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NEW YORK ADVERSE POSSESSION LAW AS A CONSPIRACY OF FORGETTING: *VAN VALKENBURGH V. LUTZ* AND THE EXAMINATION OF INTENT

Probably the most notorious and complex of adverse possession cases is *Van Valkenburgh v. Lutz*.[1] The case creates a major contradiction in the requirement of adversity or hostility as to the intent required of the possessor in taking possession.[2] Yet, in spite of the absurdity it injects into the law of adverse possession, it is notably studied by a large number of law students in the United States by virtue of its presence in a widely used property casebook.[3] "Hostile" possession, required in virtually all jurisdictions in the United States,[4] is the aspect that creates the most discord amongst legislators, com-

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

[2] The basic requirements for title by adverse possession are hostile, notorious, exclusive, and continuous possession for a statutorily delineated period of time. The five elements may be described as follows:

> The first requirement, hostility under claim of right, means simply that the adverse possessor must not hold the land in subservience to the rights of the record owner. He must treat the land as his own. The second, notoriety or openness, requires only that the hostile possession be manifested to the world at large, in part to alert the record owner to the availability of a cause of action against the possessor. The third, actual possession, means that the adverse possessor must physically occupy the land in the same fashion the average owner would. The fourth, exclusivity, holds that adverse possession cannot be claimed by a person who shares the use of the land with the record owner or one claiming under him. The fifth requirement [continuity] . . . means no more than that the possessor's claim must be maintained throughout the statutory period.

R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 334 n.10 (1983) [hereinafter *Subjective Intent*]. *See also* William Sternberg, *The Element of Hostility in Adverse Possession*, 6 TEMP. L.Q. 207, 207 (1932) (naming the five elements as applicability of the statute to the owner, continuity, hostility, notoriety, and preventability). The tendency of American lawmakers, judicial as well as legislative, has been to make the requirements for title by adverse possession increasingly more stringent. *See* CHARLES C. CALLAHAN, ADVERSE POSSESSION 52 (1961).

Adverse possession law varies in American jurisdictions as evidenced by distinct wording of controlling statutes and assorted judicial interpretations as to when possession may be called "adverse." *See* RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 1012, at 1088 (Richard R. Powell ed., abr. ed. 1968). Among the circumstances to be considered in each case are the situation of the parties, the size and extent of the land, and the purposes for which the land is adapted. *See* 4 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 1142, at 743 (3d ed. 1975).

[3] *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (2d ed. 1988).

[4] CALLAHAN, *supra* note 2, at 66.

mentators, and judicial interpreters.[5] Possession must be "adverse" or "hostile" to the true owner and as against the world.[6] The justification for the adversity requirement is that the title owner should not be induced by a false sense of security to refrain from asserting his rights.[7] The vice of choosing terms such as "hostile" or "adverse" is that somehow they suggest the significance of a belligerent frame of mind on the part of the possessor.[8] This metaphorical slippage has played a part in the cases by influencing the way a possessor is perceived in the legal context.[9]

This Note discusses different interpretations of the hostility requirement in adverse possession law and focuses on the *Van Valkenburgh v. Lutz* analysis and its impact on New York adverse possession law. Part I presents the dispute amongst scholars and judicial interpreters over how to determine intent in adverse possession cases. Part II focuses on New York adverse possession law. The discussion of New York adverse possession law includes the following: case law prior to *Van Valkenburgh v. Lutz*; a detailed description of the facts, parties, and circumstances involved in the *Van Valkenburgh* case and

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[5] The intention with which possession is taken or held is regarded as a controlling factor in determining whether or not it is adverse, that is, hostile or under a claim of right.

The presumption in New York is that possession is subordinate to the title of the true owner, but permissive possession may become adverse when the title of the true owner is clearly repudiated by the possessor. *See* 2 N.Y. JUR. 2D *Adverse Possession* §§ 10, 13 (1982) [hereinafter 2 N.Y. JUR 2D]. Continued, unexplained possession for a long period of time is only evidence of hostility. 3 AM. JUR. 2D *Adverse Possession* § 48 (1986) [hereinafter 3 AM. JUR 2D].

[6] *See* 2 C.J.S. *Adverse Possession* § 59 (1986); 3 AM. JUR. 2D, *supra* note 5, § 50.

[7] *See* TIFFANY, *supra* note 2, § 1142.

[8] *See* CALLAHAN, *supra* note 2, at 66.

Scholars and case law contend that hostile possession is equivalent to possession under a claim of right or title. *See* GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2549, at 638 (1979); De Forrest v. Bunnie, 107 N.Y.S.2d 396 (Sup. Ct. 1951), *aff'd*, 117 N.Y.S.2d 676 (App. Div. 1951). Nonetheless, the terms are all widely misunderstood.

Some jurisdictions statutorily require that the possession be under a "claim of right," although Professor Walsh contends that "[i]t follows inevitably that adverse possession with claim of right under the statutes is simply legal possession of the property, a question of fact for the jury on the facts of each case." William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L. REV. 532, 553 (1939). The term also appears occasionally in a list of modifiers used by a court, although "[d]ifficulties have arisen from statements made in the cases that the adverse possessor must have occupied under claim of right . . . ." *Id.* at 537.

[9] Professor Radin's explanation of the role of the adverse possessor's mind in legal doctrine is as follows:

> (1) [The] state of mind is irrelevant; (2) the required state of mind is, "I thought I owned it;" (3) the required state of mind is, "I thought I did *not* own it [and intended to take it]." These can roughly be thought of as the objective standard, the good-faith standard, and the aggressive trespass standard.

Margaret J. Radin, *Time, Possession and Alienation*, 64 WASH. U. L.Q. 739, 746-47 (1987) (emphasis in original).

what happened to the parties and the land after the Court of Appeals case was decided; an analysis of the problems in the *Van Valkenburgh* majority opinion and how the statutory law was interpreted; New York adverse possession law after *Van Valkenburgh* and how *Van Valkenburgh* manifests and perpetuates the debate over how to interpret the hostility requirement. Part III concludes that there is a need for a new method of determining intent. To do so, judges, scholars, and judicial interpreters must concede that differences exist between theory and practice and that they must create a combined objective and equitable standard to devise the method. Finally, the Court of Appeals must overrule *Van Valkenburgh v. Lutz*.

I. THE DISPUTE OVER HOW TO DETERMINE INTENT

Traditionally, the dispute over how to determine the intent of the possessor has been between proponents of either the objective or the subjective camps. The objective view, favored among commentators, holds that one need look no further than the physical acts of the claimant to determine whether the possession has been maintained in "hostility" to any other claiming right to the same land.[10] The intent to possess, and not the intent to take irrespective of the right of the real owner, governs. According to the subjective school—widely condemned by scholars—objective physical acts may constitute useful circumstantial evidence from which the requisite hostility and claim

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[10] *See* THOMPSON, *supra* note 8, § 2549, at 636-37. This view, which prior to the decision in *Van Valkenburgh v. Lutz* had been said to prevail in New York, still exists as the law in the digests. *See* CALLAHAN, *supra* note 2, at 68 (citing 3 AMERICAN LAW OF PROPERTY 779,780 (A. James Casner ed., 1952)) [hereinafter 3 AMERICAN LAW]. According to Professor R.H. Helmholz, The American Law of Property, the Restatement, law review articles, and hornbooks all adopt the objective test. *See Subjective Intent*, *supra* note 2, at 332.

The objective view endorses a strict statute of limitations approach where adverse possession is primarily a matter of the extinguishment of the right and remedy of a landowner. According to Callahan, this is

> essentially the English position; and it may reasonably be contended that many, if not most, courts in this country have come out that way in fact. But certainly many have not; and possibly because of that, and possibly also because of the amount of loose and contradictory talk to be found in the cases of almost every state, there has been what has been described as a regrettably vast amount of litigation about it.

CALLAHAN, *supra* note 2, at 68. The courts rarely discuss the operation of the statute in barring the true owner's action as the sole reason why title arises by adverse possession. *See* 3 AMERICAN LAW, *supra*, § 15.4, at 774. Walsh agrees and states that

> the true approach is the historical one. It is believed that most of the difficulties and uncertainties in this subject have arisen out of a failure to follow that approach and by the acceptance of false notions expressed by the courts as a result of misapprehension and misunderstanding of what is essentially a really simple matter.

Walsh, *supra* note 8, at 536.

of right may be inferred, but it is the true "secret thoughts" of the claimant, the actual, subjective intent, that control the character of possession and may defeat an otherwise successful claim.[11] Both scholars and judicial interpreters generally acknowledge that the subjective approach is speculative and thus problematic, and that the objective view offers a far more workable test for determining intent by excluding inquiry into the possessor's state of mind, thereby confining attention to external and thus verifiable facts.[12]

The question of hostility and claim of right, and the conflict over whether to investigate the actual intent of the possessor, has been fought out principally in cases of mistaken boundary lines.[13] Under the Maine rule of *Preble v. Maine Central Railroad Company*,[14] when a landowner occupies land beyond his true boundary line, believing that it lies within his boundary, his possession cannot be adverse and cannot ripen into title.[15] The Connecticut rule of *French v. Pearce*[16] holds that the possession is hostile even though the possessor would not have used the land had he known the location of the record boundary; the external occupation itself creates the presumption of hostility.[17] A third and lesser used subjective rule provides that the possessor must have a consciously hostile intent to claim against the

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[11] *See* Philip Thompson, Jr., Note, *The Element of Adverse Possession Requiring Hostility and a Claim of Right Is to Be Measured Objectively, by the Act of the Claimant, Rather Than Subjectively, by His Inner Beliefs*, 19 GONZ. L. REV. 777, 781 (1984).

