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## Keeping the Welcome Mat Rolled-Up: Social Justice Theorists' Failure to Embrace Adverse Possession as a Redistributive Tool

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# KEEPING THE WELCOME MAT ROLLED-UP: SOCIAL JUSTICE THEORISTS' FAILURE TO EMBRACE ADVERSE POSSESSION AS A REDISTRIBUTIVE TOOL

TESSA DAVIS\*

*“The essential difference between prescription and limitation is that in the former case title can be acquired only by possession as of right. That is the antithesis of what is required for limitation, which perhaps can be described as possession as of wrong.”<sup>1</sup>*

*“Property rights must be defined and structured so as to grant legal protection for particular interests while at the same time limiting that protection to ensure an environment in which all people may exercise their rights . . . . Contrary, perhaps, to popular belief, this means that one of the purposes of property systems must be to distribute ownership widely.”<sup>2</sup>*

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1. J.A. Pye (Oxford) Ltd. v. Graham [2000] Ch. 676 at 691 (Eng.) (quoting Buckinghamshire County Council v. Moran [1990] Ch. 623 at 644).

2. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY, 144 (Yale University Press 2000).

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#### MISSED OPPORTUNITIES: INTRODUCTION

Lord Justice Nourse made the statement above in a seminal case regarding adverse possession out of the United Kingdom. His purpose was to clarify the difference between an implied license by prescription and adverse possession as a limitation action. Yet, his use of the phrase "possession as of wrong" is illustrative of more than just this distinction. "Possession as of wrong" or, perhaps more appropriately, wrongful possession, tracks the intuitive reaction to adverse possession as a concept. Adverse possession, a doctrine which grants a squatter (or boundary encroacher) legal title to another's property, cannot be *right*. Rather, the grant of title to an adverse possessor must be *wrong*, both in that it effectuates a *wrong* on the *rightful owner* and in a moral sense, insofar as it is understood to be theft, and theft is generally agreed upon to be a moral wrong. Nevertheless, the doctrine of adverse possession persists.

While some theorists defend adverse possession on utilitarian grounds and others challenge it with Lockean, rights-based theories, human rights or social justice theorists rarely discuss the doctrine. Scholars debate a proper definition of the term social justice, but herein it describes both theorists who, and theories which, drawing upon human rights and redistributive justice principles, focus on more egalitarian property systems. *J.A. Pye (Oxford) Ltd. and another v. Graham and another (Pye)*, a recent U.K. case, raised the question of whether adverse possession may violate a human right to own property. The case implicated the then recent-

ly adopted U.K. Human Rights Act of 1998, therein explicitly bringing adverse possession into the human rights realm. Yet, a review of the case as it moved through the U.K. courts and the European Court of Human Rights reveals, however, that courts have not embraced a consideration of adverse possession as playing a role in substantive human rights or social justice concerns. This is due, in part, to the dearth of human rights and social justice scholarship on the doctrine. Though human rights and social justice theorists have failed to fully develop the doctrine, their theories lay the groundwork for utilizing adverse possession as a tool to fashion new property systems. Utilizing adverse possession as a social justice tool can help foster systems with widespread property distribution while actively recognizing and supporting human rights of both owners and those seeking ownership.

To understand the role adverse possession plays in re-envisioning property systems, one must have a working knowledge of the dominant theories of property, as well as social justice scholarship on property distribution. Part I of this paper will outline the major approaches to property law and theory. Part II will then build upon this understanding and transition into a close analysis of adverse possession doctrine, as well as provide an introduction to the *Pye* cases. Part III examines the current, limited discussion of adverse possession in social justice scholarship, as well as delves deeper into social justice property theories. Part IV proposes the adoption of adverse possession as a tool for social justice theorists and delimits the ways in which the doctrine can reform property systems in line with social justice goals, while respecting individual rights.

## I. MAJOR THEORIES IN PROPERTY LAW

Prior to discussing *Pye*, adverse possession doctrine, and the role it can play in advancing social justice goals, it is necessary to have a working understanding of the dominant theories justifying private property systems. While this paper aligns itself with social justice goals, an evaluation of the sustainability and/or appropriateness of each theory is outside the scope of, and ancillary to, the focus of this paper. Thus this paper assumes the validity of social justice theories and does not focus on disproving the sustainability or validity of opposing theories. Brief outlines of utilitarian and rights-based theories are provided to give the reader a functioning knowledge of these prevailing approaches explaining property law. Of principle focus are social justice theories of property law, so as to enable a full discussion of the ways in which adverse possession

provides an avenue to the realization of social justice goals which accords with philosophical bases of such theories.

### A. Utilitarian Approach

A utilitarian approach to property law focuses on the maximizing of social welfare or happiness.<sup>3</sup> Property and property ownership are valuable only insofar as they promote the greatest quantity of social welfare and happiness. Stated differently, utilitarian theorists focus singly on “maximiz[ing] the size of the pie.”<sup>4</sup> Critics note that concerns of equality of access to, or distribution of, the “pie” are secondary to, or wholly absent from utilitarian arguments.<sup>5</sup> Ensuring security of title and getting property into the hands of those who value it most are the primary utilitarian means of promoting social welfare.<sup>6</sup>

For utilitarians, property is merely an instrument to the realization of an overarching goal. Security of property rights is essential as it spurs individuals to invest themselves in the development and use of their property. That investment fuels the overall efficiency and welfare of society.<sup>7</sup> Some utilitarian arguments focus more on maximizing the economic value as a measure of overall systemic utility and thereby social welfare and happiness.<sup>8</sup> To economic utilitarians, the key function of property laws is to ensure that the person who places the highest value on a given piece of property acquires said property.<sup>9</sup> Such a goal is fueled by lowering transaction costs to ensure that transfers of property are frequent.<sup>10</sup> With frequent transfers, the overall efficiency and utility of the system are advanced by encouraging property to find its way into the hands of the person who values it most highly.<sup>11</sup> A property system that accomplishes this and provides security of title is a utilitarian ideal.

### B. Rights-Based Approach

Rights-based theories owe their foundations to John Locke’s

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3. See ALI RIZA ÇOBAN, PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 37 (Ashgate Publishing 2004).

4. SINGER, *supra* note 2, at 118.

5. *Id.*

6. See ÇOBAN, *supra* note 3, at 38-39; SINGER, *supra* note 2, at 118-19.

7. See ÇOBAN, *supra* note 3, at 38-39.

8. See *id.* at 39.

9. See *id.* at 39-40; SINGER, *supra* note 2, at 118-19.

10. See ÇOBAN, *supra* note 3, at 39-40; SINGER, *supra* note 2, at 120.

11. ÇOBAN, *supra* note 3, at 39-40.

writings on property.<sup>12</sup> Locke founded the right to possession of property in the concept that an individual has the natural right to her own labor. When she invests that labor into property, she gains a natural right to control of that property by virtue of her intrinsic right to her labor; an appropriation of property into which one does not invest her labor is an impermissible appropriation of that person's labor.<sup>13</sup> Importantly, this right only extends so far as to permit an individual appropriation of property which leaves sufficient property for others.<sup>14</sup> Where the right to property is a natural right all persons have in a state of nature, the right to the protection of property by the State emerges as a result of humankind's consensual agreement to "enter into one Community."<sup>15</sup> Locke's natural right to property, and the consent-based right to protection of property, lays the groundwork for Robert Nozick's influential theory of private property law.

Robert Nozick relies upon Locke to develop his theory of private property as a system of rights acquired through just acquisition and just transfer.<sup>16</sup> In a Nozickian approach, any "distribution is just if it arises from another just distribution by legitimate means."<sup>17</sup> Just transfers are limited to voluntary transactions or gifts; any other appropriation of property is unjust and therefore invalidates the holding.<sup>18</sup> Nozick asserts that the question of whether a holding is just is a historical one, rather than one answered by looking at the current state of holdings; i.e. if a holding was just at the time of acquisition (either by just transfer for or original acquisition), it is just.<sup>19</sup> Thus, in sharp contrast to social justice theorists, consideration of current distributions is an impermissible inquiry.<sup>20</sup>

Intimately related to his historical evaluation of the justice of a holding is another key aspect of Nozick's view: that anything more than minimal governmental intervention into the regulation of property violates the fundamental principles of just acquisition and transfer.<sup>21</sup> Redistribution is a foreign and indefensible concept to Nozickians—so long as property is transferred by gifts or an in-

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12. *Id.* at 44; SINGER, *supra* note 2, at 168-69.

13. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 287-89 (Peter Laslett ed., Cambridge University Press 3d ed. 1988) (1960); COBAN, *supra* note 3, at 44; SINGER, *supra* note 2, at 168-69.

14. LOCKE, *supra* note 13, at 286.

15. *Id.* at 270-77.

16. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY, 253-83 (Oxford University Press 1988) [hereinafter WALDRON PRIVATE PROPERTY].

17. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, 151 (Basic Books, Inc. 1974).

18. *Id.* at 150-52.

19. *Id.* at 149-55.

20. *Id.* at 153-59.

21. *Id.* at 149.

dividual's uncoerced desire to transact with others, the question of in whose hands said property ends is beyond the State's concern.<sup>22</sup> Or, as Nozick summarizes: "*From each as they choose, to each as they are chosen.*"<sup>23</sup>

What happens when persons are never chosen, nor able to choose? Social justice theorists take up the considerations of how property systems shape the welfare of each individual and how they may be reconceived to better protect individual welfare and advance social justice.

### C. Social Justice Approaches

The following theorists present three distinct but related approaches to social justice theory of property law. Joseph Singer's social relations property system represents the most complete departure from the utilitarian and rights-based approaches to property law. Jeremy Waldron follows a liberal rights-based approach to property that, while similarly focused on individual rights, differs substantially from the Nozickian rights-based model previously discussed. Lastly, the human-flourishing model of property law advanced by Eduardo Peñalver is examined. Peñalver's model embraces both utilitarian and rights-based concepts. Because of their profound social justice focus, Waldron's and Peñalver's theories are more appropriately discussed as social justice theories of property, despite their grounding in the language and theory of natural rights and utilitarianism.

#### 1. Joseph Singer—Social Relations Property System

Singer advances a social relations model of property. Central to Singer's model is the concept that property systems are a matter of social justice. Where rights-based or utilitarian models fail, Singer argues, is in their ignorance or disavowal of the idea that "[p]roperty rights are . . . legal rules that shape the contours of human relationships regarding control of valuable resources."<sup>24</sup> Utilitarians avoid answering the moral questions which property systems demand in favor of "promot[ing] the general welfare or social utility."<sup>25</sup> Rights-based theorists ignore the impacts on others effectuated by property systems that focus solely upon the protection of individual "entitlements" at the expense of "obliga-

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22. *Id.* at 159.

23. NOZICK, *supra* note 17, at 160.

24. SINGER, *supra* note 2, at 134.

25. *Id.* at 117-18.

tions.”<sup>26</sup> Property, to Singer, must be understood as a set of “entitlements *as* obligations we owe others with whom we are in relationship.”<sup>27</sup>

Singer spends a great deal of time arguing the merits of a social justice theory of property against utilitarian and rights-based theories. The inquiry upon which this paper focuses is whether Singer and other social justice theorists err in ignoring adverse possession as a part of social justice property theory. Thus a full evaluation of the details of Singer’s critique of other theories is unnecessary and beyond the scope of this paper. I will assume *arguendo* the validity of Singer’s theory of property and his critique of utilitarian and rights-based theories.

A defining entitlement of Singer’s theory is the right to be able to participate in the property system. To illustrate the pervasiveness of this idea in all property theories, Singer describes a situation of private property gone *wrong*, i.e. counter to what most understand to be the proper functioning of a private property system.<sup>28</sup> Singer’s example is set in a previously communist Eastern European country transitioning to a private property system. The prime minister of this country reported to an advisor, presumably one from a country with a private property system resembling our own, that she had successfully transitioned her country to a private property system by granting property ownership to ten families who “could be trusted to guide the country . . . into the bright future of freedom.”<sup>29</sup>

This example is illuminating in many ways. It draws attention to the importance of the idea that private property should be widely held to the theories that justify private property systems. Those of us who have grown up in private property systems, Singer asserts, “would think the prime minister had a screw loose.”<sup>30</sup> Such a concept of private property seems so wrong because a normative justification of a private property system is that “[w]idespread distribution of property is virtually a defining characteristic” of such a system.<sup>31</sup> Thus whatever property system the prime minister may have instituted, privatized though it may be, could not properly be understood as what we generally think of as a private property system; it does not match our conception of a private property system which “presumes that there will be many owners.”<sup>32</sup> A private

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26. *Id.* at 16, 171-73.

27. *Id.* at 216 (emphasis added).

28. *Id.* at 140-43.

29. *Id.* at 141.

30. SINGER, *supra* note 2, at 141.

31. *Id.*

32. *Id.*



property system must “at least guarantee everyone the opportunity to become an owner [and] . . . that opportunity must be real rather than hypothetical.”<sup>33</sup> When ownership is not widespread or a system supports unequal distribution, redistribution is required to realize the goal of providing real ownership opportunities.<sup>34</sup>

Expectations are central to Singer’s property theory, but his definition of expectations differs significantly from that of a rights-based theorist. Singer’s model protects the expectation that all individuals have to be able to meaningfully participate in a property system that provides the “means necessary for a dignified human life.”<sup>35</sup> Such an expectation will necessarily impugn what a rights-based theorist would understand to be the expectation that she can exercise her property rights in a relative vacuum, subject only to minimal limitations by government intervention and regulation.<sup>36</sup> In a social relations property system, the denial of that expectation is appropriate as a social relations property system need only recognize “justified expectations.”<sup>37</sup> An expectation to be able to exert relative absolute control over the alienability, use of, or access to property based simply upon possession of title is an unjustifiable expectation as it “leave[s] others unduly vulnerable”<sup>38</sup> to exclusion from the system.<sup>39</sup> Thus Singer’s concept of expectations opens the door for redistribution of property based upon realizing justified expectations and overriding the unjustified.

## 2. Jeremy Waldron—Need for Affirmative Rights

Waldron advances a rights-based approach to defining the role of property in society.<sup>40</sup> Despite this similarity to Nozick, Waldron’s theory is rightly classified as a social justice theory as it, mirroring other social justice theories, focuses on widespread distribution of property and a consideration of the morality of property systems. Waldron’s point of departure is the individual, in contrast to communitarian theorists who conceptualize the individual

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33. *Id.* at 141, 144.

34. *Id.* at 140-44, 160-69. For discussion of the centrality of widespread distribution as a goal of land reform in developing nations, see Amy Ochoa Carson, Note, *East Timor’s Land Tenure Problems: A Consideration of Land Reform Programs in South Africa and Zimbabwe*, 17 IND. INT’L & COMP. L. REV. 395 (2007); Kevin E. Colby, *Brazil and the MST: Land Reform and Human Rights*, 16 N.Y. INT’L L. REV. 1 (2003); Nick Dancaescu, Note, *Land Reform in Zimbabwe*, 15 FLA. J. INT’L L. 615 (2003).

35. *Id.* at 212.

36. SINGER, *supra* note 2, at 73, 211.

37. *Id.* at 211.

38. *Id.* at 211-12.

39. *Id.* at 41-42, 141-43.

