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**Living outside the system? The (im)morality of urban squatting after the Land
Registration Act 2002**

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Abstract

The Land Registration Act 2002 (LRA 2002) has effectively curtailed the law permitting the acquisition of title through adverse possession in relation to most types of adverse possessor, including the urban squatter. While the traditional principles for the acquisition of title through adverse possession enabled a squatter to secure rights in land ‘automatically’ after twelve years, under the LRA 2002, an urban squatter seeking to defend their possession of land in this way must now apply to the Land Registry, who will serve a notice on the registered proprietor alerting them to his or her presence. This procedure provides the land owner with an opportunity to recover possession of the property before the squatter’s occupation has given rise to any claim on the title to the land. On the whole, these reforms have been presented as, and accepted as being, wholly justified in the context of a modern regime of ‘title by registration’. This article argues, however, that the reform of adverse possession also implements a contentious moral agenda in relation to advertent squatters and to absent landowners. While these provisions of the LRA 2002 will have important practical and philosophical consequences, the Law Commission has attempted to close off any prospect of further debate on the subject, without explicit consideration of current social and housing issues associated with urban squatting, or of the matrix of moral issues at stake in such cases. [Total Word Count: 14,027 including footnotes]

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Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002

(1) Introduction

The legal concept of ‘squatting’ refers to the unauthorised occupation of land belonging to another. In the words of Lord Denning: ‘...a squatter...is one who, without colour of right, enters on an unoccupied house or land, intending to stay there as long as he can.’¹ In social and political discourse in this country, however, the term tends to be associated specifically with the *deliberate* occupation of empty residential buildings in metropolitan areas - often colloquially described as ‘urban squatting’. At various points in history, particularly during the 1960s and 1970s, urban squatting has been regarded as a serious social problem. Nevertheless, and despite the popular perception of urban squatting as a criminal activity, often criticised as being tantamount to ‘land theft’, squatting, *per se*, is not a criminal offence.² Rather, the urban squatter, like other types of squatter, is regulated predominately through the civil law: for example, when landowners seek to utilise the law to remove squatters, they must pursue their action through the civil court by issuing a claim for the recovery of land.³ Most landowners who bring such an action are assured of legal protection so long as they can show good title to the land. Even still, the very fact that squatters may ‘get away with’ occupying property without

¹ *McPhail v Persons Unknown* [1973] Ch 447, 456B.

² In limited circumstances, squatting is indirectly criminalised through the Criminal Justice and Public Order Act 1994.

³ Under Part 55 of the Civil Procedure Rules.

having to pay, as well as the possibility that an owner could lose his or her title to an urban squatter, have tended to provoke moral indignation amongst the public at large.⁴

Property lawyers, on the other hand, have traditionally emphasised the *justifications* for adverse possession, based on (a different set of) moral precepts,⁵ as well as on the premise of economic efficiency.⁶ In recent years, however, both the doctrine of

⁴ The press - from broadsheet to tabloid, and from news-websites to 'topical chat shows' - often report on stories involving squatting: see, for example, O Koster, 'Farmer takes revenge on squatter... with a forklift', *The Daily Mail*, 1 September 2006, in which a farmer lifted a car, and then a caravan in which the squatter was sleeping with a fork-lift truck and moved them off his land; fifty-one 'blog' responses to this story were unanimously approving of the farmer's actions.; J Coles, 'Sun man evicts squat pair', *The Sun*, 23 July 2004; P Simms, 'Family Homeless after Polish builders turn squatters', *The Daily Mail* 9 June 2006; C Hartley, 'Squatters wreck mansion', *The Sun*, 1 September 2006; T Kelly, 'Ravers seize £10 million house', *The Daily Mail* 31 August 2006. Other news stories portraying squatters in a negative light have focused specifically on adverse possession. These include D Smith, 'Squatters to keep £1 million house', *The Guardian*, 5 April 2004; 'Squatter's tidy profit', (Tuesday, 25 April, 2000), <http://news.bbc.co.uk/1/hi/uk/725913.stm>; C Gysin, 'Squatter becomes owner of £100,000 flat', *The Daily Mail*, 15 June 2001; C Dyer 'Britain's biggest ever land-grab', *The Guardian*, 9 July 2002; 'Squatters handed £9 million five-story Hampstead home', *The Daily Mail*, 28 September 2006.

⁵ For a discussion of the morality of adverse possession in the English context, see, for example, R Auchmuty, 'Not just a Good Children's Story: A Tribute to Adverse Possession' [2004] 68 *Conveyancer and Property Lawyer* 293.

⁶ See, for example, TW Merrill, *Property Rules, Liability Rules, and Adverse Possession* (1984) 79 *Northwestern University Law Review* 1122; JM Netter, PL Hirsch & WD Manson, 'An Economic Analysis of Adverse Possession Statutes' (1986) 6 *International Review of Law and Economics* 217; DK Irving, 'Should the Law Recognise the Acquisition of Title by Adverse Possession?' (1994) 2 *Australian Property Law Journal* 1; TJ Miceli & CF Sirmans, 'An Economic Theory of Adverse Possession' (1995) 15 *International Review of Law and Economics* 161; M Baker, T Miceli, CF Sirmans & GK Turnbull, *Property Rights by Squatting: Land Ownership Risk and Adverse Possession*

adverse possession in England and Wales, and, seemingly, the attitudes of many property lawyers towards the justifiability of both squatting and adverse possession have been radically transformed. A key turning point in the erosion of adverse possession was a joint report, published by the Law Commission and the Land Registry in 1998, which set out extensive proposals for the reform of registered land, largely intended to prepare the way for the implementation of e-conveyancing.⁷ In addition, the Law Commission set out an argument for the near-abolition of adverse possession in the context of registered land,⁸ which was subsequently realised through the enactment of the Land Registration Act 2002 (hereafter 'LRA 2002'). While the traditional principles for the acquisition of title through adverse possession enabled the urban squatter to acquire rights in land 'automatically' after twelve years, under the LRA 2002, an urban squatter seeking to defend their possession of land through the acquisition of title must now apply to the Land Registry,⁹ which will serve a notice on the registered proprietor alerting them to his or her presence.¹⁰ At this stage

Statutes (2001)77 *Land Economics* 360; LA Fennell, 'Efficient Trespass: The Case for 'Bad Faith' Adverse Possession' (2006) 100 *Northwestern University Law Review* 1037; JE Stake, 'The uneasy case for adverse possession' (2001) 89 *Georgetown Law Journal* 2419; R Ellickson, 'Adverse possession and perpetuities law: two dents in the libertarian model of property rights' (1986) 64 *Wash U LQ* 723; RA Epstein, 'Past and future: the temporal dimension in the law of property' (1986) 64 *Wash U LQ* 667-722; M Dockray: 'Why do we need adverse possession?' [1985] *Conv* 272.

⁷ Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254), (London: HMSO, 1998). A pilot for the e-conveyancing project will be launched in October 2007; see generally, <http://www.landregistry.gov.uk/e-conveyancing/>.

⁸ See below, section 2.

⁹ LRA 2002, Sch 6, para 1(1).

¹⁰ LRA 2002, Sch 6, para 2.

the registered proprietor can formally object to the squatter's claim,¹¹ and by doing so prevent the registration of the squatter as proprietor of the land. Crucially, this procedure provides the land owner with an opportunity to recover possession of the property *before* the squatter's occupation has given rise to any claim on the title to the land.

These reforms are striking, not least because the doctrine of adverse possession by limitation of actions had long been regarded as a relatively stable and, for many, justifiable feature of the property law system. Without a doubt, this dramatic departure was primarily motivated by the demands of title registration, since acquisition of title through adverse possession was seen to undermine the security of the Land Register as the ultimate source of information about land ownership. However, this article seeks to challenge the hegemony of land registration objectives within the Commission's analysis. Indeed, the Commission itself had previously stated that: '...any substantive reform of [adverse possession] should be undertaken separately and ought not to be conditioned purely by registered conveyancing considerations.'¹² Nevertheless, in 2001, after conducting a process of consultation (to which a slight majority (60%) of those who responded supported the proposed reforms 'in principle'¹³) and with an acknowledgement of disquiet concerning the

¹¹ LRA 2002, Sch 6, para 3. Registration will only proceed, notwithstanding objection, if the squatter can establish an estoppel in his or her favour, an entitlement to be registered as proprietor by some other reason – for example, under a will or intestacy, or by virtue of an estate contract, or if the matter is a boundary dispute; LRA 2002, Sch 6, para 5.

¹² Law Commission, *Third Report on Land Registration* (Law Com No 158, 1987), para 2.36.

¹³ Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001), para 14.4.

state of the existing law amongst the media,¹⁴ the Law Commission enthusiastically threw its weight behind what has since been described as the: ‘...emasculatation of adverse possession in relation to registered land.’¹⁵

The Law Commission’s ultimate objective was to prevent adverse occupiers from successfully securing title where landowners had failed to engage in adequate supervision of their properties. The dangers of the old law for landowners had been highlighted by a series of high profile media reports, where squatters acquired the title to extremely valuable properties after landowners failed to evict them before the limitation period had expired.¹⁶ Of course, deliberate adverse possession is not simply the preserve of the ‘urban squatter’. However, the Commission appeared to be heavily influenced by media criticisms of cases involving local government, particularly some London borough councils, in which title to valuable housing had been lost to urban squatters.¹⁷ As one commentator has noted: ‘[t]he popular press has seized on recent cases involving local authorities where ‘undeserving’ squatters obtained title through long possession, as an example of the law being an ass.’¹⁸

¹⁴ ‘If the reports in the press are any kind of barometer, there would appear to be considerable public disquiet with the way that the law on adverse possession presently operates.’; *ibid.*

¹⁵ M Dixon, ‘The reform of property law and the Land Registration Act 2002: A risk assessment’ (2003) 67 *Conv* 136 at 150.

