Property Outlaws

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

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TWO PERSPECTIVES ON PROPERTY OUTLAWS

In part 2, we described several cases in which property disobedience yielded important shifts within existing legal regimes governing property and intellectual property. In this part and the next, we explore the ways in which the law responds to property disobedience, both for better and for worse. Along the way, we point to several doctrines that seem to recognize the value of leaving some space for property disobedience and suggest some ways in which the law (especially the law of intellectual property) might be changed in order to encourage productive disobedience while continuing robustly to protect rights of private ownership.

Inasmuch as property disobedience plays an integral part in forcing the evolution of property law, the property outlaw also faces a substantial risk of punishment or liability. Given the important position that outlaws have occupied in the evolution of property law, however, we believe that it is essential for the law to retain a certain flexibility in its response to them. Although much of our focus in this discussion is on criminal enforcement of property law, the same general observations apply to noncriminal enforcement through sanctions such as damages and fines.

For the purposes of our analysis, we will accept the common characterization of the dominant theories of criminal punishment as either broadly deterrent or retributive. By the former, we mean theories that view the purpose of punishment as creating disincentives that self-interested potential criminals will take into account in deciding whether the possible rewards of a criminal act outweigh the risk of punishment. By the latter, we

refer to theories that identify the purpose of punishment as rooted in moral theories about culpability and just deserts. Although we decidedly do not intend to take sides between these two approaches, our description of the appropriate legal response to property outlaws must vary depending on which theory one prefers. Our argument is premised on the general notion that certain categories of property outlaws are less culpable (or, in consequentialist, deterrent terms, create less social harm—or perhaps even create more social benefits) than ordinary criminals. Accordingly, we analyze a variety of ways in which adherents of both deterrent and retributive approaches can (and, to a certain extent, already do) take into account the productive aspects of disobedience in order to preserve the inherent dynamism that it introduces within property law.[1]

Property Outlaws in Deterrent and Retributive Perspectives

In the classic view, the ultimate goal of deterrent punishment ought to be something very close to zero incidence of the proscribed behavior.[2] Some contemporary theorists have suggested a similar goal, at least as an (admittedly impossibly expensive) ideal.[3] Most recent discussions, however, have abandoned the goal of zero disobedience in favor of punishment that seeks to achieve an "optimal" level of disobedience by forcing criminals to internalize the social costs of their behavior, including both the harm to victims and the costs of law enforcement. These approaches treat the question of punishment as "a generalization of the economist's analysis of external harm or diseconomies."[4] Typically, the process of calculating the optimal level of punishment is described by deterrent theorists as one involving some variation on a mathematical calculation linking, among other things, the likelihood that a criminal will be caught with an aggregation of the harm to victims and the enforcement costs generated by the criminality.[5]

Our argument is that these calculations, whether framed in terms of general or specific deterrence, fail to consider or recognize the productive informational and redistributive potential of some kinds of legal transgression. By overlooking this potentially useful function and failing to recognize that some elements of property disobedience may be more socially productive than others, deterrent models of punishment are likely to call for levels of punishment that overdeter or preclude certain forms of productive transgression. Further, the general tendency of criminal law to overdeter property violations is particularly acute when the technology of law enforcement suddenly improves. Under such circumstances, levels of deterrence that may have been appropriate when the activity in question was relatively difficult to detect are especially likely to prove excessive.

What is the value of some property disobedience that deterrent theorists have overlooked? Two categories are particularly significant. First, there may in certain situations be value in the outlaw's directly redistributive conduct. We refer to this broad category of utility gains as "redistributive value." As scholars have observed, the law of tangible property contains several doctrines that permit forced transfers under certain circumscribed conditions.[6] Second, in cases of persistent, widespread disobedience, citizen behavior communicates vital information to property owners and to the state, indicating that some element of a property law or of the owner's use of the property may be out of date, unjust, or illegitimate in some respect. We refer to this signaling function provided by outlaw conduct as its "informational value." The information generated by outlaw conduct can, under the right circumstances, persuade property owners or the state to reevaluate their commitments to the status quo.

In contrast to the forward-looking, consequentialist approach associated with deterrence theory, the retributive theory centers not on the consequences of outlaw conduct but rather on the punishment the offender deserves in light of the moral character of the conduct. As Michael S. Moore has put it, "*retributivism* is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it."[7] From a broadly retributive point of view, the argument that certain categories of property outlaws should be tolerated (or subject to reduced sanctions) by the state relies on two intuitions: first, as a general matter, those who nonviolently break property laws are less morally culpable than other types of lawbreakers; and second, the violation of outdated laws or of laws that perpetuate unjust distributions of property is less blameworthy than other criminal acts and may even at times be justified. The first intuition is already embodied, albeit incompletely, in the criminal law, which treats crimes against persons as much more serious than similar crimes against property. The

second intuition, which is similarly appealing, has also been incorporated into existing law, though not as robustly.

The foregoing discussion suggests that retributive theorists would be far more interested in the (re)distributive justice of property-outlaw behavior than in its informational value. After all, the notion of informational value resonates more strongly with the consequentialist focus of deterrence theorists. Nevertheless, assuming a degree of punitive indeterminacy within retributive systems of punishment, the informational value generated by property outlaws can be relevant within retributive theories as well.

The Types of Outlaws Revisited

Acquisitive Outlaws

ACQUISITIVE OUTLAWS IN DETERRENT PERSPECTIVE Through the forward-looking prism of deterrence, the law is rightfully viewed as reluctant to encourage disorder by loosening the punitive sanctions associated with property lawbreaking. Economists generally regard encroachments on property rights as socially wasteful rent seeking. Indeed, this analysis forms the principal basis for the most common economic arguments against theft.[8] Nevertheless, the consequentialist case for involuntary transfers of property can be quite strong when there is reason to believe that the outlaw places a higher value on the property in question than the true owner and there is some obstacle to a consensual transfer between the parties. People who have nothing (or very little) will have limited means to express in market offers the value they place on an item of property.[9] Consequently, involuntary transfers may be one of the few options available to them. The difficulty lies in identifying situations in which the outlaw truly does value the property more than the owner and in which the long-run effects of permitting occasional violations of the default rule against involuntary dispossession will not swamp the benefits created by permitting the transaction.[10]

The doctrine of adverse possession, which permits long-term trespass to mature into formal title, provides a useful illustration of this tension at work. The adverse possessor's long-term use (and improvement) of the property, combined with the risk of civil and criminal sanctions, will in

many cases constitute strong prima facie evidence that the lawbreaker places high value on the property.[11] When these factors are coupled, as adverse possession requires, with a lackadaisical response by the true owner, the law achieves a high degree of confidence that the possessor values the property more than its absentee owner does. The relative ease with which property owners can protect their rights and the heavy burdens placed on adverse possessors diminish the ancillary costs of creating such a legal mechanism for forced transfers.

But situations in which the rigorous requirements for adverse possession are met are not the only circumstances under which the law might be justified in inferring that the lawbreaker places a higher value on property than its true owner does and in which the benefit of recognizing a forced transfer would not be outweighed by the long-term effects of recognizing the lawbreaker's claim. Traditional adverse-possession law gains confidence from the failure of the true owner to step forward and enforce his or her property rights, which indicates that the owner places abnormally low value on the property. Comparable confidence may arise when there is good reason to think that the nonowning claimant values the property at an abnormally *high* level in the absence of any countervailing evidence that the true owner places similarly exceptional value on the property. This might occur, for example, when the distribution of property rights is extremely skewed, the true owner is very wealthy, the acquisitive outlaw is very poor, or other conditions, like survival or a broader conception of necessity, weigh in favor of a legal reevaluation of entitlements. On a dangerously cold night, the homeless man almost certainly values the sheltered entrance to a large shopping center more highly than even the most attentive owners value their right to exclude him. He simply cannot communicate his preference in an intelligible way within a system of consensual market transactions. Under these and similar circumstances, consequentialist considerations would seem, as a prima facie matter, to call for the law to at least temporarily accommodate the demands of the nonowner.

Apart from the direct redistributive value that results from certain involuntary transfers, pervasive and persistent acquisitive outlaw conduct can generate important and valuable information about the existence of misallocations of property rights. Concentrations of disobedience clustered around discrete legal entitlements might suggest that transaction

costs or wealth effects are standing in the way of what would otherwise be a beneficial transfer of rights. In England, for example, it was common in the twentieth century for outdoors enthusiasts to trespass on private land as they "rambled" over the countryside. Such acquisitive outlaw conduct went on for decades, sometimes accompanied by expressive forms of disobedience, until it caught the attention of the Labour Party, which ultimately responded by eliminating landowners' rights to exclude ramblers from "open" rural lands that did not implicate concerns for privacy.[12] Particularly when their conduct is pervasive and protracted, acquisitive outlaws generate an informational value above and beyond any redistributive value their behavior may have. This informational value, however, has been largely disregarded in economic discussions of nonconsensual transfers.

