

ESSAY

PROPERTY OUTLAWS, REBEL MYTHOLOGIES, AND SOCIAL BANDITS

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INTRODUCTION

In *Property Outlaws*,¹ Eduardo Peñalver and Sonia Katyal challenge our intuitions about individuals and groups who violate legal property entitlements. They argue that actions like intentional conversion, infringement, and trespass may be legal wrongs, but they are not always harmful to the society.² Instead, the authors argue that violating property laws can be socially and legally productive in a variety of ways.³ For that reason, property outlaws deserve greater respect and solicitude from the legal establishment.

To support this somewhat counterintuitive claim, the authors offer a range of stories from a variety of contexts, involving the intentional violation of legal property entitlements.⁴ In the vast majority of the cases they present, the so-called “outlaws” feel fully justified in their illegal actions.⁵ The outlaws we see depicted are not criminals but protesters, activists, and homeless squatters.⁶

Peñalver and Katyal hope to “rehabilitate, at least to a certain extent, the image of the intentional property outlaw”⁷ by offering a systemic account of laudable outlawry. More specifically, the authors seem interested in creating greater legal leeway for those who violate property laws.⁸ They also seek to increase legal theorists’ and policy makers’ general appreciation of the social benefits provided by outlaws.⁹

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¹ EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS* 11 (2010). The book builds upon an earlier law review article with the same title by the same authors, Eduardo Peñalver and Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.* at 12.

⁶ *Id.* at 13.

⁷ *Id.* at 11.

⁸ *See id.*

⁹ *See id.*

The book is both ambitious and fascinating. The outlaw's constructive role in both law and politics is a topic that has received too little attention. This book brings the topic to life, with both careful theoretical inquiries and a multitude of examples from recent history.

I cannot respond here to all the interesting questions and assertions found in *Property Outlaws* (and I should also note that there have already been some published reactions to the arguments made in the book¹⁰), so I will limit my reactions to four. At the outset, I should say that I agree with a great deal in the book. But, rather than summarize the many ways in which I agree with the authors, I will focus primarily on four points where my own perspective leads me to slightly different conclusions.

I. THE IMAGE OF THE OUTLAW

In their introductory material, Peñalver and Katyal explain that they hope to rehabilitate the image of the outlaw.¹¹ At first glance, this seems like an ambitious goal.¹² Outlaws, we might imagine, should not be popular figures. Yet, on closer consideration, I would argue that the “image of the intentional property outlaw” is really not so tarnished. Indeed, my sense is that we have a certain level of attraction to outlaws of all sorts—at least when they keep their distance from our daily lives—and that this fascination informs *Property Outlaws* and contributes to its narratives.

As historians have explain, the term “outlaw” once had a different meaning than it does today.¹³ In medieval England outlaw was a precise legal term of art with specific consequences.¹⁴ Outlaw designated a person who failed to stand trial and became a fugitive from the law.¹⁵ Society characterized such a person as *caput lupinum*—bearing the head of the wolf (in legal Latin)—and wanted, dead or alive.¹⁶ An outlaw could

¹⁰ See, e.g., Lee Anne Fennell, Response, *Order with Outlaws?*, 156 U. PA. L. REV. PENNUMBRA 269 (2007), <http://www.pennumbra.com/responses/12-2007/Fennell.pdf>; Nicole Stelle Garnett, Response, *Property In-Laws*, 156 U. PA. L. REV. PENNUMBRA 279 (2007), <http://www.pennumbra.com/responses/12-2007/Garnett.pdf>; Elizabeth M. Glazer, Response, *Rule Of (Out)Law: Property's Contingent Right to Exclude*, 156 U. PA. L. REV. PENNUMBRA 331 (2008), <http://www.pennumbra.com/responses/01-2008/Glazer.pdf>; Laura S. Underkuffler, Response, *Lessons from Outlaws*, 156 U. PA. L. REV. PENNUMBRA 262 (2007), <http://www.pennumbra.com/responses/12-2007/Underkuffler.pdf>.

¹¹ PEÑALVER & KATYAL, *supra* note 1, at 1–20.

¹² Underkuffler, *supra* note 10, at 262 (“[T]he overwhelming image of property law-breakers is negative.”).