¹⁶ Squatters in forgotten properties have made a number of high-profile successful claims for adverse possession in recent years: see, for example, C Dyer ‘Britain’s biggest ever land-grab’, *The Guardian*, 9 July 2002; D Smith, ‘Squatters to keep £1 million house’, *The Guardian*, 5 April 2004.

¹⁷ The Law Commission specifically referred to cases involving: ‘...land owned by local authorities, so that the loss resulting from a successful claim has fallen on the public purse.’; above, n13, para 14.4.

¹⁸ O Rhys, ‘Adverse Possession, Human Rights and Judicial Heresy’ [2002] *Conveyancer and Property Lawyer* 470.

Against the intensity of the opprobrium levelled against urban squatters in the media, the combined effect of relativity of title and the principle of limitation of actions, which gave rise to an apparent preference for the claims of squatters, over and above the interests of landowners, had become an awkward position to defend.

So far as the legal academy is concerned, the effective abolition of the doctrine of adverse possession has attracted surprisingly little critical attention. Martin Dixon, for example, has described himself as being: '(possibly in a minority of one) [in that he] regards the reform of the process of adverse possession by the 2002 Act as an unnecessary and economically unjustified 'bolt on' to the reform of registered land.'¹⁹ On the whole, these reforms have been presented by the Law Commission, and accepted by property lawyers, as being wholly justified in the context of a modern system of 'title by registration', such as that envisaged by the architects of the LRA 2002. It is our contention, however, that the effective abolition of adverse possession in registered land demands a more thorough critical analysis. Following Dixon's suggestion that, in fact:

'...there is nothing inherently contradictory in having principles of adverse possession operate in registered land...It is a matter of perception, not incontrovertible logic.'²⁰

we suggest that, notwithstanding the apparent elegance of these reforms, the approval they have undoubtedly garnered, and the relative lack of scholarly criticism levelled

¹⁹ M Dixon, 'Adverse Possession and Human Rights' [2005] *Conveyancer and Property Lawyer* 345 at 351. See also M Dixon, 'Adverse possession in three jurisdictions' [2006] *Conveyancer and Property Lawyer* 179 for further criticism of the reforms set out in the LRA 2002.

²⁰ M Dixon, above n15, p151-2.

against them, the reforms to adverse possession set out in the LRA 2002 require a more robust justification than the Law Commission has provided.

The Commission's analysis of the law of adverse possession should have provided the perfect opportunity to analyse in depth the vast body of theory evaluating both the efficiency and morality of the doctrine. On the one hand, it might have led to a consideration of the many theoretical economic justifications (beyond the simple matter of certainty of title) that have been put forward by various commentators in recent years.²¹ On the other hand, it might also have allowed the Commission to engage with the broad range of philosophical arguments that have traditionally been thought to justify the acquisition of title through adverse possession on moral grounds, including desert-labour theory, personhood and moral utilitarianism.²² However, the Commission failed to carry out anything like an adequate assessment of the vast body of literature on this subject, resorting instead to a "common sense" approach to the issue that revolved around the key importance of the Land Register in ensuring certainty of title in a system of registered land and the ethical distinction that was drawn between 'good faith' and 'bad faith' squatters. To illustrate the limits of the Law Commission's economic and moral analysis this article argues that the Law Commission has (unhelpfully) essentialised the problem of squatting. It has failed to consider fully the wide variety of types of squatter and the varying types of moral and economic arguments that relate to each of these categories. The application of the LRA 2002 reforms to the particular paradigm of the urban squatter provides a useful

²¹ See above, n6.

²² See, below, section 4.

lens through which to view the limitations of the Commission's analysis of the problem.

(2) The doctrine of adverse possession

Before the enactment of the LRA 2002, the doctrine of adverse possession, based on the principle of limitation, gave rise to similar results in registered and unregistered land. In unregistered land, twelve years' adverse possession led to the extinguishment of the paper owner's title, and the squatter's common law estate grew out of his possession of the land. So too, on a successful application from a squatter in registered land, the registered proprietor's title was closed, and a new title opened for the squatter: although registration was necessary to complete the squatter's *legal* title, the squatter acquired *beneficial* ownership of the property automatically, under a statutory trust. Furthermore, the doctrine was, at least in relation to unregistered land, traditionally regarded as striking a reasonable balance between, on the one hand, the rights of the landowner - whose claim, after 12 years, was regarded as 'stale', and the squatter - whose long possession of the property was recognised on grounds of both morality and economic and transactional efficiency.²³ The importance of settling claims to land ownership, as well as the perceived investment, both emotional and economic, made by the squatter in the property during the limitation period, were seen to justify the acquisition of ownership rights by the squatter after the designated time

²³ See above, nn5-6. In a recent issue of this journal, Brice Dickson, discussing the decision of *Pye v UK* in the European Court of Human Rights, noted that: '...judges in England have always accepted that the English law on adverse possession strikes a fair balance between the rights of squatters, on the one hand, and the rights of dispossessed landowners, on the other.'; B Dickson, 'Britain's Law Lords and Human Rights' [2006]26 *Legal Studies* 329 at 340.

period had expired. While this perspective has continued to prevail in many common law jurisdictions – even those which have developed mature systems of title registration²⁴ - there has, in recent years, been a major shift in property law discourse in England and Wales, which has emphasised the apparent incongruity of a doctrine of adverse possession within a system of registered land. This outlook has been attributed to the increasingly centralised focus of English land law on the bureaucratic efficiency of registered titles. In the most recent edition of *Elements of Land Law*, Gray & Gray wrote that: ‘...it has come to seem increasingly strange that adverse possession should have any relevance in a regime where the formal registration of title is supposed to provide a definitive record of estate ownership.’²⁵

The principal objective of a land registration system is to render the register more definitive as to title. The LRA 2002 has made significant progress towards this goal by transforming the fundamental basis of entitlement to land in English law, from *possession* of land as a good root of title, to *registration* as the source of title. As the LRA 2002 has demonstrated, the consequences of moving towards a mature system of title registration include the bureaucratisation of land ownership, as well as a shift in the focus of the law’s attention to the information on the register, rather than the

²⁴ For example, in Australia, where the Torrens system of title registration originated, it is notable that: ‘[e]xcepting the Northern Territory and ACT, which prohibit the acquisition of title to registered land by adverse possession, all Australasian jurisdictions permit an occupier to acquire a possessory title capable of registration and, upon registration, gain the advantages of the paramountcy and conclusive evidence provisions of the relevant registered land title statutes.’; M Park, L Ting, I Williamson, ‘Adverse Possession of Torrens Land’ (1998)72 *Law Institute Journal* 77.

²⁵ KJ Gray & SF Gray, *Elements of Land Law* (4th Edn, Oxford: OUP, 2005), p377.

situation ‘on the ground’.²⁶ In light of the policy agenda that informed the LRA 2002, it was perhaps unsurprising for the Law Commission to propose that the traditional operation of adverse possession was unsatisfactory when applied to registered land.²⁷ In fact, the Law Commission went even further, when it adopted the view that the principle of limitation in respect of land could not justifiably be retained within a system of title registration.²⁸ The Law Commission’s primary concern regarding adverse possession was that: ‘...the doctrine...runs counter to the fundamental concept of indefeasibility of title that is a feature of registered title.’²⁹ It continued that: ‘[i]f a system of registered title is to be effective, those who registered their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary.’³⁰ The Law Commission therefore sought to prevent squatters from acquiring title to land by adverse possession, except in certain specific and limited circumstances, where: ‘...it was necessary either in the interests of fairness or to ensure that land remained saleable’.³¹

²⁶ Gray & Gray have described: ‘...the ultimate achievement of the Land Registration Act 2002 [as] its ruthless maximisation of rational legal order, an aim which is symbolised by the statutory vision of an electronic register of virtually indefeasible titles, transactable by automated dealings and guaranteed by the state. Under this tightly organised regime, estate ownership, as constituted by the register record, becomes a heavily protected phenomenon, leaving little room for the operation “off the record” of some ancient and pragmatic principle of long possession.’; *ibid*, p364.

²⁷ Law Com No 254, above n7. See also Law Com No 271, above n13.

²⁸ Law Com No 254, above n7, para 10.2.

²⁹ Law Com No 271, above n13, para 14.3.

³⁰ Law Com No 254, above n7, para 10.11.

³¹ *Ibid*, para 10.2.