[12] *See Subjective Intent*, *supra* note 2, at 357.

[13] *See* CALLAHAN, *supra* note 2, at 70-71. For further discussion of adverse possession and mistaken boundary cases, see generally Percy Bordwell, *Mistake and Adverse Possession*, 7 IOWA L. BULL. 129 (1922); Stanley R. Darling, *Adverse Possession in Boundary Cases*, 19 OR. L. REV. 117 (1940); Robert C. Bryan, Note, *Adverse Possession-Intent as a Requisite in Mistaken Boundary Cases*, 33 N.C. L. REV. 632 (1955) [hereinafter Note, *Intent as a Requisite*]; John A. McLendon, Jr., Developments, Walls v. Grohman: *Adverse Possession in Mistaken Boundary Cases*, 64 N.C. L. REV. 1496, 1496 (1986).

Darling asserts that there are two main groups of mistaken belief cases by means of the results reached, each further divided into two subdivisions by the varying methods by which their results have been reached. Group A includes cases wherein a claim of ownership was held to exist despite mistaken belief. The two types of Group A cases are those that hold that all that is necessary is that the possessor claim the land as his own, and those that presume such a claim exists. Group B cases hold that no claim of ownership exists in mistaken belief cases. The two types of B cases are those that require a specific conscious intention to dispossess the true owner, and those that presume no claim of ownership exists when the possessor holds under mistaken belief. Darling, *supra*, at 131-136.

[14] Preble v. Maine Cent. R.R. Co., 27 A. 149 (Me. 1893).

[15] The problem with the subjective approach here is that it is often impossible to determine what the possessor would have intended to do if he discovered later that the land he believed was within his boundary line actually belonged to someone else. It probably does not occur to the possessor in such cases that the boundary line is incorrect until the mistake is discovered.

[16] French v. Pearce, 8 Conn. 439 (1831).

[17] *See Subjective Intent*, *supra* note 2, at 339.

true owner in order to acquire title by adverse possession.[18] According to one scholar, American courts

> in boundary dispute cases . . . 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.[19]

The undercurrent in judicial decision making is that reliance on an intent to dispossess would necessarily reward dishonesty while penalizing the honest, mistaken possessor.[20]

Although statutes, hornbooks, and most treatises state the law in terms of the objective approach, the cases often interject subjective and equitable factors. According to at least one scholar,[21] the objective test of the commentators, particularly as defined in the American Law of Property,[22] has not been used in practice. This view has also been espoused by Professor R.H. Helmholz and rejected by Professor Roger Cunningham in a series of spirited exchanges in the Washington University Law Quarterly.[23]

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[18] *See* Note, *Intent as a Requisite*, *supra* note 13, at 633; McLendon, *supra* note 13, at 1500.

Professor Radin asserts that the cases in which adverse possession comes up can usefully be divided into three paradigms, which she calls "color of title," "boundaries," and "squatters." *See* Radin, *supra* note 9, at 746. Color of title refers to the possessor who holds an invalid document of title. *Id.* Boundaries refers to disputes over boundaries. *Id.* Squatters refers to intentional possession by aggressive trespassers. *Id.*

[19] R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65, 83 (1986) [hereinafter *Response*].

[20] *See* Note, *Intent as a Requisite*, *supra* note 13, at 636.

[21] *Id.* See CALLAHAN, *supra* note 2, at 72-73, which contends that:

> the American emphasis on the adverse possessor himself, which likely had its origin in pioneer conditions, affection of Civil Law writers, and downright trouble with the concept of seisin, is . . . in the process of giving way to the theory that the entire matter is simply one of the application of the statutes of limitations.

Id. For a related view, compare 3 AMERICAN LAW, *supra* note 10, at 744, which claims that:

> the courts in declaring these supposed requirements of adverse possession have so completely failed to consider [what is considered by most commentators to be] the basic question involved in the acquisition of title by the running of the statute of limitations against the true owner's action of ejectment . . . whether the true owner had a right of action in ejectment against the wrongful possessor continuing without interruption for the statutory period. In very few cases, in applying these supposed requirements, have the courts discussed the operation of the statute in barring the true owner's action as the sole reason why title arises by adverse possession.

Id.

[22] *See* 3 AMERICAN LAW, *supra* note 10, at 771.

[23] *See Subjective Intent*, *supra* note 2, at 331; Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986) [hereinafter

Professor Helmholz contends that subjective factors make a difference in litigation whenever they are shown or suggested by external manifestations.[24] He concludes that in case law the "bad faith" trespasser who knows he is trespassing stands lower in the eyes of the law and is less likely to acquire title by adverse possession than the "good faith" trespasser who acts in honest belief that he is simply occupying what is his already.[25] The judges do not resolve their cases by using an objective test of physical possession and the consequent accrual to the record owner of an action in ejectment, even where the statute of limitations is the only relevant statute.[26] Helmholz asserts that the judges do so in part because the requirements of a claim of right and hostility are "sufficiently elastic to encompass inquiries into the adverse possessor's subjective intent."[27] He maintains that

> the judicial proclivity for making a relevant issue out of actual belief is clearly seen in developments in the conflict between the so-called Maine and Connecticut rules in boundary disputes. This area is said to pose a conflict between a "subjective" and an "objective" test, and to some extent it does. But the cases which reject, for good reasons, the "subjective" test of the Maine rule stop well short of embracing a purely "objective" test required by the "availability of ejectment" theory of adverse possession. Indeed it appears that it is the importance of good faith which has fueled development in this area.[28]

Thus, under Helmholz's thesis, one who knowingly occupies land that is not within his true boundary line will generally be penalized, regardless of the analysis the court purports to use.

The common usage of the term "squatter" supports Professor Helmholz's theory that bad and good faith possessors are distinguished. According to Black's Law Dictionary, a squatter is

> [o]ne who settles on another's land, without legal title or authority. A person entering upon lands, *not claiming in good faith* the right to do so by virtue of . . . some agreement with another whom he believes to hold the title. Under former laws, one who settled on public land in order to acquire title to the land.[29]

Reply]; *Response*, supra note 19, at 65; Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167 (1986) [hereinafter *Rejoinder*].

[24] *See Subjective Intent*, *supra* note 2, at 332-33.

[25] Professor Stewart E. Sterk advances that Helmholz's conclusions are consistent with the treatment courts have long accorded to bad faith encroachers who rely on other boundary dispute doctrines to avoid removing their encroachments. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 79 n.89 (1987).

[26] *See Subjective Intent*, *supra* note 2, at 335.

[27] *Response*, *supra* note 19, at 69.

[28] *Subjective Intent*, *supra* note 2, at 339.

[29] BLACK'S LAW DICTIONARY 1258 (5th ed. 1979) (emphasis added).

Although the difference between the squatter and the adverse possessor is said to be the intent with which possession is taken, the term "squatter" is used derogatorily and the distinction between the two types of possession is often less than clear.

Professor Helmholz views the difference in subjective terms. He asks, what did the squatter and good faith possessor know about the state of the title?[30] He contends that courts describe bad faith adverse possession as being less than sufficient to acquire title and achieving no greater rights than those of a squatter. Professor Walsh adds that

> [c]ases holding that a "mere squatter" is not in adverse possession turn on the supposed absence of claim of title and the admission of the squatter that the title is in some one else of whose identity the squatter ordinarily has no knowledge. In these cases, however, the possession is generally doubtful and equivocal in fact, and failure of the owner to act against the squatter may well have been induced by his acquiescence in a use of his property which is not that of a person claiming as owner.[31]

Helmholz advances that the judicial distinction between the possessors is made because 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."[32] Judicial decision makers, in Helmholz's view, make their determinations based on how they feel about the possessor.

Helmholz also believes that "equitable considerations" have played an important role in many of the cases which have awarded title by adverse possession to nonmistaken possessors.

> Many involved the conjunction of four "equitable" factors: a sympathy-inducing possessor, an unsympathetic record owner who had knowingly slept on his rights, the passage of a considerable period of time, and improvements made on the land by the hostile possessor. . . . [I]n these cases one suspects that the courts were as influenced by the equities favoring the claimant, as they were by the doctrine that the possessor's state of mind is irrelevant.[33]

In other words, "hostility" on the part of the record owner, or other such sympathy-inducing factors, may be as influential in decision making as any of the legal requirements.

Other scholars have deemed the inclusion of equitable factors as a moral basis for adverse possession in that it protects the possessor

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30 *See Response*, *supra* note 19, at 89.

31 Walsh, *supra* note 8, at 549 (citation omitted).

32 *Response*, *supra* note 19, at 75 (emphasis omitted).

33 *Subjective Intent*, *supra* note 2, at 347-48.

when the possessor has a strong reliance interest in the land.[34] According to this view, the possessor comes to expect and may have come to rely on the fact that the real owner will not interfere with the possessor's use of the property. Since the true owner, by actions or inactions, fed the expectations of continued use, it would be morally wrong for the true owner to allow the relationship of dependence to be established and then cut off the dependent party.[35] This theory creates sympathy for the squatter as well as the mistaken possessor.[36]

Professor Cunningham, on the other hand, endorses the strictly objective approach. He finds no tenable basis for Helmholz's broad conclusion that the American courts in recent times have consistently reached results inconsistent with generally accepted views. He asserts that many cases cited by Helmholz either reach the opposite result for which they are cited or do not involve the issue that Helmholz claims they involve.[37] Cunningham believes that a holding that mere squatter's rights are insufficient to acquire title rests on lack of actual possession on the part of the squatter.[38]

II. NEW YORK ADVERSE POSSESSION LAW

A. *Case Law Prior To* Van Valkenburgh

New York has wavered between the subjective and objective tests over the years. In 1832, the New York courts required that there be a claim of title in good faith.[39] "Later the rule was settled that the claim need not be made honestly, but the necessity of a claim of right was insisted on irrespective of whether it was right or wrong, and even though the possessor knew that the title was held by another."[40] The Court of Appeals, in a number of the early leading cases, stated that "claim of title" means merely "such claim as will be implied from the open and continuous use and enjoyment of the property by the

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34 *See* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 665-69 (1988).

