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## Open and Notorious: Adverse Possession and Immigration Reform

Timothy J. Lukes<sup>\*</sup>

Minh T. Hoang<sup>\*\*</sup>

The first thing visitors see upon arrival to Kelley Park and its San Jose Historical Museum is a replica of the gigantic light tower that briefly straddled the corner of Santa Clara and Market Streets. The tower was built by J. J. Owen, whose enlightenment interests also inspired his purchase of the *San Jose Mercury*, where a poetic supporter waxed in the premier edition of 1882,

Then all hail the Electrical Sunburst  
That can scatter the darkness of earth  
May our land be lit up with its splendor,  
And thus show all nations its worth . . .  
Like a sun for all seasons of darkness,  
A daystar for the hours of night.<sup>1</sup>

Part of Owen's progressive agenda was to support the fledgling orchard industry that was gaining a foothold in the Santa Clara Valley. The labor intensive orchard crops required many more farmhands than did the wheat and livestock operations of the old guard. Naively, Owen endorsed the utility of the local Chinese immigrant community, a good portion of which had come to help build the San Jose-San Francisco Railway: "we think it can be shown that the white laborer is actually benefited, and the sphere of his opportunities for employment actually enlarged by the employment of Chinese labor."<sup>2</sup> Threatened by the new orchard economy, the old

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1. Minnie R. Rizer, *The Electric Light*, SAN JOSE DAILY MERCURY, Jan. 1, 1882, at 4.  
2. J.J. Owen, *Untitled Editorial*, SAN JOSE WEEKLY MERCURY, Mar. 4, 1869, at 2.

guard undertook a virulent anti-Chinese campaign, accusing Owen of a position that “sets up the Mongolian as a perfect laborer.”<sup>3</sup> Vibrant San Jose Chinatowns were burned down twice, with Irish firefighters standing idle until the St. Joseph Catholic Church was threatened. The old guard celebrated victory in 1882 with the passage of the Chinese Exclusion Act, which specifically barred the entry of Chinese laborers, skilled or unskilled, to the United States.<sup>4</sup>

In 1901 the *San Jose Mercury* was acquired by brothers, E. A. and J. O. Hayes, miners and attorneys whose interest in economic diversification led to their purchase of the Eden Vale prune ranch in South San Jose. Savvier than Owen, they undertook a clever campaign of recruiting new immigrants from Japan for their orchards while simultaneously engaging in anti-Japanese rhetoric. When accused of eating dinner with Asians and considering them equal to whites,<sup>5</sup> E. A. Hayes took advantage of his newly acquired Congressional status to deliver the first ever anti-Japanese speech in the House of Representatives. So while he was profiting from Japanese immigrant labor in San Jose, in Washington he was speaking of a “Japanese menace” that he intended to “meet on the soil of Japan rather than on our own soil.”<sup>6</sup>

The Hayes brothers’ more sophisticated immigration tactics resulted in the California Alien Land Laws, the first of which was passed in 1913.<sup>7</sup> These laws did not prohibit immigration, but did bar Asian immigrants from land ownership, leaving the Hayes brothers and their orchardist colleagues with a captive labor force unable to ever achieve ownership. This scenario is hardly exclusive to San Jose. Historically the immigration issue has been manipulated by elites whose real interests had little to do with the communities in their rhetoric. Repeatedly, ethnic animosities were fueled to improve the economic positions of individuals who stood outside the unfortunate squabbles.

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3. Unspecified Author, *A Puzzling Problem*, SAN JOSE HERALD, Feb. 15, 1879, at 2.

4. Chinese Exclusion Act, ch. 60, § 7, 27 Stat. 25 (1892) (repealed 1943).

5. Unspecified Author, *More About the Chinks at Hayes’ Ranch*, SAN JOSE EVENING NEWS, Nov. 2, 1904, at 1.

6. 40 CONG. REC. 3749 (daily ed. Mar. 13, 1906) (statement of Rep. Hayes).