When considering the way in which the Law Commission chose to strike the balance between the landowner and different types of claimant for adverse possession, it is important to bear in mind the powerful influence of policy in the analysis that preceded the LRA 2002. The Law Commission, in seeking to identify the ‘compelling reasons’ that had historically supported the doctrine of adverse possession, set out four ‘traditional justifications’ for the doctrine. These justifications – as catalogued by the Law Commission - each reflected one of the twin goals of fairness and saleability.³² They were: (1) to protect against stale claims and avoid landowners from sleeping on their rights; (2) to keep land marketable, ensuring that where, for example, the landowner has disappeared and cannot be traced the land ‘remains in commerce and is not rendered sterile’;³³ (3) to prevent hardship in cases of mistake; and (4) to facilitate conveyancing. Ultimately, however, the Commission answered each of these justifications as inappropriate *in the context of registered land*. It is of course doubtless the case that the traditional justifications on ‘saleability’, set out in (2) and (4), were met by the Law Commission’s counter-argument, that: ‘[w]here title is registered, adverse possession facilitates deduction of title only in relation to those matters on which the register is not conclusive.’³⁴ Much more contentious, however, was the Commission’s approach to the concept of fairness.

The first component of the Commission’s argument sought to highlight the ‘undeserving’ nature of many claims for title through adverse possession. It accepted

³² *Ibid*, paras 10.6-10.9.

³³ *Ibid*, para 10.13.

³⁴ *Ibid*, para 10.10. It is, however, suggested below that the Law Commission failed to consider the full implications of its proposals for the saleability of property; see below, section 5.

the importance of protecting certain categories of ‘inadvertent’ squatter from hardship, for example, those operating under a reasonable mistake as to boundaries, as noted in justification (3), above, on the basis that: ‘[i]n these cases we think the squatter, whose conduct has been perfectly reasonable, should prevail over the registered proprietor’.³⁵ In contrast to this, however, the Commission was highly critical of those squatters who deliberately take possession of land, and reasoned that: ‘[i]t is, of course, remarkable that the law is prepared to legitimise such ‘possession of wrong’ which, at least in some cases, is tantamount to sanctioning a theft of land.’³⁶ The law of theft in the United Kingdom requires the dishonest appropriation of property belonging to another with the intention to permanently to deprive another of it.³⁷ To be guilty of theft, the individual defendant must know that the property belongs to another, and the ‘land theft’ approach to adverse possession extends this analysis to the knowingly unauthorised use of land. The idea that law would legitimate this ‘land theft’ through a transfer of title was described as ‘distasteful’.³⁸ Significantly, by focusing upon the construction of advertent squatting as ‘land theft’, the Law Commission has introduced, for the first time in England and Wales, an important moral distinction between what it terms good and bad faith adverse possession.³⁹ The basis of moral opprobrium, quite simply, is the squatter’s own

³⁵ Law Com No 271, above n13, para 14.7.

³⁶ *Ibid*, para 10.5

³⁷ The requirement of an intention to permanently deprive also imports the assumption that an urban squatter, squats for title rather than merely enjoying the use of the land for the time being.

³⁸ Law Com No 271, above n13, para 10.13.

³⁹ The decision of the Court of Appeal in *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* ([1999]2 EGLR 85 at 87) re-affirmed the irrelevance of the distinction between innocent and wilful trespass for the purposes of *animus possidendi* in English law. However, this distinction is a major

knowledge of his or her occupation, which - like *mens rea* under the criminal law - renders the otherwise innocent act a culpable one.

The second, and arguably more implicit, component of the Commission's moral analysis was an emphasis upon the blamelessness of the dispossessed landowner. On the one hand, the Commission identified certain landowners as blameworthy, for example, a landowner who encouraged an inadvertent squatter to rely on his representations (reasoning rooted, of course, in the ethos of proprietary estoppel) and proposed an exception to deal with this scenario. More importantly though, noting in particular the argument in justification (1), above, that the principle of limitation is intended to bar claimants from 'sleeping on their rights', the Commission pointed out that landowners who lose title to deliberate squatters are often unaware of the presence of squatters on their property until it is too late. In these circumstances – deliberate squatting unnoticed as a result of the *inadvertence* of the landowner - the Commission considered it unfair to allow a squatter to gain title to the property. Indeed, this concern with the problem of effective supervision was central to the Law Commission's rationale for the curtailment of adverse possession in registered land.⁴⁰

theme in academic commentary and judicial reasoning in the United States: see, for example, R H Helmholz, 'Adverse possession and subjective intent' (1983) 61 *Washington University Law Quarterly* 331; and underpins the law in many civil law jurisdictions.

⁴⁰ This policy approach was also reinforced in the decision of the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 when Lord Hope commented that '[t]he unfairness of the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor'; *ibid*, at 447 *per* Lord Hope.

The Law Commission alluded to two circumstances in which a landowner might not realise that deliberate squatting is taking place on his property. On the one hand, the landowner may be unaware of the presence of a squatter since squatting: ‘...can take place without it being readily detectable.’⁴¹ Deliberate squatters wishing to remain undisturbed often ‘make concerted efforts to remain invisible to avoid eviction’.⁴² This also ran counter to one of the overarching aims of the Law Commission’s reform proposals, which sought to minimise the circumstances in which ‘undiscoverable’ interests would be binding on a purchaser of land.⁴³ The second, and arguably more important issue identified by the Law Commission was the problem of ‘forgotten properties’. Properties may become ‘forgotten’ whenever a landowner fails to maintain effective scrutiny over the land and consequently does not realise that

⁴¹ Law Com No 254, above n7, para 10.6.

⁴² K Reeve and S Coward, *Hidden Homelessness, Life on the Margins: The Experiences of Homeless People living in Squats* (Crisis/Countryside Agency: London, 2004), p4.

⁴³ Law Com No 254, above n7, para 4.13. The LRA 2002 also removed freestanding overriding status from the rights of adverse possessors who had acquired equitable title before 13 October 2003, but who have not yet registered to complete their legal title. These equitable interests are now only overriding if the adverse possessor is in actual occupation of the land, thus bringing their claim under the umbrella of Schedule 3, para 2. Dixon has noted that this position: ‘...further protects a purchaser from undiscoverable and unregistered rights; and it confirms the idea that in an effective registration system possession alone should not generate title. It also supports – probably unintentionally – one of the justifications for adverse possession by disapplying the claim of anyone who is not utilising the land economically or socially.’; Dixon (2003), above n15, p144. Furthermore, the interests of persons in actual occupation are, under paragraph 2, now only overriding if they would have been ‘obvious on a reasonably careful inspection of the land’; para 2(c)(i). Similarly, in relation to those legal easements which are now overriding, the idea that the easements were ‘obvious on a reasonably careful inspection of the land’ is also added through para 3(1)(b).

squatting is taking place there.⁴⁴ Failure to keep property under scrutiny can mean that squatters are able to deliberately occupy premises unnoticed for considerable periods. Prior to the LRA 2002, this could also lead, ultimately, to the possibility of the squatter mounting a successful claim for title by adverse possession.

For the Law Commission, the problem of forgotten properties was one for which landowners were regarded as blameless. The proposals were intended to protect large landowners who ‘own numerous and perhaps widely scattered parcels of land for which they may have no present use, and *which they cannot keep under regular scrutiny*’.⁴⁵ The clear (and contentious) moral implication here – that landowners *cannot* rather than simply *do not* supervise their properties effectively – reinforces the view that they should not be punished for inadequate supervision by losing title to their land. The LRA 2002 was specifically designed to protect registered proprietors from the possibility of such oversight or inadvertence. Indeed, bearing in mind the Law Commission’s objectives in respect of avoiding ‘land theft’, these procedures are apt and effective. Since it is now impossible for a squatter to gain title to registered property without first notifying the landowner, the situation in which a landowner remains unaware of the presence of squatters until it is too late is entirely avoided. Yet, while this outcome clearly satisfies the Law Commission’s agenda in relation to transactional and economic efficiency, this article argues that the moral stance adopted by the Commission to bolster these reforms requires further exegesis. The following sections scrutinize the moral outlook adopted by the Law Commission by

⁴⁴ Of course, this can also happen on a much smaller scale, although inadvertently, when the squatter and the landowner are mistaken as to boundary lines.

⁴⁵ Law Com No 254, above n7, para 10.19.

focusing on the case of deliberate squatters who make their homes in unsupervised properties.

(3) The paradigm of the urban squatter in 'forgotten' properties

(a) Who is the urban squatter?

The phenomenon of widespread urban squatting first became evident in the UK in the periods following both the first and second world wars. It was during the 1960s and 1970s, however, that a major organised squatting movement developed, most notably in London.⁴⁶ Although urban squatting no longer attracts the high-profile coverage that it garnered during the 1960s and 1970s, this type of unlawful occupation appears to be increasing once again. In 2005, an article in *The Independent* noted that:

‘The number of squatters in England and Wales has risen by 60 per cent since 1995, according to the Advisory Service for Squatters (ASS), the best source of such estimates, from 9,500 people to around 15,000. The voluntary group, which helps squatters fight their cases in court, says its phones have not been so busy since the squatting peak of the late 1970s.’⁴⁷

In a consultation paper published during the 1970s, aimed at establishing the characteristics of the movement, the government concluded that:

⁴⁶ A Friend, ‘The post war squatters’ in N Wates and C Wolmar (eds), *Squatting: The Real Story* (London: Bay Leaf Books, 1980); C Johnstone, ‘Housing and class struggles in post-war Glasgow’ in M Lavalette and G Mooney (eds) *Class struggle and social welfare* (London: Routledge, 2000). See also *McPhail v Persons Unknown* [1973] Ch 447; *Woodcock v South West Electricity Board* [1975] 1 WLR 983; *R v Wandsworth County Court ex p Wandsworth LBC* [1975] 1 WLR 1314.