Of course, in the case of acquisitive outlaws, the quality of the information generated is undermined by the self-interested nature of the outlaw's behavior. In the context of market transactions, an offer to give something up in order to consummate the purchase gives us fairly reliable information about the value the acquiring party places on a shift in legal rights, though this information is distorted by wealth effects.[13] In the case of a forced transfer, however, we cannot tell from the outlaw's conduct the extent to which he or she values a shift in entitlements, whether for the limited purpose of the specific transaction in question or for systemic legal change more broadly. The truth of two (at least) plausible assumptions, however, would reinforce the informational value of persistent, widespread disobedience. First, in a well-functioning society, it is likely that most citizens possess an intrinsic willingness to obey the law, a willingness that is particularly pronounced when the law faithfully reflects broadly shared values.[14] And this seems true irrespective of the private gains some citizens might derive from breaking the law, particularly when they perceive that the law is fair and is widely obeyed by their fellow citizens.[15] Although empirical evidence in support of this view of the effect of criminal deterrence is unsettled, our position is at least a plausible one and has been embraced by a number of leading scholars.[16] This assumption is not meant to deny the reality that some people may actually resemble the Holmesian "bad man." For such people, cold, probabilistic considerations of deterrence will be paramount. Barring a widespread breakdown in the social

order, however, most people will opt for legal mechanisms of acquiring property, and clusters of lawlessness will convey important information. Second, as behavioral economists have found, most people are less eager to pursue someone else's property than they are to keep something they already possess.

The combination of these two factors suggests that, as an initial matter, the behavioral balance is tipped in favor of departing from existing allocations of property only through legal transactions. That bias in turn suggests that when large numbers of people persistently engage in illegal actions aimed at shifting property entitlements away from the status quo, they are likely to be acting in response to fairly powerful incentives or objections. Widespread failure to resort to the market within a particular subgroup, or an intentional and coordinated strategy to shun the market, will therefore often suggest some sort of market failure or widely perceived injustice.[17]

None of this discussion is meant to suggest that we are unmindful of the potential costs involved. As rule utilitarians have frequently (and plausibly) pointed out, associated with any government decision to permit violations of general laws against forced transfers is the risk of creating negative spillover effects that could easily outweigh any short-term gains achieved by a specific forced redistribution. The long-term negative side effects of permitting the activities of individual acquisitive outlaws could take several forms. First, permitting outlaws to either temporarily or permanently retain the property they seize might well encourage property owners to resort to violence in order to protect their property or might discourage them from making productive investments in their property out of fear of losing it. Second, tolerating forced acquisitions in one case might erode the general deterrent effect of the criminal law and encourage further acquisitive behavior in broadly analogous situations by opportunists with less compelling claims than the original lawbreakers. And third, permitting lawbreakers to profit from their actions could more generally undermine respect for the rule of law.[18]

Of particular concern is the possibility that, over the long run, the general deterrent effects of permitting certain forced transfers will generate harmful feedbacks that actually magnify the harm caused by the illegal act, repercussions that would minimize the possibility that ratifying the forced

transfer could be beneficial for society as a whole. For example, numerous adherents to the "broken windows" theory of criminal behavior have repeatedly hypothesized about the crime-amplifying effects of visible disorder.[19] Permitting some forced transfers might conceivably contribute to such a feedback process, especially if the forced transfers were concentrated around neighborhoods already suffering from the effects of pervasive disorder.

Although these effects raise serious concerns and should not be treated lightly, none of them rules out in advance the possibility that if the benefit of a forced transfer is great enough for a large enough number of people, legalizing certain categories of forced transfers, temporarily or permanently, can be a productive solution that ultimately reinforces, rather than undermines, the rule of law. As Frank Michelman has observed, the nature and extent of owners' responses to "forced sharing" raise difficult empirical questions that cannot be determined a priori through abstract reasoning.[20] In other words, in cases of extreme want, permitting forced transfers could be beneficial, even over the long run.

Further, if the pressure for the particular type of forced transfer within a community is broad enough, legalizing the transfer may *increase* order and respect for the rule of law and for property rights by bringing the official law into greater conformity with people's sense of justice and fairness.[21] For example, among squatting communities in the nineteenth-century United States, the perception that land policy was patently unfair and unworthy of obedience threatened to undermine squatters' respect for the rule of law more broadly.[22] Bringing the law of land distribution into conformity with the widely held views of the local community—by ratifying squatters' (illegal) appropriations—converted a group of outlaws into a group with something at stake in protecting the (modified) property system.

A similar intuition appears to underlie the arguments made by Hernando de Soto with respect to the benefits of granting title to squatters in Lima, Peru. In Peru, where the mass of people are cut off from property ownership by their own poverty, residents have frequently resorted to concerted land invasions to occupy underutilized land, both public and private.[23] As de Soto observes, "people are capable of violating a system which does not accept them, not so that they can live in anarchy but so that they can build a different system which respects a minimum of essential rights."[24] De Soto notes that 69 percent of the houses built in Lima in 1985 were constructed on unlawfully occupied land. Under the circumstances de Soto describes of widespread rejection of the existing distributive order, ratifying the conduct of property outlaws—or accommodating them by creating a formalized process by which they can accomplish the goal of ownership—can ultimately become an order-enhancing, not an order-destroying, strategy.

Other observers of squatter communities throughout the developing world have commented on their impressive, albeit largely informal, orderliness. Robert Neuwirth ultimately concurs with de Soto and others who have argued that—for better or for worse depending on one's orientation—once squatters' claims are recognized, squatters typically become fierce defenders of their property rights and, by extension, supporters of the legal order from which they were formerly excluded.[25] The simultaneous radicalism and conservatism of squatters explains why they have so frequently been attacked by commentators on both the left and the right: they are suspect to the right because their squatting begins in an act of defiance of the established legal order; and they are suspect to the left because when they succeed, they reinforce the very systems of private ownership they initially transgressed.[26]

For analogous reasons, how others respond to a system of forced sharing will depend on the precise means by which that sharing is accomplished. Not all disobedience, even of the acquisitive variety, need contribute to a sense of widespread disorder that would undermine broader crime-control efforts. An act of illegal appropriation may actually contribute to visible *order*. For example, squatters in the American West created elaborate (and ordered) systems of informal law to protect their investments should their legality some day be recognized.[27] Similarly, de Soto has observed that organized squatters in Peru often keep meticulous land records indicating who "owns" which parcel and take great pains to defend their informal property rights against owners and "ordinary criminals."[28] A great deal of urban squatting in the United States in the 1970s and 1980s was highly organized and likewise may have worked to displace the preexisting disorder generated by extensive urban abandonment.[29] Urban squatters were fixing broken windows, not breaking them. It is per-

haps for this reason that neighborhood residents were typically supportive of urban squatting efforts, notwithstanding their illegality.

ACQUISITIVE OUTLAWS IN RETRIBUTIVE PERSPECTIVE It is commonplace within theories of civil disobedience to distinguish between conscientious disobedients who violate laws with the self-conscious purpose of drawing attention to the injustice of the laws they oppose and mere criminals motivated by greed or selfishness. Ronald Dworkin's theory of civil disobedience, for example, actively privileges conscientious lawbreakers (who overlap substantially with our own category of expressive lawbreakers) over other types of criminals.[30] Indeed, for Dworkin, the principal difference between the most justified and least justified forms of civil disobedience turns on the degree of intensity with which the disobedient citizen views the violated law as unjust. Accordingly, under his view of civil disobedience, many of the people we have called acquisitive lawbreakers would not fare particularly well. Their subjective motivation, although often a mystery, frequently appears to be little more than a self-interested desire to acquire property rights currently in the hands of others.

The central message sent by the acquisitive outlaw's actions is that another person owns something that the outlaw wants (or needs) but that he or she will not (or cannot) purchase in a voluntary transaction. In most cases, this desire for the property of another will be unworthy and unjustified, and society correctly responds to the lawbreaker's behavior by punishing the transgression. But, as we have shown, at times external conditions might call into question, or at least lead us to soften, our reflexive tendency to penalize the lawbreaker.

In contrast with Dworkin, we believe that the justification of an act of acquisitive disobedience can turn on the objective content of the law and the facts on which the law itself operates, not just on the subjective attitude of the outlaw. In reaching this view, we draw on a long, though recently neglected, tradition within Western property thought.