¹³ See Desmond Manderson, *From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature*, 15 CARDOZO STUD. L. & LITERATURE 87, 104 (2003).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

be murdered with impunity by any member of society, creating a state-endorsed radical inversion of the social contract.¹⁷

Today, however, we use the term outlaw to describe generally those who violate legal rules in a determined way. Accordingly, Peñalver and Katyal define “property outlaws” as people who act in ways that fail to conform to legal rules concerning property rights. Their stories of outlaws, however, focus on those who disobey a property law in a nonviolent manner and out of a political conviction that the rule they are violating is, in fact, an illegitimate rule.¹⁸ These are, I think, somewhat mild outlaws compared to the historic English fugitive.

They are also a rather mild sort compared to the rogues gallery of outlaw types that popular media presents to us on a daily basis. On television we can find serial killers, criminal masterminds, pirates, thugs, escaped prisoners, and even kind-hearted comedic protagonists that wind up, by no fault of their own, pursued by lines of police cars. We all know and admire some of these outlaws. A very short list of outlaws (factual and fictional) who I have admired (to some degree) would include Spartacus, Robin Hood, Grace O’Malley, Jean Valjean, Pancho Villa, Billy the Kid, Bonnie and Clyde, Michael Corleone, Thelma and Louise, Captain Jack Sparrow, Omar Little, and Jake Sully. No doubt your personal list includes others.

My favorite childhood outlaws were a fictional band from a galaxy far, far away. The first three *Star Wars* stories were a classic tale of outlaw resistance, mashing up themes of the European resistance fighters in World War II (smugglers vs. Stormtroopers) with student counter-culture of the 1960s (young, idealistic rebels tapping into the force). Leia, Luke, and Han joined the Rebel Alliance and became outlaws defying what passed for law and order in their corner of the universe. Their exploits culminated in the complete destruction of two rather expensive pieces of imperial property. Now that I am slightly more mature, I realize the spectacles of technology and violence that attended the operations of the Rebel Alliance were probably a large part of why I found the trilogy, and its outlaw characters, so engrossing. Outlaws are very exciting figures. Personally, I rarely use deadly weapons, flee armed pursuers, or break into buildings. Yet most outlaws, given their poor relations with the state, conveniently need to do these sorts of visually exciting and pulse-quickenning things.

In the early English era of outlaws, the outlaw was often fleeing from the possibility of being a key player in a public spectacle of dismemberment or execution. Ironically, in today’s age of mass incarcera-

¹⁷ *Id.*

¹⁸ See PEÑALVER & KATYAL, *supra* note 1, at 16–17.

tion, the public derives enjoyment from the spectacle of the outlaw's crime, not the outlaw's punishment. And so, we find ourselves cheering for young and energetic celebrities on the screen who play assassins, rogue spies, vampires, gangsters, and pirates engaged in all sorts of things that we find fascinating and terrifying—and that are, by and large, illegal.

The appeal of the outlaw story is not all about the spectacle of the outlaw life though. The outlaw's psychology is probably just as important. The outlaw that we imagine is a truly free individual. Living a hunted existence, the outlaw is at liberty to come up with a social code from scratch. While the creative industries frequently seek to commercially exploit this license by feeding us gruesome fantasies of criminal sadism,¹⁹ they also explain that some outlaws, like the Rebel Alliance, can exist above, rather than below, the moral bar of the status quo. Although we see an abundance of outlaw villains, the outlaw hero—the rebel against tyranny—is really the perennial favorite, with Robin Hood being the classic example and *Avatar's* Jake Sully being one of the more recent incarnations. These idealistic and self-sacrificing outlaws find themselves in violent conflict with state authorities due to their devotion to justice.

To make this plot work, however, it is not enough to make the noble outlaw self-sacrificing and good. In order to create a spectacle, the state must be firmly allied with evil. All of King John's supporters and henchmen must be cruel thugs, the Stormtroopers must be soulless automotons, and so forth. Only then can special-effects professionals do their work, providing explosions, weapons, and mayhem in a way that is more or less morally palatable. Of course, when we wake up from these fantasies, we should realize that the perfectly noble outlaw and the perfectly villainous state are exceedingly rare occurrences. So the noble and violent outlaw narrative, which requires the concurrence of these two, is nearly statistically impossible.