35 *See id.* at 666-67; *see also* Radin, *supra* note 9, at 748-50.

36 *See* Radin, *supra* note 9, at 748-50. *See also* Patty Gerstenblith, *Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 121 n.8 (1988) (noting that Helmholz's thesis that the knowing wrongdoer will prevail if he or she presents a particularly sympathetic character has been accepted, at least in part, by Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 685-89 (1986)).

37 *See Rejoinder*, *supra* note 23, at 1180, 1184-85.

38 *Reply*, *supra* note 23, at 38 nn.141-43.

39 *See* 3 AMERICAN LAW, *supra* note 10, at 779 (citing Livingston v. Peru Iron Co., 9 Wend. 511 (N.Y. 1832)).

40 Walsh, *supra* note 8, at 553 (citing Humbert v. Trinity Church, 24 Wend. 587, 610 (N.Y. 1840); Percy Bordwell, *Disseisin and Adverse Possession*, 33 YALE L.J. 141, 149 & n.176 (1923)).

possessor as would be exercised by the usual owner of such property."[41] The claim of title did not require express declarations of intention, so long as the possessor did not have the owner's permission and did not disclaim an intent to acquire title during the running of the statute.[42] Whether the claim was bona fide was not important; the operative factor was the negligence of the owner in refraining from bringing his action until after the statute of limitations had run.[43] When claim of title, in other words, hostility, was lacking, the possession would not operate to bar the legal title,[44] no matter how long the occupation continued.[45]

It is useful at this point to recite a brief history of the statutory requirements in New York. The current New York statute[46] has a long derivation. It started as a Field Code provision in 1848 and was revised in 1876 to become part of the Code of Civil Procedure. In 1920, the Code of Civil Procedure became the Civil Practice Act, which was later repealed by the Civil Practice Law and Rules, and in 1963 became the New York Civil Practice Law and Rules and New York Real Property Actions and Proceedings Law.[47] The statute of limitations was reduced from twenty years to fifteen and finally to ten years of hostile possession before title by adverse possession could be granted.

At the time of the notorious *Van Valkenburgh* case, the New York Civil Practice Act §§ 34, 38, 39, and 40 provided the statutory provisions for claims not founded upon a written instrument. Civil

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41 Walsh, *supra* note 8, at 552-53 (citing *Humbert*, 24 Wend. at 610, Bedell v. Shaw, 59 N.Y. 46 (1874); Ramapo Mfg. Co. v. Mapes, 110 N.E. 772 (N.Y. 1915); Monnot v. Murphy, 100 N.E. 792 (N.Y. 1913); Barnes v. Light, 22 N.E. 441 (N.Y. 1889); Belotti v. Bickhardt, 127 N.E. 239 (N.Y. 1920)). *See also* Bordwell, *supra* note 40, at 148.

42 *See* Barnes v. Light, 22 N.E. 441 (N.Y. 1889); La Frambois v. Jackson, 8 Cow. 589 (N.Y. 1826).

In *Barnes v. Light*, the Court of Appeals stated the following:

> The actual possession and improvement of the premises, as owners are accustomed to possess and improve their estates, without any payment of rent, or recognition of title in another, or disavowal of title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and unless rebutted by other evidence, will establish the fact of a claim of title. Possession, accompanied by the usual acts of ownership, is presumed to be adverse until shown to be subservient to the title of another.

Barnes, 22 N.E. at 442 (quoting *La Frambois*, 8 Cow. at 603-604).

43 *See* Humbert v. Trinity Church, 24 Wend. 587 (N.Y. 1840).

44 *See* Doherty v. Matsell, 23 N.E. 994 (N.Y. 1890).

45 *See La Frambois*, 8 Cow. at 589.

46 N.Y. REAL PROP. ACTS. LAW §§ 501-551 (McKinney 1979).

47 These are cited to in N.Y. CIV. PRAC. L. & R. historical notes as, respectively, N.Y. C.P. (Field Code) (1848); N.Y. C.C.P. 1876; N.Y. C.P.A. (1920). The current codes are cited as N.Y. CIV. PRAC. L. & R. (McKinney 1990); N.Y. REAL PROP. ACTS. LAW (McKinney 1990).

Practice Act §§ 38 and 39[48] required demonstration by clear and convincing proof that for at least fifteen years there was an actual occupation under a claim of title, and provided that only those premises so actually occupied and no others were deemed to have been held adversely. Under § 40 of the Civil Practice Act,[49] the essential elements of proof were that the premises either were protected by a substantial inclosure or were usually cultivated or improved. Although the mental element was required by the statute, and still is, it was not defined.[50]

Although the New York courts and legislature adopted the objective approach,[51] the cases have not uniformly practiced it, particularly in the last thirty to forty years. The confusion created by the nonconformity is exemplified and perpetuated by the *Van Valkenburgh* precedent. Its perplexing interpretation of statutory and common law prompted Professor Cunningham to view the case as the epitome of the "confusion of the courts as to the meaning of the 'claim of right' requirement."[52]

B. Van Valkenburgh v. Lutz

In 1912, the Murray Estate, a tract of 479 acres in Yonkers, New York, was offered for sale at auction in small lots.[53] William and Mary Lutz, married on January 20, 1912, purchased lots 329 and 330 of the estate, which were equivalent to lots 14 and 15 in block 54 of the official tax map of Yonkers.[54] They took title in the name of William Lutz by two separate deeds dated July 31, 1912.[55] Although

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[48] For reference to law as currently codified, see N.Y. REAL PROP. ACTS. LAW §§ 512, 521 (McKinney 1979).

[49] For reference to law as currently codified, see N.Y. REAL PROP. ACTS. LAW § 522 (McKinney 1979).

[50] Although New York is one of several states which has added the requirement in its statute, *see* N.Y. REAL PROP. ACTS. LAW § 521 (McKinney 1979), the addition of the claim of right requirement has not served to clarify the meaning of adversity and leaves the impression that the occupant must by word or act proclaim his or her ownership continuously during the running of the statute. *See* 3 AMERICAN LAW, *supra* note 10, § 15.4; *see also* TIFFANY, *supra* note 2, at 742.

[51] For a good summary of the objective approach of the leading decisions of the Court of Appeals prior to *Van Valkenburgh*, see Berke v. Lang, 115 N.Y.S.2d 83, 86 (Sup. Ct. 1952).

[52] *Reply*, *supra* note 23, at 59.

[53] *Van Valkenburgh*, 106 N.E.2d at 29. It was also asserted that the Murray Estate consisted of 467 acres, *see* Respondent's Brief at 4, Van Valkenburgh v. Lutz, 106 N.E.2d 28 (N.Y. 1952), not merely 479 small lots as argued. Appellant's Reply Brief at 3, *Van Valkenburgh* (No. 5059-48). Maps of Yonkers from 1898 and 1907 indicate that the land owned by the Murrays was about twenty-one acres. *See* ROGER H. PIDGEON, ATLAS OF THE CITY OF YONKERS plate 18 (1896); HANS MUELLER, ATLAS OF YONKERS, NEW YORK plate 18 (1907).

[54] Respondent's Brief at 4, *Van Valkenburgh* (No. 5059-48).

[55] *Id.*

other lots of the former estate were sold, only the Lutzes and one other family moved in and took possession of the land.[56] At the time of William Lutz's purchase, all of the lots were wooded and largely unimproved.[57]

Yonkers, located in the southwestern corner of Westchester County, is distinguished by rough, hilly terrain, with five glacial ridges dividing the city into narrow valleys; seven hills have elevations exceeding three hundred feet.[58] The divisive effect of the topography accounts for many small, clearly defined neighborhoods.[59] Yonkers's municipal limits consist of natural boundaries formed by the Bronx and Hudson Rivers to the east and west, respectively, the village of Hastings to the north, and New York City to the south.[60]

Lots 14 and 15, purchased by the Lutzes, were located above Leroy Avenue on top of one of Yonkers's extremely steep hills.[61] Leroy Avenue was a "paper" street; it existed officially on paper, but was not yet constructed.[62] Even after the street was paved, it was still impossible, or at least hazardous, to reach the Lutz home from Leroy Avenue.[63] Indeed, the house is barely visible from the street over the steep rocky frontage.

Lutz's property was contiguous with a triangular tract of land, measuring 150 by 126 by 170 feet and consisting of lots 19 through 22 on the official tax map of Yonkers.[64] In 1912, Lutz cleared his own two lots and at least part of the four lots of the triangular tract.[65] He immediately began to make use of all the land by cutting timber, building and storing items on the land, and cultivating all six lots.[66] With the help of his brother Charlie, Lutz built a home on lots 14 and 15 and a 5-by-10½-foot one room frame pine shack on lot 19 of the triangular tract.[67] In 1920, William, Mary, and their five children be-

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56 *Id.* at 5.

57 *See* Record at 161, *Van Valkenburgh* (No. 5059-48) (testimony of William Lutz).

58 *See* MICHAEL P. REBIC, LADMARKS LOST & FOUND: AN INTRODUCTION TO THE ARCHITECTURE AND HISTORY OF YONKERS 1 (1986).

