ESSAY

THE POLITICS OF PROPERTY AND NEED

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INTRODUCTION 363
I. THE POLITICS OF NEED 366
CONCLUSION 376

INTRODUCTION

Property rights and their protection are of unquestioned societal and individual importance in the early twenty-first-century United States. The identification of those who control the earth's resources and the products of those resources is critical to industry, commerce, science, art, and just about any imaginable human endeavor. On an individual level, knowledge of secure rights in things is an integral part of daily life and a necessary part of psychological well-being. Political stability and, indeed, the ability to maintain democratic government depend upon some workable and enforceable system of rights and obligations in regard to the material resources that are indispensable to human life.

It is, therefore, a jolt of sorts when one encounters a book that presents the "photographic negative" of this picture: one that exposes the tolerance towards property lawbreakers by society and law. In *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership*,[1] Eduardo Moisés Peñalver and Sonia K. Katyal describe how the image of our social and legal structure as one that rigidly enforces property rights and punishes property lawbreakers is, in fact, an erroneous one. In many situations, our culture celebrates property lawbreakers, and they are instrumental as the inspiration for legal change.[2]

Consider, for instance, what the authors call "acquisitive outlaws," or those who take title of land from others by squatting.[3] In the nineteenth-century American West, settlers often occupied land to which they had no legal title in an effort to create their own facts-on-the-ground.[4] In

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1 EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 9–10 (2010).

2 *See id.* at 11.

3 *See id.* at 55.

4 *Id.*

the view of settlers, "[e]very citizen . . . [was] entitled to own land, and the claims of those who actually work[ed] the land should take precedence over the fungible interests of absentee land speculators."[5] Condemned by the Eastern political and legal establishment as "greedy, lawless land grabbers who had no respect for law, order, [and] absentee ownership of property,"[6] the settlers, over time, nonetheless converted popular support in Western states into political and legal victories.[7] "[L]ocal courts transformed state property law in ways that favored the actual occupants of land,"[8] such as loosening the requirements for obtaining title through adverse possession.[9] In time, "[t]he transformation of the image of squatters from . . . shameless lawbreakers and usurpers . . . to the revered pioneers of American mythology" was virtually complete.[10]

Successful acquisition of title to land by nineteenth-century squatters and later generations of adverse possessors[11] provides perhaps the most notorious example of defiance of land laws with tacit cultural and legal acceptance. However, as the authors explain, other examples exist. Through common law theories or government action, urban squatters in the 1970s and 1980s targeted vacant property in distressed inner-city areas and were often eventually awarded legal title.[12] There were also what the authors call "expressive" property outlaws: those who unlawfully occupied the land of others to protest social oppression and unjust laws.[13] Primary among expressive property outlaws were African Americans who conducted civil rights sit-ins in the 1960s[14] and Native-American activists who occupied federal land in the late 1960s and early 1970s.[15] Although general laws of trespass did not change as a result of these actions, greater popular understanding of the justness of these causes—and the need for legal change to address these grievances—was achieved.[16] Indeed, civil-rights protesters altered the course of American democracy.[17] The actions of Native-American activists (in some cases)

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5 *Id.* at 56 (footnote omitted).

6 *Id.* at 58.

7 *See id.* at 60.

8 *Id.* at 61 (footnote omitted).

9 *See id.* at 61–62.

10 *Id.* at 63.

11 *See, e.g.*, *id.* at 148–52.

12 *See id.* at 133–34, 202.

13 *See id.* at 65.

14 *See id.* at 64–70.

15 *See id.* at vii–viii.

16 *See id.* at vii–viii, 67–70.