And yet, the Robin Hood myth persists. The historian Eric Hobsbawm, in his 1969 book, *Bandits*, provided a compelling cross-cultural account of what he termed the phenomenon of the "social bandit," the popular outlaw figure.²⁰ Hobsbawm saw the outlaw as a sort of peasant proto-revolutionary, defying the oppressive and illegitimate state, while drawing popular support and admiration from the local (agrarian and im-

¹⁹ Jenny McCartney, *The Dark Knight Taints Our Children's World View*, TELEGRAPH, July 26, 2008, <http://www.telegraph.co.uk/comment/columnists/charlesmoore/3560989/The-Dark-Knight-taints-our-childrens-world-view.html> (commenting on the latest Batman movie, *The Dark Knight*, and noting that for a film marketed to young children, "the greatest surprise of all—even for me, after eight years spent working as a film critic—has been the sustained level of intensely sadistic brutality throughout the film").

²⁰ ERIC HOBSBAWM, *BANDITS* (Weidenfeld & Nicolson 4th ed. 2000) (1969).

poverished) community. Drawing from Asia, Africa, South America, and the Mediterranean, Hobsbawm's book provided a range of accounts of popular outlaws who inspired songs and folklore.²¹

Although Hobsbawm's account of social bandits is historical, it moves rather lightly between the outlaws of fact and the outlaws of folklore. In folk stories, Hobsbawm tells us, the social bandit opposes injustice, aids the powerless against the powerful, supports the poor against the rich, and defends the rights of the local community.²² These conditions, as often as not, are not met in fact. But the community that sings the praises of its outlaw figures, much like Hollywood, is perfectly willing to bend the facts and fill in some missing details.²³

I think we can conclude, based on Hobsbawm's work and the continued prevalence of outlaws in the media, that our public image problem with outlaws is really not so much the problem of underappreciation, but of overappreciation (albeit at a distance). Culturally, we seem to yearn for stories of noble outlaws in pulse-quickening resistance against oppressive states. We cannot stop telling tales of young, poor, talented, passionate, clever, idealistic, and defiant individuals resisting an authority that is violent, corrupt, humorless, alien, imperialist, and, most importantly, unjust. The outlaw narrative grabs us and permeates world culture.

Accordingly, I would offer a slight modification to the goal of the authors. The popular image of the outlaw is really not all that bad, nor has it ever been. The real challenge in the legal study of outlaws, I would say, is in taking our popular enthusiasm for outlaws and using it to say something constructive about our political process, especially in the modern era of representative democracy and the complex administrative state.

II. DEFINING THE MODERN OUTLAW

Eric Hobsbawm's social bandits, to the extent they are rooted in factual history, tend to dwell on the borders of state power.²⁴ Bands of popular outlaws, Hobsbawm tells us, emerge primarily in times of famine and political crisis for the obvious reasons that robbery provides a workable alternative to starvation, especially in times when the state's police power is weakened by an unstable government.²⁵

Yet most of Hobsbawm's outlaw stories take place in past centuries. He identifies barely any outlaws operating in the later part of the twenti-

²¹ See *id.* at 46–62.

²² *Id.* at 47–48.

²³ *Id.* at 46–49 (contrasting the actual bandit with the archetypal bandit).

²⁴ See *id.* at 34–35.

²⁵ *Id.* at 26.

eth century. Part of Hobsbawm's thesis is, in fact, that the golden age of the social bandit has ended.²⁶ True popular outlaws in the style of Robin Hood, according to Hobsbawm, were tied to traditional agrarian peasant cultures.²⁷ They generally do not arise, he says, in modern industrial states.²⁸ Hobsbawm's book was published in 1969.²⁹ Today's digital age, where everyone and everything is wired, logged, and tracked, is an even worse fit for independent bands of mountain and forest-dwelling outlaws protected and supported by local communities.

