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PROPERTY IN-LAWS

NICOLE STELLE GARNETT[†]

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

I am a descendant of property outlaws. In 1856, my great-great-great grandfather Robert Fowler, an English immigrant, moved his family to the Cherokee Neutral Lands in the southeastern corner of the Kansas Territory. As the appellation suggests, however, Grandpa Bob was not supposed to be there. The Neutral Lands—a twenty-five-mile-wide strip of land extending along fifty miles of the Missouri border north of the Oklahoma-Kansas state line—were established as a buffer zone between white settlers and Native Americans in an 1825 treaty with the Osage; the treaty prohibited all settlement in the area. A decade later, another treaty conveyed the Neutral Lands to the Cherokee Nation, again on the condition that it remain people-free.¹ This prohibition did not deter as many as three thousand white settlers from moving there in the decade leading up to the Civil War. In 1860, the federal government undertook to remove them. Moving north, soldiers burned farms and evicted families,² stopping for the winter less than a mile from the Fowler settlement. Luckily (for Grandpa Bob), the Civil War intervened, and the soldiers were recalled from their eviction duties to fight more important battles. During the war, another group of property outlaws—this time a band of Confederate-sympathizing Missouri Bushwhackers and their Cherokee allies—also sought to evict the settlers from the Neutral Lands. Over the course of a month, the pillaging band drove more than sixty families from their homes before Union troops killed their ringleader, an

[†] John Cardinal O'Hara, C.S.C. Associate Professor of Law, Notre Dame Law School. I am indebted to Notre Dame Law School Research Librarian Patti Ogden for hunting down the details of my property outlaw history, and to my father, Tom Stelle, for having the courage to break the family silence about it. I thank Tricia Bellia, Peg Brinig, Rick Garnett, and Stewart Sterk for helpful comments and insights. Jessica Laux provided excellent student research assistance.

¹ See 2 KANSAS: A CYCLOPEDIA OF STATE HISTORY, EMBRACING EVENTS, INSTITUTIONS, INDUSTRIES, COUNTIES, CITIES, TOWNS, PROMINENT PERSONS, ETC. 354-55 (Frank W. Blackmar ed., 1912) [hereinafter KANSAS: A CYCLOPEDIA] (describing the history of Cherokee Neutral Lands).

² *Startling News from Southern Kansas*, CHI. TRIB., Nov. 5, 1860, at 2.

unsavory character named John Matthews.³ Again, Robert Fowler emerged unscathed (although family lore has it that he sent his family to hide in a nearby creek bed).

My renegade roots don't end there. At the end of the Civil War, the Cherokees ceded title to the Neutral Lands "in trust" back to the United States. Soon thereafter, Secretary of the Interior Orville H. Browning sold the land to his brother-in-law, railroad baron James Joy, for \$1 per acre.⁴ Outraged by the sale, the settlers quickly organized a vigilante organization known as the "Cherokee Neutral Land League." The League had two purposes: to promote the settlers' interests in Washington, D.C., and to engage in violent self-help measures closer to home. In furtherance of these goals, the Land League established a "death line" along the Neutral Lands' northern border, threatening to hang any railroad employee attempting to survey below it;⁵ raided railroad offices, attacked construction crews, and burned the headquarters of a pro-Joy newspaper; and used various tactics—including, in at least two cases, murder—to dissuade settlers from purchasing their claims from Joy.⁶ (My father assures me that Robert Fowler participated in League activities; I am afraid to ask which ones.) Federal soldiers again intervened, this time to protect the railroad's interests.⁷ Throughout the dispute, the settlers asserted their right to acquire the property directly from the federal government under the terms of the Homestead Act. Eventually, those who arrived prior to 1866 were permitted to purchase the property from the government, although at the appraised value rather than the usual \$1.25 per acre.⁸ In 1870,

³ See *Startling News from Southern Kansas*, CHI. TRIB., Aug. 13, 1861, at 1 (describing Matthews's reign of terror).

