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Forgive Us Our Trespasses

By Daniel Davison-Vecchione*

ABSTRACT
This paper considers the questions raised by the introduction of the offence of squatting in a residential building under s 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, particularly in regard to trespass to land, existing anti-squatting measures, human rights and prosecutorial policy.

I. INTRODUCTION
On September 1, 2012, s 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereinafter ‘the 2012 Act’) came into force. This section introduces the offence of squatting in a residential building. The introduction of the new offence was based on the limited degree of protection afforded to property owners by the previous legal measures.1 As explained in the foreword of the Government’s response to the Ministry of Justice’s 2011 consultation paper, there was significant concern with the ‘appalling impact’ of squatting, with note made of ‘the cost and length of time it takes to evict squatters’, as well as to clean and repair property following eviction.2

Despite the obvious underlying policy objectives of deterring trespassers from squatting and further transferring responsibility for redress away from private individuals and towards state actors,3 the offence’s creation has the potential unfavourable consequence of introducing disconcerting levels of legal uncertainty in respect of the civil and criminal divide. Particularly noteworthy is the possible impact of the offence upon trespass to land in tort law. Questions may also be raised over the extent to which the new offence actually complements the existing measures that can be taken against squatters at both the civil and criminal level.

At the time of writing, the Justice Minister and other members of the Conservative Party are considering an extension to the criminalisation of squatting on commercial as well as domestic properties.4 Additionally, the question of the wider ramifications of the squatting offence has recently reared its head in the context of adverse possession in property law.5 It therefore seems an appropriate time to consider the following matters: (i) the effect of the

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1 Ministry of Justice, Options for Dealing With Squatters (Response to Consultation CP12/2011) 1.
2 ibid.
5 Best v Chief Land Registrar [2014] EWHC 1370 (Admin). The issue was whether a squatter’s criminal conduct prevented him from claiming title through adverse possession. The Administrative Court held that it did not. For the author’s comment on this ruling, see: Daniel Davison-Vecchione, ‘To Make a House a Home: Best v Chief Land Registrar’ (2014) 4 Conveyancer & Property Lawyer 351.
criminalisation of squatting under the 2012 Act upon the law relating to trespass to land; (ii) the question whether the 2012 Act serves to fill a gap that could not already be filled effectively by the relevant legislation; (iii) the potential relevance of Article 8 of the European Convention on Human Rights (ECHR) to the provisions of the 2012 Act, as well as the discretion to prosecute.

(i) Trespass to Land

(a) Current Law

There are significant manners in which the new offence could impact upon tort law; and in particular on the law relating to trespass to land. This tort takes the form of an interference with possession and ordinarily involves an unauthorised entry onto land.6 As seen from Conway v George Wimpey & Co Ltd (No. 2), the entry need only be deliberate; any honest or reasonable belief on the part of the trespasser that it was authorised is irrelevant.7 Accordingly, the plaintiff in that case had been given a lift by the defendants’ lorry driver, and was held to have trespassed despite being unaware that the driver was not authorised to carry persons other than the defendants’ men.8 In contrast, an intrusion will not amount to trespass where it is involuntary, as illustrated by Smith v Stone where the defendant was forcefully carried onto the land.9

An action for trespass can be brought by a person in possession of the land. As such, it is generally true that a lodger cannot bring an action for trespass.10 On the other hand, a tenant can bring such an action even against his landlord, provided that the landlord’s entry does not accord with the terms of the lease.11 Although on this basis a true owner who is out of possession theoretically cannot sue for trespass, an action can be maintained by the owner if the slightest indication is made by him or one of his predecessors in title that he intends to take possession. As such, the Privy Council held in Ocean Estates Ltd v Pinder (Norman) that the plaintiff development company had sufficient possession to sue for trespass on the basis of their predecessors’ cultivation of the land, as well as the entries of their own architect and surveyor.12 Furthermore, under the legal fiction known as ‘trespass by relation’ it is possible for a person with an immediate right to possession to be deemed, upon entering the land, to have been in possession since his right to it accrued.13 The owner will thus be able to take action for those trespasses committed whilst he was out of possession.

As both protect the enjoyment of land, there are strong similarities between the torts of trespass and nuisance. Nuisance, however, deals with consequential harm and as such usually requires evidence of damage. Trespass, on the other hand, requires the interference

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6 For less obvious examples, see Gregor v Piper (1829) 9 B & C 591 (placing refuse against a wall); Westripp v Baldock [1938] 2 All ER 779 (placing a ladder against a wall).
7 [1951] 2 KB 266 (CA).
8 ibid 274
9 (1647) Style 65, 82 ER 533.
10 Allan v Liverpool Overseers (1873-74) LR 9 QB 180, 191-92.
11 Lane v Dixon (1847) 3 CB 776, 136 ER 311.
13 Dunlop v Macedo (1891) 8 TLR 43 (QB).
to be the direct result of the defendant’s actions, but does not require damage to be proven. An injunction will therefore usually be granted to restrain a continuing trespass, even where the trespass is of a trivial nature and the consequences of an injunction for the defendant are serious. The Chancery Division’s ruling in *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* showed that the withholding of an injunction was not justified, even though the trespass did not affect normal use of the land. Nonetheless, there are special circumstances where an injunction will not be granted. In *Jaggard v Sawyer* a house was built in breach of a restrictive covenant. The Court of Appeal held an award of damages to be an appropriate remedy as, given the plaintiff’s failure to apply for interlocutory relief, an injunction would have been oppressive.

