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Kenneth A. Manaster
_Santa Clara University School of Law, kmanaster@scu.edu_

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SQUATTERS AND THE LAW: THE RELEVANCE OF THE UNITED STATES EXPERIENCE TO CURRENT PROBLEMS IN THE DEVELOPING COUNTRIES

KENNETH A. MANASTER

INTRODUCTION

The recent, massive growth of the cities of Africa, Asia, and Latin America has brought a multitude of new problems to these areas. One of the most critical, and hitherto unheard of, problems is the problem of the urban squatters. Literally millions of persons now reside within major cities without having any lawful right to be on the land they occupy. The problem these persons present is complex and serious: How and when are these countries going to be able to offer their masses of urban dwellers the opportunity and the resources to legally acquire the housing they need?

In order that it may be clear what is meant here by “squatter,” the following definition is offered as an attempt to describe the principal elements of the most critical situations usually considered: squatters are persons who occupy land owned by other persons or institutions with the intention of doing so indefinitely and with the knowledge that they do not own the land but without the consent of these owners to indefinite occupancy and use. In short, squatters are illegal settlers on land who intend to stay indefinitely.

This definition is presented at the outset because a comparison will be made here between two historical types of squatter situations which on the surface appear quite different. The comparison is between squatters in the United States throughout its history and squatters in today’s developing nations. The definition above attempts to emphasize those features which, from a legal point of view, are quite similar in both types of situations. Although squatters on the vast, open lands of the United States may seem to present different problems from those presented by the masses of squatters now packing themselves into major cities of Africa, Asia, and Latin America, from a legal standpoint there is but one problem and one challenge underlying the main features of both types of situations. The challenge is for the law to serve society’s needs by facilitating the fairest and most beneficial use of land rather than impeding it. The squatter situations which were most critical in the United States and those which are so explosive in the modern world are not isolated instances of cantankerous or

* LL.B. Harvard; Fulbright Grantee, University of San Marcos, Peru; Member, Illinois Bar. 
lawless individuals taking it into their minds to hold by force some other fellows’ land where the grass looks greener. They are, instead, social movements of great magnitude. In the United States squatting was primarily the result of an immigrant population moving west to make homes in a vast nation. In the cities of the poor nations of today, squatting is the result of unparalleled population growth and of the rush from the economically stricken countrysides to the cities with their promise, or dream, of a better life. The legitimate needs of large groups of people, then, are the foundations of squatting movements. The challenge is for the law to strike a just balance between those needs and the interests of legitimate land owners under the prevailing legal standards.

Squatters, as we have defined them, are engaged in activity which is clearly contrary to the prevailing legal standards of conduct and delineation of rights; when this activity is on a large scale, it is necessary for the peace and stability of a nation that this defiance of law either be brought to a halt or that the law be so implemented and adapted as to satisfy the needs underlying the squatting. It should be clear from a description of both the United States experience and the current world problems that the law has shown itself incapable of simply stopping wide-spread squatting. If serious social changes are in fact at the roots of squatting, then a failure to adapt legal concepts and methods to meet these new changes and needs—to strike the just balance and help men make the best use of land—will simply mean that the law is not serving as an effective vehicle for either social order or social progress, nor for the balancing of the two.

The history of squatters in the United States includes the institution of a number of legal measures which can be seen as attempts to fashion the law to meet the changing conditions and desires of the people. The question we shall try first to answer here is: To what extent and in what ways can the United States experience with legal measures for dealing with squatting help in the identification and implementation of measures to solve squatter problems in the developing nations of the modern world? The inquiry will have four Sections: First, a brief description of current squatter problems in the developing nations. Second, a description of squatting as it has been known in the United States. Third, an explanation and evaluation of the legal means employed by state legislatures and courts in this country for dealing with squatter settlements. This Section will focus mainly upon the doctrine of adverse possession—its purposes, its effectiveness, and its possible utility in confronting modern squatter problems. Fourth, the principal measures adopted by the national government of the United States for
dealing with squatters on public lands. The Preemption and Homestead Acts will be the main objects of this examination, with particular reference to their possible ability to clarify the rights of existing squatters and to anticipate and regulate likely future squatting.

**URBAN SQUATTERS IN DEVELOPING COUNTRIES**

As an indication of the tremendous numbers of urban squatters in the developing countries, the following are recent estimates of the percentages of squatters in the populations of various cities: 45% of Ankara, Turkey; 21% of Istanbul, Turkey; 33% of Karachi, Pakistan; 20% of Manila, Philippines; 35% of Caracas, Venezuela; 50% of Maracaibo, Venezuela; 30% of Cali, Colombia; 25% of Santiago, Chile. One estimate places Singapore’s squatters at 130,000, and Hong Kong reportedly had as many as 300,000 by 1950. Current estimates place the number of city squatters in Peru at about 750,000 or more, mostly in the area of the capital, Lima, but also in Arequipa and a number of other smaller Peruvian cities. Indicative of the rapid urban growth and squatter influx in Peru is the fact that the number of squatter residents in the Lima area in 1958 was estimated at 130,000, in 1962 at 338,000, and in 1966 at 500,000. The total population of Lima at present is something over two million persons; squatters thus account for about 25% of Lima’s population. This percentage is the result of the tremendous growth of Lima which started just before World War II. As of 1942 Lima’s population was about 521,000 and its squatters certainly were no more than four or five thousand.

There is a small but growing quantity of research being done

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1 C. Abrams, Man’s Struggle for Shelter in an Urbanizing World 13 (1964) [hereinafter cited as Abrams, Man’s Struggle].
2 Id. at 22.
3 This figure is given mainly on the basis of estimates by John F. C. Turner. His extensive research in Peru has indicated that squatters account for 25-30% of the population of Lima and 35-45% of those provincial towns which are undergoing rapid urbanization. This places Lima’s squatters at about 500,000, and other other cities at upwards of 250,000. See also H. Dietz, Uncontrolled Urban Development in Lima: A Brief History and Evaluation 3 (Unpublished graduate student research paper, University of Indiana, 1967); Turner, Environmental Security and Housing Input, 9 Carnegie Review 13 (1966); J. Turner, Colonización Urbana No Regulada: Problemas Que Crea y Criterios Públicos al Respecto 72. An official study estimated in 1962 a total of 528,905 squatters nationally, of which more than 180,000 were outside the Lima area. Corporación Nacional de La Vivienda, Información Básica Sobre Barrios Marginales en La República del Perú 213.
4 A. Cordova V., La Vivienda En El Perú: Estado Actual y Evaluación de las Necesidades 76.
5 Corporación Nacional de La Vivienda, supra note 3, at 213.
6 Turner, supra note 3.
7 Violich, Cities of Latin America 224 (1944).
on the subject of urban squatters. What it has indicated is that population growth and increased migration from rural to urban areas in the developing countries have far surpassed available urban housing facilities for middle and low income persons. The result has been that on vacant lands in the central areas and on the outskirts of major cities a variety of types of squatter colonies have developed. For the most part the living conditions are crowded and unsanitary; there is little or no attention to, or attempts at enforcement of, whatever building, health, and safety regulations may exist. In some areas, however, the dwellings are fairly clean and well-equipped, even if their construction is not sturdy. And in some instances, even substantial, sturdy homes and stores of concrete and similar materials have been built. Such instances point up the fact that lack of available low-income housing—rather than poverty alone—is probably the immediate cause of most squatting.

One particularly interesting feature of squatter settlements is that the extent to which squatters improve their dwellings and make them more permanent seems to be a function of the degree of security which the squatters feel they have in their present locations. If eviction appears possible at any moment, a well-built and stable community is unlikely. This fact helps to suggest an approach to the solution of the many problems facing squatters and the urban areas in which they live. If the factor of security in the right to use land has a great bearing on the use which will be made of it, then it would seem that policies for the alleviation of squatter problems might usefully concentrate, as a first major step, upon measures for clarifying and stabilizing the legal rights of the squatters.


9 See, e.g., Abrams, Man's Struggle 14, 16, 18.

10 Abrams, Man's Struggle 16; Abrams, Squatter Settlements 27; Turner, Uncontrolled Urban Development 11-12.

11 "[G]rant of ownership to squatters on public property would give them
achieving some security in their occupancy, in this view, squatters would be more likely to improve their holdings and to take an interest, individually and in common, in the development of their communities. It is a matter of having a stake in the community.

Most urban squatting takes place on government-owned land, but private land is far from safe from squatters. In many instances the numbers and the determination of squatters have been so great that private landowners have been fearful for their own safety if they should attempt to take steps for removal of squatters. Similarly, some recent government attempts at evicting squatters have been met by forcible resistance from the squatters.