⁴ See PAUL WALLACE GATES, FIFTY MILLION ACRES: CONFLICTS OVER KANSAS LAND POLICY, 1854-1890, at 153-64 (1954) [hereinafter GATES, FIFTY MILLION ACRES]; KANSAS: A CYCLOPEDIA, *supra* note 1, at 355-56; see also Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652, 672 (1936) (discussing the sale in the context of the Homestead Act).

⁵ H. CRAIG MINER & WILLIAM E. UNRAU, THE END OF INDIAN KANSAS, 118-19 (1978).

⁶ GATES, FIFTY MILLION ACRES, *supra* note 4, at 171-72; KANSAS: A CYCLOPEDIA, *supra* note 1, at 356.

⁷ GATES, FIFTY MILLION ACRES, *supra* note 4, at 176-77.

⁸ *Id.* at 188. For a full account of the sale of the Cherokee Neutral Lands see *id.* at 153-93; KANSAS: A CYCLOPEDIA, *supra* note 1, at 355-57; and MINER & UNRAU, *supra* note 5, at 116-21.

Robert Fowler's son, George, purchased 160 acres from the federal government for \$500.⁹

My family's story will be familiar to those who have read Eduardo Peñalver and Sonia Katyal's engaging article, *Property Outlaws*.¹⁰ Robert Fowler was, according to their taxonomy, an "[a]cquisitive outlaw[]":¹¹ he was a trespasser whose actions were "oriented primarily toward direct appropriation."¹² Peñalver and Katyal contrast the self-interested acquisitive outlaw with the other-regarding "[e]xpressive outlaw[]," who trespasses as a form of conscientious objection, and the "*intersectional* outlaw[]," whose actions commingle acquisitive and expressive elements.¹³ According to Peñalver and Katyal, property outlaws are underappreciated because, in appropriate circumstances, they serve both "redistributive" and "informational" functions.¹⁴ That is, property outlaws both catalyze "efficient or justified forced transfers of entitlements" and "draw[] attention to the need for reform."¹⁵ My reflection on *Property Outlaws* focuses on two of the article's animating assumptions about property and property laws. Most of my Response challenges Peñalver and Katyal's repeated assertion that acquisitive outlaws serve a valuable *destabilizing* function. The closing paragraphs of my Response question their characterization of trespass as a relatively harmless form of conscientious objection.

Throughout their article, Peñalver and Katyal express concern that property law's inherent conservatism and preference for stability causes it to have "a greater tendency than many other areas of law to become ossified and out of date."¹⁶ They reason that acquisitive, and perhaps also intersectional, outlaws serve a necessary destabilizing function, providing occasional "'shocks' to the system" that, in the end, promote a new, more just equilibrium.¹⁷ My intuition, however,

⁹ The abstract of title indicates that George Fowler purchased the property, although the family's oral history suggests that this purchase was orchestrated as a way to get around the acreage limitations and that George subsequently transferred the property to his father for \$1.

¹⁰ 155 U. PA. L. REV. 1095 (2007).

¹¹ *Id.* at 1105.

¹² *Id.* at 1102.

¹³ *Id.* at 1105.

¹⁴ *Id.* at 1103 (internal quotation marks omitted).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* It is worth noting that similar arguments about "ossification" have been made in other substantive areas of law. See Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 132-133 (1985) (corporate law); Lawrence M. Friedman & Robert V. Percival, *Who Sues for Di-*

is the opposite of Peñalver and Katyal's: it strikes me that acquisitive outlaws usually respond to *instability* in a property regime, not the ossified *hyper-stability* that Peñalver and Katyal fear. Thus, while Peñalver and Katyal are correct that acquisitive outlaws sometimes prompt an efficient evolution of property rules, I suspect that the evolutionary sequence generally proceeds from instability to stability, not from bad stability to instability to good stability as they suggest.

