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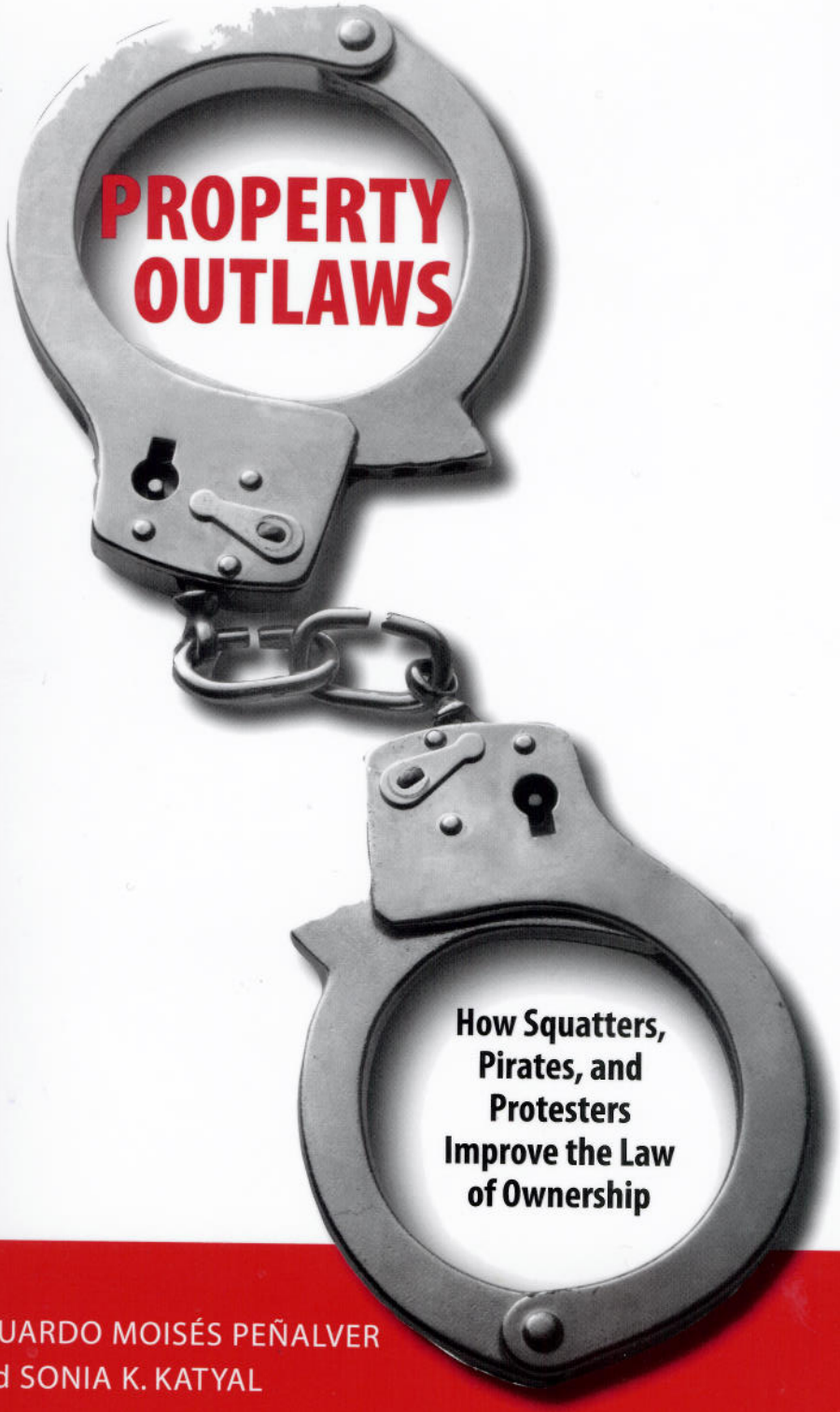

How Squatters, Pirates, and Protesters Improve the Law of Ownership

EDUARDO MOISÉS PEÑALVER
and SONIA K. KATYAL

PROPERTY OUTLAWS

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PREFACE

On November 20, 1969, early in the morning, a group of eighty-nine Native American activists landed on the federally abandoned property of Alcatraz Island in the San Francisco Bay.[1] They claimed the land "by right of discovery" and under the terms of a treaty signed in 1868, the Treaty of Fort Laramie, which gave Native Americans the right to unused federal government property that had previously been theirs.[2] Their occupation became the longest and most visible occupation of any federal facility until the federal government forcibly removed fifteen remaining protesters nineteen months later. Although the occupation did not result in a shift of title, it was, by any account, a watershed moment in American history. Alcatraz was an opening shot in the Red Power movement, which repeatedly employed the tactic of property occupations to draw attention to Native American issues. Between 1969 and the late 1970s, Native American activists carried out over seventy occupations of property, including the Trail of Broken Treaties, which involved the occupation of the Bureau of Indian Affairs (BIA) headquarters.[3]

Although their protests, like other civil rights demonstrations, were occasionally characterized by sporadic violence and controversy, there is no question that the Red Power movement contributed to a fundamental shift in government policy.[4] As the nation took note of what was happening at Alcatraz, President Nixon announced a formal reversal of previous federal policy toward Native Americans, proclaiming that the government would now fully support tribal self-determination and return 48,000 acres

of land that had been taken without compensation to the Taos people.[5] That year, Congress passed fifty-two legislative proposals that dramatically increased funding for the BIA, scholarships, water rights, housing, and health care.[6] In one communication, Alcatraz resident Grace Thorpe wrote, "Our seizure of Alcatraz is the awakening of Indian self-determinism and Indian unity. It is the beginning of the Indian's rightful claim, not only to his land, but also his own destiny and power."[7]

The same pattern has been borne out, again and again, by the complex phenomenon of property disobedience. The actual number of property-outlaw movements, both in the United States and abroad, is truly astonishing. Countless movements, well known and obscure, have resorted to unauthorized tactics to achieve their property goals. In many cases, they have been successful, obtaining for their participants the desired access to, possession of, or even title to property. Whether they fail or succeed, however, outlaws reveal an essential ambiguity at property's core. For the people occupying Alcatraz, property was both the object and the subject of their disobedience, the instrumental tool upon which the protest was based as well as the proverbial "brass ring" they hoped to gain in the event that their action succeeded.

