

2007

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### Recommended Citation

Lee Anne Fennell, "Order with Outlaws?," 156 University of Pennsylvania Law Review PENNumbra 269 (2007).

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## ORDER WITH OUTLAWS?

LEE ANNE FENNELL<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 provocatively argue that the violation of property laws can enhance the social order. Using examples that include the settlement of the American West, lunch counter sit-ins, and urban squatting, Peñalver and Katyal maintain that the law's proper development depends in some measure on the purposeful crossing of property boundaries.<sup>2</sup> While these breaches disrupt order in the short run, Peñalver and Katyal suggest that they ultimately produce a more stable legal regime. As the authors put it, "[T]he apparent stability and order that property law provides owe much to the destabilizing role of the lawbreaker, who occasionally forces shifts of entitlements and laws."<sup>3</sup> In short, the authors present a case for "order with outlaws."<sup>4</sup>

Peñalver and Katyal make an extremely important contribution to legal scholarship by identifying and examining potential benefits embedded in what is usually a much-maligned activity—breaking property laws. Their exploration and synthesis of different lawbreaking contexts is creative, far ranging, and theoretically rich, and their taxonomy of outlaws adds a great deal of conceptual clarity. Although the normative payoff of the project has yet to be fully articulated,<sup>5</sup> the article's analysis underscores a central challenge: because most property violations are damaging, we need some way to distinguish socially valuable boundary crossings from socially destructive ones. The authors suggest that ex post determinations may be able to perform this

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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> See generally *id.*

<sup>3</sup> *Id.* at 1098.

<sup>4</sup> Apologies to ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>5</sup> Peñalver and Katyal's article is part of a larger project; the authors' book, *PROPERTY OUTLAWS*, is forthcoming from Yale University Press.

sorting function,<sup>6</sup> but this move only defers, rather than eliminates, the need for analytic guidance. Building on what I view as the article's most compelling theme—the information-generating function of law-breaking<sup>7</sup>—I will suggest one way of approaching the question.

### I. INFORMATIVE OUTLAWS

The article's most compelling claim is that lawbreaking can generate useful information. As the authors explain, the information produced by the breaching of property boundaries can take several distinct forms. First, at least where sanctions are significant or social stigma attaches to disobeying the law, lawbreaking transmits information about the intensity of the outlaw's preferences.<sup>8</sup> Where the preferences at issue relate to the valuation of a property entitlement, we would ordinarily rely on markets to gauge intensities. But a knowing property violation can add information where a market transaction is unavailable, if the violation occurs under circumstances that allow us to draw inferences about the violator's and the record owner's relative valuations. For example, adverse possession, if predicated on a knowing trespass, could provide just such a test of relative valuations.<sup>9</sup>

Second, breaking a law that blocks particular entitlement reconfigurations can help to overcome society's "imaginative deficits" by offering a glimpse of a world featuring those reconfigurations.<sup>10</sup> In this way, information about the implications of a potential legal change can be vividly conveyed. Peñalver and Katyal provide the powerful example of lunch counter sit-ins, explaining that some people with segregationist leanings changed their views when confronted with the reality of individuals seeking service at a lunch counter.<sup>11</sup>

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<sup>6</sup> See Peñalver & Katyal, *supra* note 1, at 1181.

<sup>7</sup> See generally, *id.*

<sup>8</sup> See *id.* at 1137-38. A significant literature examines the ways that voting systems and markets capture or fail to capture intensities of preferences; see, for example, JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 125-30 (1962); Saul Levmore, *Voting with Intensity*, 53 *STAN. L. REV.* 111, 142-59 (2000).

<sup>9</sup> See Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 *NW. U. L. REV.* 1037, 1073-75 (2006); see also Peñalver & Katyal, *supra* note 1, at 1169-71 (discussing utilitarian and nonutilitarian justifications for intentional adverse possession).

<sup>10</sup> See Peñalver & Katyal, *supra* note 1, at 1161; *id.* at 1129-30 (citing and discussing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983)).

<sup>11</sup> See *id.* at 1139-40.