40. Jeremy Waldron, *When Justice Replaces Affection: The Need For Rights*, 11 HARV. J.L. & PUB. POL’Y 625, 628-29 (1988) [hereinafter Waldron Justice].

as part (and product of) a community.<sup>41</sup> Rather than relying upon “affective bond[s]”<sup>42</sup> to meet an individual’s needs, Waldron argues for affirmative rights for the individual should the bonds of community and relationships fail.<sup>43</sup> Affirmative rights not only protect an individual’s interests and relationships, but also allow her “to initiate *new* relations.”<sup>44</sup> Waldron’s view is thereby not only compatible with the conception of an individual as part of community, but also provides affirmative protections for when the community may fail to meet an individual’s needs.<sup>45</sup>

A minimum right to property is an essential part of Waldron’s theory. Private property, in modern society, is required for an individual to be able to perform basic human functions: sleeping, bathing, etc.<sup>46</sup> As such, access to property affects one’s ability to participate in social and economic life, so it follows that those who lack private property lack the freedom to participate as equal human beings in society.<sup>47</sup> A person’s right to property is a “general” right one has because she is a human being, a Hegelian “free moral agent.”<sup>48</sup> This stands in stark contrast to the “special” right a person has under a Lockean rights-based theory of property because of her actions to acquire property.<sup>49</sup> To be able to respect the equality of all human beings, society must ensure that all individuals have a general right to private property.<sup>50</sup>

Waldron is very specific in his use of the term *right*, however. A right of access to a property system is necessary, but insufficient. A right must exist to ensure that “everyone should actually *own* something” rather than just provide an *opportunity* for ownership.<sup>51</sup> As Waldron states, quite explicitly, in his discussion of homelessness and the need for an affirmative right to property, “one cannot pee in an opportunity.”<sup>52</sup> For example, Waldron recognizes the importance of a constitutional right to property, such as that found in South Africa’s Constitution, but criticizes such a right for falling short of a guarantee. Rather, an individual must have an affirmative right to possess property that she can turn to

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41. *Id.* at 631.

42. *Id.* at 629.

43. *Id.* at 631.

44. *Id.* at 631, 642.

45. *Id.* at 634.

46. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 320 (1991) [hereinafter Waldron Homelessness].

47. *Id.* at 320-23.

48. WALDRON PRIVATE PROPERTY, *supra* note 16, at 443-44.

49. *Id.*

50. Waldron Homelessness, *supra* note 46, at 320-25.

51. WALDRON PRIVATE PROPERTY, *supra* note 16, at 390.

52. Waldron Homelessness, *supra* note 46, at 322.

when denied ownership by fate or circumstance.<sup>53</sup>

### 3. Eduardo Peñalver—Promoting “Human Flourishing”<sup>54</sup>

Peñalver advances what he terms a “[h]uman [f]lourishing/[h]uman [c]apabilities” approach to property, which is an amalgamation of rights-based and utilitarian property theories.<sup>55</sup> Peñalver grounds this approach in the recognition that community is “inherent in the human condition,” essentially saying that we are all dependent upon one another to “develop the distinctively human capacities that allow us to flourish.”<sup>56</sup> In order to flourish, an individual needs not only to be part of a community, but to be able to exercise her own agency “to make meaningful choices.”<sup>57</sup> Through its emphasis on the agency of the individual, Peñalver’s approach echoes Waldron’s Hegelian argument of a general right to property. Distinctively, however, for Peñalver, the individual is both simultaneously autonomous of, and inseparable from, the community.<sup>58</sup>

To Peñalver, a just society is one in which an individual has the “capabilities” for living “in a manner consistent with norms of equality, dignity, respect . . . justice . . . freedom and autonomy.”<sup>59</sup> The four defining “capabilities” are for “life,” “freedom,” “practical reason,” and “sociality.”<sup>60</sup> Property, in the author’s view, is a physical requirement necessary to achieving this state of human flourishing, but it cannot be acquired without others.<sup>61</sup> Like Singer, Peñalver recognizes that capitalism and the current private property system do not effectuate adequate access to property ownership to promote human flourishing.<sup>62</sup> Acknowledging this, Peñalver argues that the State has an affirmative duty to redistribute “surplus resources.”<sup>63</sup> Doing so advances the utilitarian goal of promoting human flourishing, as well as the individual right to exercise one’s agency in the world.<sup>64</sup> The joint rights-based and utilitarian

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53. WALDRON PRIVATE PROPERTY, *supra* note 16, at 392, 408; Waldron Homelessness, *supra* note 46, at 322-23; Waldron Justice, *supra* note 40, at 629.

54. Peñalver co-authored the articles discussed with either Gregory Alexander or Sonia K. Katyal, as indicated in the citations. As Peñalver is the unifying theorist, I refer to the model as his in the text for ease of reference.

55. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 134 (2009).

56. *Id.* at 134-35.

57. *Id.* at 135.

58. *Id.* at 135-36.

59. *Id.* at 140.

60. *Id.* at 138.

61. See Alexander & Peñalver, *supra* note 55, at 138-48.

62. *Id.* at 146.

63. *Id.* at 148.

64. *Id.* at 148-49.

grounding of Peñalver's argument makes his theory distinct, though clearly related to those of Singer and Waldron.

Having a working knowledge of the three major approaches to property law, it is now appropriate to discuss the doctrine of adverse possession. An examination of the doctrine, as well as the *Pye* case, will illustrate the relative uniformity of adverse possession and the theories for and against it in both the United States and the United Kingdom. It will also illustrate the absence of serious social justice theory on adverse possession, despite its potential use as a redistributive tool.

## II. ADVERSE POSSESSION DOCTRINE: BACKGROUND AND THE PYE CASES

Adverse possession is a common law doctrine that allows one in possession of land, but lacking legal title to it, to gain title to the property after she has met the required elements of the doctrine.<sup>65</sup> The change of title from the prior owner to the adverse possessor is not a standard transfer but rather occurs by virtue of the adverse possessor's "possession and the statutory extinguishment of the former owner's title."<sup>66</sup> While the language of the requirements differs, adverse possession doctrine in the United States predictably tracks that of the United Kingdom.<sup>67</sup> Because of the significant overlap, one can move freely between discussion of the doctrine and its challenges and justifications in both countries.

### A. United States

Modern adverse possession doctrine in the United States requires the adverse possessor to satisfy six requirements to have a successful claim: "(1) actual possession [that is] (2) open and notorious, (3) hostile (without permission), (4) exclusive, (5) continuous, and (6) for the required" statutory period.<sup>68</sup> Jurisdictions vary in their inquiry into and requirement of a specific state of mind of the adverse possessor regarding the property. For some, the adverse possessor must simply exert actual possession of the property,

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65. JOHN E. CRIBBET ET AL., *PROPERTY: CASES AND MATERIALS*, 168 (9th ed. 2008); ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY*, 757-58 (West Publishing Co. student ed. 1984).

66. Charlotte C. Williams, Comment, *Reaching Back to Move Forward: Using Adverse Possession to Resolve Land Conflicts in Timor-Leste*, 18 PAC. RIM. L. & POL'Y J. 575, 597 (2009).

67. Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 127-28 (1997).

68. CRIBBET ET AL., *supra* note 65, at 177 (discussing the foundational adverse possession case *Marengo Cave Co. v Ross*, 10 N.E.2d 917 (Ind. 1937)).

while other jurisdictions require the possessor to have a “subjective belief that [she] . . . owns the property” or an “intent to displace.”<sup>69</sup> Under the common law, the adverse possessor had to be in possession for twenty years, though many jurisdictions have reduced that requirement.<sup>70</sup> While the time of possession required may vary by jurisdiction, adverse possession doctrine is relatively uniform as a “well[-]entrenched” aspect of property law.<sup>71</sup>

### B. United Kingdom

As it provided the model for U.S. adverse possession doctrine, the U.K. doctrine closely resembles that of the United States.<sup>72</sup> For an adverse possessor to have a successful claim, she must establish 1) factual possession and the 2) *animus possidendi* (the intent to possess), which are 3) adverse to the title owner’s interest and persist for the statutory period.<sup>73</sup> Until 2002, modern U.K. adverse possession doctrine regarding registered land was defined by the combination of the Land Registration Act of 1925 (LRA 1925) and the Limitation Act of 1980 (LA 1980). If the elements of adverse possession were met for the statutorily required period of twelve years, the title owner’s interest was extinguished “without warning and without compensation.”<sup>74</sup>

The Land Registration Act of 2002 (LRA 2002) significantly altered adverse possession.<sup>75</sup> Rather than an immediate extinguishing of title when all elements have been met, the LRA 2002 now permits an adverse possessor to apply to be granted title after ten years of adverse possession.<sup>76</sup> After an application is made, the title owner is notified of the adverse possessor’s application.<sup>77</sup> Unless the adverse possessor is entitled to possession based on a claim of equitable estoppel,<sup>78</sup> boundary dispute,<sup>79</sup> or “some other reason,”<sup>80</sup> the title holder may defeat the application by evicting the squatter and re-establishing possession within two years.<sup>81</sup>

69. *Id.*

70. 3 AM. JUR. 2D *Adverse Possession* § 13 (2010).

