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Following in the Squatter's Footsteps: An Illegal Immigrant's Path to Citizenship

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FOLLOWING IN THE SQUATTER'S FOOTSTEPS:
AN ILLEGAL IMMIGRANT'S PATH TO CITIZENSHIP

by

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Following in the Squatter's Footsteps: An Illegal Immigrant's Path to Citizenship
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Following in the Squatter's Footsteps: An Illegal Immigrant's Path to Citizenship

Thesis directed by Assistant Professor Adam Hosein

Abstract:

With an argument by analogy, I propose a framework of 'adverse occupation' as both a compromise to the proponents of the affiliation view and the autonomy view as well as an applicable solution within non-ideal theory. The components of this framework should be able to account for previous concerns addressed by these proponents by advancing a method of acquisition of certain rights by occupying a county under certain conditions. 'Adverse occupation' has five elements that must be established: the occupation must be (1) open, (2) continuous for the statutory period, (3) exhibiting the breadth of an established, contributing lifestyle, (4) adverse to the currently occupied country's interests, and (5) firm. These just provisos will require that the state grants the full set of rights that come with citizenship to qualifying illegal immigrants.

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CHAPTER I

INTRODUCTION

In “Man’s Struggle for Shelter in an Urbanizing World,” C. Abrams writes,

Human history has been an endless struggle for control of the earth’s surface; and conquest, or the acquisition of property by force, has been one of its more ruthless expedients. With the surge of population from the rural lands to the cities, a new type of conquest has been manifesting itself in the cities of the developing world (p. 12).

In today’s society in which immigration is at the forefront of political controversy, I would venture to guess that most American readers would assume that this “new method of conquest” is immigration. However Abrams continues, “Its form is *squatting*, and it is evidencing itself in the forcible preemption of land by the landless and homeless people in search of a haven” (emphasis mine, p.12) Abrams’ text was written in 1964, and since then, procedures have been developed to handle the phenomenon of squatting. One of these methods is ‘adverse possession.’ In this paper, I will draw out the compelling analogy of this phenomenon to the current issues concerning illegal immigration. Using this analogy, we will have a promising starting point from which we can begin to resolve current struggles surrounding immigration such as granting citizenship to illegal immigrants¹, and I intend to make this solution appealing to both the proponents of an affiliation view and the proponents of an autonomy view.

In the ethics of immigration, we are concerned with cosmopolitan justice. Cosmopolitan justice, “concerns the principles governing the fair distribution of basic burdens and benefits that

¹ Much scholarly work in this field avoids the use of the term ‘illegal immigrant’ as this may carry with it undue prejudice. In this paper, I am specifically focusing on the immigrants that have violated the legal structure, and they are thus here illegally. As with Ryan Pevnik, I agree that, “To forfeit the use of the term ‘illegal’ in favor of the term ‘irregular’ is just to muddy the issue” (p. 163). Throughout, I will use ‘illegal’ simply as a report on the particular immigrant’s status within the state, and it should not be taken as a normative judgment.

people suffer of enjoy; all the people who may be affected by a putative principle” (Seglow, p. 318). Immigration controls neatly fall into this stipulatively defined realm of concern. Controls of immigration alter life chances and opportunities by restricting and granting benefits to those involved.

There is reason to think that societies have a right to enforce their borders and restrict membership. One clear statement of this is offered by Michael Walzer in his *Spheres of Justice* when he argues that “the very idea of distributive justice presupposes a bounded political community of which some people are members and others are not” (as cited in Seglow, p. 319). He continues,

Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life (Walzer, p. 62).

Yet even if we reject this right of the state as is done by Joseph Carens, we may still think it is an open question as to what a state like ours might owe to immigrants. Though he endorses a “right to go where you want to go” and argues that free movement is a “basic human right”, he also believes that it is still important to determine what we owe to immigrants (Carens, 1992, p. 36).² For the purposes of this paper, we need not be overly concerned with this fundamental worry. I will grant that societies have some right to enforce their borders and restrict their membership. Yet as this is a project in non-ideal theory, there is a question of what should be done by the state when these methods of restriction are imperfect or even directly thwarted by individuals. At the outset, we must also remember that my argument is restricted to liberal states.

² See also: Joseph H. Carens, “The Case for Amnesty: Time Erodes the State’s Right to Deport” (2009). In this piece, he writes, “Most people think that the state has the right to determine whom it will admit and to apprehend and deport migrants who settle without official authorization. Let us accept that conventional view about states and borders as a premise and explore the question of whether a state nonetheless may sometimes be morally obligated to grant legal-resident status to irregular migrants. The claims of irregular migrants are strong, even on this conventional assumption” (p.1).

That is to say that there are minimal standards of respect for persons that cannot be violated by the state. The state may have this right to restrict immigration, but there are also additional duties of the state owed to the individuals that are present within their borders despite the fact that these individuals have violated this initial right of the state. This is also not an appeal to free movement, some right to immigrate, or a case for open borders. My argument is much smaller in scope in that I only wish to consider those who have already illegally immigrated and ask what it is that is owed to them by the state.

By making an analogy between squatting and illegal immigration, we have a way to acknowledge that there has been a wrong done within the actions of the illegal immigrant. The important benefit of this analogy is that it allows opponents of illegal immigration to maintain negative connotations associated with the activity and a general disapproval of breaking the law as well as an endorsement of the right of the state to enforce and regulate its borders. In other words, it allows us to concede that illegal immigrants have done something wrong and maybe even committed a significant wrong. Yet this wrong does not require that our discussion stops here once we appropriately apply the proposed analogy. We can acknowledge the initial wrong while still requiring further consideration despite the transgression. There is nothing about the analogy that would require one to say that the initial act of illegal immigrant was just. Yet the analogy still allows us to conclude that we must nonetheless provide these immigrants with certain rights despite this wrong. The analogy pushes us to look at a bigger picture that includes motivations for actions, utilitarian concerns, pragmatic benefits, and the proper relationship between owners and the state. These further considerations give us a useful framework for understanding how and why rights and even full citizenship should be granted to illegal immigrants, and I will call this framework ‘adverse occupation.’

CHAPTER II

THE CASE FOR ADVERSE POSSESSION

Keeping this analogy at the forefront of our considerations, I now want to look at squatting in particular in order to analyze the current American legal structure in place for squatting. This framework is called ‘*adverse possession.*’ Adverse possession is:

‘[a] method of acquisition of title to real property by possession for a statutory period under certain conditions. Adverse possession generally has five elements that a claimant must establish: the possession must be (1) open, (2) continuous for the statutory period, (3) for the entirety of the area, (4) adverse to the true owner’s interests, and (5) notorious” (Gardiner, p. 122).

Using this legal framework, a squatter may be able to gain title to the land or building in which they are squatting if it is determined that their inhabitation has been sufficiently obvious, continuous, against the true owner’s intent, and only when they are making improvements to the land.