Third, a pattern of property violations can serve a diagnostic function by identifying distributive shortcomings in a legal system.<sup>12</sup> The outlaw's actions not only draw attention to the problem, but (returning to the point above) instantiate one possible way of resolving it.<sup>13</sup> That the outlaw-initiated change in distribution will remain in place in the absence of legal enforcement or self-help on the part of the record owner may also generate useful information about relative valuations—information that may bear on whether society should ratify the change.<sup>14</sup> Instead of approving the specific violations in question, society might respond through other reforms to distributive policy.<sup>15</sup> The point can be generalized further: widespread disregard of a property law can be symptomatic of a legal or political defect whose root cause and most promising cure are far removed from the broken law in question.

## II. LINE-DRAWING

The observation that lawbreaking may have an informational silver lining is an important one, but it is not immediately obvious what to do with that insight. Certainly, Peñalver and Katyal do not suggest that violations of property rights are always or even usually beneficial on net. Yet, identifying the characteristics that distinguish the lawbreaking that we might want to encourage (or not overly discourage) from the mundane run of socially damaging property violations is no easy task.<sup>16</sup> We need some way to sift from the great mass of potential violations those that are likely to offer especially high-quality information that is unavailable from other sources.<sup>17</sup>

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<sup>12</sup> See *id.* at 1143, 1155.

<sup>13</sup> See *id.* at 1169 (noting that the law could—and sometimes does—simply ratify the acquisitions of property outlaws).

<sup>14</sup> Peñalver and Katyal recognize an additional “redistributive value” to certain kinds of acquisitive violations. See *id.* at 1143. This value seems to be largely subsumed within the value that outlaw-generated information provides through its beneficial effects on legal rules. However, additional gains might be realized through efficient distributive shifts that are allowed to stay in place in the absence of, or in the period preceding, legal ratification.

<sup>15</sup> See *id.* at 1178-80.

<sup>16</sup> See *id.* at 1181 (stating that “it is very difficult to specify in advance in general terms the content of the category of justified property lawbreaking with any precision,” and suggesting reliance on ex post case-by-case determinations).

<sup>17</sup> A separate question, how best to glean that information without degrading the value of the informational signal, is discussed *infra*, Part III.

*A. Good Outlaws, Bad Outlaws*

One simple dimension along which we might sort outlaws is on the normative attractiveness of the ends that they are pursuing. Here, we might initially be tempted to favor Peñalver and Katyal's "[e]xpressive outlaws," who violate the law to send a message, over "[a]cquisitive" or "intersectional" outlaws, whose violations are motivated (in whole or in part) by a desire to redistribute resources in their own favor.<sup>18</sup> But expressive outlaws can have unsavory agendas too, as the authors recognize.<sup>19</sup> Consider an inversion of the lunch counter sit-in scenario. Following Joseph Singer's analysis, we might view public accommodations laws as having established an easement of sorts that allows people of all races to access meals at a private landowner's lunch counter during normal hours of operation.<sup>20</sup> Viewed in these terms, a racist owner's refusal of service is no less a property violation than the original sit-in, and the racist owner no less an expressive outlaw than the civil rights protestors. Just as expressive ends can vary in normative valence, so too can acquisitive ends—an outlaw may act out of simple greed or abject need.

After considering such possibilities, Peñalver and Katyal indicate that their analysis is meant "to encompass both actors whose ends we share and those whose ends we find reprehensible."<sup>21</sup> However, they go on to predict that their prescriptions will "likely . . . have different impacts on different sorts of property outlaws, based on differences in the objective circumstances and aims of the outlaws and in the democratic response to their activities."<sup>22</sup> This qualification suggests an implicit reliance on either the political system or public opinion to provide a normative backstop. Such a reliance seems to be somewhat in tension with the authors' view of lawbreaking as a corrective to shortfalls in the majoritarian process.<sup>23</sup>

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<sup>18</sup> See Peñalver & Katyal, *supra* note 1, at 1105 (emphasis omitted) (introducing this taxonomy) .

<sup>19</sup> *Id.* at 1137.

<sup>20</sup> JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 39-41 (2000) (observing that the access right created by public accommodations laws could be characterized as an easement).

<sup>21</sup> Peñalver & Katyal, *supra* note 1, at 1137.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *id.* (suggesting that "those isolated from the majoritarian process" will be more likely to resort to lawbreaking than "those well connected to the levers of power").