7. CAL. CIV. CODE §671 (West 2008), *repealed by* 1955 Cal. Stat. p. 767.

It is sad, but not surprising, that acrimony regarding immigration has been so prevalent in the present presidential campaign. In South Carolina, Mike Huckabee reinvigorated racial attitudes that only the most naive would have considered moribund when Strom Thurmond switched to the Republican Party. Huckabee's "Secure America Plan" topped his issues list, a stipulation of which was his promise to "take our country back for those who belong here."<sup>8</sup>

The tried and true Dixiecrat tactic, now employed by factions within the Republican Party, of seducing poor white voters to vote against their economic interests in favor of racial camaraderie, remains effective, and those with rational positions about immigration struggle to influence the attitudes of those seduced by this deception. No broad investigation of the immigration issue in the United States can be undertaken without considering the influence of racism. However, even in a state like South Carolina, where there is significant gentrification and African American economic advancement and political participation, there is room for a more legitimate immigration debate. Yet Democrats are loath to broach it, preferring to link immigration to our heartstrings with appeals to reuniting parents to their inaccessible children.

There is an interesting and formidable reason for this. Every time a politician of either party suggests a progressive, substantive, and logical mediation of the problem of undocumented workers, opponents are quick to use the term, "illegal." For a polity so enchanted with the rule of law, any position with such an unseemly provenance is suspect. There can be no comparisons whatsoever, it seems, between Mexican migrants that slip into Texas to Anglo-Saxon pioneers who endured the bureaucracy at Ellis Island.

A certain amount of sheepishness, then, appears unavoidable. How can proponents of human rights support patriation for undocumented workers while simultaneously opposing questionable interrogation techniques in the War on Terror? The rights position necessarily condemns waterboarding and the like as unethical and

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8. Originally found at <http://www.mikehuckabee.com>, as reported in, Thomas Black & Matthew Keenan, *Calderon, in U.S., Says Jobs to Cut Mexico Emigration (Update 1)*, BLOOMBERG, Feb. 12, 2008, [http://www.bloomberg.com/apps/news?pid=20601086&sid=aGonDIK5347g&refer=latin\\_america](http://www.bloomberg.com/apps/news?pid=20601086&sid=aGonDIK5347g&refer=latin_america).

illegal, against prevailing international laws, to be prohibited despite infrequent, yet undeniable, results. Progressives, then, seem especially vulnerable to depiction as hypocrites; while sanctimoniously rejecting practical reasons for bending interrogation conventions, they celebrate the economic benefits of undocumented laborers while conveniently avoiding their legal status.

Immigration reform, then, like that suggested by John McCain, is compelled to include “reparation” payments on the part of the immigrants in return for our recognition. Other, including the *New York Times*, while recommending patriation for long term undocumented workers, demand that applicants first suffer at the end of the line. Barack Obama merges the most popular strictures, pledging to require “undocumented immigrants who are in good standing to pay a fine, learn English, not violate the law, and go to the back of the line for the opportunity to become citizens.”<sup>9</sup> The word “amnesty” is shouted by opponents of legal recognition of undocumented aliens, but also whispered by sympathizers, revealing an apparent unanimity of perception that undocumented workers are undeniably and unambiguously illegal, and thus always vulnerable to righteous indignation. Partly due the resulting zeal on one side, and timidity on the other, another generation of immigrants is subject to fear and marginalization, and the accompanying susceptibility to economic exploitation. But again, the subtlety and sophistication of the oppression has evolved. That immigrants, whose migration in years past was overlooked and even welcomed, can now be labeled as criminals, is a formidable obstacle to legitimate status.

We suggest that there are reasons to support the patriation of undocumented immigrants without invoking sentimentality, generosity or amnesty, all of which tend to elicit commensurate sanctions and indignance. Instead, we want to confront directly the seemingly airtight presumption of illegality. We will depend in our argument upon a concept in property law. The concept is adverse possession, and in some form or other, it exists in most legal systems throughout the world. Simply put, adverse possession allows a proprietary claim to individuals who have occupied property that is

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9. <http://www.barackobama.com/issues/immigration/#out-of-shadows>.

not initially theirs. We will show how the concept of adverse possession can assist immigration progressives to face the legality issue rather than sidestep it, in so doing strengthen the argument for a humane and rational immigration policy.

### I. THE LEGAL CONCEPT

Adverse possession is familiar to all who have survived the first year of law school and its obligatory course in property. Not surprisingly, the term, at least in its American connotation, has its roots in English law, where it was employed in the Lockean campaign to transform property from the exclusive domain of the monarch to the inviolable extension of those whose labor extracted it from nature. Individuals were said to obtain property from the crown “adversely” if they could demonstrate longstanding residency and improvement of the land.