17 *See id.* at 69–70.

led to greater federal tribal self-determination and eventual Congressional payment of historical injustice claims.[18]

The authors point out that tension between established property rights and the "justness" involved in their defiance exists in other, more post-modern settings as well. For instance, the governments of South Africa, Brazil, Thailand, and other countries have challenged the monopoly patent rights to critical pharmaceutical compounds (e.g., HIV/AIDS drugs) on the grounds that their citizens are entitled to access to medications that will save their lives.[19] As a result of governmental pressure, patent-holding drug companies have slashed their prices or agreed to provide drugs to poor populations free of charge.[20] On another front, cyber-activists defying copyright claims have won victories in the courts in the form of broadened interpretation of fair-use laws.[21]

The authors provide a rich, brilliantly intuitive, and provocative account of property lawbreaking. In particular, the book raises the following question. The authors show, convincingly, that property lawbreaking is a far more prevalent and more positively dynamic force than the mythology of property, and its protection, would allow. However, the authors do not claim that all property lawbreakers are endowed with this positive image or function. The authors are not property anarchists. How, then, do we determine *which* property lawbreaking activities are "positive," and which are not?

From the authors' discussion of tolerated property lawbreaking in our history, two general clusters of justificatory reasons appear to emerge. First, there are what we might call *efficiency reasons*, by which property lawbreakers are tolerated because their actions involve a more efficient or societally desirable use of resources.[22] In addition, there are *rectification reasons*, by which property lawbreakers are tolerated because of the perceived moral justness of their claims.[23]

The land-squatting cases, patent cases, and copyright cases illustrate the implicit acknowledgment of the first, or "efficiency," rationale. In each case, society (arguably) tolerated property lawbreaking because the settlement activities by squatters, the wider dissemination of disease-fighting compounds, and the freer use of copyrighted material were believed to achieve better use or distribution of available resources.[24] On the other hand, the land squatting cases and patent cases also illustrate

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18 *See id.* at vii–viii.

19 *See id.* at 93–108.

20 *See id.* at 108.

21 *See id.* at 109–21.

22 *See* Laura S. Underkuffler, *Lessons from Outlaws*, 156 U. PA. L. REV. PENNUMBRA 262, 264 (2007), http://www.pennumbra.com/responses/12-2007/Underkuffler.pdf.

23 *See id.* at 264.

24 *See id.* at 264–67.

"rectification reasons," as do those involving civil rights and Native-American claims.[25] Arguably, a latent injustice exists in property rules that preserve land for absentee speculators in preference to landless settlers or that preserve patent profits while the sick die. Similarly, the property claims of commercial and federal landowners pale when asserted against the moral justness of African Americans' civil rights or Native Americans' claims.[26]

Despite the force of these explanations, selective toleration of property lawbreakers must involve more. For instance, when considering land claims, although greater efficiency might often be involved in tolerated property lawbreaking, it cannot be enough alone. *Most* land could probably be used more efficiently, or in a more societally-desirable manner, if nonowners were given the chance to do so; however, that fact is rarely enough to trump the usual prerogatives of title. The same holds true of rectification claims, which invoke the existence of prior social or economic injustice. There are many individuals or groups who have historical injustice claims, whom we—the public—would undoubtedly not treat kindly if they or their descendants were to occupy public or private land.[27]

What is the additional factor that justifies property lawbreaking in these cases? We now turn to that question.

I. THE POLITICS OF NEED

All property lawbreaking cases involve judgments about the actions of individuals. The more compelling cases, however, are united by an additional commonality. In these cases, the acceptability of the lawbreakers' conduct depends not only upon the actions performed, what their actions are, but also upon the identities of the lawbreakers and objectors. These are not cases (such as traditional adverse possession) in which tolerance of lawbreaking is based upon behavior alone; these are cases in which property-violating actions are tolerated because of *who* the actors, their beneficiaries, and their opponents are.

Consider, for instance, the cases of urban squatters and unauthorized settlers of the American West. Although the traditional elements of adverse possession existed—such as the lawbreakers' putting "nonproductive" land to "productive" use—many other factors influenced public sympathy in these cases. The actors were not wealthy speculators or corporate owners who expanded their empires through the illegal occupation of the land of others. Rather, the actors were landless individu-

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25 *See id.* at 264.
26 *See id.* at 264.
27 *See id.* at 265.

als, urban and rural, who appropriated the land of individuals, corporations, or governments with whom the public had little sympathy. In short, the tolerance of the lawbreaking actions in these cases involved a distinctly *redistributive* aspect.