There are several defences that can be raised against an action for trespass to land. For example, a person who enters land under a licence is not a trespasser since he is authorised to be there. A licensee becomes a trespasser upon the expiration or effective revocation of his licence. He is, however, permitted a reasonable period of time to do what has to be done as a result of the revocation; for instance, leaving the premises. A licence will be considered irrevocable where an equitable remedy would be granted to prevent revocation. This can be seen from *Hurst v Picture Theatres*, where the plaintiff, who had been forcibly removed from his seat at a cinema, succeeded in his action. In this case Kennedy LJ held that there was ‘a good equitable right’ which rendered the defendants’ conduct wrong in law. Additionally, a licence cannot be revoked where it is coupled with a grant of a proprietary interest, as well as where the licensee cannot undo what he has already done lawfully in execution of the licence.

Furthermore, a defence of estoppel by acquiescence can be raised where the defendant has been encouraged or permitted by the claimant to act to his detriment in such a manner that it would be unconscionable for the claimant to enforce his rights. As per *Jones v Stones*, there is no acquiescence where the claimant merely delays in complaining. The respondent in this case, who had placed an oil tank and flowerpots upon the boundary wall with the appellant’s property, was thus unable to raise estoppel as a defence. Lastly, in addition to the statutory powers of the police to enter and search premises, police officers have the power at common law to enter premises without a warrant if they genuinely believe that there is ‘a real and imminent risk of a breach of the peace’.

14 (1987) 284 EG 625 (Ch).
16 ibid 283.
17 *Wood v Leadbitter* (1845) 13 M & W 838, 153 ER 351.
19 [1915] 1 KB 1 (CA) 15.
20 *Thomas v Sorrell* (1673) Vaugh 330, 124 ER 1098, 1109.
21 *Armstrong v Sheppard & Short* [1959] 2 QB 384 (CA) 399-400.
22 [1999] 1 WLR 1739 (CA).
23 ibid 1746.
25 *McLeod v Commissioner of Police of the Metropolis* [1994] 4 All ER 553 (CA) 560.
(b) Possible Impact of the 2012 Act

The significant question in respect to trespass raised by the 2012 Act is as follows: at what point does a trespasser become a squatter for the purposes of s 144? As the offence is committed where the trespasser ‘knows or ought to know’ of his trespassing, it appears that where the defendant honestly believes that he is not trespassing, as in Conway, it will not give rise to liability under s 144, unless the belief was unreasonable. The offence also does not apply to situations where a person is ‘holding over after the end of a lease or licence’. In other words, there will be no liability where a lease or licence has terminated, but the former lessee or licensee is yet to depart from the premises. Furthermore, the entry must be into a ‘residential building’, which is defined as a building ‘designed or adapted, before the time of entry, for use as a place to live’.

Despite these attempts at clarification, there remains much potential uncertainty about the scope of the Act. For instance, a ‘building’ for the purposes of the offence means any structure or part of a structure, ‘including a temporary or moveable structure’. The question of what can be considered ‘a temporary or moveable structure’ under this provision will likely prove significant in regard to vehicles such as motor homes and camper vans, as well as caravans and other trailers. Although the possibility exists that the case law on this matter will follow a comparable line to that which defines a ‘building or part of a building’ for the purposes of burglary under s 9 of the Theft Act 1968, focusing on the degree of an object’s permanence, dividing lines, in this respect, may still prove difficult to draw.

The section also curiously provides that a person is not prevented from being a trespasser where he has derived title from a trespasser. It has been academically commented that the meaning of this provision is quite perplexing, as it seems self-evident that a trespasser yet to acquire formal title cannot ‘legitimise the possession of another’. Indeed, in its broadest sense, it could be taken to mean that a person is considered a trespasser for the purposes of the new offence, even where he has derived title from a registered proprietor and said registered proprietor ‘was originally a trespasser’. This would, of course, be a somewhat absurd interpretation as Parliament could not have intended for a person’s conduct to be criminalised even where he has, in terms of land law, become the proprietor.

What is most concerning, however, is that there is no provision as to the time scale of the offence. Rather, it is provided that the person must be ‘living in the building or intends

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26 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 144(1)(b).
27 ibid (n 7).
28 ibid s 144(2).
29 ibid s 144(1)(a).
30 ibid s 144(3)(b).
31 ibid s 144(3)(a).
32 For examples, see B and S v Leathley [1979] Crim LR 314 (freezer container sufficiently large and permanent to be ‘building’); Norfolk Constabulary v Seekings and Gould [1986] Crim LR 167 (articulated lorry trailer not sufficiently permanent).
33 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 144(4)
34 Martin Dixon and Sue Highmore, ‘Editor’s Notebook’ (2012) 3 Conv 185, 186.
35 ibid.
to live there *for any period*’ (emphasis added). This is crucial because, unless the higher courts can outline a reasonably predictable manner of determining whether a trespasser’s conduct gives rise to criminal liability, the offence may throw the boundary between tort and crime into serious question. Such erosion of the civil and criminal divide has been underway for a significant period of time. As observed by Rutherford, several of the measures introduced by the Crime and Disorder Act 1998 blur the distinction between civil and criminal sanctions. Whilst at the time of writing this paper the 1998 Act is in the process of being phased out, one measure under the statute worth considering is the anti-social behaviour order (ASBO). This is because the ASBO and its newly introduced successor, the injunction to prevent nuisance and annoyance (IPNA), are both strong examples of legislative measures that combine elements of civil and criminal law. As such, it may be helpful to view these measures and the squatting offence as progressively reconceptualising civil and criminal liability through successive governments.