As the legacy of the Red Power occupations reminds us, property disobedience is not always just about specific claims to resources; it is also about persuasion—drawing upon the unique ability of property law as an institution to communicate particular claims to others.[8] Not all outlaw movements, however, are created equal in terms of their scope, aims, or effectiveness. Just as property law aims to enhance stability by establishing a system of clear and fixed rules, dividing public from private, it also crucially motivates cultural and political forces that contest and destabilize, creating chaos and confusion in the midst of seeming orderliness. Today, forty years after the activists first set foot on Alcatraz, we see this dialectic emerge time and time again in contemporary urban and rural environments, with respect to both tangible and intangible forms of property. Homelessness advocacy groups have helped groups of newly homeless families suffering from the economic downturn to squat in vacant, foreclosed properties.[9] The bike collective Critical Mass takes over the streets of metropolitan cities in order to reinvent the concept of public space; urban community gardeners take over vacant lots to beautify the city and create a sense of shared eco-

logical responsibility; pirate microradio stations in the Bay Area and mashup artists interrupt everyday sonic worlds; cyberactivists like the Electronic Disturbance Theatre and others mount international electronic civil-disobedience campaigns.[10] And still, tribal members continue to occupy property, as a group of Mohawk protesters in Canada demonstrated in 2007 and 2008 when they successfully blockaded a contested area of land to stave off development.[11]

The debates that these movements spark continue to unfold.

In this book we will not pretend to decide, in each instance, whether the phenomenon of property disobedience is defensible or necessary. Our goal instead is merely to identify some of the ways in which this pervasive phenomenon has, intentionally or not, spurred legal innovation, perhaps even strengthening the rule of law. In the process, we hope to shed new light on this important engine of legal change.

We could not have completed this project without the people and institutions who have generously assisted and supported us. We are grateful to the Fordham and Cornell law schools for generous research funding while we worked on this book. In addition, we thank the Hastings and Yale law schools for serving as homes away from our home institutions during significant periods of research and writing. We are also particularly indebted to research librarians at Fordham, Cornell and Yale. Paul Miller, of the Fordham law library, was especially helpful, performing the invaluable task of tracking down letters to the editor from the time of the Greensboro sit-ins.

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Finally, we would like to dedicate this book to our families.

INTRODUCTION

At 4:30 p.m. on Monday, February 1, 1960, Ezell Blair Jr., Franklin McCain, Joseph McNeil, and David Richmond—all freshmen at the North Carolina Agricultural and Technical State University (North Carolina A&T)—walked into the cafeteria at the Woolworth's store in downtown Greensboro, North Carolina. They sat down at the counter and quietly waited for service. They received none. Blair, McCain, McNeil, and Richmond were black, and Woolworth's, like all the department stores and restaurants in Greensboro, followed the local "custom" of refusing to allow black patrons to sit down to eat at the lunch counter. Although they received no service, the four men sat quietly and without incident. When the store closed at 5:30 that day, they left.

The next morning, at 10:30, the four young men returned to Woolworth's, along with sixteen other students from North Carolina A&T. They each purchased a small item from the store's lunch counter, which was willing to sell black customers food but not to allow them to sit down at the counter to eat it. As seats opened up at the lunch counter, the young men and women sat down in violation of the store's customary policy. Some students spoke quietly among themselves; others studied. In the meantime, white customers continued to come and go, puzzled at what they were witnessing. When the students finally left, shortly after lunchtime, they promised to return the next day in even greater numbers. McCain and Blair, acting as spokesmen for the group, said that they would continue to sit at the lunch counter for "several days, several weeks," un-

til Woolworth's changed its racist policy. The students were careful to note that they were not planning to boycott the store. "We like to spend our money here," McCain said, "but we want to spend it at the lunch counter."[1]

By Thursday morning, the group had swelled to over sixty protesters and now included students from nearby Bennett College. They occupied virtually every seat at the lunch counter, and service came to a standstill as waitresses—in accordance with Woolworth's policy—refused to serve them. North Carolina's attorney general, Malcolm Seawell, commented on the situation, noting that North Carolina had no law against serving members of both races at a lunch counter, but also observing that there was no law that required a private business to serve anyone it did not wish to serve. His implication was clear. By sitting at the lunch counter against the wishes of the store's owners or managers, the students were engaging in a criminal violation of private property rights. Despite the attorney general's implicit threat, the sit-down protests continued on Friday and Saturday. White youths confronted the growing group of black college students, hurling insults at them. After a bomb threat on Saturday, February 6, Woolworth's decided to close its lunch counter indefinitely.

By the middle of the following week, copycat sit-down protests had sprung up in Winston-Salem and Charlotte. And lunch counters at Woolworth's and other department stores in those cities closed down as well. Joseph Jones, a black student at Johnson C. Smith University and a leader of the Charlotte sit-ins, commented, "I have no malice, no jealousy, no hatred, no envy. All I want is to come in and place my order and be served and leave a tip if I feel like it."[2]

By the end of the month, similar sit-down protests were occurring throughout the South. As the movement grew in strength, the department stores began to change their tactics. At first, the stores had responded to the protesters by ignoring them or closing the lunch counters entirely, perhaps in hope that the students would quickly lose interest. But as the protests persisted, and even grew, the stores began to assert their private property rights more forcefully.