⁴⁷ S Busch, ‘My place or yours?’, *The Independent*, 3 February 2005.

‘Squatters are not a homogenous group. Some, whether families or single people, have a genuine need for housing...Some have political objectives – either to influence central and local government housing policies, or to bring about more far-reaching changes. Others may prefer the life-style of squatting and its cheapness; or they may be existing council tenants trying to force the council into giving them a transfer, or the children of tenants trying to obtain their tenancy. Yet others may be disaffected groups or individuals who welcome the freedom and anonymity of squatting, may be passing through or tourists. The list could go on.’⁴⁸

This excerpt captures the variety of attitudes and circumstances of the urban squatter, across political, social and economic spectra.⁴⁹ As the Government implicitly recognised in 1975, an essentialist model of ‘the urban squatter’ would fail to capture the nuances of the heterogeneous collection of individuals who chose to engage in the activity of deliberate squatting in empty residential property.

So far as central government and the media are concerned, urban squatting has typically been regarded as a serious social problem.⁵⁰ It is not only successful cases of adverse possession that have attracted considerable public disapproval,⁵¹ but the

⁴⁸ Department of the Environment, *Consultation Paper on Squatting* (London: HMSO, 1975).

⁴⁹ See also A M Pritchard, ‘Squatters – The Law and the Mythology’ [1976] *Conveyancer and Property Lawyer* 255.

⁵⁰ N Wates & C Wolmar, *Squatting: The Real Story* (London: Bay Leaf Books, 1980). Some local government bodies seem to have had a more ambivalent attitude: see, for example, the mass of squatters that were able to occupy properties belonging to Lambeth council for many years, with the council’s knowledge, discussed further below.

⁵¹ See above, n4 and associated text.

mere presence of squatters - and their perceived proclivities as a social group - arguably attracts as much opposition as the risk that squatters may pose to the property rights of landowners. Modern representations of urban squatters tend to portray those who squat as part of a dangerous subculture.⁵² Media reports associating squatters with a range of social problems, from drug dealing to arson, dereliction, vandalism, and litter, feed: '[a] popular mythology...that all squatters are parasitic deviants who steal people's houses and constitute a threat to everything decent in society.'⁵³ The political response to urban squatting has also been particularly unsympathetic. In 1991, the Home Office declared that:

'There are no valid arguments in defence of squatting. It represents the seizure of another's property without consent...The Government does not accept the claim that is sometimes made that squatting is a reasonable recourse of the homeless resulting from social deprivation. Squatters are generally there by their own choice, moved by no more than self gratification or an unreadiness to respect other people's rights.'⁵⁴

In fact, this attitude is also reflected in legal responses to the phenomenon of urban squatting. Successive governments have sought to provide more effective support for those affected by this particular form of squatting through legislative initiatives.⁵⁵ For example, sections 72 to 76 of the Criminal Justice and Public Order Act 1994

⁵² For a recent example of the media's portrayal of urban squatters, see V Dodd, 'The party's over for squatters in £14 million house', *The Guardian*, September 1 2006.

⁵³ Wates & Wolmar, above n50, p3.

⁵⁴ Home Office, *Squatting: a Home Office consultation paper* (London: HMSO, 1991), paras 5 and 62.

⁵⁵ Home Office, *ibid*; see also Lord Chancellor's Department, *New procedures to combat squatting in houses, shops and other buildings: a consultation paper on proposals for rule changes* (London: HMSO, 1994).

enhanced police powers under the Criminal Law Act 1977 by criminalising squatters who displace the occupiers of residential properties from their homes. Similarly, in the context of property law, the courts have been accused of ‘subverting’ the Limitation Act 1980, as: ‘...judicial reluctance to assist squatters has manifested itself in a number of different ways.’⁵⁶

The 1991 Home Office portrait of the urban squatter emphasises characteristics of selfishness, irresponsibility and dangerousness. Yet, by essentialising the urban squatter in this way, contemporary political and social discourses have suppressed an alternative image of the urban squatter. For left-wing commentators, and urban squatters themselves, the indictment of ‘land theft’ may, in some cases, be countered by the defence of necessity, with squatting presented as a justifiable activity in light of structural socio-economic injustices within the housing market.⁵⁷ Indeed, the apparent rise in urban squatting at the beginning of the 21st century can be viewed as a reaction to a new housing crisis. Historically, large-scale urban squatting has been linked to periods of acute shortage in affordable housing stock, particularly in the south-east, coupled with high proportions of empty properties.⁵⁸ Certainly, the early

⁵⁶ Rhys, above n18, p471; one example of a judicial technique to defeat squatters was the doctrine of ‘implied licence’; see *Leigh v Jack* (1879) 5 Ex D 264 (CA); *Wallis’s Holiday Camp v Shell-Max* [1975] 1 QB 94 (CA). For a more recent illustration of judicial creativity in this vein see *Beaulane Properties Limited v Palmer* [2005] EWHC 817.

⁵⁷ Of course, while used here as an analogy, the criminal defence of necessity has not worked to protect squatters in practice. In *Southwark London Borough Council v Williams* [1971] 1 Ch 734 the Court of Appeal famously held that necessity was no defence to trespass by homeless people squatting in empty council houses during a severe housing shortage in London in the 1970s.

⁵⁸ Reeve & Coward, above n42.

years of the twenty-first century have seen the return of the historical economic preconditions for urban squatting: many British cities are currently experiencing spirally housing costs, and this is coupled with a growing political concern with the high incidence of empty homes across the country. Average house prices in Britain rose by almost 12% from 2003-2004, following a rise of 16% from 2002 to 2003.⁵⁹ In addition, statistics published by the Office of the Deputy Prime Minister have indicated that 3.8 million new households will be in need of accommodation by 2016;⁶⁰ that there are currently around 78,000 families living in temporary accommodation in England and Wales;⁶¹ and that properties currently lying empty could potentially offer around 600,000 new homes,⁶² almost one hundred thousand of these in London alone, where the housing market is most saturated.⁶³ The government has identified the problem of ‘empty homes’ as a key political issue, and the Office of the Deputy Prime Minister has released a series of papers aimed at tackling the problem by bringing these properties back into the system.⁶⁴ These issues cast an interesting light on the relative moral blameworthiness of urban squatters, who

⁵⁹ Social Trends 36, (London: Office for National Statistics, 2006), p158.

⁶⁰ *Ibid*; statistics from *Housing Statistics: projections of Households in England 2021* (London: DETR, 1999).

⁶¹ *Ibid*; statistics from *More than a Roof: A Report into Tackling Homelessness* (London: ODPM, 2002).

⁶² *Ibid*.

⁶³ Information provided by local authorities to DTLR on Housing Investment Programme returns: www.emptyhomes.com.

⁶⁴ See, for example, Office of the Deputy Prime Minister, *Empty Homes: Temporary Management, Lasting Solutions* (A Consultation Paper) (London: HMSO, May 2003); Office of the Deputy Prime Minister, *Empty Property: Unlocking the Potential – A Case for Action* (London: HMSO, February 2003).

occupy empty residential property as their homes, and landowners who fail to adequately supervise their land.

(b) Local authority properties as targets for urban squatting

Interestingly, since the ‘hey-day’ of organised urban squatting in the 1960s and 1970s, the movement has been predominately concentrated in local authority properties. By 1986, 74 per cent of all premises occupied by squatters (around 5,500 properties) were owned either by local authorities or housing associations.⁶⁵ In 1990, three London boroughs alone - Southwark, Lambeth and Hackney - owned 65 per cent of the national total of squatted homes.⁶⁶ It is interesting to note that, even at this time, when local councils managed almost a third of all dwellings in the country and were the principal providers of rented housing,⁶⁷ the number of empty properties controlled by councils accounted for a relatively small proportion of the total number of empty properties, both in London and in the rest of the country. In 1975, for instance, when squatting in local authority properties was at its peak, there were 60,000 empty private properties, and only 12,000 empty council homes in London – a 5:1 ratio.⁶⁸ More recent statistics showing the numbers of vacant dwellings in London and across England and Wales reflect an even greater disparity between the numbers of empty private properties and local authority properties: in London, in 2005, the proportion of

⁶⁵ Above, n54, para 9.

⁶⁶ *Ibid*, para 10.

⁶⁷ From a peak of 30 per cent of all housing in the UK local authorities now control just 11 per cent: see Department for Local Communities and the Environment statistics at http://www.communities.gov.uk/pub/7/Table101_id1156007.xls.

⁶⁸ D Cant, *Squatting and private property rights* (London: UCL, 1978).

empty private properties (74,811) when compared to empty council properties (9,619) shows a ratio of almost 8:1.⁶⁹ Indeed, the preponderance of empty private properties compared to empty local authority properties is even greater across England and Wales as a whole, at a ratio of 12:1.⁷⁰

In an effort to explain the disproportionate presence of urban squatters in local authority properties, it has been suggested that the practical benefits of targeting such properties include the greater ease with which potential squatters can identify empty properties in the public sector, and the fact that squatters were less likely to be secretly and illegally evicted by force by a local authority.⁷¹ The tendency for urban squatters to occupy empty local authority properties is also explicable (historically at least) on ideological grounds, on the basis that the local authority has a duty to house the homeless. Perhaps most importantly, however, council housing may also appear an attractive prospect for urban squatters since local authorities are more likely to own large numbers of non-transactional properties, which are liable to become ‘forgotten’. Indeed, this is clearly the type of property that historically has been most frequently targeted by urban squatters. As Pritchard noted in the 1970s, the most frequent victim of squatting was ‘the local authority or other person or body that has acquired the

⁶⁹ Statistics are based on information provided by local authorities to DTLR on Housing Investment Programme returns, see <http://www.emptyhomes.com/resources/statistics/statistics.htm#2004>

⁷⁰ *Ibid.* In 2005 there were 585,539 private properties lying vacant, compared to 48,594 local authority properties. These statistics do not include properties owned by Registered Social Landlords or other publicly owned homes.

