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Till We Have Built Jerusalem: The Need for Squatter's Rights in the Midst of the Homeless Epidemic

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INTRODUCTION

In an increasingly uncaring society, little practical attention is paid to those elements that people view as “anti-social, criminally inclined, unemployed and not interested in working.” 2 This quote refers to the common perception of homeless and disenfranchised citizens, whose inability to obtain life’s basic comforts grows more alarming as the spectre of an American recession threatens to plunge the international economy into a depression. 3 The purpose of this

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And did those feet in ancient time
walk upon England’s mountains green?
And was the holy Lamb of God
on England’s pleasant pastures seen?
And did the countenance divine
shine forth upon our clouded hills?
And was Jerusalem builded here
among these dark Satanic Mills?

Bring me my bow of burning gold!
Bring me my arrows of desire!
Bring me my spear! O clouds, unfold!
I will not cease from mental fight,
Nor shall my sword sleep in my hand,
till we have built Jerusalem
In England’s green and pleasant land

Id.


3 An Independent Streak, The Economist, January 26, 2008. This threat of American recession hits close to home for the middle-class elements of the country as one of the principal concerns arising from the recession is the major
comment is to argue against the majority decision in the 13th Street Homesteaders case, which focuses on the need for privity as a prerequisite to adverse possession. Privity, the notion that “a succession of trespasses, even though no appreciable interval between them, should not be allowed to defeat the record title,” is no longer tenable. The English common law view of adverse possession is what we should adopt, because the English view considers only the passage of time. It would allow recognized communities, such as the Homesteaders of East 13th Street, the opportunity to retain their homes in the face of government action.

The comment is organized into five sections: Section one introduces the doctrines of adverse possession and tacking, and discusses the policies behind them. This is an exploration of basic concepts and is the foundation for the other sections.

Section two focuses on the homeless epidemic along with common perceptions of homelessness and its effects. Additionally, it contains a discussion of squatters and summarizes the controversy surrounding squatters.

Section three is devoted to the 13th Street Homesteader’s Case, involving New York’s eviction of squatters living in multiple buildings on 13th Street. The discussion delves into both the majority and the dissenting opinions. The dissent takes the view that courts should consider not only the adverse possessor’s physical presence on the land but also the claimant’s “other acts hit taken by the housing market, causing a huge “mortgage mess” and “great financial losses.” A Long Slog, THE ECONOMIST, January 12, 2008.

Howard v. Kunto, 477 P.2d 210, 217 (Wash. App. 1970). The court in Howard goes on to state that, in terms of privity, “there is a substantial difference between the squatter and the property purchaser…and a strong public policy favoring early certainty as to the location of land ownership which enters into a proper interpretation of privity.” Id. In this way, the court is able to rule in favor of the mistaken property owner in Howard, ruling that even mistaken deeds are sufficient for the determination of privity, while preserving the public view that squatters should not be rewarded for their trespass. Id.
of dominion and control over the premises that would appropriately be undertaken by owners of properties of similar character, condition and location.”

Section four revisits the public policy justifications and applies them to 13th Street Homesteaders. It then suggests that the reasoning of the majority does not work in today’s world and advocates our adoption of the English view of tacking.

Section five, in conclusion, confronts issues, like homelessness and poverty, which might get worse in light of the current American economy. In light of this possibility, section five again advocates the adoption of the English view, which would allow more people to keep the homes they’ve adversely possessed, alleviating in some measure the problem of homelessness.

I. Adverse Possession

A. Doctrinal Foundations

Oliver Wendell Holmes, while discussing statutes of limitation and the law of prescription, said “a thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.” The doctrine of

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5 East 13th Street Homesteaders’ Coalition v. Lower East Side Coalition Housing Development, 230 A.D. 2d 622, 624 (N.Y. A.D. 1996) (quoting Ray v. Beacon Hudson 88 NY 2d 154, 156 (N.Y. 1996). Judge Titone, speaking for a unanimous Court). In a slightly more modern vernacular: the view that the court should take into consideration what the claimant does with the land, and whether those actions are consistent with what another owner would have done with the same land. For example, if one owns a campground that they rent to various interests during the summertime, and personally use only on certain holidays, the courts might determine that use to be reasonable, given the nature of the land. In contrast, if one does the same thing with a two-bedroom home in the middle of a suburb, the finding will likely be different.

6 Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 476 (1897). This quote treads close to the desired interpretation of the Stake article, introduced above. Its language, with focus on the something “taking root in your being,” supports the argument, made by Stake that adverse possession should be approached with consideration to the fact that “by investing will in the land, the adverse possessor develops an attachment in land which is critical to their identity.” Jeffrey Evans Stake, The Uneasy Case for Adverse Possession, 89 GEO. L.J. 2419, 2456 (2001). While there are certainly economic approaches, Stake’s article makes a good case for the psychological considerations and ramifications of adverse possession, which echoes numerous statements by Holmes.
adverse possession, implicated in this passage, is a complex topic. While it “promotes efficient and economic use of land, thereby serving important economic and social ends,” there “are problems associated with it, including, but not limited to, monitoring problems, safety concerns, and environmental degradation.” Despite these associated problems, the doctrine has many practical applications in our modern society, one of which will be examined at length in this comment. Adverse possession allows persons to retain unused property which they have taken for themselves. While a more controversial method of obtaining shelter, adverse possession has the benefit of being a self-reliant approach, in contrast to other methods such as homeless shelters and Habitat for Humanity.