59 *Id.* The division is now further compounded at the socioeconomic level by the fact that a higher percentage of lower income families are concentrated in the western sector while a large portion of the eastern sector, uses the more fashionable Bronxville and Scarsdale mailing addresses. *Id.*

60 *Id.*

61 Respondent's Brief at 4, *Van Valkenburgh* (No. 5059-48).

62 DUKEMINIER & KRIER, *supra* note 3, at 90.

63 The author visited the site and confirmed this fact.

64 Respondent's Brief at 5-6, *Van Valkenburgh* (No. 5059-48).

65 *Id.*

66 *Id.*

67 Record at 162, *Van Valkenburgh* (No. 5059-48) (testimony of William Lutz).

gan to occupy the house on Leroy Avenue. In 1921,[68] Charlie began to live in the pine shack, which was known to the neighbors as "Charlie's house."[69]

Because access to Leroy Avenue was impossible by car, the family regularly used a dirt road, called a "traveled way," to reach their home.[70] The traveled way ran across the north and west side of the triangular tract.[71] According to Lutz, the traveled way was in existence on the Murray Estate before the property was divided and offered for sale to the public.[72] It still exists and is used by Lutz's son for access to the house.[73]

The Lutzes cultivated the soil of the triangular tract by plowing it and planting fruit and vegetable crops.[74] They also built a coop on the tract in which they kept between 125 and 200 chickens.[75] The garden, which included corn, tomatoes, cabbage, beets, lettuce, carrots, pumpkins, beans, and peaches,[76] provided produce for the family and for a number of their neighbors. Reports on the size of the cultivated area are in dispute. The Lutzes claimed that the area extended from the traveled way on one side of the property to a row of logs and brush, a boundary over one hundred feet in length set aside by Lutz at the opposite end of the premises to Gibson and Leroy.[77] Others contend that the property was primarily wild and uncultivated.[78] The tract was also used as a depository for junk, debris, and cast-off automobile parts and furniture.[79] In short, the triangular plot of land may or may not have been an eyesore to the neighborhood, depending on whose version one chooses to believe.

In 1928, a private water pipeline leading to the Lutz home broke. William, who worked in New York City as an electrician, left his job to repair it.[80] As a result, he was fired and never obtained another job.[81] Instead, Lutz earned money by tending the garden, selling his produce and eggs, doing odd jobs for the neighbors, and collecting

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68 *Id.* at 199.

69 *Id.* at 271; *See also* Respondent's Brief at 6, *Van Valkenburgh* (No. 5059-48).

70 Respondent's Brief at 5, *Van Valkenburgh* (No. 5059-48).

71 *Id.*

72 *Id.*

73 The author visited Murray Estate and found the traveled way to be still in existence.

74 Respondent's Brief at 6, *Van Valkenburgh* (No. 5059-48).

75 Record at 282, *Van Valkenburgh* (No. 5059-48) (testimony of Mary Lutz).

76 The plot was known to some of the neighbors as "Mr. Lutz's gardens." *Id.* at 196.

77 *See* Respondent's Brief at 6, *Van Valkenburgh* (No. 5059-48); Record at 275.

78 Appellant's Reply Brief at 5, *Van Valkenburgh* (No. 5059-48).

79 Record at 29, *Van Valkenburgh* (No. 5059-48). *See also Van Valkenburgh*, 106 N.E.2d at 30.

80 Record at 280, *Van Valkenburgh* (No. 5059-48) (testimony of Mary Lutz).

81 *Id.*

rent from Charlie. Lutz did not pay taxes on the triangular tract, which consisted of lots 19 through 22.

In December 1937, Joseph and Marion Van Valkenburgh built a house on Courter Avenue, lots 31 and 32 in block 52, which was west of the triangular plot and within sight of the Lutz home.[82] According to Father Nicholas Pilavas, who later purchased the home, the Van Valkenburghs never moved in. Instead, they lived in another house a few blocks away. Yet, they always carefully maintained the house on Courter Avenue, whether in person or by a hired caretaker.

In 1946, a feud began between the two families. According to Mary Lutz, she first saw Van Valkenburgh in April 1946, when she had trouble with him over her children, who had evidently been having a party.[83] Mary Lutz asked her husband William to speak with Van Valkenburgh, who had come running up to the traveled way.[84] A heated argument took place and Van Valkenburgh called the police to arrest William Lutz.[85] However, it was not until fourteen months later, on July 13, 1947, that William Lutz was arrested on charges of assault, taken away, and jailed.[86]

A different version of the story was offered by Van Valkenburgh.[87] According to this version, William Lutz assaulted Van Valkenburgh's son on the Van Valkenburgh property after chasing the boy from the Lutz garden.[88] Lutz supposedly brandished an iron pipe and threatened to kill the boy.[89] Lutz and Van Valkenburgh argued, and Lutz was arrested on charges of criminal assault, jailed, and released on bail.[90] After failing to appear for the trial the following year, Lutz was rearrested and released on bail and was eventually convicted for criminal assault.[91] There was also testimony that Van Valkenburgh was arrested in 1948 for criminal trespass,[92] but it is unclear whether Lutz initiated that action.

In April 1947, the City of Yonkers held a sale to foreclose tax liens. Included in the property for sale was the triangular plot con-

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82 Appellant's Reply Brief at 8, *Van Valkenburgh* (No. 5059-48).

83 Record at 276-77, *Van Valkenburgh* (No. 5059-48).

84 *Id.*

85 *Id.*

86 *Id. See also* Record at 278, *Van Valkenburgh* (No. 5059-48); Respondent's Brief at 6, *Van Valkenburgh* (No. 5059-48).

87 *See* Appellant's Reply Brief at 8-9, *Van Valkenburgh* (No. 5059-48); DUKEMINIER & KRIER, *supra* note 3, at 90.

88 Appellant's Reply Brief at 8, *Van Valkenburg* (No. 5059-48).

89 *Id.* at 9.

90 *Id.*

91 *Id.*

92 Record at 138, *Van Valkenburg* (No. 5059-48) (testimony of Joseph Van Valkenburgh).

taining lots 19 through 22.[93] Although lots 19 through 22 had been purchased at the sale of the Murray Estate, the record owners had never asserted title by occupying or keeping up with tax payments.[94] The Lutz family was not named as a defendant or otherwise notified of the proceedings.[95] The Van Valkenburghs purchased several lots, including the aforementioned four lots.[96] The pertinent deed was dated April 14, 1947, and the consideration was $379.50.[97] A few days later, Joseph Van Valkenburgh deeded his interest in the property to his wife.[98]

Ordinarily, the tax foreclosure sale would have conveyed good title against Lutz, even if Lutz had a valid claim of adverse possession prior to the sale.[99] The reason Lutz could have survived the foreclosure sale is not entirely clear, but there are a few possible explanations. First, if Lutz was the true owner by virtue of adverse possession, he had to have actual or constructive notice in order for the sale to be valid to assure that his due process rights would not be violated.[100] "[U]pon general rules of procedure, it has been held that anyone having any interest in the realty involved must be made a party to the action before his title of rights may be affected or foreclosed by the action on the tax lien."[101] Van Valkenburgh could have argued that the sale was valid and that Lutz's interest did not survive the sale because Lutz was not the owner by virtue of adverse possession, that he had sufficient constructive notice of the sale, or that the statute mandated only that the record owner be made a party. However, Van Valkenburgh's attorney did not make any such arguments, at least not in the published records or briefs involved in the legal dispute that took place later.

In July 1947, the same month Lutz was either arrested or rear-

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93 Appellant's Brief at 3, *Van Valkenburgh* (No. 5059-48).

94 *See generally* Respondent's Brief at 5, *Van Valkenburgh* (No. 5059-48); Appellant's Brief in Opposition at 3, *Van Valkenburgh* (No. 5059-48).

95 Respondent's Brief at 7, *Van Vallkenburgh* (No. 5059-48).

96 Record at 26, *Van Valkenburgh* (No. 5059-48).

97 *See* Respondent's Brief at 6-7, *Van Valkenburgh* (No. 5059-48); Appellant's Brief at 3, *Van Valkenburg* (No. 5059-48).

98 Respondent's Brief at 7, *Van Valkenburgh* (No. 5059-48).

99 *See* 58 N.Y. JUR. *Taxation* §§ 428, 432, 433 (rev. ed. 1977).

100 N.Y. TAX LAW §§ 165, 165-b (McKinney 1943) (current version at N.Y. REAL PROP. TAX LAW § 1120 (McKinney 1979)) called for the owner to be notified and for public notice of foreclosure by publication at least once per week for six successive weeks in two newspapers in the tax district or the county.

For further discussion of the notice issue under current New York in rem statutes, see Richard M. Schaus, Comment, Mennonite Board of Missions v. Adams: *Insufficient Notice Under the New York In Rem Statutes*, 33 BUFF. L. REV. 389 (1984).

101 72 AM. JUR. 2D *State and Local Taxation* § 897, at 193 (1986).

rested for criminal assault, Van Valkenburgh set out to "take possession" of the triangular tract in the name of his wife.[102] Van Valkenburgh informed the Lutzes, by registered mail from his attorney and upon a visit while accompanied by two policemen, that the Van Valkenburghs were owners of the land and that the Lutzes should remove all of their property.[103] Van Valkenburgh also had the land surveyed, which determined that Lutz's garage encroached upon Van Valkenburgh's land.[104] In response, Lutz visited Van Valkenburgh's attorney twice that July.[105] At the second meeting, Lutz agreed to remove all of his buildings, junk, and garden within thirty days, but he claimed an easement over the traveled way.[106] Van Valkenburgh then erected two fences across the traveled way which cut off the Lutz family from any access.[107] When the fences were erected, Lutz brought an action to enjoin the Van Valkenburghs from maintaining the fences.[108]

At the trial, Lutz stated, presumably upon the advice of his attorney, that although Marion Van Valkenburgh was the owner of the land, he had a right of way over the traveled way.[109] Lutz testified that he knew he was not the owner of the triangular tract and that "Charlie's house" was on another's land, but that he believed his garage was on his own land.[110] The court found for Lutz and the plaintiffs were enjoined from maintaining the fence.[111] The judgment was affirmed by the Appellate Division.[112]

In 1948, the Van Valkenburghs brought the infamous suit to remove the encroachments of the garage, shed, shack, hut, chicken coop, and other structures placed upon the property by Lutz, to deliver possession of the premises, and for any further relief the court would deem just and proper.[113] Lutz was served on April 8, 1948.[114]

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102 Respondent's Brief at 7, *Van Valkenburgh* (No. 5059-48).