What follows will not be a full defense of adverse possession. Rather the main thrust of my argument is meant to be conditional. It is conditional in that if we accept adverse possession, then it follows that we should also accept the analogous legal framework that I will propose. As opposed to giving a full defense of adverse possession, I will focus on what I take to be the two main persuasive principles behind the rationale for this law, and my brief defense can be considered to follow this bipartite structure. For the first principle, I will show that there is in general something distasteful about unnecessary or excessive waste within a society with limited

resources. The first part of my partial defense of adverse possession will try to show further that it is also justified that under these conditions of waste comes the loss of ownership. The second aspect of adverse possession relies on the equally compelling notion that the contribution of labor has some bearing on gaining a title of ownership. After considering these two rationales for adverse possession, I will move to the conditional argument that if we accept this, then we must also accept my suggested framework as it relies on analogous rationales and is mirrored in structure.

To develop the first rationale for adverse possession, we must first see that adverse possession can be understood in multiple ways and this compounded by the variety of ways that ownership is understood in American law. This particular vein of property law also encourages questions about the nature of ownership in general. Some conceptions of squatter's rights in American commentary depict this as if it is the "morally paradoxical" case of "turning land thieves into owners", while other conceptions focus on "the extinction of the original owner's superior right to possess due to her own inaction" (Katz, p. 49). This latter conception is the approach that is found in current English law, and it is the appropriate understanding as it avoids the 'morally paradoxical' concerns of the former.

Yet adverse possession is much more stringent than merely requiring inaction on the behalf of the owner. In order for a squatter to qualify for adverse possession, the actions of the squatter must pass the 'inconsistent use' test, "according to which a squatter succeeds in a claim for adverse possession only where she establishes, by acts of possession that are inconsistent with the owner's intended uses of the land, that the original owner lacks effective authority over the land" (Katz, p. 50). These further qualifications are reflected in the legal format of adverse possession in criteria (4) and (5). As Katz argues, these qualifications are enough to reconcile

any initial moral qualms about adverse possession. She writes, “A squatter’s inconsistent use exposes a vacancy in the property system—an object of property over which the original owner no longer has effective authority. The squatter justifiably succeeds insofar as he fills that vacancy” (Katz, p. 51). She thinks that it is because of this that an adverse possessor is properly thought of as creating order in society rather than as a land thief or ‘deserving laborer’. She continues,

A successful adverse possessor assumes the mantle of ownership...undiminished by the initial illegality of its path to power. The possibility of social order requires that someone wield ownership authority in the former case, and public authority in the latter. Adverse possession solves the moral problem of agendaless objects just as the recognition of the existing government (whatever its origins) solves the moral problem of stateless people (p. 51).

Ownership should be understood to be part of the way that a state creates order in society as a whole. If we understand ownership in this way, we are well-situated to understand the moral significance of squatting without being led astray by debates that pit owner’s rights against possessor’s rights. To engage in this debate, I fear is to miss the purpose entirely.

Adverse possession is justified by the proper role of the state and its relationship with owners in a civil society. If the state is to be a legitimate authority, then a weak construal of one of its roles is that the state ought to attempt to maintain reasonable order in society. Ownership and property law is one beneficial way that this goal is achieved, but this picture is clearly far from being complete. Part of this social order is made up of the owners themselves, and the state must rely on them to some extent. As we are working in non-ideal theory, we must acknowledge that many owners do not fulfill their duties as owners, and as aligned with an effort to maintain social order, “the adverse possessor, having asserted effective authority over the object and displaced the original owner, assumes an indispensable role in the property system and also the larger system of public authority of which the property system is part” (Katz, p. 52). Once again,

we can see that the case for adverse possession will not come down merely to the weighing of individual rights (though this is certainly relevant), but there is a stronger case for adverse possession in that it is a crucial feature of property ownership in a society that strives to maintain social order. In this case, I will show why it is that the original owner has justifiably lost the claim of ownership and additionally why it is that the new possessor ought to gain this claim.

The conception of adverse possession as the weighing of distinct rights is common in English law, but adverse possession in American commentary and case law tends to draw more from the language of private “taking” or “land theft, with the apparently anomalous result that the law through adverse possession sanctions theft” (Katz, p. 60)³. We must completely dispel this conception as this is equally misguided. Adverse possession serves an important role in American society, and it can be justified in accordance with utilitarian concerns on the basis that adverse possession, “(1) prompts lazy owners to use their land or sell it off; (2) roots out stale claims while the evidence is still fresh so that title searches are simpler and less costly; and (3) respects the expectations of third parties who have relied on appearances” (Katz, p. 62). These benefits enable the state to maintain social order in situations in which an owner is not fulfilling his or her obligations. These considerations are just one reason to think that the original owner may lose the claim to ownership in certain cases.

A further defense of adverse possession will shift our attention back to the ‘Inconsistent Use’ model proposed by Katz and the related criteria, (4) and (5)⁴, from the qualifications of successful adverse occupation. According to the ‘Inconsistent Use’ conception, adverse possession can only successfully apply to the squatter’s inhabitation when the squatter is using

³ The emphasis here is on commentary in American culture concerning adverse possession. This conception does not reflect the legal structure of adverse possession in America, and many scholars (including Ballantine) have rejected this conception. (as cited in footnote 51, Katz, p. 60). I am addressing American commentary, because this line of thought may provoke unnecessary objections to my treatment of the subject.

⁴ Provisos (4) and (5), respectively: adverse to the true owner’s interest and notorious.

the land in a way that is inconsistent with the original owner's intent. At first blush, this might seem to be the most problematic or worrisome feature of this law, but in fact, this severe restriction serves as way to provide evidence that the original owner has effectively (if not totally) abandoned the property. This pragmatic benefit also limits the need or potential for conflict between the owner and the squatter, because at no point must the squatter demonstrate her dominance over the original owner. Older conceptions of adverse possession required that the squatter demonstrate some sort of deliberate 'ill will' against the original owner. Criteria (4) and (5) preserve the core of this idea and facilitate the necessary evidence while removing all hostility and confrontation between the two involved parties.

I take these considerations to show that there is good reason to have this particular conception of adverse possession over another, but we must also provide the rationale for having something like adverse possession at all in a society. This law may still seem to some to be quite peculiar for purely pragmatic reasons, and I want to address these further worries about the role of adverse possession for our analogy will not get us very far if we find that it rests crucially upon an unnecessary feature of American law. In fact, there is quite a strong case in favor of adverse possession in a society. It is a very strategic law that encourages responsible land ownership while also allowing protection for those outside of the land ownership system.

According to Gardiner,

The policy supporting adverse possession is that the rule forces landowners to maintain and monitor their land. Moreover, this policy discourages owners from 'sleeping' on their property rights for an indefinite period...Adverse possession promotes efficient and economic use of land, thereby serving important economic and social ends (p. 122).

This is of course not to say that adverse possession is without fault. As he continues, "there are problems associated with adverse possession, including, but not limited to, monitoring problems, safety concerns, and environmental degradation" (Gardiner, p. 122). Yet these problems are not

germane solely to the case of squatting as these concerns arise in nearly all cases in which property possession changes hands. I do not take it to be a fault of the legal measure of adverse possession that people may pervert or abuse the structure that is in place. In principle, the law encourages responsible landownership such as preservation and maintenance while also allowing an avenue by which an individual can come to possess land that is not held to these bare minimum standards.

