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Taxonomies of Squatting: Unlawful Occupation in a New Legal Order

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Legal responses to the activity of 'squatting' include criminal justice, civil actions, property law and housing policy. Some legal analyses of unauthorised occupation focus on the act of squatting, others on the squatter's claim to title through adverse possession. This paper explores recent developments in the law of adverse possession which have been shaped by particular discursive constructions of both squatters and dispossessed landowners. It develops a 'taxonomy of squatting' by mapping the positions adopted by the Law Commission, the legislature and various domestic and European courts, in respect of moral issues thrown up by the doctrine of adverse possession, including the distinction between good faith and bad faith squatting, the landowner's duty of stewardship, and the question of compensation. By unpacking the circumstances in which squatting occurs, the paper develops a series of matrices to classify legal responses to unlawful occupation and to facilitate a more systematic and coherent understanding of law's responses to squatting.

INTRODUCTION

The erosion of traditional principles of adverse possession in the Land Registration Act 2002, together with the decision of the Grand Chamber of the European Court of Human Rights in *Pye* v *The United Kingdom*[1] – articulating important claims about the legitimacy of title acquisition by adverse possession in the context of Article 1 of the First Protocol to the European Convention on Human Rights – have embedded a new legal order for the regulation of title by adverse possession, underpinned by a set of taken-for-granted moral perspectives which reflect a wholly negative view of the activity of squatting.[2] These changes have taken place against a backdrop of rising moral outrage towards squatters who secure title to land in this way.[3] Furthermore, while academic analyses in the US continue to consider the justifications for adverse possession,[4] and the traditional doctrine of adverse possession continues to subsist across a range of ECHR juris-

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1 Application no 44302/02; available online at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=822955&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last visited 12 June 2008).

2 See N. Cobb and L. Fox, 'Living Outside the System: The (Im)morality of Urban Squatting after the Land Registration Act 2002' (2007) 27 *Leg Studs* 236.

3 See Cobb and Fox, *ibid*, footnote 4.

4 See, for example, L. A. Fennell, 'Efficient Trespass: The Case for Bad Faith Adverse Possession' (2006) 100 *Northwestern University Law Review* 1037; E. M. Peñalver and S. K. Katyal, 'Property Outlaws' (2006) 155 *University of Pennsylvania Law Review* 1095.

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dictions, as well as in many Torrens-style land registration systems,[5] property law scholars in England and Wales have indicated that, in the context of the prevailing approach to title registration: '. . . it has come to seem increasingly strange that adverse possession should have any relevance in a regime where the formal registration of title is supposed to provide a definitive record of estate ownership.'[6]

The courts, in a similar vein, have described the (pre-2002) operation of adverse possession as 'apparently unjust',[7] with Neuberger J recently observing that it was: '. . . hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years'; a conclusion which '. . . does not accord with justice, and cannot be justified by practical considerations, [is] draconian to the owner and a windfall for the squatter'.[8] Furthermore, the Law Commission's re-designation of adverse possession as 'theft of land',[9] as part of its work on land registration, has copper-fastened the portrayal of the squatter's actions as wrong (tantamount to criminal activity), with the dispossessed landowner as the 'victim' of the piece.

This article re-considers the way in which the moral responsibility of both squatter and landowner has been cast in this new legal order. The prevailing approach to adverse possession in England and Wales presents a simplified, 'black-and-white' picture of unlawful occupation, treating as essential the landowner as 'in the right' and the squatter as acting wrongfully. In this article, we argue instead that the activity of unlawful occupation raises a series of complex questions relating to both the use of land and the regulation of title, which can usefully be considered by unpacking the variety of socio-legal constructions of squatter and landowner, and by considering the activity of unlawful occupation in relation to use of land as well as (registered) title. In doing so, we have found it helpful to consider the legal construction of the squatter and the landowner through a range of legal lenses: crime; housing; limitation; property; and human rights; as there is some difference of approach across these contexts, for example, as to whether the primary concern of the legal response is with the act (or consequences) of squatting itself, the acquisition of title through adverse possession, or a combination. The purpose of this analysis is to develop a 'taxonomy of squatting' with which one might better evaluate the law in this area.

The idea of pursuing legal scholarship through the development of taxonomies is not without its critics, both within and beyond the UK legal academy.[10] In the context of English property law, the activity of classification has become

5 See *Adverse Possession*, a Report by the British Institution of International and Comparative Law for Her Majesty's Court Service (September 2006), which outlines the key principles across a range of ECHR and common law jurisdictions.

6 K. Gray and S. F. Gray, *Elements of Land Law* (Oxford: Oxford University Press, 4th ed, 2004) para 6.50.

7 *J. A. Pye (Oxford) Ltd* v *Graham* [2002] UKHL 30 at [2] *per* Lord Bingham.

8 *J. A. Pye (Oxford) Ltd* v *Graham* [2000] Ch 676, 709–710.

9 Law Commission, *Land Registration for the 21st Century: A Conveyancing Revolution* (Law Com No 271) (London: HMSO, 2001) para 10.5.

10 See, for example, D. Campbell, 'Classification and the Crisis of the Common Law' (1999) 26 JLS 369; P. Jaffey, 'Classification and Unjust Enrichment' (2004) 67 MLR 1012; G. Samuel, 'English Private Law: Old and New Thinking in the Taxonomical Debate' (2004) 24 OJLS 335.

strongly associated with the Birksian taxonomy of private law,[11] which, briefly stated, sought to identify a series of discrete categories into which legal rights, obligations, claims and outcomes would be 'mapped', to evaluate the 'rightness' of a decision by its ability to fit into the appropriate category, and to use the resulting taxonomy to direct the future development of the law along certain rational, clearly identified channels. This article does not purport to contribute to this project: as the 'keepers of the squatting taxonomy'[12] it is not our goal to set out a 'rational taxonomy' of legal responses to squatting, or of adverse possession, but rather to set out a 'formal taxonomy' through which we can better understand the complex and significant twists and turns which the law has taken in this field in recent years.

The purposes of such a 'formal taxonomy' were usefully explored in a recent paper, in which Emily Sherwin analysed the role and function of legal taxonomies.[13] Sherwin considered two competing models of legal taxonomy: (1) the 'reason based taxonomy' applied by Professor Birks, whereby legal rules and decisions are classified according to 'legal principles', and the resulting taxonomy is employed to determine future decision making, and (2) the 'formal taxonomy', a process by which efforts are made to classify legal materials according to rules of order and clarity. Sherwin noted that while a reason-based taxonomy seeks to identify 'high-level decisional rules', formal taxonomy 'serves less ambitious objectives, such as facilitating legal analysis and communication'.[14] For formal taxonomy, the key objective of mapping legal provisions, principles or decisions was articulated by Sherwin as based in a recognition that: '[c]lassification plays a necessary role in legal analysis: to think and argue clearly about law, we need to organize the raw material of legal rules and decisions into more general categories. Yet, surely these general categories should correspond to the *reasons* that under lie the law. Only then will they be of practical use as guides to legal decision-making.'[15]

This paper begins the construction of a formal taxonomy of legal responses to unauthorised occupation in England and Wales. We believe it is a timely exercise given recent developments in both legislative and judicial policies in the UK which have dramatically altered legal responses to squatting and, particularly, to adverse possession. On the one hand, the Land Registration Act 2002 (LRA 2002) set out a new legal framework for the regulation of title in registered land which has effectively curtailed the operation of adverse possession in favour of squatters,[16] described by one commentator as 'the emasculation of adverse possession in

11 See, for example, P. Birks, *English Private Law* (Oxford: Oxford University Press, 2000) vol 1, xxxv-xliii; P. Birks, 'Definition and Division, A Meditation on *Institutes* 3.13' in P. Birks (ed) *The Classification of Obligations* (Oxford: Oxford University Press, 1998); P Birks, 'Equity in the Modern Law' (1996) 26 *Western Australian Law Review* 1.

12 Birks refers to 'the keeper of the trusts taxonomy', for example, in section IV.D of his lecture 'Equity, Conscience, and Unjust Enrichment' published at (1999) 23 *Melbourne University Law Review* 1.

13 E. Sherwin, *Legal Taxonomy* (Cornell Law School Legal Studies Research Paper Series, Paper 47, 2006) at http://ssrn.com/abstract=925129 (last visited 12 June 2008).

14 *ibid* Abstract.

15 *ibid* 4, emphasis added.

16 See, for example, M. Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] Conv 136; M. Dixon, 'Adverse Possession and Human Rights' [2005] Conv 345, 351; M. Dixon, 'Adverse Possession in Three Jurisdictions' [2006] Conv 179.

relation to registered land.'[17] Perhaps most interestingly, this 'Velvet Revolution' was achieved with no effective opposition either within the property law community, or in any wider public forum.

In a recent article,[18] the present authors analysed the impact of the LRA 2002 on the doctrine of adverse possession in registered land. This article argued that the reforms set out in that Act, while presented as a practical response to the incongruities between 'title by registration' and acquisition of title by squatters, also implemented a contentious moral agenda in relation to advertent squatters and to absent landowners. Furthermore, it was noted that while these provisions will have important practical and philosophical consequences, the Law Commission has attempted to close off any prospect of further debate on the subject, without explicit consideration of important contextual matters, for example, the contemporary social and housing issues associated with urban squatting, or the matrix of moral issues at stake in such cases. Yet, the implicit emergence of a moral agenda in relation to adverse possession in English law raises important issues relating to the treatment of the squatter as essentially a wrong-doer. Having established the role of the moral agenda in the LRA 2002, in this article we seek to begin the process of delineating the moral content of legal frameworks regulating unlawful occupation, in a 'taxonomy of squatting'.

This project is important, not only as a means of analysing the provisions of the LRA 2002 relating to adverse possession, but also as a tool for mapping the judicial role in the constructions of squatter and landowner in cases of unlawful occupation. In the recent *Pye* litigation, both the English courts and the European Court of Human Rights have appraised the doctrine under Article 1 of the First Protocol to the European Convention of Human Rights. These developments have played a significant role in the re-construction of legal responses towards the activity of squatting, and the acquisition of title by adverse possession. However, the obvious contestation between various judges in these cases, exemplified by the Grand Chamber's rejection of the earlier European Court of Human Rights judgment, indicates a debate that has clearly not been resolved at the highest levels.

In identifying a series of squatting taxonomies, this paper views the activity of squatting broadly, and focuses on legal responses to both the *use* of property and the acquisition of *title* through adverse possession. The object of the exercise is not to attempt to fit the law into a rational scheme,[19] as a 'reason-based taxonomy' would require, but rather to pursue what Sherwin describes as a 'formal taxonomy', that is, by mapping the range of legal materials which deal with squatting issues in order to better understand 'the purposes and principles that animate legal decision making.'[20] For this reason, the discussion focuses on the discursive tropes that underlie the various responses to unlawful occupation in contemporary English law. This analysis is necessary, in part, because these responses are scattered across legal topics, both public law and private law. Nevertheless, several common

17 *ibid* Dixon (2003), 150.
18 Above n 2.
19 See Sherwin, above n 13, 2, describing the English taxonomical debate in the context of restitution and unjust enrichment.
20 *ibid* 4.

themes can usefully be mapped across these contexts. These themes include questions of *fault* on the part of both the squatter and the dispossessed landowner, and the *hardship* likely to be occasioned upon each party in the event of alternative legal outcomes.