A claim for adverse possession of real property is generally perceived as being founded on five elements: “the possession must be (1) open, (2) continuous for the statutory period, (3) for the entirety of the area, (4) adverse to the true owner’s interests, and (5) notorious.” It is a commonly held modern principle that the second element, the requirement of continuous possession for the statutory period, applies to all elements of an adverse possession claim. It is not possession alone, but each element that must satisfy the demands of continuity, “it being

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7 Gardiner, supra note 1, at 121. “When a case of adverse possession arises, someone loses land. Modern experimental psychology gives us good reason to believe that the doctrine places the loss on the person who will suffer it least--the person whose roots are less vitally embedded in the land.” Stake, supra note 4, at 2434-35.

8 Gardiner, supra note 1, at 121. “A second cost of adverse possession is the cost of monitoring. To avoid losing his land, RO must expend time and effort in the search for possessors. What benefits society reaps from owners' additional visits to their lands are not immediately obvious. There is no reason to believe that owners left to make decisions on their own will monitor too little. Stake, supra note 4 at 2434-35.

9 Gardiner, supra note 1, at 121. (quoting Adverse Possession of Landlord as Affected by Tenant’s Recognition of Title of Third Person, 38 A.L.R. 2d 826 (1995).

10 Id.
established that any material interruption of such possession, or of the adverse character thereof, may restore the constructive possession of the legal owner.”

This modern construction of the adverse possession elements precluded a finding of “occupation under a claim of title” in the case of Van Valkenburgh v. Lutz. This case involved feuding neighbors, one of whom owned the land in question. The defendant non-owner farmed and otherwise cultivated the land for most of his life, and the entire neighborhood knew the land as “his gardens.” The Court of Appeals of New York found that, despite continued possession of the parcel of land in question, when the defendant “had the opportunity to declare his hostility and assert his rights against the true owner, he voluntarily chose to concede that the plaintiff’s legal title conferred actual ownership.” The ultimate decision deprived Lutz of any claim to adverse possession, despite a continued occupation of the land for “upwards of thirty years.”

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13 Id. The court’s recitation of the facts states that the property, overgrown when the Lutzses moved into the neighborhood, was not only possessed by Lutz; but, was also used as a farm, from which Lutz derived his primary income. See id. A number of incidents led to this action, including more innocent feuding between neighbors, Lutz and Van Valkenburgh, but also assault charges by Van Valkenburgh against Lutz, when the latter attacked the children of the former. See id. It might be argued that its placement as the premier case for students of adverse possession is due as much to its colorful history as its discussion of the doctrine.
14 Id. Despite such knowledge among the community, it was a relatively simple matter for Van Valkenburgh to stir up conflict with Lutz:

When the opportunity to buy the triangular parcel at a tax foreclosure sale was presented to the Van Valkenburghs in 1947, one can imagine that they jumped for it. Once they asserted their claim to the triangular parcel, the case that has come to represent “adverse possession” to thousands of law students began. We hear of Joseph Van Valkenburgh’s aggressive tactics and William Lutz’ legal missteps. We hear how the Van Valkenburghs eventually won the case, although William Lutz did not live to see the end. He died in 1948, four years before the famous decision was rendered.

Laura S. Underkuffler, Teaching Property Stories, 55 JLEGED 152, 156 (2005).
15 Id.
16 Id. In what would seem to be a departure from what the average citizen would desire, the court seemed to almost imply that bad faith was and should be required for any finding of adverse possession to have merit. Todd Barnet,
This is one example of how the adverse possession doctrine can spawn some questionable judicial results.

**B. Public Policy Justifications**

Adverse possession shares some of the concepts found in John Locke’s Labor Theory, a modernized statement of which follows:

> Though the earth and all inferior creatures be common to all men, yet every man has property in his own person. The labor of his body, and the work of his hands, we may say, are properly his. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.\(^{17}\)

Locke’s theory and adverse possession are predicated on the value of labor and of rewarding an individual who makes property his own. Both seek the greatest use of property. The principal differences between the two concepts are found in the details of adverse possession. Locke’s theory fails to move past the broad principal that man has property in his own labor.\(^{18}\) Adverse possession, on the other hand, is subject to a number of limitations imposed by the courts. For example, one must have possession that is adverse to the owner’s interest and continuous; therefore, it is not merely the unilateral action of the adverse possessor that determines the status of the property in question. In Part Six of the New York Law and Practice of Real Property, Joseph Rasch asserts: “if one has reason to know that someone is in

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\(^{17}\) **JOHN LOCKE,** *TWO TREATIES ON GOVERNMENT*, Ch. V, sec. 27. This text, Locke’s second treatise on government, was published in 1690, and has since been republished in numerous formats, including online formats included in public domains. While well known for containing his views on labor theory, it should be noted that the text contains other sections devoted to nature, war, and slavery.