If it is determined that a particular squatter colony, especially one on government land, is so well-established that its occupants will refuse to leave under almost any circumstances, a program for clarifying the squatters' rights in their location would probably do much to bring about improvement of dwellings and general conditions in the settlement. A program of this sort would be one of legal arrangements determining questions of land ownership and use. Such a program would also be useful where squatters might be willing to leave if other land were made available to them, i.e., alternative land suitable for their continued occupancy and not needed for some immediate public purpose. Certainly such a program would have a greater chance for effective impact if it were supplemented by technical assistance in material improvements and community organization. We will not examine such supplemental programs here, even though their importance in particular areas might be at least as important as legal tenure programs. Instead, we will concentrate upon the more basic, legal questions which must eventually be resolved in all squatter improvement programs, and which in most such programs would seem to be a prerequisite to the effective implementation of any sort of improvement measures.

We have referred already to programs which would confirm rights of squatters in the land they have appropriated; security of tenure there would be the immediate goal. Similarly, if a resettlement program is contemplated, or one which would make new settlement areas available for persons not yet in squatter status, delineation of legal rights at the outset will avoid or reduce many of the problems associated with squatter colonies. Not the least of the gains which new, clearly presented legal arrangements will foster is a greater incentive to improve it. Conveyance or legal rental of the property will tend to spur law observance." Abrams, Squatter Settlements 62.

12 Abrams, Man's Struggle 13-14.
13 N.Y. Times, April 13, 1966 at 15 (Squatter Inroads Fought by Bogotá).
will be public awareness that the law is attuned to the needs of the population and can change to serve them. Seen even solely as a matter of respect for law and public order, then, the long term interests of society would seem to be well served by measures of this sort. For it is certainly no indicator of a strong government that persons can defiantly use public land contrary to declared public policies. Nor does it promote respect for the law and existing institutions if private owners of land can get neither enforcement of their ownership rights nor even official acknowledgement that their rights continue to exist.

SQUATTERS IN THE UNITED STATES

The squatting which has occurred in the United States has been almost wholly in rural areas, and primarily involved lands owned by the federal government on the western frontier. But even at the time of the first colonists in the seventeenth century squatting was common on lands owned by the Crown or by the settlement companies commissioned by it. It has been pointed out that the Pilgrims on the Mayflower settled at Plymouth as squatters. A number of other early colonist groups were also squatters since they too first made their settlements and only later secured grants of rights from the owners of the land. Similar instances of squatting occurred on state lands after the Revolution as well. The motivation behind these instances was usually the desire for a place to settle, make a home, and cultivate land. This was made clear when great numbers of persons settled on the lands of what are now the Middle West and West. Because the states had ceded these lands to the national government soon after the adoption of the Constitution, the squatter problem became above all a challenge to federal government policy.

Throughout the nineteenth century, controversy grew over the official disposition to be made of the public lands. Two principal aspects of the controversy were (1) the question of whether the public lands should be used primarily as a source of revenue by sales to any interested purchasers or as a haven for actual settlement regardless of the revenue produced, and (2) the question of whether particular measures would redound more to the benefit

15 See, e.g., Harris, supra note 14, at 152.
16 Id. at 103, 401.
of squatters or of speculators. These questions and the attempted resolutions of them will be examined below.

There has been some urban squatting in the United States. The most significant instances of it were in San Francisco during the Gold Rush and in various cities during the Depression of the 1930's. Rural squatting has cropped up, also, in isolated instances in the modern United States. "Squatters" have even been identified in a number of recent protest demonstrations involving civil rights grievances and other matters, but these incidents do not fall within the definition we are using, for they are essentially a different sort of phenomenon.

**State Law on Squatters**

**The Doctrine of Adverse Possession: Generally**

In the colonial period and the early years of the nation, various measures were implemented by the individual colonies, and then states, for granting rights to squatters on public land. Since the fundamental aspects of the most important of these measures had their greatest eventual use at the national level, they will be discussed below. The present section will concentrate upon the doctrine of adverse possession in state law. We will not discuss the related Anglo-American doctrine of "prescription," for it usually does not pertain to disputes over basic land ownership questions, and it is founded on certain historical usages—such as the presumption of a "lost grant"—which would most likely serve only to complicate with legal fictions any discussion of squatter problems.

The adverse possession doctrine is plainly relevant to squatter problems because both have to do with illegal use of land. Squatters, as we have said, are illegal settlers. The statutes which are the basis of the doctrine are statutes of limitations which provide, in essence, that after a specified period of time the owner of land will lose

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17 See, e.g., Hibbard 347; Robbins 9.
18 Robbins 193; Sakolski, Land Tenure and Land Taxation in America 240 (1957); Abrams, Squatter Settlements 35a-37, 49.
19 Abrams, Man's Struggle 12.
21 See generally 2 Hilliard, The American Law of Real Property 270-74 (4th ed. 1869) [hereinafter cited as Hilliard]; Sedgwick and Wait, Trial of Title to Land 550 (2nd ed. 1886) [hereinafter cited as Sedgwick and Wait]; W. Walsh, Title by Adverse Possession 8 (1939) [hereinafter cited as Walsh]. Not to be dealt with here are questions of "tacking" successive possessions in adverse possession law, and of rights in improvements put on land by an unlawful occupant. Although important questions in many cases, they are not central to the purposes of this study.
his right to remove from the land an unlawful occupant. On the face of it, then, adverse possession statutes, as the limitations statutes are often called, pose time limits on owners' rights to evict illicit occupants such as squatters. The matter is not quite this simple, however, for the field of adverse possession law is one in which sketchy statutes have affected important rights in significant ways; consequently, the courts have had to act to fill in gaps left by the statutes' apparent effects. In so doing, numerous questions have been raised, and the courts have attempted to provide answers. Surprisingly little—one might say shockingly little—has been said by the legislatures and courts, however, about the purposes of the statutes and the judicial overlay which make up what is known as the doctrine of adverse possession. If nothing else were to be shown by the United States experience with squatters, at least the law of adverse possession—by its gaps and uncertainties—would point up the need for clear thinking and articulation of premises by legislators and judges in order that laws relating to rights in land may be susceptible of even-handed application and may promote the interests of society in the use of land.

There are three questions regarding adverse possession which should be considered here: First, has protection of squatters been one of the purposes of the doctrine? Second, has the doctrine actually been applied so as to protect squatters, either with or without there being an express purpose of doing so? Third, if adverse possession has been used to protect squatters, and even if it has not, could it be structured and used now so as to promote useful policies in modern squatter situations? The first two of these questions will be considered together here because of their close interrelationship.

The Doctrine of Adverse Possession: Purposes and Effects

There is authority for asserting that the doctrine has had the purpose and effect of protecting squatters. Let us first consider what we mean here by "protecting." There is general agreement that once the statute of limitations bars the owner's action at law

22 Sedgwick and Wait, 562; W. E. Taylor, Titles to Land by Adverse Possession (pts. 1-2), 20 Iowa L. Rev. 551, 738 (1935) [hereinafter cited as 20 Iowa L. Rev.].

23 There is virtually nothing in the books that bears on whether [the law of adverse possession] should be the way it is; or, for that matter, whether it should be at all. This branch of the law is suffering, as are some others, from a fundamental difficulty: how can a particular question be answered intelligently without some fairly explicit assumption as to the more general task to be accomplished? C. C. Callahan, Adverse Possession 77 (1961) [hereinafter cited as Callahan].
for recovery of land, no other relief is allowed him against the initially unlawful possessor.\textsuperscript{24} The effect of this is to leave the possessor with exclusive rights in the land, that is, with what is usually called an independent, complete title founded on possession. What has happened is that the rights in land against all the world except the true owner, which the possessor is generally considered to have, are made good against the owner as well once the owner's right to evict is barred.\textsuperscript{25} It is in this sense that we can speak of an adverse possession statute "protecting" the possessor.

Because there has been so little intelligent discussion of the purposes of the adverse possession doctrine, the purposes must be discovered mainly by inference from actual application of the doctrine. The main problem for the courts in deciding when and how an adverse possession act applies—and thus the major problem in deciding whether squatters are to be protected—is to determine when the owner begins to have a cause of action against which the statute will run. In other words, if we find the courts deciding that a squatter's activities give rise to a cause of action in the owner which the statute can bar, then we can say squatters are to be protected by the doctrine. If something other than squatter status and activity is required—something which means that a squatter’s activity will not be sufficient to start the statute running—then we will have to say that adverse possession is not intended to protect squatters.