There is an underlying principle that grounds this defense of adverse possession which I must now bring to the forefront, and this will be the most important reason to believe that the original owner has lost her claim to ownership. There is here an implicit ‘no waste’ principle. Other versions of a no waste principle can be found in a wide array of philosophical literature, but one interesting discussion of a similar principle is defended by Michael Blake and Mathias Risse in their coauthored piece, “Is There a Right to Free Movement? Immigration and Original Ownership of the Earth.” In this article, they discuss what it is to waste resources in terms of ‘over-use’ and under-use.’ They determine the fairly strong conclusion in favor of ‘Common Ownership’ of resources which holds that, “Common Ownership may entitle people to entry in areas that are less overcrowded than where they came from... Comparisons have been made in terms of proportionate usage of areas (considering their value for human purposes) relative to other areas” (p. 14). According to their conception, one is essentially an ‘under-user’ of resources if they are under-using the resources *proportionately* to how the resources could be used otherwise although the previous quote says proportionate to the use in other areas. Applying this specifically to the case of immigration, they argue,

Under-users have two ways of responding to would-be immigrants: they can relinquish territory, allowing for the founding of other political entities, or they can admit them to their territory. In that case, prudential and moral reasons will speak against keeping immigrants systematically outside of the political economy” (p. 13).

Blake and Risse are using a measure of proportionality to give a both a moral and prudential case against the justification of under-use of resources in a society. Of course, any measure that relies on a relative, proportionate determination will result in a very strong proposal for what it means to *under-use* resources.

Defense of a 'No Waste Principle':

My proposal on the other hand requires a much more moderate principle. Where Blake and Risse have offered a defense of a no proportionate under-use principle, I am defending a 'No Waste' principle. We can see that these two are quite distinct in strength. If it is at least conceivably defensible that a productive society cannot afford for *proportionate* under-use of resources, then it is certainly more palatable that a society cannot afford to defend any cases of *absolute* waste of resources. It is this latter situation which applies most obviously to the case of the squatter.

To defend a no waste principle on utilitarian grounds, we have seen that there is a prudential argument in favor of a no waste principle in that it may be able to trump some existing rights. The claim supporting a no absolute waste principle is the claim that trumping existing rights will, in the specific circumstances that I have laid out, be more beneficial to the society than to hold the original rights as absolute. There is something that can outweigh or even abolish earlier claims to ownership such as the presence of more productive owners, and this is especially likely to be true in situations of absolute waste (as we have seen in the case of the squatter). In the case of illegal immigration, this may once again be a largely empirical claim, but I here also think that this is a merit of the theory. It can ultimately be determined if, in cases of waste, it is more beneficial to the society to grant the illegal immigrant rights to citizenship,

employment, ownership, etc, and of course, I believe that the odds are overwhelmingly in the favor of this being the outcome of such a weighing of benefits.

As I have said, however, this discussion should not hinge on the weighing of rights. We ought to think that there is something about ownership that brings about responsibility. It is quite intuitive that previous claims to ownership can be nullified as opposed to merely outweighed in situations of waste or neglect. Consider this hypothetical situation: you are walking around town one day when you come upon a stray dog who has clearly been left to fend for itself. This poor, skinny, shaggy dog, named Rex, is still wearing a tattered collar bearing the phone number of the previous owner. You take Rex into your home and provide him with food and water. Maybe you then make a sincere attempt to contact the owner, but due to his neglect, you cannot reach the previous owner. Additionally, the owner makes no attempt to retrieve the dog. Naturally we think that it is his responsibility to retrieve the dog rather than it being your responsibility to dedicate a vast amount of time to seek him out.

By this time, several months have passed. Rex is now a healthy, happy dog, and he has not only bonded with your other pets but also with the rest of your family. Your children adore him, and he has developed a fondness for his new sleeping quarters on the otherwise unused couch in the basement. Now one day, a man you have never seen before comes to your door and demands to take Rex back as he is the rightful owner. Do not we think that there is something wrong with this man's claim? He has neglected his right (and the responsibility) that comes with proper ownership. As we can see in this case, it is not the mere claim to ownership that matters. Rather what matters is the responsible upkeep of this claim. In the case of Rex, this man has relinquished his right to ownership of the dog due to neglect, and by your presence and your role as a responsible new owner, the dog is effectively yours. It is not that your new right to the

ownership of Rex somehow trumps the original owner's rights. Rather it is that he no longer has any right to your beloved Rex at all! Our intuitions certainly support this conclusion.

We can see how this hypothetical situation relates to the case of the squatter. We should no longer think that it is peculiar or unintuitive that one can become a rightful owner in cases of neglect. We have seen now that it is plausible that an owner could lose her claim to ownership in these cases, but we are now also beginning to see that there is reason to think that the new possessor somehow generates a new claim to the property. There is reason to think that this is a justified gain in the case of the squatter independent of the reasons why the original owner has lost her claim. This case is also well captured in the distinction between ownership and possession. As Katz explains,

Ownership does not depend on physical possession. A person can own without ever having taken possession of the land in a physical sense. Actual possession, by contrast, is the underlying material manifestation of the squatter's right to possess. This is not to say that ownership is a matter purely of formal right. The owner's position also depends on a material manifestation. But the material fact on which ownership depends is not actual possession but rather the effective authority to control the agenda (Katz, p. 66).

The man from our thought experiment was the owner of Rex purely as a matter of formality. You, on the other hand, have a right to possess, and this is what must be given due consideration. If this effective authority to control the agenda is not merely under-utilized, but furthermore, outright neglected, then the original owner can no longer be said to be a rightful owner given the presence of a responsible squatter. It is not just that the squatter merely occupies the land left by the owner, but they take on a role of possessor as they take on *responsibility* of the land.

One might worry that I have unfairly constructed this example by using an animal as we are sympathetic to thinking that we owe something to animals or there is some sort of particularly strong sense of responsibility that comes into play when the object of our concern is an animal.

Yet this case works equally as well if we were to substitute an inanimate object. Imagine that, instead of Rex, the neglectful owner is wasting some other resource that is limited.

Imagine that the neglectful owner has permanently and spontaneously moved out of a house but has left the faucet running in his previous residence for years with no intention of returning nor any intention of paying his water bills. Not only would another be justified in entering his home to turn off the now rusted faucet, but we would also say that if this new agent were to start paying the water bills and perhaps return the luster to the faucet, they certainly have a claim to utilize this faucet for their own water consumption. With this example, I hope we can see that it is not that the resource is sentient that makes us respond to neglect, but rather it seems to matter that the resource is limited. In this case, the dreadfully neglectful owner will justifiably lose his claim of ownership as in the case his ownership of Rex.

I take these previous considerations to conclude the first rationale for adverse possession which concerns how one loses claims of ownership. There is however a second rationale behind this law which allows the move to new ownership. As previously stated, this will certainly not provide a full defense of adverse possession, but after we have developed this second rationale, I believe we will at least have reason to take this proposal quite seriously.