\(^{18}\) *Id.*
possession and does nothing to assert his rights, it is not unreasonable to penalize him by precluding him from thereafter asserting his rights.”

Two policies underlie adverse possession. First, it rewards a person who makes use of empty land. Second, it punishes that person who lets the land lie unused and worthless, in an operation that “sounds, at first blush, like title by theft or robbery.” These considerations have given rise to three distinct methods by which courts might implement adverse possession: using adverse possession to punish sleepers; focusing on the conduct of the would-be adverse possessor; and, strictly focusing on the expiration of the statute of limitations.

The sleeping theory acts to “punish civil wrongdoers.” Of course, the wrongdoers are not civil wrongdoers in the ordinary sense of the phrase. The wrongdoers are “those who sleep on their rights and their penalty is to lose those rights.” This view flows directly from the public policy justification of making use of land, though some argue that “the sleeping theory is hard to accept as a justification for adverse possession today.”

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19 JOSEPH RASCH, POSSESSION UNDER CLAIM OF RIGHT, 2 NLPRP (2d ed., 2007). Some see this as serving basic principles of economics. David Hume originally propounded the utilitarian theory of property, which “rejected natural or formal rights as justifications for property, suggesting instead that the laws of property were mere conventions that people obeyed out of self-interest: i.e., that property rights develop out of utility alone.” David L. Rosendorf, Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights, 45 U. MIAMI L. REV. 701 (1991). The article goes on to say that “The utilitarian theory’s recognition of property rights as artificial constructs that serve as a means to achieve happiness is the dominant contemporary view of property. . .” Id.

20 Henry W. Ballantine, Title by Adverse Possession, 32 HARV. L. REV. 135 (1918) (discussing the public policy reasons behind the use of the adverse possession doctrine).

21 See generally, Gardiner, supra note 1, at 119.

22 Stake, supra note 4, at 2434. (quoting WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 853, 860 (3d ed. 2000). This section in Stake’s article highlights some of the more prominent of what Stake refers to as “uneasy cases of adverse possession.” Id.

23 Id.

24 Id. at 2435. While the view, elucidated in footnote 19, is a prevailing view of how to approach real property law and the doctrine of adverse possession, the sleeping theory is an off-shoot of further developments in this approach. Note that the above view discusses how we view property, as individuals, with a look to “self-interest.” Rosendorf,
The second view, focusing on the conduct of the would-be adverse possessor, is the view accepted by American courts today. It is the view implemented in 13th Street Homesteaders, the elements of which are explained in the previous section.

The third view is one that focuses strictly on the passage of the statute of limitations. This view rests, initially, on the notion that “once there is an entry against the true owner, she has a cause of action.” In the Massachusetts case of Totman v. Malloy, the court stated “we have long held that the state of mind of the claimant is not relevant to a determination whether the possession of land is nonpermissive.” This contrasts sharply with the commonly accepted American view, stated above. The American system focuses primarily on the actions of the possessor, while this view harmonizes with the English view, which “does not require privity as a prerequisite for tacking.” Explained simply, this view, which we will call the English view, sets no requirement on the mental state of the adverse possessor, nor is it burdened by the limitations of its American cousin. The English Limitation Act of 1980 states merely “No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

\[supra\] note 18, at 701. The sleeping theory rises more from the modern take on that economic approach, as proposed by Posner. In his text, Economic Analysis of Law, he states that the ultimate development in property rights is efficiency. One of the elements of such efficiency is not that a person has right to property he claims in an adverse manner. It is the right to remove others from your own property. This right is placed with the encouragement of efficiency and free trade. Not engaging your right to eject others from your own property leads to the application of the sleeping theory of adverse possession. R. Posner, Economic Analysis of Law, (3d ed. 1988).


27 F. Clark, Law of Surveying and Boundaries, §561 (3d ed. 1959) at 568.

28 Pye v. Graham, UKHL 30 (2002). The court goes on to discuss a split between the views of adverse possession being, under English Law, ruled by actual possession, and the view of the passing of time, as espoused by the Limitation Act as far back as 1934. Obviously, given the court’s reliance on the language of the Limitation Act, and
possession to take effect. This view resembles the sleeping theory, but does not focus much on actually punishing the sleeper. It is this view that America should adopt, moving away from its own limited adverse possession doctrine. Given the current state of the American economy, and the ever-increasing problem of homelessness, we need more ways to aid the homeless. We can no longer afford to support a doctrine that impairs the ability of a growing number of American citizens to retain shelter.