The logic, if not always the formal procedure, of adverse possession extends deeply into American experience. Ironically, in California, the first to lay claim to formerly undeveloped land were immigrants of European descent, whose development ambitions were frustrated by the pre-existing system of Mexican land grants protected by Congress under the Gwin Bill<sup>10</sup> and the Treaty of Guadalupe Hidalgo.<sup>11</sup> Irish, French, and Italian newcomers were irate that supposedly wide open spaces were closed to them, and they argued that their improvements to their communities justified legal recognition. San Jose was famous for its Settlers War of 1861, which pitted the *californio* Chabolla family against angry American squatters.<sup>12</sup> Similar disputes over land rights erupted throughout the West.

To legally qualify for consideration under the concept of adverse possession, the claimant must, of course, first demonstrate possession. Possession is ordinarily synonymous with occupancy, and is defined as “having and holding or retaining property in one’s

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10. California Land Claims Act, ch. 41, 9 Stat. 631 (1951).

11. Treaty of Guadalupe Hidalgo, U.S.–Mex., Feb. 2, 1848, 9 Stat. 922.

12. See Dorothea Louise Schmitt, *History of the Santa Clara Valley: The American Period, 1846–65* (June, 1928) (unpublished M.A. thesis, University of California, Berkeley) (on file with Bancroft Library, University of California).

power or control.”<sup>13</sup> In fact, the concept of possession has been recognized to include an element of physical interaction with the land; passive control is insufficient. In *Blume v. MacGregor*, the California Court of Appeals found that the claimant adequately commenced the period of adverse possession upon dumping and spreading soil on the land, thereby indicating “exclusive management and control, rather than a mere temporary trespass.”<sup>14</sup>

That the possession is also adverse requires the fundamental predicates that the occupancy is both exclusive, meaning that the owners and claimants do not agree to shared ownership or occupancy, and hostile, meaning that the claimant’s possession must be unaccompanied by any recognition, expressed or inferable from the circumstances, of the right from the holder of the legal title.<sup>15</sup> In fact, to be considered hostile, the claimant’s occupancy interest must be taken as an invasion of the right of the holder of the legal title.<sup>16</sup>

Although the states vary as to the more specific prerequisites of an adverse possession claim, there are generally four additional conditions that claimants need satisfy.<sup>17</sup> First, the claimant must occupy the land in circumstances providing reasonable notice to the owner. This is what is known as open and notorious occupancy. For possession to be open and notorious, the claimant’s possession must be visible to others, if not the owner at least to neighbors.<sup>18</sup> Thus, the law recognizes that a benign resignation or accession to hostile occupancy legitimizes the presence of the occupants.

Second, the claimant must demonstrate continuous occupancy for a specified period of time. In California, that period is five years, in other states up to twenty. In any case, the law tends to dismiss occupancy that is merely transient. However, with obvious relevance to undocumented labor, it is interesting that the courts have decided

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13. *Nathan v. Dierssen*, 79 P. 739, 740 (Cal. 1905).

14. *Blume v. MacGregor*, 148 P.2d 656, 664 (Cal. Dist. Ct. App. 1944); *see also Landini v. Day*, 70 Cal. Rptr. 260, 262–63 (Cal. Ct. App. 1968).

15. *Sorensen v. Costa*, 196 P.2d 900, 904 (Cal. 1948); *Kunza v. Gaskell*, 154 Cal. Rptr. 101, 106 (Cal. Ct. App. 1979).

16. *Laubisch v. Roberdo*, 277 P.2d 9, 12 (Cal. 1954).

17. For a brief but adequate description of the usual elements of adverse possession see Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423–24 (2001).