Under the 1998 Act, an ASBO could be applied in situations where a person had acted in a manner ‘that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself’, providing that the order was ‘necessary to protect relevant persons from further anti-social acts by him’. Whilst granted by a court when exercising its civil jurisdiction, not only could public bodies or officials such as local authorities and chief police officers apply for an ASBO, but breaching an ASBO constituted an offence. Under the scheme established by the 2014 Act, an IPNA can be granted by a court where it ‘is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour’ and ‘the court considers it just and convenient to grant the injunction’. A person’s conduct constitutes ‘anti-social behaviour’ for the purposes of the Act in three situations. The first is where the conduct ‘has caused, or is likely to cause, harassment, alarm or distress to any person’ (as was the case with the ASBO). The second is where the conduct is ‘capable of causing nuisance or annoyance to a person in relation to that person’s occupation of residential premises’. The third is where the conduct is ‘capable of causing housing-related nuisance or annoyance to any person’. Additionally, it is possible for the court to attach a power of arrest to the IPNA, which a constable can exercise without warrant if there is reasonable cause to suspect that a provision of the IPNA has been breached.
As a result of these factors, as well as their general use to pre-emptively deal with forms of public disorder, the ASBO and the IPNA possess a noticeable element of criminal law, or at the least quasi-criminal. At this point it is worth noting that according to the European Court of Human Rights, bringing civil proceedings can amount to charging a person with an offence when this is done ‘by a public authority under statutory powers of enforcement’ and the proceedings carry punitive elements.50 As such, if a challenge to the ECHR compatibility of a granted ASBO or IPNA ever reached Strasbourg, it is quite possible that it would be regarded as a criminal measure despite its ostensibly civil nature. It is true that, unlike the 2012 and 2014 Acts, a Labour government rather than a Conservative government introduced the 1998 Act. Nevertheless, it remains possible to construe the 2012 Act as one of many steps towards a conception of unlawful behaviour that does not readily divide liability for a private wrong which entitles an injured party to a remedy (civil liability) from liability for a social wrong which warrants active state intervention to punish the wrongdoer (criminal liability).

It is true that, as famously observed by Holmes, a ‘bad man’ may draw little or no distinction between different forms of legal sanctions, caring only for the fact that ‘if he does certain things he will be subjected to disagreeable consequences’.51 Nonetheless, it is submitted that the civil and criminal divide is one that should be clearly maintained. Although, as commented by Llewellyn, one can characterise both civil and criminal cases as disputes submitted to the process of adjudication,52 ‘the criminal law does not primarily have the aim of problem solving’.53 Instead, it serves a more overtly protective function, governing relations between state and individual in such a manner that it imposes normative limits on state power by insisting that ‘criminal conduct be tightly defined’ and that there is ‘a rigorous standard of proof along with other procedural protections’.54 Additionally, it would appear reasonable to assume that even the Holmesian ‘bad man’ would perceive a meaningful difference between conduct that could lead to him having to pay damages or comply with an injunction and conduct that could additionally or alternatively lead to imprisonment.

The lack of a clear divide between civil and criminal liability creates further issues in light of the principle of legal certainty recognised at common law55 and outlined under Article 7 ECHR. As held by European Court of Human Rights in Kokkinakis v Greece, in order to satisfy this principle, a defendant must be able to ‘know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable.’56 With the domestic effect given to Article 7 by s 1 of the Human Rights Act 1998 (HRA) considered, the need for offences to have definitional clarity becomes especially significant. Although it is certain that the courts will strive to firmly set the boundaries of criminal liability under its provisions, the absence of any stipulation as to time could, under the widest interpretation of the 2012 Act, lead to acts

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50 Benham v United Kingdom (1996) 22 EHRR 293, para 56.
51 Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 HVL 457, 461.
53 Rutherford (n 37) 59-60.
54 ibid 60.
55 R v Rimmington (Anthony) [2006] 1 AC 459 (HL) 482 (Lord Bingham).
56 (1994) 17 EHRR 397, para 52.
of trespass being criminalised to an extent broad enough to lend credence to what has long been described as the ‘wooden falsehood’ that trespassers will be prosecuted; a result which Parliament is highly unlikely to have intended. It is thus submitted that greater care should have been taken to clearly indicate the offence’s boundaries when the 2012 Act was being drafted.

(ii) Anti-Squatting Legislation

(a) Existing Statutory Mechanisms

In addition to the predominantly common law field of trespass to land, the new offence should be considered in light of the civil and criminal measures under legislation that could already be taken against squatters. Of particular importance is the question whether the new offence actually serves to fill a lacuna that could not already be effectively covered by the existing law.

