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Weeks v. Krysa: Cultivating the Garden of Adverse Possession

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I. INTRODUCTION

In *Weeks v. Krysa*, the Maine Supreme Judicial Court, sitting as the Law Court, found that cultivating a garden on a disputed parcel was an "occasional encroachment[]," insufficient to show intent to "displace the owner of the disputed lot or put the owner on notice" of being at risk of adverse possession.[1] Under the traditional common law of adverse possession, cultivation of a garden is one of the hallmarks of an open and notorious use that would put a record owner on notice.[2]

However, after *Weeks v. Krysa*, a question remains as to whether cultivation of a garden will be sufficient to support a finding of adverse possession in Maine. Moreover, the court did not fully articulate the reasoning underlying its decision. This Note will examine the reasoning of *Weeks v. Krysa* in detail. It will also closely consider *Webber v. Barker Lumber Company*, a 1922 case the Law Court relied upon in concluding that gardening and cultivation do not constitute sufficient encroachments to constitute "'clear proof [] of acts and conduct' . . . to put the owner on notice that the owner's property rights were in jeopardy."[3] It will review the activities enumerated in *Webber*, and assess whether such activities are distinguishable from cultivation or gardening, particularly in the context of Maine's historical application of the law of adverse possession.

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1. Weeks v. Krysa, 2008 ME 120, ¶ 18, 955 A.2d 234, 239. The Law Court also considered a variety of other alleged activities in regards to the adverse possession claim in question, including clearing of fallen trees and brush, children playing on the land, and the payment of taxes, all of which it also rejected, in addition to the garden evidence, as a basis for a claim of adverse possession. For the purposes of this Note, I will omit discussion of these elements.

2. *See* 2 C.J.S. *Adverse Possession* § 42 (2003) ("Regular and seasonable cultivation may or may not be required, but usually is sufficient to constitute actual possession . . . . [I]t is not necessary that every inch of a tract of land be in cultivation"). *See, e.g.*, Cambron v. Kirkland, 253 So.2d 180 (Ala. 1971) (cultivation of corn established possessory act for adverse possession); Kendrick v. Kendrick, 10 So.3d 1000 (Ala. Civ. App. 2006) (cultivation, among other actions, held to be sufficient to establish adverse possession); Walker v. Hubbard, 787 S.W.2d 251 (Ark. Ct. App. 1990) (landscaping and planting of non-indigenous items supported claim); Bugner v. Chicago Title & Trust, 117 N.E. 711 (Ill. 1917) (Indicating cultivation is a sufficient possessory act; that possessor's "acts of cultivation apprised every one who witnessed it that he actually cultivated the whole strip during that length of time to within about 2 or 3 feet of the north line, and the 'division of fields' on his north line clearly marked the line to which he claimed, as completely as if a fence had been at all times erected thereon"); Manville v. Gronniger, 322 P.2d 789 (Kan. 1958) (discussing farming); Cowden v. Cutting, 158 N.E.2d 324, 327 (Mass. 1959) ("It is well established that acts such as those found by the judge or shown by the evidence do not require a conclusion of disseisin of wild or wood land not fenced or reduced to possession by cultivation."); Sea Pines Condo. III Ass'n v. Steffens, 814 N.E.2d 752 (Mass. App. Ct. 2004) ("regular and continuous" trimming of brush supported a claim of adverse possession); Ramapo Mfg. Co. v. Mapes, 110 N.E. 772, 776 (N.Y. 1915) (mowing a meadow would be a sufficient act to constitute adverse possession).

3. *Weeks*, 2008 ME 120, ¶18, 955 A.2d at 239 (quoting Falvo v. Pejepscot Indus. Park, Inc., 1997 ME 66, ¶ 8, 691 A.2d 1240, 1243).

Finally, this Note will consider some of the policy rationales underlying the common law of adverse possession and apply those policies to the gardening and cultivation context of the case of *Weeks v. Krysa*. Although the Law Court's decision in *Weeks v. Krysa* can be read as a logical outgrowth of Maine precedents, it seems to mark a step away from the traditional law of adverse possession as it developed and is applied elsewhere in the United States. Thus, this Note will present the perspectives of economic theory and environmental theory as applied to adverse possession, and then synthesize the two approaches, using environmental economics, in order to assess how the decision in *Weeks v. Krysa* may impact the underlying law of Maine.

II. LEGAL OVERVIEW

In *Weeks v. Krysa*, the Law Court reviewed the findings of fact of the trial court "for clear error . . . affirm[ing] the trial court's explicit and inferred findings of fact regarding adverse possession so long as they are supported by competent evidence."[4] In its statement of facts, the court noted that "[d]uring at least the 1970s, the [claimants] maintained a garden, which likely encroached onto the disputed lot."[5] Although the Law Court, under the clear error standard,[6] could have dismissed or disputed the trial court's findings of fact supporting the length of time the garden was maintained as being clearly erroneous, or alternatively held that as a matter of law the time was inadequate to meet Maine's twenty-year requirement for adverse usage, it instead chose to apply the law and dispute that the facts as found "constitute adverse possession."[7]

In Maine, to prove adverse possession, one must show "by a preponderance of the evidence, that possession and use of the property was (1) actual; (2) open; (3) visible; (4) notorious; (5) hostile; (6) under a claim of right; (7) continuous; (8) exclusive; and (9) for a duration exceeding the twenty-year limitations period."[8] Additionally, these elements must be shown by "clear proof of acts and conduct sufficient to put a person of ordinary prudence, and particularly the true owner, on notice that the land in question is actually, visibly, and exclusively held by a claimant 'in antagonistic purpose.'"[9]

Maine's open lands tradition provides a presumption of permissive use to abutting landowners and the general public.[10] Until recently, the presumption of

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4. *Id.* ¶ 11, 955 A.2d at 237 (internal citation omitted).