The Statute of Limitations Approach

The question of what activity creates a cause of action and starts the statute running has been discussed widely by the courts and commentators. The simplest, and most strictly logical approach is that which the American Law of Property proposes.\textsuperscript{26} It is a strict emphasis upon the fact that rights by adverse possession are based upon a statute of limitations. The action which the statute will bar is essentially an action in ejectment. Historically this action has been used for the recovery of possession of land from one who has assumed possession without the owner's consent or lawful authorization. Ejectment is not intended for use against a transient intruder; that is the province of trespass. Ejectment is, as it is called in modern statutes, an action "to recover the possession" of land.\textsuperscript{27}

\textsuperscript{24} 3 American Law of Property § 15.2 (Casner ed. 1952); Hilliard 302-3; Ballantine, \textit{Title by Adverse Possession}, 32 Harv. L. Rev. 135, 139-41 (1918).
\textsuperscript{25} 3 American Law of Property § 15.2, at 760-62; Walsh 6; Ballantine, \textit{Claim of Title in Adverse Possession}, 23 Yale L.J. 219, 220 (1919).
\textsuperscript{26} See generally 3 American Law of Property §§ 15.1-15.4; Walsh 8, 16-20.
\textsuperscript{27} E.g., N.Y. Real Property Actions and Proceedings Law § 601 (McKinney 1963).
Once unlawful possession is gained, under this approach, the action will lie and the statute will begin to run. The great weight of authority has established that the use of land which will constitute the requisite “possession” is the normal use which an ordinary owner of the land would make of it.28 In this “statute of limitations approach” once such possession is shown to have existed, the action is shown to have accrued; thus, if the statutory period has passed, the action is barred. The possessor thereby gains a full, possessory title. In arriving at this result it is not necessary to engage in discussion of the possessor’s “adverseness” beyond showing an unauthorized, ordinary, and exclusive use of the land; such use constitutes the unlawful possession giving rise to the owner’s cause of action. There is little or no case law explicitly adopting this approach, but one commentator has suggested that it is likely to become more popular in modern decisions—especially in those seeking to simplify the doctrine and eliminate the incongruous results often arrived at in the “mistake” cases.29

28 3 American Law of Property § 15.3, at 765 (“the degree of actual use and enjoyment of the parcel of land involved which the average owner would exercise over similar property under like circumstances”).

29 Callahan 72-73. I make the statement in the text that few cases assert the statute of limitations approach, despite the following quotation in 3 American Law of Property § 15.4, at 776-77:

The great majority of the cases establish convincingly that the alleged requirements of claim of title and of hostility of possession mean only that the possessor must use and enjoy the property continuously for the required period as the average owner would use it, without the consent of the true owner and therefore in actual hostility to him irrespective of the possessor’s actual state of mind or intent. By such statements as this the editors seem to suggest that the weight of the case law supports their strict statute of limitations approach, focusing upon the facts of possession alone and disregarding the possessor’s state of mind. The cases cited in support of this statement, however, do not dispense with an intent requirement. Instead they declare that an express intention of ousting the owner and usurping his title is a permissible intention for the purpose of gaining title by adverse possession; they do not say intent is irrelevant. See, e.g., Guaranty Title and Trust Corp. v. United States, 264 U.S. 200, 204-5 (1924); Carpenter v. Coles, 77 N.W. 424 (Minn. 1898) (“So the whole inquiry is reduced to the fact of entering and the intent of the disseisor to usurp possession for himself to the exclusion of others.”). These cases retain a “hostile intent” factor of a sort we shall examine infra. That such cases do not stand for the position favored in American Law of Property would be clearest in a “mistake” case; the statute of limitations approach would afford protection to a possessor who innocently believed he owned the land where the “hostile intent” approach would not. Even though an approach such as that in Abel v. Love, 143 N.E. 515 (Ind. App. 1924), cited by the editors, might allow the mistaken possessor to gain title by adverse possession, it would do so only through the logical inconsistency of presuming an adverse intent from the occupant’s acts of ownership even though the facts made clear that no such intent existed.

A case such as Abel admittedly is, in its result, very close to what the editors favor, but it still does not have the simplicity or directness of the editors’ approach and should not be considered as standing directly for it. This appears to be true of most of the cases relied on by the editors on this point. One review
The effect of this approach would seem to be to protect possessors, such as squatters, because of the fact of their possession alone and wholly apart from the questions of intent. Even a possessor acting under some innocent mistake about his rights would seem to be protected. The authorities, often regardless of the particular approach being taken, do speak of protection of actual possession as a purpose of the doctrine; they speak as much of it as they speak in depth of any one particular purpose. The idea is usually phrased as protection of settlers, of those who actually put the land to use, by affording them security in their occupancy after the statutory period has passed.\(^3\) It has been stated that it is a positive effect of the doctrine, even if not an underlying policy of it, that actual settlers are to be protected, that their labors are to be rewarded by security of possession and full ownership. Since the settlers being referred to apparently are persons without lawful grounds for being on the land, and since the statute of limitations approach confirms title in such persons without inquiry into their intent, it would seem that this approach has the effect, and probably the purpose, of protecting squatters.

The Present Right Approach

The "present right" approach represents another approach to the determination of what activity by an unlawful occupant will produce a cause of action which will start the adverse possession statute running. It is used in a substantial number of jurisdictions and has been assumed by some commentators to be the correct view. It asserts that rights by adverse possession can be gained only if the occupant asserts and believes—however mistakenly in fact—that he has a present right of ownership which gives legal validity to his occupancy. This requirement as to the possessor's belief, or intention, is usually referred to as "claim of right" or "claim of title."\(^3\)\(^1\) It must be noted that many adverse possession of their discussion of adverse possession has pointed out their failure to acknowledge that many courts have required more than possession in deciding what the elements of an adverse possession are to be. Symposium on American Law of Property, 41 Calif. L. Rev. 349, 368 (1953) [hereinafter cited as Symposium].

\(^3\)\(^0\) "For the protection of those who occupied titled lands, the Congress of the Republic [of Texas] fixed short terms of adverse possession whereby the title was transferred to the adverse occupant, holding under the conditions stated in the statute. . . . The policy, of course, was justified for the protection and security of the actual settlers, so necessary to the growth and future prosperity of the state." W. Simkins, Title by Limitation in Texas 2 (1924) [hereinafter cited as Simkins]. See, e.g., Callahan 86; Sedgwick and Wait 565; R. Tyler, Ejectment and the Law of Adverse Enjoyment 864 (1871); Abrams, Squatter Settlements 69.

\(^3\)\(^1\) Tyler, supra note 30, at 859 ("for the protection of those who have remained in possession under a title supposed to be good"). Cf. Ballantine, Title
statutes specify that the owner's cause of action runs only against one who unlawfully occupies under a claim of right or title. Other statutes require that the occupant claim under "color of title," and this is generally considered to refer to some written instrument which the occupant believes confers title upon him. Since squatters nowadays seldom, if ever, have such instruments to support their conduct, we will focus mainly upon the statutes which require only a claim of right or title; we shall also consider statutes which do not specify any such requirement but which have had it added by judicial construction.

One possible source of confusion should be touched upon at the outset. On the surface it seems that the present right approach, no matter how the requirement may be phrased, would deny the benefits of the statute of limitations to the possessor who does not claim such a right and, conversely, would deny to the owner a cause of action against a possessor who does claim this right. This apparent effect of the present right view is pointed out as a key weakness by proponents of the statute of limitations view. Since it is not necessary for our inquiry to resolve this question, it should be sufficient to point out that the present right view probably does assume, and courts applying it would make certain, that the owner still has the right to evict the intruder even though the intruder is not making a claim sufficient to vest title in him eventually. This result could be achieved by saying that in such an instance the owner's remedy is in trespass against the temporary intruder, rather than ejectment against an unlawful possessor whose status as such could be established only by a claim of present right. Another, probably simpler, tack would be to say that the ejectment remedy will continue to run against the occupant and will not be barred unless he establishes the requisite possession for the statutory period; this does introduce a kind of dual standard into the ejectment remedy, but under the present right approach there would seem to be justifiable reasons for it. Other expressions of the legal

by Adverse Possession, 32 Harv. L. Rev. 135 (1918) ("to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing").

32 See statutes cited in 20 Iowa L. Rev. at 551-54.
33 Id.
34 3 American Law of Property § 15.4, at 774.
35 That the dual standard ejectment remedy is what the courts might contemplate in these circumstances is suggested by the large number of cases in which statements appear similar to the following comment in a recent Indian treatise: "A squatter upon a land even holding possession for the statutory period would not acquire title by adverse possession unless the possession is also under a claim of title..." Krishnaswami, Adverse Possession (4th ed. 1963). See, e.g., Jasperson v. Scharnikow, 150 F. 571, 572 (9th Cir. 1907) ("This idea of acquiring title by larceny does not go in this country."); Missouri Lumber and Mining Co. v. Chronister, 259 S.W. 1042 (Mo. 1924).
grounds for this result probably could be formulated so as to be certain, in the present right conception, that by claiming less than a present ownership right the unlawful occupant does not wholly deprive the owner of the remedies which he would have against a more clearly hostile entrant upon the land. In short, the present right approach should not be considered worthless because of this surface incongruity.

