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## Lessons from Outlaws

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## LESSONS FROM OUTLAWS

LAURA S. UNDERKUFFLER<sup>†</sup>

In response to Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

In *Property Outlaws*,<sup>1</sup> Eduardo Peñalver and Sonia Katyal set out an ambitious goal. Challenging both popular and legal assumptions, they attempt to reshape the image of those who deliberately violate the property rights of others. The gist of their argument is that these lawbreakers are not villains, but heroes—and that this is true regardless of whether we consider their actions from a social, economic, or legal point of view.

This agenda is a tall order. Lawbreakers generally are not a favored segment of society, and property laws—which provide a deeply felt need for individual security—would seem to be particularly important to uphold. Indeed, the overwhelming image of property lawbreakers is negative. As Peñalver and Katyal acknowledge, a trespasser in popular culture and common law is a “transgressor, a law-breaker; a wrong-doer, [a] sinner, [an] offender.”<sup>2</sup> Indeed, “[i]n early modern England, landowners frequently left ‘man traps’ and ‘spring guns’ along boundary lines to discourage trespass on their lands.”<sup>3</sup> Although the law might discourage such deadly self-help measures today, the idea that a trespasser is a wrongdoer who gets what he deserves is still immortalized in the myths of popular culture and in the spirit of the law.<sup>4</sup>

How, then, can we see property lawbreakers in positive terms? Peñalver and Katyal ground their positive view of property lawbreakers in the notion that legal reform is a constant necessity. By their account, property lawbreakers play “[a] powerful, and at times ironic,

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<sup>1</sup> Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

<sup>2</sup> *Id.* at 1097 (quoting XI THE OXFORD ENGLISH DICTIONARY 328 (1961)).

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* (explaining, for example, that one may still come across “Trespassers Will Be Shot” signs in rural areas of the United States today).

role . . . in the process of fostering the evolution of property [law].”<sup>5</sup> Although we tend to think of property law as unchanging and forever protecting, in reality, property law—like all law—must be dynamic.<sup>6</sup> Social and economic forces continually require us to rethink the collective judgments that we have written into law. Citing “expressive” property lawbreakers, who intend to send a message about the perceived injustice of existing property arrangements (such as Native American activists and black civil rights activists who seized property to dramatize their views),<sup>7</sup> and “acquisitive” property lawbreakers, who intend to acquire the underutilized land of others (such as homesteaders in the old American West and contemporary squatters in American cities),<sup>8</sup> Peñalver and Katyal point out that property lawbreakers may in fact be an important force in achieving larger social and economic goals that “ossified” property rules otherwise resist.<sup>9</sup>

Once it is recognized that property lawbreakers may play a desirable role, an obvious question arises: how do we determine which activities by property lawbreakers are “positive,” and which are not? It is clear that Peñalver and Katyal do not endow all property lawbreakers with this positive cast. These authors are not anarchists; they recognize that there are distinct costs—in the undermining of the idea of the rule of law, and in the demoralization of other property owners and aspirants—that follow from rewarding individuals who flout the rights of others with new rights for themselves.<sup>10</sup> The key, then, is to distinguish positive or desirable property lawbreaking from that which is not. What precisely, in this context, separates the valuable “wheat” from the reprehensible “chaff”? Since property rights are intended to protect *all* property holdings from external threats, how do we know when these threats should be repulsed, and when not?

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<sup>5</sup> *Id.* at 1098.

<sup>6</sup> *See id.* (arguing that the stability property law affords society is grounded in an undercurrent of change that maintains the law’s relevance and prevents it from becoming outdated and unhelpful).

<sup>7</sup> *See id.* at 1102-04, 1114-22 (describing the 1969 Native American occupation of Alcatraz island, as well as the lunch counter sit-in movement of the Civil Rights era).

<sup>8</sup> *See id.* at 1105-13, 1122-28 (drawing parallels between the adverse possessors of the American frontier and modern urban squatters).

<sup>9</sup> *See id.* at 1103 (“Property law has a greater tendency than many other areas of law to become . . . out of date . . . . [P]roperty outlaws have played a crucial role . . . in drawing attention to the need for reform.”).

<sup>10</sup> *See id.* at 1149 (acknowledging the potential long-term negative consequences of condoning acquisitive outlaw behavior).