Early Christian thinkers, for example, viewed the failure of the rich to share with the poor as tantamount to theft.[31] John Chrysostom typified this point of view when he wrote that "not to share our own wealth with the poor is theft from the poor and deprivation of their means of life; we do not possess our own wealth, but theirs."[32] In the thirteenth century,

Thomas Aquinas built on this tradition when he argued that a poor person who takes what he needs from the "superabundance" of another is simply taking that to which he is already morally entitled, and consequently, does not commit the crime of theft.[33] Indeed, in Aquinas's time, canon lawyers believed that the destitute were permitted to complain to ecclesiastical authorities when local elites failed to comply with their duty to share their resources with the poor. A priest or bishop could then compel the wealthy to give alms, using the denial of absolution and the threat of excommunication, if necessary, to achieve his goals.[34]

On the American frontier, squatters frequently invoked the doctrine of necessity, often expressed in terms that echoed medieval natural law ideas, in order to justify their own trespass on public and private lands. Writing about squatter conceptions of ownership on the nineteenth-century frontier, Donald Pisani observed that the American Revolution popularized the notion that "God had given the Earth to mankind in common and that human beings had the same right to land as they had to air and water." In addition, Pisani noted, settlers believed that "human beings had a right to life and self-preservation—and hence to subsistence." So common were these sentiments among squatters that one military officer charged with the task of removing squatters from mission land in California in 1847 complained that "if there was one more word of the *Law of Necessity* . . . I should be compelled to send [the squatters] forthwith to [Mexico] in irons."[35]

More recently, Jeremy Waldron has endorsed a redistributive principle that "nobody should be permitted ever to use force to prevent another man from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them."[36] Within modern criminal law, analogous intuitions appear to underlie the justificatory doctrine of necessity, although in practice (as we discuss further in the next chapter), the doctrine has been so hemmed in by qualifications and exceptions that it has become virtually inoperative in circumstances of economic need.

It is important to note that, unlike its role within the dominant theories concerning civil disobedience, the subjective attitude of the acquisitive outlaw with respect to the justice of the violated law is not the most relevant factor in this analysis. Calling the lawbreaker's action an act of selfishness, even if the allegation is true, does not undermine its justification un-

der our inquiry. Instead, what matters is whether, as a question of objective distributive justice, the lawbreaker took what he or she badly *needed* from the superabundance of another in such a way that those actions avoided an even greater evil. Someone in dire need is certainly not justified in taking from someone else in dire need. The outlaw's subjective view regarding the objective injustice of the existing property distribution, however, is not the critical factor.[37]

Even assuming the justice of acquisitive actions under the most extreme circumstances of need, the more interesting question is whether there is an argument that the category of justified acquisitive conduct extends beyond the situation of the person in immediate need of sustenance for physical survival. We limit ourselves to the observation that there are plausible theories of distributive justice that would be amenable to permitting some additional room for self-help beyond the extreme case of, say, imminent starvation. In large part, the question turns on the breadth of one's definition of "necessity." Many people would admit the validity of some acquisitive actions to fulfill basic human needs but then argue for an extremely narrow understanding of "need" as encompassing only those items necessary to sustain physical survival.

Notwithstanding substantial economic inequality and poverty, in an affluent society like ours, the number of people who might need to violate property laws in order to stave off imminent physical harm attributable to poverty is likely to be very small, though not zero.[38] In a highly unequal society in the developing world, the numbers will be much larger, as de Soto's work illustrates. Worldwide, roughly a billion people live on land that is not their own, many of them in conditions of extreme deprivation. Some observers estimate that by 2030, one in four people on the planet will be squatting. As one commentator has put it, "the overwhelming majority of the world's one billion squatters are simply people who came to the city, needed a place to live that they and their families could afford, and, not being able to find it on the private market, built it for themselves on land that wasn't theirs."[39]

Many theorists have argued for a broader understanding of necessity beyond these situations of dire need in both the developing and developed world. Thinkers as diverse as Aristotle, Adam Smith, and, more recently, Amartya Sen and Elizabeth Anderson have, for example, agreed that the

category of human need extends well beyond the basket of goods necessary to stave off starvation and exposure.[40] In particular, they have focused on the intuition that because human beings are social animals, their legitimate "needs" include the property necessary to facilitate a minimally acceptable degree of participation in the social and political life of their respective communities. Given the differences in material circumstances of various communities and, accordingly, the different material preconditions for effective participation, this understanding of necessity is likely to yield different concrete definitions of need for differently situated societies.[41]

As Adam Smith put it in his *Wealth of Nations*, the category of "necessaries" includes "whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without"—for example, leather shoes, a commodity that might be viewed as a luxury or perhaps as an eccentricity in other cultures, but that was a minimum requirement for even the most basic level of social respectability in Smith's England.[42] Building on Smith's culturally relative definition of needs, Amartya Sen has proposed a definition of poverty that considers the material commodities necessary to permit a person to survive physically and to participate, at least at some minimal level, in the social life of the community.[43]

If we employ this metric while shifting our attention away from subsistence economies, the commodities necessary to participate minimally in the life of a community are likely to expand.[44] Presumably, in some communities or at some time in human history, a loin cloth, some tools or weapons, and a makeshift shelter would have been sufficient to be a member of the community in good standing. A comparable list for life in the twenty-first-century United States would include substantial quantities of clothing, a fairly sophisticated shelter with indoor plumbing and various utilities (electricity, gas, telephone service), a series of functional household appliances, and an effective means of transportation.[45]

As a community becomes more affluent, the list of commodities needed to participate in community life tends to expand. This is why items that were once regarded as luxuries, such as indoor plumbing, are now considered minimal requirements of habitability and why, notwithstanding indoor plumbing's onetime status as a luxury item, we are justified in con-

tinuing to refer to housing that lacks indoor plumbing (and even to much housing that has it) as unacceptably "poor." Seen in this light, arguments that the poor are materially well off in comparison with the poor of the last century often come off as incurably obtuse.

To a limited extent, existing law recognizes the importance of this expanding list. For example, landlord-tenant law permits tenants to engage in self-help by, for example, refusing to pay rent or deducting the cost of certain essential repairs from the rent when the landlord fails to maintain the property adequately.[46] And the circumstances that would justify such a refusal to pay rent encompass features of residential property, such as running water, that would have been viewed as housing luxuries a century ago.[47] Unfortunately, the legal protection of an individual's right to receive most of these services is inadequately protected by existing law.

Extending Sen's context-specific definition of "need" to the question of self-help, one could plausibly argue that the propertyless person is entitled to take from the property of others not just what is necessary to sustain physical existence but also at least some of those commodities needed to permit a minimal participation in the life of the community. This assertion sounds fairly radical when stated in the abstract. Nevertheless, existing property doctrines like the implied warranty of habitability, adverse possession, and necessity suggest that self-help redistribution is already accepted, in a circumscribed way, by current property laws. As we discuss at greater length below, we are not calling for the creation of new legal categories so much as the expansion of existing tools. The necessity doctrine, for example, need not encompass every element of the expanded list of needs. After all, on most accounts, the entitlement protected by the doctrine does not guarantee the right to avoid any need at all, but only "dire" or some similarly qualified need. Still, a broader understanding of human need might justify expanding the prerequisites for an assertion of necessity beyond a showing of imminent physical harm.

Expressive Outlaws

EXPRESSIVE OUTLAWS IN DETERRENT PERSPECTIVE Expressive outlaws present deterrent theorists with a different calculus, in large part because of the relative modesty of their demands. They do not seek to take possession of someone else's property for themselves. Indeed, because expressive outlaws are not attempting to acquire property for themselves, they have fewer incentives—aside from a desire to express their legal preferences—to engage in the lawbreaking activity to begin with. As Eric Kades has argued, their willingness to risk injury or jail in order to express their dissent therefore suggests that they place an exceptionally high value on changing the legal status quo. Moreover, the visibility they bring to what may have been a sublimated legal disagreement (for example, the myth of black acquiescence in the private segregation of the Jim Crow South) means that their activities generate information for those in political power. And, unlike in the case of acquisitive outlaw conduct, this information is not tainted by the same degree of material self-interest.[48] Finally, because expressive outlaws are typically organized, their activities may not contribute to the same extent as decentralized acquisitive outlaw behavior to an increase in visible disorder that could undermine respect for the rule of law among the general population. The lunch-counter sit-in protesters, for example, were nothing if not orderly, as even some of their opponents conceded.

But a rigorous examination of the expressive outlaw requires recognition of a paradoxical caveat: to legitimize, *ex ante,* the lawbreaker's activity would radically undermine the expressive message itself.[49] That is, part of the message is intrinsically tied to its status as disobedience; to legitimize the disobedience would therefore dilute, and even counteract, the message's vitality.[50] Accordingly, although we advocate a reevaluation, after the fact, of the proper level of punishment of expressive outlaws, we remain cognizant of the expressive value that is generated by the lawbreaker's willingness, before the fact, to accept punishment, and we thus are reluctant to advocate a prospective change in rules.