5. *Id.* ¶ 8, 955 A.2d at 237.

6. The clear error standard requires the Law Court to defer to the trial court's findings of fact in the absence of clear error:

> [F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. ME. R. CIV. P. 52(a).

7. *Id.* ¶ 11, 955 A.2d at 237.

8. *Id.* ¶ 12, 955 A.2d at 238 (internal citation omitted).

9. *Id.* ¶ 13, 955 A.2d at 238 (quoting *Falvo*, 1997 ME 66, ¶ 8, 691 A.2d at, 1243).

10. In *Weeks*, the Law Court found:

> Maine has a tradition of acquiescence in access to nonposted fields and woodlands by abutters and by the public. Pursuant to our open lands tradition, recreational use of unposted open fields or woodlands and any ways through them are presumed permissive

permissive use was applied explicitly only to claims for prescriptive easements.[11] However, for the purposes of this article it should be noted a 2002 case clarifies that such permissive uses are not only assumed over "wild and uncultivated" land, or land of "trifling" value, but rather over all Maine land: "[T]hese terms are maintained in the precedents because the significance . . . is not what they say about the land, but the principles they establish regarding public, recreational uses of land."[12] For example, permissive uses have been defined to include recreational uses such as walking, hiking, and hunting[13]—and even cutting timber.[14] These permissive uses have been traditional to land use in the state of Maine, and stem from a policy judgment that "such use . . . is consistent with, and in no way diminishes, the rights of the owner in his land."[15]

Thus in the context of adverse possession, this approach by Maine's courts has effectively limited the ways in which claimants may sustain a claim of adverse possession, such that a putative adverse possessor must demonstrate that the use is adverse to the interests of the record owner, and overcome the presumption of permissive use[16] by showing use of the property "the way as the owner would use it . . . us[ing] it as though he owned the property himself."[17] Accordingly, in *Weeks v. Krysa*, when the Law Court held that the cultivation of a garden was insufficient to "put the owner on notice that the owner's property rights were in jeopardy,"[18] the conclusion was implicit that gardening is more like a permissive use, or a use "consistent with . . . the rights of the owner in his land"[19] rather than hostile to the title owner.

III. *WEEKS V. KRYSA*

A. The Case Law of Maine

Weeks v. Krysa is, at base, a simple dispute over an unbuilt lakefront lot.[20] The disputed lot, of which Forrest Estes and John and Westie Krysa are the formal title owners (hereinafter "the Krysas"), is located in Waterboro, Maine, in York

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and do not diminish the rights of the owner in the land. *Id.* ¶ 15, 955 A.2d at 238 (internal citation omitted).

11. *See, e.g.*, Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, ¶ 19, 804 A.2d 364, 370 (presumption of permissive use applied in case of alleged prescriptive easement); S.D. Warren Co. v. Vernon, 1997 ME 161, ¶¶ 15-17, 697 A.2d 1280, 1284 (use of a road for access to hunting insufficient to establish a public prescriptive easement because the use was deemed permissive); Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (permissive use of way through golf course presumed).

12. *Lyons*, 2002 ME 137, ¶ 21, 804 A.2d at 371.

13. "Under our precedents, public recreational uses of unposted open fields or woodlands and the ways through them are presumed permissive." *Id.* ¶ 19, 804 A.2d at, 370.

14. Stewart v. Small, 119 Me. 269, 271, 110 A. 683, 684 (1920).

15. *Town of Manchester,* 477 A.2d at 1130 (Me. 1983); *Lyons*, 2002 ME 137, ¶¶ 20-21, 804 A.2d at 370. This precedent, accordingly, clarifies that the "character" of the disputed lot at issue in *Weeks v. Krysa*, e.g., whether it is "wild" land, is irrelevant.

16. *Weeks*, 2008 ME 180, ¶¶ 15-16, 955 A.2d at 238-39.

17. Blanchard v. Moulton, 63 Me. 434, 435 (1873).

18. *Weeks*, 2008 ME 180, ¶ 17, 955 A.2d at 239.

19. *Town of Manchester*, 477 A.2d at 1130.

20. *Weeks*, 2008 ME 120, ¶ 3, 955 A.2d at 235-36.

County.[21] It fronts Little Ossippee Lake and is bordered on three sides by a lot owned by the Weeks and Hutchinson families (hereinafter "the Weeks family").[22]

The Weeks family filed suit in November 2004 alleging both common law adverse possession and statutory adverse possession.[23] After a bench trial, the court entered judgment for the Weeks family with a finding of common law and statutory adverse possession.[24] The facts of the case were largely undisputed,[25] and because no party sought additional factual findings pursuant to Maine Rule of Civil Procedure,[26] the Law Court "review[ed] the [trial] court's express and inferred findings of fact for clear error,"[27] as noted above. Because of this procedural posture, this Note will omit any discussion of potential factual disputes and accept the facts as presented in the trial and appellate record.[28] In this case, the evidence adduced by the Weeks family to support their claim of adverse possession included the fact that the Hutchinson family maintained a garden that encroached on the disputed lot for some time.[29] Additional evidence included the fact that after storms and occasionally at other times, the Weeks family cut trees and cleared brush on the disputed lot;[30] they paid taxes on the lot for some time but not immediately prior to the suit;[31] and the Weeks and Hutchinson children played on the lot and

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21. *Id.*

22. *Id.*

23. Under Maine law,

> No real or mixed action for the recovery of lands shall be commenced or maintained against any person in possession thereof, when such person or those under whom he claims have been in actual possession for more than 40 years, claiming to hold them by adverse, open, peaceable, notorious and exclusive possession, in their own right.