⁷¹ Cant, above n68.

premises for redevelopment, whether in the long term or as soon as acquisition of neighbouring sites and supply of finance will allow.⁷²

Of course, the problems associated with ‘forgotten properties’ are not confined to local authorities. Following the transfer of large volumes of council housing stock to registered social landlords under Large Scale Voluntary Transfers, these organisations are now vulnerable to similar risks, owing to the large volumes of stock they manage.⁷³ The problem of ‘forgotten’ properties is also potentially significant for the private sector. Although there is no empirical research on contemporary squatting preferences, it is reasonable to expect that private property may be increasingly targeted by squatters, as the decreasing stock of council properties since the 1970s,⁷⁴ combined with more efficient management practices in the public sector, have dulled the squatting potential of local authority properties.⁷⁵ On the other hand, from 1975 to 2005, the proportion of private sector to public sector empty homes has more than doubled.⁷⁶ Private bodies are also likely to own not only residential properties, but empty commercial buildings which could prove attractive to squatters. Although it is perhaps less likely that property will be literally ‘forgotten’ by private owners, property purchased for speculation or future use may not be regularly monitored, for

⁷² Pritchard, above n49.

⁷³ See for example the recent case of *Family Housing Association v Donellan* [2002] 1 P&CR 34, which highlighted the vulnerability of private sector landlords in relation to adverse possession.

⁷⁴ As a result of the right to buy legislation and Large-Scale Voluntary Transfers (‘LSVT’) to registered social landlords.

⁷⁵ This appears to be the practical conclusion reached by the authors of the latest edition of the *Squatters Handbook: Advisory Service for Squatters, Squatters Handbook* (12th ed, 2004), p10.

⁷⁶ See above, n68-70 and associated text.

example, if the owner lives abroad. Such properties are now likely to be equally attractive to urban squatters seeking to identify an empty property which they can occupy, and in which they are likely to go undisturbed, for the time being at least.

(4) The ‘immorality’ of the urban squatter

The new regime for adverse possession in registered land, as set out by the Law Commission and implemented through the LRA, adopted a clear moral view on ‘advertent squatters’, as the prospect that the urban squatter could acquire the title to land automatically, on the expiry of the limitation period, was deemed to be inherently unfair. There were two elements to this rationale: first, that unlike other types of inadvertent trespasser, urban squatters were identified as immoral because they deliberately occupied property which they knew did not belong to them; and secondly, that the landowner who failed to effectively supervise his property was to be regarded as blameless, even though he or she had failed to identify and/or remove squatters who were occupying their property within the limitation period. When considering the Law Commission’s policy stance on squatting, Dixon has noted that: ‘the point...is not that the provisions of the LRA 2002 are flawed or misguided. They reflect powerful arguments of policy and, while not everyone may agree with them, those arguments cannot be dismissed lightly.’⁷⁷ It is suggested, however, that the Law Commission’s moral stance on urban squatters played an important role in excluding – and, for the future, avoiding - any further consideration of the ideological arguments surrounding squatting and adverse possession. The complex philosophical and jurisprudential issues at stake were reduced to two simple ‘facts’: (1) acquisition of

⁷⁷ Dixon, above n15, p153.

title through adverse possession is incompatible with title registration; and (2) squatters act immorally by trespassing on other people's land. The final step for the Law Commission was to lightly dismiss the notion that squatting should be supported, or even tolerated, by law at all.

This simplistic account of the competing interests at stake when balancing the squatter's possession against the landowner's right to ownership prioritises transactional efficiency, bolstered by the position that advertent squatters are morally blameworthy, while landowners are morally blameless. This position can be challenged on two grounds: for one thing, the Law Commission's moral stance on advertent squatting was assumed without any explicit consideration of the vast body of philosophical and jurisprudential debate that has surrounded the morality of squatting. In addition to this, the narrow parameters of the Law Commission's analysis failed to recognise that the phenomenon of squatting must be located within a broader systemic framework, in relation to both the extrinsic factors that encourage urban squatting – for example, rising house prices, inadequate supply of affordable housing, and a high volume of empty properties - and the systemic consequences of both squatting itself, and the legal regulation of property rights through adverse possession, for the housing market. The Law Commission's moral essentialism foreclosed any consideration of these important issues.

The Law Commission's proposals implicitly constructed the moral debate over the doctrine of adverse possession around a binary division between 'good faith' and 'bad faith' squatters. Yet, while the 'land theft' approach to adverse possession appears, *prima facie*, to provide a convincing justificatory basis for the Law Commission's

agenda in relation to registered land, the Commission should not simply be accepted as having had the final word on the morality of ‘bad faith’ squatting, particularly in light of its apparent lack of engagement with the traditional justificatory theories. The actions of the ‘bad-faith’ squatter in an unsupervised property can be usefully conceptualised through the alternative perspectives of labour-desert theory, personhood theory, and moral utilitarianism. Each of these frameworks allows for the possibility that, in certain contexts – specifically, in the case of an advertent squatter - the consequences of unauthorised occupation by a squatter may negate the original title-holder’s moral claim, and provide a moral justification for the conduct of the squatter. The case of urban squatters, who make their homes in unsupervised properties, brings this balance into sharp relief.

Locke’s labour-desert theory is grounded in the idea that natural rights to land can be acquired through productive use.⁷⁸ Locke was primarily concerned with justifications for the acquisition of first ownership rights in un-owned or ‘natural property’, and he emphasised the need to reward the person who makes the highest and best use of the land: ‘...the useful labourer rather than the sluggard...’⁷⁹ Of course, a fundamental difficulty, when it comes to applying this approach to adverse possession is the fact that the land is already owned by the title holder and, as such, cannot be construed as ‘natural property’ in the Lockean sense. However, this hurdle might arguably be overcome by treating the title-holder’s neglect of the land as a form of quasi-

⁷⁸ J Locke, *Second Treatise on Government* (Oxford: Blackwell, 1966).

⁷⁹ *Ibid*, p336. For a critique of this approach see CM Rose, ‘Possession as the Origin of Property’ (1985) 52 *University of Chicago Law Review* 73.

abandonment, so that the title-holder's claim would be diminished.⁸⁰ On the other side of the balance, an urban squatter who occupies an unused property, and invests time and energy into improving the property, may add weight to their labour-desert claim. Indeed, in many cases involving urban squatters who make their homes in empty buildings, there is evidence that they expend labour on buildings that have been left in a state of disrepair,⁸¹ and this could arguably be viewed as giving rise to a Lockean moral claim.

Against this argument, it should be noted that, in some cases, properties may be left empty, undeveloped and in a state of disrepair because the landowner, rather than abandoning the property, has future plans for the development of the land. The argument that the landowner's future plans for the use of land precludes the acquisition of title by the squatter has emerged intermittently in judicial decisions,⁸²

⁸⁰ Rose, for instance, has implied that in certain circumstances neglect of property by a landowner may allow a squatter to invest greater labour in the land, justifying the transfer of property through adverse possession; *ibid*, p79.

⁸¹ See, for example *Lambeth LBC v Archangel* [2002] 1 P&CR 18, in which Mr Archangel turned his squatted property into the premises of an organisation called Rehab II, the purpose of which was the rehabilitation of ex-offenders, some of whom had lived at the property. Part of the evidence used against him when he sought title, as evidence that Archangel acknowledged that Lambeth had a superior right to the property, was a letter he wrote to Lambeth Council detailing a refurbishment project that he was undertaking.

⁸² See, for example, *Leigh v Jack Leigh v Jack* (1879) 5 Ex D 264; *Wallis & Cayton Bay Holiday Camp Ltd v Shell-Max & BP Ltd* [1975] QB 94; *Powell v McFarlane* (1977) 38 P&CR 452 (for criticism of this approach). This 'implied licence' theory has been rejected and removed by statute (Limitation Act 1980, Schedule 1, para 8(4) – which provided that a licence would not be implied due solely to the fact that the squatter's occupation was not inconsistent with the landowner's plans for future use of the

and was most recently revived in the context of registered land in *Beaulane Properties Ltd v Palmer*.⁸³ At first sight, the idea that legal policy supports the landowner's decision to leave the property empty appears to run contrary to the Government's current agenda in relation to empty properties, particularly empty homes.⁸⁴ It should be noted, however that the strategy of bringing empty properties back into use was not viewed by the Government as a justification for squatting: rather, the presence of squatters was seen as an obstacle in the path of local authorities who are seeking to identify empty properties,⁸⁵ and re-allocate those empty homes according to statutory principles.