The central purpose of the present right position seems to be to protect and secure the possession of persons who occupy land while asserting their mistaken belief that they have at present a rightful claim to it.36 If we say—as has been done almost always in adverse possession cases since the original English statute of 1623—7—that statutes of limitation are "statutes of repose" and that with regard to land they aim at the "quieting of men's estates," we can say further that the present right requirement means protection will be given to the possessory estate only of one who actually believes he has a legal estate as well. Squatters, therefore, would not be protected, for as we have seen in defining squatters, participants in large squatting movements are generally well aware that the land is owned by persons other than themselves.

The Hostile Intent Approach

There is another interpretation given to statutes which require claim of right or title and even to some which do not; this approach would not require a claim of present right, but would consider as sufficient either (1) an intention to gain and hold exclusive possession for the statutory period so as to gain title under the

The notion in these cases seems to be that no title by adverse possession can be gained by one even in full possession of the land if he does not claim a present right to it; such persons are often called "squatters" or "mere squatters" by courts taking a present right approach. These courts still allow the ejectment remedy to run against such occupants. As the Restatement of Property describes this result:

In the law of adverse possession many results are reached which do not follow from the usual meaning of the words of the statute of limitations. Thus, although the statutes are silent as to any required state of mind of the defendant, a right of action that has existed for longer than the statutory period may still be exercised if the defendant did not claim "adversely," as that word has been defined.

2 Restatement of Property, ch. 15, at 892 (1936).

"Squatter" is given another colloquial meaning, i.e. one who is on another's land knowing it belongs to the other, and either making it clear he would leave whenever the owner wished or giving the owner reason to believe he would do so. See Sykes v. Hayes, 23 F. Cas. 584 (No. 15709) (C.C.N.D. Ill. 1874). Cf. 3 American Law of Property § 15.4, at 776.

36 Supra note 31.

37 An Act for Limitation of Actions, and for Avoiding of Suits in Law, 21 Jac. I, c. 16.
adverse possession statute, or (2) a more general intent to oust the true owner and maintain possession in the manner of an owner indefinitely. This view, which might be called the "hostile intent" approach, is quite different from the present right view. It is closer to the statute of limitations view, and actually differs from it only by the addition of the element of intent. Whereas the statute of limitations position protects any full possessor regardless of his intent and without an inquiry into it, the hostile intent concept requires the possessor to have and make known—by words, conduct, or both—his intent to gain title under the statute or somehow otherwise to deny the owner the benefits of ownership. Both this view and the statute of limitations approach redound to the benefit of squatters, who do have the requisite possession in most cases and who are also likely to have an intention to obtain ownership by adverse possession where the doctrine is established. If the squatters do not know of the possibility of gaining ownership by adverse possession, or if the doctrine does not exist, an intention by them to gain ownership through some other governmental action under existing legislation, or under legislation which the squatters would like to have enacted, is quite likely and ought to suffice under the hostile intent approach, for the requisite claim of right or title.

Other Views of Purposes and Effects

Two of the conceptions of adverse possession which we have examined have indicated a purpose to protect squatters. We might even infer from the results they suggest that this is their principal purpose. While saying this, however, it must be borne in mind that because adverse possession is based on statutes of limitation, the doctrine necessarily has been applied on a case by case basis—that is, when the statute is raised as a defense to an owner's action to recover land. It has been used, therefore, more to deal with specific squatters, often in small, isolated squatting situations, than it has been for settling the rights of large groups of squatters all at once or in any integrated series of steps.

It should be repeated that the purposes of adverse possession

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38 "[Claim of right] means, then, a purpose to appropriate the land of another to one's own exclusive use, with or without any other evidence of right, other than the right to obtain the title by conforming to the conditions of the statute transferring title by limitation." Simkins at 7.

39 Supra note 29, and cases cited therein; Sedgwick and Wait 566-67, 615. It should be pointed out that the three approaches I am describing on the question of the main requisites of an adverse possession correspond in a rough way to three views of the phrase "claim of right" mentioned in Symposium 368 & n.11. Also, it should be noted that the three approaches often exist alongside one another in jurisdictions in multiple adverse possession statutes with different terms.
are but vaguely stated in the law; we can ascertain the purposes only by looking to actual or suggested applications of the doctrine. This we have done above, referring to different approaches taken within the doctrine and to some explicit statements of purpose. We have seen protection of unlawful settlers as a purpose of the statute of limitations approach and the hostile intent approach, and we have seen protection only of those settlers who honestly claim some present right to the land as the purpose of the present right approach.

Other purposes have been asserted by various authorities as underlying the doctrine of adverse possession. An accurate description of the doctrine must recognize that a number of purposes have entered into the formulations of it. For our discussion of squatters it might be enough that we can say a substantial body of legislation and case law has had the effect of protecting squatters in their possession of land. Explicit declarations that this is a purpose of adverse possession add further to the relevance which the doctrine thus has for modern squatter problems. In order that the use of the doctrine in this country be fully understood, however, we should consider some of the other purposes attributed to it at times.

First, as noted above, statutes of limitation are frequently termed statutes of repose. The idea usually put forward is that after a substantial period has passed, persons enjoying certain rights, and others associated with them, relying upon the state of affairs, should be able to continue their conduct without disturbance from those who much later would assert that they are entitled to the rights in question. There is an element of protection of reliance here, or what might be seen as a purpose of stabilizing the social and legal order. There are also practical questions for the courts and litigants when suits are brought on stale claims, that is, on claims which are old and which often can be litigated only with the aid of remaining witnesses' faded memories. If stale claims could be freely brought, the difficulties of preparing a defense might well be compounded; for example, occupants of land who had a presumably lawful basis for their entry, or whose predecessors had this, might find it difficult to secure the proof necessary for what might otherwise be a valid defense.

Thus it can be said that the considerations commonly associated

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40 For a modern summary in outline form of policy considerations relevant in adverse possession cases, see Symposium, 369 n.14 (“The policy considerations are not necessarily in accord with one another and an actual decision may involve balancing contending considerations.”).

41 See, e.g., Sedgwick and Wait 564.

42 Callahan 83-87.
with ordinary statutes of limitations problems are also important considerations underlying the purpose of the adverse possession doctrine. These considerations, however, do not all point in the same direction in all cases. For example, it would seem that statutes of limitation with shorter periods have in view the evidentiary considerations less than considerations such as protection of an occupant's possession, i.e., his "repose." The shortest adverse possession periods appear to be those in color of title statutes; the periods are shorter, we should probably assume, because the possessor's entry on the land is considered by the legislature to be a more legitimate, meritorious one than is the entry of a person without color of title, such as a person holding under some unwritten claim of present right or one claiming no present right at all, i.e., a squatter. The practical evidentiary questions underlying statutes of limitations generally do not justify the shorter period for the color of title possessor; one might even say the period should be longer for him since his evidence of right, a written instrument, is probably easier to preserve than is evidence supporting an unwritten claim of right.

What all of this suggests is simply that policy choices, especially as to who and how readily the adverse possession statutes will provide protection, have entered into the preparation of the statutes and into their application. It is not enough to describe adverse possession as just another instance of the usual considerations underlying statutes of limitation; one must try to discern the policy choices which have been made. And if one is considering a new statute to be prepared, he must decide what policies he wishes the statute to advance and must try to design the statute to achieve this.

Questions of purpose have often been raised with regard to the doctrine's bearing on the rights and duties of the true owner of land which is being occupied unlawfully. For one thing it is said that the limitations statutes have the function of punishing the owner who is negligent in enforcing his rights. One modern student of the law of adverse possession has dismissed this suggestion by saying that punishment is the province of criminal statutes, not of civil statutes of limitations. His view is correct, it would seem, to the extent that it makes clear that punishment is not a major purpose of the doctrine; yet one clear effect of the doc-

43 Simkins 4; Symposium 368 n.12.
44 Cf. Callahan 54-55.
46 Callahan 90-91.
trine is that negligent owners are punished in the sense of being deprived of enforcement of their rights after a period of time. However, one key question posed by the modern squatter situations described above is whether an owner who is prevented by the sheer force and determination of squatters from asserting his rights should ever have those rights barred by operation of a statute of limitations.