71. CRIBBET ET AL., *supra* note 65, at 168.

72. Gardiner, *supra* note 67, at 127-28.

73. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 689; Julia Simmonds, *Squatter Case Finds Its Way to the European Court of Human Rights*, 10 L. & T. REVIEW 37, 37 n. 2 (2006).

74. Simmonds, *supra* note 73, at 38.

75. *Id.*

76. Land Registration Act, 2002 c. 9, § 97, sch. 6, para. 1(1) (Eng.) [hereinafter LRA 2002].

77. *Id.* at para. 2.

78. *Id.* at para. 5(2).

79. *Id.* at para. 5(4).

80. *Id.* at para. 5(3).

81. Simmonds, *supra* note 73, at 37 n.9.

Thus the LRA 2002 may make it increasingly difficult for adverse possessors to acquire possession.<sup>82</sup>

### *C. Theories Supporting and Challenging Adverse Possession*

Justification for and criticisms of the doctrine are similar on both sides of the Atlantic. The prevailing justifications for the doctrine—that it clarifies title by eliminating the possibility of old claims and that it encourages efficient use of land—are utilitarian in nature.<sup>83</sup> By quieting title, adverse possession arguably contributes to the security of an owner's interest in property. Once secure in her property rights, the owner, it is presumed, will more fully develop her property or may feel better able to transfer her property to another—either action contributes to the efficiency of the economy.<sup>84</sup> Rather than letting land lay unused, adverse possession encourages owners to actively use and monitor their land, thereby contributing to the general welfare and “ultimate progress of society.”<sup>85</sup> Traditional utilitarianism (uninformed by social justice theory) clearly dominates current theoretical justifications for adverse possession.

Dominant criticisms of the doctrine are in line with a Locke via Nozick rights-based approach to property. Calling the doctrine “draconian” and one which “does not accord with justice,”<sup>86</sup> critics assert that adverse possession “unfairly deprives rightful owners of their title.”<sup>87</sup> To a Nozickian rights-based theorist, the title owner holds title until she decides to transfer said title through a state-sanctioned just transfer.<sup>88</sup> Thus adverse possession seems to such a theorist to be little more than theft, which has, regrettably, been backed by the State.

### *D. Adverse Possession and Human Rights*

A potential for a shift in the discourse on adverse possession came in the form of the Human Rights Act of 1998 (HRA 1998). While the United Kingdom ratified the European Convention on

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82. *Id.* at 38.

83. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 709-10; CRIBBET ET AL, *supra* note 65, at 176; Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2435, 2441-42 (2001).

84. Williams, *supra* note 66, at 601; Stake, *supra* note 83, at 2435, 2441-42.

85. Gardiner, *supra* note 67, at 156.

86. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 709-10.

87. Stake, *supra* note 83, at 2448.

88. *J.A. Pye (Oxford) Ltd v. U.K.*, 43 Eur. Ct. H.R. 3, 50 (2005) (stating that “[a]s registered freeholders, the applicant’s title [to the land] was absolute and not subject to any restriction, qualification or limitation.”).

Human Rights in 1951 (ECHR), the ECHR protocols did not govern U.K. law until after the HRA 1998.<sup>89</sup> The specific provision regarding property and the one in debate in *Pye*, is Article 1 of Protocol 1 which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>90</sup>

The similarities to the Fifth Amendment of the U.S. Constitution are clear. But for the purposes of this paper, the most important distinction is that the ECHR and the HRA 1998 grew out of and were adopted as part of a growing awareness of the need for affirmative human rights documents. As such, unlike the U.S. Constitution, the ECHR and HRA 1998 explicitly open the door for a discussion of the theories of, philosophical foundations for, and legal implications of human rights doctrines. Strikingly, as one will find after examining *Pye*, even under a system which explicitly recognizes human rights, U.K. courts have not informed their jurisprudence with the theories and discourse of human rights.

### *E. Overview of Pye*

*J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd v. The United Kingdom (J.A. Pye (Oxford) Ltd. and others v. Graham and another* in the U.K. courts) neatly illustrates the pervasiveness of utilitarian and rights-based arguments on adverse possession. The case moved through the Chancery Court, Court of Appeals and House of Lords within the United Kingdom, after which it proceeded through the lower chamber and Grand Chamber of the European Court of Human Rights.<sup>91</sup> The decisions, as well as the dis-

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89. A.W.B. Simpson, *Constitutionalizing the Right of Property: The U.S., England and Europe*, 31 U. HAW. L. REV. 1, 16 (2008).

90. Human Rights Act, 1998, c. 42, § 1(3), sched. 1, pt. 2, art. 1 (Eng.).

91. *J.A. Pye (Oxford) Ltd v. U.K.*, App. No. 44302/02, 46 Eur. H.R. Rep. 45 (2008); *J.A. Pye (Oxford) Ltd v. U.K.*, App. No. 44302/02, 43 Eur. H.R. Rep. 3 (2006); *J.A. Pye (Oxford) Ltd v. Graham* [2002] UKHL 30, 3 All E.R. 865 (appeal taken from Eng.); *J.A. Pye (Oxford)*

sents, provide an accessible means for grasping the theoretical underpinnings of the arguments for and against adverse possession. Additionally, *Pye* is an especially appropriate case as it raised the question of whether adverse possession violates a human right to own property under the Human Rights Act of 1998.

The focus of *Pye* was a dispute of the possession of approximately fifty-seven acres of land.<sup>92</sup> In 1983, John Graham received a grazing license from J.A. Pye Holdings to use land adjoining the Graham's Manor Farm.<sup>93</sup> Pye owned the land with the intention of developing it in the future once the necessary permits could be obtained.<sup>94</sup> In January 1984, Pye refused to renew the license by way of a letter to the Grahams.<sup>95</sup> At the close of 1984 and in May 1985, John and Michael Graham, John's son, sent further requests to the company for a renewal of the grazing license.<sup>96</sup> After the May 1985 letter, there was no evidence of any further contact between the Grahams and Pye until 1997.<sup>97</sup> At all times since the expiration of the grazing license, the Grahams used the property for grazing, harvested hay, and maintained the boundaries and condition of the property.<sup>98</sup>

The Grahams claimed title to the disputed land under the Limitation Act of 1980. In 1997, the Grahams filed cautions with the Land Registry. Pye then filed an application to counter the cautions, but the Land Registry issued a statement in favor of the Grahams in September 1998. Subsequently Pye filed suit in the Chancery Court to retain possession of the property in January 1999, thereby initiating this illustrative case.<sup>99</sup>

At the Chancery Court, the only question presented was whether there was sufficient evidence for the court to hold in favor of the Grahams as adverse possessors.<sup>100</sup> As the period of adverse possession was initiated and completed prior to 2002, the LA 1980 controlled. LA 1980 provides, in pertinent part, that:

Where the person bringing an action to recover land . . . has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the

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Ltd. v. Graham, [2001] EWCA (Civ) 117 (appeal taken from Eng.); *J.A. Pye (Oxford) Ltd*, [2000] Ch. 676.

92. *J.A. Pye (Oxford) Ltd*, 46 Eur. H.R. Rep. 45 at 1087.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *J.A. Pye (Oxford) Ltd*, [2000] Ch. 676 at 676-685.

99. *Id.* at 687.