103 *See* DUKEMINIER & KRIER, *supra* note 3, at 90.

104 A survey was made by J.C. Steinkamp in July 1947. *See* Record at 187-89, *Van Valkenburgh* (No. 5059-48) (testimony of J.C. Steinkamp).

105 Appellant's Brief at 4, *Van Valkenburgh* (No. 5059-48).

106 *Id.*

107 *Id.* at 5. *See also* Respondent's Brief at 7-8, *Van Valkenburgh* (No. 5059-48).

108 Appellant's Brief at 5-6, *Van Valkenburgh* (No. 5059-48). The trial took place in Westchester Supreme Court but was unrecorded. According to the record, Romolo Egidi, a neighboring landowner, put up the fences with Van Valkenburgh and was a party to the action.

109 *Van Valkenburgh*, 106 N.E.2d at 32. *See also* Appellant's Reply Brief at 6, *Van Valkenburgh* (No. 5059-48).

110 Record at 156-80, *Van Valkenburgh* (No. 5059-48) (testimony of William Lutz).

111 *Id.* at 45-47.

112 *Lutz v. Van Valkenburgh*, 81 N.Y.S.2d 161 (App. Div. 1948).

113 Record at 5-6, *Van Valkenburgh* (No. 5059-48) (complaint).

114 *Id.* at 1 (statement under Rule 234).

Both parties hired new attorneys.[115] Lutz's answer was served on the 28th of April, and a second action was commenced by service upon Mary Lutz.[116] The defendants' answer denied generally the allegations of the complaint and alleged, as an affirmative defense and as a counterclaim, that William Lutz had acquired title by virtue of having held and possessed the subject premises adversely to the plaintiffs and their predecessors for upwards of thirty years.[117]

William Lutz died on August 28, 1948, devising all his property to his wife.[118] Thereafter, by motion made November 6, 1948, Mary Lutz, as executrix of the last will and testament for the deceased defendant, was substituted and the two actions were consolidated.[119] The trial was held before Judge Frederick P. Close, who found that title to said lots was perfected by William Lutz by virtue of his continuous adverse possession since the year 1935.[120] The Appellate Division affirmed in a memorandum opinion.[121] The Van Valkenburghs appealed.[122]

The Court of Appeals, by a four to three majority, reversed, dismissed the counterclaim, and granted judgment in full to Van Valkenburgh, subject to the existing easement, with costs.[123] Judge Dye, writing for the majority, concluded that the proof failed to establish actual occupation in such a manner as to give the Lutzes title by adverse possession. Judge Dye's analysis of Lutz's possession was so contradictory in terms of the hostility requirement that it cannot be used as a precedent. Further, the opinion both exemplifies and perpetuates the confusion over how to determine intent. This Note will examine Judge Dye's analysis in detail after providing a postscript on the Van Valkenburghs and the Lutzes.

C. *A Postscript on the Van Valkenburghs and the Lutzes*

The legal battle between the families continued after the Court of

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115 Respondent's Brief at 3, *Van Valkenburgh* (No. 5059-48).

116 Record at 1, *Van Valkenburgh* (No. 5059-48) (statement under Rule 234).

117 The statute of limitations at the time of Van Valkenburgh was fifteen years. New York's statute of limitations is now ten years. *See* N.Y. REAL PROP. ACTS. LAW §§ 501, 511, 512, 521, 522 (McKinney 1979).

118 Respondent's Brief at 2, *Van Valkenburgh* (No. 5059-48).

119 *see* order reprinted in Record at 20-21, *Van Valkenburgh* (No. 5059-48) (presenting the order reprinted).

120 Judgment was entered on March 31, 1951 in Westchester County Supreme Court, but was unrecorded. *See id.* at 46-47.

121 Van Valkenburgh v. Lutz, 105 N.Y.S.2d 1003 (App. Div. 1951). One judge dissented on the ground that the evidence was insufficient to establish title by adverse possession.

122 *See* Record at 3, *Van Valkenburgh* (No. 5059-48).

123 Van Valkenburgh v. Lutz, 106 N.E.2d 28 (N.Y. 1952).

Appeals decision was rendered. In 1952, a motion for reargument was denied and a motion to amend the remittitur was granted by the Court of Appeals.[124] The amended remittitur read, "[j]udgments reversed, counterclaim dismissed and judgment directed to be entered in favor of plaintiff, Joseph D. Van Valkenburgh, for the relief prayed for in the complaint subject to the existing easement, with costs in all courts."[125] An execution was issued on the judgment for costs and disbursements. Eugene Lutz, to whom Mary had transferred the property,[126] moved to vacate the purported lien created by virtue of the judgment and to vacate and set aside the execution directing the sale of the property.[127] The motion was granted by an order dated September 30, 1957.[128] The Van Valkenburghs moved for a rehearing of the motion, and, on such a rehearing, moved that Eugene's motion be denied and the order of September 30, 1957 be vacated and set aside.[129] The Van Valkenburghs' motion was denied by order dated February 8, 1958, and they appealed the order denying the rehearing.[130] Once again, the previous order was affirmed.[131] Because they only appealed the order denying the rehearing, and not the order granting Eugene's motion, the Van Valkenburghs waived the right to prosecute the appeal.[132] Due to a procedural error, Eugene Lutz did not have to sell his family home.

Litigation began again when Eugene Lutz, as guardian ad litem for Charles Lutz, brought an action to obtain a judgment declaring that Charles was, by virtue of adverse possession, vested with an absolute and unencumbered fee.[133] Charles, who was mentally incompetent, was not a party to the first action, so he was able to attempt to save his home.[134] Joseph Van Valkenburgh thereafter instituted actions against Charles to recover possession of the premises and to

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124 Van Valkenburgh v. Lutz, 107 N.E.2d 82 (N.Y. 1952).

125 *Id.*

126 Eugene also owned other property in block 54. In August 1947, he purchased lots 26 through 28 from Gertrude Davidson. Eugene also owned lots 17 and 18. Eugene was the youngest and only Lutz child still remaining in Yonkers.

127 *See* Van Valkenburgh v. Lutz, 175 N.Y.S.2d 203 (App. Div. 1958).

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 This was action #1 of an unpublished judgment of the Supreme Court, Westchester County, dated November 23, 1965. *See* Lutz v. Van Valkenburgh, 277 N.Y.S.2d 42 (App. Div. 1967).

134 In an opinion affirming an order denying summary judgment, the Appellate Division, Second Department, determined that neither res judicata nor collateral estoppel prevented Charles from asserting title by adverse possession. *See* Lutz v. Van Valkenburgh, 218 N.Y.S.2d 979 (App. Div. 1961).

compel the removal of certain encroachments therefrom.[135] The actions were consolidated and the trial court awarded Charles title by adverse possession to the same lots involved in the 1952 decision.[136] The Appellate Division reversed,[137] and the case was appealed to the Court of Appeals.[138] Charles testified that when William and he constructed the house twenty-seven years earlier, he had believed that the house was on William's land.[139] Charles alleged that since 1921 he had inhabited the property and had a lease as tenant of William.[140] Although Charles testified that he paid for the house, he also stated in a number of instances that the premises were owned by persons other than himself.[141] The period of time and the witnesses in both this case and the action against William and Mary were the same; the testimony of those who were deceased after the first case was read at the second. The Court of Appeals found for the Van Valkenburghs on the ground that Charles's occupation was not under a claim of title.[142]

As of 1991, Eugene Lutz and his family still lived at the home on Leroy Avenue.[143] Eugene owned a gas station in Yonkers and has since retired. He still uses the traveled way, which continues to be the only access to the house. By 1975, the garden and the shack were no longer on the disputed property.

Eugene is still bitter about the dispute, and refuses to speak about it, describing it as "water under the dike."[144] He does not respond to written inquiries and even went so far as to rip up the return receipt from an envelope sent by registered mail. When I confronted him in person as he drove up the traveled way, he asked me belligerently if I was "the lady who has been bothering [him]" ("bothering him" consisted of mailing him two letters). He has an unlisted phone number and has two guard dogs, whose vicious nature, according to his wife,

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135 These were actions #2 and #3 of the November 23, 1965 litigation. Lutz v. Van Valkenburgh, 277 N.Y.S.2d 42 (App. Div. 1967).

136 *See id.*

137 *Id.*

138 Lutz v. Van Valkenburgh, 237 N.E.2d 84 (N.Y. 1968).

139 *Id.* at 84.

140 *Id.*

141 *Id.* at 85.

142 *Id. See also* Elmer M. Million & Robert F. Koretz, *Property*, 19 SYRACUSE L. REV. 399, 404 (1968). For the prior history of this case, see *In re* Lutz, 205 N.Y.S.2d 956 (App. Div. 1960); Lutz v. Van Valkenburgh, 218 N.Y.S.2d 979 (App. Div. 1961); Lutz v. Van Valkenburgh, 247 N.Y.S.2d 1012 (App. Div. 1964); Lutz v. Van Valkenburgh, 277 N.Y.S.2d 42 (App. Div. 1967).