Under the Civil Procedure Rules (CPR), an order for possession can be brought against a trespasser where the land is allegedly ‘occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land’. Such a claim must be started in the County Court unless ‘the claimant files with his claim form a certificate stating the reasons for bringing the claim in that court verified by a statement of truth in accordance with Rule 22.1(1)’, in which case it may be started in the High Court. When the court issues the claim form, a date for the hearing will be fixed and ‘the defendant must be served with the claim form, particulars of claim and any witness statements’ at least five days before the hearing date where the property is residential (two days where it is not).

As held in McPhail v Persons, Names Unknown, where the appellant squatters had sought a stay of execution after possession orders had been obtained against them, a court must make a forthwith order unless a specified date has been agreed between the landowner and squatter. As stated here by Lord Denning, ‘when the owner of a house comes to the court and asks for an order to recover possession against squatters, the court must give him the order he asks’. This was confirmed in Swordheath Properties v Floydd, where Megaw LJ held that without the applicant’s consent, ‘the judge has no power or discretion to grant a suspension of execution’.

57 WVH Rogers, Winfield & Jolowicz on Tort (18th edn Sweet & Maxwell 2010) 685.
58 Civil Procedure Rules 1998, r 55.1(b).
59 ibid r 55.3(1).
60 ibid r 55.3(2).
61 ibid r 55.5(1).
62 ibid r 55.5(2)(a).
63 ibid r 55.5(2)(b).
64 [1973] Ch 447 (CA).
65 ibid 460.
66 [1978] 1 WLR 550 (CA) 552.
It is also possible for a claimant to seek an Interim Possession Order (IPO), provided that the following requirements under r 55.21 are met: (i) the only claim made is a possession claim against trespassers for the recovery of premises, (ii) the claimant has an immediate right to possession, (iii) the claimant has had said right ‘throughout the period of alleged unlawful occupation’, (iv) the claim is made within 28 days of when ‘the claimant first knew, or ought reasonably to have known’ of the occupation. The hearing of the application will be ‘not less than 3 days after the date of issue’. As outlined under r 55.23, within 24 hours of the application’s issue, the defendant must be served with the claim form, the application notice with supporting written evidence and a blank form for his witness statement. The defendant may respond by filing a witness statement at any time before the hearing.

In order to determine whether an IPO should be granted, the court will take into account whether the claimant has given or is prepared to give a number of undertakings in support of his application, such as to not ‘damage or dispose of any of the defendant’s property’ before the claim for possession has been finally decided. An IPO will be made if:

i. The claimant has filed a certificate of the aforementioned documents outlined under r 55.23.
ii. The claimant has proved service of said documents to the court’s satisfaction.
iii. The court considers the aforementioned conditions under r 55.21 for an IPO application to be satisfied.
iv. The court considers any undertakings given by the claimant as a condition of making the order to be adequate.

An IPO will require the defendant to vacate the premises within 24 hours of the order’s service. Furthermore, a date for the hearing of the possession claim will be set ‘not less than 7 days after the date on which the IPO is made’. The IPO must be served within 48 hours of being sealed with copies of the claim form and supporting written evidence. The IPO will expire on the date of the hearing of the possession claim, where the court can make any order that is considered appropriate and may in particular make a final order.

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68 ibid r 55.21(1)(a).
69 ibid r 55.21(1)(b)(i).
70 ibid r 55.21(1)(b)(ii).
71 ibid r 55.21(2).
72 ibid r 55.22(6).
73 ibid r 55.23(1).
74 ibid r 55.24(1).
75 ibid r 55.25(1)(b)(iii).
76 ibid r 55.25(2)(a)(i).
77 ibid r 55.25(2)(a)(ii).
78 ibid r 55.25(2)(b)(i).
79 ibid r 55.25(2)(b)(ii).
80 ibid r 55.25(3).
81 ibid r 55.25(4).
82 ibid r 55.26(1).
83 ibid r 55.26(2).
84 ibid r 55.27(2).
for possession, dismiss the claim, give directions for the claim to continue or enforce any of the claimant’s undertakings. 85

The advantage of an IPO is that under the Criminal Justice and Public Order Act 1994, ‘a person who is present on the premises as a trespasser at any time during the currency of the order commits an offence’. 86 The exceptions to this are where the trespasser leaves the premises within 24 hours of the time of the order’s service or ‘a copy of the order was not fixed to the premises in accordance with rules of court’. 87 An offence is still committed, however, where a person who was in occupation at the time of the order’s service leaves, but re-enters or attempts to re-enter the premises within the one-year period beginning with the date of the IPO’s service, even if the order has by this time expired. 88 As such, an IPO can deter removed occupiers from returning and allow for the removal and penalisation of ‘repeat offenders’ without the need for further civil action. 89

Additional protection against squatters is provided by the Criminal Law Act 1977, s 7(1) of which provides that ‘any person who is on any premises as a trespasser after having entered as such’ commits an offence if he fails to leave the premises upon being required to do so on behalf of ‘a displaced residential occupier’ (DRO) or ‘a protected intending occupier’ (PIO). A DRO is ‘any person who was occupying any premises as a residence immediately before being excluded from occupation by anyone who entered those premises, or any access to those premises, as a trespasser’, provided that he continues to be excluded by the original trespasser or any subsequent trespasser. 90 Allowing time for the trespasser to leave the premises does not mean that he stops being a DRO. 91