For the second rationale concerning how one comes to be an owner, we must look not only to the distinction between ownership and possession, but also to the traditional Lockean conception of ownership. In “Self Ownership and World Ownership: Against Left-Libertarianism”, Richard Arneson explains the notion of rights of ownership,

Legitimate ownership encompasses a range of entitlements down to bare entitlement to access...If one fully owns a thing, one has the right to use it as one chooses so long as one does not use it in ways that violate other people's rights not to be harmed, the right to exclude all others from using it, the right to allow others to use in on terms one sets...These various ownership rights are enforceable (Arneson, p.3).

This Lockean conception is that of legitimate ownership. It must be clear that adverse possession is not a threat to the institution of legitimate ownership. The worry that adverse possession is an apparent violation of legitimate ownership is reconciled within this account when we consider how one comes to be an owner according to Locke. One comes to be an owner by the investment of labor in a property. He writes,

He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. No body can deny but the nourishment that is his. I ask then, when did they begin to be his? When he digested? Or when he eat? Or when he boiled? Or when he brought them home? Or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could. That *labor* put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right (Locke, p. 225).

The squatter that qualifies for adverse possession is the one that invests labor into the land when this role is not being fulfilled by the owner. If labor is what matters in a claim to ownership, the adverse possessor has this legitimate claim. The squatter generates a claim to possession by laboring on the land. We have already said that the squatter under consideration must be making improvements to the land, and this reconciles with the Lockean conception of ownership.

One thing that may be problematic within the Lockean framework is that he speaks of the initial labor relation with the property rather than some necessarily continual relation with the owner and the land. If all that is needed is the original planting of the acorn rather than some maintained cultivation of the acorn, then this will cause a worry not only for my view, but for the legitimacy of adverse possession in general. In order to make plausible the notion that it is a continual relationship with the land that matters, as opposed to a fleeting initial investment of labor, this will return us to a discussion of the aforementioned ‘no waste’ principle.

As we have seen in the case of squatting, the squatter inhabits a property that has been left to waste by the previous owner. They are able to live on the property in such a way that the

original owner either does not notice their presence due to their utter neglect of the property or they have not made sufficient effort to evict the squatter which indicates that they are essentially ‘sleeping on’ their rights as owners. This situation only commits one to claims about what qualifies as absolute waste of resources as opposed to proportionate under-use of resources. I am not trying to justify cases in which the squatter has simply come onto the rightful owner’s land and somehow made *better* use of the property than the owner or contributed merely additional labor. We are here concerned only with cases of absolute waste, and endorsing a claim such as a ‘no absolute waste’ principle should be seen as fairly uncontroversial in this light. With that in mind, it may of course be difficult to determine what precisely qualifies as absolute waste in less obvious cases than that of the squatter. I will return to this concern when we return to the application of such a principle in the case of illegal immigration.

Now with this understanding of adverse possession, we will begin to see that the case for adverse possession is highly analogous not only to the reasons why we ought to give illegal immigrants rights but also and more helpfully *how* we should give illegal immigrants rights that they do not currently receive due to their illegal status.

CHAPTER III
MOTIVATION FOR THE ANALOGY
OF SQUATTING AND ILLEGAL IMMIGRATION

Let us now look at the similarity of the illegal immigrant's situation to that of the squatter. I will argue that, though the new right of the illegal immigrant may in some sense be adverse to the interests of the occupied country, what actually matters is the nature of responsibility and the upkeep that must be in place in order for the state to maintain any claims of enforcement and ownership. This is the relevant consideration. If the illegal immigrant has resided in a country long enough, has established ties to a great enough extent, and has contributed sufficient labor with their presence, then the state will have relinquished its role as a responsible enforcer of borders. The state is no longer justified in intervening after this time period in an attempt reestablish this neglected title. To do so would be like the return of Rex's original owner, that is, an unjustified attempt to enforce a right that is not only at that point merely a matter of formality but a nullified and neglected one at that.

Today when we talk about the membership of citizenship in the U.S., there are two basic principles that justify being a member in this group: *jus soli* ("the law of the soil") and *jus sanguinis* ("the law of blood"). Both of these general principles determine our allocation of citizenship rights, and they conjure images of entitlement or limited membership. In nearly every society, there are certain restrictions on membership, and this is even drawn into arbitrary boundaries on the Earth. Yet today there is also something that subverts the underlying

paradigms of *jus soli* and *jus sanguinis*. This is the phenomenon of migration that is undeniably ever more present in our globalizing world. In general, migration is “the temporary or permanent move of individuals or groups of people from one geographic location to another for various reasons ranging from better employment possibilities to persecution” (Hagen-Zanker, p. 4). For the purposes of this paper, I will be focusing on the *illegal* form of immigration to demonstrate a correlation to the current issues surrounding this phenomenon central to America. This is also the most problematic vein of immigration in that this is the subgroup which is most likely to be denied basic rights, and whether this denial is legitimate or illegitimate remains to be seen.

It is important to evaluate our methods of justifying or denying rights to immigrants, and this is true because rights (and citizenship) “define access to certain resources, benefits, protections, decision-making processes, and opportunity-enhancing institutions which are reserved primarily to those defined as right-holders” (Shachar, p. 7). With this much at the moral stake, we must look with close scrutiny at any process that creates unequal opportunity. To begin, I do think that it is at least possible that there may be justified grounds for institutions that even knowingly provide unequal opportunities to different groups of people, and if there is such a case of a legitimate denial of fair treatment in the political sphere, then the illegal immigrant is the best candidate for this justification. The *illegal* immigrant has broken a law and thus undermined the very political institutions that would grant the immigrant such rights. It might be that this is enough to justify denying rights even if it means denying equality in this case.

With this in mind, we are now situated to contemplate the analogy that is at the heart of this paper. We will see that there is a clear analogy between the acts of squatting and illegally immigrating. To begin the analogy, one way to highlight the similarities is to look at the reasons

that explain why people squat and the reasons that explain why people migrate (both legally and illegally). We will find that these are surprisingly similar.

Common Motivations to Squat	Common Motivations to Migrate
<ul style="list-style-type: none"> • economic situation/poverty • political • entrepreneurial • personal political views • loss of family • natural disaster • political instability • avoiding arrest/other legal ramifications in home country/other state • protest • voluntary desire to change one's lifestyle •conservational 	<ul style="list-style-type: none"> • economic situation/poverty • political • entrepreneurial • personal political views • family reunification • natural disaster • political instability • avoiding arrest/other legal ramifications in home country/other state • protest • voluntary desire to change one's lifestyle

Though this is certainly not an exhaustive list, I take this to show that there is at least an initial connection between the two acts. When creating legal structure, it is good practice to look at the motivations by which people act in the way that is in question. Though drawing attention to similar intentions is not enough to show that there is a tight analogy between two acts in other aspects, this is a compelling starting point from which we may begin to evaluate the analogy. We see this emphasis on the importance of intentions in legal distinctions such as murder versus manslaughter, hate crimes versus assault, etc. The intent with which one acts seems to, at least in most cases, have both legal and moral weight. Then if the motivations *and* legal transgressions are similar in nature as in the cases of squatting and immigration, it will be beneficial to look to the preconceived law that we have successfully applied in the case of squatting, adverse possession, and see how this can be used to reconcile our more pressing issues concerning illegal

immigration. We will see that there are analogous reasons that the state will lose its claim as an enforcer and also reasons why the illegal immigrant gains a claim to citizenship. In order to better argue for this analogy, I want to first acknowledge two possible objections by clarifying my position, and these should motivate that the legal transgressions are indeed similar even beyond the overlapping original motivations.