So while Peñalver and Katyal's more modern outlaws are thematically connected to the outlaws of Hobsbawm and fiction, they are, of necessity, different sorts of outlaws. Perhaps the most celebrated outlaws in the book are the young African-American students who organized lunch counter sit-ins in the segregated South during the early 1960s.³⁰ In addition to their stories, we hear stories about the Native-American activists who occupied Alcatraz Island in the late 1960s,³¹ the AIDS activists who sought to defy international patent laws to procure life-saving drugs for South Africans,³² the nineteenth century squatter-pioneers of the American frontier,³³ and a variety of digital downloaders and "hacktivists" who have challenged copyright law.³⁴

These nonfictional "outlaws" do share some important characteristics with Hobsbawm's bandits. For instance, Hobsbawm's outlaws are often robbers of the rich who are adopted by an oppressed peasantry.³⁵ Peñalver and Katyal's outlaws create "redistributive value" while promoting the interest of disadvantaged communities.³⁶ Both sorts claim to engage in the pursuit of justice, though they use different strategies. Most importantly, the outlaws featured by Peñalver and Katyal avoid physical violence. It follows that, given their nonviolent tactics, the outlaws of Peñalver and Katyal are fairly powerless against the violent forces of the state. Hobsbawm's social bandits effectively evade state power, at least for a few years, while Peñalver and Katyal's outlaws seem to anticipate the probability of state punishment in exchange for the possibility that their actions will influence public opinion.

Yet, although the exemplary outlaws in the book seem fit to a certain type, the abstract figure used for the outlaw is considerably broader.

²⁶ *See id.* at 144.

²⁷ *See id.* at 143–44.

²⁸ *Id.* at 144, 184.

²⁹ *Id.*

³⁰ PEÑALVER & KATYAL, *supra* note 1, at 64–70.

³¹ *Id.* at vii–viii.

³² *Id.* at 93–97.

³³ *Id.* at 55–63.

³⁴ *Id.* at 169–82, 84–86.

³⁵ HOBBSAWM, *supra* note 20, at 20.

³⁶ PEÑALVER & KATYAL, *supra* note 1, at 127.

The authors divide their field of outlaws into two primary groups.³⁷ On one hand are “expressive outlaws,” those who violate the law primarily to make a political statement.³⁸ On the other hand are “acquisitive outlaws,” those who seek to materially benefit from legal property transgressions.³⁹ Peñalver and Katyal also distinguish between outlaws who knowingly break clearly established rules, and “altlaws” who break—or contest—certain interpretations of less firmly settled laws.⁴⁰

These categories, as the authors concede, are not divided by clear and bright lines.⁴¹ The settler-squatters of the frontier are described as acquisitive outlaws, yet they defend their actions in the language of political philosophy, stressing their productive labor and personal connection to the land.⁴² They contrast their sweat equity and pioneer spirit with the speculative and remote involvement of the ostensible owners, wealthy Eastern speculators.⁴³ So their acquisitive behavior is perhaps also expressive.

By dividing the field of outlaws into acquisitive and expressive sorts of outlaws and altlaws, Peñalver and Katyal structure their analysis of these sorts more easily (for example, one can compare the category of acquisitive altlaws with expressive outlaws). They also make it easy to apply further dualistic frameworks to these groups (for example, retributive and deterrent approaches can be applied to acquisitive or expressive outlaws and altlaws).⁴⁴

I appreciate the utility of coming up with these various subsets of property outlaws; however, I worry that these abstract categories have a tendency to drift a bit from the specific examples that seem to interest the authors. If the goal of the book is really to discuss property lawbreakers generally, the cast of outlaws should include a few more villains mixed in with the heroes. For instance, I think most law professors know at least one student who left a laptop unattended in a library and returned to find it missing. Since the Code of Hammurabi and the Eighth Commandment, rulers have been making rules targeted at punishing this sort of acquisitive property outlawry. Hobsbawm’s social bandits may be vanishing today, but the common thief still exists.

³⁷ *Id.* at 16.

³⁸ *Id.* at 16–17.

³⁹ *Id.*

⁴⁰ *Id.* at 17–18. The “altlaws” are more closely associated with intellectual property violations. *Id.* at 80.

⁴¹ *Id.* at 17, 80.

⁴² *Id.* at 55–63.

⁴³ *Id.* at 58–59.

⁴⁴ *See id.* at 125–42.

If the book is really about *all* property outlaws, as the authors claim,⁴⁵ Peñalver and Katyal stack the deck by offering us the outlaw protester,⁴⁶ the homeless squatter,⁴⁷ Jean Valjean stealing bread for the children,⁴⁸ and the politicized hacker.⁴⁹ The majority of nonviolent property outlaws are probably the shoplifters of the world. Are they also in need of image rehabilitation? Do they provide the same sorts of social benefits that the book's noble outlaws provide? If not, the abstract class of outlaws and altlaws seems a bit too broad.