My point is not to criticize Peñalver and Katyal's principled refusal to classify outlaws' agendas based on perceived normative goodness, nor their apparent hope that truly bad outlaws will be recognized as such and treated accordingly. But the existence (indeed, prevalence) of bad outlaws underscores the fact that altering property protections is not costless. Accordingly, we should seek some analytic basis for isolating those instances in which the information value of lawbreaking is high enough to be worth the risks involved.

### B. Ownership Blockades

We can gain some traction on the question by observing that when a property interest is protected by what Calabresi and Melamed term a "property rule,"<sup>24</sup> there are two conceptually distinct ways that an outlaw might violate the owner's interests. An outlaw may appropriate the owner's control over whether a transaction occurs (as the lunch counter protesters, who were happy to pay the going rate for their meals, were doing), or she may instead appropriate the value of the thing taken (as a shoplifter does when she makes off with a scarf that she could easily have purchased at the cash register). Of course, many outlaws violate both elements of ownership simultaneously, as when a housebreaker steals a vase (carrying off the item's value along with the owner's prerogative not to sell the thing at all) or a trespasser tramples the daisies (depriving the owner of both the exclusion right and the flowers' worth). But the distinction remains important, because it helps to isolate a feature that is both central to property rights and vulnerable to societal revision—the owner's veto power.

#### 1. Outright Vetoes

There is something special about an owner's ability to block a transaction, and hence something noteworthy about lawbreaking that is narrowly focused on removing a blockade. The ability to veto a transaction altogether—whether it means keeping someone from crossing one's property line or preventing a neighbor from forcibly purchasing one's home—is central to our notion of property. But this right of exclusion also presents the danger that resources will be mo-

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<sup>24</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.").

nopolized in a way that will render them unavailable to a higher-valuing user. Property law already incorporates recognition of this fact through doctrines such as necessity, adverse possession, and eminent domain. Efforts by outlaws to overcome veto rights in new and different settings may generate useful information about value-reducing blockades.

## 2. Prices as Vetoes

Outright refusals to deal are only one way that an owner holding a property-rule-protected entitlement can block a transaction; prices are another. Property rule protection differs from liability rule protection not only in precluding involuntary transfers of the owner's entitlement, but also in giving the owner control over the price at which any such transfer will occur.<sup>25</sup> Liability rules, in contrast, strip the owner not only of the ability to resist a transfer in a claimant's favor, but also of the ability to choose the price.<sup>26</sup> Because a high price can block a transaction just as surely as an announcement that the entitlement is "not for sale," the power to set prices can present concerns similar to those associated with veto rights. But because subjective valuations are notoriously difficult to verify, an owner who is *not* granted control over price levels, as under a liability rule, may be forced to surrender some increment of value.<sup>27</sup>

The upshot is that it will often be difficult to tell whether a high price represents a "price blockade" adopted for strategic or spiteful reasons or, instead, an honest statement of value. This, in turn, makes outlaw behavior in response to the price signal difficult to classify. Nonetheless, we can readily distinguish cases in which goods are available at competitive prices but the outlaw simply wants to acquire them for a lower (or zero) price. Such an outlaw is acting not to change the way that access to the good is structured or to overcome a strategic holdout problem, but rather only to alter the distributive outcome. In the ordinary case, such a violation is unlikely to produce useful information.<sup>28</sup>

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.* (explaining that, under a liability rule, the value of the entitlement would be "determined by some organ of the state rather than by the parties themselves").

<sup>27</sup> *See* Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 *YALE L.J.* 2091, 2095 (1997) (describing "undercompensation" as the "signature risk[] of . . . liability rules").

<sup>28</sup> *But see infra* notes 34-43 and accompanying text (discussing the communicative power and implications of violations that are the product of dire need).