A PIO is an individual who has been excluded from the premises by a trespasser and falls into one of the following categories:

i. He has a freehold or leasehold interest in the premises ‘with not less than two years still to run’ 92 and requires the premises for his own residential occupation. 93

ii. He has a tenancy or licence to occupy the premises ‘granted by a person with a freehold interest or a leasehold interest with not less than two years still to run’ 94 and requires the premises for his own residential occupation. 95

iii. He has a tenancy or licence to occupy the premises granted by a relevant authority 96 and requires the premises for his own residential occupation. 97

85 ibid r 55.27(3).
86 Criminal Justice and Public Order Act 1994, s 76(2).
87 ibid s 76(3).
88 ibid s 76(4).
90 Criminal Law Act 1977, s 12(3).
91 ibid s 12(7).
92 ibid s 12A(2)(a).
93 ibid s 12A(2)(b).
94 ibid s 12A(4)(a).
95 ibid s 12A(4)(b).
96 ibid s 12A(6)(a).
97 ibid s 12A(6)(b).
In any proceedings under s 7, the accused can defend himself by proving that he believed the person requiring him to leave the premises to not be a DRO or PIO, or acting on behalf of one.98 It is also a defence for the accused to prove that the premises are (or form part of) premises mainly used for non-residential purposes, and that he was not on any part of the premises mainly or wholly used for residential purposes.99

(b) Filling a Lacuna?

In light of this existing arsenal of anti-squatting mechanisms, as well as the admittance by the Ministry of Justice that there is ‘very little information held centrally about the number of people who squat’,100 the Government’s standpoint that the introduction of a new offence was justified by the level of public concern becomes somewhat questionable. Indeed, from a total of 2,217 responses to the Ministry of Justice’s consultation, 2,126 were from members of the public concerned about the impact of criminalising squatting, as opposed to only 25 from members of the public concerned about the harm that squatting can cause.101 1,990 of the responses were admittedly in support of a campaign organised by Squatters’ Action for Secure Homes and on this basis the Government took ‘a qualitative rather than quantitative approach’.102 Nonetheless, the Government’s response did not acknowledge the failure of the consultation response to provide ‘any reliable statistics on the extent of squatting or the perceived problem’,103 especially considering how there were only seven responses from victims of squatting in residential properties.104

The summary of responses to the Ministry’s consultation included numerous opinions from relevant bodies. The Metropolitan Police Service considered the existing law to be ‘broadly in the right place’, with existing offences allowing them to ‘tackle the worst cases of squatting’.105 Although they could see a case for widening existing offences to protect residential properties not currently under occupation (such as homes under renovation), they warned of the possible impact of creating a new offence ‘in terms of community relations, local policing objectives and cost’.106 The creation of a new offence was strongly opposed by both the Law Society and the Criminal Bar Association, with the former arguing that squatting was a rare problem and that to introduce new offences despite the range of relevant existing offences would be ‘disproportionate and counterproductive’.107 The Magistrates Association expressed general reluctance towards the creation of new laws without proper analysis of why existing powers may not be satisfactorily working.108 In regard to possible new provisions, they held a preference for ‘making any offence contingent upon a refusal to leave on request by the rightful owner’.109

98 ibid s 7(2).
99 ibid s 7(3).
100 Ministry of Justice, Options for Dealing With Squatters (Consultation CP12/2011) 4.
101 Ministry of Justice (n 1) 7.
102 ibid.
104 Ministry of Justice (n 1) 7.
105 ibid 10.
106 ibid.
107 ibid.
108 ibid 10.
109 ibid.
Those who expressed favour towards creating a new offence included the Residential Landlords Association and the British Property Federation, with the former reporting a particular concern with properties ‘being occupied between lets’. The National Landlord Association believed the current law to be inadequate, but ‘did not necessarily believe that banning all types of squatting was the right answer’; rather, they supported the allocation of new police powers to direct squatters to leave buildings. Predictably, individual residential property owners who had been victims of squatting, including ‘a couple who could not move into their new home and a man who found squatters in his mother’s home after she had died’, were supportive of creating a new offence.

Nonetheless, as noted by Cullen and Brown, it is worth bearing in mind that such individuals, particularly the first, could probably have been protected by the criminal law under s 7 of the 1977 Act as PIOs, but it was not addressed in the response whether police assistance had been sought. Furthermore, it was recognised by the Metropolitan Police Service that lack of training and practical knowledge of the relevant law, particularly s 7 of the 1977 Act, could be a ‘barrier to effective enforcement’. If the s 7 offence is currently not being properly enforced, it is questionable whether the police and Crown Prosecution Service (CPS) will be able to enforce the new offence any more effectively. If not, then local authorities may simply resort to using existing civil procedures to remove squatters, in which event there would be absolutely no practical benefit gained from s 144 of the 2012 Act at the cost of all the potential legal confusion discussed thus far. It is therefore submitted that the new offence has in reality not provided a substantial benefit to the existing legislative framework.