18. *Id.* at 2423.

that the concept of continuity includes periodic occupation, as would be the case if a claimant occupies the property for the purposes of seasonal farming.<sup>19</sup>

Third, the claimant must occupy the land under color of title, which means that there is evidence or comportment resembling ownership.<sup>20</sup> This can take a number of forms, not the least of which is some sort of official documentation. The courts have long recognized that legitimacy accrues, despite formal legal ambiguities, to entities that have received longstanding recognition of proprietary interests. Color of title remains relatively unchanged since the late 1800s, and has been defined by the California Supreme Court to be “an apparent title, founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like. To give color, the conveyance must be good in form, contain a description of the property, profess to convey the title, and be duly executed.”<sup>21</sup>

Last, in addition to the near universal prerequisites of lengthy and visible tenure, some states, including California, consider whether claims of adverse possession include evidence of tax payments on the property.<sup>22</sup>

## II. RELEVANCE TO IMMIGRATION

A legitimate claim, then, for patriation of undocumented workers, based on the legal prerequisites of adverse possession, is compelling. Undocumented immigrants clearly occupy the United States, especially given the sense in which occupation is related to physical connection and interaction with the land. And as for the exclusivity and hostility of the occupancy, their presence and employment here assert claims due citizenship, that under the current state of the law are unsupported. For the immigrants in question, there are no guest worker programs or temporary visas that might mitigate claims of hostility to their interests.

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19. *Id.* at 2424 n.28.

20. *Machado v. Southern Pacific Trans. Co.*, 284 Cal. Rptr. 560, 570 (Cal. Ct. App. 1991).

21. *Packard v. Moss*, 8 P. 818, 820 (Cal. 1885).

22. *See* CAL. CIV. PROC. CODE § 325 (West 2006); *see also* *Smith v. Byer*, 3 Cal. Rptr. 645, 647 (Cal. Dist. Ct. App. 1960).

Similarly, that the occupancy of undocumented immigrants is open and notorious is difficult to refute. Estimates now put their number at twelve million, sixty percent of whom arrived before 2000,<sup>23</sup> when the theory and practice of border protection were contradictory. That some might claim ignorance to the extent of the problem, or claim a recent epiphany regarding a threat of excessive immigration, does not mitigate the longstanding presence of undocumented workers to any who cared to extend their awareness to the migration.

As for the element of continuous presence of undocumented workers, the vast majority of these workers have been longstanding participants in the American economy. Since the Clinton border crackdowns in the mid-1990s, the median tenure in the United States of an undocumented immigrant is 6.6 years.<sup>24</sup> And although seasonal farm labor has receded in favor of a much wider vocational distribution,<sup>25</sup> even the early agricultural concentration of immigrant labor, supported by the court's ratification of occasional occupancy, may be considered continuous.

As for evidence of color of title, there are a myriad of policies that legitimize the occupancy of undocumented immigrants. Perhaps the most significant, pursuant to the 14th Amendment, is recognition of American born children with citizenship status, regardless of the citizenship status of their parents. Various public health programs proudly solicit clients regardless of immigration status. And nine states presently extend driver's license privileges to the otherwise undocumented. Although many of these policies may be rescinded or restricted in the future, it would be difficult to justify retroactive enforcement.

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23. JEFFREY S. PASSEL, PEW HISP. CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 2 (2006), <http://pewhispanic.org/files/reports/61.pdf>.

24. DANIEL T. GRISWOLD, CATO INST., CTR. FOR TRADE POLICY STUDIES, WILLING WORKERS: FIXING THE PROBLEM OF ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES 7 (2002), <http://www.freetrade.org/pubs/pas/tpa-019.pdf>.

25. Jennifer Van Hook, Frank D. Bean & Jeffrey Passel, *Unauthorized Migrants Living in the United States: A Mid-Decade Portrait*, MIGRATION INFO. SOURCE, Sept. 2005, <http://www.migrationinformation.org/feature/display.cfm?ID=329>; see also FRANK D. BEAN & GILLIAN STEVENS, AMERICA'S NEWCOMERS AND THE DYNAMICS OF DIVERSITY (2003).

Likewise, there is clarity on the issue of taxes. Undocumented immigrants are subject to income tax and social security payments on wages earned. Additionally, as specified in an official report the State of Tennessee Comptroller's Office, undocumented immigrants boost the national and state economies through contributions in the form of sales taxes, property taxes included in rents and other consumption taxes.<sup>26</sup> In fact, a report by the state of Texas indicates that "undocumented immigrants in Texas generate more taxes and other revenue than the state spends on them."<sup>27</sup>

### III. JUSTIFYING THE CONNECTION OF ADVERSE POSSESSION TO IMMIGRATION

More important than qualification for legal standing, however, is justification of extending the concept of adverse possession to undocumented immigrants. Here it helps to consider adverse possession in terms of widely recognized policy considerations. We need to ask, what arguments best support the wisdom of the concept of adverse possession, and to what extent do those arguments extend effectively to the realm of immigration?