Given the intrinsic link between the illegality of their conduct and the quality of the information that the conduct provides, it is not clear that generally applicable and substantive legal accommodation before the fact is a desirable response to expressive outlaws, even from the point of view of the outlaws themselves. It is not surprising, for example, that many of the lunch-counter sit-in protesters specifically wanted to be jailed and in some cases even objected when judges proposed suspending their sentences.[51] The converse was also true, and opponents of civil rights were sometimes eager to avoid enforcing the law against protesters in order to deny them

the platform created by acts of civil disobedience. As Kades correctly puts it, "if it is the illegal nature of civil disobedience that grabs the attention of the rulers, then eliminating all sanctions will render the tactic less effective."[52] However, as Kades further points out, this logic does not preclude substantially lightening the punishment meted out to expressive outlaws.[53] Expressive lawbreakers do appear to generate less social harm than the typical criminal. Any consequentialist accommodation of expressive outlaws would, however, seek to minimize harm to property owners while preserving the expressive value of the disobedience itself.

EXPRESSIVE OUTLAWS IN RETRIBUTIVE PERSPECTIVE The retributive justification for expressive violation of criminal laws is, to a certain extent, less controversial than the case for acquisitive outlaws. As Dworkin puts it, "Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community."[54] Much of the standard rationale for tolerating classic manifestations of civil disobedience stems from a widespread recognition of the importance of conscience to individual autonomy. Dworkin, for example, argues that lawbreaking is most easily justified when it is expressive of the view that one is being compelled by the law to perform what one conscientiously believes to be a deeply immoral or unjust act.[55]

Daniel Markovits goes further than Dworkin, arguing that intentional lawbreaking can be acceptable even in the absence of a strongly held belief in the deep injustice of the existing law. Indeed, he argues that disobedience is "an unavoidable, integral part of a well-functioning democratic process" when it is employed to expose and overcome "democratic deficits" caused by inertia built into the democratic political process. Consistent with his majoritarian theory of legal obligation, Markovits limits the scope of permitted "democratic disobedience" to situations in which the act of legal defiance expresses a view that has "significant support among the citizenry" but that has been held in check by the inertia of the democratic process. Disobedience that lacks such majoritarian support cannot persist in the face of a clear expression of majority support for the legal status quo.[56]

Although we welcome Markovits's broader view of the acceptable scope of expressive disobedience, we would go a bit further. In our view, expressive disobedience represents an important part of the political process even in the absence of the democratic deficits that arise when the law fails to reflect already-existing majority sentiment. Instead, we view such lawbreaking as having as a legitimate goal the *creation* of majority sentiment where none existed before.

As Robert Cover understood, allowing groups to live out their alternative legal conceptions uniquely fosters the normative diversity that is essential to life in a free society.[57] Though not all such expressive disobedience need ultimately be embraced by the official lawmakers, its social value provides a reason to create space for such expression, at least to a certain extent. By allowing people to live out an alternative vision of legal possibility, lawbreaking can help overcome what might (to paraphrase Hannah Arendt) be called imaginative deficits, deficits that may well prevent majorities from embracing the previously unexplored shapes that the law might take.[58] As we have already argued, the ability of lawbreaking to demonstrate the range of imaginative legal possibilities beyond the parameters of existing democratic debate is particularly (though not exclusively) strong for those who intentionally violate property laws (as opposed to other sorts of laws).

Even beyond property lawbreaking's imaginative power, however, the formal ratification of concerted illegality can play an important role in protecting minorities against majoritarian oppression. When a minority group demonstrates the intensity of its preference for legal change through an embrace of illegality in the face of a policy supported by only the most apathetic of majorities, considerations of fairness arguably favor legal change, notwithstanding the persistent absence of majority support for affirmatively implementing such change. Under these circumstances, a fair solution might be to put the strength of majority sentiment to the test (that is, to gauge its ability to overcome the inertial forces Markovits describes) by providing the opportunity for legislative override of the requested legal accommodation. Such a move would reverse the direction of the inertial forces to determine whether such mildly favorable majority sentiment can summon up the energy to reassert itself in favor of the old rule.[59]

It is important to note that a significant part of the reduced culpability associated with expressive disobedience, at least as compared with revolutionary action, stems from the civil disobedient's implicit affirmation of

the democratic process through his or her voluntary submission to criminal punishment for the unlawful acts. In other words, expressive outlaw conduct affirms the authority of the community's democratically enacted laws even as it forcefully challenges one particular product of that system. It seems clear that expressive outlaws are less blameworthy than other sorts of criminals, but what is not clear is that the proper response to their reduced culpability is a complete elimination of criminal liability, as opposed to, for example, reduced punishment or targeted relief offered after the fact. We discuss several possible responses to the conduct of expressive outlaws in the next chapter.

9

RESPONDING TO PROPERTY OUTLAWS

Our principal purpose in this book has been to highlight the importance of certain categories of intentional property disobedience to the evolution of property law. In particular, we wanted to bring to the forefront two neglected values generated by some intentional property disobedience—what we have called its redistributive value and its informational value. Given the power of these two values, we argue for a reconfiguration of sanctions in certain contexts. This does not mean that sanctions are always (or even usually) inappropriate; indeed, as we argued in the context of our discussion of expressive outlaws, the expressive outlaw's willingness to face the imposition of legal penalties is part and parcel of the outlaw's expressive force.

We are concerned, however, that, in its approach toward enforcing property norms, the law may aim to preclude too much. As we have argued, the law must take into account the socially productive nature of some property disobedience, not just its social costs. In fact, total deterrence does not appear to be the goal of most contemporary theorists. Moreover, at least in practice, the degree and likelihood of punishment for most property law violations have left sufficient play in the joints of the system to permit some kinds of intentional disobedience to lead to significant legal change.

As we discuss in chapter 11, however, the dynamically evolving technologies and strategies of law enforcement constantly threaten to eliminate the needed flexibility within the enforcement of property laws. In crafting their responses to property outlaws, decision makers must there

fore pay careful attention to these shifts in the technology or strategy of law enforcement that dramatically increase the risks of property disobedience. When enforcement becomes cheap, easy, and pervasive through the advent of new technology, preexisting legal responses can easily become excessive—particularly in cases where the law previously engaged in only sporadic enforcement. If too effective, harsh sanctions can inadvertently stamp out the informational benefits of some property disobedience. In short, dramatic improvements in the ability to detect and punish property disobedience have the ability to shift the potential outlaw's calculus in significant ways, not all of which are socially beneficial.

This focus on the possibility that improvements in the technology of property enforcement can suppress productive disobedience is particularly crucial in the context of intellectual property, where the technology (and policy) of property enforcement is undergoing revolutionary change. But our point is a general one that, as our discussion of adverse possession below illustrates, applies with equal force in the context of tangible property. Of course, there are reasons to doubt that the deterrent force of some punishments, such as those accompanying most trespass statutes, could possibly be excessive, because the crimes are misdemeanors accompanied in practice (at least in this country) by relatively light punishments.[1]

In some cases, however, even nonviolent trespassing protesters have been made to suffer harsh penalties through creative prosecution. For example, in the United Kingdom, nonviolent trespassers advocating the "right to roam" were, in one famous case, sentenced to over a year in prison through the creative use of criminal statutes. More routinely, even misdemeanor criminal trespass can carry prison sentences of up to a year.[2] In addition, in some instances, particularly those involving expressive behavior, injunctions and contempt sanctions have dramatically increased the penalties for even minor property crimes. Added to the actual sentences imposed, the ancillary effects of criminal convictions of *any* sort, such as reputational and professional harm, can magnify the force of even minor criminal sanctions.

Outside the specific context of trespass, punishment for minor property crimes can, through the application of "three strikes" laws and similar laws targeting repeat offenders, lead to the imposition of harsh sentences that might cause even someone in the most dire and uncontroversial situation

of necessity to think twice before violating the property rights of others. In California, for example, under a "three strikes" regime, petty larceny can be punished as a felony if the defendant has a prior conviction for the crime, and any felony (including such elevated "petty theft" convictions) can count as a third strike. The possible effect of this practice was shown in the U.S. Supreme Court case *Lockyer v. Andrade:* the defendant, who had a history of committing property and drug crimes, was sentenced to twenty-five years to life in prison after being caught attempting to steal videotapes valued at roughly $150.[3]

When confronted with a pattern of pervasive and protracted property disobedience, legislators and prosecutors are often tempted to respond by increasing penalties in an effort to increase the deterrent effect of the law. That increased repression often takes the form of enhanced sentences, but it can also occur through increased certainty of law enforcement, as prescribed by the social-influence theories of criminal behavior.[4] Although the strategies of heightened penalties and heightened enforcement are not inherently inconsistent, they are often presented as the only valid alternatives. A third possibility, typically overlooked, is to ratify widespread property disobedience through targeted legal accommodation.