Similarly, extension of tolerance to protest-trespassing and patent-breaking was rooted in the compelling nature of the human stories that prompted the lawbreakers' actions. The ultimate tolerance of property-rights violations by civil rights activists and Native-American protesters was the product of acute public awareness of the human needs that these lawbreakers championed. In the case of patent-breaking by foreign governments, there was little save the HIV/AIDS patients' poverty—and the severity of their illnesses—that was argued to justify the governments' threatened redistribution of corporate wealth.

Peñalver and Katyal recognize that there are undeniably redistributive elements involved in the tolerance of many instances of property lawbreaking. The authors explain this phenomenon in economic terms. As a standard economic proposition, the law should be structured so that property comes into the hands of the party who values it most.[28] Property lawbreaking is tolerated when transfers to that party are impeded by the usual prerogatives of ownership.[29] "Concentrations of disobedience," they observe, "might suggest that transaction costs or wealth effects are standing in the way of what would otherwise be . . . beneficial transfer[s] of rights."[30] For example, in traditional adverse possession cases, it can be inferred "that the lawbreaker places a higher value on [the] property than its true owner," who—through negligence—has failed to assert his rights.[31] Since the usual prerogatives of title inhibit this transfer, they are disregarded.

The idea that toleration of lawbreaking is rooted in different valuations of property by owner and challenger rings true in the traditional adverse-possession context. Assuming that the adverse possessor desires to work the property for "better use," and assuming that the record title holder (through inaction) has "slept on his rights," the collective conclusion might well be drawn that the adverse possessor values the land more than the title holder, and for this reason, compelled change in ownership is societally desirable.

In many lawbreaking situations, however, the idea that different subjective valuations of the property can be imputed to lawbreaker and owner, and used to justify the breach of presumed ownership rules, clearly falls short. For instance, tolerance for the disregard of traditional

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28 See PEÑALVER & KATYAL, *supra* note 1, at 128–29.

29 *See id.*

30 *Id.* at 129–30.

31 *See id.* at 129.

ownership rules by civil-rights protestors, Native-American activists, and patent-breaking governments had little to do with who "valued the property" the most. Store owners passionately defended their exclusionary rights against civil-rights sit-ins, and the federal government resorted to violence to evict Native-American demonstrators from its land. Pharmaceutical companies defended their patents with every means, legal and nonlegal, that they could muster. Ultimate societal tolerance of these claims had little to do with the parties' relative, subjective valuations of the contested property or the lawbreakers' inability to express, in market terms, the intensity of their desires.[32] Undoubtedly, in these cases, the lawbreakers valued the property (or its occupation) highly, and the titleholders did as well. Obviously, more underlies the issue here than a simple comparison of the intensity of the imputed desire of "A" for the property and the imputed desire of "B."

The authors hint that more exists, by observing that society often tolerates property lawbreaking when "the distribution of property rights is extremely skewed, the true owner is very wealthy, the acquisitive outlaw is very poor, or . . . survival or . . . necessity" is at stake.[33] The question, however, is *why* we attribute a higher valuation of the property to the lawbreaker in these cases, and *why* that valuation justifies lawbreaking, even if it exists. The imputation of a higher subjective valuation of the property by the lawbreaker seems, in such cases, to be wildly speculative, or—even if possible—hardly justificatory, of itself, of the outcome.

In fact, it is not the subjective valuation of the property by owner or lawbreaker that truly drives tolerance of lawbreaking in these cases; rather, the idea of subjective valuation is a surrogate for something else. What we are really saying is that we believe that the very poor or desperate man *must value* the property more because *he needs* it more; and we believe that *because he needs it more,* he should have it.

To put it another way, it is not the fact that a certain claimant has a heightened valuation or desire for property (due to poverty, survival, or necessity) that drives toleration of a breach of the usual property rules in these cases; it is because we, as a society, believe that there are reasons for this heightened desire that justify the claim. It is not because a man who is starving or freezing desires the property of others that may cause us to disregard the usual rules of ownership; it is because his need to sustain life is recognized as justification for the bending of the usual rules of the property game.

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32 *See id.* at 128.

33 *See id.* at 129.