Legal responses to unlawful occupation, broadly defined, can be categorised across these fields of legal regulation, by focusing on four central factors which we have identified as significant in English law. The first of these is the identity of squatters as they have been constructed within legal discourses in the UK: the legal construction of squatters in English law presents particularly interesting scope for analysis in light of the strength of the negative social construction of unlawful occupation, evidenced not least by media portrayals of squatters, whether in relation to their use of land, or the acquisition of title through adverse possession.[21] The second factor relates to the type of property subjected to unlawful occupation, which can range from empty residential (publicly or privately owned) property to commercial property, urban or rural property, and, of course, also including what are often very small amounts of property in the context of boundary disputes. The third factor is the squatter's motivation for committing the trespass – and law's response to this: whether the trespass is committed under a mistake, as may be the case in a boundary dispute; with a view to deliberate acquisition of title; or with the intention to *use* the land for the time being, perhaps because the squatter has nowhere else to live. The fourth and final factor is the legal response, across the range of principles and policies considered in this paper, to the conduct of the landowner: that is, whether the landowner is regarded as blameworthy or at fault.

By organising our discussion around these four variables, we hope to identify coherent patterns in the law – a 'formal taxonomy' – with a view to enhancing legal analyses and evaluations of recent and significant shifts in the law and policy of adverse possession. Once again, these taxonomies are not intended to identify legal principles which would act as a constraint on future legal decision making; rather the object is to shed light upon the moral principles that we believe to be implicit in both legislative and judicial policy. In the following sections, we seek to organise the diverse legal materials relating to squatting and adverse possession across the ambit of English law as they can be positioned against the matrices of *fault* and *hardship*. We then proceed to consider how this taxonomy can help us contextualise recent judicial pronouncements in the House of Lords and the European Court of Human Rights, in the context of the *Pye* litigation.

LEGAL RESPONSES TO UNLAWFUL OCCUPATION

The provisions by which the activities of squatters are regulated in law are scattered across a wide range of legal contexts. This section focuses on the ways in which this multiplicity of contexts obscures a range of underlying attitudes

21 See Cobb and Fox, above n 2, footnote 4 and associated text; see also K. Green, 'Citizens and Squatters: Under the Surfaces of Land Law' in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998).

	Economic efficiency	Housing need	Squatters constructed as a social problem?	Morality	What is at stake: Title or Use?
Criminal	NO	NO	YES	**YES (role of moral perspective for criminal law)**	USE
Housing	YES (need to effectively utilise housing stock)	YES (only housing policy is concerned with housing need)	YES	**YES (immorality of jumping the queue)**	USE
Property (limitation)	YES (resonates with values of property law)	NO	NO (principle of limitation ostensibly neutral to squatter as social problem)	**NO (ostensibly neutral to moral question)**	TITLE
Property (registered land after LRA 2002)	YES (resonates with values of property law especially in registered land)	NO	YES	**YES (re-emergence of moral agenda in reforms of LRA 2002)**	TITLE

Figure 1 – The 'meta-map' of legal responses to squatting in English law

towards the activity of squatting and towards the morality of both the squatter and the dispossessed landowner. This focus on morality reflects the central, but implicit, impact that moral perspectives – whether in relation to the squatter's unlawful occupation or the landowner's fault or neglect in failing to effectively supervise the land – have had on recent developments in the law of adverse possession. This section begins by mapping the law regulating unlawful occupation as it has developed in the context of criminal law, housing, and property law. The following section will then consider the role of human rights discourse, as manifested through the *Pye* litigation, in transplanting constructions of the squatter and the dispossessed occupier in English law, into a broader international forum.

Although this paper embarks on the process of classifying law's approaches to unlawful occupation by focusing on morality, it is important to emphasise that this is only one aspect of what we see as a wider 'meta-map' of legal regulation in this context. As Figure 1 indicates, across the spectrum of English law, legal discourse has emphasised a range of competing (and overlapping) perspectives on unlawful occupation: the need to act in the interests of economic efficiency, to respond to the problem of housing need, to treat squatters as a 'social problem' to be addressed through law and policy, or to focus on the (im)morality of unlawful occupation. It is also useful to bear in mind that, across these contexts, the objective of regulation varies: so, for example, while both the criminal law and housing are concerned with the activity of squatting as it impacts on the *use* of land, property law is primarily concerned with the consequences of squatting in relation to the acquisition of title through adverse possession.

The primary role of the meta-map is to highlight the ways in which legal discourses concerning squatting are moulded by the values and priorities of different branches of the legal system. For instance, the criminal law approach to squatting has developed to reflect a continued moral panic around the 'urban squatter'. In contrast to this, the housing perspective places considerably more emphasis on the importance of economic efficiency in the use of land, particularly residential property, and the need to ensure that property is effectively utilised to serve housing needs. We also consider the impact of the LRA 2002 by identifying the way in which the shift in property law's approaches to squatting has reflected both the construction of squatters as a social problem and the emergence of a new morality agenda in relation to adverse possession.

Criminal law

Despite the popular perception of squatting as a criminal activity, often criticised as being tantamount to 'land theft', squatting, *per se*, is not a criminal offence in English law. Although squatters commit the tort of trespass, this usually constitutes a civil and not a criminal trespass, remediable by the landowner bringing a private action against the squatter in the form of a claim for the recovery of land.[22] Indeed, when a group of squatters took up residence in a former police station at Arbour Square in East London in 2004, Scotland Yard spent several months attempting to recover possession of the property in order to sell the land to a developer.[23] While the squatters flew a skull-and-cross-bones flag at half-mast over the building, the police were powerless to use force against the unlawful occupiers. Once squatters have effectively taken possession of property as their home, it is an offence to: 'use or threaten violence to secure entry to any premises when it is known that there is someone present on the premises who is opposed to the entry';[24] which means that unless the squatter voluntarily yields up possession, the landowner must obtain a court order before it will be possible to recover the land.

The only circumstance in which squatting has been criminalised in English law (as a criminal trespass), and where the police have enhanced powers to act,

22 Under Pt 55 of the Civil Procedure Rules 1998, SI 1998/3132. See also Sch 1, Ord 24 and Ord 113. This procedure can be 'fast-tracked', particularly if use is made of an interim possession order, allowing a hearing within three days of the application. The squatter is guilty of a criminal offence if he fails to leave on being served with an interim possession order, returns to the property to which the order applies within 12 months, or knowingly or recklessly gives false information in order to obtain or resist such an order; Criminal Justice and Public Order Act 1994, ss 75 and 76. Although the new criminal offence of 'aggravated trespass' was created in 1994, it applies only in limited circumstances, when a person trespasses on land, when a lawful activity is taking place on that land or land nearby, and the trespasser does anything to intimidate, obstruct or disrupt that activity; Criminal Justice and Public Order Act 1994, s 68. This provision is often used in response to large scale trespasses, for example, travellers in unauthorised encampments or protesters, and raises many further issues for the squatting taxonomy of which limits of space prohibit exploration in this article.

23 S. O'Neill and N. Woolcock, 'Squatters find police station is good home without any charges' *The Times* 17 January 2005; available online at http://www.timesonline.co.uk/tol/news/uk/article413446.ece (last visited 12 June 2008).

24 Criminal Law Act 1977, section 6.

CRIMINAL LAW	**Fault**	**Hardship**
Squatter	Squatter at fault for forced dispossession of occupied property	Not relevant
Landowner	Dispossessed landowner in occupation, not neglectful, so not at fault	Loss of an occupied home would constitute severe hardship

Figure 2 – The Criminalisation of Squatting: Criminal Justice and Public Order Act 1994

is when squatters displace the occupiers of residential properties.[25] These provisions do not apply to non-residential, or empty residential properties, where the control of squatting is left to the civil law. The criminalisation of squatting in only these limited circumstances bears some useful analysis in relation to the four key factors identified in the introduction to this paper. Furthermore, as Figure 2 demonstrates, this analysis can in turn be mapped in terms of the 'fault' of each party – the squatter and the landowner – and the 'hardship' each will suffer, depending on the nature and extent of legal intervention.

First, in relation to the identity of the squatter, criminal law regulates squatting *only* when the squatter displaces an occupier from the home which they currently occupy. The criminal law's focus, then, is firmly upon a particular type of squatter: the 'urban squatter', who squats deliberately, and predominantly in empty residential housing stock. Thus, as criminal law responds to concerns about law and order, from drug dealing to arson, dereliction, vandalism, and litter – what Wates and Wolmar described as the: '. . . popular mythology . . . that all squatters are parasitic deviants who steal people's houses and constitute a threat to everything decent in society'[26] – it is perhaps not surprising to find, within the criminal law, an emphasis upon the immorality of squatting and on this type of squatter as a social problem. This approach is also reflected in a report published by the Home Office in 1991, which stated that:

> [t]here are no valid arguments in defence of squatting. It represents the seizure of another's property without consent . . . The Government does not accept the claim that is sometimes made that squatting is a reasonable recourse of the homeless resulting from social deprivation. Squatters are generally there by their own choice, moved by no more than self gratification or an unreadiness to respect other people's rights.[27]

In these circumstances, it is clear that *fault* is firmly fixed upon the squatter, especially vis-à-vis a landowner who is, at the time, in occupation of the property.

25 See Criminal Justice and Public Order Act 1994, ss 72-76, amending the Criminal Law Act 1977. For this purpose, the 1977 Act designates two types of displaced occupier: the displaced residential occupier and the protected intending occupier. It is a criminal offence for a squatter to fail to leave premises when either of these individuals demands that they do: Criminal Justice and Public Order Act 1994, s 73, modifying Criminal Law Act 1977, s 7.

26 N. Wates and C. Wolmar (eds), *Squatting: The Real Story* (London: Bay Leaf, 1980) 3.

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

The type of property to which this provision applies is also significant: only occupied residential property – that is, property which is currently in use as a home – is protected in this way by the criminal law. Displacement from one's home, distinct from displacement from any other type of property – is likely to cause particularly serious hardship to the landowner.[28] Yet, when considering the squatter's motivation for trespass (and despite the arguments that might potentially be made in this context relating to homeless squatters), hardship for the squatter is not regarded as a relevant factor by the criminal law. Although squatters who target residential property often do so because they wish to use the property for accommodation, in some cases because they are homeless, to do so at the expense of someone else's home is, for English law, the trigger for criminalisation. Finally, we note that a landowner who is directly displaced from current occupation of the property cannot be regarded as being at fault since he or she has not been careless, has not neglected or abandoned the property, but was making appropriate use of the property as a home at the time of the dispossession.