It is significant that adverse possession has practical applications for the courts, as “it rests upon social judgments that there should be a restricted duration for the assertion of ‘aging claims,’ and that the passage of a reasonable time period should assure security to a person claiming to be an owner.”29 As such, adverse possession operates on both theoretical and practical levels. Regarding the former, it serves to make land useful, punishing one who makes no use of his/her land, and rewarding one who converts it to a useful purpose.30 Regarding the latter, the doctrine serves to streamline real property law, protecting the courts from ancient claims.31

C. The Tacking Doctrine

The tacking doctrine plays a major role in adverse possession. In Buchanan v. Cassell, the Supreme Court determined that: “a purchaser may tack the adverse use of its predecessor in interest to that of his own where the land was intended to be included in the deed between

29 POWELL ON REAL PROPERTY § 91.01 (Michael A. Wolf gen. ed. 2005).

30 Ballantine, supra note 19, at 135. (discussing the public policy reasons behind the use of the adverse possession doctrine).

31 POWELL ON REAL PROPERTY § 91.01 (Michael A. Wolf gen. ed. 2005).
them.” This view on tacking, advanced by the Supreme Court, makes it “clear that tacking is permitted... when one claims more land than that described in the deed.”

A later question raised, in the case of Howard v. Kunto, was “novel in that none of the property occupied by defendant or his predecessors coincided with the property described in their deeds, but was contiguous.” The ultimate question in that case was privity, and the court examined historical reasons behind the doctrine. As the court said, privity allows for the tacking of claims, and it comes from “the notion that a succession of trespasses, even though there was no appreciable interval between them, should not, in equity, be allowed to defeat the record title.” The court also said “the requirement of ‘privity’ is no more than judicial recognition of the need for some reasonable connection between successive occupants of real property so as to raise their claim of right above the status of trespasser.”

This deviates from the English view and the Howard court recognized this, stating that “the English common law does not require privity as a prerequisite for tacking.” Ultimately, the

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32 Buchanan v. Cassell, 53 Wash. 2d 611, 614 (1959). The court relied on its language in Faubion v. Elder, where it stated “it is sufficient to state that the description of a need will be held to include the land in question, since, where there is privity, the united interest can be tacked.” Faubion v. Elder, 49 Wash. 2d 300 (Wash. 1956). Note also that, according to Powell, “When A conveys Blackacre to B, and B then seeks to claims adverse possession of adjacent land not covered by the deed, and wishes to tack the possession to prior possession by A, It is believed that both the weight of authority, and the more desirable rule, find privity in these circumstances, and so permit tacking.” 16-91 Powell on Real Property § 91.10. Not also that, at this time, cases are not unanimous on this issue. Id.


34 Howard, 477 P. 2d at 212.

35 Howard, 477 P.2d at 212. The court in City of Rock Springs v. Sturm described the necessity of a claim of right, or title, to be the point that had given rise to the “greatest amount of controversy in the adverse possession doctrine.” City of Rock Springs v. Sturm, 39 Wyo. 494. (Wash. 1959).

36 Howard, 477 P.2d at 212.

37 Id.

38 Id. at 215.
court in *Howard* allowed for a finding of privity when a mistaken purchase existed between successive owners, stating that there “is a substantial difference between the squatter or trespasser and the property purchaser.” 39 Here, the court betrays the American view frowning squatters and, now, on the homeless. We can no longer afford to sustain such a bias, treating squatters as wrongdoers or people acting in bad faith. The distinction between mistaken property purchasers and squatters, a fine one to begin with, can no longer stand.

**II. Homelessness and Squatters**

**A. Population and Homelessness**

The current population estimate for the United States is 299,398,484. 40 That number is approximately 50,000,000 higher than the population during the early 90s. 41 Of that number, more than 3,000,000 a year suffer from homelessness. 42 According to the United States Census Bureau, the total world population on January 1, 1998, was 5,886,645,394 people. 43 Using average annual growth rate percentages, the Census Bureau estimates that the world population will be approximately 9,368,223,050 by the year 2050. 44

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39 *Id.*


41 U.S. Census Bureau, Population Finder (2006), http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on (last visited September 21st, 2007)


44 *Id.*
According to national studies, “even more Americans are at a risk of homelessness.” A large portion of the population lives one emergency away from the possibility of being homeless. While the situation seems bleak, there are a number of remedies used to erode the base number of homeless in America. Non-profit groups such as Habitat for Humanity gain new chapters every year, preaching a mission of “eliminating poverty housing and homelessness from the world, and making decent shelter a matter of conscience and action.” Habitat builds houses with small affordable payment plans for disenfranchised families in Africa, the Middle East,

45 The National Law Center on Homelessness and Poverty, http://www.nlchp.org/hapia.cfm (last visited September 21, 2007) Nearly 3.5 million Americans experience homelessness annually. The homeless population is made up of children, families, veterans, and mentally ill individuals. At 40% and rising, families are the fastest growing segment of the homeless population. It is estimated that in 2008, one in fifty children across the nation will experience homelessness. Homelessness can further compromise the well being of children who are already at risk for health problems, delays in development, and academic impediments. “Rep. Davis leads Bipartisan Effort to Increase Funding for Homeless Assistance Grants,” US Federal News (2006).