Another form that the concern for the owner's position may take is the statement that the doctrine must insure fairness to the owner by placing certain requirements on the possessor before the possessor will be entitled to the doctrine's protection. This consideration will assure that the owner has a fair chance of noticing what is happening on his property and of doing something about it. As an indication of the difficulty of assessing the relative importance of different purposes of the doctrine, it may be noted that these requirements—which usually are phrased in terms of the entrant's possession having to be actual, open, notorious, continuous, exclusive, etc.—seem to be explicable as serving the purpose of fair notice to the owner just as easily as they are explicable as serving the purpose of protecting actual settlers rather than just temporary intruders. That the balance which has been struck has given some greater weight to the latter purpose is suggested by the fact that no explicit requirement is made that the occupant take steps directly aimed at giving notice of the adverse occupancy to the owner, even when the owner's identity and whereabouts are known to the occupant. The concern thus seems to have been more, one might say, with the interests of the hardworking settler than with the absent landowner. Unfortunately, in the absence of authoritative statements on the point, we can do little more than speculate about possible policy determinations such as this. We at least can isolate some of those factors, however, which have gone into the law of adverse possession, so that future legal doctrines and measures can be based upon a deeper understanding of the policies which may be given effect by legislative and judicial decisions in this field.

It has been said that one purpose of adverse possession is to promote the active use of land. We have already examined the

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48 See 3 American Law of Property § 15.3, at 768.
49 Sedgwick and Wait 564 ("it is contrary to the interests of the states that lands should lie uncultivated during the litigation over the title to them, and..., therefore, a limitation should be put upon such litigation"); Simkins 2; Symposium 369 n.14. But see Callahan 91-92, in which it is questioned (1) whether we need to encourage the use of land through such means as adverse possession and (2) whether adverse possession can effectively encourage the development if there is a great need for it. Callahan implies that if there is a need to
purpose of protecting settlers, and such protection appears to be one way of promoting land use. If we say that limitations periods and possession requirements are formulated on the basis of some sort of weighing, however unarticulated it may be, of the interests of users such as settlers against the interests of owners who have not attempted to use the land, then we are saying that promotion of normal uses of land is a possible purpose of adverse possession. It is clearly an effect of the doctrine, for all the approaches we have examined have required actual use of the land in a way for which it is suited. Thus it is probably accurate to say that active land use has in fact been a purpose of the doctrine, and it is certainly safe to say that formulation of new adverse possession statutes for modern problems should take into account the effect which such statutes could have on promotion of land use. Where adverse possessors are already on the land, the doctrine secures their possession and, presumably, the continued use of the land by them and their successors. Where land is not in use, the prospect of gaining title by adverse possession may well be an invitation in some instances, although probably not many, to new users of the land. The shorter the statutory period, the more likely the latter result will occur.

Consideration of adverse possession as a means of promoting the use of land suggests an examination of the possibility of acquisition by adverse possession against the government. Generally in this country it has been held that one cannot gain rights by adverse possession on land owned by a unit of government. As to land owned by the national government, this position has usually been simply a question of federalism; that is, a state adverse possession statute cannot limit the rights of the national government.

As against a state government and its local subdivisions, the encourage land use it is because of overpopulation rather than excess land; he also seems to assume that adverse possession is useful only if the latter circumstance is behind the policy of promoting land use. It should be clear by now that our discussion is exploring the possibility which is the opposite of that assumption; namely, the possibility that adverse possession can be useful in crowded, overpopulated urban areas.

50 See Callahan 92.
52 See, e.g., Redfield v. Parks, 132 U.S. 239, 243-44 (1889). See also Simmons v. Ogle, 105 U.S. 271, 273 (1882) where the following reason is given for the general rule prohibiting adverse possession against the government:
For so common is it for squatters and trespassers to settle on the lands of the United States, and so indulgent are the laws in encouraging such settlements, and so numerous are these settlements without claim of right, and such is the impossibility of resisting or ejecting the settlers, or of efficiently asserting the right of possession by the government, that the weight of the inference in favor of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed.
impossibility of adverse possession has most often been called a result of the "sovereignty" or "sovereign immunity" of the state from its own limitations statutes.53 More deeply considered, the idea seems to be that the state, and the public, should not suffer a loss of important property rights because of the negligence of public servants in failing to protect these rights. Certainly the fact that the interests of the public, rather than of a single individual or private institution, are involved in state ownership of land plays a large role in this thinking. The possibility of collusion between adverse possessors and government officers, over the course of time and to the detriment of the general community, may be an even firmer underlying reason for the policy of adverse possession not accruing against the government.

In a few jurisdictions, notably California, adverse possession has been allowed by judicial doctrine to accrue on land owned by the state or units of local government if the land is not being used for, and has not been reserved for, public purposes.54 This suggests that a policy is being advanced in favor of the use of land, as opposed to its lying idle even under clearly identified ownership such as that of a governmental unit. Thus it would seem that if the policy of the government is to promote worthwhile land use, and if adverse possession is designated as one vehicle for this purpose, the doctrine can have broader possible effect, and can even aid in the planning of land uses, if it is drawn to afford adverse possession against the government in certain areas where the encouragement of land use is desirable. If this is allowable as to local government units, as it is so limited in some jurisdictions,55 it is hard to see why it should not also be allowable as to the state itself. Debates as to the content of "sovereignty" and as to which sub-units of the state partake of that quality56 should be put aside in favor of careful, legislative policy-making.57

54 See Richart v. San Diego, 109 Cal. App. 548, 293 P. 673 (1930) and cases there cited; Annot., supra note 51, at 598. A number of states have statutes explicitly allowing limitations to run against the state or other governmental sub-units. See statutes cited at 20 Iowa L. Rev. 739-40.
55 See Annot. supra note 51, at 612.
56 For an example of a case distinguishing treatment of municipal property on a "sovereignty" basis, see Black v. Chicago, B. & Q. Ry. Co., 86 N.E. 1065 (1909).
57 Care is essential in this area because, as we have seen, there are risks here which probably only honesty and efficiency in the administration of government can overcome.

It is worth mentioning, with regard to adverse possession against a unit of government, that since even an unlawful possessor of land has rights to it against all the world except the true owner, then if a government is the owner,
The final area to be explored in determining the purpose of the adverse possession doctrine is the relationship of adverse possession to a title recording system. Professor Charles Callahan, in his recent lectures on adverse possession, observed that the most frequently stated purpose of the doctrine has been "the clearing of title to land." He considers this purpose part of an overriding policy of facilitating transfers of land. The original "quieting of men's estates" phrase is explained by him as referring "not to the repose of the individual person which may arise from the statute," but instead to encouraging transferability of land. He suggests that adverse possession has sought to serve this purpose: it assures a purchaser from one who has long-standing record title that no ownership claims will ever successfully challenge the vendor's right to convey title; adverse possession can defeat an undiscovered defect in the vendor's title which is not shown by the record. But Callahan's analysis of the adverse possession shows, quite correctly, that it is not an effective instrument for facilitating land transfers through reliance on the recording system. In the first place, as he says, adverse possession gives title even to persons outside the record; their title can easily have the effect of denying reliability to purchases made on the basis of a recorded ownership. Secondly, the only possessors which the recording system and adverse possession together can protect are possessors who claim under recorded color of title or some other recorded claim of present right. But, as Callahan does point out, protection of purchasers from these persons is really just a matter of reliability of the record; the vendor's possession, adverse or otherwise, is largely irrelevant to the purchaser who wants a record title safe from inconsistent claims. Thus the marketable title statutes, and the "curative statutes" which erase infirmities caused by minor con-

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a decision by it not to assert its ownership rights would seem to have the effect of giving the possessor all the rights he would normally need in order to use the land freely and in security. Cf. Page v. Fowler, 28 Cal. 605 (1865); 3 Am. Jur. 2d Adverse Possession § 205, at 297 ("Even where the statute does not run against the government one may acquire rights in public lands by adverse occupancy against all third persons, and this is true even though the claimant admits the government's ownership.

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Cf. Symposium 368 ("one of the really important functions of adverse possession; to limit title examination to a reasonable scope and to quiet the title of purchasers with respect to ancient defects that cannot be discovered under our disorderly recording system even by a reasonably diligent title examiner.

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Callahan 104.
veyancing defects, serve the purpose Callahan has in mind much more clearly than adverse possession ever can.\textsuperscript{60}

In fact it can be suggested that there is little evidence of what Callahan says is the most often mentioned purpose of adverse possession. It is probably true that a principal effect of the present right approach and of color of title acts is that record titles are more reliable;\textsuperscript{61} but there is still the great leeway for titles by adverse possession, wholly apart from the recording system and easily disrupting its certainty. Furthermore, we have seen that a considerable body of law on adverse possession does not relate to possessors with claims of present legal rights, but rather to squatters who make no such claims and really have little to do with or to gain from the recording system. It is only after a squatter obtains title by adverse possession that he can enter the recording system—though it is not even necessary for the validity of his title—by means of a judgment or decree which confirms his title and which he can record.\textsuperscript{62} Callahan’s discussion, in short, contributes only a recognition that the present right approach does have something to offer to the usefulness of the recording system.

