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Response

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ESSAY

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I am grateful to Cornell Law School for organizing this panel discussion and to the *Cornell Journal of Law and Public Policy* for publishing the proceedings and for giving me an opportunity to respond to the excellent comments of the panelists. I am particularly grateful to my colleague Laura Underkuffler for her generous praise of the book, and I find little to disagree with in her comments. She is right to distinguish between the utilitarian case for redistribution and justifications built around objective conceptions of human need.

Although we tried in the book to emphasize the distinction between the two frameworks, we hoped to avoid having to engage with the deeper theoretical conflicts that arise between them. Instead, our goal was to explore the possibility of an overlapping consensus with regard to how these competing accounts respond to the phenomena of property outlaws. I agree with Professor Underkuffler that the "politics of need" describes the moral universe very differently than the utilitarian or economic language of preferences and desires. But I do think the situations the former identifies for ratifying forced exchanges will usually coincide with those identified by the latter. Nevertheless, Professor Underkuffler's comments convince me that we should have discussed in more depth the potential for conflict between the two accounts and explored more fully the situations in which they diverge.

Professor Lastowka's thoughtful remarks also provide an opportunity to offer a few clarifications of our thesis. In his comments, he makes four important points: (1) that, contrary to our motivation in writing the book, the image of "outlaws" does not really need to be rehabilitated, since they are embraced within popular culture, as figures like Robin Hood and Jean Valjean make clear, (2) that we have conveniently picked our examples to portray outlaws in an unambiguously favorable light, (3) that we should not favor self-help redistribution because of its potentially harmful consequences, and (4) that, in a democracy, disobedience must be a marginal technique of political expression with very limited significance. Although I find much to agree with in Professor

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Lastowka's insightful remarks, I would like to offer a few counterpoints as well.

Responding to our assertion that outlaws are not generally held in high regard, Lastowka explains, "I would argue that 'the image of the intentional property outlaw' is really not so tarnished. Indeed, my sense is that we have a certain level of attraction to outlaws of all sorts—at least when they keep their distance from our daily lives."[1] His qualification about the attraction to outlaws—even in popular culture—helps to illustrate the ambivalent role outlaws play in our legal culture. We sometimes exhibit a soft spot for outlaws, but primarily when they "keep their distance." And yet, as Lastowka points out, "[i]f a property outlaw is simply someone who fails to follow the letter of property law, the majority of people are property outlaws."

It is this tension—our simultaneous fascination and discomfort with property disobedience, even while we go about violating property laws—to which we refer in discussing the importance of exploring the phenomenon in greater depth. In addition, while our popular culture does provide examples of likeable outlaws, when it comes to actually discussing whether outlaws have a role to play in a functioning property system, most legal scholars make no room for them. Thus, the dominant economic analyses of theft find no possibility of productive elements—whether redistributive or informational—within forced exchanges. Our goal is to move beyond simple romanticism about Robin Hood or the Rebel Alliance and to explore whether our culture's occasionally positive attitudes towards property disobedience is grounded in any good that they actually accomplish and, if so, whether that good is (or can somehow be) reflected in legal structures.

Lastowka worries that we have cherry picked our examples to highlight the positive examples of disobedience, to the neglect of the mostly negative consequences of disobedience. He asks:

> Peñalver and Katyal stack the deck by offering us the outlaw protester, the homeless squatter, Jean Valjean stealing bread for the children, and the politicized hacker. The majority of non-violent property outlaws are probably the shoplifters of the world. Are they also in need of image rehabilitation? Do they provide the same sorts of social benefits that the book's noble outlaws provide?[2]

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[1] Greg Lastowka, *Property Outlaws, Rebel Mythologies, and Social Bandits*, 20 CORNELL J.L. & PUB. POL'Y. 377 (2010).

[2] Lastowka, *supra* note 1, at 384.

The default position in most legal scholarship is that property disobedience is unjustified and unproductive. At the same time—as Lastowka acknowledges when he says that virtually everyone violates property laws—this overridingly negative attitude towards property disobedience, particularly in legal scholarship, is clearly not the entire story.

Thus, although we acknowledge at the outset that most forms of disobedience are unproductive,[3] we self-consciously chose to provoke readers' attention by presenting examples of disobedience that successfully generated legal reforms. We do not suggest that these examples are representative of the universe of property disobedience. Indeed, we go out of our way to note that they are not. As we note in the introduction, the category of "outlaws" includes both the civil rights sit-in participants and those who, since 1964, have continued to deny equal access to places of public accommodation.[4] But, we do want to highlight the possibility that some disobedience is productive and that such a phenomenon can help to explain existing features of the law that have proven puzzling to legal scholars (e.g., certain features of the law of adverse possession or necessity). At the same time, we hope to complicate the implications of acknowledging that, as Lastowka puts it, "[t]he majority of non-violent property outlaws are probably the shoplifters of the world."[5] In that regard, our examples are not wholly unrepresentative. Although the 19th-century squatters on the American frontier now enjoy the respectable status of "pioneers," they were – at the time – described as little better (and often much worse) than shoplifters. The same can be said of today's file-sharers.