Under the laws of most states at that time, owners of private businesses could refuse to serve anyone for any reason, and a person who failed to leave a store after being asked to do so by its proprietor was guilty of crim-

inal trespass. When the protests showed no signs of abating, store owners began to flex these legal muscles, and the arrests began. On February 22, thirty-four students were arrested for criminal trespass in Richmond, Virginia, when they refused to leave the lunch counter at a large downtown department store. Over the succeeding days and months, hundreds more students were arrested in North Carolina, Virginia, and throughout the South for refusing to honor the racially discriminatory exercise of private property rights by the owners of lunch counters.

Forty-five years, to the day, after the four Greensboro college freshmen sparked a national movement to end private discrimination in stores and restaurants, Downhill Battle, an anticopyright activist group, organized a massive nationwide screening of the acclaimed 1987 documentary *Eyes on the Prize*—a film that had been shown to generations for its valuable historical footage of the civil rights movement.[3] As various Internet and print news sources, and Downhill Battle's own Web site, reported, the film, billed as the "most important civil rights documentary ever," had languished since 1995 because of expired copyright licenses for the photographs and other archival footage used in the film. Some of the footage in the documentary had been licensed for only five years, and the film's producer, Henry Hampton, had passed away before the rights were renewed. Things had changed since the film was first created—licenses had become far more costly to procure, and the vast archival material included in the film made them prohibitively expensive. Blackside, the production company that had inherited the rights to the film, could not afford to renew the licenses. As a result, the film could not be rereleased until new licenses were procured. By the mid-1990s, the film had become, for all practical purposes, unavailable to the general public—a few rare VHS copies occasionally surfaced on eBay for as much as $1,500.[4]

Ironically, many of the sources used in the film would have fallen into the public domain, or been close to doing so, had Congress not retroactively extended the length of copyright protection by twenty years in the 1998 Copyright Term Extension Act. For example, in one poignant scene, Martin Luther King Jr.'s staff is shown singing the song "Happy Birthday," a song that would have entered the public domain in 2010 had the law not been passed. Because of the Copyright Extension Act, however,

the song will not enter the public domain until 2030, and the cost of a license has grown dramatically since the film was made. According to some Warner Brothers executives, the song currently commands licensing fees between $3,000 and $5,000 for a single use in a film.[5]

Eyes on the Prize had, in a sense, become a victim of its own high standards for documentary production: because it relied on such an exhaustive array of research and sources, it became too costly to rerelease after the original licenses had expired. And without the proper licenses, any public display of the film risked infringing the rights to the panoply of material that was still protected. The high cost of relicensing the material made the film a captive of its content, barring its general distribution to the viewing public. As a result, this important and revered film could no longer be shown in public.

For many civil rights advocates, particularly educators and historians, this was a tragic turn of events. After a few news articles reported on the film's unavailability, Downhill Battle decided to organize a public protest to coincide with Black History Month in order to draw attention to the effect of copyright law on *Eyes on the Prize* in particular and the circulation of information in general. The only way to do this, the group reasoned, was to simply *show* the film—in other words, to defy the restrictions of copyright protection in order to demonstrate the cost of the law itself. One civil rights leader, Lawrence Guyot, proclaimed, "'Eyes on the Prize' is one of the most effective documentaries ever put together that dealt with civic engagement. . . . This [absence of license renewal] is analogous to stopping the circulation of all the books about Martin Luther King, stopping the circulation of all the books about Malcolm X, stopping the circulation of books about the founding of America. . . . I would call upon everyone who has access to 'Eyes on the Prize' to openly violate any and all laws regarding its showing."[6] Just as earlier generations of civil rights activists challenged property laws, through sit-ins and other forms of everyday resistance, in order to articulate their demands for equal access to lunch counters and other places of public accommodation, Guyot called for similar challenges to existing intellectual property rights in the name of greater access to information.

So Downhill Battle organized a massive day of digital disobedience. Its announcement read: "Eyes on the Prize is the most renowned civil rights

documentary of all time; for many people, it is how they first learned about the Civil Rights Movement. . . . But this film has not been available on video or television for the past 10 years simply because of expired copyright licenses. We cannot allow copyright red tape to keep this film from the public any longer. So today we are making digital versions of the film available for download."[7]

Downhill Battle's method of protest was simple: the group digitized the first three episodes of the documentary and posted them online, where the episodes could be downloaded for free using peer-to-peer software, like BitTorrent. Then, Downhill Battle encouraged people to copy and distribute the files in order to raise awareness of copyright's effect on the circulation of information. Downhill Battle dubbed their protest "Eyes on the Screen" and coordinated hundreds of public showings of the movie at universities and in private homes throughout the country. The organizers believed that their activities fell squarely within the "fair use" protections of the Copyright Act. "We're talking about a cultural and national icon," Guyot explained in a telephone interview to the *Boston Globe*. "There's never been a more key time to revitalize our faith in our ability to impact on every level. I'm not doing anything illegal, I'm persuading people to buy copies and those who have copies to share them, to facilitate as many showings as possible."[8]

The protest, however, was short lived. Downhill Battle's efforts, though nationally visible, were ultimately curtailed—because of Blackside's own intervention. Even though Downhill Battle planned to digitize and post the remaining episodes on peer-to-peer networks, it was forced to take them down after Blackside contacted its copyright lawyers, who concluded that the protest not only violated the filmmaker's copyright but might also irritate the various license holders whose works were used in the film. Tony Pierce, one of Blackside's lawyers, strongly disagreed with the protesters' belief that their activities were legal, calling their fair use defense "warped." Pierce continued, "Their activities were blatantly illegal, and I think they knew they were when they did them." Other Blackside lawyers were more moderate in their assessment. "We appreciate and are very glad that people are interested in 'Eyes,' but I think the way Downhill Battle is going about it is unacceptable and illegal," said another Blackside lawyer, Sandy Forman from the law firm of Akin Gump Strauss Hauer & Feld. "We don't like that Downhill Battle would illegally digitize copies and

then encourage people to illegally download them and encourage people to exhibit them without the rights to do so."[9]