Some may be quick to point out that there is what they take to be an important disanalogy between the two cases that I have presented, and I want to dispel this worry before moving into any conclusions that we may draw from the analogy. The worry may look something like this: squatting is by definition an illegal activity; migration on the other hand comes in two forms, illegal and legal. This will not be a concern for the scope of this paper, because in virtue of the analogy, the focus of this paper is strictly on the illegal form of migration. It will also be important to note that there is a distinction between squatting out of necessity and squatting in order to make a political statement. This only serves to strengthen the analogy, because similarly, there is an important distinction between migrating out of necessity (which may result more often in illegal immigration) and migrating as a personal or political statement.

For example, we can imagine the case of the immigrant who is offered an elevated employment position in their company that will require them to move to another country. This immigrant, supposing that they obtained the correct work visas and other necessary paperwork, is not the sort of immigrant that this paper is concerned with. We face much less resistance both intuitively and legally when it comes time to consider granting that immigrant basic rights. On the other hand if we now consider the immigrant who is fleeing their country due to religious persecution or perhaps the one who comes with children, we feel much less inclined to say that we just ought to grant this person basic rights. There is reason to acknowledge that this person

has subverted a structure that we have in place in order to maintain and accommodate immigration. As I will show, we can acknowledge this initial wrong, but at the same time, dispel this further intuition that we are in some way more justified in denying rights to this latter immigrant than in the case of the legal immigrant. There is a way to justify granting rights even to the extent of basic citizenship to the illegal immigrant, and we will see this by looking at the analogous case of adverse possession.

Secondly, I want to address a possible objection to the analogy that may have arisen from the previous discussion of adverse possession and the correlating endorsement of a no waste principle. It may be said that there is relevant disanalogy between the case of squatters and that of illegal immigrants that justifies the application of adverse possession in the case of the squatter whereas a similar measure will not be justified in the case of the illegal immigrant. One might object that a squatter is more entitled to property rights due to the fact that the particular property or settlement is *unwanted* or abandoned by the owner. The property that they inhabit is unwanted in some way that is not analogous to the presence of illegal immigrants in an inhabited country.

In response to this worry, I believe that this objection can actually serve to strengthen the analogy between squatting and illegal immigration. In the same manner that a squatter takes on unwanted (or at least relatively undesirable) properties, the illegal immigrant is most likely to take on the more undesirable or unwanted jobs within the new society. The position of an illegal immigrant is like that of a squatter in that the illegal immigrants' jobs are often lacking the infrastructure and support that is found in the jobs of natural citizens, and in this way, the illegal immigrant's position in society is highly analogous to that of the squatter on an unwanted property.

It may admittedly be less clear in the case of the illegal immigrant that they are in some way occupying the relatively undesirable positions in society, but just because we do not have an abandoned house to point to as undeniable evidence, we should not assume that there is a disanalogy here. According to the Public Policy Institute of California, “About half of farm workers nationwide are illegal immigrants...They are also concentrated in construction, manufacturing (especially textiles and animal processing), retail trade (especially restaurants), and services (especially private household services)” (Johnson, p. 9). Keeping this laundry list of jobs in mind, it is interesting to note that when the Fair Labor Standards Act was enacted in 1938 (requiring a national minimum wage and thus establishing requirements of overtime pay), it specifically excluded job protections in the restaurant, retail, domestic and farm industries (Meyerson, p. 1). There is a stark and unsettling overlap in these two sets of labor fields. Of course, the Fair Labor Standards Act was eventually somewhat expanded. Nonetheless it is still the case that,

...agricultural laborers still have no federal legal right to collect overtime, home healthcare workers have no right to the minimum wage and ‘tipped’ workers such as waiters are entitled to a minimum of just \$2.13 an hour. Nor are agricultural and domestic workers accorded the right to unionize under the National Labor Relations Act...and such low-paid independent contractors as port truckers and taxi drivers are also excluded (Meyerson, p.1).

Not only are jobs of this nature clearly lacking the legal protections and political support of nearly any other job on the market, these disadvantages are only compounded by the fact that many of the workers are also here illegally. This positions them in such a way that even if many of them knew the possible avenues of legal recourse available to them (supposing any were available in the first place), many would be afraid to act on any remedy for their situation due to fears of deportation. These job positions are rife with (illegal) employer abuse, and these jobs (and just general positions in society) are certainly analogous to the situation of the squatter. We

must acknowledge that the illegal immigrant occupies the relatively undesirable positions in society in much the same way as squatters take on the undesirable and dilapidated properties. Also the availability of jobs to illegal immigrants, along with the taxes that otherwise would not be paid, and the labor that otherwise would not be contributed are all evidence of apparent waste within our society. We will see later how this claim will play a further role in the application of the no waste principle in the case of immigration.

It is also important to remember that in the structure of adverse possession, contrary to popular thought, the squatter is not actually taking the land from the previous landowner (or anybody for that matter). This is not a case of one citizen's rights being weighed against or somehow in conflict with another's. In fact, the role of rights has very little to do with the process of adverse possession at least in the legal conception. In the case of squatting:

Adverse possession vests the possessor with the complete title as effectually as if there had been a conveyance by the former owner. But the title is independent, not derivative, and relates back to the inception of adverse possession. The adverse possessor does not derive his title from the former owner, but from a new source of title, his own possession (Ballantine, p. 142).

Though it appears as if the former land owner is handing over their title of ownership to the squatter, this is not the case. By neglecting the land to such an extent as to allow for squatters, they have effectively abandoned any claims to ownership. Then as the squatter takes on the responsibility of ownership, they are separately given a new claim to ownership. In the legal form, this is not thought of as a case of balancing two competing interests or rights to ownership of one piece of land. Rather adverse possession occurs in the case of the abandonment of property rights on behalf of the original owner due to neglect, and a separate, further step is necessary for a new owner to come upon the effectively abandoned property. Thus squatting should be thought of as quite distinct from any form of justified theft or even from any cases in

which there are competing interests to property rights. Analogously we will see how the same is true in the case of the illegal immigrant.

CHAPTER IV

GRANTING RIGHTS USING THE FRAMEWORK OF ADVERSE POSSESSION

Now when we have questions concerning how to handle granting rights to illegal immigrants, my suggestion is that we can rely on the preexisting framework of adverse possession. Using this framework, we will see that the illegality of the action is not the ultimate consideration. I am here suggesting the framework for a law that I will call *adverse occupation*. Relying on the structure of adverse possession, my definition of adverse occupation could be stated as:

Adverse occupation is a method of acquisition of certain titles or rights by occupation within a county for a statutory period under certain conditions. Adverse occupation generally has five elements that a claimant must establish: the occupation must be (1) open, (2) continuous for the statutory period, (3) exhibiting the breadth of an established, contributing lifestyle, (4) adverse to the currently occupied country's interests, and (5) firm.