We suspect that most legislators unthinkingly favor the option of increased repression, primarily in the form of longer sentences, over the possibility of legal reform.[5] This is certainly the correct response under many circumstances. Some norms are sufficiently important and entrenched that their violation should not be tolerated. Moreover, the avarice of some people means that a certain level of property crime will persist, no matter how just society's wealth distribution. Much of the conduct that contributes to such background levels of crime is typically unjustified and is unlikely to convey much useful information. Nevertheless, our analysis counsels against the common knee-jerk tendency toward ever higher penalties and instead encourages lawmakers to consider the possibility that spikes in or concentrations of property disobedience can provide an opportunity to reevaluate society's commitment to property law's status quo. Extremely high penalties, combined with the unpredictability of the criminal-justice system, can make the cost of engaging even in justified outlaw conduct too high for most people.[6] Although they may prevent crime, high penalties can stifle the informational value generated by property disobedience—in-

formation that is essential to maintaining property's evolutionary dynamism.

The social-influence approach of increased law enforcement, which advocates an engagement with both the "price" of crime and its social meaning, presents more of a puzzle for our analysis. Proponents of this school of thought often favor a higher-certainty—lower-penalty strategy of criminal punishment.[7] Our analysis lines up, at least to an extent, with the prescriptions of the social-influence theory, but we are also cognizant of the potential chilling effect on justified disobedience of frequent, albeit low-level, punishment endorsed by this strategy. A proper concern with the importance of permitting some leeway for productive and justified disobedience suggests the need to retain a degree of flexibility within strategies aimed at aggressively eliminating disorder—in some cases even counseling in favor of tolerating intentional underenforcement.

Although we believe that property outlaws are sometimes justified in their conduct and can offer society valuable information about inefficiencies or injustices in the property system, the unlawful nature of their behavior *is* cause for concern. In part, this concern stems from the likely uneven and potentially unfair effects of outlaw behavior on property owners and third parties. If property reform is left to the individual actions of outlaws, it is unlikely that the losses imposed on owners will be fairly distributed. Because outlaws typically operate in their own neighborhoods, the result might be actions that perversely make the situation of the poor as a whole even worse.

In part, however, our concern also stems from the dangers that criminal behavior poses to the well-being of outlaws themselves. By engaging in illegal behavior, even if justified, property outlaws take substantial risks. In light of the potential that property owners and their sympathizers will engage in violent self-help, outlaws risk their physical safety. In addition, they risk being burdened by substantial fines, imprisonment, or social stigma. Although their actions may be useful in highlighting areas of needed legal reform, it would be wrong to conclude that the existence of property outlaws is a matter of indifference.

A concern with the unfair potential burdens both on property owners and on outlaws themselves suggests that lawmakers should favor the enhancement of alternative means for potential outlaws to express opposition to the legal status quo. With these qualifications in mind, in this chapter we discuss several possible legal responses to property outlaws. In the next part, we turn our attention to the law of intellectual property. In the context of traditional tangible property law, we divide our discussion of possible legal responses to outlaw behavior into two categories; each corresponds to one of the two principal values we view as being created by property outlaws. Viewing outlaws' redistributive and informational value through the bifurcated lens of outlaw actions and possible alternatives to such actions yields four possible strategies. In response to outlaws' redistributive value, the state may either (1) selectively ratify certain forced transfers or (2) increase systems of government-sponsored redistribution. In response to outlaws' informational value, the state may either (1) incorporate the information generated by outlaw behavior into the political process through deliberative feedback mechanisms or (2) increase subsidies of legal substitutes for expressive disobedience.

Increased governmental redistribution will tend to reduce the need for reliance on forced transfers and on expensive and unreliable procedural mechanisms for weighing the justifications for such transfers after the fact.[8] Similarly, increased subsidization of speech that is subversive of the status quo reduces the pressure to engage in illegal expressive conduct to draw attention to groups' complaints. Conversely, however, in the absence of the state's willingness to create and adequately fund viable alternatives, we can expect continued or increased reliance on disobedience.[9] It is important to note, however, that these two types of strategies are not mutually exclusive.

Responding to Property Outlaws' Redistributive Value

Ratifying Certain Forced Transfers

PRIVATE ACQUIESCENCE One obvious possibility when confronted with an acquisitive outlaw is for the owner to simply make an assessment of the outlaw's need for the property the outlaw has appropriated. In *Habits of the Heart,* Robert Bellah and his coauthors relate a story about John Winthrop, the first governor of the Massachusetts Bay Colony. "When it was reported to him during an especially long winter that a poor man in his

neighborhood was stealing wood from his woodpile," they write, "Winthrop called the man into his presence and told him that because of the severity of the winter and his need, he had permission to supply himself from Winthrop's woodpile for the rest of the cold season. Thus, [Winthrop] said to his friends, did he effectively cure the man from stealing."[10] The same response is open to each owner: to recognize the justice of another's claim on one's own surplus and to act accordingly. This is not "charity," strictly speaking, but rather a private assessment of the justice of the outlaw's claim to one's property. It is only after owners decide against acquiescence in the unauthorized behavior that the sorts of formal legal mechanisms we describe in the remainder of this chapter come into play.

As we explore in more depth in our discussion in chapter 12 of private acquiescence in the context of intellectual property, the nonrivalrous nature of information makes such private accommodation a much more palatable course of action for owners of intellectual property than it is for owners of tangible property; in the context of tangible property, the decision to acquiesce may deprive owners of their own enjoyment of the property in question. Of course, even with tangible property, acquiescence need not entail any disruption in the owner's use and enjoyment of his or her own property. This is particularly true in the case of land, where the same parcel may support multiple nonconflicting uses. And we suspect, although the data would be extremely difficult to gather, that private acquiescence in intentional trespass is a very common response when the trespass has a minimal impact on the use to which the owner has decided to use the land.

ADVERSE POSSESSION The doctrine of adverse possession permits a trespasser who makes sufficiently open and notorious use of someone else's land for a specified period of time to obtain title ownership.[11] In most states, the law permits even the knowing trespasser (or so-called bad-faith adverse possessor) to take advantage of this doctrine. Although not a criminal law doctrine, adverse possession ultimately converts someone who would otherwise qualify as a criminal trespasser into an owner.

Lee Fennell has called bad-faith adverse possession a case of "efficient trespass," but "efficient theft" would be a better term.[12] The result of adverse possession is not merely permission to continue trespassing on another's property without being able to exclude the true owner, as one would expect from a theory of efficient trespass. Nor is it merely an option to purchase the property at fair market value in a forced sale. Instead, the result of successful adverse possession is an outright involuntary and uncompensated transfer of ownership from the original owner to the unlawful possessor.

Under certain circumstances, such a forced transfer can be justified in consequentialist terms. And, as Fennell has persuasively argued, the broad contours of adverse-possession law seem to be well crafted to isolate a category of situations in which we can have a great deal of confidence that such transfers are efficient. But the doctrine can also be justified in nonconsequentialist terms. The intentional adverse possessor, or squatter, has typically been someone without much property but with a great deal of time and a willingness to invest substantial labor in improving the unoccupied property of another. In addition, the intentional adverse possessor seeks to put the property in question (real estate) to valuable use, either for shelter or the pursuit of a livelihood. Finally, the property must be sufficiently unimportant to its true owner that the owner permits an interloper to intrude on the property and occupy it for a lengthy period of time, typically seven to ten years.

One could justify the legal ratification of intentional adverse possession by applying something like the nonconsequentialist principle we have previously discussed in relation to the retributive response to acquisitive outlaws: it is not wrong to appropriate someone else's surplus property in order to provide for one's own need when viable legal alternatives are not available. The application of this nonconsequentialist principle would seem to track fairly closely the acquisitive outlaw behavior most strongly justified by consequentialist approaches. This principle, of course, generates substantial epistemological problems when it comes to determining whether its conditions are actually satisfied. Adverse possession gets around these problems by adopting onerous conditions that ensure its application will be radically underinclusive.

It is true that the adverse-possession doctrine does not on its face pay much attention to the "need" of the adverse possessor, but when the doc-

trine is applied to the knowing adverse possessor, that need will very likely be manifest. With the exception of boundary disputes, it seems unlikely that many of the property rich will have either the time or the inclination to intentionally adversely possess someone else's land. And the status of the property in question as "surplus" property of the true owner is also likely to be satisfied when the owner cannot be troubled to assert his or her property rights within the prescribed period of time.

In the past, the doctrine of adverse possession sometimes served an important redistributive function and constituted a significant threat to absentee ownership.[13] Its significance in recent years, however, has declined to such an extent that it is now plausibly described as merely a mechanism for clearing title errors and resolving inconsequential border disputes.[14] This diminished role for adverse possession is the natural result of the increased affluence our developed economy coupled with reductions in the cost of property surveillance that make it cheaper for property owners to oust potential adverse possessors, both of which diminish the incentives for potential adverse possessors to seek out property to possess in the first place.