ME. REV. STAT. ANN. tit. 14, § 815 (2003) (cited in *Weeks*, 2008 ME 120, ¶ 4, 955 A.2d at 236). In 2006 the Law Court clarified that. in Maine, "there is only one claim [for adverse possession]—the common law claim as amended by the Legislature." Dombkowski v. Ferland, 2006 ME 24, ¶ 19, 893 A.2d 599, 604. The Law Court went on to detail that the legislative intent behind the statutory claim for adverse possession was only to modify one section of the common law, to eliminate the common-law intent requirement to sustain a claim of adverse possession—an issue that does not arise in *Weeks v. Krysa*. *Id.*

24. *Weeks*, 2008 ME 120, ¶ 10, 955 A.2d at 237.

25. *Id.* ¶ 5, 955 A.2d at 236.

26. Under the Maine Rules of Civil Procedure,

> RULE 52. FINDINGS BY THE COURT. (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the Superior Court justice or, if an electronic recording was made in the District Court, the District Court judge, shall, upon the request of a party made as a motion within 5 days after notice of the decision, or may upon its own motion, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment if it differs from any judgment that may have been entered before such request was made . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. ME. R. CIV. P. 52(a).

27. *Weeks*, 2008 ME 120, ¶ 11, 955 A.2d at 237.

28. This includes assuming that, as the district court found, "the owners of the Weeks lot 'maintained a garden which likely encroached on' the disputed lot." *Id.* ¶ 18, 955 A.2d at 239.

29. *Id.* ¶ 8, 955 A.2d at 237.

30. *Id.* ¶ 19, 955 A.2d at 239.

31. *Id.* ¶ 20, 955 A.2d at 239.

traversed it to reach the water or other properties.[32] However, for the purposes of this Note, I will focus only on the issue of the garden.

B. Analysis of the Holdings

In reviewing the evidence of the Weeks family's cultivation of a garden on the disputed lot, the Law Court stated that the gardening was analogous to an "[o]ccasional encroachment[]" which did not constitute "[an] act[] of sufficient notoriety to support an adverse possession claim."[33] It analogized to *Webber v. Barker Lumber*, where the court had held that maintaining fences, pasturing animals, and the cutting of wood and timber did not "openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and as such . . . give notice of such hostile intent."[34] The Law Court in *Weeks* stated that "the *Webber* precedent is particularly significant because we vacated a finding of adverse possession by the trial court, holding that evidence of fencing, pasturing cattle, and occasional cutting of timber on otherwise undeveloped land was insufficient to support an adverse possession finding."[35]

These statements are the whole of the analysis provided by the Law Court as to whether cultivation of a garden is a possessory act adverse to the ownership interests of the record titleholder under Maine law. Moreover, the Law Court did not distinguish the factual situation in *Weeks v. Krysa* from its decisions in previous cases where an adverse possessor's clearance of a plot and maintenance of a lawn or garden were assessed as evidence of open notice to the true owner. For example, where a putative adverse possessor used a disputed parcel "in a typically residential manner that included recreation, storage, and gardening, . . . [those uses] were sufficient to put the true owner on notice of the extent of their trespass," satisfying the actual, open, visible, and notorious elements of the requirements for adverse possession.[36] In that case, the Law Court specifically pointed to the adverse possessors' use of the parcel as "a driveway, a lawn, and [a] garden," noting that they "raked and mowed the parcel, trimmed bushes and lilacs, maintained a compost pile, and formed a rock garden."[37] These uses constituted acts of possession as would "be expected of the average owner of such property."[38] Similarly, where an adverse party cleared an overgrown area, created a lawn, and kept that lawn mowed, the Law Court upheld the trial court's application of that evidence to support a finding of adverse possession.[39]

Permissive use, on the other hand, prevents a successful claim of adverse possession; the Law Court held in another case that specific circumstances of permission undermined a claim to adverse possession of land abutting the

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32. *Id.* ¶ 8, 955 A.2d at 237.

33. *Weeks*, 2008 ME 120, ¶ 18, 955 A.2d at 239.

34. Webber v. Barker Lumber Co., 121 Me. 259, 264, 116 A. 586, 588 (1922).

35. *Weeks*, 2008 ME 120, n.7, 955 A.2d at 239.

36. Striefel v. Charles-Keyt-Leaman P'ship, 1999 ME 111, ¶ 10, 733 A.2d 984, 990.

37. *Id.* n.4, 733 A.2d at 990.

38. *Id.* ¶ 10, 733 A.2d at 990 (quoting Baptist Youth Camp v. Robinson, 1998 ME 175, ¶ 13, 714 A.2d 809, 814).

39. *Dombkowski*, 2006 ME 24, ¶ 31, 893 A.2d 607.

property.[40] There, the party asserting adverse possession claimed that having "kept the area mowed, [and] using [the property] for recreation, storage, septic, and gardening purposes" constituted notice to the owner of record of the adverse use.[41] The Law Court concluded that the trial court properly reviewed the "surrounding circumstances," including the fact that the mill owners "allowed and encouraged workers to use company property adjacent to their homes, and never refused permission for such use," even though the company never specifically gave permission for gardening.[42] Thus, in that case, the Law Court found a presumed permissive use in the absence of explicit permission based on the surrounding circumstances, including the facts that the adverse possession claimants "used the land exactly as every one else [the other residents of the mill town] was using it" and that "if they had asked permission, the mill would have granted it."[43]