The justifications of adverse possession in property law tend to fall under two distinct concepts. The first is based on the influence of time, the second on the influence of improvement. As for the relevance of time, adverse possession laws are important because they recognize that the quality and quantity of evidentiary material deteriorates with time, and that without preferences for more recent evidence of occupancy, claims may become increasingly stale: subject to expense, inefficiency, and unreliability. By limiting the extent to which historical occupancy can be legitimized, the courts can assert their longstanding interest in quieting titles.

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26. See JOHN G. MORGAN, STATE OF TENNESSEE COMPTROLLER OF THE TREASURY, IMMIGRATION ISSUES IN TENNESSEE 5–8 (2007), <http://www.comptroller1.state.tn.us/repository/RE/immigration07.pdf>.

27. See CAROLE KEETON STRAYHORN, STATE OF TEXAS, OFFICE OF THE COMPTROLLER, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY 1 (2006), <http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf>.

The benefits of recognizing time are twofold. The first is the more practical, that by limiting the time in which owners must demonstrate some sort of interest in occupancy, transaction and information costs involving transferring property are diminished. However, there is also a more substantive reason for recognizing the influence of time on occupancy claims, and that is to avoid the undesirable disruptions of precipitous intervention in favor of appreciating the ambiguities and nuances that time introduces. The courts recognize a fairness issue when, after years of benign neglect, legal owners seek the suppression of often profound changes to the demographic landscape. Courts recognize the degradation of evidence over time, the loss of sharpness of witness recollection, and sundry other difficulties. Accordingly, the adverse possession doctrine intervenes to allow courts to avoid resolution of claims that are expensive and stale, given the deterioration of the quality and quantity of evidentiary materials.<sup>28</sup>

The relevance of time to adverse possession in property law applies nicely also to the immigration realm. Precipitous and unequivocal legal intrusions into the security of millions of people who have lived and worked here for many years are an affront to the consideration of time and its attendant ambiguities. Fully two thirds of all children born of undocumented immigrants, now over three million, are American born citizens.<sup>29</sup> Additionally, the insecure status of the undocumented affects the wider family unit, many of whom are citizens or legal residents. The anxieties of these “mixed status” families have been detailed in the press, which have led to the underrepresentation and suppression of many American voices.<sup>30</sup>

The disruptive prospects of retroactive scrutiny of immigration practices have reverberated through the wider Latino population. Between 2002 and 2007, a perception of personal experiences of discrimination has risen from 31 to 41 percent among native born

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28. See Lindsey L. Tonsanger, Note, *Increasing E-Quality in Rural America: U.S. Spectrum Policy and Adverse Possession*, 90 MINN. L. REV. 1506, 1525–26 (2006) (citing *Hewes v. Bruno*, 424 A.2d 1144, 1145 (N.H. 1981)).

29. PASSEL, *supra* note 23, at 7.

30. Wendy Koch, *'Mixed Status' Tears Apart Families; When Illegal Immigrants' Kids Are Legal, Choices Painful*, USA TODAY, Apr. 26, 2006, at A3; Julia Preston, *Facing Deportation but Clinging to Life in U.S.*, N.Y. TIMES, Jan. 18, 2008.

Latinos. And the Pew Hispanic Center has linked this rise directly to the presence of the new immigration stridency. There is an eight percent discrepancy regarding perceptions of discriminatory treatment (19 to 11 percent) between Latinos who do and do not perceive heavy local government focus on the issue of immigration.<sup>31</sup>

Confidence and reliability concerns, due to the passage of time, extend also to the wider economic sector. Undocumented immigrants have become crucial elements in the economies of numerous industries. Their easy replacement by the citizen unemployed, for instance, would be problematic, since the number of undocumented workers exceeds the number of unemployed, and by especially wide margins in Texas and California.<sup>32</sup> And the geographical distribution of the unemployed in areas with fewer job opportunities makes the argument for some easy transition more untenable. Specific industries have been quick to complain about the negative impacts that recent disruptions in immigration enforcement have caused. New York farmers are concerned about the viability of their dairy herds,<sup>33</sup> and various crops, valued at more than \$300 million, are feared to be unharvestable,<sup>34</sup> without the presence of undocumented workers.