### 3. Challenges to Vetoes

As a first cut, then, we might focus our attention on outlaws who break through a veto asserted by an owner with monopoly power over a resource. By challenging the owner's right to control whether a transaction occurs, such outlaws strike at the heart of what is uniquely property-like (and hence uniquely valuable and worrisome) about property—its reservation of veto rights to an owner. This is not to say that all—or even most—challenges to veto rights are information rich, much less justified. Property rules hold a privileged place in our system of law, and for good reason.<sup>29</sup> But when an owner is able to completely preclude access to a resource for which no good substitutes exist, the law should (and typically does) take notice. Outlaws may help bring to light unnoticed or underappreciated impediments stemming from owners' monopolization of resources.

A focus on blockades also offers a way to distinguish veto-challenging property violations, like lunch counter sit-ins, from violations that assert veto powers in areas where access has been legally mandated, like the exclusion practiced by the racist luncheonette owner. This distinction dovetails with arguments about political inertia. As Peñalver and Katyal emphasize, “[P]roperty law is unusually resistant to legal change,” for reasons that likely include the constitutional protections extended to property interests and the vested interests that property-holders have in preserving the status quo.<sup>30</sup> The fact that property is by its very nature an access-constricting institution might suggest that this inertia typically operates in the direction of locking in veto rights, rather than locking in access rights. If this is correct, property violations that challenge veto rights, especially those of long standing, might be expected to produce more meaningful information than would be generated by violations of access rights more recently established through the political process.<sup>31</sup>

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<sup>29</sup> See, e.g., Epstein, *supra* note 27, at 2096-99 (discussing the dominance of property rules over liability rules); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1724 (2004) (“The preference for property rules can be understood as a response to the information costs that shape other aspects of entitlement delineation.”).

<sup>30</sup> Peñalver & Katyal, *supra* note 1, at 1133; see *id.* at 1133-35 (discussing reasons for property law's resistance to change).

<sup>31</sup> Cf. Daniel Markovits, Essay, *Democratic Disobedience*, 114 YALE L.J. 1897, 1933-34 (2005) (suggesting that “the distance between [a democratically authoritative sovereign] engagement and the present political situation—measured in terms of citizen preferences, institutional continuity, time, or whatever other variables contribute to individual authorship of collective decisions . . . may be so great that the conditions of sovereign authority no longer apply in connection with the policy at hand”).



## III. RESPONSES TO OUTLAWS

As Peñalver and Katyal recognize, it is not enough to identify the sorts of violations that have high information content. It is also necessary to consider what adjustments (if any) we might make to property law to selectively elicit that information. Avoiding an undue weakening of the property system as a whole is an obvious concern, and one that is reflected throughout the article. Another problem, also recognized by the authors, is that any legal incentive (or reduction in disincentive) for property violations will dilute the informational signal that a violation sends.<sup>32</sup> Although Peñalver and Katyal grapple with these tensions at some length, approaching the question with the notion of vetoes or blockades explicitly in mind can shed useful light.

My focus on owners' veto powers and my invocation of the work of Calabresi and Melamed might seem to suggest that liability rules would be the best way to harness the information generated by lawbreakers. That is not necessarily the case. Injunctive relief, the standard accompaniment to property rule protection, would indeed have an information-muffling effect, at least if it were imposed quickly enough to stop violations from occurring or from coming to the attention of the polity.<sup>33</sup> But liability rules are not the only alternative; property rules can also be enforced with supercompensatory penalties. Allowing outlaws to obtain stolen entitlements at their fair market value—the liability rule solution—would be expected to underdeter violations and, at the same time, weaken the informational signal associated with a violation. In many settings, a better answer will be to keep supercompensatory penalties in place that can meaningfully test the outlaw's preference intensity without precluding her message from being heard.

In some cases, however, the good being sought by the outlaw is of such an essential character that the presence of a legal blockade and the absence of any alternatives may be enough to make out a prima facie case against penalizing the violation. The doctrine of necessity follows this reasoning, albeit in limited circumstances, and Peñalver and Katyal's notion of "expressive necessity" would extend the idea to

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<sup>32</sup> See Peñalver & Katyal, *supra* note 1, at 1181 ("The trick is to avoid completely foreclosing certain types of productive lawbreaking without encouraging broader criminal behavior to such a degree that the informational value of productive lawbreaking is itself destroyed.").