In contrast, the Law Court's holding in *Webber v. Barker Lumber* demonstrates that the salient factor a court should consider is whether the acts that the putative adverse possessor used to evince a use adverse to the title owner were sufficient to show hostility notorious to the title holder.[44] Ultimately, the Law Court held that the building of a brush fence, the pasturing of animals, and the cutting of wood and timber were not sufficient to show such hostility.[45] In that case, Charles Webber sued the Barker Lumber Company in trover for the value of the trees the defendant had removed from the disputed property, and the defendant contended that it had received permission for the removal by those who held title via adverse possession.[46]

The court first examined the issue of fencing, which the proponents of the claim of adverse possession contended demonstrated "substantial inclosure" adequate to "afford notice . . . of the builder's assertion of right."[47] The Law Court found that rather than serving as notice to the owner of record, the fence in that case was "simply convenient means of keeping . . . cattle from escaping."[48] Moreover, the court held, the cattle pasturage on the disputed parcel was also not sufficient to "openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and . . . give notice of such hostile intent" because rather than being a form of deliberate pasturage it constituted "unrestricted meandering" from the neighbor's property.[49] In practice, the cows were set loose upon the attempted adverse possessor's property and wandered onto the disputed land due to want of fencing on one side of the land.[50]

This approach to limiting acts of ownership sufficient to give notice of adverse intent is, although not stated explicitly by the Law Court as such, an outgrowth of

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40. *Falvo*, 1997 ME 66, ¶ 10, 691 A.2d at, 1243.
41. *Id.* ¶ 6, 691 A.2d at 1242.
42. *Id.* ¶ 9, 691 A.2d at 1243.
43. *Id.* (internal quotation omitted).
44. *See generally Webber*, 121 Me. 259, 116 A. 586.
45. *Id.* at 263-67, 116 A. at at 588-89.
46. *Id*. at 260, 116 A. 586.
47. *Id.* at 262-263, 116 A. at 587-88 (quoting Roberts v. Richards, 84 Me. 1, 12, 24 A. 428, 428 (1891) (internal quotation marks omitted)).
48. *Id.* at 263, 116 A. at 588.
49. *Id.* at 264, 116 A. at 588.
50. *Webber*, 121 Me. at 264, 116 A. at 588.

the historic Maine approach to adverse possession. It differentiates presumptively permissive uses, such as recreation and passage, from acts of ownership that have the potential to provide notice of hostile intent to the owner of a property.[51]

In choosing to apply *Webber v. Barker Lumber*, rather than the previous Maine cases where an adverse possessor used the disputed land for gardening or a lawn and was successful in a claim against the title owner, the Law Court in *Weeks v. Krysa* signaled that it regarded even the cultivation of a garden as presumptively permissive, rather than an act of ownership. Thus, the salient question is whether cultivation of a garden, which unlike cattle pasturage, is an exclusive use, should be seen as adverse to the interests of the true owner—and what policy considerations underlie such an assessment.

IV. ANALYSIS OF POLICY RATIONALES

Adverse possession has been justified by a variety of policy rationales. Jeffrey Evans Stake provides a useful overview of these rationales in his article *The Uneasy Case for Adverse Possession*. They include the interrelated theories that those who "sleep" on their property rights should lose their rights under a theory of justice, that those who put land to productive use should be rewarded, and that the doctrine of adverse possession "stimulates" title holders to monitor their land more closely, among others.[52]

The following discussion will examine in detail the policy rationales for adverse possession under environmental and economic theory, and then apply a combined form of environmental economic theory to the facts of *Weeks v. Krysa*. Then, it will consider which approach to the question of adverse possession is the best for the state of Maine.

A. Economic Theory and Rationales for Adverse Possession via Cultivation

From an economic perspective, the analysis of adverse possession generally begins with the rationale of economic efficiency. In one of the seminal works for the law and economics movement, Guido Calabresi and A. Douglas Melamed provided a structure for assessing such efficiencies, arguing that legal rules should allocate entitlements efficiently so as to reduce societal costs, or externalities (costs to third parties).[53] Additionally, under this rubric, to allocate an entitlement society

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51. The evidence of woodcutting was rejected, not because woodcutting inevitably fails to establish adverse possession, but because in the instant case the cutting was "desultory" and failed to demonstrate "'an asserted exclusive appropriation and ownership.'" *Id.* at 265-66, 116 A. at 588-89 (quoting Adams v. Clapp, 87 Me. 316, 320, 32 A. 911, 912 (1895)).

52. Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2434-37 (2001). The other theories he enumerates include: encouraging litigation, encouraging owners to sue promptly, reducing litigation costs, flushing offers to purchase, providing psychological justification for neighborly disputes, protecting lenders, quieting titles, facilitating market transfers, eliminating barriers to development, reducing boundary uncertainties, protecting vested titles acquired by adverse possession, protecting "true owners" against false record owners, and psychological loss-aversion from attachment to property. *Id.* at 2437-56.