A similar perspective was offered by another Blackside representative on a widely read blog. "This protest might be a good thing, as far as copyright goes, but as far as *Eyes* goes, it's really not." The representative pointed out that Downhill Battle's calls to illegally copy and distribute the film made negotiations with the copyright holders even more difficult. "Whatever the motives," he added, "the counter-copyright crew are essentially hijacking someone else's life's work and appropriating its power and recognition for their own purposes. In the process, they are potentially diminishing and damaging its own effectiveness. . . . They invoke Henry Hampton's name and legacy on their page, where they advocate downloading and illegally distributing his works. Henry Hampton may have made documentaries, but that doesn't mean he worked for free. . . . So trying to invoke his name while you encourage everyone to trample on the rights granted his works strikes me as extremely hypocritical."[10]

The critical comments generated a firestorm of discussion about the relative merits of the "Eyes on the Screen" protest—for copyright law, for the future of civil rights education, and for the intersection between the two areas. In the end, Blackside received several hundred thousand dollars in grants from the Ford Foundation and private philanthropists to purchase the rights to use the images in the film. Even with this infusion of money, however, the expense of licensing the songs used in the original film was thought to be too expensive, and Blackside expected that it would have to drop some of them in order to stay within budget. By 2006, however, the film was once again being shown on PBS.

At first glance, the four college freshmen who launched the 1960 sit-down movement at the Woolworth's in Greensboro, North Carolina, and the intellectual property activists at Downhill Battle may not appear to share a great deal. The Greensboro protests were aimed at defending the fundamental human dignity of black Americans, a dignity that had been under assault for centuries. The intellectual property activists at Downhill Battle are focused on helping people get access to information that is, for the most part, already available to them, albeit for a price. Even if we focus

on the fight over *Eyes on the Prize,* an important repository of documentary material about the most important social movement of the twentieth century, we must recognize that there is a stark difference between fighting for civil rights and fighting for access to a *film* about civil rights.

We should not, however, let hindsight distort our assessment of either effort. At the time of their sit-down protests, the Greensboro protesters were maligned as threatening sacred rights of private property and the rule of law in pursuit of what many commentators considered a trivial interest in access to lunch-counter service. Such criticism did not come just from conservatives and segregationists. Thurgood Marshall railed against the sit-down protests, and a black minister in Charlotte, North Carolina, lambasted the students' actions as "uncalled for, unnecessary, ill-advised and inexpedient."[11] Conversely, some contemporary observers viewed Downhill Battle's efforts to provide access to *Eyes on the Prize* as vital to the future of our democracy. One former staff member of the Southern Christian Leadership Conference (Martin Luther King Jr.'s organization), Bruce Hartford, explained his efforts to organize an illicit screening of the film by noting the similarities between the fight for civil rights and the fight for access to information. "I think probably the issue of the 20th century was race. The issue of the 21st century is going to be access to information. . . . Without access to information," he observed, "democracy is a myth."[12]

Whatever one thinks of the relative merits of the two protests, they share a great deal. The most obvious commonality operates on the level of tactics. Both the Greensboro protesters and the information activists relied on a readiness to trample on entrenched property rights in order to draw attention to their demands for political change. And in so doing, both movements demonstrated a flair for the dramatic and for attracting the media attention that politically motivated property disobedience generates.

Whether the Greensboro students or Downhill Battle knew it or not, in violating property rights as they did, they were tapping into a long tradition within the history of American property law. For as long as there has been private ownership, it seems, there have been people who have sought to challenge the prerogatives of ownership in search of a more just social order. Sometimes they have succeeded. More often, they have not. But the pervasive influence of these outlaw tactics on the development of Ameri-

can property doctrine cannot be denied. In this book we hope to explore in some depth the phenomenon of property disobedience, in its various forms, and the role that it plays both as a challenge to and as an essential component of our system of private ownership.

Imagine that scientists invented a machine capable of costlessly detecting every crime, no matter how trivial, and identifying its perpetrator. If such a machine were possible, should the state build it? Set aside concerns about privacy. Suppose that the machine would not detect or record any noncriminal activities, whether conducted in public or private. It would not, for example, involve videotaping and then evaluating the activities of innocent people as they went about their business on the streets or in their homes. Burglaries, assaults, thefts, and criminal trespass would all be detected and recorded in the system's database.

To some readers, entertaining any doubt about the desirability of the goal of perfect law enforcement might be the sign of some moral or intellectual defect, particularly coming from two professors of law. If a society, especially a democratic society, has enacted criminal statutes, established a system of private property and contract, and defined duties of care that its members owe to one another, then surely the perfect enforcement of those norms would be an unmitigated good and ought always to be preferred to a situation in which some people violate those norms with impunity. As long as it did not run afoul of *other* legal norms (such as privacy rights) or cost too much, anything that might improve the effectiveness of legal enforcement should be welcomed without hesitation. The machine must be built. Right?

As alluring as the idea of perfect law enforcement might appear at first glance, some doubts very quickly begin to spring to mind. The question whether to build the machine would seem to be an impossible one to answer without first knowing a number of different facts, both about the society that is proposing to build the machine and about the specific acts (and actors) that the machine detects. How just, for example, are the laws defining specific actions as "criminal"? Are the society's criminal punishments excessive? Are its property rights wisely defined and fairly distributed? Even if an act meets the definition of a legal violation, can the machine always correctly assess whether the person who engaged in that

criminal act was justified in doing so? If the person committed an assault, for example, was she acting in self-defense? If he stole some bread, was he driven by hunger or by avarice? Even if a specified illegal act was not justified, was it the consequence of circumstances that mitigate our moral condemnation such that we think its perpetrator ought to be wholly or partially excused from sanctions?