143 All information after the 1968 action was taken from personal interviews, primarily from conversations with Rev. Dr. Nicholas J. Pilavas of the Prophet Elias Greek Orthodox Church in Yonkers (February 1991), and from individual observations.

144 Interview with Eugene Lutz, in Yonkers, N.Y. (Feb. 1991).

preclude opening the front door. She reacted suspiciously, even when Father Nicholas Pilavas rang her doorbell, although he wore his religious collar, was her next door neighbor, and purchased land from her husband. If Eugene and his wife took after his father, there is no question that William was a "hostile" man. If Professor Helmholz is correct that the courts are influenced by such subjective factors, it is not surprising that the courts would decide against William and Eugene Lutz.

The Van Valkenburghs no longer live in the neighborhood. Marion Van Valkenburgh died sometime in the 1970s and Joseph passed away in 1985. Although the Van Valkenburghs built the house on Courter Avenue, they never lived in the house or rented it. Van Valkenburgh was a partner in a publishing firm in downtown Manhattan, which still bears his name. Despite his absence, Van Valkenburgh refused to sell any of his property in Yonkers until 1982. Both Van Valkenburgh and Eugene Lutz eventually sold land to the Prophet Elias Greek Orthodox Church, which is still located on Leroy Avenue in between the Lutz home and the uninhabited Van Valkenburgh house. Directly behind the church is the triangular plot on which Father Nicholas Pilavas plans to build a new church and a parking lot. Van Valkenburgh, who Father Pilavas describes as a shrewd and difficult man, finally sold his property for $140,000, after initially setting the purchase price at no less than $250,000. Eugene Lutz sold lots 17 and 18 to the church. Gibson Place, which on the maps separates the church from the triangular plot, was never made into a street; it is now owned by the church and is indistinguishable from the other land. Thus, the entire disputed area, the subject of bitter hatred, is now resting peacefully in the hands of the church.

D. *Problems in the* Van Valkenburgh *Majority Opinion: Judge Dye's Interpretation of New York Law*

With regard to the first Court of Appeals opinion, there were two acts of possession analyzed by Judge Dye that are relevant to this analysis: the encroachment of the garage and the intentional use of the land for construction of the shack.[145] Judge Dye structured his evaluation in terms of whether there was proof of occupation by improvement. However, he conducted such an evaluation by probing

145 The essential elements of proof under the applicable provisions of the Civil Practice Act were that the occupation of the premises be under a claim of title and that the premises either were protected by a "substantial inclosure" or were "usually cultivated or improved." Civil Practice Act §§ 39, 40. Although a total of four acts of possession were examined by Judge Dye, only the construction of the shack and the garage were eliminated on mental grounds; the garden use and the storage of junk were eliminated on nonmental grounds.

the subjective intent involved in the two acts of possession. Each was analyzed for the hostility with which the acts were undertaken. In the process, different standards of hostility for each act of trespass were developed which were in hopeless contradiction. If taken seriously, this contradiction would guarantee that adverse possession is not attainable in New York.

It is clear from where this contradiction arises. There is a striking similarity in the wording and conclusions of the Van Valkenburgh brief and of the Court of Appeals majority. The same contradiction was in this brief and was copied into the majority opinion without any attempt to reconcile with the law of hostility.[146]

Judge Dye's opinion, to the extent it pertained to the border encroachment of the garage, overruled earlier New York mistaken-boundary decisions, which allowed for possession to be adverse as long as it was nonpermissive.[147] The external occupation itself created the presumption of hostility, despite the fact that the possessor would not have used the land had he known the location of the record boundary.[148] Instead of following this objective approach of the Connecticut rule, as used in previous New York cases, Judge Dye took the subjective approach of the Maine rule. Judge Dye argued that since Lutz testified to having built the garage without conducting a survey, Lutz must have thought that he was building on his own property. Thus, the proof fell short of establishing that Lutz possessed under a claim of title hostile to the owner.[149] Under Judge Dye's standard, the adverse possessor may not obtain title to land possessed when he or she mistakenly believes it is his or her own.

Conversely, with respect to the nonboundary dispute over "Charlie's house," Judge Dye held that an adverse possessor may not be granted title when the possessor knows that the land is not his or her own. It is difficult to reconcile this conclusion with the earlier rule in New York that the adverse possessor's knowledge of another's

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146 Compare Judge Dye's interpretation of the "actual occupation" as physical possession by cultivation of the entire tract, *see Van Valkenburgh*, 106 N.E.2d at 29, with Appellant's Brief at 8-9, *Van Valkenburgh* (No. 5059-48), and compare Judge Dye's conclusion that Lutz's admissions in the easement action characterized his entire possession, see *Van Valkenburgh*, 106 N.E.2d at 29-30, with Appellant's Brief at 19-20, *Van Valkenburgh* (No. 5059-48).

147 *See* Recent Decisions, 17 ALB. L. REV. 181, 184-85 (1953) (citing Belotti v. Bickhardt, 127 N.E. 239 (N.Y. 1920) and Eggler v. New York R.R. Co., 201 N.Y.S. 619 (App. Div. 1923)).

148 *Id.*

149 *See Van Valkenburgh*, 106 N.E.2d at 29-30. Judge Dye also used this testimony to support his conclusion that the garage encroachment failed to supply proof of occupation by improvement.

ownership will not defeat his cause, so long as he claims adversely.[150] The construction of a home for Lutz's brother and the use of the land for cultivation, storage, and other purposes for upwards of thirty-five years are physical acts which indicate an intent to possess and which ordinarily would provide an owner with sufficient notice of an adverse claim. Lutz's subjective knowledge that he did not own the land was not apparent from his physical actions and should not have been a factor in an objective assessment of his claim.

Even more disturbing about the knowledge of ownership analysis is that, when combined with the conclusions regarding the garage encroachment, the deduction is that neither knowledge nor ignorance of the ownership of the land will suffice to award title by adverse possession. Relying heavily on the winning brief, Judge Dye concluded that the required "claim of title" was lacking with respect to the shack because Lutz knew the land under the shack did not belong to him. With respect to the garage encroachment, Lutz lacked the proper intent because Lutz thought the land did belong to him.[151] These views are both subjective, yet they are completely inconsistent. The contradiction is especially absurd because, as Professor Callahan observed, "[p]rowling around in Lutz's head produced a result which, superficially at least, is remarkable. . . . [I]f you compare this with a list of the possible states of mind you may conclude that the only true adverse possessor is one who, with respect to the title to the land, has no views whatsoever."[152] This type of unconscious possession described by Professor Callahan is required by the conflicting standards of hostility developed by Judge Dye, yet such a type of possession simply does not exist. These standards can not be applied in practice and essentially make the law useless.

The importance that Judge Dye gave to the subjective knowledge of the possessor explains why he also emphasized the testimony by Lutz, in the 1947 easement action, that Marion Van Valkenburgh was the owner of the triangular tract. Although the trial court recognized that the admission was made under the erroneous advice of Lutz's previous attorney and thus disregarded the disclaimer, the majority opinion of the Court of Appeals weighed the concession heavily. Lutz's admission that he was not the owner of the property, according to Judge Dye, was evidence of a lack of hostility under a claim of right.

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150 *Recent Decisions*, *supra* note 147, at 183 (citing 4 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY 445 (3d ed. 1939)).

151 *See Van Valkenburg*, 106 N.E.2d at 30.

152 CALLAHAN, *supra* note 2, at 10.

The generally accepted rule in New York is that when an oral disclaimer of title by the occupant is made before the statutory period has run, it indelibly stamps his possession as nonadverse and prevents title from vesting in him.[153] However, a disclaimer of title by the occupant made after the statutory period has run does not stamp his possession as nonadverse, nor is it sufficient evidence to destroy title acquired by adverse possession.[154] Thus the question should turn on whether title by adverse possession had already vested in Lutz before the 1947 action. If the possession was sufficiently adverse by virtue of Lutz's acts of dominion over the property as against the previous owners of the plots, whose land had been foreclosed and sold to the Van Valkenburghs,[155] the oral disclaimer would not divest Lutz of the title he had already acquired by adversely possessing the property for the statutory period. Van Valkenburgh argued that the oral disclaimer made after the statutory period was "evidence tending to show the character of the previous possession."[156] However, the fact that several neighbors testified that they had called the property "Mr. Lutz's gardens" and the shack "Charlie's house" and had believed the property was owned by Lutz[157] made it more likely that the acts of the defendant were of sufficient character to give notice to the original owner, and to make the later oral disclaimer irrelevant.[158] Instead,

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153 Decisions, 19 BROOK. L. REV. 145, 148 (1952) (citing De Lancey v. Hawkins, 49 N.Y.S. 469 (App. Div. 1897), *aff'd*, 57 N.E. 1108 (N.Y. 1900) and Colvin v. Burnet, 17 Wend. 564 (N.Y. 1837)).

154 *Id.* (citing Barnes v. Light, 22 N.E. 447 (N.Y. 1889)). *See also* Baker v. Oakwood, 25 N.E. 312 (N.Y. 1890); 4 TIFFANY, *supra* note 2, at §§ 1171-72.

155 According to William Lutz's testimony, the parcels were owned by Mr. Cohen and Mrs. Rosenbloom. Record at 168, 170, *Van Valkenburgh*, (No. 5059-48).

156 *Van Valkenburgh*, 106 N.E.2d at 32 (Fuld, J., dissenting). *See also* Appellant's Brief at 19, *Van Valkenburgh*, (No. 5059-48).