In explaining the rationale for endorsing the rule of adverse occupation, we will see that there are analogous costs and benefits as in the case of adverse possession. However as in the case with squatters, the benefits of enacting adverse occupation far outweigh the costs. Ultimately I will argue that this rationale can be extended not only to the particular right of illegal immigrants to property ownership, but even so far as a granting of citizenship and all of the rights that come with this. First we must now take a closer look at what each of these requirements might mean in application as they are admittedly quite vague as initially construed.

I have suggested that an illegal immigrant might qualify for adverse occupation under the conditions that their occupation is (1) ‘open’ and (2) ‘continuous for the statutory period.’ These requirements are aimed at capturing one intuitive aspect of what is known as the ‘autonomy view.’ When it comes to the rights of the undocumented, their autonomy is what is important, because this allows that the undocumented migrants can acquire rights in the same way as the documented. This view remains faithful to the reality of our political system, because it recognizes that a great deal depends merely upon how efficient the enforcement methods are. This relates to important considerations of the mere facts concerning how much time the illegal immigrant spends in a country. This feature is a very relevant consideration when determining how to allocate rights and a morally significant one at that. The ‘open’ and ‘continuous for the statutory period’ provisos allow us to take into consideration the amount of time the immigrant has already been in the country, and this also takes into account the relationship of the individual immigrant with the state. Also as in the case with the squatter, we will see that there are both reasons to think that the state loses a claim due to its neglect of the duties of an enforcer of borders, and additionally the illegal immigrant gains a claim to occupation.

Adverse Occupation & the Autonomy View

Accounting for some aspects of the autonomy view will be important for a satisfactory conception of adverse occupation, because the autonomy view can provide a very good account of why we do not need to grant citizenship rights to individuals such as tourists. As Adam Cox and Adam Hosein point out,

Given that restrictions on autonomy come in degrees, the Autonomy View can provide a good explanation of, for instance, what distinguishes tourists from long-term residents. Tourists, unlike long-term residents, are in the country for a very short period of time and thus the state takes very little control over their lives. Because of this the state owes much less to the tourist (Hosein, p. 13).

This statutory period that I have suggested will play a similar role in the process of distinguishing between individuals such as the tourist and the illegal immigrant. Also the 'open' qualification allows that there are degrees of adverse occupation as occupation itself comes in degrees. Granted, the justification for rights on the autonomy view seems to be importantly different from the justification that I have offered for the law of adverse possession. The relation between these two justifications should however be seen as complementary even if they are stemming from different perspectives. The justification for rights on the autonomy view is meant to be encompassed and expanded upon in my justification of an adverse occupation law. The appeal of my justification is that it incorporates the autonomy view while also accounting for further justifications within the additional provisos. By looking back at the case of the squatter, we can develop an even clearer understanding of this concept.

If a government can be effectually unaware of the illegal immigrant's presence in the country for a given period of time, then the government is in no better position than the land owner in the case of the squatter, and we can consider the government to be 'sleeping' on their rights as an enforcer of the country's borders. The illegal immigrant is here able to live in the country in such a way that the government either does not notice their presence due to the state's neglect, the inefficacy of the enforcement methods, or due to the fact that they have not made sufficient effort to deport the immigrant. It is true that the government may be spending a lot of money to enforce borders, but this fact contributes little to our calculation if these methods are ineffective to the degree that they allow illegal immigrants to maintain and establish an open lifestyle in the state. After this point, it seems to be merely a matter of formality that the state is an enforcer of borders and not a true exercise of control. As related back to the case of the

squatter, we determined that this is sufficient to indicate that the original claimant is essentially ‘sleeping on’ their rights as owners, or in this case, as enforcers of the borders.

One question that I have not yet addressed is what concrete quantity of time this must be in order to qualify for the first two provisos of adverse occupation. However, for the purposes of this paper, I do not feel pressed to offer such a determinate answer. I believe that this is an empirical question and would have to be determined with reference to facts about the current enforcement procedures and knowledge about the usual rate at which the government can be expected to act upon (or even become aware of) the presence of illegal immigrants. These empirical facts may determine that the ‘statutory period’ is in fact a concrete duration that may apply in all cases, or if it is more reasonable to expect that the statutory period would vary from case to case, then the statutory period could be dependent upon the individual circumstances. It is important to note here that this is where my view diverges from the autonomy view. I have asserted that the length of an immigrant’s stay is relevant to an indication of the government ‘sleeping’ on its rights as an enforcer. The autonomy view would instead say that the length of stay is relevant to considerations concerning a degree of governmental control over the immigrant’s life. By this, I mean that I am shifting the focus from what the state owes to the illegal immigrant, and instead, I think length of stay should be a reflection on the government’s role as owner. Where Hosein and Cox argue that, “mere presence in a territory can, over an extended period of time, become enough to entitle a citizen to equal concern from the state, even in the absence of affiliation” (p. 13), I am arguing that this mere presence in the territory says something about the state and its neglect of responsibilities as owner.

Returning now to the question of a concrete quantity of time in order to qualify for the first two provisos, we can see that in the case of squatting the analogous statutory period varies

in accordance with the degree of degradation and obvious presence of the squatter. Thus I take it to not be a failure of adverse occupation if it did ultimately require some circumstantial application of the duration of statutory periods. This method has proved effective in the case of squatting, and I think there is no relevant disanalogy here that would press one to give a more determinate answer in the case of illegal immigration at this point.

Adverse Occupation & the Affiliation View

To offer further justifications for some of the other provisos, we will now look at two other qualifications that I have embedded in my conception of adverse possession. I have said that the illegal immigrant's presence must (3) exhibit the breadth of an established, contributing lifestyle and be (5) firm. At first blush, these qualifications are admittedly as troublingly vague as the previous ones. Yet with a defense of some of the more desirable aspects of the affiliation view of illegal immigration, I think that we will have good reason to endorse these qualifications even if they are vaguely construed.

The affiliation view can defend these two provisos as this view holds that things such as family reunification are what matter when allocating rights to individuals. In the case of the autonomy view (which I take to offer support for provisos (1) and (2)), the concern is for the relationship of the state with the individuals. Yet in the case of the affiliation view, the concern is focused on the individual's relations with other citizens. Carens offers a comprehensive defense of a version of the affiliation view. He writes,

The longer one stays, the stronger one's connections and social attachments. For the same reason, the longer one stays the stronger one's claim to be treated as a full member. At some point a threshold is reached, after which one simply is a member of society, tout court, and one should be granted all the legal rights that other full members enjoy (Carens, p. 29).

He argues that we ought to care not just about sheer presence in the state, but also things like family reunification. This view focuses on the ties that the illegal immigrant has cultivated within the new society. In creating this framework, it would be wrong to ignore this aspect by solely focusing on the autonomy view. Accounting for the strengths of both the affiliation and the autonomy view will make adverse occupation not only a compromise between these two theories, but also including these provisos will make adverse occupation sufficiently stringent in that it also allows room to respect this initial right of the state as an enforcer of borders. We would not want a framework that would nullify this right in all cases, but rather one that picks out only the cases in which this is justified.