The housing context

One of the principal tensions in relation to unlawful occupation in the housing context is between the *use* of property by squatters, the *non-use* of empty homes by landowners, and the implications of both for the housing allocation process. The problem of 'empty homes' has been identified as a key political issue, particularly in light of rising house prices and indications that there are currently around 78,000 families living in temporary accommodation in England and Wales;[29] that 3.8 million new households are estimated to be in need of accommodation by 2016;[30] and that properties currently lying empty could potentially offer around 600,000 new homes, almost 100,000 of these in London alone, where the housing market is most saturated.[31] These market conditions provide an attractive environment for 'urban squatters', that is, squatters who unlawfully occupy empty (usually residential) property for use as accommodation.[32] Against the backdrop of the empty homes debate, it might be considered that the hardship associated with (risk of) homelessness provides a degree of moral justification for urban squatting. Yet it is clear that, for English law, when a person squats because of homelessness (or, as was often the case in London in the 1960s and 1970s, for political reasons relating to housing management), from a housing perspective, as from a criminal law perspective, he or she is regarded both as a social problem and as personally blameworthy.

28 See L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart Publishing, 2006), particularly chapter 3 which discusses the impact of dispossession and displacement from an occupied home. Of course, the impact of these powers is debatable, since it seems highly unlikely that an urban squatter would target occupied housing.

29 See *More than a Roof: A Report into Tackling Homelessness* (London: ODPM, 2002).

30 *Housing Statistics: Projections of Households in England 2021* (London: DETR, 1999).

31 Information provided by local authorities to the Department for Transport, Local Government and the Regions (DTLR) on Housing Investment Programme returns; see the website available at http://www.emptyhomes.com (last visited 12 June 2008).

32 See Cobb and Fox, above n 2, text accompanying nn 65–76.

However, the reasoning behind this allocation of fault differs fundamentally in the housing context, compared to that which emerged in the context of crime control (see Figure 3). First, while urban squatting has been linked, historically, to protest at the perceived injustices of local authority housing allocation procedures,[33] housing policy inevitably favours a principled, bureaucratic system of housing allocation, which can take account of factors such as need or welfare interests, over the 'who dares wins' of urban squatting.[34] Furthermore, urban squatting of empty homes has been identified as a *barrier* to bringing these vacant properties back into official 'use'.[35] The presence of squatters is said to render the 'emptiness' of the property less evident to the local authorities which are now charged with a clearly defined duty to maintain and enhance the health of the housing market, including identification of empty properties, across a range of tenures.[36] In particular, local authorities owe a statutory enforcement duty to impose Empty Dwelling Management Orders where owners either cannot be identified or are unwilling to bring the property back into use.[37] Finally, the construction of urban squatting within housing policy as a serious social problem is tied to concerns about the impact of squatters on neighbourhoods, as a reflection of the historic connection between urban squatting and neighbourhood 'anti-social behaviour'.[38]

Yet, the Empty Homes agenda also appears to confer a degree of responsibility upon landowners for their failure to ensure the use of their vacant properties. Government literature in this area alludes to the problem of wasting resources and specifically housing. In 2006, the Department of Communities and Local Government stated that: '[w]e recognise that each empty property is a wasted resource from the point of view of the owner, a wasted opportunity from the point of view of a developer and a wasted asset from the point of view of Local Authorities charged with bringing forward sufficient land and housing to meet projected housing needs.'[39] The emphasis on wastefulness can be read as implying that landowners who leave their property empty have failed in some broader duty towards society as a whole, by squandering the valuable contribution that the housing resource holds for the well-being of communities, as a resource for use, for economic regeneration, and (in part, by preventing the growth of squatting) for neighbourhoods. The website for the Department for Communities and

33 D. Cant, *Squatting and Private Property Rights* (London: UCL, 1978). See Cobb and Fox, *ibid*, text accompanying nn 46–49.

34 The attitude of the English courts has been clear and consistent since the decision in *Southwark London Borough Council* v *Williams* [1971] 1 Ch 734, when the Court of Appeal famously held that necessity was no defence to trespass by homeless people who were squatting in empty council houses during a severe London housing shortage in the 1970s. The availability of a system of public housing was used by Lord Denning to strengthen his argument.

35 See Office of the Deputy Prime Minister, *Empty Property: Unlocking the Potential: An Implementation Handbook*, (London: HMSO, 2006) section A1.2, 19.

36 These duties are set out in the Local Government Act 1999 and the Housing Renewal Regulatory Reform Order 2001.

37 See Office of the Deputy Prime Minister, *Empty Dwelling Management Orders: Consultation on Secondary Legislation* (London: HMSO, 2005).

38 See above, text accompanying n 18.

39 DCLG, *Empty Property: Unlocking the Potential – A Case for Action* (London: HMSO, 2006) Ministerial Forward, 5.

HOUSING	**Fault**	**Hardship**
Squatter	Squatter at fault for avoiding allocation process and for damaging communities	Some hardship but addressed through allocation process
Landowner	Landowner at fault for leaving property vacant	Little hardship as property is not in use

Figure 3 – Housing: the 'empty homes' agenda

Local Government clearly sets out that department's concerns with empty properties, which is worth quoting at length:

> Anyone who is unfortunate enough to have lived next door to a property that has been left empty for a long period of time will understand the sheer frustration and misery such a situation can create. Poorly maintained empty properties are not only unsightly and unattractive, they seriously reduce the value of adjoining properties.
>
> As the government department responsible for shaping housing policy in England, how the existing housing stock is used falls squarely within Communities and Local Government's remit. It is important to maximise use of the existing housing stock so that we can minimise the number of new homes that need to be built each year, particularly in areas of the country where housing demand is high, such as the south east of England.
>
> Empty homes not only restrict housing supply, they also detract from the quality of the local environment and can cause significant problems for local residents. Poorly maintained empty homes attract vermin, cause damp and other problems for neighbouring properties and are magnets for vandals, squatters, drug dealers and arsonists.[40]

From this perspective, landowners who allow their properties to lie empty are constructed less as 'victims' who experience hardship at the hands of squatters, than as acting 'at fault' vis-à-vis neighbouring occupiers, owners, the neighbourhood, and society at large (through the correlation made between empty properties and anti-social behaviour), and, crucially, as failing to make effective use of the housing resource. The development of the Government's 'Empty Homes' agenda has important implications for the proposition that landowners who leave their property lying empty and unsupervised are morally blameworthy. This allocation of fault to the landowner will be contrasted with the idea of the 'blameless landowner', who cannot be expected to identify and remove squatters from his or her premises, in the context of the reform of adverse possession in registered land, considered further below.

40 http://www.communities.gov.uk/housing/housingmanagementcare/emptyhomes/frequentlyaskedquestions/(last visited 12 June 2008).

Adverse possession and the traditional principles of limitation

The doctrine of adverse possession is perhaps the most controversial aspect of the legal regulation of squatting, because it ultimately relates to a squatter not merely using, but securing legal title to a landowner's property. The operation of the doctrine of adverse possession formed the basis of the *Pye* litigation, which is considered in detail in later sections of this article. In theory, the traditional doctrinal approach to adverse possession under the Limitation Act 1980[41] was ostensibly neutral to the social contexts considered in this paper, and to the themes of fault and hardship: once the necessary criteria were in place – that the true owner was out of possession, the squatter was in possession and that the possession was 'adverse' – the 'clock' would start against the landowner. If the squatter remained in adverse possession of the land for a period of twelve years, a combination of the limitation principle (whereby the landowner's right of action to recover the land was usually extinguished),[42] and the doctrine of relativity of title, meant that the squatter acquired an effective status of 'irremovability' against both the landowner and (by relativity of title) any other parties seeking to establish possession. Furthermore, these principles applied across the full range of circumstances in which unlawful occupation of land took place: factors such as the identity of the squatter, the nature of the property, the squatter's motivation for trespass and the conduct of the landowner were ostensibly irrelevant.

Yet, while this 'one size fits all' approach to adverse possession by limitation did not appear to distinguish between different circumstances of squatting, it is clear that the doctrinal definitions of 'possession', 'intention to possess' and 'adverse' did give the courts some scope to respond to the context of the unlawful occupation. In fact, we would agree that 'judicial reluctance to assist squatters has manifested itself in a number of different ways.'[43] For example, when considering whether the squatter has established factual possession of the property, English courts are typically reluctant to find the true owner to be out of possession if there is any evidence that he or she is still in control of the land.[44] The presumption of lawful possession means that the slightest acts of control by the landowner will generally suffice to indicate that he or she is still in possession of the property.[45]

Similarly, restrictions on the potential for successful claims of adverse possession have developed through the requirement that the squatter's possession must be adverse. The 'implied licence' theory, applied in a series of cases from the late nineteenth century,[46] was based on the proposition that, in order to be 'adverse', the squatter's possession must be inconsistent with the landowner's future plans for the use of the land – otherwise, the landowner was deemed to have granted

41 Which still applies to unregistered land in England and Wales.
42 Limitation Act 1980, s 15.
43 O. Rhys, 'Adverse Possession, Human Rights and Judicial Heresy' [2002] Conv 470, 471.
44 See, for example, *Powell* v *McFarlane* (1979) 38 P&CR 452, 470; *JA Pye (Oxford)* v *Graham* [2003] 1 AC 419 at [70] *per* Lord Hope.
45 *Powell* v *McFarlane* (1977) 38 P&CR 452 at 472, *per* Slade LJ; *Lambeth LBC* v *Blackburn* (2001) 82 P&CR 494 at [19] *per* Clarke LJ.
46 *Leigh* v *Jack* (1879) 5 Ex D 264; *Wallis's Holiday Camp* v *Shell-Max* [1975] 1 QB 94 (CA); see *Powell* v *McFarlane* (1977) 38 P&CR 452 for criticism of this principle.

an implied licence to the squatter, so rendering his or her possession to be by permission rather than adverse. This seems to support a construction of the landowner as tending to leave land unused for good economic reasons, for example because of future plans for development: thus, the landowner is not at fault for leaving the land unused for the time being, making the loss of title to the land (and the opportunity to carry out the future plans) a disproportionate hardship. The 'implied licence' theory was significantly restricted in the Limitation Act 1980,[47] and the English courts initially responded by co-operating in the curtailment of the doctrine.[48] The High Court's recent attempt to revive this doctrine in *Beaulane Properties Ltd* v *Palmer*[49] can, however, be viewed as in accordance with the current trend towards a greater role for fault- and hardship-oriented policies in English adverse possession law.