157 *See* Record at 191-249, *Van Valkenburgh*, (No. 5059-48).

158 Another troublesome aspect of the opinion was Judge Dye's seemingly strict and literal compliance with New York Civil Practice Act §§ 34, 38, 39, and 40. Judge Dye concluded that since there was no proof of substantial inclosure, the statute could only be satisfied by evidence showing the premises were sufficiently cultivated or improved. Van Valkenburgh described the property as a woodlot without any fences and without any definite or physical boundaries. *See* Appellant's Brief at 4, *Van Valkenburgh* (No. 5059-48). But see Respondent's Brief at 5, *Van Valkenburgh* (No. 5059-48), where Lutz contended that the limits of the tract were marked by natural and man-made boundaries consisting of the "traveled way," Gibson Place, the declivity to Leroy Avenue, and a fence made by Lutz of lumber and brush.

In terms of cultivation, Judge Dye interpreted "actual occupation" as necessitating utilization of the whole of the premises claimed and that virtually no part of the land claimed may be left uncultivated. However, as Justice Fuld's dissent noted, the weight of New York authority indicated otherwise; the requirement was interpreted as such use as an owner would exercise over property of a similar nature, sufficient to give notice to the real owner of the hostile claim. *See* Belotti v. Bickhardt, 127 N.E. 239 (N.Y. 1920); La Frambois v. Jackson, 8 Cow. 586 (N.Y. 1826); Ramapo Mfg. v. Mapes, 100 N.E. 772 (N.Y. 1915). *See also Recent Decisions*, *supra* note 147, at 182-83; *Decisions*, *supra* note 153, at 146-47. Fuld asserted that

Judge Dye disregarded this objective evidence of the character of Lutz's occupation of the land.

E. Van Valkenburgh *and the Manifestation of the Debate*

> In our trip through the mind of the adverse possessor we have taken a wrong turn somewhere. What started out as a requirement of a claim of right, and took away Charlie Lutz's house, has ended as a requirement of a claim of wrong, which took away Mrs. Lutz's garage because it was believed to be wholly on the builder's own land. Faced with results such as this, the urge to stop prying into the possessor's intent is very strong. The immediate job of application is much simpler if we do not; and, if we do not, we can consign to the ash can, which is clearly the proper depository, a few adjectives and a couple of hundred years of legal funny-business.[159]

The inconsistency regarding how to determine the possessor's state of mind to fulfill the adversity requirement in *Van Valkenburgh v. Lutz* epitomizes the confusion and perpetuates the debate over the adversity requirement. Lutz was held to have occupied without a claim of title as a consequence of his subjective mental state, rather than as demonstrated by his acts alone, although the conclusions based upon his mental state were contradictory. It must be acknowledged, at least in this instance, that courts do not follow the objective statute of limitations approach upheld by the treatises and digests.

Professor Callahan points out the seldom mentioned, yet relevant point made in the Court of Appeals briefs that suggests there was such a subjective factor involved in the decision.[160] Van Valkenburgh's brief deemed Lutz's actions as "typical of an irresponsible squatter, guided by motive of pure expediency . . . . [He] did nothing to improve the land but littered the woods around his house with filth and junk, brought in by scavenging the dump. [Van Valkenburgh] is merely trying to . . . protect his home by cleaning up the neighbor-

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> [s]ince the character of the acts sufficient to afford such notice 'depends upon the nature and situation of the property and the uses to which it can be applied,' it is settled that the provisions of sections 39 and 40 are to be construed, not in a narrow or technical sense, but by reference to the nature, character, condition, and location of the property under consideration.

(citing Monnot v. Murphy, 100 N.E. 742, 743 (N.Y. 1913)) According to Lutz, *see* Respondent's Brief at 11-14, *Van Valkenburgh* (No. 5059-48), and Fuld's dissent, *see Van Valkenburgh*, 106 N.E.2d at 30, the evidence demonstrated that by far the greater part of the lots was regularly and continuously used for farming and was more than adequate, as Lutz's neighbors' testimony demonstrated, to give the owner notice of an adverse claim to the entire parcel. Instead, Judge Dye copied Van Valkenburgh's argument without alteration.

159 CALLAHAN, *supra* note 2, at 72.

160 *Id.* at 8-9.

hood."[161] Lutz's brief described Van Valkenburgh's actions as "obviously manifesting his self-proclaimed superiority to poor people."[162] Since the objective evidence was strong that Lutz did occupy the land in dispute for over fifteen years acting as the owner of the property, and there is no indication of acquiescence on the part of the owners before Van Valkenburgh, the decision suggests that the majority in *Van Valkenburgh* disregarded the outward nature of Lutz's possession and upheld the notion that such bad faith possession ought not be rewarded when "upstanding citizens" such as the Van Valkenburghs purchase it in good faith.

Regardless of whether the decision falls within Helmholz's framework, the *Van Valkenburgh* reasoning is demonstrative of the confusion associated with the application of the adversity element by the courts and is unworkable as a precedent in this respect. The case leaves unresolved, among other things, the key element of the law—how and when the courts determine intent. Unless a uniform approach between commentary and case law is embraced, the law of adverse possession in New York will continue to be plagued with inconsistencies and will remain an arbitrary method of settling disputed titles.

F. *New York Law After* Van Valkenburgh

1. Van Valkenburgh *as a Precedent*

Although *Van Valkenburgh* was conspicuously ambiguous regarding Lutz's requisite intent, it is nonetheless a frequently cited case. In the vast majority of adverse possession cases, however, the courts have used what may be considered "creative disregard" of the implications of Judge Dye's analysis. The courts have largely ignored as governing authority that aspect of the case that is illogical and have frequently cited the case mistakenly or for aspects other than the examination of the possessor's intent. In the process, the confusion resulting from the case has had a detrimental effect on subsequent case law which has also been evidenced in the digests.[163]

At least thirty-two New York cases have cited *Van Valkenburgh*, although closer analysis reveals that a number of the cases cite the 1957 action in which the Van Valkenburgh's motion to appeal was

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161 *Id. See also* Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 42-43.

162 CALLAHAN, *supra* note 2, at 8-9. *See also* Respondent's Brief at 37-38, *Van Valkenburgh* (No. 5059-48).

163 2 N.Y. JUR. 2D, *supra* note 5, § 11, at 317 states that occupying premises under a claim of title will constitute the necessary hostility to fulfill the requirement and cites *Van Valkenburgh* as support. *Id.*

dismissed because the right to prosecute the appeal had been waived.[164] The remaining cases cite *Van Valkenburgh* for several different propositions: the general common law and statutory requirements of adverse possession,[165] disclaimer of title,[166] judicial estoppel,[167] the clear and convincing evidence standard,[168] the principle that there is no title by adverse possession when claim of right is lacking,[169] and the principle that claim of right is synonymous with hostility.[170] Examination of the cases citing *Van Valkenburgh* reveals that they did not follow it for its paradoxical definition of hostility or claim of right, but instead treated the case primarily as if it stood for objective standards. There is no attempt to reconcile the later cases with *Van Valkenburgh*.

The *American Law of Property*, one of the most respected authorities on the law and one that takes an "uncompromisingly objective"[171] approach to adverse possession, also ignores the significance of the *Van Valkenburgh* contradiction in its discussion of hostility and claim of title.[172] The case is cited in a footnote as being contrary to the view that claim of title should be determined objectively.[173] Although this footnote acknowledges that the case does not use the objective approach, the fundamental contradiction is disregarded or neglected. Treatment as such in both treatises and case law leads one to wonder whether there is some kind of conspiracy to ignore the implications of the *Van Valkenburgh* opinion.

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164 Van Valkenburgh v. Lutz, 175 N.Y.S.2d 203 (1957).

165 *See* Franzen v. Cassarino, 552 N.Y.S.2d 789, 790 (App. Div. 1990); Poulos v. Ferraiolo, 233 N.Y.S.2d 800, 801 (App. Div. 1962); Fallone v. Gochee, 189 N.Y.S.2d 363, 365 (App. Div. 1959); Terrusa v. Mancine, 143 N.Y.S.2d 344, 344 (Sup. Ct. 1955); DeRosa v. Spaziani, 142 N.Y.S.2d 839, 842 (Sup. Ct. 1955); Romano v. Kosior, 135 N.Y.S.2d 593, 594 (Sup. Ct. 1954); Whiffen v. Deymark Corp., 128 N.Y.S.2d 757, 758 (Sup. Ct. 1954); South Atlantic Realty Co. v. Caruselle, 119 N.Y.S.2d 218, 219 (Sup. Ct. 1952).

166 *See* Gorder v. Masterplanned, 557 N.Y.S.2d 484, 486 (App. Div. 1990); City of Tonawanda v. Elliott Creek Homeowner's Ass'n, 449 N.Y.S.2d 116, 120 (App. Div. 1982).

167 *See* Chemical Bank v. Aetna, 417 N.Y.S.2d 382, 384 (Sup. Ct. 1979).

168 *See* Gerwitz v. Gelsomin, 416 N.Y.S.2d 127, 128 (App. Div. 1979); Mastin v. Village of Lima, 448 N.Y.S.2d 274, 275 (App. Div. 1982), Rusoff v. Engel, 452 N.Y.S.2d 250, 251 (App. Div. 1982); Esposito v. Stackler, 554 N.Y.S.2d 361, 363 (App. Div. 1990).

169 *See* Rusy-Bohm Post No. 411, American Legion, Inc. v. Islip Enters., 170 N.Y.S.2d 23, 24 (App. Div. 1958); Wysocki v. Kugel, 121 N.Y.S.2d 528, 529 (App. Div. 1953); Shoenfeld v. Chapman, 115 N.Y.S.2d 1, 3 (App. Div. 1952).