Exposure of this truth presents a puzzling question. When discussing property, lawbreaking tolerance, and the reasons for it, why are the authors so reluctant to recognize the explicit role of human need in these cases? They acknowledge the general need to weigh costs and benefits in the enforcement (or nonenforcement) of property laws.[34] Making human needs a part of this calculation, however, seems to be a very difficult proposition.[35] In this, they are not alone. In the politics of American property law, we do not simply throw the individual human needs of claimants into the hopper along with economic productivity, certainty, security, and other considerations.

Indeed, explicit recognition of what our intuition tells us—that human need *must* be a part of property rules and entitlements—is an admittedly jarring and radical notion. How can we articulate, as a matter of fact, that the poor, or sick, or cold and homeless are entitled to the bending or breaking of otherwise generally applicable *property* rules?[36] The idea that such circumstances might be of moment when determining what due process requires, or how legal counsel should be guaranteed, is one thing. To consider a person's circumstances when determining the enforcement of property rights and responsibilities, seems to be quite another.

There seems to be a particular, deeply theoretical problem in recognizing individual human need as a part of the property calculation. What is that problem? Why are "we"—including those of us who are legal commentators, and who pride ourselves on our willingness to face the truth—so reluctant to join "property rights" with "recognition of human need" in the same breath? Furthermore, does this sentiment have any merit?

Reluctance to join ideas of property and human need is particularly puzzling when we reflect how, as a practical matter, property rules and government enforcement of distributions of wealth consider the issue of human need routinely. Tolerance of property lawbreakers, as detailed by Peñalver and Katyal, might present the most extreme example of human need, trumping presumed property entitlements. However, it is hardly the only one. Welfare laws, progressive income taxes, federal social se-

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34 *See, e.g.*, *id.* at 128 (describing the difficulty in, and necessity to, "identify[ ] situations . . . in which the long-run effects of permitting occasional violations of the default rule against involuntary dispossession [of property] will not swamp the benefits" that lawbreaking actions provide).

35 For instance, the authors argue that property-lawbreaking actions by the poor and destitute are tolerated because "the nonowning claimant values the property at the abnormally *high* level [, and there is an] . . . absence of any countervailing evidence that the true owner places on similarly exceptional values on the property." *Id.* at 129.

36 *See, e.g.*, *id.* ("On a dangerously cold night, the homeless man almost certainly values [deserves?] the sheltered entrance to a large shopping center more highly than even the most attentive owners value their right to exclude him.").

curity and disability laws, the new federal medical insurance laws, and a myriad of other American laws are explicitly tied to poverty, age, disability, and other human needs as integral parts of government allocation and enforcement of property rights and wealth.

Several possible reasons exist for our reluctance to explicitly join the ideas of property rights and need. First, the interjection of "needs" questions into our thinking about property entitlements might create a dangerous slippery slope. Structural or procedural qualifications of the usual prerogatives of property rights (e.g., deprivation of title through eminent domain) is one thing; exceptions to the usual prerogatives of ownership, in such cases, can be limited, predictable, and carefully structured to control the collective power involved. Explicit authorization of "needs" claims is quite another. In the latter case, we would, in effect, be authorizing the making of raw, unprincipled choices about when otherwise valid property rights *should* or *will* lose. When something as important as property rights is at stake, it might be argued, legal decisionmakers should not be involved in the whimsical business of substantive-value choices.

Of course, an inherent tension exists between societal redetermination of any issue and the competing prerogative of existing entitlements. This is as true of compromised property rights as it is of any others.[37] However, this general observation hardly proves the objector's case. Property rights—that is, *existing* property rights—are themselves substantive choices, enforced by collective power. Every property right, by nature, is the state's enforcement of substantive criteria and substantive outcomes. No societally recognized and enforced property right, which is "normatively neutral," actually exists. The idea that *changes* to existing rights are "substantive," while the law of existing rights is not, is obviously and hopelessly facile. It is no less "substantive" to enforce the rich man's (existing) claim to the resources of the earth, than it is to enforce the poor man's challenge to the same. The need to evaluate the competing, substantive, and normative claims is the same in both cases.