The challenge is to acknowledge that the enforcement of property laws is vitally important to owners and to society as a whole, while at the same time recognizing the complexity of the phenomenon of property disobedience. Correspondingly, the category of disobedience sweeps in those who conscientiously dissent from the legal status quo; those who callously disregard the rights of others; those who unintentionally transgress confusing property norms; those who are desperately on the edge of survival; and many others (including some who would fit under more than one of these descriptions). The question is whether a system of property that seeks—as ours surely does—to discourage or punish the "shoplifters of the world" can find ways to do so without losing sight of these other, more ambiguous, consequences of lawbreaking. As we put it in the book:

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[3] EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 18 (2010).

[4] *See id.* at vii–viii.

[5] Lastowka, *supra* note 1, at 384.

> It goes without saying, then, that acknowledging the complexity of property disobedience does not mean canonizing any of the groups we describe. Thus, as we say in the Introduction, there is no guarantee that disobedience will be directed towards 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. 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.[6]

Our position is not in favor of outlaws generally, or even squatters in particular. It is in favor of recognizing the complexity of the category of property disobedience. Thus, while (as a policy matter) we generally approve of the Homestead Act, that does not require us to disregard settlers' own injustice towards Native Americans. Our main purpose in telling the story, however, was to highlight the role that squatting had in shaping federal land law over the course of the nineteenth century and trying to determine whether there are any broader lessons to be gleaned from that role.

The ambiguity of the nineteenth-century squatters leads nicely into Lastowka's third criticism: that we are not adequately sensitive to the dangers of self-help redistribution as a means to economic justice. A poor person can inflict significant injustice as he goes about trying to satisfy his own needs. We agree with Lastowka's wise concern about this danger. For just this reason, we warn that "associated with any government decision to permit violations of general laws against forced transfers [of property] is the risk of creating negative spillover effects that could easily outweigh any short-term gains achieved by a specific forced redistribution."[7] And these risks are often concentrated on other people on the margins of the property system, who are less able than the well-to-do to fend for themselves.

But, even taking into account these risks, situations will arise in which the injustice of the existing distribution is so great and the prospects of adequate state response are so dim that the costs are worth paying. This is not, and we do not argue that it is, a strategy that a state ought to pursue as an explicit goal. We therefore agree with Lastowka

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6 PEÑALVER & KATYAL, *supra* note 3, at vii.

7 *Id.* at 131.

that "any state that relies on modern-day Robin Hoods as a significant source of redistributive value has clearly failed to meaningfully protect the interests of its citizens."[8] In fact, that is precisely our point in presenting, as we suggest self-help as an alternative to state-coordinated redistribution.

But our book is not an exercise in ideal theory. Rather, it is an attempt to grapple with property systems as they actually exist—in a world with imperfect legislatures and occasionally heartless (or clueless) democratic majorities. In this world, government inevitably fails from time to time, sometimes because of indifference and sometimes because of a lack of information. And when it does so, disobedience (even disobedience that is not conscientious) can work as a second-best mechanism for satisfying people's needs. More importantly, such disobedience can bring government's failure to the attention of the public and political elites, encouraging it to pursue more efficient means of accomplishing the same goal.

This observation of occasional state failure also sheds light on Lastowka's fourth point. In an ideal state, he says, "we would not seek to encourage most individuals to follow their inner outlaw in lieu of other forms of political participation."[9] He continues by noting that "peaceful civil disobedience tends to be largely symptomatic of a failure in other forums."[10] Lastowka says that, "[i]n a country where more than a quarter of the public declines to vote, I do not think we are at great risk that many people will choose to adopt outlaw tactics."[11]

But, it is important to recognize that low levels of voter engagement can signal either apathy or disgust. The former can result when government is actually working for most people, while the latter constitutes a more troubling symptom of disengagement in the face of a persistently nonresponsive state. Disobedience has a role to play in both contexts. In a functional democracy, Dan Markovits has observed that, even under the best of circumstances, decision-making is characterized by inertia that prevents majorities from recognizing the need for—or summoning the energy to accomplish—legal change.[12] Disobedience therefore plays a crucial role in spurring the kind of democratic engagement necessary for the recognition of latent majorities.

In addition, as Robert Cover recognized, where mechanisms of governance have broken down and no longer respond to majority sentiment—or where (by accident or design) they persistently disfavor

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8 Lastowka, *supra* note 1, at 388.

9 *Id.* at 389.

10 *Id.*

11 *Id.*

12 *See* Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897 (2005).

marginalized minorities—disobedience can constitute a form of resistance that may even succeed in changing existing structures for the better.[13] This is arguably the kind of disobedience undertaken by the participants in the Greensboro sit-ins.

To sum up, we did not write the book because we think all (or even most) disobedience is valuable or productive. And we think the existing law, particularly in the realm of tangible property, often does a reasonably good job of responding to disobedience. In the book, we recount a number of ways that the law of property already accommodates a great deal of productive disobedience through private under-enforcement and doctrines like necessity and adverse possession. We do think, however, that legal scholars have generally failed to recognize the complex role of disobedience within our property system. Our goal is to shed some light on that complexity and on what it can teach us about how property works, and we are grateful to Professor Lastowka for pushing us to further refine some of those themes.

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[13] *See* Robert Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narratives*, 97 HARV. L. REV. 4 (1983).