(iii) Article 8 ECHR

(a) Relevance to the 2012 Act

It is worth considering any possible role which Article 8 ECHR may play in proceedings concerning the 2012 Act. Under Article 8, everyone ‘has the right to respect for his private and family life, his home and his correspondence’. As such, the possibility exists that a squatter prosecuted under the new provisions will argue that the offence disproportionately infringes his Article 8 rights, which are given domestic effect by s 1 HRA 1998. Alternatively, it is possible that a squatter will argue that the CPS’ decision to prosecute him under the new provisions amounts to an Article 8 violation. To explore these possibilities and establish the extent to which a trespasser can rely on Article 8, particular focus will be drawn to the existing jurisprudence on possession orders.

In Qazi v Harrow LBC the House of Lords found no infringement of Article 8 where a local authority brought possession proceedings against a former joint tenant who no longer

110 ibid 9.
111 ibid.
112 ibid.
113 Cullen and Brown (n 103) 54.
114 Ministry of Justice (n 1) 32.
115 Cullen and Brown (n 103) 55.
had any legal or equitable right to remain in the property. Here the view of the majority appeared to be that a defence based upon Article 8 ‘can never prevail against an owner entitled under the ordinary law to possession’. Matters are complicated, however, by
the subsequent dialogue between the domestic courts and Strasbourg. In Connors v United Kingdom, which concerned the summary eviction of gypsies after being given a final warning about anti-social behaviour, the European Court of Human Rights found a disproportionate infringement of Article 8 as the domestic courts had been granted a power to evict ‘without the burden of giving reasons liable to be examined as to their merits’. In contrast, in Blecic v Croatia the termination of the applicant’s specially protected tenancy was not found to violate Article 8 as the applicant had been sufficiently involved in the decision-making process to be able to protect her interests. The cases of Connors and Blecic indicate that precluding a court from examining the merits of the individual case when possession proceedings are brought violates Article 8, even if the resident has become a trespasser. However, there will be no violation where the careful consideration of the case’s merits is required under domestic law.

In Kay v Lambeth LBC the House of Lords accepted that the majority view expressed in Qazi, insofar as ‘the enforcement of a right to possession in accordance with the domestic law of property can never be incompatible’ with Article 8, had to be modified in light of the subsequent Strasbourg jurisprudence. Here two ‘gateways’ were outlined by Lord Hope for a challenge based on Article 8: (i) by contending the ECHR compatibility of ‘the law which enables the court to make the possession order’ and (ii) by contending the validity of the decision to make the possession order itself. However, this latter possible challenge was limited by his Lordship to decisions which ‘no reasonable person would consider justifiable’. This appears to limit a court’s ability to consider the merits of a decision to that permitted under the traditional Wednesbury test of unreasonableness in English administrative law. Put differently, a court would only be able to intervene where the decision was ‘so unreasonable that no reasonable authority could ever have come to it’. As observed by Loveland, this creates difficulties because the necessary examination of a case’s merits indicated by the aforementioned Strasbourg rulings would result in frequent Article 8 violations where domestic housing law allows such examination ‘only to Wednesbury level intensity’.

Matters are further complicated by the European Court of Human Rights’ decision in Kay v United Kingdom. Here the possession order made against the occupier was

117 ibid 1103 (Lord Scott).
118 (2005) 40 EHRR 9, para 94.
121 [2006] 2 AC 465 (HL) 534 (Baroness Hale).
122 ibid 517.
123 ibid.
124 Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (CA).
125 ibid 230.
126 Loveland (n 120) 168.
found to violate Article 8 as there had been no opportunity to challenge the decision’s proportionality in light of personal circumstances.\(^{128}\) For all intents and purposes, the court had been ‘bound to order possession on finding that the occupiers had no legal right to remain’.\(^{129}\) Thankfully, the Supreme Court of the United Kingdom in *Manchester City Council v Pinnock*\(^ {130}\) has attempted to reconcile the conflicting lines of domestic and Strasbourg authority. Delivering the leading judgment, Lord Neuberger held that any person ‘at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure […] even if his right of occupation under domestic law has come to an end’.\(^ {131}\) His Lordship did, however, make it clear that in virtually every case where the occupier has no right to remain in the property, and the local authority has an entitlement to possession under domestic law, ‘there will be a very strong case for saying that making an order for possession would be proportionate’.\(^ {132}\) As commented by Johnson, ‘this decision clearly attempts to steer a mid-course between giving County Courts the ability to consider human rights arguments on evictions with a desire not “to open the floodgates” to Article 8 challenges’.\(^ {133}\)

In any event, it is clear that a trespasser is able to enjoy rights under Article 8. This is consistent with the established Strasbourg position that, for the purposes of Article 8, a ‘home’ depends upon ‘sufficient continuing links’ with a residence rather than a recognised proprietary interest.\(^ {134}\) Nonetheless, the above cases concerned individuals who had originally enjoyed a right of residence, only to subsequently become trespassers. The question therefore remains as to whether an individual who has always been a trespasser is afforded protection by Article 8. Nield takes the view that if the meaning of ‘home’ under Article 8 ‘is totally divorced from proprietary rights’, there is no logical reason for such a person to not be able to rely on Article 8, although the unlawfulness of the occupation would still have to be taken into account when determining ECHR compatibility.\(^ {135}\)