47 Habitat for Humanity, http://www.habitat.org/how/factsheet.aspx (last visited September 21, 2007). The Habitat mission, in greater specificity is given thUsly:

Habitat for Humanity International is a nonprofit, ecumenical Christian housing ministry. HFHI seeks to eliminate poverty housing and homelessness from the world, and to make decent shelter a matter of conscience and action. Habitat invites people of all backgrounds, races and religions to build houses together in partnership with families in need. Habitat has built more than 225,000 houses around the world, providing more than 1 million people in more than 3,000 communities with safe, decent, affordable shelter. HFHI was founded in 1976 by Millard Fuller along with his wife, Linda.

Id. While arguably the most recognizable national organization for homeless aid, others exist such as the not-for-profit HomeAid America Inc., established in 21 states. Its mission is to build or renovate housing where homeless families and individuals can live while rebuilding their lives. Submission to the program is fairly involved:

The different homeless service organizations that exist around the state would identify the need and contact HomeAid. There's a pretty extensive screening process. HomeAid looks at the service provider's financial history, its stability, because once we give them this project, they're responsible for maintaining it. The structure would be whatever that service provider would identify as their need. If they have an existing building that needs rehabilitation, or if they have a piece of property where we could put up a four-, six- or eight-unit apartment or condos, we'll do that. Homeless people live there up to five years, depending on the service provider.

Europe, America, and the Caribbean. Such organizations are just one possible remedy for homelessness. Indeed, it is beyond the scope of this comment to describe all such remedies and programs. We are, however, advocating one—squatting.

**B. Squatting**

Early American adverse possession closely adhered to the English common law tradition which, historically, underwent substantial transformation from a system that promoted heredity and limited access to land to a system that emphasized individual protection. In feudal times, land was the societal focus, having primary importance until the rural middle class showed up, and an economy based upon wages instead of service caused the demise of feudalism and a focus on individual rights. Along with strong individual property rights, adverse possession arose as a new English principle.

It was first identified in 1275 in the Statute of Westminster, requiring seisin for the establishment of such claims; however, this policy changed in 1623 with the Statute of Limitations, which many American colonial jurisdictions used as a prototype for their own laws. This statute reflects “the early desire in England to prevent the waste of land resources and to force owners to monitor their lands property.”

Again, America deviated from this view as a poor view of squatters led to “government antagonism.” Unfortunately, organizations seeking to compel the recognition of squatters’

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49 Rosendorf, supra note 18, at 721

50 Id.

51 Id.

52 Id.

53 Rosendorf, supra note 18, at 721.
legitimacy are unable to combat this common American view. “Traditionally, both governments and citizens have viewed squatters as criminals who take advantage of neglectful municipalities and land owners.” However, this view is not a universal one. The U.N. Commission on human rights issued a report “illuminating ‘Twelve Misconceptions and Misinterpretations of the Right to Housing’ and attempting to dispel the notion that ‘squatters are criminals.’” While this report suggests a more benevolent perspective on squatters, it is, arguably, the former view which still holds sway over a larger portion of American society.

Generally, “an impression is created that pavement dwellers are anti-social elements, and that a majority of them are criminally inclined, unemployed and not interested in working.” This is an unfortunate view given the state of American, and world, homelessness. While squatting is not confined to any particular area, “with the surge of population from the rural lands to the cities,” it has become a creature of the city, “manifesting itself in the cities of the developing world.” This proliferation of squatting in cities of course reflects the increase of metropolitan populations. The more people in a given area, the more likely that some are without homes. Those without homes must find ways to live, and that involves, in a lot of cases, squatting to create homes.

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54 Gardiner, supra note 1, at 121.


57 Id. at 119.

58 Id.
III. East 13th Street Homesteaders v. Lower East Side Coalition

A. Background

On May 11, 1989, an article was released in The New York Times with the lead:

“Around Tompkins Square Park in an area called Alphabet City, because of avenues named A, B, C and D, are 16 abandoned tenement buildings occupied by people who simply took them over.”59 The article deals with the motivations and trials of the self-appointed “homesteaders.”60 The occupants of Alphabet City are a far cry from stereotypical views on squatters. Addie Norman, who denominated the squatters as homesteaders, was “29 years old and a financial manager for a nonprofit public-interest group called the Citizens Association for New York City, working on and living in the first-floor space she occupied with her dog, Tika.”61 Addie Norman lived at “533 East 13th Street”62 from which “they remove rubble as they make their assigned spaces more livable.”63 For those who harbor stereotypes of homeless individuals, the article goes on to state that “there are families with children, couples and single people. Some, like Addie Norman, have regular jobs, while others are sporadically employed. A few are painters, some are musicians, and one is a playwright.”64

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60 Id.

61 Id.

62 Id.

63 Id.

64 Id.
Such a portrait is hardly that of “anti-social elements... criminally inclined, unemployed and not interested in working.” Indeed, it may be difficult to keep from sympathizing with such people when “the average job pays $4 or even $5 an hour...that brings you maybe $120 a week. So how are you going to obtain an average apartment down here when they cost around $800 to $1,000?”