100. *Id.*



right of action shall be treated as having accrued on the date of the dispossession or discontinuance.<sup>101</sup>

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him . . . .<sup>102</sup>

[A]t the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.<sup>103</sup>

Judge Neuberger held for the Grahams, finding that they had 1) factual possession, 2) the necessary intent to possess the land (*animus possidendi*), and 3) that the possession was adverse under the LA 1980 and LRA 1925.<sup>104</sup> Even as he found in favor of the Grahams as adverse possessors, Judge Neuberger expressed a rights-based criticism of the doctrine:

[T]his is a conclusion which I arrive at with no enthusiasm . . . if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years . . . it does seem draconian to the owner and a windfall for the squatter.<sup>105</sup>

Title is supreme and gives the owner the right to do anything (or nothing) with her property. Under this view, the adverse possessor has no viable claim to the property.

Rights-based criticisms, such as Neuberger's, as well as utilitarian justifications for adverse possession, abound throughout the *Pye* opinions. In the Court of Appeal, *Pye* introduced the question of whether the doctrine violates a human right to own property recognized in the United Kingdom by the HRA 1998.<sup>106</sup> The question could not be addressed by the lower court as HRA 1998 did not come into effect until 2000.<sup>107</sup> The Court of Appeal reversed, hold-

101. Limitation Act, 1980, c. 58, § 15(6)(7), sch. 1 (Eng.).

102. *Id.* at pt. 1, 15(1).

103. *Id.* at pt. 1, 17(b).

104. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 689.

105. *Id.* at 709-10.

106. *J.A. Pye (Oxford) Ltd.*, [2001] EWCA Civ 117 [18]-[34].

107. *Id.* at [45]-[46].

ing for Pye, on the grounds that the Grahams' possession had not been incompatible with the owner's intent toward the property and therein did not satisfy the requisite intent to possess.<sup>108</sup> Regarding the human rights claim, the court held there was no violation of Article 1 of Protocol 1 of the ECHR, as adverse possession does not deprive an owner of her possessions, but rather her right to bring a claim to keep those possessions.<sup>109</sup> In the alternative, assuming there was a potential violation, the court stated that adverse possession is justified on the utilitarian grounds of clarification of title and the desire to "promote social stability by the protection of . . . established and peaceable possession."<sup>110</sup> The court's dismissive treatment of the human rights claim and reversion to utilitarian arguments illustrates the court's failure to seriously consider the relationship between property, adverse possession, and human rights.

After losing at the Court of Appeal, the Grahams appealed the case to the House of Lords. That court reversed the appeal court's judgment and restored the Chancery court's order in favor of the Grahams.<sup>111</sup> Importantly, the court found the appellate court's interpretation of intent to possess to be in error.<sup>112</sup> Additionally, at the House of Lords, Pye conceded that the HRA 1998 could not apply retroactively.<sup>113</sup> However, in a concurring opinion, Lord Hope of Craighead considering the human rights challenge, simply stated that "[f]ortunately . . . a much more rigorous regime has now been enacted [by the LRA of 2002 which will] make it much harder for a squatter . . . to obtain a title to [registered land] against the wishes of the proprietor."<sup>114</sup> Lord Hope makes no consideration of the potential rights of an adverse possessor. Thus, while his overall consideration of the human rights issue is brief, it is also incomplete. Echoing the lower courts, Lord Hope criticizes adverse possession on rights-based grounds, and avoids a full discussion of potential corollary human rights implications for the adverse possessor.<sup>115</sup>

Pye then brought suit in the European Court of Human Rights against the United Kingdom for a violation of Article 1 of Protocol 1 of the ECHR.<sup>116</sup> The lower chamber held for Pye, finding that adverse possession doctrine, under the LA 1980 and LRA 1925, vio-

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108. *Id.* at [40]-[44].

109. *Id.* at [52(2)].

110. *Id.* at [52(3)].

111. *J.A. Pye (Oxford) Ltd*, [2002] UKHL 30 [2],[66].

112. *Id.* at [31]-[45], [61]-[62].

113. *Id.* at [65].

114. *Id.* at [73].

115. *Id.* at 885 ("Once possession has begun, as in the case of the owner of land with a paper title who has entered into occupation of it, his possession is presumed to continue.").

116. *J.A. Pye (Oxford) Ltd*, 43 Eur. H.R. Rep. 3 at 43 (2006).

lated Article I of Protocol 1.<sup>117</sup> The court articulated a rights-based argument, stating that: “[A]s registered freeholders, the applicants’ title to the land was absolute and not subject to any restriction, qualification or limitation;” absent any other defect, the title was absolute.<sup>118</sup> The court emphasized that takings in the public interest, which are permissible under Article 1 of Protocol 1, should be recognized “only in exceptional circumstances” and that the taking by adverse possession in this case did not qualify as such a circumstance.<sup>119</sup> By relying heavily on Nozickian rights-based theories of adverse possession, the lower chamber failed to change the discourse on adverse possession to one that seriously entertains human rights concerns.

The Grand Chamber, hearing *Pye*, reversed the lower chamber decision, finding there was no violation of Article 1 of Protocol 1.<sup>120</sup> In its decision, the court found that the United Kingdom’s interest in clarification of title was reasonable under the demands of Article I of Protocol I.<sup>121</sup> Therein, the court relied upon the oft-cited utilitarian justification for adverse possession. In considering the rights of the adverse possessor, the court stated it “would be strained to talk of the ‘acquired rights’ of an adverse possessor.”<sup>122</sup> Mirroring the lower chamber, the Grand Chamber returned to well-trod theories on adverse possession. Going even further than the lower chamber, the court was dismissive of any potential social justice or human rights claim of the adverse possessor. Again, when faced with a potential to inform adverse possession doctrine with human rights theory, the Grand Chamber, like those before it, failed to do so.

Three decisions in favor of the adverse possessor, two in favor of the title owner, yet not a single decision engages in substantive human rights discussions. The decisions in favor of the Grahams as adverse possessors were granted grudgingly, finding adverse possession “draconian”<sup>123</sup> or as illustrative of “[t]he unfairness in the old regime.”<sup>124</sup> Essentially, in the view of the courts, the Grahams are the undeserving benefactors of an unjust law.<sup>125</sup> The only human rights entertained are those of the title owner; there is no corresponding discussion of the rights that, though not currently recognized in a human rights document applicable to the United

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117. *Id.* at 63-64.

118. *Id.* at 57-58.

119. *Id.* at 63.

120. *J.A. Pye (Oxford) Ltd* 46 Eur. H.R. Rep. 45 at 1106 (2008).

121. *Id.* at 1101.

122. *Id.* at 1105.

123. *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 710.

124. *J.A. Pye (Oxford) Ltd.*, [2002] UKHL 30 [73].

125. *Id.* at [28].

Kingdom, the adverse possessor could or should have to title. The only mention of any potentially “acquired rights” is made in passing and demeaned as being essentially inconsequential.<sup>126</sup> *Pye* may raise human rights questions, but the courts faced with the case skirted a real discussion, offering nothing but the same old answers.

### III. ADVERSE POSSESSION AS A TOOL FOR ADVANCING HUMAN RIGHTS AND SOCIAL JUSTICE: CURRENT DISCUSSION

#### A. Social Justice Theorists’ Failure to Consider Adverse Possession

Utilitarian justifications for, and rights-based criticisms of, adverse possession abound. Very few social justice theorists, however, have seriously considered the doctrine as a legal means of increasing access to private property ownership. Those that do address the doctrine frequently collapse into utilitarian arguments of efficient use of property and promotion of general welfare, rather than arguing in support of the doctrine explicitly on social justice grounds.