We are obviously not breaking any new ground by raising these questions. Most legal theories make some provision for at least some categories of justified lawbreaking, such as conscientious disobedience of unjust laws or apparently unlawful behavior necessitated by the exigencies of a natural disaster. On the other hand, the precise contours of these exceptions and the application of these exceptions in the evaluation of unlawful behavior are often controversial and have been hotly debated. Some, for example, have argued that taking a person's life, even in self-defense, is never permissible. Others have argued that economic need, no matter how great or blameless, cannot justify taking someone else's property.

In this book we cannot hope to recount the full scope of these debates, or even join many of them—at least not in any comprehensive way. Instead, we intend to focus on the phenomena of property disobedience and on the role, if any, it appropriately plays in the construction and design of a system of private ownership. Moreover, we come to the discussion of disobedience not as criminal lawyers or philosophers but rather as specialists in property and intellectual property, respectively. What does our project exclude? Primarily, any discussion of crimes and other legal wrongs that implicate a person's body. Removing from the conversation actions that violate people's physical integrity, either negligently or intentionally, will (we hope) limit the scope of controversy in ways that will permit a richer consideration and discussion of the topics that remain. Our narrow focus on property violations is not an arbitrary effort to dodge hard cases. We believe that such a focus is justified not simply on account of our own particular intellectual interests, but because, as we will argue at greater length in chapter 1, violations of property rights differ in morally significant respects from other sorts of legal wrongs. As the Model Penal Code affirms, an action that implicates a person's body is both more serious and more irrevocable in its consequences than one that implicates a person's property rights. This is not to say that there are not borderline cases, that there

might not be violations of property rights that implicate interests whose importance rivals a person's bodily integrity—as might happen, for example, where the property in question is so closely bound up with a person's bodily security as to render a violation of property rights tantamount to a violation of the person. Home invasion is an example of such a borderline case. Close cases might also arise where the owner's relationship with the property is so intimate that a violation of that relationship is felt by the owner to be as intense and irrevocable as a physical assault. Such liminal cases are interesting, and we address them at various points throughout the book. But we do not believe that their existence vitiates the fundamental validity of the broad distinction we are drawing at the outset between violations of property rights and violations of the body.

So let us assume that our hypothetical law-enforcement machine is only capable of detecting violations of property rights. The question we hope to address at length in this book is whether it would be wise for a government to purchase it and turn it on. Why wouldn't it be? After all, the image that most of us have of the person who intentionally flouts property laws is not a particularly favorable one. The *Oxford English Dictionary,* for example, defines a trespasser as a "transgressor, a law-breaker; a wrong-doer, sinner, offender."[13] In early modern England, landowners frequently left "man traps" and "spring guns" along boundary lines to discourage trespass on their lands.[14] Indeed, in rural areas of the United States, it is, even today, not uncommon to come across signs warning that "trespassers will be shot."[15] The overridingly negative view of property lawbreakers in popular consciousness comports with the status of property rights within our characteristically individualist, capitalist, political culture.

The dim view of property lawbreakers is shared to a large degree by scholars of property law and intellectual property law alike, who recognize the important role that property plays in maintaining social order through a stable system of private ownership. The apparent threat to that order and stability posed by property lawbreakers is underscored by the importance attached to exclusivity within contemporary theories of property. Both courts and commentators have placed this right at the conceptual center of private ownership.[16]

One of the key purposes of property law, as Abraham Bell and Gideon Parchomovsky have correctly argued, is to provide stability, both for own-

ers and for those who would engage in transactions with them.[17] Property law achieves this stability in a variety of ways. One crucial way is through the criminal enforcement of existing property entitlements. Laws of criminal trespass protect the boundaries around real property established through market transactions. Laws prohibiting larceny, fraud, robbery, burglary, and the piracy of intellectual property similarly wrap private entitlements within the safety of the publicly enforced criminal law. The law protects the stability of property rights of all sorts with civil remedies as well, through the use of injunctive remedies and supracompensatory damages.

In contrast to this familiar story, in this book we hope to cast some doubt on the value of stability by retelling the story from a different angle. Our aim is to broaden the focus so that the discussion is not just about property's stability, but also about its need for dynamism, its ability to change and to fluctuate according to shifting norms, values, and social realities. In other words, we seek to supplement the dominant focus on the importance of property's stability by highlighting the powerful, and at times ironic, role of selective disobedience in the process of fostering the necessary evolution of property. We believe that the apparent stability and order provided by property law owes much to the destabilizing role of the lawbreaker in occasionally forcing needed reform and in generating a series of important legal shifts along the way. A more balanced portrayal of the lawbreaker than the one offered by an exclusive focus on the value of stability offers a richer and much more accurate picture of the dynamics behind the evolution of property laws and the forces that drive them.

Our goal in this book is therefore to discuss some reasons why the perfect property law-enforcement machine might not be such a great idea. We do not seek to applaud lawlessness in general, but rather to highlight some specific cases in which property disobedience has positively influenced the direction of the law. In the process, we hope to rehabilitate, at least to a certain extent, the image of the intentional property outlaw, and to show how this figure has repeatedly played an integral role in producing our system of property and intellectual property. We also hope to shed light on a complex and subtle tension: although property seems to be so stable and orderly, it also masks a latent instability stemming from the persistence of transgression. Far from universally undermining the value of property,

however, this underlying instability is frequently constructive and indeed necessary to prevent the entire edifice from becoming outdated.[18]