Another perspective from which to view the morality of the urban squatter is to apply Radin's 'personhood' theory, which drew on Hegel's justification for private property,⁸⁶ emphasised the relationship that develops between the individual and certain items of property that become constitutive of their personhood, and argues that these relationships should be protected because: '...to achieve proper self-development – to be a *person* – an individual needs some control over resources in the external environment.'⁸⁷ The theory of 'property for personhood' clearly supports the idea that the value that the property represents to the urban squatter as a home might

property. See *Buckingham County Council v Moran* [1990] Ch 623; *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865.

⁸³ [2005] EWHC 1460.

⁸⁴ See above, nn63-64 and associated text.

⁸⁵ See *Empty Property*, above n64.

⁸⁶ See GWF Hegel, *Elements of the Philosophy of Right* (ed AW Wood, transl. HB Nisbet), Cambridge, Cambridge University Press, 1991), pp73-102.

⁸⁷ MJ Radin, 'Property and Personhood' [1982]34 *Stanford Law Review* 957.

give rise to some moral claim in relation to the property, particularly against a neglectful landowner. In Radin's analysis, the function of the personhood perspective was to: '...serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law';⁸⁸ and property that was occupied as a *home* was identified as a quintessential example of 'worthy' property.⁸⁹

The proposition that investing one's self in property gives rise to a moral claim against that property may justify some moral claim on the part of urban squatters who occupy empty properties as their homes. Conversely, title-holders who leave their properties unused and unsupervised, may have *ownership* of the thing, but do not make *use* of the thing – a relationship that Hegel described as 'empty proprietorship' and thus as a 'madness of personality'.⁹⁰ Radin's personhood theory focused on situations in which a person may become bound up with property through use and, consequently, where that relationship between the person and the property may provide an objective moral basis for legal protection. A key example for Radin was the occupier's relationship with his or her home, as this relationship was, based on

⁸⁸ MJ Radin, *Reinterpreting Property* (Chicago, University of Chicago Press, 1993), p35.

⁸⁹ Radin described different forms of property as being located on a continuum, ranging from property that is constitutive of personhood (described as 'personal property') to property that carries no meaning beyond its capital value (described as 'fungible property'). Radin argued that: '...in our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum.'; *ibid*, p54. For a detailed discussion of the applicability of 'property for personhood' in the context of the *home*, see L Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart Publishing, 2007), Chapter Six.

⁹⁰ Hegel, above n86, p91, (s62).

social consensus, regarded as being likely to support healthy self-constitution. In contrast, the owner who has no use for the property was portrayed as a: ‘caricature capitalist’,⁹¹ that: ‘...most people view...with distaste’.⁹² she claimed that: ‘...in our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum. There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic.’⁹³

Radin’s theory of ‘property for personhood’ offers an interesting alternative perspective on the relative moral claims of urban squatters, who make their homes in empty properties, and neglectful landowners. It is certainly arguable that the squatter’s relationship with the land may garner moral approbation on the basis that the squatter’s interest in the property is personal, while the absentee landowner’s claim is towards the fungible end of the continuum. One problem, however, is that while Hegel, on the one hand, was concerned with the first acquisition of ownership interests, Radin presumed that the claimant seeking to assert personal property in an asset would already be the *owner* of that asset, and would be seeking to defend that ownership against third party claims (for example, eminent domain). Furthermore, even allowing unauthorised occupation to found the basis for a personhood claim, in striking a balance between the competing interests of the squatter and the landowner, it would be necessary to demonstrate that the threat to the personhood of the squatter outweighs the personhood invested by a particular landowner in that property, and

⁹¹ Radin, above n88, p44.

⁹² *Ibid.*

⁹³ *Ibid*, p54.

this also depends upon an assumption that the landowner has no ‘personal’ interest in the property because he or she is out of possession.⁹⁴

For the landowner’s personhood in the property to be reduced to the point that a squatter could claim superior title, the landowner must no longer believe in his or her ownership of the property, for example, when a squatter occupies a property that has been literally ‘forgotten’ by the landowner.⁹⁵ Of course, there have been reported cases in which urban squatters have acquired title to properties belonging to local authorities who had no knowledge of their ownership.⁹⁶ However, this argument is less persuasive in the more usual case, in which individual landowners are aware of their ownership of property, but do not realise that a squatter is in occupation. In such circumstances it is much more difficult to conclude that the landowner’s own personhood has been extinguished. Yet, it is important to bear in mind the context of this discussion: even if it were accepted (for the sake of argument) that the personhood approach does not suffice to justify re-distribution of title in favour of squatters who occupy property as their home, it is arguable at least that the (im)morality of squatting raises complex jurisprudential issues, which were not admitted under the Law Commission’s agenda against adverse possession in registered land.

⁹⁴ Stake, above n6, p2456. Note, however, Posner’s argument that: ‘Over time, a person becomes attached to property that he regards as his own, and the deprivation of the property would be wrenching. Over the same time, a person loses attachment to property that he regards as no longer his own, and the restoration of the property would cause only moderate pleasure.’; R Posner, *Economic Analysis of Law* (5th Edn, 1998) pp89-90.

⁹⁵ Posner, *ibid.*

⁹⁶ For example, in *Ellis v Lambeth London Borough Council* (1999)32 HLR 596.

Finally, it is arguable that the (im)morality of the urban squatter, as well as the case for protecting neglectful landowners can be usefully viewed through the lens of moral utilitarianism. Some commentators have argued that a utilitarian moral assessment, which prefers the outcome that achieves the maximum overall benefit for *both* landowner and squatter, may justify the squatter's on-going use of the property, or even the acquisition of title through adverse possession, because the squatter has a greater need than the landowner in relation to this property. This argument seems particularly persuasive when applied to a homeless squatter and a landowner who has no present use for the property. It is arguable that a squatter who occupies property as a home will inevitably have more need for the property than a landowner who is not using the property.⁹⁷ From this perspective, it is possible to distinguish different types of squatters, from those who extend the boundaries of their existing properties (who are, for one thing, already landowners and who are more likely to be of similar socio-economic circumstances to the landowners they dispossess), to those who take possession of large tracts of rural land, who may put the property to use for farming, but are not necessarily property-less, to urban squatters, who are more likely to occupy empty property because of need.

It is interesting to note that the Law Commission did not view all urban squatters as mere opportunists, but did, to some extent, acknowledge the possible relevance of use value to an urban squatter. In *Land Registration for the Twenty-First Century*, the

⁹⁷ Of course, Stake also challenges this model for the apparent licensing of theft on grounds of an individual's relative poverty, together with the increases, once again, in costs of monitoring and protection of property; above, n6, p2458.

Law Commission recognised that unlawful occupation may sometimes arise from acute housing need, expressing ‘understandable sympathy’ for homeless squatters who took possession of empty properties as a matter of necessity.⁹⁸ However, the Law Commission swiftly by-passed this issue by claiming that the proportion of claims brought by this type of squatter was relatively small, and that: ‘...the much more typical case in practice is the landowner with an eye to the main chance, who encroaches on his or her neighbour’s land.’⁹⁹ Yet, the moral blame attributed to advertent squatting which, although arguably motivated by need, was labelled ‘land theft’, compared to the forbearance shown to those who acted under a mistake as to boundaries, suggests that the Commission’s ‘sympathy’ was extremely limited.

Fennell has argued that there is an important class distinction between ‘good faith’ inadvertent squatters and ‘bad faith’ advertent squatters:

‘The prototype squatter is poor and landless. People who own no land cannot mistakenly believe that the land they are occupying is their own. In this regard, a good faith requirement is distributively conservative, designed to benefit only the already-landed.’¹⁰⁰

Fennell went on to argue that, rather than labelling inadvertent squatters as ‘good faith’ squatters, and advertent squatters as ‘bad faith’ squatters, a justified advertent squatter could be re-conceived as a ‘higher-valuing user’ of the land, who commits an ‘efficient trespass’.¹⁰¹ Although this argument could, controversially, be employed to

⁹⁸ Law Com No 271, above n13, para 2.70.

⁹⁹ *Ibid.*

¹⁰⁰ Fennell, above n6, p98.

¹⁰¹ *Ibid.*

suggest that acquisition of title through adverse possession could provide a vehicle for property re-distribution, it also brings under question the argument that a squatter can *never* obtain a superior title after deliberately taking possession of another person's land because they are guilty of blameworthy conduct. Fennell argued that evidence of advertence (or bad faith) should not, in itself, be sufficient to preclude a claim to land, since the value that the land holds for the squatter might be so much greater than its value for the landowner as to justify the award of title to the squatter.

In addition to its economic implications, this is also simultaneously and implicitly a moral argument. For one thing, Fennell's construction of squatters as 'higher-valuing users' implicitly suggests a moral view on the question of who is a more deserving user of the property between the squatter and the landowner. Furthermore, by focusing on the idea of 'market failure' (ie, the inability to buy the land) as the explanation for the squatter's trespass, this analysis does not attribute 'blame' on the urban squatter. Rather, the phenomenon of squatting is presented as a consequence of the broader housing market trends, such as those that have been associated with high levels of advertent urban squatting, particularly in London: that is, rising house prices, depleted stocks of affordable housing and a high volume of empty properties.