A more nuanced formulation of this objection might be made along the following lines. It is not a reluctance to make normative judgments that is truly the issue; it is the value of stability. For good reasons, we value stability in the rules of property, and the explicit interjection of "need" into the equation will impair that value. In other words, we recognize that the existing regime of property rights is, over time, a product

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37 *See, e.g.*, Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991, 1005 (2009) (arguing that "[c]oming up with a list of the basic capabilities or freedoms that individuals should inevitably enjoy" requires a societal consensus on that issue, which is in tension with the liberal democratic ideal of individual freedom).

of layer upon layer of substantive, societal choice; we recognize that this regime might be unjust, or immoral, or otherwise undesirable, in some external sense; but to upset that system with change, on the ground of human need, will be—of itself—too costly.

Peñalver and Katyal consider a form of this concern in their discussion of tolerated reasons for property lawbreaking. Tolerance of individually initiated redistributive acts, they write, carries "the risk of . . . negative spillover effects that could easily outweigh any short-term gains achieved" by the property lawbreaking.[38] Such negative side effects include erosion of respect and of the deterrent effect of law, and the discouragement of property owners in the making of productive investments in their property.[39]

If the "outlaw behavior" or other permitted act is an articulated and predictable part of law (e.g., the rules of adverse possession), then there is no problem with the erosion *of law*, because that change in entitlements is a part of law's features. Similarly, there is little danger that such doctrines will discourage productive investment, because property owners (in theory, at least) can take steps to avoid their application. In other cases, however, the idea that endorsing change in entitlements on the basis of need could engender disrespect for law or deter investment is more compelling. For instance, it could be argued, discretionary and unpredictable need-based decisions, which ignore the rights of landowners or patent holders, might well erode trust in the authority of law or the willingness of owners to invest in such property.

If we take a step back, we see that there are two different issues intertwined in this concern. First, there is the question of the effects of the *actuality* of such a contingent view of property rights on respect for and reliance upon law. Second, there is the question of the effects of the explicit *acknowledgment* of it.

Since selective recognition of human need in determining property rights (e.g., needs of squatters, AIDS patients, welfare recipients, and others) is what we now have, we are in a position—as an actual matter—to evaluate its effects. If tolerance of the appropriative needs of Western and urban squatters, civil-rights activists, AIDS patients, subsidized-medical-insurance recipients, welfare recipients, and others has seriously undermined the stability of the American property regime and the expectations of owners, it is not obvious. Such exceptions to the usual guarantees of property have existed for many years, with minimal apparent effects. Indeed, the obligations of property holders to those without property have existed in various forms since the founding of the Ameri-

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38 *See* PEÑALVER & KATYAL, *supra* note 1, at 131.

39 *See id.*

can Republic.[40] In view of this truth, the idea that this situation—of itself—undermines the rule of law or respect for property hardly seems to be credible.

The fact that this existing—and largely unacknowledged—situation has had little practical effect does not address, of course, what the explicit acknowledgment of the situation might do. There are certainly times, in life and in law, when what we actually do is better left unsaid. Perhaps we must, on occasion, compromise property rights for the needs of others, but that does not necessarily mean that we should flaunt the doing of it.

There is, first, the general concern that the acknowledgment of contingent rights in these cases would undermine the principle of law *as* law; for instance, it is difficult to see "exceptions" to legal rules as "enforcement." Upon reflection, however, this concern is certainly more imaginary than real. The law often acknowledges the need for discretionary, and arguably arbitrary, case-by-case enforcement; there are few legal rules that are unfailingly clear and certain in every application. The life of the law is, in fact, more often characterized by the weighing of competing human values than by the unvarying application of preset rules. Usually, this process is acknowledged. The simple fact that property lawbreaking and other "human needs" cases involve the discretionary weighing of competing values cannot be the reason for our extreme reluctance to acknowledge the contingency of legal rights in this context.

Perhaps, then, it is not the *general* idea of contingent rights that causes the problem in this case, but rather its *particular* application. Perhaps there is something peculiar to property—its function and nature—that makes acknowledgment of contingent or situational rights assumed to be workable and desirable in other contexts, particularly *un*workable and *un*desirable in this.