Consider Robert Fowler. There was nothing stable about the property rules governing the Cherokee Neutral Lands in 1856. Over the thirty preceding years, the U.S. government had signed treaties with two different tribes regarding the territory, both times stipulating that it remain essentially empty.¹⁸ It was clear, at least from the time that the Kansas Territory was opened to settlement on May 30, 1854, that this was a holding pattern—not a stable equilibrium.¹⁹ Eventually, any reasonably informed observer could have concluded that the Neutral Lands would be settled. The only questions were how and by whom, although history strongly suggested that it would be by white settlers, not Native Americans. In other words, squatters like Robert Fowler did not destabilize a settled property regime, but rather sought to position themselves as protected rights-holders when the regime ultimately stabilized.²⁰ For this reason, I question Peñalver and Katyal's assertion that the squatters believed that "federal land policy was patently unfair and unworthy of obedience."²¹ It would be more accurate to say that the squatters believed that one possible resolution of the uncertainty—the sale of federal lands to speculators, rather than its direct transfer (for little or no consideration) to settlers—was unjust. And, in the end, they reasonably anticipated that the federal government would choose to legalize their occupation, in much the same way that families welcome the stability introduced when a courtship turns to marriage. Better property in-laws than outlaws.

voice? *From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 76-82 (1976) (family law).

¹⁸ See KANSAS: A CYCLOPEDIA, *supra* note 1, at 354-55 (detailing the 1825 treaty with the Osage tribe and the 1835 treaty with the Cherokee nation).

¹⁹ See GATES, FIFTY MILLION ACRES, *supra* note 4, at 48 ("No greater blunder has been made by Congress than the one it committed in opening Kansas Territory to settlement . . . without clearly establishing the rights of settlers on trust lands and of Indians on diminished reserves.").

²⁰ See *id.* at 154 ("Some squatters seem to have . . . hoped either that the tract would become part of the public domain . . . or that it would be sold in small units to squatters as the Delaware, Iowa, and Confederate Peoria lands had been.").

²¹ Peñalver & Katyal, *supra* note 10, at 1151.

A similar story can be told about the practice of “titling” informal property rights in the developing world. Now a standard international development practice,²² titling was popularized by Peruvian economist Hernando de Soto in his 1989 book, *The Other Path*. De Soto observed that in Lima, 42.6% of all housing was built on illegally acquired land at the time of his studies.²³ He argued that squatters’ informal (i.e., illegal) status not only deprived them of access to capital, reduced productivity, and discouraged investment, but also forced them to rely on entirely extralegal mechanisms for protecting their entitlements and enforcing order.²⁴ To the extent that the squatters’ situation, in Peru and throughout the developing world, results from a colonial-era land tenure system that favors a few large landowners, Peñalver and Katyal’s concern about an “ossified” property regime applies.²⁵ But many squatting settlements are located on public lands; in other cases, the title is uncertain or disputed.²⁶ In such cases, as Stewart Sterk helpfully illuminates in a forthcoming article, the costs of acquiring accurate information about the scope of property rights may themselves weigh in favor of an encroacher. Sterk suggests that when such “search costs” are exceedingly high, liability-rule protection against

²² See, e.g., Jonathan Conning & Partha Deb, Impact Evaluation for Land Property Rights Reforms 1 (June 26, 2007) (unpublished manuscript, on file with author) (“The World Bank alone committed nearly \$1 billion in [sic] fiscal year 2004 to land administration, land titling and other land reform projects . . .”); see also, e.g., Jean O. Lanjouw & Philip I. Levy, *Untitled: A Study of Formal and Informal Property Rights in Urban Ecuador*, 112 *ECON. J.* 986, 989 (2002) (examining a titling program in Ecuador); Sebastian Galiani & Ernesto Schargrodsky, Property Rights for the Poor: Effects of Land Titling 1-8 (Aug. 2005) (unpublished manuscript, on file with author) (discussing land titling efforts in Argentina, Brazil, Cambodia, China, Ghana, Peru, and Vietnam).