53. As the authors note,

> Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change

should assess the end-result distributional goals sought to be achieved; the authors use as an example that "[t]here are also preferences which are linked to dynamic efficiency concepts—producers ought to be rewarded since they will cause everyone to be better off in the end."[54] In practice, these analyses are often predicated on the assumption that production and use are socially preferable to stagnation and disuse, which contributes to the valuation of property; for example, in the case of eminent domain, where a social good is sought to be achieved our legal structure allocates an entitlement to the government to set "market value" prices on property in order to facilitate the "highest and best use" of property for the good of society.[55]

As applied to the doctrine of adverse possession, this "economically optimal" approach naturally leads to the implication that society benefits from "active" versus "passive" users of property—after all, they add productivity to the social network. Moreover, as Judge Richard Posner has pointed out, adverse possession has the advantage of shifting a property right from the title owner who, through her dilatory approach, has demonstrated that she values the property at $0 to one who, through "use" in the context of adverse possession, has shown a higher valuation, and even perhaps through productivity enhanced that property's value.[56] Thus, adverse possession "improves rather than challenges the system of property rights."[57]

The law and economics approach provides an additional rationale for adverse possession: minimizing transaction costs. These are costs that arise in cases where one party to a potential transaction is absent, or for a variety of reasons acts as a holdout, or fails to assess an accurate market value for her property, such as in the case of eminent domain discussed above.[58] Accordingly, under the "sleeping owner" rationale, property owners should be subject to potential adverse possession in order to encourage them to make themselves known, which will reduce transaction costs for any potential buyers.[59] The two goals of placing property in the hands of one who values it maximally, and of reducing transaction costs, can be tied together, under the rationale of enabling the "mov[ement of] scarce resources into the hands of those who place the highest value on them."[60]

Under an interrelated valuation justification first posited by Oliver Wendell

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> would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.

Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-94 (1972).

54. *Id.* at 1098.

55. *Id.* at 1106-09.

56. Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 559-60 (2000).

57. *Id.* at 560.

58. Calabresi & Melamed, *supra* note 53, at 1107-08.

59. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130-31 (1985).

60. Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1064 (2006).

Holmes, which has been termed the "personhood rationale,"[61] the emotional value assigned to the disputed property by the adverse possessor becomes preeminent over its market value, which justifies assigning ownership to the individual whose long-term actual possession demonstrates that she values it at a higher level than the title owner.[62] Judge Posner described this dynamic by noting that if the title owner were restored the property it would be perceived as an accession to wealth, since that owner was dilatory in ownership previously, and effectively forgot she owned the property.[63]

Thus, under an economic assessment, three primary criteria may provide a justification for adverse possession: first, that it enables property to be valued at its highest and most efficient social use (i.e., the adverse possessor's use produces better social and economic utility for the property); second, that it encourages title owners to prevent increased transactional costs by monitoring their rights (which increases social and economic utility through market efficiency); and third, that it enables the individual who values the property maximally to become the title owner.

Through this rubric one may then review the requirement that an adverse possessor use the disputed property as an owner would in order to provide sufficient notice to the title owner. The Maine standard of presumptively permissive use for certain activities may then be assessed through whether it provides social and economic utility. For such actions as hunting, fishing, and access to waterfront, it is clear that a presumptively permissive use facilitates both efficient economic use and reduction in transaction costs. Encouragement of production is seen as an optimal economic value—and the activities enumerated above provide productive economic use of land, particularly in a largely rural state like Maine where a significant portion of the property is not subject to cultivation or development. Similarly, where economic value is found in reducing transaction costs, it makes sense to presume permissive uses that are by nature unrelated to the marketability of property and do not necessarily relate to whether a given owner has been "sleeping" on her rights. And, finally, since, as the Maine courts have held, such uses are consistent with, rather than adverse to, an owner's use of her land,[64] this rationale maximizes use and valuation of the land by the owner without limiting periodic uses by others that may be economically beneficial.

On the other hand, uses such as cultivation or gardening should engender a different analysis under this law and economics approach. Only a single individual may cultivate a plot of land at any given time, in contrast to the multiplicity of those who may hunt, fish, or even cut timber.[65] In *Weeks v. Krysa*, the Law Court analogized the cultivation of a garden to a more periodic use of land, such as grazing cattle.[66] However, under an economic analysis this analogy is faulty—

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61. Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 290 (2006).

62. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897).

63. RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 70 (3d ed. 1986).

64. *See, e.g., Town of Manchester*, 477 A.2d at, 1130.

65. Clearly, these "renewable" resources have been demonstrated to be less than unlimited in recent decades.

66. *Weeks*, 2008 ME 120, ¶ 18, 955 A.2d at, 239.

refusing to recognize cultivation as a non-permissive use that is more analogous to the type of use inherent to an owner neither maximizes productive use, encourages the reduction of transaction costs, or allows efficient market valuation and movement of property to the "higher-valuing user."[67] Effectively, the rule in *Weeks* contradicts all of the major economic rationales for adverse possession. Moreover, because it applies a rule more suited to transitory and periodic uses to a use that is more analogous to an improvement, the *Weeks* decision could affect the future course of the common law of adverse possession in Maine.

Thus, it is incumbent to posit the optimal rule. As we have seen, under a traditional economic analysis, a rule allowing adverse possession by use of the disputed property via cultivation or gardening would be seen as advantageous. However, a significant environmental critique may undermine that conclusion, as seen below.

B. Environmental Theory and Adverse Possession

In general, environmental theory has been used to reject, rather than support, the status quo of adverse possession law.[68] Environmental theorists have offered a multiplicity of responses to what is seen as a fundamentally anti-environment property doctrine, including proposals to create specific rules for adverse possession of wild (undeveloped) land,[69] to create "conservation" exceptions that would allow record owners to exempt conserved land from adverse possession,[70] and to implement a property registration system, based on a proposed uniform law.[71] Additionally, one state has, by statute, prevented adverse possession claims against publically owned land held for conservation or open space.[72]

One of the most effective critiques of adverse possession from an environmental perspective argues that adverse possession law was wrongly expanded in the United States by nineteenth century judges.[73] In England, adverse possession law evolved as a rational method to reward those who demonstrated the

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67. Fennell, *supra* note 60, at 1064.

68. *See, e.g.,* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994).

69. *Id.*

70. Klass, *supra* note 61, at 302.

71. Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 BUFF. ENVTL. L.J. 1, 48-52 (2004).