My second concern is that the law itself may really play a significantly smaller part than we imagine in our understanding of the outlaw and the outlaw's productive role in law. From the standpoint of the property professor or the lawyer, it may seem that those who don't obey the formal laws of property are outlaws. Instead, I would say, from the popular perspective, the outlaws are normal people, and we are punctilious lawyers.

If a property outlaw is simply someone who fails to follow the letter of property law, the majority of people are property outlaws. After all, how could the nonlawyer fathom the modern doctrine of property? Each year, I spend a semester trying to introduce the basics of servitudes, adverse possession, encroachments, nuisance, etc. to law students who are truly motivated to learn about these doctrines. Every year, I see that students are amazed to encounter the legal rules that ostensibly govern their property relations with others.

Indeed, about once a year, a student in my property law class asks me if entering a neighbor's lawn to retrieve a poorly thrown ball or frisbee constitutes a legal wrong (no doubt, my introduction to trespass law calls to their minds some painful memory of an angry neighbor or a lost chattel). And at about the same rate, I get a question about the legal status of a chattel left behind by an acquaintance a few years ago. Does a rule exist regarding the use of the thing or a requirement to effectuate its return? What I find most endearing about these sorts of questions is that they are so peculiar to first-year law students. I imagine these students have never before, and perhaps will never again, inquire into the state's formal opinion about overthrown frisbees and lost bracelets.

Robert Ellickson famously observed, in his study of property law on the ground, that even in cases where land use is vitally important to a person's livelihood, often the affected populace is really not very famil-

⁴⁵ *Id.* at 15 (noting that the category includes "actors . . . whose ends we find reprehensible").

⁴⁶ *Id.* at 64 (discussing the lunch counter sit-in movement of the 1960's).

⁴⁷ *Id.* at 13 (discussing the settlers of the American frontier).

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 84 (discussing "hacktivists" who believe that "[a]ll information should be free").

iar with formal property rules.⁵⁰ Social custom can easily diverge from the rules of property law, yet people will somehow manage to get by.⁵¹

So while the “outlaws” identified in the book may be, from the lawyer’s perspective, outlaws, they may also be, from their own perspectives, simply ordinary people with unusually strong convictions. Purposeful outlaws of this exact sort are unusual because they actually have some correct sense of what formal property law demands, some concurrent conviction that the legal rule fails to accord with justice, and some hope that society will benefit by their open and nonviolent defiance of the law. And, just like the outlaws of fiction, these sorts of outlaws require a foil in the form of a community that fails to recognize their demands for justice.

Without such a foil, a lawbreaker’s conflict with the formal law may go unnoticed, even by the lawbreaker. On most days, if one steps on a neighbor’s lawn to retrieve a ball or drives fifty-nine in a fifty-five mile-per-hour zone, this may be a legal violation, but it is a violation condoned by social norms. Where social norms create a working, albeit formally illegal, system, the state will not need to intervene. The outlaws celebrated by Peñalver and Katyal do not just violate property laws that they dislike; they challenge opposing stakeholders who feel justified in seeking state aid to enforce the contested property rule. Hobsbawm understood his bandits as proto-revolutionaries. Peñalver and Katyal’s property outlaws are somewhat similar. They do not simply defy formal property laws—they engage in political action.

To summarize, the abstract outlaw in *Property Outlaws* is a vague figure, yet the stories focus on a narrow subset of property outlaws: those who are ideologically motivated and who seek legal transformation. The much more general class of intentional lawbreakers is in tension with the examples of outlawry offered for our approval. This gap complicates the themes of the book somewhat because our admiration for those who engage in willful civil disobedience diverges somewhat radically from our opinion of both criminal pickpockets, as well as our general lack of concern for those who fail to obey obscure or unenforced laws.

III. OUTLAWS AS REDISTRIBUTORS

In their effort to rehabilitate the general image of property outlaws and in their argument against a perfect system of deterrence, Peñalver and Katyal claim that outlawry can provide society with two important benefits. The first of these benefits is “redistributive value,” and the sec-

⁵⁰ ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 48–64 (1991).