170 *See* Bernat v. Echo Society of Niagara Falls, 185 N.Y.S.2d 847, 850 (App. Div. 1959) (Halpern, J., dissenting); Platt v. Smith, 127 N.Y.S.2d 66, 67 (Sup. Ct. 1954); South Atlantic Realty Co. v. Caruselle, 119 N.Y.S.2d 218, 219 (Sup. Ct. 1952).

171 *Response*, *supra* note 19, at 67.

172 *See* SUPPLEMENT TO AMERICAN LAW OF PROPERTY 1952-1976 § 15.4, at 578 (A. James Casner ed., 1977).

173 *Id.* at 579.

2. *The Subsequent Cases and the Analysis of Intent*

Just as the courts have ignored the implications of the *Van Valkenburgh* opinion in the way they cite to the case, they have similarly disregarded the standards by which Lutz's intent was examined. Although many cases have taken subjective intent into account, no subsequent New York case has denied granting adverse possession on the basis of the contradictory standards of hostility imposed by Judge Dye. Nor have judges consistently followed the purely objective standard of the scholars and early precedents. Professor Helmholz asserts that

> most judges and juries . . . 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 the case. For them, the temptation to do right will be strong. . . . 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 case law, in search of the 'correct rule.' There is . . . 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 . . . .[174]

Subsequent New York case law appears to support this thesis.

West v. Tilley[175] was a unique New York case in two ways: the court dealt with both case law and text commentary to support the use of the Connecticut rule and it acknowledged the need to distinguish *Van Valkenburgh* in order to do so. The court concluded that the "majority rule" had been recognized in New York and thus the requisite intent for adverse possession may exist despite the fact that the possession was taken under the mistaken notion that the property was within the claimant's true boundary line.[176] In promoting the Connecticut rule over the Maine rule, the court quoted Professor Richard Powell stating that the Maine rule "has been strongly criticized as unsound historically, inexpedient practically, and as resulting in better treatment for a ruthless wrongdoer than for the honest landowner. Its harshness is substantially mitigated by a judicially ac-

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[174] *Response*, *supra* note 19, at 104.

[175] West v. Tilley, 306 N.Y.S.2d 591 (App. Div. 1970).

[176] *See* Patrick J. Rohan, *Recent Decisions*, 22 SYRACUSE L. REV. 121, 131 (1970-71).

cepted presumption of hostility."[177] In its attempt to adopt the objective approach, the court upheld the notion that the subjective intent of a "ruthless" bad faith possessor matters and such possession should not be rewarded.

It is interesting that although the *West* court reached a different result than the court in *Van Valkenburgh*, the facts of *West* were somewhat similar, even as to the triangularity of the plot of land and the defendant's claim of title with no basis in a written instrument. Despite the fact that the character of the lake-front land in *West* was different from that of wooded Yonkers, the proof regarding the statutory requirements as recounted in the opinion did not seem any more persuasive than that provided by Lutz. The main distinction was that the possessor in *West* mistakenly possessed land not within the true boundary line of her family home. However, in its attempt to distinguish the cases, the Fourth Department described *Van Valkenburgh* as follows:

> There a closely divided court in substance held . . . there was no proof that claimant by mistake placed a building on adjoining lands. To the contrary [Lutz] testified that he knew at the time of construction that the building was not on his land.[178]

The problem here is that the judges confused the facts of the case. The mistaken boundary referred to was the garage encroachment, which Lutz thought was on his own property. The shack was the building that Lutz testified he knew was not on his land; no mistaken boundary claim was asserted in regard to the shack. *Van Valkenburgh* simply does not support, but in fact contradicts, the *West* court's holding with respect to the mistaken boundary claim. Thus, the court's attempt to distinguish *Van Valkenburgh* is unpersuasive.

West is a clear example of how the courts creatively disregard the facts and implications of *Van Valkenburgh* in order to hold for the good faith possessor. The *West* judges were justified in attempting to clarify the law with respect to mistaken boundaries by embracing the Connecticut rule; however, their method did not succeed in eliminating the problems with the law both before and especially after the *Van Valkenburgh* decision. Other cases with facts similar to those of *Van Valkenburgh* make no attempt to account for the contradiction established by the Court of Appeals. The cases grant and deny title by adverse possession without articulating or following a consistent method of analyzing the possessor's intent. For example, in *Mc-*

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177 *West*, 306 N.Y.S.2d at 594 (quoting 6 RICHARD R. POWELL, REAL PROPERTY § 1015 (Lori A. Hauser ed., 1991)).

178 *West*, 306 N.Y.S.2d at 595 (citations omitted).

Cosker v. Rollie Estates, Inc.,[179] a nonboundary dispute over cultivated residential lots in Westchester, and *Rodenbeck v. Bekasinski*,[180] an action to remove a garage encroachment, the Court of Appeals granted adverse possession, while in *Gerwitz v. Gelsomin*,[181] a dispute in which the possessors cultivated and built upon an adjacent lot, and *Esposito v. Stackler*,[182] a conflict over a triangular plot on which the adjoining owner stored personal items and debris, the Appellate Division did not grant adverse possession. As a result, New York case law during the period of 1952 to 1990 is neither consistently objective nor subjective in the analysis of intent, and no cases were based solely on the subjective standard. Although there are cases, such as *West v. Tilley*, in which the court made a genuine effort to follow the purely objective approach, the specter of *Van Valkenburgh* nonetheless haunts the case law in New York in both Court of Appeals and Appellate Division cases. The presence of *Van Valkenburgh* in a widely used property law casebook[183] further perpetuates confusion wherever the case is studied. There is no clearly articulated standard to follow and no way for the lower courts in New York to grant adverse possession if they follow the *Van Valkenburgh* precedent. If there is going to be adverse possession law in New York, the absurd contradiction presented in *Van Valkenburgh* must either continue to be ignored by the lower courts or be remedied by the Court of Appeals.

Despite the interjection of subjective factors by many judicial interpreters in the analysis of intent, there is still no consensus on how a hybrid approach should be adopted. There is similarly widespread denial that subjective considerations are factors in the decision-making process. Nonetheless, the majority of the post-1952 cases that did not use solely objective criteria awarded title by adverse possession on an equitable basis. For example, no cases after *Van Valkenburgh* compelled a possessor to remove encroachments from a record owner's property. Such influence of equitable factors was mentioned but not emphasized in Helmholz's articles. Although Helmholz would attribute these decisions to the preference for good faith possessors, they were clearly and consistently due to "practical" considerations of the implications of the decision.[184] In the process, the unworkable contradiction of *Van Valkenburgh* continues to be creatively disregarded.

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179 McCosker v. Rollie Estates, Inc., 168 N.E.2d 533 (N.Y. 1960).

180 Rodenback v. Bekasinski, 176 N.E.2d 509 (N.Y. 1961).

181 Gerwitz v. Gelsomin, 416 N.Y.S.2d 127 (App. Div. 1979).

182 Esposito v. Stackler, 554 N.Y.S.2d 361 (App. Div. 1990).

183 *See* DUKEMINIER & KRIER, *supra* note 3.

184 *See, e.g.*, Lewis v. Village of Lyons, 389 N.Y.S.2d 674 (App. Div. 1976) (awarding title by adverse possession for an encroachment, but not awarding title to other parts of the same

III. CONCLUSION

Van Valkenburgh and the subsequent New York adverse possession cases demonstrate that there is no satisfactory uniform answer to the problem of how to determine the intent with which the possessor enters and holds land. We have found fault with objective, subjective, and hybrid approaches, yet we supposedly cannot eliminate intent as an element of the law, because without it there would be no distinction between an adverse possessor and a squatter. The distinction should be even more important in these times of economic hardship when society faces a vast increase in homelessness, because now is the time when the courts should promote legal and productive use of land, particularly by those who might not be able to afford it otherwise.

Except for *West v. Tilley*, the New York courts have dealt with the problem primarily by ignoring the leading case in the area. It is an interesting jurisprudential fact that when a case becomes embarrassing or unworkable, it is "forgotten" instead of overruled. The solution is not to "giv[e] way to the theory that the entire matter is simply one of the application of the statute of limitations."[185] Nor has the slow evolution of property law remedied the situation.[186] A combined effort on the part of theoreticians and practitioners is necessary if New York is to emerge from the cloud of confusion surrounding adverse possession law as it stands today. In fact, something must be done if there is going to be any adverse possession law at all. The first and most important step is to acknowledge the *Van Valkenburgh* decision and universally discount it, and the Court of Appeals should do so by overruling the case.

Once *Van Valkenburgh* is in some way discounted, it would be propitious to find a way to combine an objective test with a test balancing the equities in favor of each claimant. Although Professor Cunningham denies the influence of moral considerations in decision making and Professor Helmholz acknowledges it, yet finds it "unsettling,"[187] the cases have indicated that equitable principles are factored into the decisions and cannot be ignored. The creation of a combined objective/equitable standard provides a workable test within a moral framework while eliminating the speculation involved in an inquiry into the possessor's subjective intent. In other words, an

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property); Campano v. Sherer, N.Y.S.2d 237 (App. Div. 1975). *See also* Sinicropi v. Town of Indian Lake, 538 N.Y.S.2d 380 (App. Div. 1989).

185 CALLAHAN, *supra* note 2, at 73.

186 *But see id.* at 72.

187 *Response*, *supra* note 19, at 103.

objective approach may be retained if it is modified to meet the needs of judges and scholars and if both sides concede that the law has been applied differently in theory and in practice. As a result, the recurrence of decisions such as *Van Valkenburgh v. Lutz* will be avoided in the future.

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