²³ HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 13 (June Abbott trans., 1989).

²⁴ *Id.* at 151-74.

²⁵ See, e.g., KLAUS DEININGER, *THE WORLD BANK, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* 17 (2003) (observing the difficulty of reforming the Spanish hacienda system); Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank’s Land Policy: Principles, Experience, and Future Challenges*, 14 *WORLD BANK RES. OBSERVER* 247, 266-67 (1999) (discussing colonial land tenure systems as an impediment to reform).

²⁶ See, e.g., Lee J. Alston et al., *The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier* 12 *J.L. ECON. & ORG.* 25, 29 (1996) (describing the process for squatters to claim title to government-owned frontier land in Brazil); Rafael Di Tella et al., *The Formation of Beliefs: Evidence from the Allocation of Land Titles to Squatters*, 122 *Q.J. ECON.* 209, 210 (2007) (discussing title uncertainty in Buenos Aires, Argentina squatter settlements).

encroachers may make more sense (from an efficiency standpoint).²⁷ And, interestingly, the example offered by Peñalver and Katyal of the forced transfer of rights to squatters in South Africa reflects just such a change—the court refused to evict the squatters, but also awarded the owner damages for the loss.²⁸

Consider, finally, Peñalver and Katyal's example of "intersectional" outlaws—squatters organized by civil rights groups during the early 1980s to occupy abandoned urban properties. Peñalver and Katyal are correct that the campaigns had both acquisitive and expressive elements. But, tellingly, a central thrust of the squatters' message was opposition to the inherent instability of the existing property regime.²⁹ Decades of urban disinvestment had left our cities riddled with vacant, decaying, buildings; many of them had become the locus of serious criminality. Local governments owned many of these buildings as a result of tax delinquency and, even before the organized squatting campaigns, took (initially unsuccessful) steps to establish urban homesteading programs. The urban squatters, responding to the same signals and incentives as their western forbearers, sought to position themselves as likely owners when the government ultimately acted to stabilize the existing property regime.³⁰

Peñalver and Katyal's belief that acquisitive outlaws destabilize settled property rules, rather than respond to unsettled ones, leads them to overstate the value (and understate the costs) of their disruptive actions. Throughout the article, they suggest that property outlaws are important in part because those excluded by economic circumstance from market transactions have little recourse other than lawbreaking to signal how much they value a commodity.³¹ The difficulty is that, absent the uncertainty present in all three of Peñalver and Katyal's ex-

²⁷ See Steward E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. (forthcoming 2008) (manuscript at 13-25, on file with author).

²⁸ See Peñalver & Katyal, *supra* note 10, at 1178-79 (discussing *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*, 2004 (8) BCLR 821 (CC)).

²⁹ See *id.* at 1122-26 ("[T]he urban squatters of the late twentieth century acted out of an amalgamation of motives, not least of which was a desire to express their opposition to the government's failure to provide adequate low-income housing in the cities.").

³⁰ See *id.*

³¹ *Id. passim.*

amples of outlaw campaigns,³² the costs of forcibly redistributing property from attentive owners to desirous claimants will almost always outweigh the benefits. Property rules evolve slowly for good reasons. Stable property rules provide important information, both to owners and to those who wish to transact with them. Instability, among other things, impedes market transactions and discourages owners from investing and improving in their property.³³ As Henry Smith and Thomas Merrill have observed, the need for stability is highest for dimensions of property rights that are invisible; the tangible attributes of property—i.e., the metes and bounds of a parcel—are relatively easy to ascertain, and there is less of a need to be concerned about third-party information costs.³⁴ Thus, Peñalver and Katyal may be correct that, on a very cold night, a homeless man will place extremely high value on the right to obtain shelter in a shopping mall.³⁵ And, for reasons helpfully illuminated by Lee Anne Fennell in a recent article, they also are correct that an acquisitive outlaw's state of mind does send important signals about how much he values the property he seeks to acquire.³⁶ Even assuming, however, that on cold nights a homeless man values access to the mall more than the developer who owns it values her right to exclude him, granting the homeless man a right of access would generate a host of difficulties. Outsiders would not know which homeless people own cold-night easements, to which malls, and under what circumstances; insiders (e.g., mall developers and their financiers) would worry that future encumbrances would devalue mall property, etc.