Yet, in a number of other ways there appears to be evidence that courts have supported the squatter vis-à-vis the landowner. Specifically, it seems to be the case that the idea of a 'duty of stewardship' through effective scrutiny of one's land carried some weight in the pre-2003 system of adverse possession. For instance, in *Purbrick* v *Hackney London Borough Council*,[50] Neuberger J concluded that 'it is to some extent implicit in the present law of adverse possession, that an owner of property who makes no use of it, whatever, should be expected to keep an eye on the property to ensure that adverse possession rights are not being clocked up. A period of 12 years is a long period during which to neglect a property completely.'[51] Where the landowner has made *no* effort to control the land, it is easier both to view the landowner as bearing some blame for the loss of the land, and to consider the burden of hardship relatively lighter than it would be were the landowner still at least attempting to secure his possession. Reciprocally, this could also be regarded as giving the squatter in this context – who may be viewed as less blameworthy since he or she is making use of land over which the owner has failed to exercise control – a morally stronger claim to eventual title.[52]

One variable that could have enabled the courts to pursue a more explicitly moral approach to adverse possession is the distinction between 'good faith' and 'bad faith' adverse possession. The good faith/bad faith distinction is employed in many jurisdictions[53] to distinguish between squatters who are deemed to bear fault in relation to the unlawful occupation because of their deliberate intrusion upon another's property (bad faith trespassers), and those who are innocent of any wrongdoing because they are unaware that they have trespassed (good faith trespassers). English courts have never explicitly departed from the position that, for the purposes of *animus possidendi* in English law, the distinction between innocent

47 Limitation Act 1980, Sched 1, para 8(4), which provides that there shall not be an implied licence due solely to the fact that occupation is not inconsistent with the future use of the property.

48 See, for example, *Buckinghamshire County Council* v *Moran* [1990] Ch 623; *JA Pye (Oxford) Ltd* v *Graham* [2002] 3 All ER 865.

49 [2005] EWHC 1460; the decision in *Beaulane* was also rooted in the response of the English court towards the impact of the Human Rights Act 1998, discussed further below.

50 [2003] EWHC 1871.

51 *ibid* at [25].

52 See, for example, *JA Pye (Oxford) Ltd* v *Graham* [2000] Ch 676, 705G-H, *per* Neuberger J.

53 This distinction is a major theme in academic commentary and judicial reasoning in the USA – see, eg, R. H. Helmholz, 'Adverse possession and subjective intent' (1983) 61 *Washington University Law Quarterly* 331 – and underpins the law in many civil law jurisdictions.

and wilful trespass is irrelevant, thus maintaining the position that, in the context of unregistered land, the degree of fault attributed to the squatter is not a factor to be taken into account in determining title.[54] Yet, as the next section will indicate, the absence of the 'fault' trope within the context of limitation has, with the enactment of the LRA 2002, been effectively superseded by a considerably more fault-oriented approach to adverse possession in registered land.

Adverse possession and the Land Registration Act 2002

To the extent that property law was ostensibly neutral to the moral questions of fault and hardship in unlawful occupation, everything changed with the 'new legal order' ushered in with the enactment of the Land Registration Act 2002 ('LRA 2002'). The mechanics of the LRA 2002 so far as adverse possession is concerned can be briefly stated: in order for a squatter to obtain title to registered land, the squatter may, after being in adverse possession for ten years, apply to the Land Registry to be registered as proprietor.[55] Crucially, however, the squatter has no *entitlement* to be registered at this stage. The Land Registry must then respond by sending a notice to the registered proprietor (and others with registered interests in the land), informing them that an application has been made by the squatter.[56] Recipients of such a notice are given 65 business days in which to object to registration of the squatter as proprietor, and it is, generally, only if there are no objections that the squatter will be registered with title to the land at this stage.[57]

These provisions have been described as 'the emasculation of adverse possession in relation to registered land',[58] and as signalling '. . . the end of adverse possession as a threat to the security of registered title, save in cases where the registered proprietor genuinely has no use for the land (and does not wish to keep it).'[59] Where a landowner does object to the registration of the squatter as proprietor, there are two possible outcomes. If the circumstances fall within one of the exceptions set out in Schedule 6, paragraph 5 – that is, that the squatter has an estoppel in his or her favour; that the squatter has some other entitlement to be registered (eg an estate contract, inheritance); or the dispute concerns a boundary; then the squatter can be registered as proprietor even though the landowner has objected. On the other hand, if the squatter's application does not fall within one of these limited exceptions, and the registered proprietor does not take steps to physically remove the squatter (ie by issuing a writ for possession) within a further 2 years then the squatter can re-apply to the Land Registry, at which point the squatter will be entitled to be registered as proprietor.

The reforms to the law of adverse possession in the LRA 2002 were primarily justified within the context of the Act as a whole, which sought to sharpen the system of registered land, to become a system of title by registration (as opposed to registration of title). However, the Law Commission papers that preceded the

54 See, for example, *Prudential Assurance Co Ltd* v *Waterloo Real Estate Inc* [1999] 2 EGLR 85, 87.
55 LRA 2002, s 97 provides that a squatter may apply to the Land Registry to be registered as the proprietor of an estate in land in accordance with Schedule 6.
56 LRA 2002, Sched 6, para 2.
57 *ibid* para 3.
58 Dixon (2003), above n 16.
59 *ibid* 151.

Act[60] also disclosed a strong moral stance on the immorality of squatting,[61] which undoubtedly had a powerful impact on both the proposals themselves and the relative lack of opposition with which they have been met, both before and after enactment.[62] The language of the Law Commission's analysis clearly portrayed the squatter as being at fault – for example, in the Commission's observation that: '[i]t is, of course, remarkable that the law is prepared to legitimise such "possession of wrong" which, at least in some cases, is tantamount to sanctioning a theft of land.'[63] The landowner, on the other hand, was constructed as a blameless character, in need of protection from the Land Registry, even when he or she might arguably have been regarded as being 'at fault' due to a failure to effectively scrutinise the land. The explicit emphasis on the register as the driving force behind the reform of adverse possession in England and Wales also supported the Law Commission's approach to hardship in relation to the landowner, epitomised by the risk that a landowner could lose title to registered land, against the backdrop of the Land Registry's guarantee of title.[64]

It is useful to map the exceptions to the erosion of adverse possession in the LRA 2002 against the fault/hardship matrix. The LRA 2002 identified three circumstances in which the squatter could be registered as proprietor on a ten-year application: where there is an estoppel in favour of the squatter; where the squatter has a beneficial entitlement to the property by some other means (eg an estate contract or by inheritance), and where the dispute concerns a boundary and both the claimant squatter and the landowner were mistaken as to the position of the boundary.[65] When considering the identity of the squatter, the nature of the property, the squatter's motivation for trespass and the conduct of the landowner, it is possible to track how the fault/hardship balance shifts from the landowner to the squatter in each of these cases. For example, when considering the squatter's motivation for trespass, it is significant to note that, in all three cases, these squatters are likely to have acted in good faith.

First, in relation to estoppel, a squatter who can establish an estoppel against the landowner has already shown both that the landowner's conduct adduces some ele-

60 Law Commission, *Land Registration for the 21st Century: A Consultative Document* (Law Com No 254) (London: HMSO, 1998). See also Law Commission, *Land Registration for the 21st Century: A Conveyancing Revolution* (Law Com No 271) (London: HMSO, 2001).

61 See Cobb and Fox, above n 2.

62 The present authors are happy to join Martin Dixon, who described himself as being: '(possibly in a minority of one) [in that he] regards the reform of the process of adverse possession by the 2002 Act as an unnecessary and economically unjustified "bolt on" to the reform of registered land'; Dixon (2005) above n 16, 351. See Dixon (2006), above n 16 for further criticism of the LRA 2002 reforms in relation to adverse possession.

63 Above n 60 (1998), [10.5]. It is interesting to note that the Law Commission's reform proposals were formulated against the backdrop, and with an awareness, of the line of recent cases in which squatters had successfully claimed title to local authority properties: see for example, *Lambeth London Borough Council* v *Archangel* [2002] 1 P&CR 18; *Lambeth London Borough Council* v *Bigden* (2001) 33 HLR 43; *Lambeth London Borough Council* v *Blackburn* (2001) 82 P&CR 494. These cases highlighted the inter-relationships between the housing issues discussed above and the reform of the property law principles of adverse possession in registered land, as the concerns of the criminal law and housing discourses were brought to bear on land law discourse.

64 The issue of guarantee of title underpinned many of the arguments raised in the *Pye* litigation; see below.

65 LRA 2002, Schedule 6, para 5.

ment of fault (by making a representation or giving encouragement to the squatter concerning the ownership of the land), and that the squatter can be identified as not at fault – since by analogy with equitable estoppel, the squatter who fits within this exception can be viewed as needing 'clean hands'. Although the hardship of not having (use of) the land is potentially significant for both parties, the squatter appears to have a stronger claim to hardship in light of ten years or more of possession without fault, as well as the hardship argument based on preserving the status quo: that is, that the squatter is currently in occupation of the property.[66]

Secondly, in relation to the squatter who has an entitlement by some other means, it is significant that, again, the squatter cannot be regarded as being 'at fault', even though the failure to complete by registration may have been the squatter's omission, since his or her pre-existing beneficial entitlement means that, in substance, the lack of registered title can be viewed as a technicality. Perhaps more significantly, the balance of hardship is particularly striking in this context: since the squatter's entitlement to the land amounts to an equitable interest which was acquired outside the context of the adverse possession, and the landowner's interest is more akin to the position of a trustee, the hardship to the squatter, should the Land Registry fail to recognise his or her claim would be much greater than any hardship to the registered title holder.

A similar picture emerges in relation to boundary disputes – with the added implications of dealing with what are in reality likely to be very small amounts of land. The 'squatter' has acted in good faith – so without fault – under a mistaken belief as to the location of the boundary. Similarly, the hardship to the landowner must be small, since, in order for the exception to apply, the registered proprietor must have shared this mistaken belief.

Taken together, the general rule following the LRA 2002, and the three exceptions to this general rule, represent a new moral matrix underpinning the English law of adverse possession after the 2002 Act, along axes of fault and hardship, as Figure 4 illustrates. However, enactment of the 2002 Act is by no means the end of the story so far as the construction and reconstruction of the taxonomy of adverse possession for English law is concerned. In the next section, we analyse another important dimension of the new legal order of adverse possession in England by considering the relationship between this domestic taxonomy of the English law of adverse possession, and the recent high-profile litigation brought to the European Court of Human Rights by English landowners, property development company *J.A. Pye (Oxford) Ltd.* Spanning over seven years, the *Pye* litigation was considered by the Court of Appeal and House of Lords before reaching the European Court of Human Rights and was recently concluded, in favour of the UK government, with the judgment of the Grand Chamber of that court in August 2007.

66 As David Hume once reasoned, '[m]en generally fix their affections more on what they are possess'd of than on what they never enjoyed . . . it would be greater cruelty to dispossess a man of anything than not to give it to him.' D. Hume, *A Treatise of Human Nature: being an attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* (London: Allman, 1817) Book III, Part II, Section 1.