One such utilitarian argument emerges in “Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws.” In his article, Brian Gardiner argues for a shortening of the statutory periods required for a successful adverse possession claim.<sup>127</sup> While his goal, insuring access to property for all and eliminating homelessness,<sup>128</sup> is in accordance with social justice theory, Gardiner’s approach is traditionally utilitarian. Gardiner justifies adverse possession as a means of enhancing the efficient use of property, clarifying title, and eliminating “resource gaps.”<sup>129</sup> Absent from Gardiner’s discussion is any argument that adverse possession is a means to property ownership that is justified by social justice and/or human rights concerns.<sup>130</sup> Gardiner’s goal is laudable but his argument in support of adverse possession cannot be construed as part of the social justice approach to property. Herein, Gardiner fails, as do the following social justice theorists, to recognize the redistributive role adverse possession can play in advancing social justice goals.

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126. *J.A. Pye (Oxford) Ltd*, 46 Eur. H.R. Rep. 45 at 1105 (2008).

127. Gardiner, *supra* note 67, at 156.

128. *Id.*

129. *Id.*

130. *See generally id.* I do not mean to impugn Gardiner’s goal or intentions in arguing in favor of adverse possession, but rather to highlight the absence of social justice theory on adverse possession by distinguishing Gardiner’s argument as a utilitarian one.

*B. Peñalver's Human Flourishing and Adverse Possession*

Peñalver makes the most thorough examination of adverse possession of the social justice theorists discussed herein. Although his examination is thorough, it cannot be said to take up the banner for adverse possession as a redistributive tool for social justice property theorists. Rather than a serious consideration of the role adverse possession *can play* in redistributive schemes, Peñalver conducts a largely historical study of the role the doctrine *has played* in shaping property law as we now know it through the settlement of the American West and urban squatter's movements.<sup>131</sup>

Peñalver recognizes the role adverse possession can play in drawing attention to inequitable property distribution. Such "acquisitive outlaw conduct," if repeated, may have the ability to raise awareness of the fact that the market and the current property system are failing to adequately protect all individuals.<sup>132</sup> As such, systematic attempts at adverse possession can be, and have historically been, an awareness-raising mechanism.<sup>133</sup> While Peñalver's focus on adverse possession as a social movement tool is largely historical, it opens the door for reconsideration of the current role of the doctrine in social justice property theory.

At the core of Peñalver's argument is that a person in need does not commit a wrong when she takes the property of another.<sup>134</sup> As discussed earlier, Peñalver recognizes property as a right to which all are entitled as a means of exercising their own agency and promoting human flourishing. If an individual has no other means of obtaining property and is thereby denied her agency and ability to flourish, it is not wrong for that person to "self-help."<sup>135</sup> Peñalver notes that the adverse possession doctrine and the modern ease of monitoring property combine to ensure that the property taken now is most likely to be "surplus" property that the title owner could afford to ignore.<sup>136</sup> This fact, for Peñalver, strengthens the moral claim of the adverse possessor to possession.

While calling for an "expansion of existing [self-help] tools,"<sup>137</sup> Peñalver, in the same breath, largely resigns adverse possession to the category of a previously-useful doctrine. The author's hope for expansion of the doctrine rests on a call to lower the statutory pe-

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131. See generally Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

132. *Id.* at 1146.

133. *Id.* at 1146-47.

134. *Id.* at 1170.

135. *Id.* at 1158, 1170-71.

136. *Id.* at 1170-71.

137. Peñalver & Katyal, *supra* note 131, at 1158.

riod to ease the burden on the adverse possessor.<sup>138</sup> No attempt is made to argue for an attempt to inform the doctrine through social justice theory, despite recognizing that it is likely to be only the propertyless who attempt adverse possession.<sup>139</sup> Peñalver effectively reconciles himself to a reality in which adverse possession can do nothing but “clear[ ] titling errors and resolv[e] inconsequential border disputes.”<sup>140</sup>

Peñalver should not accept adverse possession as an antique redistributive tool. His theory of property makes property possession a requisite for the realization of individuals’ equality and agency, as well as for the promotion of human flourishing. If Peñalver is committed to widespread distribution of property, he should approach adverse possession with a more creative and welcoming view to promote overall human flourish and individual agency. Peñalver takes a step toward embracing adverse possession, arguing for an “expansion of existing [redistributive] tools.”<sup>141</sup> But an expansion means more than just calling for a shortening of statutory period requirements.

Peñalver recognizes that most of the property that would be taken by adverse possession would not be the family farm but would be surplus property,<sup>142</sup> the holding of which by the title owner is, in aggregate, excluding others from ownership. Yet, Peñalver calls only for a shortening of the statutory period to possess property. If, as Peñalver argues, redistribution can be justified by both utilitarian (promotion of human flourishing) and rights-based theories (enabling individual agency), Peñalver should call for the law to consider such factors as part of adverse possession analysis. Considering adverse possession’s redistributive potential alongside its proven potential as social movement tool,<sup>143</sup> Peñalver’s argument fails not in its attempt to approach adverse possession from a social justice framework, but in stopping short of advocating ways to ensure that adverse possession can continue to be the effective social justice tool he identified it as in history.

### *C. Waldron’s Rights and Adverse Possession*

Waldron’s rights-based theory and adverse possession have a more tenuous relationship than those of Singer and Peñalver. On the surface, it seems as though the doctrine could be a viable redis-

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138. *Id.* at 1171.

139. *Id.* at 1170.

140. *Id.* at 1171.

141. *Id.* at 1158.

142. *Id.* at 1170.

143. *See generally* Peñalver & Sonia K. Katyal, *supra* note 131.

tributive tool for Waldron's theory. Waldron is committed to redistribution, explicitly stating that "[n]obody should be permitted ever to use force to prevent another man from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them,"<sup>144</sup> redistribution must occur to avoid this situation. Adverse possession, in such a view, could be understood as a right to which propertyless are entitled to take the property necessary for life from those who have too much (echoing Peñalver's observation). Yet such a right is not sustainable or sufficient in Waldron's view.<sup>145</sup> The role adverse possession could play in Waldron's theory is largely that of a stopgap measure.

Adverse possession and Waldron's theory do find common ground, as adverse possession is more than an abstract right to property. Waldron is critical of constitutional "rights," finding them to be only abstract opportunities, rather than affirmative guarantees.<sup>146</sup> Adverse possession is more than an abstract opportunity but less than a guarantee. If an individual can meet the statutory requirements, she has a right to bring an action for title to that property, a right she can assert in a court of law. Importantly, however, she is not guaranteed to receive title, a reality that moves the doctrine back to the realm of mere opportunity on Waldron's continuum. Thus, while Waldron could encourage utilization of the doctrine as a currently-sanctioned means of redistribution, he is unlikely to be wholly satisfied with adverse possession as a tool to ensuring universal property ownership.

#### *D. Singer's Social Relations Theory and Adverse Possession*

Singer's theory provides the most fertile ground for growing a relationship between social justice theory and adverse possession. Singer's property theory, like those of Waldron and Peñalver, emphasizes the importance of widespread distribution to a humane property system. For Singer, "[p]roperty . . . promotes both autonomy and social welfare,"<sup>147</sup> but to successfully do so, it must be

144. *Id.* at 1154 (quoting JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 240-41 (1993)).

145. WALDRON PRIVATE PROPERTY, *supra* note 16, at 283 (stating that "Of course, no actual property system can include among its legal rules a right that anyone may take from the holdings of another what he needs to survive. Necessity in our law is no defense to theft or trespass . . . however, I have shown how this constraint can be turned into the basis of an argument for a redistributive welfare state—a system which, by ensuring that the situation of desperate need never arises for anybody, effectively guarantees that property rights never have to be asserted and enforced in the face of such need.").

146. Waldron Justice, *supra* note 40, at 630-31; Waldron Homelessness, *supra* note 46, at 322-323; WALDRON PRIVATE PROPERTY, *supra* note 16, at 390-392, 408.

147. SINGER, *supra* note 2, at 162.

available to all in a very real way.<sup>148</sup> Adverse possession is a real means of increasing property distribution. It can provide a non-owner the means to obtain title to private property through her time and work invested in property where she otherwise might be wholly excluded from the property system by circumstance.<sup>149</sup> Furthermore, the doctrine fits particularly well with Singer's concept of justified and unjustified expectations.