On the face of it, joining the ideas of "property" and "contingency" in the same breath does seem to be incongruous. The central idea of property is protection against the claims of others, including those of "needs-based" predators. This idea of property is critically important, psychologically and practically, even if it is, of course, often compromised in practice. As has been pointed out before, the idea of property rights as individually protective and practically absolute is a psychologically important one for human beings and acts as a political restraint on

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[40] *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–70 (1997); Carol M. Rose, *Property as Wealth, Property as Propriety*, *in* NOMOS XXXIII: COMPENSATORY JUSTICE 223, 232–39 (John W. Chapman ed., 1991).

government.[41] Acknowledgment of human need as a factor of equal weight might destroy the vitality of this idea of property and its important psychological and political functions.

The idea of property-as-protection in American politics is powerful and cannot be underestimated.[42] The genuine question, however, is not the utility of that idea, but whether it will be destroyed if the rights of property are acknowledged, at times, to be affected by the needs of challengers. This prospect, when soberly considered, seems remarkably unlikely. The idea of property as individual protection has survived, individually and collectively, through centuries of human existence. It has repeatedly survived concerted, frontal ideological assault, including efforts by mass-movement totalitarian political regimes in the recent twentieth century. It has survived circumstances far more extreme and far more challenging than the simple, occasional recognition by government of its need-based contingency. The idea of property-as-protection survives because it is deeply rooted in the psychological needs and appropriative drives of individual members of the human species. It does not survive because it is propounded—as a matter of myth—to be an absolute right by human societies and governments.

There is a final objection to needs-based calculations that is inherent in their nature. This objection is raised, powerfully, by the most startling examples of tolerated outlaw behavior that Peñalver and Katyal describe. In the cases involving squatters in the American West and inner cities, civil-rights protesters, AIDS patients, and others, property lawbreaking is tolerated because of who the property owners and their challengers are. The outcomes in these cases depended not only on the nature of the lawbreaking actions, but also on the *identities* of the parties.

Identity-based outcomes present a serious challenge to what we ordinarily assume to be a foundational principle of American property law. There is a tremendous reluctance in American law to imply that property rights and protection depend upon the identity of either the title-holder or his challenger. As a matter of legal institutional design, we assume that the rights, privileges, and obligations of property ownership are the same for all owners and all challengers, regardless of wealth, social status, political influence, or other factors. The actions (or inactions) of owners or challengers may impact the outcome of a case, but the identities of owners or challengers may not. The rules of property ownership are the same whether the owner or challenger is an elderly widow in a shack or

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41 *See* Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J. L. & JUR. 161, 190 (1996).

42 *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 137–39 (2003).

the Exxon Mobil Corporation. Property is property. We pride ourselves on our strictly even-handed approach.

The great power of this principle—for owners *or* challengers—is illustrated by the notorious *Kelo* case. In *Kelo v. City of New London*,[43] the United States Supreme Court upheld the taking of modest private homes for the purpose of government-sponsored commercial and residential economic development.[44] In the process, the Court ignited a firestorm of controversy.[45] How could the government, by eminent domain, simply take the homes of private citizens for "more desirable" residents? On the one hand, property-rights activists, populists, advocates for racial minorities and the poor, and small-business owners roundly condemned the decision.[46] On the other hand, commentators generally acknowledged that government must have the power of eminent domain to accomplish necessary public projects, including (at times) economic development.

Coming up with a "neutral" principle that would reliably spare homes like those in *Kelo,* but permit the condemnation of other, less emotionally wrenching property, proved to be a difficult proposition. For instance, one might suggest that the law should permit the use of the power of eminent domain when the public purpose is particularly compelling, when the use of eminent domain—because of hold-outs—is particularly necessary, or when the individual property owner directly benefits (in some way) from the proposed government action. With all of these tests, however, problems arise. Limiting the power of eminent domain to situations where the public purpose is "compelling" seems to leave the field wide open to government takings, since public works projects almost always have some kind of compelling characteristic. If eminent domain is used only in situations where this power is "critical" to the accomplishment of government objectives, because of hold-outs or practical problems, the use of eminent domain is preserved not only for building super-highways but also for cases such as *Kelo*. If the power of eminent domain is limited to situations in which the victim of the taking "directly benefits" from the project, this might eliminate particularly egregious cases of private-developer benefit from the eminent domain power. However, it will not eliminate cases in which a widespread pub-

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43 Kelo v. City of New London, 545 U.S. 469 (2005).