All things being equal, improvements in the technology for enforcing property rights make the category of adverse possession even more radically underinclusive than it would otherwise be. Owners need not expend much energy monitoring their property, and prospective squatters are confronted with a minuscule likelihood of successfully obtaining title. This observation suggests that as the technology of property monitoring improved, property law should have responded by easing the requirements for adverse possession. Because the behavioral requirements of adverse possession continue to serve the purpose of putting reasonably attentive owners on notice that their property is occupied by another, the most straightforward way to maintain the balance struck in the past by adverse-possession law in the face of technological advances in property surveillance would be simply to reduce the period of time for which the adverse possessor must possess the property. We have seen such a reduction in New York, where the period was originally twenty years but was shortened over the course of the twentieth century, first to fifteen years, and then to ten. And in the United States, adverse-possession statutes are generally shorter in the younger, western states. But even shorter periods than those that presently prevail might make sense. Although seven to ten years may have been a fair period of time to require of an adverse possessor in the nineteenth-century West, when a trip from the East Coast to the West Coast and back could take months, a shorter period would seem to be more than sufficient to protect the interests of even moderately vigilant property owners in this era of six-hour transcontinental flights and instantaneous, ubiquitous telecommunication. The case for such a reduction in the time period required for adverse possession seems particularly strong in the context of urban properties, where it is virtually impossible for even the most careless owner not to notice an adverse possessor's use of his or her land.

A trend in the United States in recent years has been to do away with so-called "bad-faith" adverse possession, that is, adverse possession in which the possessor knows that the property belongs to another. At the level of formal doctrine, this trend represents a dramatic change in direction. The traditional test for adverse possession in the United States has typically ignored the state of mind of the adverse possessor, or when the test has taken it into account, either has simply required the adverse possessor to act as if the property was his or her own or has required the adverse possessor to know that it belonged to another. Richard Helmholz has argued that, notwithstanding the formal doctrine, courts have, at least in recent years, favored good-faith adverse possessors over those who knowingly occupy the property of another. If Helmholz is correct, then the recent trend toward the formalization of the requirement of good faith is more properly understood as bringing doctrine into conformity with practice than as a dramatic legal shift.

Whether we describe the trend as a legal revolution in adverse possession law or a long-needed updating of the law to bring it into line with actual practice, the question remains whether the requirement of good faith (both in doctrine and in practice) is a wise one. Understood as a mechanism for redistribution, as we have proposed, adverse possession likely has less of a place in a wealthy, modern capitalist society in which nearly everyone has the basic necessities of life. Accordingly, it is perhaps understandable that modern adverse-possession law in the United States is narrowing the scope of permissible nonconsensual transfers of property. On the other hand, in the current economic crisis, the explosion of home foreclosures

has resulted in enormous numbers of absentee-owned, unoccupied dwellings. According to the U.S. Census Bureau, 15 percent of housing units in the United States were vacant at the end of 2008.[15] These vacant houses posed a threat to neighborhood property values, as foreclosing banks failed to maintain the empty properties.[16] At the same time, homelessness among families suffering from the economic downturn is a growing problem. Given this combination of pervasive need and widespread underutilization of existing housing units, there seems to be a continuing place for a redistributive conception of adverse possession, even in the United States.

In any event, there can be little doubt that extremely skewed landownership patterns in the developing world constitute a serious barrier to development, particularly where landownership provides access to a livelihood. With one billion (intentional) squatters worldwide, bad-faith adverse possession remains one promising means of providing security of tenure and legal formalization for an enormous number of people. In other words, even if the prohibition of intentional adverse possession makes sense in the United States, there are substantial reasons for developing countries to resist emulating that trend, at least for the time being.

NECESSITY The doctrine of necessity permits nonowners to trespass on, and under certain circumstances even to appropriate, the property of others in order to avoid a grave harm.[17] In the criminal context, the basic insight of the doctrine, which has been recognized by nearly every state and federal court in the country, is that a person should not be punished for being forced by circumstance to choose between two evils, the lesser of which involves breaking the law.[18] Although it varies significantly by jurisdiction, the criminal defense of necessity has traditionally been understood to justify the defendant's otherwise unlawful appropriation of the property of another when (1) the defendant's illegal conduct was committed to avoid a significant evil; (2) the defendant reasonably believed that his or her actions were necessary to avoid this evil; (3) the defendant had no alternative legal means of preventing this harm; and (4) the evil sought to be avoided is greater than the harm expected to result from the defendant's criminal conduct.[19]

A related doctrine applies within the noncriminal law of property, privileging access to private property when necessary to protect those in dire need from death or serious bodily harm. Such property users are not obligated to compensate property owners unless they damage or consume the property in question. (So, for example, a stranded hiker would not have to pay for mere access to a vacant hotel in order to seek shelter from a snowstorm, but the hiker would have to pay for any damage caused by the break in.) Moreover, the law protects the right of access of the person in need, even permitting that person to engage in reasonable self-help in order to overcome attempts by property owners to interfere with access in times of dire need.[20]

The doctrine can be fairly easily justified in consequentialist terms. But it can also be explained in moral terms that are similar to the redistributive principle we have been discussing. Like adverse possession, however, the doctrine of necessity creates substantial epistemological problems, to which the law has responded by couching the doctrine in qualifications that end up making it profoundly underinclusive.[21]

In its traditional formulation, the necessity doctrine falls squarely within the circumstances that approximate those in which we have argued that acquisitive outlaw behavior would be justified: situations in which someone in need nonviolently takes what he or she needs from the surplus of another. The conduct of many squatters, both those of the nineteenth-century American West and those in many parts of the developing world today, as well as those in the modern urban context, would appear to fall within the boundaries of this description. In addition, many of the behaviors of homeless people that have been criminalized by local governments in recent years fit comfortably within a plausible understanding of necessity.[22]

Most courts, however, have interpreted the necessity defense in an artificially narrow way that would restrict it to extremely unusual circumstances, such as natural disasters. Most significant for our purposes, several courts have held that, as a categorical matter, the doctrine is not available when the evil the defendant seeks to avoid is caused by economic forces alone.[23] We reject these narrow reconstructions of the defense and would require courts to treat dire economic necessity in precisely the same way that they treat necessity caused by natural disasters. In a predominantly market-based economy that relies almost exclusively on consensual transactions to get property from one person to another, economic necessity

can be as dire an evil as catastrophic flooding.[24] Moreover, as in the case of natural disasters, third parties who assist those in situations of dire necessity should also be entitled to take advantage of the defense.[25]

In one Texas case, a woman was charged with welfare fraud after she unlawfully obtained work to supplement her welfare income in order to provide food for her children. Her lawyer proffered the testimony of several experts that the defendant's children were suffering from malnutrition prior to her attempt to supplement her income and that the state welfare benefits available to her were insufficient to provide minimally adequate nutrition for herself and her children. The trial court refused even to allow the defendant to present the evidence to the jury, and the defendant was convicted.[26]

In *Southwark v. Williams*, a 1971 case involving urban squatters in London, the court endorsed an equally narrow interpretation of the necessity doctrine. Homeless families had been living on the streets of London and had, with the assistance of an urban-squatting advocacy group, nonviolently occupied an abandoned home owned by the Borough of Southwark. When the borough brought suit to oust them from possession, the defendants pled the defense of necessity. The court categorically rejected the defense's applicability, arguing in sweeping terms that necessity could never be used outside the context of imminent threats to physical safety caused by environmental calamities and the like: "When a man, who is starving, enters a house and takes food in order to keep himself alive[, our] English law does not admit the defense of necessity. It holds him guilty of larceny." The court's justification rested entirely on the long-term side effects of a broad necessity defense on public order and the security of property. "If homelessness were once admitted as a defense to trespass," the court implausibly argued, "no one's house could be safe."[27]

The court's worries for the security of home ownership were needlessly alarmist in the context of a case about homeless urban families occupying abandoned and derelict housing. There is no reason that the necessity doctrine cannot be tailored to steer its beneficiaries toward underutilized, abandoned, or other obviously neglected property. Nevertheless, the court's concern with the long-term consequences flowing from a broad definition of necessity is a reasonable one.

Necessity would actually be applied only after the fact by a jury (or judge) whose decision would not bind future courts or juries.[28] Moreover, in a society in which most people perceive the system of social welfare to be adequate to provide for the needs of the poor, few fact finders would be willing to conclude that acquisitive conduct was justified in any but the most obviously justified circumstances. Although permitting a greater number of defendants to argue the necessity defense to juries would marginally raise the cost of law enforcement and might yield a slightly lower conviction rate for property crimes, it is unlikely that these effects would encourage many people to undertake additional criminal actions.

The impact of broadened consideration of necessity by juries could be diminished even further if the defense were styled as an excuse or mitigation, rather than as a justification. Characterizing arguments beyond the traditionally narrow limits of the necessity doctrine—as excuses or as factors to consider in mitigation of the prescribed punishment, rather than as outright justifications—would further permit judges and juries to consider the role that economic need played in the defendant's decision to violate the law outside the confines of the traditional necessity defense and without confining their options to the binary choice of conviction or exoneration.