⁵¹ *See id.* at 52–64.

ond is “information value.”⁵² In this section, I will explain my concerns about the concept of “redistributive value.”

The argument here is that outlaws create greater social equity and fairness by intentionally transferring ownership from the property rich to the property poor (i.e., themselves).⁵³ Peñalver and Katyal suggest that these intentional violations of property interests can be socially legitimate in some circumstances. Specifically, where the property rich enjoy a surplus illegitimately, depriving them of that surplus by means of an appropriative transfer creates a social benefit.⁵⁴ The authors reference in the introduction the classic Jean Valjean example with the starving outlaw stealing food to save himself and the lives of others.⁵⁵ In such cases, while theft is a violation of property law, our norms deem it excusable. Indeed, most of us, I would think, might recognize some nonlegal obligation on the part of the wealthy to share food with those who are starving in their presence.⁵⁶

So, in essence, the redistributive Robin Hood robs from the property rich to give to the property poor, which in some cases *is* the Robin Hood in question. Interestingly, unlike Hobsbawm, Peñalver and Katyal do not seek to evaluate Robin Hood against a background of revolutionary political theory. Instead, they see Robin Hood as a potentially useful administrative tool. Robin Hoods can help achieve the sort of baseline requirements that society generally thinks the social welfare state ought to provide.

As Peñalver and Katyal point out, the law is not entirely inimical to this sort of acquisitive appropriation. In some cases, the law may actually treat those who intentionally violate property rights favorably. Doctrines such as adverse possession, acquiescence, and necessity effectively validate certain acquisitive appropriations.⁵⁷

In Chapter Three of their book, Peñalver and Katyal provide one story of this sort of acquisitive redistribution: the settler-squatters on the United States frontier in the nineteenth century.⁵⁸ This struggle pitted local settler populations against distant speculators.⁵⁹ Though many of the squatting settlers were initially, legally speaking, trespassers, they appealed to doctrines such as adverse possession to ultimately take own-

⁵² PEÑALVER & KATYAL, *supra* note 1, at 127.

⁵³ *See id.* at 128 (“[T]he consequentialist case for involuntary transfers of property can be quite strong when there is reason to believe that the outlaw places a higher value on the property in question than the true owner.”).

⁵⁴ *See id.*

⁵⁵ *See id.* at 9

⁵⁶ *See id.* at 134–35 (suggesting that such an obligation exists).

⁵⁷ *See id.* at 147–58.

⁵⁸ *Id.* at 55.

⁵⁹ *Id.*

ership of the land they invaded.⁶⁰ Chapter Three concludes by noting the irony of how the settlers, who were originally branded as “shameless lawbreakers and usurpers by eastern elites,” ultimately became “the revered pioneers of American mythology.”⁶¹

The story of the popular triumph of the pioneer squatters, however, is in tension with the story that introduces the book, the account of a small group of activist Native Americans who occupied Alcatraz Island and claimed legal possession of it.⁶² Ultimately, after a year and a half, federal forces ousted these individuals.⁶³ Recalling the occupation of Alcatraz helps us remember that the “revered pioneers of American mythology” did not just oust wealthy land speculators, they also displaced indigenous populations.⁶⁴ Viewing the settlers from the vantage of the Native Americans, I think, should make us more ambivalent about the social desirability of outlaw redistributions.

The pioneer-squatters show that trespass can be legally constructive, in the sense that particular appropriations may be ultimately endorsed by the state, yet the story focuses primarily on local might making local right.⁶⁵ From the standpoint of an ideal democratic theory, the success of local armed forces in making their own rules is not exactly inspiring. Hobsbawm argues that local rural communities have often preferred their local bandits to foreign occupiers, and the connection to the “revered” pioneers is clear.⁶⁶ Yet if redistributive justice is the goal, why should we ever create a special space for rewriting property law through raw power? Property outlawry as a redistributive solution only makes sense when we can tell the Robin Hood story convincingly, and this, as mentioned before, is more common in fiction than fact.