72. "[T]his section shall not bar any action by or on behalf of the commonwealth, or any political subdivision thereof, for the recovery of land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose." MASS. GEN. LAWS ANN. ch. 260, § 31 (1987). *See also* Aaron v. Boston Redev.Authority, 850 N.E.2d 1105, 1108-09 (Mass. App. Ct. 2006) ("[I]f the Commonwealth is holding land for the purposes outlined [e.g., conservation] . . . third-party claimants . . . will not be able to sustain a claim against the Commonwealth's superior right to the land even after twenty years.").

73. *See* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996) [hereinafter Sprankling, *The Antiwilderness Bias in American Property Law*] (arguing that in the nineteenth century, American property law developed a bias toward encouraging agrarian development that still pervades property law doctrines, including adverse possession). Sprankling, *An Environmental Critique of Adverse Possession*, *supra* note 68, at 816 (positing a "development model" bias in adverse possession law that serves an economic ideology of development).

indicia of ownership, in light of the lack of an "effective title recording system."[74] In contrast, American courts in the nineteenth century applied a new "wild lands" standard for unimproved land that rewarded those who put land to productive use in the absence of an absentee record title owner.[75] This "development model," which posits that any type of use is preferable to an undeveloped status quo, is, as one scholar argues, "fundamentally antagonistic to the twentieth century concern for preservation."[76] In the nineteenth century, the most commonly successful adverse possession claims transferred property from those who preserved wild (undeveloped) land (or, at least, left it alone) to those who exploited it through development or use of its natural resources.[77]

The "development model" that evolved judicially in the nineteenth century distinguishes between "wild" (defined as wholly undeveloped land) and cultivated land,[78] but fails to contemplate the hybrid situation that is extremely common in the state of Maine—where a parcel of land is partially cleared but does not contain any permanent structures, fencing, or landscaping. In order to fully protect and encourage environmental preservation, any proposed modification to the standard for adverse possession must cover such properties. Perhaps the reason the Law Court is so reluctant to qualify even some less-ephemeral uses on others' land as sufficiently notorious to satisfy as adverse is that it rejects the "legal fiction" of "constructive notice," which pretends that record owners of property, even that located in remote locales, "would" find out about such adverse uses.[79] In Maine, perhaps it is unreasonable to expect, even in non-wild lands, the monitoring that would enable actual notice, rather than constructive notice.

Moreover, by positing that utility is maximized by a record owner who holds the land specifically in order to preserve it, but failing to consider contexts where the record owner holds the land without preservationist intent but nevertheless refrains from development, the environmental approach may be unnecessarily limited.[80] Indeed, some proposals would specifically limit the application of adverse possession-limiting doctrines to those who can document "conservation intent" in the management of their land.[81] Thus, these approaches would not apply

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74. Sprankling, *The Antiwilderness Bias in American Property Law*, *supra* note 73, at 538 ("[I]t was reasonable to expect that the true owner of property would either reside there or, at least, inspect it frequently enough to detect trespassers and bring a timely suit in ejectment. On the other hand, lengthy possession uninterrupted by litigation could be construed as community acknowledgement that the occupant was the true owner.").

75. Sprankling, *An Environmental Critique of Adverse Possession*, *supra* note 68, at 848-49.

76. *Id.* at 816.

77. *Id.* at 821 ("These courts transformed the doctrine from a mechanism designed to protect the title of the true owner against false claims into a tool designed to transfer title to wild lands from the idle true owner to the industrious adverse possessor.").

78. *Id.* at 865.

79. Barnet, *supra* note 71, at 12.

80. *See* Sprankling. *An Environmental Critique of Adverse Possession*, *supra* note 68, at 875. In the case of the abandoning owner, Sprankling argues that adverse possession is not necessary because the property will be repossessed via a tax lien and resold. *Id.*

81. Klass, *supra* note 61, at 324. Klass argues for a shift in adverse possession theory and law that "would result in courts focusing . . . on evidence that the owner intended to leave the land in a natural state, or that the owner's actions resulted in a conservation benefit, thus formally recognizing

to situations such as that in *Weeks v. Krysa*, where the owner was neither "preservationist" nor wholly "absent."[82]

Should they? One could argue that in order to best preserve land from development, an environmental approach to adverse possession should encourage conservation, if that is preferable, whatever the motivations of the title owner of the property. Some states, such as Maine, may see value in rewarding even dilatory owners who keep property free from development. Regardless of which approach is used, such an outcome may provide greater environmental benefits.

More specifically, even the environmental critiques that reject the "development model" nevertheless reinforce the notion that it is appropriate for cultivation to be an act that justifies a finding of adverse possession: e.g., "clearance and cultivation afford constructive notice to a reasonable owner."[83] This approach fails to question the underlying assumption of adverse possession shared by both economic and environmental theories—that it must rationally punish the dilatory title owner who is, under the environmental critique, redefined as one who neither develops nor mindfully conserves the land. Moreover, in a state like Maine where a substantial number of property owners own unbuilt lots, like the one at issue in *Weeks v. Krysa*, the concept of the "reasonable owner" who supposedly visits her land regularly is unrealistic.

So what of gardening and cultivation? The *Weeks v. Krysa* court called the gardening evidence before it insufficient to show an intention to provide notice to the title owner of the land.[84] But aside from likening such cultivation to occasional encroachments like timber cutting and cattle grazing, the court did not articulate a rationale for its decision. This Author has posited that the holding may form an implicit extension of the Maine tradition of permissive use; alternatively, the court could have seen the cultivation of a garden as an inherently ephemeral activity which did not constitute sufficient development to constitute a true "improvement" of the property. Unfortunately, environmental theory thus far appears to have little to add to any discussion of whether gardening alone *should* constitute use, or why, if not.