In the mid-1990s, citing “danger of buildings collapsing,” the city was “given the go-ahead to evict squatters from city-owned buildings in the East Village.” While arguments exist challenging the public policy reasoning of the city, this comment will not deeply explore the politics of the city under its then mayor, Rudy Giuliani. However, lest a reader be swayed instantly by the good sense displayed by the City of New York in tearing down decrepit buildings, it should be noted that Jim Morgan, an architect, wrote the following in the New York Times: “It is important for New Yorkers to understand that the May 30 blitzkrieg-style police raid upon the East 13th Street homesteaders' buildings was based on a demonstrably false pretext.”

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65 Gardiner, supra note 1, at 121


In sharp contrast to the city’s contention, the article states “records of the New York State Supreme Court trial on the matter clearly show that there is absolutely no danger of those buildings collapsing -- by the admission of city building department officials, as well as testimony of other licensed professionals (including myself).”\(^\text{70}\) While this is a bold, somewhat inciting statement, Morgan justifies its validity, stating “after years of public demand for increased police protection, criminal justice budgets are now swollen...Police Department planners are hard pressed to spend available funds, and they seize upon an essentially benign operation like this eviction of a few ‘squatters’ as their opportunity to do so.”\(^\text{71}\) Finally, Morgan elaborates on the price: “The astonishing display of repressive force assembled on the Lower East Side this week is said to have cost $5,000,000.”\(^\text{72}\) This article is merely one of a series of complaints leveled against city officials and agencies in the “self-help eviction”\(^\text{73}\) of the squatter’s of “537,539,541, and 545 East 13\(^{\text{th}}\) Street.”\(^\text{74}\)

**B. Case Facts**

The action in question arose “in or about October 1994 by petitioners, who were occupying five New York City-owned buildings.”\(^\text{75}\) The original complaint came about in response to the City’s attempt to evict the petitioners for the implementation of a federally subsidized plan to rehabilitate the buildings and create 41 low-income housing units.\(^\text{76}\) While

\(^{70}\) *Id.*  

\(^{71}\) *Id.*  

\(^{72}\) *Id.*  


\(^{74}\) *Id.*  

\(^{75}\) East 13th Street Homesteaders’ Coalition v. Wright, 217 A.D. 2d 31 (N.Y. A.D. 1995).  

\(^{76}\) *Id.*
numerous causes of actions, as stated above, were alleged, the core of the petitioners’ argument was their acquisition of ownership of the abandoned structures by way of adverse possession. The squatters claimed that they, as a community, had continuously possessed the properties in question for a long enough period to satisfy the state’s adverse possession statutes. They sought an injunction against the city, as, without such an injunction, the city could go through with their plan to renovate the properties, thereby mooting their case.

On February 10, 1995, the court issued a temporary restraining order enjoining respondents from using self-help to eject petitioners from the subject building and directing a hearing on the preliminary injunction motion. The respondents, including Deborah Wright acting in her capacity as the Commissioner of the New York City Department of Housing Preservation and Development, maintained that the buildings were inspected in order to aid respondents in preparing for the preliminary hearing. Personnel determined that two of the buildings in a hazardous condition “constituted an imminent danger to the occupants’ health and

77 Id.
78 Id.
79 Id. the injunction was requested to stop the City’s use of self-help, a right that arose under common law whereby a landlord entitled to possession could resort to self-help without fear of civil liability so long as he used no more force than reasonably necessary. Berg v. Wiley, 264 N.W. 2d 145, (Minn. 1978). The court in Rucker v. Wynn determined that “under the terms of a commercial lease, a landlord has a right to re-enter and re-claim the land, providing that there is no breach of the peace.” Rucker v. Wynn, 441 S.E. 2d 417 (Ga. App. 1994). This view followed naturally from the requirement, set down in Peacock v. Hunt Naval Stores, that the “grantee’s holding remains lawful until the owner recover in action against him, or re-enter by peaceful means.” Peacock v. Hunt Naval Stores, 96 Ga. 542 (Ga. 1895). The view that has steadily grown more prevalent, in regards to self-help, is the view of Berg v. Wiley, Id. See Berg, 264 N.W. 2d at 145, in which the court recognized the more modern trend to disapprove of self-help, owing to the fact that the mere potential, in any eviction, for a violent breach of the peace, where adequate means of judicial process are available, justifies holding against the inclusion of self-help into the available remedies of the landlord.

81 Id.
safety as to require complete evacuation.” The inspectors also found the first floor of a third building in the same condition and issued the Vacate Orders dated April 20, 1995.

An incident occurred following this ejection that drew major public attention to the case. According to a New York Times’ article “At about 10 P.M. on July 4, with much of the city's attention focused on the fireworks over the East River, some squatters and their East Village allies sneaked back into one of the tenements they had been forced to vacate six weeks earlier.” To further irritate the police, “they briefly commandeered the building's roof where they waved homemade flags, taunted police officers and tossed debris and firecrackers onto the street.”

