in litigation. And they are likely to believe that morality should count for a good deal in the outcome of a case. For them, the temptation to do right will be strong. I believe that we academics must make some room for these moral considerations when we describe the law as it is applied in practice. No matter the efforts of Justice Holmes and Professor Cunningham to promote a law of truly objective standards, considerations of inner blameworthiness "creep back in." We cannot prevent it.

### C. *The Tasks of Writers on Property Law*

Were legal scholars confined to describing what goes on in recent cases, as did my initial article, they would have a limited claim to respectful attention. There is ample room for scholarly criticism of legal rules. There is also room, and indeed a need, for legal theory, even of the most abstract sort. Such scholarship has been illuminating and ultimately useful in legal development. The tasks of students of the law cannot and should not be reduced to one type of scholarship.

On the other hand, writers ought to make clear just what sort of work they are undertaking. The temptation to confuse the prescriptive with the descriptive is a real one. It is also one that should be resisted. If we pay attention to the case law only as it accords with what we conceive the law should be, we may find a real gap opening between our statements of the law and the law as courts actually apply it. The result of that gap will be that courts will simply pay no attention to what we say.

This has happened in the law of adverse possession. The coverage in the supposedly authoritative *American Law of Property* has been reduced to virtual irrelevance in the case law because it treats questions of subjective intent as entirely unimportant, whereas the great majority of American courts find it to be relevant in deciding adverse possession cases. Its author has picked and chosen from among the case law, in search of the "correct rule." There is, as I have argued, much to be said in favor of the position that a purely objective standard is a preferable rule. But it is simply not the rule applied in most of the cases, at least in the recent cases. And it is a mistake to pretend that it is.

Regrettably, Professor Cunningham's *Reply* does pretend that it is. Readers of the *Reply* must be struck by how often he is obliged to dismiss

as unimportant the actual words of decisions, and how frequently he is required to invent rationales for cases that are not found in the opinions.<sup>163</sup> He describes what judges have written as “loose statements”<sup>164</sup> or as providing “no clear rationale”<sup>165</sup> for their decisions. He argues that although “some courts have recognized the best explanation,”<sup>166</sup> what is actually said in the opinions is often “confused,”<sup>167</sup> “aberrational,”<sup>168</sup> or given “no particular weight”<sup>169</sup> in deciding the case. He dismisses statements taken from the opinions as “snippets”<sup>170</sup> or as “selective quotation” and “out of context.”<sup>171</sup> By taking this approach, he has persuaded himself that the cases do not provide “any real support”<sup>172</sup> for what they seem to show. That is the relevance of subjective intent.

This need not be, even for strong supporters of a “pure possession” approach to adverse possession. An example comes easily to hand: an article by Professor William B. Stoebuck, one of the co-authors of Professor Cunningham’s hornbook.<sup>173</sup> In an article that appeared in 1960, Professor Stoebuck described the law of adverse possession in the state of Washington.<sup>174</sup> His survey showed the relevance of subjective intent in the cases,<sup>175</sup> and it demonstrated the necessity of good faith on the part of adverse possessors.<sup>176</sup> This he admitted and described. But he did not like it. He described the resulting case law as “a jungle”<sup>177</sup> and concluded that “the court could yet perform a service by doing away with any requirement of subjective intent, negative or affirmative.”<sup>178</sup> The ar-

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163. See cases cited *supra* note 90; see also *Reply, supra* note 4, at 21 & 13 n.39.

164. *Reply, supra* note 4, at 21, 23 & 6 n.14.

165. *Id.* at 21 & 53. See also *Reply, supra* note 4, at 17 n.52 (“The rationale of the ‘claim of right’ requirement is not clear.”); *id.* at 22 n.74 (“But the court did not make clear the significance of this ‘disclaimer.’”).

166. *Id.* at 21.

167. *Id.* at 21, 22 n.73, 28 n.96, 32 n.117; see also text accompanying 59 n.234.

168. *Id.* at 28 n.97.

169. *Id.* at 32 n.114; see also text accompanying 48 n.189.

170. *Id.* at 48.

171. *Id.* at 32.

172. *Id.* at 40.

173. See *supra* note 5.

174. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960).

175. *Id.* at 76-81 (“Why subjective intent should even be a part of adverse possession is unclear, but apparently it arises from connotations attaching to the word ‘claim’ in ‘claim of right.’”).

176. *Id.* at 83 (“Though the ten-year statute makes no requirement of good faith, decisional law has injected one.”).

177. *Id.* at 78.

178. *Id.* at 80.

ticle was both descriptive and prescriptive, and was clear about which was which.

In the event, Professor Stoebuck's article may also have had a real effect on the development of the law. In 1984, the supreme court of Washington overruled a long string of prior cases, expressly adopting the view that an adverse possessor's "subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant" to the question of whether he acquires prescriptive title.<sup>179</sup> "What is relevant," the court held, "is the objective character of [the claimant's] possession."<sup>180</sup> The court cited Professor Stoebuck's article in so doing. I do not know enough about the history of this litigation to ascribe the victory to the influence of the article, but I hope it is not mere wishful thinking to suppose that the clarity and accuracy of Professor Stoebuck's description and criticism of the existing case law played some part in the outcome.

Unfortunately, this cannot be claimed for Professor Cunningham's *Reply*. It does not give an adequate description of the recent case law. Perhaps a part of the failure of the *Reply* may be attributed to lack of certainty about what "good faith" and "bad faith" mean in the context of the law of adverse possession. To the extent that this is the explanation, I must share the blame. But I do not believe that it is the pervasive problem behind Professor Cunningham's failure to demonstrate the irrelevance of subjective intent and good faith in the law of adverse possession as it is applied in American courts today. That failure, ironic in an article that cites scores of judicial decisions, stems from his unwillingness to take the cases seriously.

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179. *Chaplin v. Sanders*, 100 Wash. 2d 853, 861, 676 P.2d 431, 436 (1984).

180. *Id.* at 862, 676 P.2d at 436.