From Peñalver and Katyal's discussion of positive property law-breaking, two general justifications for these activities emerge. These are what we might call (a) *efficiency reasons*, by which property outlaws are tolerated because their acts use land more efficiently or intensively;<sup>11</sup> and (b) *rectification reasons*, by which property outlaws are tolerated because their acts protest past injustice, and there is general recognition of the legitimacy of their rectification claims.<sup>12</sup>

Consider, as do Peñalver and Katyal, squatters who established homes in abandoned inner-city buildings in the 1970s and 1980s, and adverse possessors who claimed title to vast tracts of land owned by absentee private and public owners in the nineteenth-century American West. Efficiency and rectification considerations advanced the toleration of their claims; land which was not being productively used (and, inferentially, was owned by wealthy speculators or an indifferent government) was being put to good use by others.<sup>13</sup> Civil rights activists in the 1960s who occupied lunch counters and public buildings received widespread support because of the perceived truth of their rectification arguments: the system of legal segregation that pervaded the South at that time denied black Americans equal rights to property and its benefits.<sup>14</sup> Widespread public sympathy in 1969 with Native American activists who occupied the abandoned federal property of Alcatraz Island was due both to the rectification reasons that the activists advanced (that the land, from a historical point of view, was theirs) and efficiency reasons (that the land, having been abandoned, had no current useful role).<sup>15</sup> Clearly, the public's response would not have been the same had they occupied an active federal naval base or the public's favorite national park.

The descriptions by Peñalver and Katyal of these property law-breakers and our reasons for tolerating them ring true, and are fascinating reading. There is no doubt, as the authors point out, that property lawbreakers act for both personal acquisitive and ideological reasons, and that public toleration of property lawbreaking is grounded in both economic models privileging "productive" use of land<sup>16</sup> and public acknowledgment (on occasion) of historic injustice

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<sup>11</sup> See *id.* at 1143 (generating what the authors term "redistributive value").

<sup>12</sup> See *id.* (generating what the authors term "informational value").

<sup>13</sup> See *id.* at 1105-13, 1122-28.

<sup>14</sup> See *id.* at 1114-22.

<sup>15</sup> See *id.* at 1123.

<sup>16</sup> Arguments can be made, of course, that more intensive use of land is not always the most productive. For instance, in some situations, preservation might yield far more productive benefits in the long run than intensive human use.

done to particular groups. There are, in addition, other reasons that can be advanced for the toleration of property lawbreakers, as reflected in the law of adverse possession. These include observations that third parties should be able to rely on the assumption that the occupants of land are titleholders if they have occupied the land long enough; and that human beings who have occupied land for long periods will become deeply rooted in that land and will therefore resist dispossession, whether they came by the property legally or not.

However, as convincing as all of these reasons for our toleration of property outlaws are, something still seems to be missing. Although efficiency is important in property arrangements, simple efficiency reasons for property lawbreaking are not as powerful as they might, at first blush, seem to be. It is true that property lawbreakers are often tolerated when they put land to a better (more intensive) use. However, *most* land could probably be used more efficiently, or more intensively, if nonowners were given the chance. Farm fields could become home sites, and private woods could become parks. Yet we do not allow this. In fact, efficiency arguments for property lawbreaking are very selectively honored.

The same is true for rectification claims for prior social and economic injustices. Not all groups who have experienced injustice are legitimate candidates for tolerated property lawbreaking in the public mind. For instance, most observers would probably place the grievances of Japanese Americans interned during World War II into a different, monetarily compensable category. One cannot imagine tremendous public sympathy if these victims or their descendants illegally occupied public or private land to dramatize their claims, however just their arguments. So, what is this additional element—in addition to efficiency and rectification reasons—that pushes us to sympathize with property lawbreakers and to selectively tolerate their claims? Peñalver and Katyal hint at what this might be. Intentional property lawbreaking, they write, is “a strategy employed by those who cannot afford to file civil suits or whose voice in the legislative process is too weak to attract the attention of lawmakers.”<sup>17</sup> It is appealing “to the powerless and [the] marginal.”<sup>18</sup> It is “a tool of the little people—of the ‘have-nots.’”<sup>19</sup> It is used by “those [who are] disenfranchised by

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<sup>17</sup> *Id.* at 1100.

<sup>18</sup> *Id.* at 1101.