Obviously, the jury is a less-than-perfect mechanism for operationalizing and assessing outlaws' informational and redistributive value. Juries are small and are usually not representative of the electorate as a whole. Nevertheless, they are the only direct point of involvement by citizens within the criminal process. Juries have therefore almost always played crucial roles in bottom-up lawmaking.[29]

To be clear, we have no illusions that the jury process constitutes an ideal mechanism for disseminating information to the broader political community. The feedback between the jury and the democratic process, for example, cannot work when the jury system is itself fatally flawed or reflects unbridgeable cleavages within the polity. When a segment of the population is excluded from the jury, as was the case in the Jim Crow South, juries simply cannot function as a stand-in for the conscience of the community or as a means of filtering information back into the political process. Similarly, when a segment of the community is excluded from the political process, or when a political community is so segmented by class or race that there is an utter lack of basic respect for certain members of the

community, the jury mechanism for feeding information back into the political process will be impaired. But as long as the jury system operates in a relatively nondiscriminatory manner and the society is not already irreparably cleared by racial, gender, or class divisions, broadening the use of the necessity defense would provide destitute defendants with a meaningful opportunity to explain the motivations for their conduct and provide jurors with important insights into the challenges or hardships faced by the poorest members of society—insights that they can then disseminate to the larger political community.

Robert Ellickson has reasonably questioned the educative value of brief encounters with the poor, such as the typical fleeting interaction with panhandlers on the street.[30] But in the context of a protracted interaction, as in a criminal trial, it is plausible to think that exposure to the hardships faced by the poorest citizens could help educate the jury, as well as any members of the public or press who might be attending the trial, about the nature of economic injustice, and thereby feed useful information back into the democratic political process.[31] Additionally, a large number of acquittals under the necessity defense would provide a powerful signal to the relevant authorities that the public perceived the jurisdiction's provisions for the poor to be inadequate.

Increasing Government-Sponsored Redistribution

Of perhaps greater concern than the long-run effects on law and order is the cumulative effect of justified acquisitive outlaw conduct on certain property owners. It is impossible to predict with any certainty the extent to which the costs imposed on property owners by concentrated outlaw conduct would lead to further deterioration of economic activity in areas of concentrated poverty. If the consequences were extensive, however, they would further harm those living in economically depressed communities. Whether these long-term costs exceeded the benefits of the forced transfers would depend on the degree of need satisfied by the transactions. Of course, for nonconsequentialists, those costs would be irrelevant to the inquiry whether the acquisitive outlaw was justified in taking the property to satisfy his or her needs. Nevertheless, even a nonconsequentialist can favor an effort to provide for the justified needs of the poor through the most efficient means possible.

Compensation or other risk-spreading mechanisms for property owners affected by justified self-help might work to cabin negative side effects. In his recent book on global constitutional property, Greg Alexander discusses *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*, a South African Constitutional Court case considering how to treat forty thousand squatters who had illegally occupied property owned by a Johannesburg farmer. The court refused to compel the squatters to leave the land they had taken but, acknowledging the unfairness of the burden they had imposed on the landowner, commanded the government to compensate the landowner for his losses.[32] The judgment recognized the legitimacy of each party's claims: the squatters' claim to land on which to live and the landowners' claim not to be forced to bear the entire cost of honoring the squatters' legitimate claims. In effect, the court concluded that both parties' rights had been violated by *the state's* failure to adequately address the country's maldistribution of land, and the court crafted a remedy that mimicked as closely as possible the benefits of a centralized solution to the problem. As the South African property scholar Andre van der Walt puts it, this remedy treats the state's "failure to protect one right (access to housing) as the direct cause of failure to protect the other right (property). . . . If the one right was protected properly, the other one could have been protected as well."[33] In other words, the *Modderklip* decision perfectly illustrates the interdependence between owner and nonowner that lies at the heart of the phenomenon we are describing.

The costs associated with self-help suggest that it would usually be far cheaper for society to provide for the needs of the poor in a more organized and proactive fashion. A comprehensive system of government-sponsored redistribution and social insurance is an obvious substitute for the sorts of self-help redistribution envisioned by doctrines like adverse possession and necessity, and would generate far fewer spillover effects. Louis Kaplow and Steven Shavell argue, for example,[34] that legal rules are generally a less efficient redistributive mechanism than the tax system, and Robert Ellickson has commented that "if redistribution is to be carried out, families, charities, and welfare agencies know far more than judges about who is deserving of aid."[35] But it is important to note that, although a system of voluntary or mandatory redistribution may be more efficient than distributive-minded changes in property law, it does not follow that

self-help is inferior to a highly unequal status quo and therefore not justified when adequate redistribution is not forthcoming.

As a society expands its formalized systems of redistribution, we should expect that its members will rely less and less on simply taking what they need and express less tolerance for those who do. Nevertheless, the status quo biases within the property system resist the expansion of redistributive systems, and, as Markovits argues, the political process itself generates its own inefficiencies that prevent redistributive programs from being kept up to date. Accordingly, it seems likely that even in societies that make substantial efforts to provide adequate social safety nets, movements of outlaws will crop up from time to time to prod the process along.[36]

The potential for the natural interplay between these two strategies of redistribution is illustrated by the homeless. The services currently available to the homeless are viewed by many as inadequate to provide for even their most basic needs.[37] In addition, because of their uniquely challenging circumstances, the homeless find it very difficult to take advantage of those social services that are provided by the state and by private actors.[38] Accordingly, they are frequently forced to resort to informal (and, increasingly, illegal) mechanisms of providing for their needs, such as illegal begging and trespass.

Surveys of public opinion indicate that citizens generally believe that the resources available to the homeless are inadequate and should be expanded. Members of the public also appear to believe that the criminal law should not penalize the homeless for taking actions necessary for survival.[39] Making the necessity defense available to the homeless who nonviolently break laws against trespass, theft, or panhandling might well result in a substantial number of acquittals. If, however, the services were improved to the point that they were widely perceived to be adequate, jurors would become less sympathetic toward those homeless people who continued to prefer illegal means to satisfy their needs. A broadening of the necessity defense, therefore, need not be a harbinger of chaos or the collapse of private ownership, as the *Williams* court feared.[40] Instead, it seems capable, through the jury process, of calibrating itself to the circumstances.

Responding to Property Outlaws' Informational Value

Ratifying forced transfers in order to accommodate certain categories of outlaws is likely to have some effect on the value of the information communicated by disobedience. Deterrence theories of punishment (and common sense) suggest that making the perceived punishment for crime less certain or less severe will itself increase *to some extent* the likelihood that people will be willing to break the law.[41] Moreover, excusing, *ex ante*, certain categories of disobedience is likely to generate strategic behavior on the part of lawbreakers that may well blur the boundaries distinguishing justified from unjustified behavior. The trick is to avoid completely foreclosing certain types of productive disobedience without encouraging broader criminal behavior to such a degree that the informational value of productive disobedience is itself destroyed. The task, therefore, is to preserve the expressive and communicative value of the disobedience in such a way that the law (1) reduces spillover effects and (2) avoids diluting the message, but (3) still provides an adequate level of deterrence against other less productive forms of disobedience. The law can accomplish this by selectively awarding a combination of case-specific immunities and particularized sentence reductions, all of which can help preserve any informational value without necessarily blurring the boundaries between productive and unproductive disobedience.

However, it is very difficult to specify in advance the content of the category of justified property disobedience with any precision. It is far easier to assess the justification of such actions on a case-by-case basis after the fact. Accordingly, most of the legal responses that we advocate in this part focus on *ex post* evaluations, often discretionary and nonprecedential in nature, that permit government decision makers to take into account the full complexity of the circumstances in determining how, or whether, to punish a particular act of disobedience.

The use of *ex post* mechanisms that operate on a case-by-case basis has two benefits. First, these are the sorts of mechanisms best suited to the moral complexity of outlaw conduct. Second, because deterrence operates through the *expected* sanctions of potential outlaws, the case-by-case, nonprecedential operation of the reforms we suggest limits their potential long-term effects for those contemplating future disobedience. The gen

eral deterrent-decreasing effect of building an *ex ante* exception into laws of theft and trespass is likely to be more substantial than that of granting after-the-fact case-by-case relief from criminal sanctions for individuals whose conduct happens to satisfy the requirements of, say, necessity.[42] This would remain true unless (1) *ex post* relief were predictably granted in an appreciable number of cases and (2) the substantial likelihood that they would be able successfully to take advantage of such *ex post* relief were communicated to other potential lawbreakers. The decision whether to rely on prospective rules or standards that are subject to clarification after the fact is frequently presented as an all-or-nothing choice, but the use of discretionary, *ex post* remedies can be coupled with the prospective reassertion of rule-like prohibitions and therefore can help to preserve the informational value of protracted outlaw conduct.