C. Environmental Economics and Weeks v. Krysa

Despite the appearance of irreconcilable differences in the economic and environmental perspectives toward the doctrine of adverse possession, the two approaches can be harmonized. If one replaces the assumptions underlying the economic analysis and then views the environmental movement to preserve undeveloped land and prevent sprawl as an economic necessity, it becomes clear that in order to achieve those end results, both approaches should be utilized.

However, some environmental ethicists reject any economic analysis either

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conservation as a 'use' of land and a 'possession' of land in a way that has been ignored in the past." *Id.* at 286.

82. Although some evidence was adduced that the Krysas' predecessor in title failed to pay taxes for some years, the arrears evidently never became significant enough to prompt the local government to seek a tax lien. *Weeks*, 2008 ME 120, ¶ 20, 955 A.2d at 237.

83. Sprankling, *An Environmental Critique of Adverse Possession*, *supra* note 68, at 850.

84. *Weeks*, 2008 ME 120, ¶ 18, 955 A.2d at 239.

because they perceive it to subvert the moral values implicit in environmentalism,[85] or because, as one theorist has said, "there is no economic or even utilitarian rationale available for preserving the natural environment."[86] From this perspective, the instrumental efforts toward environmental protection must be guided not by economic or other utilitarian concerns, but by independent ethical principles.[87]

Others have argued, however, that the application of economic analysis to environmental issues may be "essential to accomplishing" environmentally beneficial results.[88] The application of economics should, among other methods, be used in order to "determine the appropriate type and level of environmental protection."[89] This requires the use of a cost-benefit analysis approach.[90] Much like the argument that "use" in the adverse possession context should be redefined to include declarations of conservation intent, this approach must redefine economic efficiency to include environmental goals.[91] The end result of such a cost-benefit analysis is an optimal level of efficiency that allocates the marginal costs accurately—in other words, it should be used to ensure that any resource allocation is designed to serve *any* named interests, including environmental and economic values, even where intangible.[92]

Thus, in the context of adverse possession, what are the costs and benefits of limiting the application of the doctrine to situations where the putative adverse possessor acts to transform the land in question in a permanent manner? This question is implicit in the Law Court's decision in *Weeks v. Krysa*. If the court's analysis is followed to its logical conclusion, the exclusion of the cultivation of a garden—which the court analogized to more ephemeral uses like grazing cattle—may signal that the Law Court will not consider any non-permanent modifications to property as sufficiently notorious. The inverse, perhaps, might be stated as the rule in Maine since *Weeks v. Krysa*: In order to prevail when bringing an adverse possession claim, the "use" of the land must constitute a transformation or improvement of the property, or else the Law Court may term it an "occasional encroachment."[93]

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85. Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 436-37 (1996).

86. *Id.* at 437 (quoting Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 225 (1974)).

87. *See id.*

88. Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175, 177 (2003).

89. *Id.*

90. *Id.* at 179.

91. *Id.* at 182-83.

92. Under this rubric, it becomes necessary to attach economic values to entities that have no market price and thus cannot be appraised using traditional valuation methodologies. Russell S. Jutlah, *Economic Theory and the Environment*, 12 VILL. ENVTL. L.J. 1, 21 (2001).

93. This post-*Weeks* approach may mark a departure from the Law Court's previous holdings, which did occasionally support findings of adverse possession where uses were ephemeral. Stowell v. Swift, 576 A.2d 204, 205-06 (Me. 1990) (gathering firewood and picnicking, along with claiming of gravel, supported finding of adverse possession); Johnson v. Town of Dedham, 490 A.2d 1187, 1190 (Me. 1985) (cutting firewood and allowing others to pick berries, which was considered ordinary management of wild lands, supported quiet title action). These cases demonstrate that the Law Court has taken a variety of approaches to the question of the occasional encroachment, even in the period

In assigning an economic value to the allocation of property under an adverse possession scheme, one must review the valuation of undeveloped land in both the locality and the aggregate. Economic benefits flow from the preservation of land as undeveloped to individuals in close proximity to the property, but also to the state and even the nation as a whole, which benefits from the carbon sink effect of undisturbed soil and biomass,[94] which may be retained as financial benefits through some form of trading offset.[95] However, quantifying these values and transforming them from theoretical to actual, and assigning the benefits to individuals or state actors, may be prohibitively complicated.[96]

Under this rubric, then, as discussed above, to economically quantify the limitation of the applicability of the doctrine of adverse possession in Maine after *Weeks v. Krysa*, one must assign a value to the potential increase or decrease in development. The decision essentially incentivizes adverse possessors to engage in formal development if they seek success with the doctrine—but on the other hand, it makes it more difficult for potential adverse possessors to succeed by disincentivizing record owners from development for the sake of preventing adverse possession. However, if one reviews the most frequent cases of adverse possession in Maine, it is clear that generally they arise through neighbors utilizing abutting land. If such neighbors more frequently receive the land in dispute through adverse possession, then it may be more likely that the land will remain undeveloped. In *Weeks v. Krysa*, for example, if the character of the use that the putative adverse possessor claimed was adverse to the owner continued, the likelihood would be that the land would continue to be formally undeveloped, in that no additional housing or other structures would be built. This, of course, stands the traditional rationale for adverse possession on its head.