<sup>33</sup> I mean to include here not only injunctive relief as such, but also direct police action undertaken to prevent a violation from occurring or to stop an ongoing violation.

a subset of expressive lawbreaking.<sup>34</sup> Peñalver and Katyal observe that “direct civil disobedience”—breaking the very property law that one is protesting—may at times represent the only feasible way to demonstrate the implications of an entitlement realignment.<sup>35</sup> Copyright’s fair use doctrine, which can permit limited borrowing from a work for purposes of parodying it,<sup>36</sup> offers an interesting analogy. Just as some amount of borrowing from a work is indispensable to a parody of that work,<sup>37</sup> so too may access to property be necessary to critique the entitlement system embedded within it. In both cases, the owner controls an element essential to a particular message and for which there are no good substitutes.<sup>38</sup>

A somewhat different challenge is presented by an acquisitive outlaw who is in such dire need that his violation communicates a fundamental failure of the social structure.<sup>39</sup> As Jeremy Waldron has argued, the state’s withdrawal of all public places for performing necessary functions (such as sleeping) is logically inconsistent with the strong protection of private property rights, because these activities must be done somewhere if a person is to exist at all.<sup>40</sup> In this context, no single owner holds a blocking monopoly on the resource in question (a place to sleep), but all owners are collectively able to foreclose access to that resource to those who lack property of their own.<sup>41</sup> While the strong enforcement of private property boundaries may be necessary to avoid placing undue burdens on any particular private owner, exclusion from public places must hinge on the availability of some alternative location for performing essential life functions. For

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<sup>34</sup> See *id.* at 1183-84.

<sup>35</sup> See *id.*

<sup>36</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (analyzing parody within copyright’s “fair use” framework); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 71-74 (1992) (distinguishing parody that targets the borrowed work itself from parody that borrows from one work to mock something else).

<sup>37</sup> See *Campbell*, 510 U.S. at 588 (“When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”).

<sup>38</sup> See Peñalver & Katyal, *supra* note 1, at 1183-84 (distinguishing “indirect civil disobedience” (breaking one property law to critique another law) from “direct civil disobedience” on the grounds that expressive alternatives are lacking for the latter); Posner, *supra* note 36, at 71-74 (discussing the market obstruction to obtaining access to a work for purposes of parodying it, and distinguishing the case in which one work is used as a parodic weapon against a different work).

<sup>39</sup> See Peñalver & Katyal, *supra* note 1, at 1153-55.

<sup>40</sup> Jeremy Waldron, Essay, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296-302 (1991).

<sup>41</sup> See *id.*

example, in the wake of a Ninth Circuit opinion employing similar reasoning,<sup>42</sup> the City of Los Angeles has recently agreed not to enforce bans on sidewalk sleeping, pending the provision of 1250 new beds for low-income persons.<sup>43</sup> Such acts of provisional ratification are likely to generate important inputs to the political process.

#### CONCLUSION

Peñalver and Katyal persuasively argue that property violations can, at times, generate information that is discourse-enhancing, market perfecting, inertia defeating, reform inducing, and, ultimately, order preserving. But most property violations destabilize the social order without producing any significant offsetting benefits. The authors' analysis highlights the need for greater analytic clarity about the kinds of violations—and the kinds of remedies for them—that tend to generate net informational benefits. In pursuing that objective, it seems fair to observe that much of what pushes our intuitions about property outlaws has at its heart anxiety about the very potent veto rights that we extend to owners. Those rights are fundamental to our vision of ownership, but they have also been hedged about with exceptions and modifications to prevent owners from unduly blocking transactions. The work of refining property law to strike the right balance between access and exclusion is always ongoing, and Peñalver and Katyal skillfully show us that outlaws can offer useful, if unconventional, guidance.

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Preferred Citation: Lee Anne Fennell, *Order with Outlaws?*, 156 U. PA. L. REV. PENNUMBRA 269 (2007), <http://www.pennumbra.com/responses/12-2007/Fennell.pdf>.

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<sup>42</sup> *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (“[T]he Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.”), *vacated as moot*, No. 04-55324, 2007 WL 3010591, at \*1 (9th Cir. Oct. 15, 2007).

<sup>43</sup> Solomon Moore, *Some Respite, if Little Cheer, for Skid Row Homeless*, N.Y. TIMES, Oct. 31, 2007, at A14.