We are not the first property scholars to notice these dynamic tensions within property law. Jeremy Waldron, for example, has observed that the central function of a system of private property is to resolve what might otherwise become intractable and violent conflict over access to and control over scarce material resources.[19] But property law's resolution of these latent conflicts is always somewhat tentative, and property remains the site of recurring conflict as competing camps state and restate their claims to particular contested resources. This dialogic (or, perhaps, dialectic) vision of property law extends to other areas of law as well. Indeed, it parallels in many ways recent discussions within constitutional theory that have privileged a popular bottom-up conception of lawmaking over the more traditional focus on official organs of lawmaking. Thus, Stanford Law School professor and dean Larry Kramer has described the important role played by lawbreaking and mob action in the early republic's popular constitutional legal culture.[20] And Rutgers law professor Jim Pope has discussed the importance of worker lawbreaking for the development of constitutional doctrine during the New Deal era.[21]

These many discussions of the venerable American tradition of popular lawmaking help render our own discussion of the value of property lawbreaking less radical or less threatening than it might otherwise seem. In addition, our task is made easier by the fact that, despite the broadly negative view of property lawbreakers that prevails among lawyers and lay people alike, our popular culture has also simultaneously embraced a more favorable view of outlaws. Even while we condemn theft and trespass, we celebrate the exploits of Robin Hood and the bravery of the 1960s civil rights protesters. We know that, although lawbreaking is by and large undesirable and even dangerous to social stability, property outlaws have repeatedly played a powerful role as catalysts for needed legal reform. Time and again, groups of people have intentionally violated property laws, and in a number of important cases, the law of property has responded by shifting to accommodate their demands, in the process bringing those groups back within the fold of the law-abiding community. At other times, the legal ambiguity of their activities has offered the law the opportunity to refine itself in response to their challenge. This is particularly true in the case

of intellectual property law, which has long relied on the contributions of individuals who have exploited legally ambiguous technologies to spur innovation and new business models. Whatever one thinks of the merits of any individual case, there can be no doubt that—considered as a whole—these legally dubious activities have been important engines for legal change. As a consequence of this ambiguity, a diverse group of people disenfranchised by or disenchanted with the existing property system, from the squatters on the nineteenth-century American frontier to the Native American and civil rights protesters of the 1960s to the urban squatters of the 1970s and 1980s to file sharers and patent activists of the new millennium, have flouted property laws in hopes of achieving their diverse goals.

In most cases, they have been rebuffed. But in many important cases, they have succeeded. And yet the useful role repeatedly played by these challengers in forcing change has been mostly ignored by legal scholars. The failure is attributable, at least in part, to a larger tendency among scholars writing about property to focus their attention on questions concerning the initial emergence of regimes of private ownership, either from systems of common property or from open-access systems. Here, scholars have focused their inquiries mostly on why private property rights emerged over time. In addition, a growing number of scholars have explored the role of social norms and private ordering in the informal adjustment of formal property entitlements.

These discussions have no doubt provided substantial insight. Property theorists have paid less attention, however, to the equally interesting question of *how* formal regimes of private ownership evolve from one particular bundle of ownership rights to another. What accounts for key shifts in ownership and access over time? As history often reveals, once a robust system of private property has been established, the precise content of that standard bundle of rights changes over time in response to varying pressures and incentives, both internal and external to the institution of ownership. Indeed, a focus on the mechanisms of legal evolution within existing private property regimes is all the more important and interesting in an advanced capitalist society like ours, where, for large swaths of resources, the nearly complete "enclosure" of commons and open-access resources has already been accomplished.[22] Even in the intellectual property context, the pervasive growth of copyright control mechanisms may have drastic ef-

fects on the access to cultural and technological resources that might otherwise fall within the public domain.

Some scholars have taken up the question of legal transitions within existing property regimes. Many have done so by focusing on incentives to litigate as an explanation for patterns of change within the law.[23] Others have focused on the means by which interest groups band together to influence legislative change, both in the arena of property, intellectual property, and elsewhere.[24] But these officially sanctioned mechanisms of legal change provide only part of the picture, particularly within the law of property. Certain categories of nonowners, after all, are likely to be reluctant, or simply financially unable, to initiate costly civil litigation or to assert effective political pressure to stake their claims.

Almost by definition, intentional lawbreaking as a mechanism for legal change is a strategy employed by those who cannot afford to file civil suits or whose voice in the legislative process is too weak to attract the attention of lawmakers in order to wrest a change in property relations, whether de facto or de jure, from existing entitlements.[25] In other words, intentional lawbreaking is typically (though not always) a tool of the have-nots. And in many cases, as we shall show, an initial transgression of a property entitlement is an essential event in provoking a shift in the law. It should therefore come as no surprise that some of the most significant judicial opinions in the common law development of property law have come on the criminal side of the docket.[26] And even in the context of intellectual property, courts and legislatures have often been moved to enact civil safe harbors or to extend the concept of fair use to protect previously "disobedient" behavior. Moreover, protracted lawbreaking, as in the case of the civil rights protesters of the 1960s, may catalyze a favorable legal response by shifting public opinion and inviting legislative intervention. Given the tactic's appeal to the powerless and marginal, it is unsurprising that many of the stories of property change on which we focus have an undercurrent of concern about distributive justice.

We are under no illusions that property outlaws will always pursue ends that we consider good or worthy. Intentional lawbreaking has been used in the defense of oppression and discrimination just as it has been used to foster liberation and equality. The nature of property lawbreaking suggests that it will be used by nonowners more than owners and by those isolated

from the majoritarian process more than by those well connected to the levers of power. But this does not guarantee that it will be directed toward progressive ends. Nineteenth-century squatters, for example, frequently dispossessed Native Americans of their land even as they clamored for recognition of their own informal property rights.[27] Similarly, racist property owners continue to break the law and exclude people from public accommodations on the basis of race, just as the civil rights protesters dissented from the status quo by forcing themselves onto segregationist property in violation of trespass laws. Although our own political commitments lead us to view civil rights lawbreaking more sympathetically than segregationist lawbreaking, we believe that both lawbreakers qualify as "property outlaws," and our discussion attempts to encompass actors whose ends we share as well as those whose ends we find reprehensible. The legal responses we discuss in part 3, however, will likely have different impacts on different sorts of property outlaws, given differences in the objective circumstances and aims of the outlaws and in the democratic response to their activities.