LRA 2002 – GENERAL	Fault	Hardship
Squatter	Squatter at fault (only 'bad faith')	Not relevant
Landowner	Landowner not at fault (unreasonable burden)	Loss of title a major concern
ESTOPPEL		
Squatter	Squatter not at fault	Potentially large – and is in occupation of the property
Landowner	Landowner at fault	Potentially large hardship from loss of title to land
OTHER (BENEFICIAL) ENTITLEMENT		
Squatter	Squatter not at fault	Potentially large as the squatter is in occupation and entitled to ownership in equity
Landowner	Landowner not at fault	Little hardship as no equitable entitlement and not in occupation
BOUNDARY DISPUTE		
Squatter	Squatter not at fault	Hardship due to mistaken belief in rightful ownership
Landowner	Landowner not at fault	Little hardship as landowner also mistaken

Figure 4 – Land Registration Act 2002, general rule and exceptions

The *Pye* litigation has brought to the fore important issues concerning the way in which European human rights law engages with the doctrine of adverse possession, including, specifically the central importance attributed to the context of the new (domestic) legal order of adverse possession and registered land in England. It has divided the European Court of Human Rights, reflected most clearly in that court's competing appraisals of the UK's own moral claims about the doctrine. Furthermore, competing deployments of the principles and concepts of European jurisprudence, such as the margin of appreciation granted to member states, hint at the tensions between alternative approaches underpinning the majority and dissenting opinions in both the Chamber and Grand Chamber. The analysis in the following section has two objectives. First, while the outcome of the Grand Chamber decision resonates with the argument that the reforms set out in the LRA 2002 implemented a particular moral agenda, rather than following automatically and inevitably from sharpening of the system of registered land in the LRA 2002,[67] we find the reasoning of the Grand Chamber unconvincing on its own terms. Second, we draw attention to a parallel process of reasoning within the dissenting judgements which opens up the potential for a more convincing understanding of the moral dimensions of adverse possession, which is rooted in the owner's *duty of stewardship* in relation to her land.

67 Which the present authors have also made elsewhere, see Cobb and Fox, above n 2.

HUMAN RIGHTS DISCOURSE AND THE *PYE* LITIGATION

Introducing the *Pye* litigation

The facts of *Pye* v *Graham* are well-known: J. A. Pye (Oxford) Ltd is a large land-holding company based outside Oxford, which in February 1983 entered into a written agreement with Mr and Mrs Graham, who were neighbouring farmers. The agreement allowed the Grahams to use for grazing 25 hectares of registered land belonging to the company that adjoined the Grahams' farmland. However, after the agreement came to an end, the Grahams continued to use the land, and Pye made no further effort to prevent them from doing so. In June 1997 the Grahams registered cautions at the Land Registry against the claimant's title to the land on the basis that they had obtained title by adverse possession. The land was then estimated to be worth at least £2.5 million.[68] At trial, the Grahams were found to be entitled to be registered as proprietors of the land. However, on a series of appeals before the UK domestic courts (allowed by the Court of Appeal, reversed by the House of Lords) Pye claimed that the loss of its land under the pre-2003 system breached Article 1, Protocol 1 of the European Convention, which protects the peaceful enjoyment of possessions, and that the UK Government should be required to compensate it for the resulting loss. The case reached the European Court in November 2006 and, interestingly, the decision of the Court was not unanimous; indeed, quite the opposite. A majority of only four-to-three of the original Chamber agreed that there had been a breach of the Convention by the UK Government. In response, the Government petitioned under Article 43 of the European Convention (reserved for exceptional circumstances) for the case to be brought before the Grand Chamber for a further hearing. The judgment of the Grand Chamber was released in August 2007, and in this final, fascinating stage in the *Pye* litigation, the Grand Chamber, by a split decision (10 to 7), reversed the decision of the original Court, holding that there had, in fact, been no breach of Article 1, Protocol 1 (hereafter 'P1-1').

Positioning *Pye* within the squatting taxonomies

In positioning the *Pye* litigation, it is useful to begin by noting two general points: first, that both chambers of the European Court were ultimately unconvinced by the argument levelled by the applicants that challenging the doctrine of adverse possession, derived as it was from the principle of limitation, was limited to an argument under Article 6 of the European Convention, which safeguards the individual's right to due process. The courts concluded instead that, while challenges relating to the Convention-compliance of limitation periods had been considered with respect to Article 6 in earlier European jurisprudence, this did not preclude consideration of such provisions under other articles of the Convention. The chambers also both dismissed the claim of the applicants that P1-1 was not engaged because adverse possession constituted an incident of land ownership

68 *Pye* v *UK* (Application no 44302/02) 30 August 2007 at [23]. This is the value put forward by the Government, although Pye claimed their losses at over £10 million.

imposed at the moment of acquisition. There was therefore no doubt among the judges of both courts that P1-1 was engaged by the issues raised in relation to adverse possession.

Where the Chamber and Grand Chamber differed, however, was in their respective appraisals of the compatibility of the doctrine of adverse possession with the European Convention. The broad impact of P1-1 can be briefly stated, as comprising three distinct rules:[69] the first rule states the principle of peaceful enjoyment of property; the second rule covers deprivation of possessions, and provides that deprivations can only occur subject to certain conditions; and the third rule recognises that states are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they might deem necessary for that purpose. Interference by a state with an individual's rights to property can be justified on the basis of the public or general interest. In short:

> Measures which interfere with property rights must have a legitimate aim, and must be proportionate. They must also strike a fair balance between the rights of the individual and the general interest of the community.[70]

Indeed, it is now well-established that states are granted a wide margin of appreciation to take action interfering with an individual's rights under P1-1. The European Court will accept a state's own judgment about what is in the public interest, and the appropriate balance struck in pursuit of that public interest, unless it is found to be 'manifestly without reasonable foundation'.[71]

What follows is a brief appraisal of the judgments of both the Chamber and Grand Chamber of the European Court in the *Pye* litigation, in which we begin to consider the subtly different forms of legal reasoning deployed in the majority opinions in both the Chamber and Grand Chamber, and designed to position the dispute in *Pye* within particular (competing) taxonomies of squatting. Before considering each of these competing taxonomies in detail, the following section presents three components of the European jurisprudence around P1-1 which formed the foundation for this 'taxonomical struggle'.

European jurisprudence as the basis for moral taxonomies of squatting

The majority in both the Chamber and Grand Chamber sought to derive support for their respective positions from the (moral) priorities of European jurisprudence. In doing so, the courts were particularly keen to identify whether the doctrine of adverse possession was appropriately classified for the purpose of P1-1 as either a deprivation or control of use of property. This legal distinction, it was claimed, was central to an appraisal of the legality of the doctrine because of its implications for the question of compensation for landowners affected by interference with the enjoyment of their possessions. While a deprivation of property

69 *Sporron and Lonnroth* v *Sweden* (1982) 5 EHRR 35 E Ct HR.
70 J. Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester: Wiley, 1999) at [14.8].
71 *James* v *United Kingdom* (1986) 8 EHRR 123 at [46].

required the compensation of the landowner in all but 'exceptional circumstances', they argued, the state was under no such requirement when merely controlling use. Correctly identifying the nature of the doctrine of adverse possession according to this jurisprudential distinction was therefore integral to the courts' appraisal of the hardship legitimately experienced by landowners under P1-1.

Our analysis also illustrates how the legal reasoning of the European Court was influenced, in part at least, by the UK Government's own powerful critique of the pre-2003 system. In particular, those judges opposed to the doctrine (both within the Chamber and Grand Chamber) deployed the wide margin of appreciation granted to individual states in relation to P1-1 to draw explicitly upon these domestic justifications when justifying the position of the European Court of Human Rights. Finally, the courts' moral taxonomies were influenced too by the specific facts of the *Pye* litigation. As we have argued in earlier sections, adverse possession has different moral implications, in terms of fault and hardship, depending upon the circumstances in which it operates. For example, one may judge the transfer of land ownership under the doctrine more or less justifiable given the particular characteristics and conduct of landowner and squatter. The obvious question arising from this observation, of course, is the extent to which particular scenarios can, or should, be given weight over others by the European Court when assessing the legitimacy of the mechanism overall under P1-1.

Indeed, the extent to which the general appropriateness of a complex legal mechanism like the doctrine of adverse possession can legitimately be assessed based on the specificity of its operation in a particular context has concerned the European Court in previous cases. The Court asserted in *James* v *UK* that its approach will vary depending upon the role of the state in the alleged infringement of P1-1. Where the alleged infringement is the result of an executive act by a public authority, the court will focus its attention upon the specific facts of the case. However, the approach changes when the state is challenged *qua* legislator, because the alleged infringement is the result of enforcement of that legislation by a private party.[72] In such circumstances, while the case is brought as an individual grievance, it is the court's duty to consider the compatibility of the legislative framework as a whole, rather than the specific factual context giving rise to the application to the court.

Nevertheless, in *James* v *UK*, the court went on to add that 'this does not mean the Court will examine the legislation in abstracto.'[73] Instead, the particular experience of the applicant must be treated as 'illustrative' of the impact of the legislation in practice 'and, as such, material to the issue of compatibility with the Convention.'[74] The question begged by this proviso, however, is exactly how a court is expected to strike an appropriate balance between an appraisal of the general acceptability of a legal rule and its specific (potentially severe) operation in a particular factual context. What the *Pye* litigation suggests, quite simply, is that both the Chamber and the Grand Chamber were able to manipulate the

72 *ibid* at [45].
73 *ibid* at [37].
74 *ibid* at [37].

adjudicative discretion granted to them by this rule to move between the generality and specificity of the operation of the doctrine of adverse possession to reach the desired outcome. Most importantly, as the following sections demonstrate, the specific facts of *Pye* appear to have had a considerable impact upon the Grand Chamber's appraisal of the doctrine of adverse possession as it applied in this case – to which the relevant law had been the pre-2003 provisions – particularly in relation to the issue of the landowner's fault.

The Chamber judgment[75]

The first judgment of the European Court was undoubtedly influenced by the changes to the domestic law of adverse possession in England and Wales introduced by the LRA 2002. The court explicitly noted, when assessing whether the pre-2003 system struck a fair balance between the rights of a landowner and the public interest, that: '. . . in judging the proportionality of the system as applied in the present case, the Court attaches particular weight to the changes made in that system and to the view of the Law Commission and the Land Registry as to the lack of cogent reasons to justify the system of adverse possession as it applied in the case of registered land.'[76] Accordingly, as illustrated below, for the original chamber the squatting taxonomy implicitly developed by the Law Commission (around the poles of fault and hardship) loomed large in its own appraisal of the pre-2003 system of adverse possession.