Redistributive outlawry certainly exists. It exists as the inevitable symptom of regimes that fail to provide for the poor. When people are penniless and hungry, some will steal—though, just as importantly, some won’t. When people have no space to call their own, they *must* sleep somewhere. We should not, however, praise these actions as strategies, rather we should point to them as symptoms of regimes that deserve our condemnation. Peñalver and Katyal do seem to recognize this because they concede, at one point, that a functioning state works better than

⁶⁰ *Id.* at 61.

⁶¹ *Id.* at 63.

⁶² *Id.* at vii–ix.

⁶³ See generally TROY JOHNSON, *THE OCCUPATION OF ALCATRAZ ISLAND* (1996) (discussing the late-twentieth century Native American takeover of Alcatraz Island).

⁶⁴ PEÑALVER & KATYAL, *supra* note 1, at 15. The authors do not, however, acknowledge this tension as much in Chapter Three as they do in their Introduction.

⁶⁵ See Garnett, *supra* note 10, at 279. In responding to the authors’ earlier article on property outlaws, *supra* note 1, Garnett suggests that the frontier era was not so much about assertive acquisition but anarchy.

⁶⁶ See HOBBSAWM, *supra* note 20, at 20.

outlaw justice at promoting “redistributive value.”⁶⁷ However, they argue that when the state fails to protect its members, permitting the poor to engage in theft and squatting is better than punishing them for feeding themselves and occupying space in the world.⁶⁸

This is right, I suppose. But it should be followed by an important qualifier: any state that relies on modern-day Robin Hoods as a significant source of redistributive value has clearly failed to meaningfully protect the interests of its citizens. The ideal state would surely use law rather than outlawry as the optimal redistributive strategy.

IV. OUTLAW BEHAVIOR AS INFORMATION SIGNAL

The other key value Peñalver and Katyal identify with property outlaws is “information value.”⁶⁹ According to the authors, outlaws provide lawmakers, and the general population, with “information value” by sending a powerful signal about their evaluation of the legitimacy of property rules.⁷⁰ The lunch counter sit-ins and the Native-American occupation of Alcatraz are described as examples of preference expression.⁷¹ Before these property violations, the broader community was unaware of the extent to which the disenfranchised group opposed the status quo of property allocation.⁷² By breaking the rule, the outlaws signaled their preferences directly and clearly.⁷³

As Peñalver and Katyal explain, the information provided by the outlaw does not end with signaling personal preference because the outlaw action overcomes an “imaginative deficit” by allowing the public to see the actual result of the proposed change.⁷⁴ The Greensboro sit-ins did not merely express a preference for integrated lunch counters, they brought the desired situation into being. The reality of the new property allocation could be observed rather than merely theorized.

Peñalver and Katyal are undoubtedly correct, I think, that outlaw actions provide information value to society. They also recognize that a sort of symbiotic relationship exists between the very fact that the actions

⁶⁷ PEÑALVER & KATYAL, *supra* note 1, at 156–57 (suggesting that “government-sponsored redistribution and social insurance” are superior to common law doctrines such as “adverse possession and necessity”).

⁶⁸ *Id.* at 157–58 (“[A]lthough a system of voluntary or mandatory redistribution may be more efficient than distributive-minded changes in property law, it does not follow that self-help is inferior to a highly unequal status quo and therefore not justified when adequate redistribution is not forthcoming.”).

⁶⁹ *Id.* at 127.

⁷⁰ *Id.* at 138–42.

⁷¹ *Id.* at 139.

⁷² *Id.* (noting that prior to the lunch-counter sit-ins, for example, the Jim Crow South may have adhered to the “myth of black acquiescence [to] private segregation”).

⁷³ *Id.*

⁷⁴ *Id.* at 141.

are outlawed and the sort of information that outlaw action provides.⁷⁵ The property outlaw sends a strong signal about preference *because* the outlaw risks the consequences of open defiance to state authority (the original “Greensboro Four” were reportedly menaced, on the first day of their protest, by a police officer with a billy club).

The expressive outlaw here diverges importantly from Hobsbawm’s figure of the social bandit. Hobsbawm views the bandit as a primitive revolutionary and expresses what seems like admiration for violent and ineffective anarchist figures. A different, more Hobsbawmian version of *Property Outlaws* might tell different stories. The featured property outlaws of recent history might have included modern global anarchist movements and some of the more militant student groups of the 1960s, such as the Weather Underground. These are groups that have also violated property laws to express their political preferences.⁷⁶ By confining their examples to outlaws engaging in peaceful civil disobedience, rather than revolutionary violence, Peñalver and Katyal make their “information value” claims much more palatable.