Adverse possession recognizes the justified expectations of an individual to be able to participate meaningfully in, and gain access to, the property system. In his brief mention of adverse possession, Singer recognizes it as a doctrine that gives weight to justified expectations in possession of property that may arise outside the formal title system.<sup>150</sup> For Singer, informal arrangements and indicia of possession are not to be ignored in a social relations property system. Rather they are to be respected as one of the many elements which shape relationships to and through property.<sup>151</sup>

Singer grounds a justified expectation in gaining title to property in the exercise of "long-standing possession" and other "informal arrangements."<sup>152</sup> Nevertheless, like Peñalver, Singer stops short of embracing adverse possession as a doctrine which can play an important role in achieving the social justice goal of widespread property distribution through recognition of justified expectations.<sup>153</sup> Here it is important to recall Singer's one universal, justified expectation to which all individuals are entitled—"[o]ne expectation we are entitled to have is that we may obtain the means necessary for a dignified human life"—property.<sup>154</sup> Viewed in light of the justified expectation which may arise through possession, adverse possession beckons as a means of recognizing both justified and universal expectations.

Earlier I criticized the United Kingdom and ECHR courts for failing to recognize the potential rights an adverse possessor may have under human rights theories alongside those of the title owner. To avoid becoming the subject of the same criticism, though on the other side of the conflict, it is important to recognize the immediate conflict which may emerge from recognizing adverse possession as a social justice tool: that of the adverse possessor's potentially justified expectation to the property and the expectations

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148. *Id.* at 41, 167.

149. Peñalver & Katyal, *supra* note 131, at 1145-46.

150. SINGER, *supra* note 2, at 45-46.

151. *Id.*

152. *Id.* at 46.

153. *See id.*

154. *Id.* at 212.



of the title owner. Singer recognizes this fundamental tension between protecting title owners' expectation of undisturbed ownership and the desire to extend access to property ownership to all individuals.<sup>155</sup> But Singer himself provides the answer to this conflict.

Singer recognizes the difficulty of defining what a reasonable expectation is,<sup>156</sup> but expressly denounces an absolutist notion of ownership.<sup>157</sup> Stated differently, "ownership cannot mean what it is often thought to mean: that one has a right to act without regard for others' interests, needs, and expectations."<sup>158</sup> No system of property, Singer asserts, can be justified without widespread distribution. It follows that no person owning property in a system which fosters unequal distribution can have a justified expectation to absolute possession of his or her property. To assert that such a person has absolute ownership would permit the continuation of an unequal system that, by its very existence, fails to respect the "dignity and equal worth of each individual."<sup>159</sup> If, as Singer asserts, "*owners have obligations as well as rights*,"<sup>160</sup> their obligations extend to the need to recognize competing expectations that call for redistribution to establish a minimum level of equality.<sup>161</sup>

#### IV. ADVERSE POSSESSION AS A TOOL FOR SOCIAL JUSTICE: ADVANCING THE DOCTRINE

Adverse possession acknowledges and respects competing expectations of owners and non-owners. As we have seen, courts do not currently evaluate adverse possession claims within the context of the overall property distribution or similar social justice concerns. Rather, courts are heavily steeped in utilitarian and Nozickian rights-based rhetoric and theory. But the fact that courts currently use different language and different rationales does not negate the potential adverse possession has for realizing social justice goals. Were it to be embraced by social justice theorists as such, the current weighing of expectations, which does occur, could be informed by the language of social justice, redistribution, human rights, and individual equality. Doing so would enable theorists to re-envision and remold adverse possession as a social justice tool.

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155. *Id.* at 167.

156. SINGER, *supra* note 2, at 46.

157. *Id.* at 163, 172-73.

158. *Id.* at 210.

159. *Id.* at 144.

160. *Id.* at 16.

161. *Id.* at 113-14, 160-62.

It is important, at the outset, to recognize that social justice theorists are not calling for abolition of private property systems, but rather for reform. All three theorists recognize the threat to the stability of the overall property system that an unregulated right to appropriate the property of others may present. However, they also all recognize the inherent instability of inequitable property distribution.<sup>162</sup> Adverse possession can play a role in redistributive efforts to realize a more sustainable property system that respects the human rights of all and advances social justice. Until that goal is realized, there will be a fundamental tension between a right to security in property provided by documents such as the Fifth Amendment or the HRA 1998 and a right to access property ownership.<sup>163</sup> However, a carefully-crafted conception of adverse possession as a social justice tool can recognize and mediate that tension.

To fully embrace the doctrine, social theorists need not change the consequences of adverse possession, but rather to inform and reenvision the doctrine with social justice theory. The consequence of adverse possession—the transfer of title to property from one individual to another—is easily reconcilable with the redistributive goals of Waldron, Singer and Peñalver. Social justice theory could add a focused evaluation of who the parties gaining and losing title may be. Consider the LRA 2002, a relatively new addition to adverse possession doctrine. While it gives the title owner a chance to reestablish possession, she is barred from doing so if the adverse possessor can demonstrate grounds for equitable estoppel, a boundary dispute, or “some other reason” to retain possession and obtain title.<sup>164</sup> It is discretionary categories such as the LRA 2002’s “some other reason” that social justice theorists can and should exploit.

Informing adverse possession doctrine with social justice theory would leave the doctrine largely unchanged. Recall that adverse possession doctrine in the United States and United Kingdom requires that the adverse possessor exert exclusive, continuous possession of the property that is hostile to the title owner and readily viewable and understood to be actual possession for a required statutory period.<sup>165</sup> All these requirements remain. It is long-standing possession in which an individual acts as owner, which

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162. Peñalver & Katyal, *supra* note 131, at 1149-52; SINGER, *supra* note 2, at 137-38, 167; WALDRON PRIVATE PROPERTY, *supra* note 16, at 283.

163. See SINGER, *supra* note 2, at 167.

164. LRA 2002, c. 9, § 97, sch. 6, para. 5(2)-(4).

165. CRIBBET ET AL, *supra* note 65, at 177 (discussing the foundational adverse possession case *Marengo Cave Co. v Ross*, 10 N.E.2d 917 (Ind. 1937)); *J.A. Pye (Oxford) Ltd.*, [2000] Ch. 676 at 689; Simmonds, *supra* note 73, at 37 n.2.

gives rise in the adverse possessor a justified expectation to gaining title.<sup>166</sup> Social justice theory should, however, advocate a shortening of the required statutory period for adverse possession.

As Peñalver recognizes, current property registration schemes and ease of modern communication combine to make monitoring of property an easy task.<sup>167</sup> This relative ease implies that those who fail to monitor their property exhibit marked carelessness or negligence in failing to do so, which leads to the inference that the property is surplus.<sup>168</sup> This surplus status and careless exercise of ownership combine to lower the weight of the title owner's expectation to continued possession afforded by documents such as the Fifth Amendment or HRA 1998. The effect of surplus status will be discussed below. Carelessness in exercise of ownership lowers the title owner's expectation when juxtaposed with the adverse possessor's careful, actual exercise of possession. To force an adverse possessor, who gains an increasingly justified expectation in obtaining title through her possession, to wait for the expiration of seven to twenty years before she can be assured title, seems an inordinate burden in the face of the less-weighty expectation of the title owner who failed to meet a low bar for monitoring his property. While jurisdictions are likely to vary in their requirements, social justice theory argues in favor of a dramatic shortening of the statutory period to respect these differently-situated expectations.

A change in the required statutory period, while substantive, is minimal in comparison to the primary contribution social justice theory makes to adverse possession doctrine. Informed by social justice theory, adverse possession doctrine would evolve a new requirement: an explicit consideration of the social context of the case. This evaluation would be highly case-specific and would require the court to conduct fact-finding regarding overall property distribution, the need of the adverse possessor, and the ownership status of the title owner. No one element would be dispositive, but rather would be considered as part of a holistic evaluation. Thus adverse possession doctrine informed by social justice theory mirrors current doctrine but with the added evaluation of the broader positioning of each party in society. By embracing this consideration, property law would shift from a sterile system of transfers of rights toward a system that recognizes the needs of individuals and the obligations we owe to each other. Before delving into how courts would evaluate adverse possession once informed by social justice theory, it will be helpful to consider an ideal-type model.