The article also quotes city officials as saying that the reason for ejection of the squatters is that “they need the buildings to create housing for low-income families.” Those who find this statement to be somewhat paradoxical would do well to read further in the article where it states:

The buildings first became planned for low-income apartments last summer when housing officials worked out a deal with the Lower East Side Housing Coalition and two national nonprofit housing organizations that would manage the $1.5 million in Federal tax credits and supervise construction. To receive the money, the groups had to begin work by the end of 1995.

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82 Id.

83 Id. Following the issuance of these vacate orders, the petitioners applied for an order annulling the vacate orders, and court entered an order to that effect, directing the city to immediately present plans for repairing the buildings. The respondents filed appeal, and several cross-motions, and won a vacate order of the automatic stay which effectively permitted the execution of the vacate orders. By orders dated June 22, 1955, the court granted petitioner’s motion for renewal of the May 25, 1995 order to the extent of directing the sealing of the buildings once vacated and seal them pending final disposition by the Supreme Court. As a result, petitioner were ejected from the buildings and those buildings were sealed. Id.

84 Kennedy, Squatter’s of 13th Street vs. Power of City Hall; More than a symbolic battle for control, N.Y. TIMES, July 12, 1995.

85 Id.

86 Id.

87 Id.
C. The Majority Holding

The main action arose from Wilk’s order granting petitioner’s motion for preliminary injunction “to the extent of enjoining respondents-defendants from using self-help means to remove them from the buildings during the pendency of this action.” The narrow issue the court determined on appeal was “whether the petitioners should be granted a preliminary injunction barring their eviction pending trial on the issue of whether legal title to the property passed to them through adverse possession.”

The court determined that petitioners could not prove ten years of actual, continuous, open and notorious possession of the subject buildings. Since petitioners’ claim of right was not supported by a written instrument, they were forced to show actual, not constructive possession. The petitioners’ response to the need for actual possession was to argue the existence of “a chain of possession of coalition members in all of the buildings during the requisite period to support the requirement of continuous ownership.”

The court responded by turning to the traditional American tacking doctrine, stating that the “record does not reveal that such successive possession was continued by an unbroken chain of privity such that it could be tacked for adverse possession purposes.” Specifically, the court found no evidence of privity between successive occupants of the apartments, nor any evidence of intended transfers between those successive occupants. In addition, some of the apartments


89 Id.

90 Lower East Side Coalition Housing Development, 230 A.D. 2d at 623.

91 Id.

92 Id. (citing Garrett v. Holcomb, 215 A.D. 2d 884).
had been vacant for some period, such that the vacating occupant and the new occupant apparently had no contact at all. The court therefore reversed the order and denied a motion for preliminary injunction, effectively ending the litigation.\(^93\)

**D. The Dissent**

Judge Kupferman, in dissent, stated that, when determining the common-law requirement of continuity of possession in an adverse possession claim to an estate in land, a court should consider not only the adverse possessor’s presence on the land but also any other acts of control over the premises that would be undertaken by owners of properties of similar character, condition and location.\(^94\) He analogized *Ray v. Beacon Hudson*, to the case before him. *Ray* involved occupancy of a summer home, coupled with regular efforts taken to secure and improve the premises and to eject trespassers during their absences for the 10-year statutory period while all neighboring structures collapsed due to vandalism or abandonment.\(^95\) The judge in *Ray* determined that these acts demonstrated continuous, actual occupation of land.\(^96\) Judge Kupferman’s compared this to the facts of *East 13\(^{st}\) Street*, where petitioners made several improvements to the properties in question, and attempted to preserve the buildings. Moreover, as in *Ray*, where the occupation was for only one month during the summer, there existed intermittent occupation by various people who are a part of a cohesive group.\(^97\)

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\(^93\) Id.

\(^94\) Id. at 624 (quoting *Ray v. Beacon Hudson* 88 N.Y. 2d 154, 156 (N.Y. 1996). Judge Titone, speaking for a unanimous Court)

\(^95\) Id.

\(^96\) *Beacon Hudson* 88 N.Y. 2d at 161.

\(^97\) *Lower East Side Coalition Housing Development*, 230 A.D. 2d at 624-25.
Judge Kupferman concluded by describing the city’s preparations to gut the buildings and rehabilitate the neighborhood with private funds and Federal tax credits only after having failed to do so for many years.\textsuperscript{98} It is important to note that the language of the dissent, while calling for a definitive conclusion as to the claim of adverse possession,\textsuperscript{99} necessarily assumes that the petitioners have “a likelihood of success on the merits of the underlying claim,”\textsuperscript{100} in contrast to his fellow judges. He bases this primarily in reliance upon Ray, evidencing a view separate from the other appellate judges. While they hold to a strict American view, his use of Ray shows a more flexible approach, allowing for tacking under common circumstances of adverse ownership, which moves toward the English view.

While the full opinion, itself, is quite small, it is rich in background detail. In the United States, “no city has experienced more urban squatting activity than New York City.”\textsuperscript{101} It seems fitting, in light of this, that an argument in favor of squatter’s rights should occur based on a New York case.