These mechanisms are not without their shortcomings, however. Giving discretion to public officials presents the danger of abuse and partiality in its exercise. Moreover, case-by-case adjudicative methods of relief have difficulty taking into account relevant consequences that flow from the aggregation of decisions in individual cases. On the other hand, much of the discretion we advocate already exists, but it is probably not being exercised along the lines we are suggesting. Consequently, our proposals would not do much to make the existing state of affairs worse. And, as we have argued, the *ex post* strategies we are recommending would help minimize long-term costs. Moreover, even where the legislature is better situated to take into account the implications of an emerging pattern of disobedience, the results of case-by-case adjudication can help draw the legislature's attention to the problem in the first place. For example, in the Netherlands, a judicial decision in favor of urban squatters generated a firestorm of controversy that led to the enactment of a law prohibiting property owners from keeping their property vacant or unused for long periods of time.[43] In other words, the sorts of mechanisms we advocate do not operate in isolation from the legislative process but are in constant dialogue with it.

Engaging Property Outlaws

EXPRESSIVE NECESSITY Although we favor the broad availability of the necessity defense for acquisitive outlaws, our analysis suggests that the necessity defense is somewhat less justifiable in the context of expressive outlaw conduct. And in fact, federal courts have been particularly reluctant to allow civil disobedients to avoid punishment by arguing necessity.[44] Most instances of expressive property disobedience, however, involve what is known as "indirect" civil disobedience, in which the law that is expressively broken, such as the law against criminal trespass, is not the law that the protesters are trying to change. This is the case, for example, with protesters who trespass on military bases in order to express their condemnation of nuclear deterrence. But intentional disobedience by those we are calling property outlaws aims at protesting the very property law being broken. That was the case, for example, with the 1960s civil rights protesters and the urban squatters of the 1970s and 1980s.

Application of the doctrine of necessity is more appropriate in situations involving direct civil disobedience. This argument depends on the greater informational value provided by direct civil disobedience. When someone violates a property law to protest some other sort of law, the only information conveyed is the intensity and seriousness of the protestor's moral opposition to the law in question. In contrast, when someone violates the very law to which he or she is opposed, the outlaw conveys both his or her intensity and seriousness and, in addition, provides a visible example of the alternative state of affairs the outlaw hopes to bring about.[45] Moreover, although there are a variety of ways to express seriousness and intensity of belief without violating the law, the only way for some nonowners to produce a concrete example of the property regime they seek is by violating the very law holding that reality back. This combination of the informational advantage of direct civil disobedience and the more effective means of expression it provides may justify widening the range of cases in which defendants may plead necessity.

It might be that the legal status quo is supported by reasons more weighty than sheer inertia or a lack of imagination on the part of the dominant majority. If that is the case, allowing the defendant to assert necessity will not do much harm. It is unlikely that a jury would find the expressive outlaw's conduct justified under most circumstances. But if a great number of people come to see the existing state of affairs in a different light as a result of the disobedience itself, they may come to view those who first showed us the way as heroes rather than criminals.

Courts have already recognized a role for something very similar to "expressive necessity" in a number of cases involving the right to engage in political and religious speech on private property. Interestingly, a number of these cases have involved property outlaws who were willing to risk conviction for criminal trespass in order to assert a right to access audiences located on private lands. In *Marsh v. Alabama*, for example, the defendant, a Jehovah's Witness, entered Chickasaw, Alabama, a "company town" near Mobile, Alabama, owned by the Gulf Shipbuilding Corporation, and began distributing religious materials. Representatives of the corporation told the defendant to leave the town, but she refused. She was arrested and charged with criminal trespass. The U.S. Supreme Court reversed the conviction, concluding that, even though Gulf Shipbuilding owned the land, the town operated for all practical purposes like a municipality and was therefore subject to the same constitutional norms that apply to public property. "Ownership," the Court said, "does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[46] In *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, the Supreme Court expanded *Marsh* to cover the right to engage in speech in a privately owned shopping center.[47] Although the Court later backtracked from its *Logan Valley* decision in *Lloyd Corp. v. Tanner*, it declined in that case to overrule it, preferring instead to narrowly construe the implications of the earlier case. But even that narrow construction was consistent with the notion of expressive necessity. The Court in *Lloyd Corp.* read *Logan Valley* as recognizing a First Amendment right to engage in speech in a private shopping center when that speech relates directly to the shopping center's operations. In such situations, the Court suggested, "no other reasonable opportunities for the pickets to convey their message to their intended audience were available," and the absence of viable substitute locations—that is, the expressive necessity of speaking at that particular location—entitles speakers to disregard owners' commands to leave.[48]

The Supreme Court ultimately overturned *Logan Valley* in *Hudgens v. NLRB*,[49] expressly rejecting its prior position, but it has continued to leave space for states to interpret their own constitutional protections of speech on private property more broadly than the federal constitutional rights.[50] Several state courts, but perhaps most expansively the New Jersey Supreme Court, have continued to provide substantial constitutional protection to political and religious speech on private property under legal theories remarkably similar to the kind of expressive necessity we are advocating.

For example, in the 1994 case *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, the New Jersey Supreme Court held that under New Jersey's constitution, people handing out leaflets in opposition to the Gulf War could not be excluded from a large regional shopping mall. The court's reasoning depended in significant part on the necessity of reaching audiences where they were, even if that meant, under certain circumstances, recognizing a constitutional right to speak on private property. "We look back and we look ahead in an effort to determine what a constitutional provision means," the New Jersey court said. "If free speech is to mean anything in the future, it must be exercised at these centers. Our constitutional right encompasses more than leafletting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them. We do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business."[51]

DISCRETIONARY RELIEF In addition to the doctrine of necessity, there are other *ex post*, discretionary, and nonprecedential tools at the disposal of the criminal law. Prosecutorial discretion and sentencing are both areas where legal decision makers could, in cases of clear necessity, exercise their authority in ways that would recognize the legitimacy of the defendant's actions while only minimally undermining the strength of criminal norms. Prosecutorial discretion differs from sentencing, however, in its binary nature, which causes it to operate more like a jury's decision to acquit. Accordingly, it should perhaps be reserved for situations in which the merits of the defendant's actions are the clearest.

A related, though less risky, strategy is for judges or the executive to treat subsequent legal reform or social consensus ratifying the property outlaw's conduct as grounds for vacating a conviction and sentence. This is the approach the U.S. Supreme Court took in cases involving civil rights protesters. In a number of cases, the Court vacated the convictions of participants in the lunch-counter sit-ins in light of the subsequent enactment of state and federal statutes prohibiting restaurant owners from excluding on the basis of race.[52] As the deeply divided Court said in *Hamm v. City of Rock Hill*, when the legislature has substituted a "right for a crime," there is a strong basis for vacating convictions, even for conduct that occurred before the legal change.[53]

The majority opinion in *Hamm* does not fully capture the power of the legislative transformation at work in that case. The statutes that shifted the legal landscape were no fortuitous coincidence; they were enacted in direct response to the very disobedience for which the defendants before the Court stood convicted. When outlaws and legislatures engage in such fruitful dialogue, judges (or executives) are on particularly strong ground in granting relief from criminal liability. Forgiveness of disobedience that the community has come to embrace only marginally reduces the deterrent effect of criminal sanctions for most criminals. In addition, it encourages those who are contemplating the possibility of setting out on an outlaw strategy for legal change to carefully assess the likelihood that they are on the wrong side of history.

Finally, unlike a broader exemption of expressive disobedience from criminal liability, this approach would not itself undermine the expressive power even of the conduct to which it applied. There is substantial truth to the notion that the moral courage of civil disobedience depends on the willingness of the outlaw to risk (or even welcome) criminal punishment in order to express the depth of his or her dissent. But selective *ex post* decisions to exempt certain outlaws from criminal punishment would preserve the moral power of the disobedience at the moment it occurred (since the outlaw would have no assurance at the time of the disobedience that such actions would fall within the scope of the exemption) while also signaling that, at times, such behavior is indeed a legitimate form of political expression.

Subsidizing Alternatives to Outlaw Behavior

Outlaw strategies are particularly appealing to those who cannot challenge the existing legal regime, whether by amplifying their voice with monetary donations to political actors or through mass media, or by pursuing civil litigation. In the case of expressive outlaws, the public subsidization of criminal defense counsel means that criminal litigation may well constitute a more practicable mechanism for pursuing legal change than the civil litigation that is the focus of many discussions of evolution within private law.

It stands to reason that some of the pressure to engage in outlaw behavior would be reduced by affirmatively creating legal alternatives to expand the voice of the "property poor." Two obvious mechanisms present themselves. First, the state could (as it has in the past) subsidize civil litigation on behalf of the poor. Expanding legal aid for the pursuit of civil complaints might well provide a viable alternative outlet for a significant amount of discontent that would otherwise be directed toward outlaw strategies for legal change. Second, expanded state subsidies for access to the political process or to means of mass communication would help amplify voices that might otherwise go unheeded, perhaps encouraging legal change that would otherwise await the pressure provided by property outlaws.