Such a standpoint has been indicated by members of the domestic judiciary, but always with a strong measure of scepticism as to whether such reliance would make any meaningful difference on the outcome of a case. For example, in *Kay* Lord Bingham remarked that although it was possible for a trespasser to rely on Article 8 in exceptional circumstances, it would be very difficult for this to properly grant squatters ‘anything more than a very brief respite’, particularly where the land being occupied is that of a public authority which the trespasser has never had any right to occupy.\(^ {136}\) Similarly, in *Birmingham CC v Lloyd* it was stated by Lord Neuberger that although it would be wrong to say that a person who had always been a trespasser could not invoke Article 8 as a defence against a possession order, such a person would have to ‘face a very uphill task

\(^{128}\) ibid para 74.
\(^{130}\) [2010] 3 WLR 1441 (SC).
\(^{131}\) ibid 1454.
\(^{132}\) ibid 1457.
\(^{134}\) Gillow v United Kingdom (1989) 11 EHRR 335, para 46.
\(^{135}\) Nield (n 129) 500.
\(^{136}\) [2006] 2 AC 465 (HL) 494-95.
Such judicial opinions are understandable. Allowing squatters to successfully rely on Article 8 outside of extremely exceptional circumstances would come dangerously close to construing the Article as a positive obligation upon the state to provide housing; an interpretation which the Strasbourg Court has strongly rejected.\[138\] As such, although it can be foreseen that squatters prosecuted under the 2012 Act will claim that their Convention rights have been breached by the provisions, it does not appear likely that a defence based on Article 8 would be successful in this respect.

(b) Relevance to Prosecutorial Discretion

The other potential manner in which squatters could avoid criminal punishment under the 2012 Act is in relation to the discretion to prosecute. It is well established that there is no duty for prosecutors to bring proceedings against persons or bodies who are suspected to have infringed the criminal law. This is not to say that this discretion means that the criminal law should be regarded as inherently open to arbitrary or discriminatory enforcement. As summarised by Hilson, the victims of offenders and the public generally have a legitimate interest in the law’s rational enforcement, so the discretion to prosecute or not prosecute has ‘important implications for fairness’ and equality before the law.\[139\] For this reason, the accountability of prosecuting bodies is maintained by the availability of policy guidelines. The CPS, for example, publishes its Code for Crown Prosecutors as a public document,\[140\] which is issued by the Director of Public Prosecutors (DPP) in accordance with s 10 of the Prosecution of Offences Act 1985.

Under the Code, there are two stages which Crown Prosecutors must follow when deciding whether or not to prosecute. First, there is a question of whether there is sufficient, admissible and reliable evidence ‘to provide a “realistic prospect of conviction” against each defendant’.\[141\] If this stage is satisfied, it must then be decided whether it is in the public interest to bring the prosecution. In order to assist such a decision, there is a guideline of relevant public interest factors outlined under paragraph 4.12 of the Code. It has been established in case law that judicial review can be made of a policy decision not to prosecute,\[142\] as well as a decision to prosecute where this ignores or runs contrary to established policy.\[143\] The appropriate place to challenge a decision to prosecute is ‘in accordance with the procedures of the Criminal Courts’, which is ordinarily by way of defence in the Crown Court.\[144\] The possibility therefore exists for a trespasser, whose conduct constitutes an offence under the 2012 Act, to not only avoid prosecution if it would be contrary to settled policy, but also challenge a decision to prosecute him in a criminal proceeding if it is in contravention of such policy.

\[137\] [2012] EWCA Civ 969 [18].  
\[139\] Christopher Hilson, ‘Discretion to Prosecute and Judicial Review’ [1993] Crim LR 739, 739-40.  
\[141\] ibid para 4.4.  
\[143\] R v Chief Constable of the Kent County Constabulary, ex parte L [1993] 1 All ER 756 (DC).  
It appears, however, that such a challenge would prove to be an uphill battle. As acknowledged by Lord Bingham in *R v DPP ex parte Manning*, in most cases the prosecutor’s decision ‘will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial’.\(^{145}\) As this kind of decision involves an assessment of the strength of the evidence and likely defences, it will ‘often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. In other words, the courts will not easily interfere by finding the decision of a prosecutor to be bad in law.’\(^{146}\) Furthermore, in *R (on the application of E) v DPP*, Munby LJ stressed the practical reality that ‘judges lack the necessary expertise and competence to formulate the kind of policy’ involved when establishing prosecution guidelines.\(^{147}\)

Nevertheless, it is possible that a squatter who challenges a decision to prosecute under the 2012 Act would attempt to rely on Article 8 ECHR. As recognised by the DPP in the Code for Crown Prosecutors, the CPS is a public authority for the purposes of the HRA\(^ {148}\) and must therefore apply the principles of the ECHR in accordance with this statute.\(^ {149}\) It has also been suggested in case law that a decision to prosecute must not contravene Convention rights. For example, in *R v G*, Baroness Hale drew emphasis to the question of whether the prosecution, conviction and sentence were ‘both rational and proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others’, holding that the conviction in question did not contravene Article 8.\(^ {150}\)