A last point regarding Callahan’s analysis pertains to those states having title registration statutes. Those statutes generally provide that a registered title cannot be acquired by adverse possession.\textsuperscript{63} Callahan concludes that under such statutes the registration schemes have displaced the doctrine of adverse possession in the function of promoting certainty of titles. This may be true if only the present right approach is considered; when a registration system is in effect, there is little or no basis for an occupant to believe he has a valid present right of ownership apart from the system. Since we have seen, however, that many policies are at work in the doctrine, it is probably more accurate to explain these provisions by saying that the certainty the registration schemes seek to provide has been considered subject to significant—and undesirable—erosion if adverse possession is allowed. The question which remains for future research and legislation is how the advantages of workable registration schemes can be harmonized with adverse possession policies such as the promotion of land use by protecting actual settlers.

\textsuperscript{60} Callahan 105.

\textsuperscript{61} Some statutes which include a present right requirement even do so in terms of a recorded instrument. See, e.g., Texas Ann. Civ. Stat. art. 5509 (Vernon 1958).

\textsuperscript{62} 3 American Law of Property § 15.14, at 830.

\textsuperscript{63} See statutes cited in 20 Iowa L. Rev. at 742.
Implications for Modern Squatter Problems

On the basis of the preceding discussion, it is apparent that the United States experience suggests a number of policies that can be served by the law of adverse possession. Which policy is effectuated will depend largely upon how the doctrine is formulated. If our immediate goal is to provide the squatters with security in their possession, while at the same time allowing the landowners a fair opportunity to utilize and enforce their existing property rights consistent with overall government land programs, we can include adverse possession statutes as one means of approaching this goal. Any statute which is formulated, however, should be drawn so as to avoid the many uncertainties which have accompanied the doctrine as it has developed in this country. Let us consider some of the main features of such a statute. 64

64 Below is a suggested potential draft of an adverse possession law based upon the discussion in the text accompanying note 64. It is “partial” in that provisions are not included which would be highly dependent for their content upon facts of the particular situation at which the statute would be aimed:

AN ACT
(a) to afford an owner of real property a fair and reasonable opportunity to make use of his property and to enforce his exclusive rights to it, and (b), after said opportunity has passed, to promote the beneficial and productive use of the property by vesting full ownership rights in the occupant proven to have had possession as herein defined for the full statutory period.

Section 1. An action for the recovery of real property from one who has possession of it as defined in Section 4, without the express consent of the owner of the property or under the provisions of Section 5, shall be brought only within year(s) from the time the possession was first obtained.

COMMENT: This section could be modified, or multiple provisions could be included, to allow different limitations periods for different types of areas. Also, graduated periods could be established for the initial years of the Act’s operation.

Section 2. If an action referred to in Section 1 is not brought within the period there specified, full and exclusive ownership shall vest in the possessor of the property there specified, or in his legal successors if he be not living or has made a valid transfer of his interest.

COMMENT: This section does not cover the problems of succession of interest, or “tacking,” fully and is not intended to do so.

Section 3. The ownership vested under Section 2 shall be capable of being duly recorded upon decree of a court of law establishing the existence of the facts necessary for the operation of Section 1. Such decree may be obtained upon petition of the possessor, provided that notice and an opportunity to be heard are given to all interested parties, including the owner whose action is alleged to have been barred by Section 1.

COMMENT: Decision of cases such as those provided for in this Section might be entrusted to a special judicial or quasi-judicial agency established for this purpose.

Section 4. Possession, as used in this Act, is defined as exclusive, overt, continuous, residential or occupational use of an identifiable area of land in a manner reasonably appropriate to the character of the land.

COMMENT: Specific uses which would constitute possession in particular areas could be specified in this Section or additional sections.

Section 5. In determining whether possession has been established under Section 4, and in any other determination under this Act, the intent of the possessor shall not be considered; except: If it is proven by the
First of all, the legislation should declare its purpose; presumably it will declare something similar to the goal which we have just stated and which we examined above. Secondly, it should reject the present right approach in favor of a strict statute of limitations approach. The latter will protect squatters without requiring complicated, subjective inquiries into the occupants' intentions. Our statute should specify that, regardless of his intention, the occupant will gain a full title, capable of being officially recognized and recorded, at the end of the statutory period if during that time he has engaged in an exclusive, continuous, overt, reasonable residential or occupational use of the land without the owner's express consent.

Actually, one provision may be necessary which does bring in the factor of the occupant's intent. It would state that in an instance in which the owner does consent, expressly or tacitly, to the squatters' continued and indefinite use of his land, then if the squatters nevertheless make clear that they do not acknowledge the consent and the implicit assumption that the consent is limited and could be withdrawn and thus change their status, they can still gain title at the end of the statutory period. This provision, of course, injects an element of the hostile intent approach into some cases; this is necessary so that an owner will not be able to assert in any given case that he has consented and has thus denied the squatter the possibility of having his settlement confirmed with ownership rights. This provision would probably be one of the most controversial in the statute because it clearly offers protection to the defiant, consciously wrongdoing occupant. It still promotes actual land use and settlement, however, and does allow the owner to know of and enforce his rights before the statute has run.

The use requirements in the statute mainly serve to insure that title goes only to actual users of the land; a subsidiary function is to give owners reason to know of the occupancy. For particular locations the statutes might specify uses which, at least presumptively, would constitute sufficient possession; this would be in the hope of encouraging them. Limitation periods might also be made to correspond roughly to the type and the location of the land, in order to provide a fair opportunity for the occupant to make clear that he is in possession and for the owner to have notice of what is transpiring. Shorter periods should encourage greater land use

owner that he expressly consented to continued use of the property by the possessor, the possessor shall not be denied the benefit of this Act if he shall prove that he made known to the owner his refusal to abide by the conditions of the consent, if there be any, such as a condition, express or implied, that the consent was given subject to its later revocation.
more quickly; thus they may be applied usefully to areas, especially urban areas, in which many people need the use of relatively small amounts of available land and in which it should not be difficult for an owner to keep up-to-date on the condition of his property. If a title registration system exists or is being instituted, a clear statement must be made as to how claims by adverse possession will fit into it—assuming we decide that the doctrine promotes policies of sufficient importance so that the registration scheme should not prohibit the doctrine altogether. Perhaps one means of harmonizing the doctrine with the registration scheme would be simply to require adverse possessors to register their claims in a reasonable time after their possession begins or after the statutory period has run. Something similar to this was required under the federal preemption laws, as we shall see below.

The length of the statutory periods highlights the problems surrounding the promulgation of a new adverse possession statute, especially one with a short limitation period in circumstances in which squatters already are present. The central problem is fairness to the owner: Will he be given a real opportunity to enforce his rights before they will be transferred to the squatters? One solution for this might be to have graduated statutory periods. For example, for possessions existing upon the promulgation of the statute or begun during its first year, five years subsequent possession will be sufficient to vest rights in the squatters; possessions begun in the second year will vest in four years; possessions begun in the third year will vest in three years; and so on until the basic statutory period is reached.

Another problem with the enactment of the statute is that adverse possession statutes, by their very nature as statutes of limitation, contain the possibility of not promoting land use policies at all. This is because a diligent owner with a competent lawyer can simply have legal proceedings instituted to protect his rights whenever they are threatened; if he succeeds, the squatters are left out in the cold. Certainly upon the passage of the new act it would indicate legislative duplicity, weakness, or both if the assumption were made that during the initial running of the statutory period the owners would not be able in fact to secure the enforcement of their rights—that is, the rights allowed in the statute. Such an

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65 See Hilliard 285-86, where it is pointed out that statutes of limitation usually operate only prospectively and that if they wholly deprive an owner of his remedies, they would deny fundamental protections of private property.

66 Although the calculation of the appropriate period is based on many factors which are hard to quantify, I would suggest for general fairness to owners and to distinguish actual users of the land from transitory trespassers, that one or two years would be a minimum in almost any situation.
assumption might mean that rights of the existing squatters would be secured, it is true, but it would be regrettable to do so by passing a law knowing it would not be enforceable in important respects.

The significant implication of this discussion is that policies for the protection of squatters can probably be initiated most effectively not by adverse possession laws but by more direct means such as the federal measures we will examine below. Adverse possession statutes, on the framework I have described here, would seem to be more useful as supplementary measures to be used for continuing adjustment of the interests of squatters and owners after more direct, large-scale measures have been instituted to confront head-on the legal problems of squatter status. Another way of stating the reason for this conclusion is to point out that the doctrine operates only case by case, as already mentioned; effective planning and regulation of squatter areas requires more comprehensiveness and coordination in the regularization of legal rights than adverse possession can provide." The only possibility which comes to mind for a broad, integrated use of adverse possession would be, as has been discussed, an explicit waiver by the government of its immunity in certain areas from acquisition by adverse possession. Additionally, the application of adverse possession statutes might conceivably be entrusted to a special judicial or quasijudicial agency for the purpose of settling adverse possession claims on a regular basis. This would be done by requiring, for example, that all claims for specified geographical areas be brought before the agency during designated, well-publicized periods of time. There is nothing apparent in the United States law of adverse possession, however, to suggest that such steps have ever been taken here or that the United States experience with the doctrine has much to offer on this suggestion. Instead, for planned attacks on squatter problems, we must turn to the federal legislation.