<sup>19</sup> *Id.*

the existing property system,” and who “flout[] the law in hopes of achieving their goals.”<sup>20</sup>

We thus have two different observations, juxtaposed. First, property lawbreakers are more tolerated in actuality than property laws and the mythology of their protection would predict. Second, those who engage in tolerated property lawbreaking are often the disenfranchised, the propertyless, the “have-nots” in the property world.

At this point we must pause. Are these simply two unrelated observations? Or does this mean that we (as a society) tolerate property lawbreaking *because* the lawbreakers are those who are losers under the existing regime of property and entitlements, while the targeted owners are winners under the same regime? Put another way, do we have different ideas about the protection that property should afford, depending on the *identities* of the wrongdoers and the titleholders?

The claim that the identities of the property wrongdoers or titleholders affect the outcome of property lawbreaking cases is clearly not true across the board. For instance, a boundary encroacher can obtain title through adverse possession whether the encroacher is penniless or rich, or whether the titleholder owns a thousand acres or one. Indeed, Peñalver and Katyal are very cautious in their possible endorsement of identity attitudes, even as they point out hints of such notions in popular culture and law.<sup>21</sup> For instance, we generally believe that those who steal to survive without threatening the lives of others are less culpable than other, more menacing criminals,<sup>22</sup> and the philosophical antecedents of Western, liberal democratic law include acknowledgment of the duty of the rich to share with the poor.<sup>23</sup>

Why are Peñalver and Katyal so cautious? Why do they seemingly feel the need, for instance, to camouflage rawly redistributive notions in less controversial theories, such as a desire to enhance social productivity or to facilitate “involuntary transfers . . . when there is reason to believe that the lawbreaker places a higher value on the property . . . than the true owner” does?<sup>24</sup>

In this caution, of course, Peñalver and Katyal are not alone. All of us writing in the field of property law and theory are reticent to

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<sup>20</sup> *Id.* at 1099.

<sup>21</sup> *See id.* at 1137 (“We intend our discussion to encompass both actors whose ends we share and those whose ends we find reprehensible.”).

<sup>22</sup> *See id.* at 1136-37 (noting that criminal law condemns simple theft less harshly than robbery).

<sup>23</sup> *See id.* at 1153 (“Early Christian thinkers, for example, viewed the failure of the rich to share with the poor as tantamount to theft.”).

<sup>24</sup> *Id.* at 1145.

champion broadly redistributive notions, or (in this context) to imply that property protection afforded by law depends on the “wealth identities” of either the property lawbreaker or titleholder. We want, after all, to be heard, not offhandedly dismissed. And, as Peñalver and Katyal note, an argument that the rights of property lawbreakers or titleholders should be grounded in their economic status “sounds fairly radical in the abstract.”<sup>25</sup>

The underlying problem that theorists and others face is that property embodies a deep and inherent paradox. On the one hand, property *by its very nature* embodies conscious, brutal, distributive decisions.<sup>26</sup> When we are considering the fate of external, physical, finite resources, such as land and all that it yields, property is a zero-sum game. If we acknowledge the “rights” of some individuals in these resources, we deny the “rights” of others. When we decide (and decide we must) who owns a building, who will farm the land, and whose mouths are fed, we are making distributive decisions, whether we like it or not. Property law design and enforcement cannot avoid this. It is a continual process of serious, deliberate, distributional decision making.

And yet—and here is the paradox—protection is also the essence of property. The promise of property law, and its critical social function, is to *protect* what it identifies as ours. Whatever the distributional fairness or unfairness that may exist, whatever the vagaries of the moment, property law promises that entitlements will not change. If I own a building, or I own land, I assume that it is mine. And this is true regardless of my needs relative to those of others. There are security, stability, and incentives to invest that are promised by these laws.

The genius of *Property Outlaws* is that it presents this paradox in a context that all of us recognize, and in a way that makes it real. Each of us knows of the power and sanctity of rights, titles, and other legal emoluments. We think far less, on a daily basis, about when and how all of these assumptions must yield. *Property Outlaws* reminds us of how we, as a society, accept, on some deep level, the reality of both notions. In addition, by so vividly portraying our past actions, it also

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<sup>25</sup> *Id.* at 1158.

<sup>26</sup> See LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 137-49 (2003) (distinguishing the protection of property from other constitutional rights in that “the extension of property protection . . . to one person *necessarily and inevitably* denies the same rights to others”) (emphasis in original).

shows us that we can afford (perhaps) to be more giving to the poor and dispossessed among us than we might otherwise suppose.

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