44 *See id.* at 473–75.

45 *See, e.g.*, John M. Broder, *States Curbing the Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1; Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20; Ronald Smothers, *In Long Branch, No Olive Branches*, N.Y. TIMES, Oct. 16, 2005, at NJ6.

46 *See* Laura S. Underkuffler, Kelo*'s Moral Failure*, 15 WM. & MARY BILL RTS. J. 377, 377 (2006).

lic benefit arguably exists, such as the increased local employment or increased tax revenues in *Kelo*.

The root problem with these doctrinal solutions is, in fact, the obvious one: none of them address the core reason for the outrage in the *Kelo* case. Our outrage is not because the government interest was not compelling, or because there was no showing of hold-outs, or because Suzette Kelo and the other plaintiffs were not theoretical beneficiaries of the proposed government conduct. Rather, our outrage is rooted in who the victims of the taking—and the initiators of the taking—*were*.

The obvious way to address the problem is the one that seems to be least palatable: to acknowledge that some properties should enjoy more protection than others and that this determination should depend upon the nature of the properties and of their owners. The taking of the homes of cash-strapped and elderly homeowners is simply not the same as the taking of corporate warehouses or parking lots. There is a powerful sentiment that *these* individuals and *these* homes deserve greater legal protection. Yet, when it comes to eminent domain, the idea of consideration of the identities of property owners encounters fierce resistance. Opponents argue that the rights and obligations of property ownership simply cannot legally depend on the identities of owners. Property rules—as a legal matter—must guarantee equal treatment, regardless of identity or wealth.

However, a great fallacy exists in that reasoning. Law is not simply a neutral set of rules that exist and are applied in the abstract. Law is the product created from the cauldron of politics and, most critically, implemented in the cauldron of politics. Whatever the "neutral" nature of the rules of eminent domain (e.g., payment of market value for property condemned through the process of law), the implementation of those rules is quite different. The wealthy and the owners of luxury shorefront homes do not lie awake in their beds with worry after *Kelo*.[47] The power of eminent domain does not fall on the wealthy or the powerful, such as owners of splendid property; it falls on those whose properties are "'nothing special,' 'detrimental to progress,' 'expendable,' or otherwise less worthy than others, and who (for this and other reasons) lack social, economic, and political power."[48]

Although the roles are reversed in *Kelo* and the outlaws cases—with consideration of need, requiring different treatment, invoked for the property owners in *Kelo*, and against them in the outlaws cases—the principle involved is the same. "Property rules" are not simply "property rules" that should apply regardless of the identities of property owners

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47 *See id.* at 386.

48 *Id.*

and property challengers. They are not "neutral rules" that exist in a norm-free, substantively "neutral," equality-enforcing universe. Property rules, as they now exist, are contingent rules, complex rules, and normatively charged rules. They are crafted and applied in response to the politics of power, security, stability, greed, and a myriad of other aspects of human life. There is no legitimate reason not to explicitly count human need among them.

CONCLUSION

Refusal to explicitly acknowledge human need—for human need's sake—as a part of the property rights calculus is difficult to justify on any rational, articulable basis. It is also acutely ironic. This is because property laws, of all laws, are the most inextricably intertwined with the use of coercive state power to allocate the resources necessary for human life. As I have previously observed, in theory (at least) we can all enjoy due process of law, freedom of speech, freedom of religion, and other rights considered to be fundamental to our laws. It is not so with property. The institution of property has, as its central purpose, the use of state power to enforce (brutally, if necessary) the allocation of all material, life-sustaining resources in the way that those in power choose. To argue that this should be done in a way that expressly ignores the issue of human need is particularly ironic.

By documenting cases in which human need is implicitly powerful in thwarting the usual prerogatives of property rights, the authors of *Property Outlaws* illuminate one of the most important but generally unacknowledged issues in property jurisprudence. *What is* the role of human need in determining the rights of property? *Why do* we work so hard to minimize or deny it? In the end, *Property Outlaws* might not resolve these issues. However, it is a brilliant and provocative push toward the facing of them. Indeed, it might be seen as a shot across the bow—a subversive tract—against the idea of property's implicit need-neutrality.