(5) The 'morality' of the neglectful landowner

As the discussion above has noted, the Law Commission's moral stance on adverse possession was premised, not only on the immorality of the squatter, but on the argument for protecting landowners who could not adequately supervise their land. It is interesting to consider the argument that neglectful landowners should be protected

by law, in light of recent scholarship on the landowner's duty of *stewardship* over property. The ethical argument that land ownership imposes a duty of effective stewardship is based on the public interest in effective land use,¹⁰² and the view that: '[t]he quest to protect the privileges of private property against all intruders regardless of the price or need ... is an unholy one.'¹⁰³ Landowners, it is argued, must look beyond their own selfish interests to ensure that the limited and vital commodity that is land is managed fairly on behalf of the community as a whole. The growing cultural, political and legal importance placed upon the notion of land stewardship provides another important ground on which to challenge the Law Commission's moral conclusions from a utilitarian perspective. A landowner who does not adequately fulfil the duty of stewardship might be said to have a morally weaker claim to that property compared to an urban squatter who occupies it as a home.

This 'stewardship' approach to land ownership appears to be reflected in the political discourses underpinning the Government's 'Empty Homes' project. While the Government's concerns about the problem of empty homes do not support urban squatting in these properties, it does clearly recognise systemic problems relating to the housing market and, more importantly, the responsibilities of landowners in relation to the utilisation of land, particularly homes. The urban squatter's housing need, combined with the landowner's lack of stewardship, provides an alternative moral perspective on the phenomenon of urban squatting. Yet, the presence of

¹⁰² See, for example, JP Karp, 'A Private Property Duty of Stewardship: Changing Our Land Ethic' (1993) 23 *Environmental Law* 735. LK Caldwell & K Shrader-Frechette, *Policy for Land: Law and Ethics* (Lanham, Maryland: Rowman & Littlefield, 1993), Ch 7 (Limits to Policy: Problems of Consensus).

¹⁰³ Karp, *ibid.*

squatters in empty properties is clearly regarded as part of the problem, and not part of the solution for these empty properties. The Empty Homes reports reflect what has become the standard moral view of squatters as lazy, feckless and troublesome occupiers whose presence is likely to have an adverse effect on the value of neighbouring properties.¹⁰⁴ However, the Empty Homes project also reflects the socio-economic impact of neglectful landowners who fail to carry out their basic ‘stewardship’ responsibilities in respect of land. Local authorities are empowered under the Housing Act 2004 to apply for an Empty Dwelling Management Orders, based on the public interest of bringing property back into use, where owners either cannot be identified or are unwilling to bring their property back into use.¹⁰⁵ This development can arguably be seen as recognition of an implicit stewardship duty on the part of landowners.

Any stewardship duty should include a fundamental obligation to engage in an appropriate degree of supervision over empty land. However, the Law Commission’s proposals have little to say about the responsibilities of the absent landowner towards the land. Instead, focusing upon large landowners such as local authorities, and with an emphasis on the apparently insurmountable difficulties inherent in policing such large tracts of land, the Law Commission was willing to assume that all examples of oversight leading to successful claims of adverse possession were not the fault of landowners, but rather an unavoidable consequence of the ownership of huge volumes of land spread across large areas. Of course, it is interesting to remember that large

¹⁰⁴ ‘Empty Homes’, above n64, p47.

¹⁰⁵ See Housing Act 2004, Chapter 2 and Office of the Deputy Prime Minister, *Empty Dwelling Management Orders: Consultation on Secondary Legislation* (London: HMSO, 2005).

rural estates represent a substantial proportion of the remaining unregistered land in this country, of which the Land Registry is keen to encourage voluntary first registration. Perhaps the Law Commission did not wish to appear unsympathetic to the owners of such estates but, rather, to reassure them that registration would provide the best protection available for their land.¹⁰⁶

Nevertheless, the challenges of effective supervision seem less acute for landowners of smaller tracts of land; in addition, it is arguable that many large landowners are in a better position financially to effectively manage their property and should therefore be expected to take much greater responsibility for surveillance. Indeed, the landowner's duty of stewardship also emerged in the opinions of the dissenting judges of the European Court of Human Rights in *Pye v Graham* when they concluded, in defence of the pre-2002 system of adverse possession, that: '[p]ossession (ownership) carries not only rights but also and always some duties.'¹⁰⁷ Of course, in many of the high-

¹⁰⁶ See Dixon, above n15.

¹⁰⁷ In *Pye v UK*, above n40, the dissenting judges identify the varying degrees of supervision possible for various different types of landowner when they claim that: 'The real "fault" in this case, if there has been any, lies with the applicant companies, rather than the Government. It has to be born in mind that the applicant company was not a private individual or an ordinary company with, one could assume, limited knowledge on relevant real estate legislation. They were specialised professional real estate developers and such a company had or should have had full knowledge about relevant legislation and the duties involved. They should have had full access to the legal advice if need be and can not claim to be ignorant as to the adverse effects of the limitation legislation. It should have been known to the applicants from the very beginning that their property right was subject to restrictions, qualifications or limitations imposed by the pre-existing legal requirements of the Limitation Act. The Government have done no more than continue to operate a mechanism which, at the end of a relatively long

profile English cases, landowning local authorities failed to identify and respond to long-term squatting because of maladministration.¹⁰⁸ These cases clearly demonstrated how, prior to the LRA 2002, properties could become ‘forgotten’ for long enough (usually at least 12 years) to give rise to successful claims for title on grounds of adverse possession, and – at least so far as the arguments against transfer of title were concerned - appeared to impact strongly on the Commission’s proposals. However, while the Law Commission emphasised the particular undesirability of losing properties that were funded by the public purse to squatters, the Commission utterly failed to recognise the moral responsibility of local authorities for the failure to adequately supervise its properties.

Indeed, one of the most extreme examples of apparent mismanagement by a local authority was the case of Lambeth’s housing department not merely ‘forgetting’ but ‘losing’ a number of properties.¹⁰⁹ In one case the council had entirely forgotten that it owned a Victorian terraced house in Brixton and consequently failed to notice that a squatter - Timothy Ellis – was in occupation of the property for more than 14 years,

limitation period, adjusts land ownership to reflect the fact that an action for adverse possession is time-barred.’

¹⁰⁸ Perhaps the most recent and well-known example of oversight is that of Lambeth Borough Council, which brought a number of high-profile actions against long-term urban squatters whom they had failed to evict over a number of decades. See for example, *Lambeth London Borough Council v Archangel* (2001) 33 HLR 44; *Lambeth London Borough Council v Bigden* (2001) 33 HLR 43; *Lambeth London Borough Council v Blackburn* (2001) 82 P&CR 494.

¹⁰⁹ See Dyer, above n4. In all, 20 properties were reportedly ‘lost’ by Lambeth Borough Council.

giving him the right to claim title to the property.¹¹⁰ Yet, while these cases were (historically) undoubtedly problematic, the maladministered-local-authority-as-landowner appears to have been adopted as the quintessential landowner for the purposes of the Law Commission's moral stance on 'forgotten' properties. The idea that landowners who fail to adequately supervise their land should be protected against squatters presumes a lack of moral blame on the part of the landowners, and – through the moral essentialism of the Commission - has been applied not only to cases involving large tracts of land, but to all types of landowners, who are no longer required to exercise stewardship over their property but, rather, can rely on the state to protect them against their own incompetence through the Land Registry's service of a notice to the landowner before any real threat to title has been made. In fact, the reforms in the LRA 2002 have made it quite unnecessary for landowners to satisfy the surveillance obligations of a stewardship duty by effectively policing of that land against squatters.

(6) Acquisitive urban squatters?

When it comes to protecting the landowner's title against successful claims for adverse possession, the notice mechanism set out the Land Registration Act 2002 will be of considerable value to owners of forgotten properties – particularly local authorities - occupied by urban squatters. A failure to identify the presence of urban squatters will never, in itself, result in the transfer of title, however long the squatter

¹¹⁰ *Ellis v Lambeth London Borough Council* (1999) 32 HLR 596. See also the case of the 'Calthorpe Street Three', who successfully acquired title to a Grade II listed townhouse, valued at £1 million; Smith, above n4.

may have been in occupation of the property. The squatter's application for title will be subject to the registered proprietor's power of veto;¹¹¹ in fact, where a property owner has failed to oversee the property, the service of notice following an application by the squatter would actually assist large-scale landowners in identifying squatters on their land. Unfortunately, however, the paradigm of the urban squatter also highlights some significant 'knock-on' effects of this legislation. Once again, the problem with the Law Commission's proposals is that they adopt an essentialist view of the squatter. The LRA 2002 appears to rest upon the portrayal of deliberate squatters as acquisitive individuals, who squat on land for the purposes of acquiring title to the property. Under the LRA 2002, urban squatters can only obtain title if they are willing to make themselves known to the landowner by applying to be registered and, by doing so, to expose themselves to the risk of eviction. To do so, one would think, the squatter would have to be strongly motivated towards securing legal title to the property.

It cannot be assumed, however, that the object of adverse possession for the urban squatter is the acquisitive goal of moving from possession to title. In fact, in perhaps the majority of cases the urban squatter's objective is not to acquire *ownership* of the property, as registered proprietor, but rather to remain in *occupation* of the property, *for the time being*: instead of 'squatting for title', the urban squatter 'squats for use'. This view of the urban squatter is supported by Green, who characterised urban squatters as 'those who use someone else's land but who do not necessarily want to

¹¹¹ Except in the limited circumstances outlined above, see n11 and associated text.

become the ‘owners’ of it’.¹¹² Indeed, Pritchard went further yet in assuming that an urban squatter ‘will rarely be contemplating, and still less often be wishing, to acquire ownership by limitation’.¹¹³ Rather than viewing the property as an asset, the urban squatter’s interest lies with the temporary use and occupation of the property, usually as a home. The problem with this construction of the urban squatter is that, if squatters rationalise the *use* of forgotten properties in this way, there could be an important ‘knock-on’ effect following the enactment of the LRA 2002. Viewed through the lens of ‘squatting for use’, the LRA 2002 may have some unfortunate – and perhaps unanticipated - implications for the effective management of ‘forgotten’ properties.