For the minority judges, this starting-point proved extremely troubling: '[w]e fear that the majority may have been swayed by the legislative changes and judicial comments, rather than trying to assess what would have been the position if, for example, the 2002 [Act] had not been passed.'[77] In truth, however, the court's reliance upon the Law Commission's construction of the doctrine is wholly understandable. Prior to the Commission's consultation paper there was a notable discursive vacuum with respect to adverse possession and registered land in English law. When the Land Registration Act 1925 – which had governed issues of adverse possession in registered land before the LRA 2002 – was enacted, the objective so far as adverse possession was concerned was to replicate, so far as possible, the system of adverse possession as it operated in unregistered land.[78] There was therefore little explicit rationalisation of the doctrine upon which the court could draw in seeking a cogent justification for the system of adverse possession within a system of registered land in the United Kingdom, other than the reform agenda which post-dated the provision under consideration, and which was dominated by the objective of achieving a more perfect system of title by registration. Significantly, this reform agenda did not allow scope for analysis of the philosophical and moral justifications that were thought to underpin the pre-2003

75 *JA Pye (Oxford) Ltd* v *United Kingdom* (2006) 43 EHRR 3 (hereafter 'Chamber judgment').
76 *ibid* at [74].
77 *ibid* at [0]–[13].
78 Section 75(1) of the Land Registration Act 1925 provided that: 'The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered . . .'

regime,[79] for instance, the potentially powerful alternative rationalisation for such a system, in the enforcement of a landowner's duty of stewardship.[80]

In the absence of any pre-2003 rationalisation for adverse possession in registered land, the Chamber could only look to the justifications proposed for the *post*-2003 system to explain the existence of the doctrine of adverse possession in the context of registered land.[81] Indeed, this epistemological limit upon the chamber's legal imagination promoted the Law Commission's approach as the only rational basis for a system of adverse possession in registered land.

This moral discourse also dovetailed easily with contemporary P1-1 jurisprudence. The Chamber noted that European jurisprudence provided states with a wide margin of appreciation when seeking to secure economic, social or other policies, so that it was only if a particular public interest objective was 'manifestly without reasonable foundation' that the State's interference with the applicant's right would amount to a breach of the Convention.[82] The UK Government had attempted to set out two justifications for adverse possession before the Chamber: (1) the public interest in preventing the injustice and uncertainty arising from stale claims being brought against a squatter and (2) the public interest in ensuring that the unopposed occupation of land (as a physical fact) and its legal ownership coincided. The Chamber rejected these objectives as irrational, deciding instead that 'the uncertainties which sometimes arise in relation to the ownership of land are very unlikely to arise in the context of a system of land ownership involving compulsory registration, where the owner of the land is readily identifiable by inspecting proprietorship register of the relevant title at the Land Registry.'[83]

The Chamber did accept that since the LRA 2002 had not abolished the doctrine entirely, the UK Government had not completely abandoned adverse possession as a doctrine; rather, it was implicitly presumed that the 'public interest' against which the rights of the landowner were being measured was oriented around the goals set out in the LRA 2002 (rather than focusing on the goals of the LRA 1925).[84] In practice, as the discussion above has indicated, the persistent public interest in an (albeit much constrained) ongoing role for adverse possession in English law after 2003 is rooted in a combination of the twin objectives identified by the Law Commission in the papers preceding the LRA 2002: economic efficiency and moral justice.[85] Nevertheless, the Chamber found in favour of Pye concluding that even on these criteria the balance struck by the pre-2003 legislative system was disproportionate.[86]

In reaching its conclusion the Chamber used European jurisprudence to deploy a particular moral construction of the operation of the doctrine of adverse possession that placed the hardship experienced by the landowner at the heart of its adjudication. Undoubtedly, the most important issue identified by the

79 See Cobb and Fox, above, n 2.
80 See further discussion below.
81 Chamber judgment at [74].
82 *ibid* at [44].
83 *ibid* at [65].
84 *ibid* at [67].
85 Above n 60 (1998) at [10.6]–[10.9] and discussion in Cobb and Fox, above n 2, 241–244.
86 Chamber judgment at [68]–[76].

Chamber was the loss of land by Pye without compensation, particularly in light of the lack of procedural protections in place under that system.[87] Regardless of the responsibilities associated with land ownership, lack of compensation was key to its view that the pre-2003 system did not strike a fair balance between the landowner's right and the public interest.[88] Importantly, the Chamber concluded that the operation of the doctrine of adverse possession amounted to a deprivation (rather than control of use) of property. Since ECHR case law provides that a failure to compensate a deprivation of possessions will always render a legislative system disproportionate unless 'exceptional circumstances' exist,[89] this rule allowed the Chamber to reinforce the earlier concerns expressed by the House of Lords regarding the lack of compensation afforded under the pre-2003 system of adverse possession.[90]

Notable, too, was the court's explicit reference to another aspect of the moral taxonomy: the fault of the landowner. The Chamber noted that the twelve year limitation period applied under the LRA 1925 allowed a relatively long window for a landowner to take action against a squatter. It also emphasised that 'in order to avoid losing their title [the applicants] would have had to do no more than regularise the Grahams' occupation of the land or issue proceedings to recover possession within the 12-year period.'[91] The Grahams had written numerous letters over the years requesting a grazing licence but the company had failed to respond to this explicit notification of their presence on the land. As the dissenting judges concluded in their opinion:

> the 'real' fault in this case, if there had been any, lies with the applicant companies, rather than the Government. It has to be borne in mind that the applicant company was not a private individual or an ordinary company with, one could assume, limited knowledge on relevant real-estate legislation. They were specialised professional real-estate developers, and such a company had or should have had full knowledge about relevant legislation and the duties involved.[92]

The Chamber's consideration of Pye's culpability highlights the significance of the individual circumstances of the applicant company for the Chamber's broad appraisal of the pre-2003 legislative regime. As noted in the previous section, ECHR jurisprudence demands that the individual circumstances of an applicant

87 Drawing upon the UK model, it was noted that: '[t]he unfairness of the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.' (*Pye* v *Graham* HL, above n 7). It is 'draconian for the owner and a windfall for the squatter that just because the owner has taken no steps to evict the squatter for 12 years the owner should lose 25 hectares of land to the squatter with no compensation whatsoever' (*ibid* at [71], citing with approval the comments of Neuberger J).

88 Chamber judgment at [71]–[72].

89 *Holy Monastries* v *Greece* (1994) 20 EHRR 1.

90 In *JA Pye (Oxford) Ltd* v *Graham* above n 7, Lord Hope of Craighead commented that '[t]he unfairness of the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor'; at [73].

91 Chamber judgment at [68].

92 *ibid* at [0]–[12].

should be treated as 'illustrative' of the operation of the legislation. By drawing upon the particular facts of the *Pye* litigation, both the majority and the minority opinions in the Chamber judgment render problematic the Law Commission's own discursive construction of the paradigmatic (predominantly large-scale) landowner as vulnerable to loss of title to squatters through no fault of their own.[93]

However, in practical terms the identification of Pye's moral culpability failed to persuade the Chamber of the adequacy of the legislation. It continued: 'the question nevertheless remains whether, even having regard to the lack of care and inadvertence on the part of the applicants and their advisers, the deprivation of their title to the registered land and the transfer of beneficial ownership to those in unauthorised possession struck a fair balance with any legitimate public interest served.'[94] Specifically, the fault of landowner was deemed irrelevant, since any fault on the part of the landowner would be overshadowed by the hardship associated with a deprivation of property without compensation. Whether or not the landowner was at fault, he or she could not deserve to lose property through adverse possession, particularly given the limited ongoing relevance of the pre-2003 system in achieving the public interest objectives of the post-2003 regime.

The approach of the Grand Chamber of the European Court[95]

Thus, the absence of compensation, prioritised under European jurisprudence, allowed the Chamber to draw upon, and reinforce, the UK's own moral taxonomy of adverse possession, by emphasising the hardship faced by a landowner over and above all other considerations. However, before the Grand Chamber, this decision was ultimately reversed. Although we have been broadly critical of what we view as insufficient analysis in relation to the dismantling of the doctrine of adverse possession, we remain unconvinced by the reasoning applied by the Grand Chamber to revive the doctrine for the purposes of this case. A potent issue for the Grand Chamber, focused as it was on the issue of compensation for the UK government, must have been the inevitable consequence that a finding in favour of Pye would potentially expose both the UK Government – and perhaps other Member States in due course – to liability for compensation.[96] In direct opposition to the Chamber judgment, and supporting its dissenting judges, the Grand Chamber's judgment was coloured by its explicit efforts to distance its reasoning from the reforms implemented by the 2002 Act.[97] However, this section argues (agreeing for the most part with the dissenting judges in that case) that the

93 Above n 60 (1998 at [10.19].
94 Chamber judgment at [70].
95 *Case of J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd* v *The United Kingdom* (Application no 44302/02) available online at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=pye&sessionid=11699191&skin=hudoc-en (last visited 15 July 2008), (Grand Chamber judgment).
96 It is noteworthy that the Irish government, which operates a system of adverse possession in the context of registered land that is broadly comparable to the pre-2003 UK system, made representations in support of the UK government before the Grand Chamber; see Grand Chamber judgment at [50]–[51].
97 See Grand Chamber judgment at [81]; cf, Grand Chamber judgment, joint dissenting opinion of Judges Rozakis, Bratza, Tsatsa-Nikolovska, Gylumyan and Sikuta, at [19].

Grand Chamber's reasoning is both illogical and at odds with European jurisprudence and, as such, provides an inadequate basis for a defence of the doctrine.

At the very first stage of the court's appraisal of the pre-2003 regime, the Grand Chamber considered again the public interest underpinning the pre-2003 regime of adverse possession. Like the Chamber before it, the Grand Chamber placed considerable emphasis on the margin of appreciation enjoyed by member states when assessing the 'public interest', in the context of social and economic policies.[98] Moreover, it reasoned that: '. . . even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration.'[99] As noted above, the Chamber implied that the only rational explanation for adverse possession could be that proposed by the Law Commission and underpinning the 2002 Act.[100] Yet, the Grand Chamber seemed to go beyond this appraisal, by refocusing attention not upon the public policy exemptions to the LRA 2002's general restraint on adverse possession in registered land, but upon the traditional objectives of limitation periods *per se*.[101] The Grand Chamber relied on the case of *Stubbings* v *UK*[102] to argue that limitation periods were generally accepted by European jurisprudence as a legitimate aim of legislation, in pursuit of 'legal certainty'.[103]

The Grand Chamber's reconstruction of the doctrine of adverse possession as merely a limitation mechanism has obvious consequences for its position within our taxonomies of squatting. We would suggest that the court was intent on 'demoralising' the issue of adverse possession, in order to avoid finding a breach of P1-1. The prioritisation of the evidential objective of legal certainty rendered the 'mechanism' of adverse possession a mere bureaucratic tool and, as such, downplayed its redistributive implications. Moreover, where moral assessment did emerge in the court's decision, it was carefully tailored to emphasise the specific fault of Pye and to gloss over both the hardship caused to the company and the Grahams' bad faith. As the court concluded, while Pye was easily able to seek possession of the land over the preceding 12 years:[104] 'in *James* [v *UK*], the possibility of "undeserving" tenants being able to make "windfall profits" did not affect the overall assessment of the proportionality of the legislation . . . and any windfall for the Grahams must be regarded in the same light in the present case.'[105] The Grand Chamber also exploited the distinction between deprivation and control of use to reinforce this moral construction. By reaching the conclusion that the operation of adverse possession as a limitation tool was a control of use, absence of compensation, so central to the Chamber's prioritisation of the hardship experienced by Pye, could be simply ignored.