**FEDERAL LEGISLATION ON SQUATTERS**

In this section we will examine the main pieces of federal legislation which were to deal with the squatters on the lands owned by the national government. The first such legislation was an act which attempted primarily to prevent any squatting on any public lands. This was the Intrusion Act of 1807.68 It ordered forcible removal of unauthorized settlers on government land, although it did allow government officials in some instances to secure agree-

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67 The possibility of joinder of many squatter defendants in an owner's ejectment action is noted at Sedgwick and Wait 161. This possibility does not, however, provide the type of broad approach discussed in the text.

68 2 Stat. 445 (1807). See Robbins 26. ("This act was a typical example of eastern ignorance of western conditions.")
ments that the settlers could remain as tenants at will until the government decided they should leave. This act proved impossible to enforce, and in 1828, a Congressional committee reported that settlements on public lands could not be prevented amidst the expectation that the lands would soon be put on the public market for sale. Moreover, many people had no land at all or only exhausted land in most cases. It became clear quite early that a flat prohibition was not the answer to the squatter problem.

A dispute had raged, from the time of the cessions of land to the new government by the original states, over whether the public lands should be disposed of cautiously, with the purpose of producing as much revenue as possible, or liberally, for the purpose of facilitating actual settlement. We shall not go into a detailed discussion of the various changes in policy which took place over the years as the controversy continued, for the history of that has been well examined; our concern here is with the value of particular legal measures, and particular pieces of legislation. By way of summary, however, the following observation seems sufficient:

The history of the United States from the founding to the period of the Civil War . . . records a prolonged contest between a government that asserted ownership to its land, and squatters who asserted rights to it. Attitudes toward squatters varied with the politics of the region and fluctuated with the pressures of the period. . . . But federal officials felt it was impossible to dislodge the settlers or to prevent the settlement. Pressures for turning over land to squatters developed, taking form in the passage of successive preemption laws from 1830 to 1862. In the long run, the squatters won the preferential right to buy their land.

The Preemption Laws

The preemption right was the principal means adopted by the federal government for clarifying the rights of squatters on the public lands. This right granted the option to buy government land which the squatter had settled and improved at a minimum price and—above all—without competition from other purchasers. Early federal preemption statutes, even before 1830, applied to limited and specific areas of public land where squatting was taking place and they were invariably the result of intense political pressure by squatter groups. These acts, and the broader Act of May 29,
were retrospective, for under them only one who had already settled could file his preemption claim and thus purchase the land apart from the general auction sales.

In 1841 the general Preemption Act was passed. This Act allowed preemption claims to be made by settlers on almost any surveyed portion of the public domain. It has been aptly pointed out that there were four principles underlying the preemption policy set forth in the Act of 1841. First, settlement of the public domain was recognized as more important than revenue from it. Second, the public domain was not to be distributed to persons already holding sufficient land. Third, the public domain was to be settled in small farms, so that the largest number of persons could benefit by gaining legal holdings. The provisions embodying

73 4 Stat. 420. See also the earlier, state preemption statutes there cited.
74 5 Stat. 453. The 1830 Act had not specified surveyed or unsurveyed land, so both seemed to be open to preemption; the 1841 Act was limited to surveyed land. See Hibbard 153. Excepted land under the 1841 Act was land reserved for purposes such as schools, Indian reservations, public roads, and towns, and land “actually settled and occupied for the purposes of trade and not agriculture.” Quite clearly the Act was meant to apply to open lands suitable for agricultural uses. The Act applied not only to existing squatters but also to individuals who “shall hereafter make a settlement in person on the public lands to which Indian title had been at the time of such settlement extinguished.” The requirements were that a settlement in person be made, that the individual “inhabit and improve” the lands he settled, and that he “erect a dwelling thereon.” If this were done, he would be entitled, upon paying the minimum price—then $1.25 per acre—“to enter with the register of the land office for the district in which such land may lie up to 160 acres.” This entry with the land register recognized the settler as having received full title to the land from the government, and a patent was issued so stating. For settlements existing at the time of the passage of the Act, the settler wishing to purchase under its terms would have to file with the land register in the district, within three months of the Act’s passage, “a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this Act.” Within twelve months of the passage, he had to make the requisite proof of settlement and improvement, make a required sworn statement, and pay the full price. For settlements begun after the promulgation of the Act, the filing was to be within thirty days of the settlement date, and the payment and proof within twelve months of it.

Among the limitations stated in the Act were provisions that no person could obtain more than one preemption right under the Act, nor could a person owning 320 acres of any other land or one who abandoned residence on his own land to reside on public land in the same state or territory, acquire any such preemption right. Furthermore, a person would not be allowed to enter lands with the register until he swore an oath before the land register officials that he was not in violation of the above limitations, that he had not settled upon and improved the land in order to sell it on speculation, that he had settled “in good faith to appropriate [the land] to his or her own exclusive use or benefit,” and that he had made no prior agreements that the title he would get from the government would inure to the benefit of anyone other than himself. False swearing in this was punishable as perjury, and the false swearer would forfeit any money paid for the land, and any conveyance he may have made of the land would be null and void, unless it were to a bona fide purchaser.

75 Robbins 89.
these three principles are relatively clear and need no elaboration here; their relevance to current squatter settlements would also seem to be clear. Fourth, "settlers [would] be protected from all intrusion and allowed a reasonable time to earn or gather together a sum sufficient to buy the land." This fourth principle refers to the period of grace between the settler's filing of his intention to purchase under the Act and the date by which he must make proof and payment; during that period no other purchaser could enter and begin a preemption claim of his own.

One must consider the wisdom and practical effects of this act, as well as its relevance to the solution of modern squatters problems. It should be emphasized that the idea of the Act was to allow actual settlers on government land to gain ownership of such land at low cost and without having to compete with other purchasers, especially those who would buy for speculative purposes. The auction system of land sales, which had been the primary means of gaining ownership of government land before the preemption laws were begun, had been shown to work to the advantage of speculators who could afford to pay more for the land than could the squatters. Preemption would now hold from the market and out of the auctions, land on which settlers had filed their intentions of purchasing at the minimum price after establishing the required uses. This approach, for the purpose of curbing speculation in government land sales while affording secure rights to existing settlements and encouraging future settlements, was basically sound and workable; it would seem to have much to offer for this same purpose in modern squatter colonies on government land even in urban areas.

One essential feature of a modern statute similar to the Preemption Act would be that the use requirements be specific enough to be enforceable effectively. The vagueness of the terms in the 1841 Act—"settlement," "inhabit," and "improve"—probably was a factor which contributed to the somewhat tarnished, though one would not say unsuccessful, history of the government's programs for promoting settlement rather than speculation. Since speculation in land was at least as likely to occur in a rural area in the nineteenth century as it is in an urban area in the twentieth century, the more precise the use requirements for the granting of preemption rights, the greater the chances of affording secure rights to the land to squatters. The Preemption Act requirement that a "dwelling" be erected was a step in the direction of specific-

76 A. Bertrand and F. Corty, supra note 72, at 49-50; Robbins 9.
77 "[T]he preemption laws and later the homestead laws succeeded in the main in putting land into the hands of farmers rather than of land jobbers." Hibbard 225.
ity, but more could have been done in the Act and more should be done in modern legislation. 78

One of the most interesting features of the Preemption Act was that it affected both existing squatters and potential squatters—that is, persons likely to become squatters in the absence of appropriate alternatives for settlement. 79 It is not clear that this feature would be of great value in a modern urban area. The preemption approach would seem more useful for giving rights to existing squatters on government land. It might even be suggested that where squatters are on private property in great numbers, and there are good reasons for allowing them to stay there, the government could consider the stabilization of legal rights a valid public purpose, and the private land could be officially expropriated for this purpose with fair compensation arranged for the owners. The government then could institute retrospective preemption measures to accord ownership rights to the squatters. A statute with prospective preemption effects, however, would be useful in an urban setting only if areas were specified which would be open to preemption claims on suitable sizes of lots for appropriate uses. This would also be true for a prospective, urban plan analogous to the Homestead Act; such a plan is discussed below.