For an urban squatter who values the use rather than the title of property, however, it will clearly be more rational to remain outside the system than to lodge a notice, thus alerting the owner to his presence in the property. Urban squatters are likely to view the prospect of lodging an application for title as a high risk strategy with little chance of success. On the other hand, the squatter who keeps a low profile in a forgotten property can continue squatting for use until discovered by the landowner. Of course, it would be folly to suggest that the windfall of title has, in earlier cases under the Land Registration Act 1925 and in unregistered land, been unwelcome. However, in the wake of the LRA 2002, a well-informed urban squatter is more likely to opt for remaining in undiscovered occupation, albeit under the on-going threat of discovery, rather than declaring themselves by making an application to the Land Registry and

¹¹² K Green, ‘Citizens and Squatters: Under the Surfaces of Land Law’ in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford: OUP, 1998), p241.

¹¹³ Pritchard, above n49, p257.

thereby alerting the legal title holder to their presence. In such cases - where the squatter chooses not to gamble with their undiscovered *occupation* in pursuit of *title*, but recognises the advantages of staying outside the system – this could have the undesirable consequence of rendering the properties which they occupy ‘lost’ indefinitely, in undiscovered limbo.

For the land owner of a forgotten property, the impact of the LRA 2002 is the shift from a situation in which the landowner becomes aware of the squatter but loses title to the land after 12 years undiscovered occupation, to a system in which the landowner retains his title, but potentially fails to recover the use of the land, since the incentive for the squatter is to stay outside the system. Of course, the primary objectives of the LRA 2002 in relation to adverse possession related to squatting for title, rather than squatting for use. Furthermore, the problem of ‘land theft’ by urban squatters has clearly been solved, in that title is not lost, and to this end, the Act has succeeded in protecting the title of land owners: the squatter who remains in quiet occupation, enjoying squatting for use, will never be able to gain title, but remains at permanent risk of identification and eviction from the premises. Furthermore, so far as the system of title registration is concerned, whether the land owner has ‘forgotten’ a property or not, so long as title is registered the information remains lodged with the Land Registry. Whether the land owner has ‘forgotten’ about a property or not, the bureaucratic goals of title registration are satisfied.

Nevertheless, it is arguable that the procedure by which adverse possession is governed under the LRA may have wider, negative consequences in relation to the use of land. Although the Land Registry ‘knows’ who owns the property, if the

landowner has ‘forgotten’ the property, and the squatter can neither obtain the title through a claim in adverse possession by mere effluxion of time, nor is likely to jeopardise ongoing use by applying to be registered and thus providing a signal to the landowner, there is a potential danger that the land could become economically and physically sterile. The Office of the Deputy Prime Minister, in the context of its ‘Empty Homes’ project, has identified a range of negative effects linked with ‘forgotten properties’, including wasted financial resources for the Local Authority and owners; increased dereliction, vandalism, litter and, in extreme cases, arson; reduced market values in neighbouring properties and the wider area; and impacts on local businesses through reduced demand for goods and services, as well as potential knock-on effects - in areas of low demand - on the viability of public services, such as schools.¹¹⁴

It is also important to bear in mind the welfare and housing consequences of on-going *occupation* by squatters in unsupervised properties. The pressing need for new residential accommodation across the country, and particularly in London, has prompted a drive to bring forgotten properties back into the market. As the discussion above has noted, the significance of properties falling outside the market was brought into sharp relief by the Government’s ‘Empty Homes’ initiative. In 2003, Jeff Rooker, former Minister of State for Housing, Planning and Regeneration at the Office of the Deputy Prime Minister wrote that:

‘The reuse of empty homes and the conversion of vacant commercial property lie at the heart of the Government’s commitment to securing an Urban Renaissance in our towns and cities. But there remained nearly three quarters

¹¹⁴ ‘Empty Property’, above n64, p6.

of a million empty homes in England at the last count in April 2002 and a substantial amount of vacant commercial property that could be converted for housing use...each empty property is a wasted resource from the point of view of the owner, a wasted opportunity from the point of view of a developer and a wasted asset from the point of view of Local Authorities charged with bringing forward sufficient land and housing to meet projected housing needs.’¹¹⁵

Yet, the presence of squatters in empty homes may conceal the fact that the properties are in fact ‘un-used’ for the purposes of Local Authority intervention. Without the ‘cloak of title’, squatters are no longer able to come forward, claim title and thus bring the property back within the market. It is worth noting that the traditional doctrine of adverse possession did, at least, enable squatter to make their occupation public without fear of eviction and, after seeking modification of the register, to deal with the land as owner. Under the LRA 2002, the urban squatter of a forgotten property is likely to be motivated to live outside the land law system and so to use the property, but outside the framework of the property or housing market.

This would also mean that while squatters benefit from the use of the property – until the landowner discovers them - without title, they will be unable to dispose of the property. Since the squatter has no prospect of acquiring title, there will be less incentive to improve or maintain the property. Of course, the squatter remains at permanent risk of discovery by the landowner. In such cases, the absence of title will ensure that any challenge to their occupation is likely to be successful, that the landowner will regain possession, and the property will once again be brought into the

¹¹⁵ *Ibid*, Ministerial Foreword, p4.

market. In the meantime, however, the attractiveness of ‘squatting for use’ as opposed to ‘squatting for title’, combined with the notice requirements under the LRA, will mean that for non-acquisitive squatters the possibility of remaining undiscovered will be preferable to risking loss of use.

(7) Conclusions

The object of the LRA 2002 was to: ‘...mak[e] dealings in land much simpler, quicker and cheaper...mean[ing] that both title to registered land and the rights in and over it will be more secure...’;¹¹⁶ and there can be little doubt that the aim of ensuring that landowners will not be susceptible to threats to title unless they no longer care to defend their ownership has – subject to limited exceptions - been broadly achieved. However, looking beyond the question of title, the reforms to the law of adverse possession achieved by the LRA can also be located within broader social, economic, moral and cultural contexts. The paradigm of the ‘urban squatter’ provides an interesting lens through which to trace the impacts of these reforms, both intended and unintended. One consequence, which appears to have been intended, is the new and apparently unimpeachable moral stance adopted by the Law Commission towards advertent squatters. Despite the importance of macro-economic factors including rising house prices, low availability of affordable housing and a high volume of empty properties, from the new phraseology of adverse possession as ‘land theft’, to the characterisation of squatters as primarily ‘landowners with an eye to the main chance’,¹¹⁷ the Law Commission has clearly identified squatters as morally

¹¹⁶ Law Com No 254, above n7, Foreword.

¹¹⁷ Law Com No 271, above n13, para 2.70.

‘blameworthy’. Meanwhile, the absentee landowners of unsupervised properties have been constructed as blameless. Yet, this simplistic account of the moral issues at stake in relation to both squatting and adverse possession fails to reflect the complexities involved in striking a balance between advertent squatters and neglectful land owners, as well as failing to take account of the knock-on effects of squatting for use for the property market and the housing market.

The LRA 2002 has, by and large, ensured that a squatter’s occupation will not be capable of maturing into title without an application to the Land Registry, at which point the landowner will be served with notice and will have a power of veto over the transfer of title to the squatter. However, the LRA will also have practical significance outside the realm of title, in the function of the new regime as a *disincentive* to undisturbed squatters in undiscovered occupation of forgotten properties, to declare themselves and seek legitimisation of their occupation. The LRA allows the landowner the opportunity to object to the registration of the squatter’s title, however long the squatter has been in possession, and, subsequently, to bring an action to recover the land from the squatter. Consequently, the preferable course of action for the urban squatter, on the presumption that they are likely to value continued use and occupation, over an action for title that is probably doomed to fail, must be to protect their future use of the property for as long as possible by staying outside the system. Furthermore, so long as these empty properties are occupied by squatters, it is more difficult for local authorities to identify and appropriate them for re-use through the Government’s ‘Empty Homes’ strategy. While these considerations were arguably outside the remit of consideration for the drafters of the LRA, it is suggested that while the registered proprietor’s title is protected by these

reforms, there may also be an adverse effect when it comes to the identification and allocation of ‘forgotten’ properties occupied by urban squatters who are happy to live outside the system.

It is also important to recognise that the Law Commission’s approach to the issue of adverse possession was supported by a very clear and decisive policy agenda, not only in relation to title by registration, but also in relation to the construction of the advertent squatter as a blameworthy individual, in contrast to its construction of landowners who fail to supervise their land as blameless and deserving of law’s protection. By adopting this position, without any explicit consideration of the complexities of urban squatting, or the matrix of moral issues at stake in cases involving squatting, the Law Commission appeared to close off any prospect of further debate on the subject. Yet, reports indicating significant increases in the incidences of urban squatting suggest the converse: that it is now apposite to re-consider the wide range of issues surrounding urban squatters, from the philosophical and moral construction of the squatter, to the social, cultural, economic and housing implications of deliberate unlawful occupation in empty residential properties.