Reviewed another way, if the economic benefit of environmental preservation on the small scale can be said to flow to the overall body politic, perhaps an economic cost-benefit analysis should not be used to assess the outcome of that rule. The dilemmas in valuation discussed above identify the fundamental uncertainty involved, which may militate against the use of cost-benefit analysis in the adverse possession context.[97]

Additionally, cost-benefit analysis may be used to assess the value an individual applies to a given good. In this context, the Holmes rationale for adverse possession—that an individual who possesses a piece of property through use begins to value that property more highly and thus gains more marginal utility

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between *Webber v. Barker Lumber Co.* and *Weeks v. Krysa*; this may show that, even after *Weeks*, the court intends to take a fact-specific approach to the issue.

94. "[A]ny action taken to sequester [carbon] in biomass and soils will generally increase the organic matter content of soils, which in turn . . . [causes] increases in soil fertility, land productivity for food production and security, and prevention of land degradation." Alexandra M. Wyatt, Note, *The Dirt on International Environmental Law Regarding Soils: Is the Existing Regime Adequate?*, 19 DUKE ENVTL. L. & POL'Y F. 165, 178 (2008).

95. Robert DeLay, *Our Post-Kyoto Treaty Climate Change Framework: Open Market Carbon Ranching as Smart Development*, 17 PENN ST. ENVTL. L. REV. 55, 65-69 (2008).

96. *See id.*

97. Jutlah notes that considerable informational limitations create problems in both identifying costs and benefits from an economic perspective, and also in assigning values to less easily assessed non-pecuniary values. Jutlah, *supra* note 92, at 23-25.

from its ownership that a mere title holder, which justifies passing legal title to the one in actual possession—can be revisited from an environmental perspective.[98] Theoretically, in *Weeks v. Krysa*, one may assess the Weeks family's valuation of the disputed land from both the perspective of one who values the actual possession of the land, but also from a potential-loss perspective—they did not bring suit to attempt to gain title until the Krysa family began "clearing brush and fallen trees on the disputed lot."[99] This response may be an example of what some economic theorists say is the reality of individual valuations: "[I]ncreasing evidence shows that people generally value losses more than equivalent gains."[100] In other words, the Weeks family may value the loss of an empty, unused lot more than they value the ownership of that lot, and the purely economic market value of the property may be actually immaterial in assessing the marginal cost of its loss.

At least one theorist has advocated the use of the economic analysis of externalities in order to assess the environmental impact of various rules.[101] Under this approach, the allocation of costs from an activity must be optimized so that those "whose activities may adversely affect environmental quality, bear the full costs that their activities may impose."[102] In the context of adverse possession, if one posits that development itself is such an activity, then the rule applied by the Law Court in *Weeks*, in its limitation of the applicability of adverse possession, fails to effectively allocate the costs of non-development, which preserves the environment, to the correct parties: title owners. However, reviewed another way, the *Weeks* decision successfully places externalities associated with environmental preservation on those owners, because their non-development of the property is not penalized by encouraging adverse possession.

V. CONCLUSION: IS THERE A BEST POLICY?

Gardening and cultivation of a plot of land is one of the traditional indicia of ownership, even outside property law.[103] Of course, as noted above, courts in adverse possession cases outside of Maine have frequently held gardening to be a significant factor in demonstrating a successful claim.[104]

However, the decision in *Weeks v. Krysa*, which breaks from that traditional application of the law of adverse possession, is supported by an environmental economic rationale. Preserving land in an undeveloped state is an economically

98. *See* Holmes, *supra* note 62, at 476-77.

99. *Weeks*, 2008 ME 120, ¶ 6, 955 A.2d at 236.

100. Jutlah, *supra* note 92, at 26-27. Jutlah cites Steve Kelman, who has criticized cost-benefit analysis for this reason, stating that it inaccurately values losses and gains identically. *Id.* (citing Steve Kelman, *Cost-Benefit Analysis: An Ethical Critique*, in PEOPLE, PENGUINS, AND PLASTIC TREES 385 (Christine Pierce & Donald VanDeVeer eds., 2d ed. 1995)).

101. *Id.* at 14.

102. *Id.*

103. In answering a professor's research survey on the connection between ownership and gardening, many respondents explicitly linked the two; e.g.: "I feel in a way that some of this has to do with ownership. This is a tended property. This is not derelict, so don't dump your stuff here, you know . . . and all of that in a kind of funny way translates to me with ownership." Nicholas Blomley, *The Borrowed View: Privacy, Propriety, and the Entanglements of Property*, 30 LAW & SOC. INQUIRY 617, 637 (2005).

104. *See supra* note 2.

efficient outcome, because with the inclusion of an environmental perspective, the prevention of the negative externalities of excessive development are included. These include the costs associated with the consumption of excess resources, the loss of open space, and the ongoing over-production of greenhouse gases, all of which are borne by the body politic, or the people of the state of Maine, as negative externalities. Therefore, the Law Court, which has limited the applicability of adverse possession in *Weeks v. Krysa*, has prevented penalizing title owners whose non-development of their land effectively fostered economic efficiency by not forcing the absorption of those externalities.

Moreover, in expanding upon Maine's tradition of presumptively permissive uses that are not deemed adverse to the title owner to include the cultivation of a garden, the Law Court's decision may encourage title owners to continue to allow such beneficial uses without fear that they will be used to sustain a claim of adverse possession. Owners would not perceive a requirement to prevent gardening on their land, and abutting landowners in particular will be able to maximally use such land without the negative externalities associated with construction and development. And, finally, owners of non-developed land would not need to formally declare conservation intent in order to protect their land from adverse possession in a wider range of contexts.

Although under all of these analyses, the Law Court's decision is amply supported by economically efficient environmental rationales, the court itself did not engage in any specific analysis of these issues. This Author suggests that such an analysis could be advantageous in the future, as it may clarify the Law Court's reasoning and demonstrate why such a decision may be ultimately beneficial to the people of the state of Maine.