\textbf{IV. A Time for Change}

As a society, we should not condone 13\textsuperscript{th} Street Homesteaders. If we go back to the policies behind adverse possession, we acknowledge that the doctrine partly exists to reward those who make efficient use of land.

\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Aetna Ins. Co. v. Capasso, 75 N.Y. 2d 860, 862 (N.Y. 1990).
\textsuperscript{101} Gardiner, \textit{supra} note 1, at 141.
Any city attempting to “create housing for low-income families”\(^{102}\) should certainly be applauded for and encouraged in their efforts. However, using that as an excuse to do so after it “defaulted on its obligation to maintain order and ensure tranquility,”\(^{103}\) is taking a step in the wrong direction. Ousting disenfranchised individuals to make room for housing for the disenfranchised smacks of other motivations, making any noble cause a mere justification for a form of profit, whether it be actual or political currency. With three million homeless out on the streets of America, we should be making every effort to see that they are able to find a home.

Unfortunately, the present American law of adverse possession does not embrace the wisdom of Judge Kupferman’s dissent. Tacking, under the American view, is permissible when two parties have privity with one another.\(^{104}\) Judge Kupferman folds the concept of tacking into another legal fiction, that of customary use. The first requires privity between two continuous possessor’s; the second allows for a lower standard of possession as long as it falls within the bounds that one would normally use a property.

Kupferman’s opinion, while brief, implies that the “intermittent possession”\(^{105}\) by a group of people working to a common goal, or a “coalition,”\(^{106}\) in the case of a squat of abandoned property, should be recognized as the customary use of such property. His view does not fall within the modern American doctrine of tacking. It is akin to the English view which requires no privity for tacking. Instead of attempting to squeeze the facts within the contours of the


\(^{103}\) Lower East Side Coalition Housing Development, 230 A.D. 2d at 625.


\(^{105}\) Lower East Side Coalition Housing Development, 230 A.D. 2d at 624-625.

\(^{106}\) Id.
American view, he might have dealt directly with defects of our present law. In a country that, more than ever before, needs doctrines that protect the homeless, we must begin reconsidering adverse possession and possibly renovating it. “Property that stands idle or unused simply acts as an anchor on the ultimate progress of society.”

Following the decline of the properties in 13th Street Homesteaders, a group of homeless individuals chose to improve and restore the property for their own use. While not directly transferred from person to person, the properties in question saw a “possession of coalition members in all of the buildings during the requisite period.” A tacked holding period among a recognized community is not far removed from the court’s view in Howard, allowing for a tacked period between two individuals. Given the current state of our country, and the lack of self-help remedies available to homeless individuals, our view, with its focus on the conduct of the would-be adverse possessor only exacerbates a major problem.

We should be encouraging people like the residents in 13th Street Homesteaders, rewarding them for taking something with no value and turning it into something of great value to themselves. Perhaps our original deviation from the English common law view was necessary in light of territorial and property needs of a growing country. However, that deviation does us a grave disservice now. We should reconsider, moving towards the English view of tacking, which requires no privity between subsequent landowners, focusing entirely on the passage of time. This would, ultimately, have the effect of allowing squatter’s to retain property, despite the haphazard nature of its use. Following the English view would hold property owners responsible for what they do with their land, punishing those who merely own, and do not use, and rewarding

107 Gardiner, supra note 1, at 141.

those who use, and truly need, the land. We need to combat homelessness, and the ill use of land. The English view can help us get there.

V. Conclusion

There is a problem in our society, and it is not going away. We need to approach this problem and combat it, not through favoring governmental needs over the needs of the individual, but by helping other citizens attain those basic comforts that we all strive for, and some take for granted. It is difficult to imagine what life would be like without a bed to sleep in at night or the familiar comforts of our home. Imagine what it would be like to be unable to find something to eat for the night, or two nights, or longer. It is hard for many people in this country to conceptualize what they would do in such a situation, yet there exists a vast population of American citizens who deal with these problems every day of their lives.

Section one discussed the definition of the adverse possession doctrine and showed how it has been manipulated by the courts to reach certain results. It also discussed the various views behind adverse possession implementation, giving an explanation of both the American and English viewpoints. Section two focused on the homeless epidemic in the United States, the common American perceptions of squatters, and the history of squatting. Section three examined the 13th Street Homesteader’s Case, exploring both the majority and dissenting opinions. While the majority opinion ruled against the squatters under the standard American approach to adverse possession, the dissenting opinion took a far more favorable approach to squatting rights, and one that is compatible with the English view.

Significantly, section four argued against the approach taken in the above case. It stated that the American view of adverse possession should no longer be sustained, and that, in light of
the current state of American economics and homelessness, we should move towards adopting a new approach, one closer to that in England. Through flexible shifts in the law, we can actually become a more caring society by paying attention to those elements unfairly condemned as “anti-social, criminally inclined, unemployed and not interested in working.”\textsuperscript{109}

\textsuperscript{109} Gardiner, \textit{supra} note 1, at 121.