We do not pretend to provide a general theory of shifts in legal regimes, or even in property law. Instead, we hope to explore just one interesting facet of this larger issue by focusing on the role of disobedience as a mechanism that, time and again, has played a key role in fostering both symbolic and substantive evolution within the law of private ownership in both the property and intellectual property contexts. In so doing, we hope to draw increased attention both to the general question of change within property rights and, in particular, to the crucial function frequently performed by outlaws within that process.

Recognizing this recurrent cycle of productive disobedience and legal reform yields a variety of interesting conceptual, descriptive, and normative conclusions. To the extent that those on the outside of the property system frequently bring about a change in the content of property rights by flouting established property rules, the story we tell in this book offers a view of property law as a dynamic institution that is broadly reflective of evolving community values as opposed to a fixed set of natural entitlements. Our discussion therefore contributes to the growing body of literature emphasizing the dialogic and social nature of property law and rejecting the frequently static, individualist conception of property rights

favored by many property libertarians. More normatively, however, we argue that lawbreakers have repeatedly played integral roles in spurring the evolution of property law. Their stories argue in favor of a careful consideration of the ways in which legal processes can be shaped to isolate the productive contributions of property outlaws from their less desirable effects.

Part I lays some conceptual foundations for the remainder of the book. In chapter 1 we ask why it is worth focusing on the law of *property*, whether tangible or intellectual, in our discussion of outlaw tactics for legal change. We argue that, despite the generalized nature of disobedience as a tool for reform, there are reasons to think that it will play a particularly important role within the evolution of property and intellectual property. Property law has a greater tendency than many other areas of law to become ossified and out of date, and therefore has a greater need for occasional "shocks" to the system. Although we do not dispute the value of stability in property entitlements, both for the individual and the market as a whole, the long-term health of this system depends on its ability to respond dynamically to changing economic and social conditions. Property outlaws have repeatedly played a crucial role in drawing attention to the need for reform. In chapter 2 we discuss the broad contours of intellectual property regulation, with particular attention to those areas that relate to our study of disobedience. We highlight how the considerations at work within intellectual property law differ from those that operate within the law of tangible property.

With those preliminaries out of the way, in part 2 we begin our discussion of outlaws in earnest, elaborating two broad categories of intentional lawbreaking that are particularly relevant to our discussion. For ease of discussion, we posit that intentional lawbreaking falls somewhere along a continuum ranging from self-regarding appropriative violations of property rights, at one end, to more other-regarding, expressive violations of property rights, at the other end. On the basis of this observation, we offer two broad categories of lawbreaking: "acquisitive" and "expressive." These examples are not meant to be exhaustive or even representative of the sheer variety of property disobedience that exists. Rather, they are simply meant to serve as illustrations of one possible typology of the disobedience that frequently reappears within the history of property and intellectual property law.

Expressive disobedience, which corresponds loosely though imperfectly to the category traditionally called "civil disobedience,"[28] is not primarily acquisitive in nature, but seeks instead to send a strong message about the perceived injustice of existing property arrangements. The 1960 civil rights lunch-counter protests, to which we return again in chapter 4, are a strong reminder of the power of expressive lawbreaking and its vital role within the process of democratic deliberation. Acquisitive disobedience, in contrast, involves actions that are oriented primarily toward direct appropriation. For acquisitive outlaws, the dominant motivating factor might be to gain immediate access to a certain good or property interest presently in the hands of another party (whether the government or a private party), as opposed to making a general statement about the appropriate scope of property rights. Like the expressive disobedience of the civil rights protests, acquisitive disobedience has a long (though more ambiguous) pedigree in our nation's history. In chapter 3 we describe the persistent lawbreaking of the squatting communities on the nineteenth-century frontier and the dramatic impact they had on the development of American land law.

The key difference between the acquisitive and expressive categories is the distinction between intentional lawbreaking that generates immediate and substantial benefits for the lawbreaker and lawbreaking that generates no such *immediate* benefits but that instead self-consciously aims to achieve (or generate support for) a larger legal goal. Of course, in drawing this distinction we recognize that self-interest and expression can often seem like inseparable halves of the same whole; nevertheless, we think that it is appropriate to draw some descriptive and normative distinctions between the two, recognizing, of course, the need for caveats and the presence of borderline cases.

Even though unauthorized activity takes place in both the property and the intellectual property contexts, intellectual property law, particularly copyright, has tended to tolerate more gray areas than other types of property regulation. To take one example, the copyright doctrine of fair use, about which we will have more to say later, is notoriously indeterminate. Rather than establishing clear rules, the fair use test sets forth a series of factors that courts are to weigh in determining whether a particular use is lawful or infringing. The consequence of this for copyright is that, unlike

in the case of the squatter or the sit-down trespasser, both of whom violated clearly established legal norms, for an enormous number of uses of copyrighted material, it is often difficult to say *ex ante* whether the user is an "outlaw." For this reason, and as we discuss in more detail in chapter 5, it is frequently more accurate in the intellectual property context to speak of "altlaws" rather than "outlaws." Because of the cloudiness of many intellectual property doctrines, intellectual property altlaws are more likely to be able to claim that their particular interpretation of the law is consistent with existing law than are property outlaws. In chapters 6 and 7 we discuss two stories of disobedience—one that focuses on the realm of patent disobedience in the global movement toward access to HIV medicines, and another that focuses on the significance of citizen journalism in the face of copyright restrictions. Both stories highlight the same expressive and acquisitive trajectories of real property disobedience that we explore in earlier chapters, but they also offer a much wider arena for contemplating whether the language of illegality properly attaches to such behaviors and whether the differences between intellectual property and real property require us to use different lenses altogether.