None of this is intended to discount the seriousness of the homeless man's plight; rather, I simply want to contrast the likely destabilizing effects of ameliorating the situation through the forcible transfer of property rights with the stabilizing effects of, for example, titling efforts in the developing world. Of course, the story might be different if the homeless man had been living in the mall since it was

³² See *id.* at 1105-28 (discussing the squatters of the old American West, the lunch counter sit-ins of the Civil Rights Movement, as well as the urban squatters of the twentieth century).

³³ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24-42 (2000) (arguing that standardization of property rights is critical to limiting external costs for market participants).

³⁴ *Id.* at 34.

³⁵ Peñalver & Katyal, *supra* note 10, at 1146.

³⁶ See Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1065-76 (2006) (arguing, on efficiency grounds, that adverse possession should be limited to intentional trespassers).

abandoned—or seized by the government for nonpayment of property taxes—fifteen years ago. But these destabilizing factors are what make Peñalver and Katyal’s celebration of acquisitive outlaws too easy. In each of their examples, a government granted title (usually to publicly held property) to small landholders—including, but not limited to squatters—believing that the transfer would stabilize an unstable property regime. As it turns out, this calculus was not always correct, but not because the land grants were themselves destabilizing. As Michael Heller has noted, many nineteenth-century homesteaders’ plots were too small to be economically viable as farms and, because the law required them to occupy the property for a period of years to perfect title, “people either stayed and starved or abandoned the land.”³⁷ Similar problems have arisen with titling efforts; many newly minted owners find their tiny plots unmarketable and unworthy of credit from mainstream sources.³⁸ The fact that urban homesteading has failed to generate the hoped-for stability in city neighborhoods can be blamed on analogous factors, or perhaps also on the circumstances that made abandoned urban buildings essentially unmarketable in the first place, including a high tax burden and property regulations that dramatically increase the cost of renovation.³⁹

I have less to say about Peñalver and Katyal’s treatment of “expressive outlaws,” which, at its core, presents an expansive theory of conscientious objection that I am ill qualified to evaluate. But I do offer a word of caution about their conviction that trespass is a “safe” form of conscientious objection because property crimes are relatively harmless.⁴⁰ Peñalver and Katyal are right, of course, that trespass is a “minor” crime, at least in terms of penalty. And they provide a commendable example of peaceful expressive property lawbreaking—lunch counter sit-ins during the early 1960s.⁴¹ But, their broad gener-

³⁷ Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1172 (1999).

³⁸ See, e.g., John Gravois, *The de Soto Delusion: Peruvian Economist Hernando de Soto’s Ideas for Helping the Poor Have Made Him a Global Celebrity. Now, if Only Those Ideas Worked*, SLATE, Jan. 29, 2005, <http://slate.com/id/2112792> (arguing that in some cases banks simply are not interested in securing loans with poor housing; in others, the poor are pushed out by the wealthy when the titles actually become valuable).

³⁹ See generally STEPHEN R. SEIDEL, HOUSING COSTS & GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE 73-75, 90 (1978) (outlining the market effects of building regulations).

⁴⁰ See Peñalver & Katyal, *supra* note 10, at 1135-36 (noting the “hierarchy of values” that places “bodily injury over harm to property”).