98 Grand Chamber judgment at [71], particularly because 'what is at stake is a longstanding and complex area of law which regulates private law matters between individuals'.
99 *ibid* at [74].
100 See above notes 84–86 and associated text.
101 Grand Chamber judgment at [67]–[74]. For example, the Grand Chamber considered the broad value of limitation periods in ensuring legal certainty, at [79].
102 (1997) 23 EHRR 213.
103 Grand Chamber judgment at [68]–[69].
104 *ibid* at [80].
105 *ibid* at [83].

ECtHR CHAMBER	Fault	Hardship
Squatter	Ostensibly irrelevant (Implicit blame?)	Irrelevant
Landowner	Irrelevant	Unjustified hardship (No compensation)
GRAND CHAMBER		
Squatter	Ostensibly irrelevant (Implicit blame?)	Irrelevant
Landowner	Blameworthy (Failure to act)	Necessary hardship (Basis of limitation)

Figure 5 – The Chamber and Grand Chamber judgments in *Pye v UK*

Thus, the Grand Chamber judgment drew upon a variety of jurisprudential techniques to reposition the doctrine of adverse possession within a less morally contentious framework than that found within both UK political discourse (and originally reinforced by the Chamber), as illustrated in Figure 5. With hindsight, however, it remains evident that the pre-2003 system of adverse possession cannot rationally be justified solely on grounds of evidential concerns regarding title in a system of registered land, nor can it be justified on grounds of overall predictability of title within the land system. One might argue that the legal certainty that the Grand Chamber referred to was not evidential, but was an attempt to claim that limitation periods are justified by settling long possession in favour of a squatter. Yet even this justification for limitation periods cannot be asserted in a system of registered title.

Nevertheless, while the Grand Chamber's explanation of the public interest pursued by the pre-2003 system is indeed irrational in the context of the English system of registration, the following sections contend that a superior justification for the public interest element of P1-1 may be drawn from a taxonomy of squatting founded upon a landowner's duty of stewardship.

JUSTIFYING ADVERSE POSSESSION: A DUTY OF STEWARDSHIP

It is difficult to avoid the possibility that the Grand Chamber's judgement may have been influenced by an awareness of the broader context, including the prevalence of adverse possession provisions across many of the Member States,[106] and the potential financial impact for these countries of any judgment which found that adverse possession operates in breach of P1-1.[107] However, putting these issues aside, this section posits the reconstruction of a workable justification for adverse possession in registered land, within the theoretical frameworks of property law and European human rights jurisprudence.

106 Above n 5.

107 Particularly in relation to liability for payment of compensation by the UK and other governments, where titles had been lost by adverse possession.

To start with, we note that the dissenting judges in the Grand Chamber expressed serious concerns that the majority: 'had argued that it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration.' Judge Lovcaides responded that: 'I do not understand the logic of this approach and I certainly do not find it convincing. I do not see how illegal possession can prevail over legitimate ownership (*de facto v. de jure*).'[108] There may however be an alternative basis on which possession could be viewed, legitimately, as taking precedence over ownership, through an application of the concept of a duty of stewardship in relation to land. Indeed, as this section will demonstrate, this possibility is hinted at in several of the *Pye* judgments, and also resonates with contemporary philosophical and policy analysis which seeks to foster productive use of land and the role of property law as potentially transformative in relation to social justice and citizenship. We argue that this alternative justification, which presents the more convincing goal of ensuring effective stewardship of land by landowners, would have provided a better basis upon which the Grand Chamber might have reached its conclusion that there was a 'public interest' justification for the pre-2003 system of adverse possession of registered land in English law.

Support for this alternative model can be identified, within the *Pye* judgments, in an interesting afterword to the dissenting opinion of Judge Louciades in the Grand Chamber judgment in *Pye* v *UK*. The dissenting judge concluded his opinion by stating that:

> in simple terms this system of adverse possession looks as if it is intended to punish a registered lawful owner of land for not showing sufficient interest in his property and for not sufficiently pursuing a squatter, who as a result is rewarded by gaining title to the property. And in this respect I fully endorse the statement of Mr Justice Neuberger when he said that the fact that an owner who had sat on his rights for 12 years should be deprived of the land was 'illogical and disproportionate'.[109]

This stewardship argument could usefully be deployed as a justifiable objective of a doctrine of adverse possession, such as that set out in the pre-2003 system, which seeks to penalise and deter poor management of land. Rather than constructing the landowner who allows adverse possession to take place as the victim of an unfair system that punishes mere 'oversight' or 'inadvertence', an alternative construction might view the landowner as negligent in discharging his or her duties of stewardship.

Even without invoking the specific requirements of title by registration, it is evident that the contemporary English model for property rights analysis is strongly oriented around an assumption, in most cases, of the superior value of individual ownership over community or social concepts.[110] In 'The Rhetoric of

108 Grand Chamber, dissenting judgment of Judge Lovcaides joined by Judge Koslo.

109 *ibid.*

110 See K. Gray and S. Gray, 'The Rhetoric of Realty' in J. Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis, 2001) 206–208, identifying a 'contemporary concern with the maximisation of welfare . . . Consistently with the guiding spirit of an increasingly secular and materialistic age, a dominant social imperative now accentuates the

Realty', Gray and Gray have argued that: '[t]he rhetoric of modern land law . . . articulates a generalised impatience with any threat to the realisation of individualist visions of the good life . . . in today's deadly serious game of privatised accumulation and consumption.'[111] Furthermore, as Gray and Gray note later in their essay, the emergence of moral arguments relating to 'reciprocity' – the 'community value' interest in land as a resource, and the risk that private land rights may be trumped by some over-arching community interest – creates obvious tensions with the individualist model, and as such has been constrained to situations in which compensation is available, or where land use regulation pursues the 'common good' as part of the (public law) 'environmental contract' between the state and the community.[112]

The concept of the private landowner's duty of stewardship has not attracted a great deal of attention in English legal writing in recent years. Indeed, beyond the obligations not to commit wrongs against others in our use of land and to comply with environmental and planning regulation, the proposition that ownership of land carries duties in relation to the owner's use of their own land – for example, to be a good steward of the land – is not a feature of English legal culture. This is in contrast to the value attributed to stewardship in respect of land in some other legal cultures. For example, one can see how the Islamic property rights framework, which '. . . conceives of land as a sacred trust but promotes individual ownership with a re-distributive ethos'[113] supports a duty of stewardship on the basis that '[p]roperty and land vest in God, but are temporarily enjoyed by men and women through responsibility or trust . . . conditional on the requirement that property not be used wastefully . . .'[114] This perspective is also supported by the concept of property rights in Islamic economics, which 'has implications far beyond the material domain as it lays stress on responsibility, poverty alleviation and redistribution',[115] and seeks to work from 'a holistic, authentic, moral, ethical and legal land rights code'.[116] The relevance of this approach to squatters and unsupervised land is most clearly illustrated by the Islamic concept of *mewat* or 'dead land', which allowed individuals to claim for their own use land that is empty and uncultivated or undeveloped.[117]

Analyses of the role of land tenure systems in promoting sustainability, economic development and social inclusion, for example, in the projects carried out by UN-HABITAT, have also highlighted the promotion of productive land use and stewardship as core values:

importance of hassle-free access to the intangible "quality of life" benefits associated with economic advantage.'‹

111 *ibid*, 207.

112 *ibid*, 265–278.

113 UN-HABITAT *Islam, Land & Property Research Series* Paper 1: Islamic Land Theories and Their Application (Nairobi: UN-HABITAT, 2005) 8.

114 *ibid* 10.

115 *ibid* 14.

116 *ibid*.

117 See S. Sait and H. Lim, *Land, Law & Islam: Property & Human Rights in the Muslim World* (London: Zed, 2006) 61.

> Better land access and more secure land rights encourage investment in the land and respect for the environment. This mitigates competition for, and pressure on, land and natural resources, while also maintaining productivity. Land rights also entail a duty of efficient and productive use.[118]

While the case of farmland in Oxfordshire may seem a world away from the developing societies with which UN-HABITAT are primarily concerned, or the *Shari'a* law communities of the Islamic world, these discussions of the duty of stewardship over land as a natural resource provide an interesting foil to the English approach, which is explicitly predicated upon taking all necessary steps to protect the paper title holder who does not use – and, more importantly, does not exercise stewardship over – his or her land.

Periods of transformation provide valuable opportunities for reflection on the values which inform our laws and policies,[119] and the new legal order of adverse possession, after LRA 2002 and the commencement of the HRA 1998, provides a basis for critical reflection on the values that underpin land laws and policies in England and Wales. In addition, notwithstanding the overall ethos of the prevailing approach, it is possible to detect threads of a *stewardship* analysis in the *Pye* litigation. In order to locate this thread, it is also important to distinguish the idea of a duty of stewardship from discussions of the decision to develop the land (or not). J. A. Pye (Oxford) Ltd had plans to develop the disputed land in the future, but also had what we must assume to have been commercially valid reasons to leave the land vacant until such time as they wished to carry out the development. The issue of land use and economic development was raised in *Pye* by the Irish Government, in its submissions to the Grand Chamber, that adverse possession could be justified '. . . in pursuance of a policy of using land to advance economic development.'[120] Of course, in a land economy where delay followed by future development may be the most appropriate economic use of land for the owner, the idea of attributing fault to landowners who fail to make effective economic use of their land, such that it is considered reasonable to divest them of their title in favour of a squatter, is not straightforward. In some circumstances a landowner who leaves property undeveloped may not necessarily have failed to make economic use of the land, as to retain the land for future development or use, for example, when market conditions are more favourable, may be viewed as the most economically efficient use of that particular land at that particular time.

This theme was also picked up by the dissenting judges to the Grand Chamber, who commented on the 'economic development' analysis, that:

118 UN-HABITAT, *Secure Land Rights for All* (Nairobi: UN-HABITAT, 2008) available online at http://www.gltn.net/index.php?option=com_docman&task=doc_details&Itemid=19&gid=170 (last visited, 12 June 2008) 4.

119 See A. van der Walt, 'Property, social justice and citizenship: The transformation of property law in post-apartheid South Africa' (2008) 19 *Stellenbosch Law Review* (forthcoming), which discussed the question whether property law can and should advance social justice, promote citizenship and build sustainable and supportive communities.