The 1841 Act applied only to surveyed land. In 1862, however, it was extended to unsurveyed land as well to protect squatters in areas the surveyors had not reached. 80 One observer has suggested that this extension should have had the effect of curbing speculation, inasmuch as the bounds of claims on unsurveyed land could be delineated only by evidence of actual possession, rather than by reliance on the plots as marked out by surveys. 81 Regardless of this effect, the need for surveying in the operation of a preemption policy would seem to be great in urban areas. It is important so that some order can be engendered and maintained in urban areas and so that supplementary programs for improving squatter colonies may be administered most easily. At the least, there must be some record of the dimensions and locations of different persons' holdings, as well as the declaration of a maximum size, even if only an approximate one, for individual lots on which preemption rights may be attained. The use of local land registers, as well as a central listing, would seem to be one aspect of the

78 The 1830 Act had required that the land be "cultivated," but this was not included in 1841.
79 The preemption provisions of the Act of 1841 repudiated the retrospective policy of preemption and recognized that settlement prior to purchase was no longer per se a trespass. The act provided that an individual, henceforth, could legally venture forth upon public surveyed land and stake a claim to the exclusion of all others.
80 Act of June 2, 1862, 12 Stat. 413.
81 Hibbard 167.
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1968] United States preemption program worthy of consideration elsewhere. 82

Another area of concern about the merits of the Act is that it gave the preemptor a complete, fee simple title. The preemptor did, of course, have to swear that he did not purchase with the intention of selling for speculation or of turning over the benefits of the title to someone else. But once he got title, he could in fact sell it whenever and however he wished; it probably would have been a very difficult matter for the land office to prove that he had had the intention all along of speculating. Furthermore, the local land officials probably did not have the time—or perhaps in some instances a sufficient interest in the efficient, impartial administration of the Act—to seek to impose the penalties provided for in the Act in the many cases in which doubtful motives on the part of the settler did exist. Apart from the problems of squatter speculators, 83 even honest settlers, those who had hoped to make a claim and stick with it, were likely to succumb to speculators when the going was rough. It had early been advocated that restrictions be placed on the titles obtained under United States public land programs, but neither the Preemption Act nor the Homestead Act “went so far as limiting the settler’s right to dispose of the land he received after it was patented.” 84 There were restrictions on the transferability of claims filed but not yet perfected into titles, and these were probably worthwhile provisions. 85 But after the patents were given, speculators were able to secure large quantities of land second-hand, from the preemptors and homesteaders. This is an effect which should be carefully restricted in the clarification of squatters’ rights, as some experts have already suggested. 86 If restrictions are really to have some significance, however, there

82 Allowance should be made, also, for the possibility of some sort of deferred payment of the purchase price. Even though the Preemption Act allowed the settler approximately one year in which to pay the price, he still had to pay it as a lump sum. This may have been suitable for frontiersmen’s earning power, but it should be carefully considered in modern, urban situations—especially where there is substantial unemployment.

83 See Hibbard 211-19.

84 Sakolski, supra note 18, at 178.


86 Where speculation in squatments is anticipated, the terms of sale may also include provisions against resale within a prescribed period or, in the alternative, repayment in full of the public outlays. These terms will vary with the country and the situation, but terms should in all cases be realistic, not overharsh or arbitrary. Some profits can be expected to be made by squatters, either through sublettings or re-sales, and a few agreements cannot hope to prevent this altogether or protect against all possible evasions.

Abrams, Squatter Settlements 13-14. Abrams also here suggests use of leases with the right to purchase upon completion of a dwelling or upon continued occupancy for a specified period. Discussion of use of conditional grants of land by the states may be found in Hilliard at 369.
must be efficient, honest, flexible but forceful administration of the legislation.

The Homestead Act

Since mention has been made here of the Homestead Act of 1862, let us take a closer look at it. The Act provided that any person, such as those individuals mentioned in the Preemption Act, was entitled to enter up to 160 acres of unappropriated, surveyed public land subject to preemption. Application to the local land office for permission to make the entry had to be filed, accompanied by payment of a small filing fee and by an affidavit stating the application was being made for the applicant's own benefit, actual settlement and cultivation, etc. Five years after this filing, but not more than seven years after it, proof of five years residence and cultivation beginning at the time of filing could be presented, along with an affidavit stating that no part of the land had been alienated; the register would then give the homesteader the patent free of charge. If the settler had abandoned the land for more than six months during the five year period, the land would revert to the government. The Act allowed the settler the option of buying at the minimum price under the terms of the preemption acts before the five year period had passed; this was generally known as the "commutation" privilege.

Charles Abrams has written, "the primary aim of homesteading policy has been to settle populations on vacant territory." This clearly was a central purpose of the 1862 Act. Abrams also points out that homesteading policy can reduce poverty, allay discontent in populated centers, and better distribute surplus population. Since these and similar purposes are fully applicable to contemporary urban areas and their squatter colonies, Abrams believes squatter resettlement programs can appropriately be called "urban homesteading." If this phrase assumes that such resettlement programs might be aided by careful consideration of the United States homesteading experience, it would seem to be particularly apt.

We have already examined a number of the main features and problems of the homesteading policy in regard to the preemption act. Homesteading is, of course, a prospective policy; thus in an urban area we must know quite clearly which areas we want to make available for regulated settlement. The speculation problem, as we have seen, is probably the largest problem. The Homestead

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87 12 Stat. 392.
89 Id. at 7.
Act did not restrict alienability of title in any way, although it did make the useful innovation of stating that no lands acquired under it could ever be held liable for the payment of debts contracted before the patent was issued. Since this provision appears to reduce the dependence on overall solvency by the settler in order to maintain his holding, it is probably a valuable tool in a program aiming at greater certainty and security of rights for squatters.

Two other aspects of the Homestead Act remain for consideration. First, it is questionable that an urban homesteading policy should grant land essentially free of charge as was done in this country's homesteading. Since we are not promoting a settlement policy in the sense in which the Homestead Act sought to "people the wilderness"—although that is something a number of countries might usefully consider—it would seem that if urban settlers are able to pay reasonable amounts for their land, they should do so. To the extent that private land is expropriated to allow areas to be opened for settlement, the sales price from the new occupants could be applied by the government to the compensation awarded to the original owners. The effects of payment for the land on the settler's attitude toward his stake in it and his inclination to make good use of it are impossible to calculate; yet positive effects are quite likely.90

Another matter examined in the preemption discussion was the specificity of the use requirements. If urban homesteading is to produce reasonably well-planned, orderly communities, it must be much more specific in its use requirements than the United States homestead laws were or probably ever had to be.91

As a final point regarding the Homestead Act, we should consider the controversy over the commutation privilege provision.92 Its supporters contended that it provided an escape route for the settler who, because of some misfortune, could not continue to work the land but still wanted to buy it outright at the minimum price. Its critics argued that it encouraged speculation, as "settlers" would get title early and then sell out if land prices were rising. This dispute was never finally resolved, and commutation remained possible even under the subsequent homestead acts passed in the early years of this century.93 If fair and realistic restrictions on

90 For a good example of a detailed outline of the essentials of a squatter resettlement program, see Abrams, Man's Struggle 232-35.
91 Supra notes 10-11.
92 See Hibbard 386-89; Sakolski, supra note 18, at 136.
93 Robbins 375. To conclude discussion of the relevant federal legislation, one should note that there are other statutes which we have not touched upon which do relate to squatters in this country. The federal preemption laws were repealed by the Act of March 3, 1891, 26 Stat. 1097. Other homestead acts were
alienation are provided in a modern homestead-type statute, a commutation privilege could serve as a useful escape hatch without fostering speculation and engrossment of land.

CONCLUSION

We have discussed the major elements of United States law relating to squatters and have seen many of its weak points and strong points. Drawing on the United States experience, suggestions have been made for legislation of two sorts which might be formulated to assist in the solution of the developing nations’ large squatter problems.

The federal Preemption Act has suggested the first type of enactment, a direct and large scale approach to the securing of rights for squatters on public land and on private land subject to expropriation. The Homestead Act also has indicated the sorts of legislative provisions which could be used in a coordinated effort to make available for potential squatters new areas for orderly settlement with secure legal rights. Measures such as these might well have a direct, immediate, broad, and beneficial impact on the squatter problems the developing countries now face.

The second type of legislation we have analyzed is the adverse possession statute. This, as we have seen, is probably most useful as an on-going measure for the adjustment and clarification of ownership interests once programs of the more direct type have brought about the major regularization of squatter status at which we are aiming.

It should not be thought that we are assuming or suggesting that United States law on squatters has all the solutions for the squatter problems of today. The hope is, rather, that where this country’s experiences can shed light on the ways in which the law can be improved to meet the needs of a nation’s growing population, those experiences will be given heed. We have pointed out here some particular aspects of United States law which do seem
to shed useful light; our experience encompasses sound and sensible legal measures, as well as short-sighted and ineffective ones. As law in the United States, often drawing on its foreign antecedents, has been adjusted slowly and sometimes painfully to serve as an instrument of social order and progress, so may the law of the developing countries adapt to meet the pressing challenges of modern times—challenges such as the squatters.