Lord Hope was also of the opinion that Article 8 should be considered in cases involving prosecutorial policy, delivering a dissenting judgment that the defendant’s conviction for rape of a child under s 5 of the Sexual Offences 2003 Act was disproportionate and that his conduct fell properly under the ambit of s 13, which concerns child sex offences committed by children or young persons.\(^ {151}\) Lord Carswell joined Lord Hope in dissent, holding ‘that to continue the prosecution under section 5, instead of substituting a charge under the appropriate section 13, was a breach of the defendant’s article 8 rights’.\(^ {152}\) Although he upheld the defendant’s conviction along with Baroness Hale and Lord Hoffmann, Lord Mance nonetheless found Article 8 to be applicable on the basis that the stigma of the charge and conviction would affect the defendant’s ‘right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality’.\(^ {153}\)

The view that Article 8 is relevant to questions of prosecutorial policy has received academic

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146 ibid.
147 [2012] 1 Cr App R 6 (QB) [50].
148 Crown Prosecution Service (n 140) para 2.6.
149 Human Rights Act 1998, s 6(1).
150 [2008] UKHL 37, [2009] 1 AC 92, 110. Here the 15 year old appellant had engaged in sexual intercourse with his 12 year old girlfriend, whom he had believed to be older. He was convicted for the offence of rape of a child under 13.
151 ibid 106.
152 ibid 111.
153 ibid 114.
support, with Malkani commenting that human rights law ‘is primarily intended to protect the individual from the coercive power of the state, and the exercise of prosecutorial discretion is an exercise of coercive power over the individual’.” This standpoint is not, however, universally shared by the judiciary: in G, Lord Hoffmann held that prosecutorial policy and sentencing did not fall under Article 8, as he considered the unfair or unjust handling of prosecution to be ‘a matter for the ordinary system of criminal justice’ rather than human rights. It is additionally worth considering that the judicial opinions in G that Article 8 was applicable to the decision to prosecute were largely based on the social stigma surrounding the particular offence of rape of a child. As remarked by Lord Hope, the defendant would ‘carry the stigma of a conviction for rape with him for the rest of his life’ despite being morally blameless on the facts.

Considering the lack of judicial consensus surrounding the applicability of Article 8 to questions of prosecutorial policy, as well as the improbability that any serious social stigma will be attached to the relatively minor offence of squatting in a residential building, it does not appear likely that a defendant would be able to successfully challenge a decision to prosecute him under s 144 of the 2012 Act, even if he were to attempt to rely on his Convention rights. Nonetheless, a clear establishment of the policy that will be followed when considering prosecution under the statute could help in mitigating any damage caused by the potential blurring of the line between tort and crime discussed earlier, although it would be regrettable for a trespasser’s personal liberty to depend so heavily on questions of policy rather than questions of law.

Conclusion

The possible consequences of the 2012 Act are far-reaching, giving rise to many significant questions about the relationship between civil and criminal law, as well as the role to be played by human rights. As acknowledged above, the statute’s underlying policy aims of further deterrence and shifting the burden of achieving redress are clear enough. The additional potential the new offence creates ‘for punishment at the hands of the state’ should dissuade trespassers from remaining on properties, thereby producing less cases of squatting to be dealt with. Additionally, landowners are provided with a further means of removing squatters without incurring civil costs.

Nevertheless, the availability under civil law of a ‘prompt and effective redress’ for squatting as well as the number of victims of squatting who were already afforded the protection of the criminal law under the 1977 and 1994 Acts raise doubts regarding the true role of the new offence. One cannot help but wonder whether it has only served to hurriedly satisfy the political aim of alleviating landowners’ fears of being deprived of their property at the dramatic expense of legal certainty. This leaves the current relationship in

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155 (n 150) 98.
156 ibid 99.
157 Cobb (n 3) 119.
158 Martil (n 89) 105.
159 ibid.
this area between tort and crime in an unclear state that could have serious theoretical
and practical repercussions. To quote Cullen and Brown’s fitting summary of the present
situation, ‘it is hard to shake off a nagging doubt that political pandering has won out’.\textsuperscript{160}

This outcome is especially disheartening in light of the sentiment shared by many
housing lawyers that the law relating to squatting has often been misrepresented by the
media.\textsuperscript{161} With the wide range of civil and criminal measures already available against
squatters, the perceived need amongst misled members of the public to afford landowners
greater protection was not especially well-grounded in reality at any point at which the
Government’s proposals were being considered (or at least not sufficiently well-grounded
to justify bringing down the sledgehammer of outright criminalisation). It has already been
shown from the recent tremors in adverse possession that the 2012 Act has tasked the
higher courts with difficult questions.\textsuperscript{162} For now, one can only wait to see if more of these
questions raise their unwelcome heads in other areas.

\textsuperscript{160} Cullen and Brown (n 103) 56.
\textsuperscript{161} Shiv Malik, ‘Squatting Law is Being Misrepresented to Aid Ministers’ Reforms, Claim Lawyers’ (The Guardian,
25 September 2011) <http://www.guardian.co.uk/politics/2011/sep/25/squatting-law-misrepresented-claim-
lawyers> accessed 17 September 2012.
\textsuperscript{162} Best (n 5).