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166. SINGER, *supra* note 2, at 45-46.

167. Peñalver & Katyal, *supra* note 131, at 1171.

168. *Id.* at 1170-71.

Consider, for a moment, the following hypothetical. Rebecca is evicted from her apartment for failure to pay rent. Rebecca is a high school teacher in inner city “New Tallahassee,” a fictional urban center, who earns an average teacher’s salary for that market. In addition to supporting herself, however, Rebecca must also support her aging mother, who requires regular medical care. Having nowhere else to turn, Rebecca moves into a building two blocks away that she knows has not been occupied for years. The property is and has been owned by a successful restaurant chain, Tally Eats, which has considered the location for expansion. Rebecca contacts the utility company and successfully poses as a new tenant and is able to get utility service for the unit. Rebecca fixes the appliances, installs new locks, and replaces a few broken windows. Tenants and owners in neighboring buildings, predominantly residential, assume the owner has finally begun leasing again and are fully aware of Rebecca’s “lease” of the apartment. Because Rebecca is no longer paying rent, she is able to save a substantial portion of her salary and thereby improve her overall financial situation. New Tallahassee has a five-year statutory period for adverse possession. At the close of five years, Rebecca files a claim to title of the apartment. The title owner learns of the claim and the case proceeds to the trial court. Assuming Rebecca has met all other statutory requirements, the court, which has adopted the new social justice theory of adverse possession, is left to consider the expectations of both parties shaped by their relative needs, status, and the overall social context.

Need must be assessed at the beginning of the statutory period of possession. Social justice adverse possession is to be used as a redistributive tool, a means of ensuring that those who are otherwise denied access to property ownership can participate in the system and improve their welfare. Need, in this context, exists when a person has been denied her universal expectation to be able to participate in the private property system.<sup>169</sup> For example, a development company attempting to adversely possess the property of a mining company cannot invoke this expectation as it has already achieved ownership status. In contrast, an individual evicted from a previous residence after being laid off from her job, who cannot afford to rent or purchase, can assert this universal expectation. Herein, the need requirement provides a procedural protection against redistribution through adverse possession to those who are already owners.

Let us now return to Rebecca’s example. Rebecca was unable to

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169. Though I borrow Singer’s language of a universal expectation, it is important to remember that Waldron and Peñalver also call for widespread distribution of property.

afford to rent property, much less to own, before she became an adverse possessor. She was undeniably in need as she was excluded from participation in the private property system. Rebecca's need derives from her ability to invoke the universal expectation that all possess the opportunity to participate in the property system as equal individuals. To evaluate her need at the close of the statutory period, when Rebecca's need may be less because of her increase in welfare and financial position, would essentially punish her for achieving the security and increased welfare that private property ownership is meant to provide. Thus, to achieve social justice goals of redistribution and to respect the role property plays in advancing individual welfare, the court must confine its evaluation of need to the beginning of the period of possession.

If an adverse possessor meets the need requirement, the court must then consider whether the adverse possessor has other justified expectations that support transfer of title. Singer recognized that an adverse possessor can gain a justified expectation to title through long-term actual possession of property.<sup>170</sup> The more complete an adverse possessor's exercise of possession, the more justified her expectation of obtaining title may become. In an urban environment, the repairs and lock change Rebecca made could suffice. In a more rural environment, the court could require more investment in the property and control over the boundaries and use of the property. The court may also consider whether the adverse possessor is using the property in accordance with general surrounding use. Rebecca used the apartment as a homestead, in accordance with local use, and cared for the property as an owner, thereby strengthening her justified expectation in obtaining title.

Lastly, the court must evaluate the ownership status of the title owner in light of overall property distribution. As previously discussed, the realities of adverse possession doctrine and the ease of monitoring property support the argument that those losing property through adverse possession are likely to be losing surplus property.<sup>171</sup> As Singer noticed, no person can have a justified expectation in keeping surplus property while others are systematically excluded from a property system; an argument that, though not using those words, Waldron and Peñalver support.<sup>172</sup> Widespread distribution is a primary goal of social justice theory, and achieving that goal will require redistribution and the corollary devaluation of some title owners' expectation to continued posses-

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170. SINGER, *supra* note 2, at 46.

171. Peñalver & Katyal, *supra* note 131, at 1170-71.

172. *Id.* at 1149-52; SINGER, *supra* note 2, at 137-38, 167; WALDRON PRIVATE PROPERTY, *supra* note 16, at 283.

sion. Surplus status, in the social context of a property system that is inequitably distributed, weakens the expectations of a title owner with multiple properties.

Returning to Rebecca's case, Tally Eats is an owner of multiple properties in a system that effectively excludes some from ownership. Tally Eats both failed to monitor its property and does not use the property as a primary source of income or homestead; it was, for all intents and purposes, surplus property, and Tally Eats was a careless owner. In the rare case that an adverse possessor somehow possesses another's homestead or property that is otherwise essential to the title owner's welfare (e.g. a farm which is the title owner's sole source of income), the title owner's expectation of continued possession may be justified and could potentially defeat the adverse possessor's claim. Through such a consideration of justified expectations and overall social context, the court can balance the interests of both the adverse possessor and the title owner.

Such a contextual evaluation of needs, expectations, and ownership status would cause a distinct shift in current doctrine. Rebecca's situation provides an ideal-type model. The real world application likely would be more nuanced. Yet the challenges of changing the law should not stop social justice theorists from attempting to inform adverse possession with theory to make it a viable, redistributive tool. The LRA 2002 provides an opening for social justice theorists to inform U.K. doctrine with these concepts in its language permitting the adverse possessor to argue that she should be granted title for "some other reason."<sup>173</sup> U.S. doctrine lacks a similarly clear inroad but carries the same redistributive potential. Regrettably, however, social justice theorists have, to date, failed to embrace that potential.

#### LOOKING TO THE FUTURE: CONCLUDING THOUGHTS

Adverse possession, even once informed by social justice theory, will not be a cure all. Waldron would criticize the doctrine as providing only an *opportunity* to gain ownership, rather than a *guarantee*. But even Waldron, alongside Singer and Peñalver, should embrace adverse possession's potential to provide a state-sanctioned avenue to ownership in a redistributive scheme that balances the justified expectations of all individuals. Such a step could bring us closer to reenvisioning property systems that recognize the social and human rights implications of property ownership.

*Pye* may have opened the door for considering human rights

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173. LRA 2002, c. 9, § 97, sch. 6, para. 5(3).

implications of property law and adverse possession, but its failure to usher in a new era of human rights theory in property law was predictable. The only human rights document available to the court, the HRA 1998, was incomplete, as it only recognized the rights of the title owner. Social justice theorists must demand that courts respect individual autonomy, dignity, and equality by recognizing both a human right to protection of ownership, as well as the right to be able to become a property owner.

Looking to the future, it is helpful to consider an example of the transformative power social justice theory can have on law. In the wake of the human rights nightmare that was apartheid, South Africa, with an aim to “fundamental social transformation,”<sup>174</sup> included in its Constitution a right to housing and a requirement that the government “foster conditions which enable citizens to gain access to land.”<sup>175</sup> Such a fundamental change to recognizing, not only theoretically, but through legal means, the foundational role property plays in shaping individuals’ lives is a laudable and achievable goal. Singer is right to say that the “[o]ne expectation we are entitled to have is that we may obtain the means necessary for a dignified human life.”<sup>176</sup> Law, however, has yet to catch-up with this progressive statement. Adverse possession has a role to play in realizing this expectation, but it cannot play that role unless social justice theorists embrace its redistributive potential and reenvision the doctrine as part of a movement to create a property system which respects and celebrates individual human rights.

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174. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 784 (2009).

175. S. AFR. CONST., 1996, §§ 25(5) and 26.

176. SINGER, *supra* note 2, at 212.