In part 3 we apply the theoretical and normative implications of our analysis to offer a series of suggestions concerning how the law should respond to property outlaws and altlaws. Here, we recognize that some forms (indeed most) of lawbreaking are unproductive. For this reason, our analysis does not aim to offer a categorical defense of the practice. Instead, we argue at the most general level that, in light of the importance of property outlaws to the evolution of property doctrine, the state's response to outlaws should be structured in specific ways to ensure that people are not overdeterred from (or unjustly punished for) challenging existing property regimes. The value of at least certain categories of property lawbreaking is twofold. First, there may in certain situations be value in the outlaw's directly redistributive conduct. That is, there may be circumstances under which we determine that the lawbreaker's decision to take someone else's property, either for him- or herself or for another, is itself defensible. We refer to this phenomenon as the lawbreaker's creation of "redistributive value." Second, in cases of persistent, widespread lawbreaking, citizen behavior may communicate useful information to property owners and to the state, indicating that some element of property law,

or some dimension of the owners' use of property, may be out of date or unjust. We refer to this signaling function provided by outlaw conduct as its "informational value." If property lawbreaking is perfectly deterred, either through draconian penalties or certain enforcement, each of these categories of potential value stands to be eliminated.

There are some indications that we might be headed toward overdeterrence, at least in certain areas. Although a far cry from our hypothetical law-enforcement machine, advances in the technology of property-rights enforcement have the potential to reduce the expected rewards of property lawbreaking to such an extent that any redistributive and informational value of such lawbreaking would be eliminated. This is particularly true in the arena of intellectual property, where the rise of digital technology, in combination with the Internet, has increased the ability of intellectual property owners to monitor and control how ordinary citizens use their products.

In light of these implications, we propose a set of policy responses that lawmakers and law enforcers can use to balance property's dual role as a source of stability and a locus of recurrent conflict and to preserve space for the possibility of productive forms of disobedience while discouraging its more destructive forms. Because the implications of our discussion differ somewhat for tangible and intellectual property, we address the two areas separately. In chapter 9 we focus on tangible property. Our proposals in this area are relatively modest, largely because the law of tangible property already contains within it a number of venerable doctrines that, in our view, acknowledge the value of a significant amount of lawbreaking. The doctrines of adverse possession and necessity, for example, provide mechanisms for nonconsensual transfers of property under certain constrained conditions. Although there have been some efforts in recent years to roll these doctrines back, or limit their application, we favor preserving them and even expanding them in a number of respects.

In chapters 10 through 12 we turn our attention toward intellectual property. When altlaws successfully defy the wishes of intellectual property owners, they can generate substantial redistributive value by shifting legal entitlements away from owners. Similarly, their conduct generates potentially valuable information about the popular conception of (or rejection of) the intellectual property owner's version of the law, and

provides an important opportunity for decision makers to clarify or revise official legal norms defining the intellectual property owner's rights. Although we draw on the similarities between outlaw and altlaw conduct in our exploration of how the law might respond, we also draw on a series of special considerations that focus on preserving innovation in the face of the complex legal challenges presented by the altlaw.

It is important to note, at the outset, that this book is not meant to be construed as a repudiation of the power and importance of the rule of law. That would be an unduly simplistic account of what property disobedience actually comprises. Instead, our project emerges from a strong faith in the rule of law, but one that embraces the occasional productive instability introduced by the forces of disobedience and that, in doing so, hopes to gain important insights into the law's proper response to the challenge posed by outlaws. Our goal, therefore, is not to undermine the institution of private property but to better understand its complexity and dynamism and, in the process, to spark new conversations about the direction that property and intellectual property law should take in the future.

PROPERTY OUTLAWS

LAW

How Squatters, Pirates, and Protesters Improve the Law of Ownership

Eduardo Moisés Peñalver and Sonia K. Katyal

Property Outlaws puts forth the intriguingly counterintuitive proposition that, in the case of both tangible and intellectual property law, disobedience can often lead to an improvement in legal regulation. The authors employ wide-ranging examples of the behaviors of "property outlaws"—the trespasser, squatter, pirate, or file-sharer—to show how specific behaviors have induced legal innovations.

"A powerful thesis, gracefully articulated."—**Tim Wu,** Professor of Law, Columbia Law School

"*Property Outlaws* offers a sparkling account of the ways in which lawbreaking can both strengthen and reshape the law. Peñalver and Katyal remind us that virtue can be found both in provocation and enforcement—and that a society wins when neither has carte blanche."—**Jonathan Zittrain,** Professor of Law, Harvard Law School, and Co-Founder, Berkman Center for Internet and Society

"Although on one hand we profess absolute belief in property rules and rights, on the other hand we often secretly celebrate urban squatters, drug patent violators, music downloaders, and others who defy the laws of property regimes. In a brilliant and provocative argument, Peñalver and Katyal argue that not only is such law-breaking justified—it is a necessary tool for social and legal change."
—**Laura Underkuffler,** J. DuPratt White Professor of Law, Cornell Law School

"From the illegal occupation of tribal and federal lands by white squatters to the Indian occupation of Alcatraz Island, from the lunch counter sit-ins to the online posting of a major civil rights film without consent of the filmmaker, Peñalver and Katyal show how those excluded from property have shaped property law and ultimately social life by intentionally infringing on the rights of owners. A major achievement."—**Joseph William Singer,** Bussey Professor of Law, Harvard Law School

"We have needed this book for a long time. For the first time, two legal scholars have woven the history of civil disobedience with the development of property law in both tangible and intangible forms."
—**Siva Vaidhyanathan,** The University of Virginia

"Eduardo Peñalver and Sonia Katyal offer a challenging and insightful account of disobedience and boundary-skirting in property law. Linking real and intellectual property law, *Property Outlaws* shows how such resistance can and should affect our concepts of law, as well as justice."—**Rebecca Tushnet,** Professor, Georgetown Law School

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