A judicious sifting through all the complexities and nuances, despite denials of the newly indignant, would be extremely difficult, and disruptive, both to immigrants and their employers. Present intrusions that ignore longstanding occupancy are disruptive of confidence and reliability. Under the logic of adverse possession, and its appreciation of the ambiguities introduced over time, undocumented immigrants have a legitimate claim to a patriation process.

The second broad justification for adverse possession laws revolve around support for the concept of improvement. Adverse

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31. PEW HISP. CTR., 2007 NATIONAL SURVEY OF LATINOS: AS ILLEGAL IMMIGRATION ISSUE HEATS UP, HISPANICS FEEL A CHILL 35 (2007), <http://pewhispanic.org/files/reports/84.pdf>.

32. CENTER FOR THE CONTINUING STUDY OF THE CALIFORNIA ECONOMY, NUMBERS IN THE NEWS, CAN THE UNEMPLOYED REPLACE UNAUTHORIZED WORKERS? 2 (2007), <http://www.ccsce.com/pdf/Numbers-aug07-unemployed.pdf>.

33. See, e.g., Julia Preston, *Farmers Call Crackdown on Illegal Workers Unfair*, N.Y. TIMES, Aug. 11, 2007.

34. See *Farmers Reeling from Immigration Raids*, GLOWREGION, Oct. 17, 2006, [http://www.glowregion.com/farmers\\_reeling\\_from\\_immigration\\_raids](http://www.glowregion.com/farmers_reeling_from_immigration_raids).

possession recognizes society's interests in developing and improving the land—that is, constructive use of the land is preferable over allowing the land to lie fallow.<sup>35</sup> Based fundamentally on the longstanding legal prejudice that improved property is preferred to unimproved property, adverse possession can occur when property owners, for long periods of time, allow unauthorized improvement of their property to be undertaken by untitled occupiers. Pursuant to California Code of Civil Procedure Section 325, for instance, land is deemed to have been possessed and occupied if the claimant either protected the land by a substantial enclosure,<sup>36</sup> or the claimant cultivated the land in manner previously undertaken,<sup>37</sup> or actually improved the land.<sup>38</sup> The obligatory reference here is to Justice Holmes, who wrote, “Man, like a tree in the cleft of a rock, gradually shapes his roots to his surrounding, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.”<sup>39</sup>

That the occupancy of undocumented workers in the United States has made a substantial contribution to the improvement of the American economic position is irrefutable. In June of 2006, 500 of the most prominent American economists sent an open letter to President Bush, concluding that “overall immigration has been a net gain for American citizens.”<sup>40</sup> And the conservative Cato Institute makes it clear that “the general benefits of immigration, including immigration from Mexico, are as relevant today as they have been

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35. Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 567–68 (2005).

36. *Palin v. Sweitzer*, 65 P.2d 351, 351 (Cal. 1937).

37. *County of Los Angeles v. Pacific Elec. Ry. Co.*, 269 P. 767, 768 (Cal. Dist. Ct. App. 1928).

38. *Gray v. Walker*, 108 P. 278, 279 (Cal. 1910).

39. Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions*, 417, 417–18 (Max Lerner ed., 1943). A recent student note, unknown to us during the writing of this essay, begins with the Holmes quotation, and offers other valuable connections between immigration and adverse possession. See Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for the Long-Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGR. L.J. 105, 106-07 (2007).

40. Alexander Tabarrik & David J. Theroux, *Open Letter on Immigration*, June 19, 2006 ([www.independent.org](http://www.independent.org)).

throughout American history.”<sup>41</sup> The undocumented workers are young, much less likely to get involved in crime, and ambitious.

There an interesting, and quite powerful, argument that the concept of adverse possession is obsolete, that our more recent interests in ecology legitimize a reassessment of the definition of improvement, and that human industriousness does not necessarily equate with enhanced value.<sup>42</sup> An old growth forest, it is now argued, is more precious than an expensive factory in its midst. But rather than dilute the power of the adverse possession metaphor in the realm of immigration, this argument actually strengthens it. For what is relevant in both applications is the idea of evolving priorities. Just as environmental issues are now more important, so may be border protection issues. However, recognizing that priorities do change, and that the law can change with them, is a powerful antidote to the excesses of present earnest.