⁴¹ *Id.* at 1114-22.

alization about the “harmlessness” of trespass as a means of expression suffers from two related flaws. First, not all property outlaws are peaceful. It is just as easy—perhaps more so—to conjure up examples of property outlaws engaging in *violent* expressive conduct. During the sit-in era, for example, other property outlaws expressed their opinions by blowing up the homes of civil rights workers. More recent examples abound: animal rights activists vandalize testing laboratories;⁴² eco-terrorists torch new suburban developments;⁴³ abortion opponents bomb clinics.⁴⁴ While I am sure that Peñalver and Katyal condemn all of these activities, each highlights the possibility that property outlaws can be just as prone to violence (perhaps more so) than individuals engaged in other forms of conscientious objection.

My second difficulty with Peñalver and Katyal’s characterization of trespass as relatively harmless is that it conflicts with their first justification for celebrating property outlaws—namely, the fact that property matters to people.⁴⁵ This conflict has serious, real-world, consequences. It may be the case that most trespasses are relatively minor offenses, settled without legal recourse; the same can be said of most family disputes. But, all the same, many of the most emotional (and violent) interpersonal disputes occur among family members, and, most wars are fought over territory. Property does matter, as centuries of battles, large and small, to defend it show. Consider, for example, the recent actions of a group of “intersectional outlaws”—Jewish settlers in the Gaza strip and the West Bank. In 2005, the Israeli government forcibly relocated over 9,000 settlers from the Gaza Strip and select areas of the West Bank. Many of those settlers had lived in those places since moving there shortly after the 1967 Arab-Israeli War, in part to make a statement that Jews are entitled to occupy all land within the borders of ancient Israel. The settlers violently resisted the government’s relocation efforts, pelting soldiers with rocks, bottles, and even pots of hot cooking oil. For weeks, the world watched as soldiers dragged women and children, kicking and scream-

⁴² E.g., Phuong Le, *Animal-Rights Group Takes Credit for WSU Vandalism*, SEATTLE POST-INTELLIGENCER, Nov. 22, 1999, at B1.

⁴³ E.g., Steve Vanderheiden, *Eco-Terrorism or Justified Resistance? Radical Environmentalism and the “War on Terror,”* 33 POL. & SOC’Y 425, 426 (2005) (summarizing activities of the Earth Liberation Front).

⁴⁴ E.g., *Bomb Found at Women’s Clinic*, CNN, Apr. 26, 2007, <http://www.cnn.com/2007/US/04/26/clinic.bomb/index.html>.

⁴⁵ Peñalver & Katyal, *supra* note 10, at 1131-33.

ing, away from their homes.⁴⁶ This summer, the Israeli authorities returned to remove groups of settlers who had “reclaimed” their property by barricading themselves into abandoned buildings. All told, at least twenty illegal settlements have sprung up since 2001. And Israel has promised to dismantle them, in an effort to diffuse the tension generated by the settlers’ presence and to prevent violent retribution by radical Palestinians who also claim the right to occupy the disputed territory.⁴⁷

In the end, I agree with much of what Peñalver and Katyal have to say about property outlaws: they do send important signals, both intentionally and as a byproduct of their selfish acquisitive actions. And, they sometimes force an efficient redistribution of resources. But I worry that their analysis proceeds from at least two incorrect assumptions about the special significance of property lawbreaking, namely that acquisitive outlaws are a destabilizing force and that trespass is a relatively harmless form of conscientious objection. When these assumptions are stripped away, their celebration of property outlaws loses some of its dramatic force.

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⁴⁶ See, e.g., Steven Erlanger, *Police Fight To Remove West Bank Settlers*, N.Y. TIMES, Aug. 8, 2007, at A10; Greg Myre, *Thousands of Settlers Remain in Gaza, Defying Israeli Orders*, N.Y. TIMES, Aug. 15, 2005, at A1.

⁴⁷ See, e.g., Dina Kraft, *Thousands of Settlers Return to West Bank Town*, N.Y. TIMES, Mar. 27, 2007, at A9; Jennifer Medina, *Settlers’ Defiance Reflects Postwar Israeli Changes*, N.Y. TIMES, Apr. 22, 2007, at A1.