120 Grand Chamber judgment at [50].

> The argument was also put forward that another possible legitimate aim of such an institution [adverse possession] would be to encourage landowners to exploit, improve, or make use of their land. I cannot find this acceptable, first of all because such encouragement may be achieved by other less onerous means such as taxation, or the creation of incentives, and secondly I cannot accept that the general interest connected with that aim can reasonably extend to depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation.[121]

It is interesting to consider this suggestion against the discussion above, which considered the arguments surrounding squatters and the empty homes debate in the UK: applying the proposition that unused land (in the form of empty homes) should be brought back into use, it is important that any system directed at encouraging more economic use of land should – rather than permitting the 'who dares wins' of squatting – proceed on a principled, bureaucratic basis, giving due consideration to the question of compensation for the landowner who may have no use for the land, but does not wish to be divested of its exchange or capital value.

Attempts, in the course of the ECHR stage of the *Pye* litigation, to defend the pre-2003 doctrine of adverse possession on grounds of the prioritisation of economic development, were, for good reason, not successful. We would argue, however, that the economic development argument does not adequately capture the duty of stewardship as we would conceptualise it in relation to land. Rather, we would contend that an appropriate duty of stewardship is founded, not on an obligation to *develop* land, but in an obligation to ensure effective *oversight* of that land. At the heart of the dissenting judges' opinion in the Grand Chamber judgment is the proposition that:

> Possession (ownership) carries not only rights but also and always some duties. The purpose of the relevant legislation was to behove a landowner to be vigilant to protect the possession and not to 'sleep on his or her rights'. The duty in this particular case – to do no more than begin an action for repossession within 12 years – cannot be regarded as excessive or unreasonable.[122]

It is this requirement of 'vigilance' that crystallises the 'stewardship' perspective on adverse possession, and which – rather than emphasising the unfairness of the regime for landowners – re-imagines the law of adverse possession as a regulatory system which enforces a duty of stewardship upon landowners. There is a persuasive argument to be made, that, in fact, stewardship rather than efficient land use provides the most cogent objective of a doctrine of adverse possession in a system of registered land. All landowners can be regarded as owing a duty of stewardship in relation to their land, even if they do not wish to make *use* of that land at the present time.[123] What is particularly interesting about this conceptualisation of the

121 Dissenting opinion of Judge Lovcaides joined by Judge Koslo.
122 *Pye* v *UK* Grand Chamber judgment, dissent at [0]–[12].
123 For a discussion of the idea of stewardship in the context of land ethics, see for example J. P. Karp, 'A private property duty of stewardship: changing our land ethic' (1993) 23 *Environmental Law* 735;

STEWARDSHIP	**Fault**	**Hardship**
Squatter	Irrelevant (Regulatory mechanism?)	Irrelevant
Landowner	Blameworthy (Failed stewardship)	Justified hardship (Loss as deterrent)

Figure 6 – A stewardship approach to the squatting taxonomy

duty of stewardship argument is that it inverts the Law Commission's own implicit squatting taxonomy: no longer is the focus upon the fault of the squatter and the hardship on the landowner; instead, it is the fault of the landowner in failing to *oversee* his or her land that forms the new core of the doctrine. (see Figure 6)

In relation specifically to the fault of the squatter, it is noteworthy that the final dissenting judgment of the Grand Chamber in *Pye* v *UK* focused on the consequential significance of a system like adverse possession, which may be perceived as: 'encourag[ing] illegal possession of property and the growth of squatting.'[124] Even if landowners are viewed as negligent (and thus 'at fault'), is it implied that this still does not justify the transfer of their titles to bad faith squatters? Working within the taxonomy of squatting set out in this article, there may still be some valid arguments to consider in relation to this question. For example, it could be argued that the bad faith squatter obtains a superior right to the property because the landowner's failure of stewardship (fault) renders the hardship of loss of land by the squatter after twelve years sufficient to warrant transfer of title: that is, that the landowner's fault justifies protecting the squatter from this hardship. Another way of looking at this question might be to shift our perspective in relation to the fault of the squatter. The Grand Chamber judgment was striking in its silence on the issue of the squatter's moral conduct, and while this may have been merely a reflection of the fact that the squatter was, at the European level, no longer a party to the action it is also interesting to consider whether the limited 'presence' of the squatter as an actor in this dispute was limited to the idea that (in the context of limitation principles) the squatter would function as a (morally neutral) regulatory mechanism, encouraging due diligence in the management of land ownership. By sidestepping the moral debate, and thereby avoiding the distinction between good faith and bad faith squatters, this approach has the potential to fundamentally reconfigure the value judgments that shape the mapping of squatters within our taxonomies of squatting.

WOULD A DUTY OF STEWARDSHIP SATISFY ARTICLE 1, FIRST PROTOCOL OF THE ECHR?

This article has proposed a re-analysis of the pre-2003 system of adverse possession that, it is argued, provides a much-needed rational underpinning to this much-maligned doctrine. In this final section, we seek to illustrate how such a

L. K. Caldwell and K. Shrader-Frechette, *Policy for Land: Law and Ethics* (Lanham, MA: Rowman & Littlefield, 1993) ch 7; Cobb and Fox, above n 2, footnote 102 and associated text.

124 Grand Chamber judgment, dissent of Judge Lovcaides joined by Judge Koslo.

reappraisal of the doctrine would have also allowed the Grand Chamber of the European Court to provide a more logical justification for the doctrine in the context of Article 1 of the First Protocol to the Convention.

Accepting the Grand Chamber's claim that it is open to a legislature to pursue the public interest by placing greater weight upon factual (albeit unauthorised) possession than registered title, this is also supported by the Law Commission for England and Wales, in its continued support for adverse possession, in exceptional cases, on the grounds of economic efficiency and moral justice. However, it is also argued that invoking a duty of stewardship as the justification of the pre-2003 system of adverse possession in unregistered land makes considerably more sense than the Grand Chamber's unconvincing reliance upon traditional theories of limitation. The stewardship justification facilitates an analysis that moves away entirely from the idea of adverse possession as a way to secure greater legal certainty, which has been correctly identified by both the Law Commission and the original chamber of the European Court as a weak justification in a system of registered land. Whereas the fault of the landowner merely supported the objective of limitation periods in unregistered land, under the stewardship model it can be viewed as a core justification for the doctrine, allowing it to be applied in both registered and unregistered land systems. More importantly, a duty of stewardship can be applied to explain the pre-2003 doctrine of adverse possession in its entirety, not simply its operation in those cases fitting the exceptions to the 2002 Act.

When it comes to considering the second stage of a P1-1 appraisal: the extent to which the imposition of a duty of stewardship strikes a fair and proportionate balance between a landowner's rights and the public interest objective under Article 1, Protocol 1 of the Convention; one problematic issue remains, since the outcome of a successful adverse possession claim could still include the transfer of title from landowner to squatter without compensation. For the Chamber, European jurisprudence could not entertain such hardship even where it could be said that the landowner was at fault for failing to evict a squatter from his or her property within twelve years. However, the Grand Chamber's approach to the issue of proportionality provides an alternative ground on which to support such an analysis.

The Chamber's assessment of the pre-2003 regime was predicated on an assessment of the doctrine as a deprivation of possessions under the second rule of P1-1. In doing so, it drew on the similar facts of *James* v *UK*, involving legislation regulating the relationship between private actors and resulting ultimately in transfer of title from one party to the other. However, in its own consideration of the proportionality of the pre-2003 regime, the Grand Chamber effectively circumvented this issue of compensation by characterising the operation of adverse possession under the LRA 1925 as a 'control of use' rather than a 'deprivation of property'. This was achieved by claiming that the legislation was:

> . . . not intended to deprive paper owners of their ownership, but rather to regulate questions of title in a system in which, historically, 12 years' adverse possession was sufficient to extinguish the former right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave title.[125]

125 *ibid* at [66].

The Grand Chamber then proceeded on the basis that where title is extinguished as part of a control of use, the strict rules relating to compensation for deprivation of property no longer apply. Accordingly, 'exceptional circumstances' were not required to justify the lack of compensation in this case. The Grand Chamber concluded that limitation periods depended for their operation upon a lack of compensation.

One potential hurdle in applying this analysis, however, might be that the Grand Chamber distinguished *James* v *UK* by emphasising that the public interest in enforcing limitation periods did not pursue a social policy of transfer of land ownership which was clearly founded upon an intention to deprive the paper owners of title. Yet, the distinction currently drawn in European jurisprudence between a 'deprivation' and 'control of use' is oblique at best, and it is arguable that, in line with the argument accepted in *James* v *UK*, in the context of adverse possession there is no intention on the part of legislators pursuing a duty of stewardship to deprive landowners of their property, but merely a desire to control their use of the land through the deterrent effect of the hardship of such loss, and so encourage landowners to maintain effective scrutiny and stewardship over their unused property.

A final issue to confront might be the degree to which a truly blameless landowner might still fail to identify a squatter on his or her land for the full twelve years. This was clearly of great concern to the Law Commission when it designed its proposals, claiming that under the law as it then stood, land could be lost to a squatter under the doctrine even where the landowner had taken reasonable steps to keep the land under effective scrutiny, specifically because squatters may not be readily identifiable, particularly because they keep a low profile. In the latest edition of Gray and Gray's *Elements of Land Law*, the authors claim that 'the possession which founds a claim for adverse possession must be open, notorious and unconcealed. It must be such that it would be noticed by a documentary owner "reasonable careful of his own interests" '.[126] This common law rule seems to provide a convincing protection for diligent landowners against 'undiscoverable' squatters. Only those, like Pye for instance, who failed to engage in such a reasonable scrutiny of his or her property over twelve years would be at risk from the operation of the doctrine. It is interesting to note that the authority that Gray and Gray claim for this final rule is an Australian case, *Re Riley and the Real Property Act*.[127] If, as the Law Commission appears to assume, this principle is not in fact present in the modern English common law of adverse possession, then the development of a stewardship approach to adverse possession could usefully incorporate such a rule. Otherwise, the risk of 'anomalous' outcomes in the operation of the doctrine – that is, where a blameless landowner who has in fact satisfied the duty of stewardship still loses his land – could be said to render the overall system disproportionate under P1-1.

CONCLUSION

The object of this analysis has been to reconsider the raft of recent developments in the law of adverse possession by devising a formal taxonomy employing

126 Gray and Gray, above n 6, para 6.110.
127 [1965] NSWR 994 1001 *per* McLelland CJ.

matrices of 'fault' and 'hardship'. This type of taxonomic activity, we feel, has much to offer for scholars who wish to better understand 'the purposes and principles that animate legal decision making' and, specifically, to consider the real values and issues at stake, although not always explicitly, in legal discourses around unlawful occupation. The taxonomy set out in this article, derived from discourses of unlawful occupation in a range of legal contexts, also provides a useful lens through which to analyse the decisions of the Chamber and the Grand Chamber of the European Court of Human Rights in the *Pye* litigation. While it is argued that, ultimately, the Grand Chamber decision is problematic in its attempt to justify the pre-2003 system of adverse possession on traditional grounds of limitation, the outcome of the Grand Chamber's decision can be more appropriately re-imagined by refocusing attention upon the fault of the landowner – rather than fault of the squatter and the hardship to the landowner, as the contemporary discourse appears to demands – through a new discourse of land stewardship.