Hiroshi Motomura, a proponent of the affiliation view, wants to deny the characterization of immigration as “an entirely external force pressing in on the United States,” because this mischaracterization arises from two components: “One is a very underdeveloped sense of citizens’ rights in immigration and citizenship matters. The other, related problem is that failure to see that immigrants are, in many cases, future Americans” (p. 424). In order to resolve this mischaracterization, he argues for the affiliation view. He writes,

According to immigration as affiliation, our treatment of noncitizens depends on their ties to this country. Newcomers put down roots...and the more enmeshed they become in the fabric of American life, the more we should treat them like citizens. Affiliation explains why the birth of children as U.S. citizens to immigrant families—no doubt a very significant tie to this country—might argue for letting the whole family stay” (Motomura, p. 427).

As he presents this case, Motomura gives us reason to take into account the “roots” that the immigrant has cultivated in the new society when we are considering what rights they deserve. If the affiliations and ties that an immigrant creates in the new society are a relevant consideration for the reasons offered by proponents of the affiliation view, then we have further reason to endorse the provisos that the illegal immigrant’s presence must (3) ‘exhibit the breadth of an

established, contributing lifestyle' and be (5) 'firm' in order to qualify for my conception of adverse occupation. To an extent, I am endorsing the affiliation view here, but this does not mean that my proposal of adverse occupation should be subject to many of the objections of the affiliation view. Many criticisms of the affiliation view will not reach my proposal as adverse occupation has additional provisos to account for the other factors that matter when determining the allocation of rights.

For example, one might think that the affiliation view cannot account for some of our basic intuitions about equality. One of these basic intuitions about equality is that, "it does not seem possible that someone's lack of participation in civil society is a good justification for limiting the state's concern for them or for giving them fewer rights" (Hosein, p. 11). My view should be immune from this worry in several ways. First of all, I have not restricted the ways in which a person rightly 'participates' in civil society. As the squatter may only have ties to the property while at the same time lacking any ties to the outside neighborhood, the illegal immigrant may have nontraditional methods or degrees of participation, but beyond this, we can look to other explanations. This 'breadth of an established lifestyle' does not have to be culture-specific nor has it even been defined in terms of participation. Rather the breadth of an established lifestyle should include a general sense of the importance of contribution. Where the squatter contributes labor as an improvement to the land, an illegal immigrant may hold a job, maintain a household, care for a family, etc. Also under adverse occupation, we have other provisos to look to in borderline cases.

We have left what I take to be the most potentially controversial qualification for adverse possession. This qualification is that the illegal immigrant's presence must be (4) adverse to the currently occupied country's interests. This proviso is the most relevant to the justifications

regarding the role of adverse possession in a civil society. After relating this back to the earlier discussion of my endorsement of a ‘no absolute waste’ principle, we will see that there are sufficiently strong reasons to endorse this qualification as we have seen in the case of the four prior provisos.

As in the case of squatters and adverse possession, there is indeed some sense in which the squatter’s presence is adverse to the original owner’s interests. It is this feature of squatting which makes it seem initially quite distasteful and any law that rewards this activity seems to be at the very least somewhat peculiar. Yet as we have seen, this initial reaction subsides with a closer look at the case of adverse possession and the understanding the original owner is not only neglecting their duties as a responsible land owner but also sleeping on their rights as an owner. Additionally there are prudential and utilitarian reasons for endorsing this framework. We will see that this is true upon closer inspection of proviso (4) as it applies to adverse occupation.

I have previously briefly advocated for the endorsement of a no waste principle in a productive society in the case for adverse possession, and we will now apply this to the case for adverse possession. Despite the fact that the illegal immigrant’s presence is in some sense adverse to the country of occupation’s interests, this is only occurring in cases of analogous absolute waste on the behalf of the state. As an example of the analogous absolute waste in the case of the immigrant, this absolute waste occurs in the occupation of jobs that would otherwise go unfulfilled without the presence of the illegal immigrants. This absolute waste can also be seen in the taxes that would not otherwise be contributed, the properties that would not be otherwise owned, and any other contributions that could not be gleaned without their presence.

As when we looked at Blake and Risse’s proportionate waste principle earlier, we can still admit that this principle would not apply in cases of over-use such as over-population.

Neither the endorsement of a 'proportionate under-use' principle nor the endorsement of a 'no absolute waste' principle would commit one to say that illegal immigrants must be granted citizenship or even admittance into a society that exhibits over-population or severe over-use of resources. The endorsement of my 'no absolute waste' principle only commits one to say that it is impermissible to deny one rights to something due to a mere fact of ownership or prior claim that is either being 'slept on' or left to absolute waste. According to this principle, we are saying that the wrongness of absolute waste in a productive (i.e. normal) society is allowed in certain circumstances to trump claims of ownership. This is a fairly noncontroversial principle, and I think can be most clearly defended on utilitarian grounds. Yet, as in the cases of the squatter and for Rex, proviso (4) is also justified in relation to the role of state as owner and on the 'Inconsistent Use' model.

CHAPTER V

OBJECTIONS CONSIDERED

One may ask at this point how this proposed legal structure justifies extending its scope all the way to granting citizenship rights to illegal immigrants. Perhaps at this point we are comfortable with the analogy with the squatter, but in that case, the squatter is only granted the right to ownership. Then, as the opponent may argue, it may seem that the analogy can only justify granting right to property ownership for the illegal immigrant if the analogy is to stay true to itself.

However this restriction on the analogy, I fear, misunderstands the nature of the analogy. The emphasis from the onset has been to strike an analogy between the similar intentions of the two cases and to derive from these intentions the justification for the most basic relevant right associated with the given action. In the case of squatting, the act is the inhabiting of a dwelling and the most basic right associated with inhabiting a dwelling is that of property ownership. In the case of the illegal immigrant, the act is the inhabiting of a country and the most basic rights associated with inhabiting a country are those granted along with citizenship. It would be ad hoc to say that the justification that I have given could justify the basic right of property ownership for the squatter, but there is some arbitrary cut-off that would serve to justify something like the

right to employment for the illegal immigrant but then would not extend this to the analogous basic right of citizenship for the illegal immigrant.

By looking at another author, Ayelet Shachar, I hope to show further why granting the maximal set of citizenship rights is not ad hoc. In her book, The Birthright Lottery: Citizenship and Inequality, Shachar argues that a similar “transfer” method of rights should actually be adopted in the case of citizens as opposed to the *jus soli* and *jus sanguinis* methods that we currently use. This clearly a more ambitious argument than I have here proposed. However her work is quite relevant as she uses a similar argument by analogy between citizenship rights and inherited property. She argues that, “By highlighting the analogy to inherited property regimes, it becomes possible to call attention to the manifold ways in which reliance on birth in the assignment of citizenship regularizes, naturalizes and legitimizes distinctions not only between jurisdictions but also between vastly unequal bequests” (Schachar, p. 4). In other words, our emphasis on the ‘privilege of inherited entitlement’ to citizenship is what cultivates many of the inequalities and injustices that we see in the treatment of noncitizens. She argues, as many would agree, that our place of birth is utterly arbitrary, and thus, it is not an appropriate criterion for assigning something that has such moral weight as citizenship rights. Adopting an additional ‘transfer’ method of rights is a matter of justice, and it ensures that the proper role of encouraging social order.