To the extent that property outlaws are peaceful actors violating property entitlements in pursuit of their own sense of justice, we should (and I think most of us do) admire them for their willingness to put their own liberty at risk in an effort to reach the public mind. Peaceful civil disobedience provides a shortcut, perhaps one like no other, toward the political acceptance of superior visions of justice.

So if we cabin the claim of “information value” to these sorts of outlaws, which I think we should, I would offer only one small point of clarification. While peaceful civil disobedience can sometimes be heroic, it is ultimately a political tactic, not a strategy or a coherent philosophy. And again, it is a tactic that works best in certain contexts. In an ideal state, we would not seek to encourage most individuals to follow their inner outlaw in lieu of other forms of political participation. In some cases, where the strategy prevails, a nonviolent protester will be popularly accepted, often in retrospect, as a heroic figure. In other cases, this sort of outlaw will be simply misguided.

In a country where more than a quarter of the public declines to vote, I do not think we are at great risk that many people will choose to adopt outlaw tactics, preferring to be jailed to bring about political change. I would venture, therefore, that peaceful civil disobedience tends to be largely symptomatic of a failure of those who engage in it to find an effective political voice in other forums. In such circumstances,

⁷⁵ *Id.* at 139 (noting that “to legitimize, *ex ante*, the lawbreaker’s activity would radically undermine the expressive message itself”).

⁷⁶ Garnett, *supra* note 10, at 286 (noting that plenty of property outlaws use more violent means).

peaceful civil disobedience, whatever its outcome, can be viewed as noble and desirable. Yet, when communities have significant political power (or even the untapped potential to wield it) and the public sphere is functioning well, there should be other ways, short of lawbreaking, to communicate preferences and set forth visions of social progress.

CONCLUSION

Property Outlaws calls to our attention the important ways in which those who violate the laws of property have managed to shape our society, sometimes for the better, by acts of legal defiance. However, while the book suggests that its topic encompasses all lawbreaking, the authors clearly have the greatest admiration for outlaws who are nonviolent and civic-minded. What I have suggested in these comments is that these more palatable “outlaws” have something rather important in common with their revolutionary relatives—their social utility is inversely proportional to the tyranny of the law that they resist.

Outlaws shine when the laws they oppose are unjust. When a government is functioning effectively, outlaws should diminish, retiring into history and fiction, where they can remain outlaws and continue to inspire us. Paradoxically, those governments that need outlaws the most will be the least receptive to the arguments in this book about the benefits of redistribution and preference information. Tyrants, like King John or Avatar’s RDA corporation are not much concerned about maximizing social welfare or envisioning a more just society. The tyrannical ruler is a thief at heart.

The best way to reinvigorate the image of the property outlaw is to identify various forms of contemporary injustice and celebrate those who actively and peacefully oppose the majority’s complacent commitment to the legal status quo. These sorts of outlaws are still with us today, and they still deserve our praise precisely because our laws are not perfectly just. Like the authors, I believe our legal rules, including our property rules, could be significantly fairer to those who have less.

Indeed, if we take the story of Robin Hood or Jean Valjean and apply the United States in the international arena, I believe our collective wealth and our military might should lead us to be especially cautious about creating outlaw stories where we play a role analogous to the Galactic Empire. We should be especially attentive to the narratives spun by those who challenge our power and legitimacy on the world stage. The outlaw actions concerning the assertion of intellectual property rights barring the distribution of inexpensive AIDS drugs, cited by Peñalver and Katyal, are an excellent example of Robin Hood resistance.

The law often does not adequately respect the important and constructive role played by peacefully disobedient political activists.

Peñalver and Katyal are right to point out that it should. When a courageous few are willing to sacrifice their personal comfort and security in pursuit of political justice and social progress, we should admire these rare people. Indeed, in a better world, Hollywood would tell us *their* outlaw stories more often.

The outlaws Peñalver and Katyal describe do indeed deserve greater respect in the eyes of the law. And I would add that Peñalver and Katyal deserve our respect as well, for calling our attention to the socially productive role of outlaws in this important book.