#### IV. CONCLUSION

There is no doubt that undocumented workers break the law when they enter the United States.<sup>43</sup> And for a society so respectful of the rule of law, and so protective of its resources and advantages, this is a powerful argument. The gigantic margins of victory that restrictive referenda receive are not driven exclusively by xenophobia or parsimony. We do not appreciate being ripped off. If undocumented

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41. Daniel T. Griswold, *A Boon Rather Than a Burden*, THE POLITIC, Aug. 28, 2007, available at <http://www.freetrade.org/node/741>.

42. See generally William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79 (1996).

43. While the adverse possession doctrine does not apply to claims against the government, the doctrine should not be so narrowly construed as to restrict or obfuscate its application to the undocumented workers. Namely, even though citizenship might be part of the benefit of the bargain for the illegal immigrant, the first and fundamental claim is one of social and economic presence among the American populace. That makes it something much more complex and deep than just superficial government relations. Recognition of a viable, contributing denizen, a social concept and an intimately private affair, must precede citizenship. The claim of citizenship ultimately follows a more basic claim—directed to the society, and to each private member of it—that recognition due to contribution and benign neglect is called for. Thus, the claim of citizenship flows from a more private source. While one path to citizenship might be the policy suggestion, the qualification for recognition has little to do with the government.

immigrants continue to be depicted unequivocally as lawbreakers, rational and fair resolution of the immigration controversy will be impossible.

Employing the concept of adverse possession in this instance, however, complicates the clarity of the workers' legal status as they remain here. Even if considered only metaphorically, the exercise is productive in moving policy debates away from the indignation stemming from a simplistic and rigid deployment of the claim of territorial infringement. Seeing that the stricter border controls we apparently now desire are legitimized not automatically, but by a commensurate responsibility to assert full occupancy of our territory, means that we need not suffer a feeling of hypocrisy when nuancing our attention to those who arrived prior to our resolve to scrutinize their presence. Putting up the "No Trespassing" signs now, in the form of national drivers' licensees or high border fences, does not legitimize retroactive enforcement.

Presently, those who argue for some path to citizenship begin from a position of weakness. Daniel Griswold of the Cato Center argues for a kind of legal selectivity, asserting that "laws must be reasonable and not fundamentally out of step." And amnesty is not really the appropriate term, since "undocumented workers would be expected to pay fines."<sup>44</sup> It may in fact be the case that the ultimate compromise involves some sort of penalty. But that should not be the starting position of advocates. By accepting an unambiguous illegality of undocumented immigrants, even as they become longstanding members of the polity and economy, advocates of a fair path to citizenship suffer a serious vulnerability.

The harshness and protectiveness of any new legislation should be considered on its merits, and not to accommodate perceived guilt from past generosity or benign negligence. For it is neither generosity nor negligence that has fueled migration here; rather, it is the opportunity for improvement, not only for the immigrants' lives, but for the lives and the surrounding environment of the resident citizens. These immigrants, who arrived under benign neglect and even open

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44. Daniel T. Griswold, *Comprehensive Immigration Reform: Finally Getting It Right*, FREE TRADE BULL. No. 29, May 16, 2007, available at <http://www.freetrade.org/pubs/FTBs/FTB-029.pdf>.

embrace, ought not suffer retribution. A claim to a process of patriation is valid without the need to balance it against punitive initiatives. The concept of adverse possession recognizes that our shared improvements deserve legal recognition, not forgiveness or punishment.

Whether or not the sympathetic and receptive associations with Ellis Island can be made, then, does not depend entirely upon the legal status of the immigrants when they arrive here. Rather, it is more important to consider just how energetically we surveyed, delineated, and occupied our territory at the time of their arrival. It is true that adverse possession may now be obsolescent, given the present sophistication of boundary delineation, the enhanced scrutiny attending much more valuable land, and concepts of improvement that include preservation. But that ought not keep us from recognizing the different conditions of the past. Likewise, we may well decide that we want to tighten our borders and lay fuller claim to our territory. But that should be the extent of the present debate. Relocating our present state of mind in a past of vastly different priorities is disingenuous and inappropriate.