Additionally much of our hesitation to grant citizenship rights to illegal immigrants rests upon an underlying assumption that may very well be fundamentally mistaken. There is this misconception that illegal immigration is somehow out of control. Illegal immigration is often depicted as if it is a massive influx of people who are unjustly draining a limited supply of resources. As far as the first part of this assumption goes, namely that we are discussing a

massive influx of people, there just is no data to support this claim. Not only has our resistance to allowing immigration served as a roadblock to our ability to measure and track the people who are going to immigrate, regardless of the legal obstacles, it is also the case that, “No one has ever presented data, even symptomatic data, indicating that the assumed upswing in migration...has taken place. The illegal movement, in fact, may not be out of control but be imperfectly regulated by current law enforcement practices” (Keeley, p. 52). Not only would granting citizenship rights to illegal immigrants give us a means of tracking and accounting for shifts in population and accurate counts of migration, but it will likely show that this assumption of the upswing of immigration and influx of people to be an unfounded assumption.

Lastly I do not wish to belabor this final point as it is the work of many other articles and begins to reach beyond the more modest scope of my paper, but I do think it is worth noting that it might just be outright unjustified to determine morally significant decisions such as the granting of citizenship rights based on the highly arbitrary notions of *jus soli* and *jus sanguinis*. As Shachar points out, “the bulk of the world’s population acquires citizenship on the basis of transmission at birth based on parentage or territorial location at time of birth” (p. 4), and this means that:

To the extent that citizenship is a valuable resource, it is currently secured on the basis of a morally arbitrary set of criteria. Birthright membership principles that sanction such distribution deserve the same critical analysis appropriate to any other social institution that stands in the way of the equal realization of opportunities (p. 4).

While this is a deeper level of scrutiny than I am prepared to do in this paper, I am quite sympathetic to the principles behind the criticism that Shachar is advancing. If we are correct in sympathizing with this criticism of birthright as an arbitrary basis for justifying citizenship rights, then it should be a much smaller task to entertain the argument that we ought to broaden the means by which someone can come to have the rights that come with citizenship.

I have offered the analogy of the squatter as a framework for an additional route to attaining the set of citizenship rights. If birthright citizenship is indeed an arbitrary category, we have reason to accept a further framework that will help those who after enduring the “lottery of their birth” have chosen to illegally immigrate (Shachar, “The Birthright Lottery”). It is with this in mind that we can dispel the objection that the extension of rights down to full *citizenship* rights would be inappropriate in the case of the illegal immigrant (as opposed to granting them merely ownership rights or some other right thought to be closer to the heart of my analogy to the squatter). After acknowledging the presence of a birthright lottery in the global structure and, importantly, the moral weight that comes with the granting of rights, I hope it is clear that relying on some structure such as adverse occupation gives us a means for assigning political membership that will allow for a more just footing.

There may be another objection to my proposal that would argue that having more people allowed to stay in the country weakens the bargaining power of the workers who are already here. It lowers the price of labor, and in this way, perhaps adverse occupation actually creates another type of injustice against this other group of citizens. Yet I can respond to this objection by agreeing with it. This objection comes from our current pattern of exploiting *illegal* workers by paying less for their labor thus diminishing the value of legal laborers requiring fair pay. I agree with this objector that what we ought to have is a labor force of legal workers who are all here with fair pay and protected rights. Bargaining power is only harmed when illegal labor is exploited. This objection will not apply to a group of fairly paid legal laborers, because this does not diminish the value of the current skilled laborers.

Another objection concerns my conception of what constitutes use. It is true that there are other legitimate types of use beyond those that are functional (as considered in the case of Rex or

the leaking faucet). There may also be use of resources in society that are for aesthetic reasons for example. I can allow for this broader interpretation of use in my proposal. I have given only examples of very clear cases of owner-possessor relationships. Of course, there are many unclear cases, and in practice, these unclear cases of adverse occupation may actually constitute a majority. Yet this is certainly true in the case of adverse possession. I have given a conditional proposal for the conception of a framework. The details of the unclear cases would naturally have to be worked out in practice as has been successfully done in the case of adverse possession.

The final objection that I will address argues that what is important in the case of squatting is the negligent owner. This is an individual actor who has clearly neglected his duties. Yet there is a strong disanalogy in the case of the illegal immigrant and the state. The state is not an *individual* owner. In fact, this is very complicated series of enforcements with many other actors involved. Some of these actors even encourage the influx of illegal immigrants for purposes such as cheap labor. These mixed messages are not present in the case of the squatter, and this is perhaps detrimental to the persuasiveness of the analogy.

In response to this final objection, I will refer to Hiroshi Motomura's "Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting" as he argues for a view that he calls "immigration as contract" (p. 374). First of all, he acknowledges this relationship between the government as enforcer and the role of employers' needs. He writes,

In assessing whether it makes sense to view unauthorized immigration to the United States as contract, it is pivotal that many of the enforcement mechanisms in U.S. immigration law, both current and historical, reflect employers' needs rather than a consistent commitment to enforcement (p. 376).

In part due to this relationship, the United States has had a large variety of policies in the past that have created the expectation that people can stay. He continues,

This policy of acquiescing and tolerating immigration outside the law effectively invites immigration outside of the law. In turn, this invitation supports contract-based claims by unauthorized migrants that they are Americans in waiting as much as immigrants who are in the United States lawfully. Both groups arrive by accepting an offer of de facto admission to the United States. (p. 376).

Perhaps then if we truly examine the actor in the case of illegal immigration, we see that the message is not as complicated as the objector would have us believe. Many illegal immigrants are given a de facto invitation if not directly encouraged to enter the United States by the employers within the country. If this is the case, then the objection to granting the illegal immigrant citizenship is once again weakened, because it is as if the squatter is actually invited into the abandoned home by the neighborhood homeowners association. This is clearly a simplification of the issue, but I take it to show that despite the possible complexity of the actor or enforcer in the case of the state, we can see that this complexity does not undermine the illegal immigrant's claim to citizenship due the current and previous toleration for illegal immigration by the government.

CHAPTER VI

CONCLUSION

In this paper, I have attempted to lay out a prudential framework to help determine the proper allocation and justification of rights for illegal immigrants. Using squatting and adverse possession to draw a tightly analogous legal proposal of adverse occupation for illegal immigrants, I have argued that I have found a set of qualifications that can accommodate theorists from a variety of perspectives such as those who hold the autonomy view to those who endorse the affiliation view. Using the merits of these theories, adverse occupation can encompass many strengths found in the array of current immigration literature while resting only on a relatively uncontroversial ‘no absolute waste’ principle. Ultimately, any illegal immigration reform will have to acknowledge both duration of presence as well as cultivated ties to the community, but even with all of this in mind, there is still a clear route in the cases that I have laid out which leads us to the necessary justification for granting the set of rights that come with citizenship to illegal immigrants.

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