

2008

# Rule of (Out)Law: Property's Contingent Right to Exclude

Elizabeth M. Glazer

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

## Recommended Citation

Elizabeth M. Glazer, *Rule of (Out)Law: Property's Contingent Right to Exclude*, 156 U. Pa. L. Rev. 331 (2008)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/553](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/553)

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

## RULE OF (OUT)LAW: PROPERTY'S CONTINGENT RIGHT TO EXCLUDE

ELIZABETH M. GLAZER<sup>†</sup>

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

*Anything for love.  
I would do anything for love.  
I would do anything for love,  
But I won't do that.  
I won't do that.*<sup>1</sup>

When Meat Loaf mystified scores of listeners in the early nineties with his logically inconsistent song lyrics, he almost certainly did not look to property law when answering his fans' most popular question.<sup>2</sup> This Response does not argue that he should have. However, Meat Loaf's (in)famous song lyrics may be able to shed light on what has become a popular question among property "fans": namely, what is the nature of the right to exclude?

In this Response, I argue that an owner's invocation of the right to exclude depends upon the owner's invocation of other rights in the property bundle. In so arguing, I analyze current efforts to understand the right to exclude through the lens of the "property outlaw," whom Eduardo Moisés Peñalver and Sonia K. Katyal profile in their recent article, *Property Outlaws*.<sup>3</sup> I first highlight the effects of Peñalver

---

<sup>†</sup> Associate Professor of Law, Hofstra University School of Law. J.D., University of Chicago Law School, 2004; M.A., Philosophy, University of Pennsylvania, 2001; B.A., Philosophy, University of Pennsylvania, 2001. For instilling in me an appreciation for Meat Loaf (and meat loaf), thanks to Toby Glazer. For helpful conversations and comments, thanks to Laura Appleman, Alafair Burke, Victoria Glazer, Sonia Katyal, Zak Kramer, Katy Kuh, Holning Lau, Allison Milld, Ashira Ostrow, and Jonathan Remy Nash. My sincere thanks to Matthew Kutner for very helpful research assistance, and to Kevin Shelton for excellent library assistance.

<sup>1</sup> MEAT LOAF, *I'd Do Anything for Love (But I Won't Do That)*, on BAT OUT OF HELL II: BACK INTO HELL (Virgin Records 1993).

<sup>2</sup> Meat Loaf has said, "What is 'that?'" is one of the most popular questions he is asked. See MEAT LOAF: LIVE WITH THE MELBOURNE SYMPHONY ORCHESTRA (Warner Music Vision 2004).

<sup>3</sup> Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

and Katyal's argument on the nature of property law's right to exclude. After summarizing recent efforts to understand the right to exclude, I describe Peñalver and Katyal's argument that outlaw behavior has a special and socially productive function in property law,<sup>4</sup> and explain the connection between their article and the right to exclude. I conclude this Response by proffering evidence that Meat Loaf may have audited a first-year property law course, or at least that he incorporated insights about property law into his music.

# I. THE RIGHT TO EXCLUDE: FAVORITE CHILD, OR ONLY CHILD?

The right to exclude has long been considered the centerpiece of property law. Since Blackstone defined property as the "sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe,"<sup>5</sup> the right has remained in the minds of property scholars "the *sine qua non*" of what property is.<sup>6</sup> Despite Wesley Newcomb Hohfeld's and A.M. Honoré's efforts<sup>7</sup> to bundle it with the rights to use, possess, and transfer property,<sup>8</sup> the right to exclude has enjoyed an elevated status in relation to its fellow sticks both by the Court<sup>9</sup> and by its commentators.<sup>10</sup>

---

<sup>4</sup> *Id.* at 1098 ("[T]he apparent stability and order that property law provides owe much to the destabilizing role of the lawbreaker, who occasionally forces shifts of entitlements and laws.").

<sup>5</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES \*2.

<sup>6</sup> Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1998); see also Richard A. Epstein, *Rights and "Rights Talk"*, 105 HARV. L. REV. 1106, 1109 (1992) (book review) ("What is wrong with a system of absolute rights that allows individuals to exclude some persons on a whim and admit others only by mutual consent? By and large, nothing.").

<sup>7</sup> See J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712-13 (1996) (indicating that the "bundle of rights" slogan derives from a combination of Hohfeld's analysis of rights and from Honoré's description of incidents of ownership).

<sup>8</sup> See JESSE DUKEMINIER ET AL., PROPERTY 81 (6th ed. 2006) (indicating that the bundle of property rights consists of "the right to possess, the right to use, the right to exclude, [and] the right to transfer"). In addition to these four, Lior Strahilevitz has argued persuasively that *Black's Law Dictionary*, and by extension jurists with an interest in unpacking property's bundle, may have erred when omitting a fifth right, "the right to destroy," from its definition of "owner." See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 790-91 (2005).

<sup>9</sup> See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (characterizing the right as "[t]he hallmark of a protected property interest"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (acknowledging the right as "one of the most treasured strands" of the bundle); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (calling the right "one of the

Recent scholarship has focused on disaggregating the elements of the right.<sup>11</sup> These efforts at disaggregation have complemented efforts to determine whether the right is not only the centerpiece, but the only piece, of property law.<sup>12</sup> Of these latter efforts, perhaps the most radical has been put forward by Professor Peñalver himself, who has argued famously that “theorists have generally overemphasized the degree to which private property enables owners to escape from communal coercion.”<sup>13</sup> Instead, Professor Peñalver favors the conception of property not as exit, but as entrance. He has argued that

---

most essential sticks in the bundle of rights that are commonly characterized as property”).

<sup>10</sup> See, e.g., Lior Jacob Strahilevitz, *Information Asymmetries and the Rights To Exclude*, 104 MICH. L. REV. 1835, 1836 (2006) (noting that the right has been deemed “foremost among the property rights”); see also PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 53 (2006) (arguing that “the cornerstone of private property is the right to exclude anyone and anything from your property that you don’t want on your property”).

<sup>11</sup> See, for example, Strahilevitz, *supra* note 10, at 1837, in which the author famously unpacked the right to exclude into four component parts:

(1) The Hermit’s Right (the right to keep everyone off the resource owner’s property); (2) The Bouncer’s Right (the right to admit prospective entrants selectively to the resource owner’s property); (3) The Exclusionary Vibe (the right to convey messages about who is welcome or unwelcome on the property, enforced primarily by social and psychological sanctions); and (4) The Exclusionary Amenity (the right to embed polarizing and costly club goods on the resource owner’s property in order to sort between desirable and undesirable entrants).

See also Shyamkrishna Balganesh, *Demystifying the Right To Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y (forthcoming 2008) (manuscript at 5), available at <http://ssrn.com/abstract=1016222> (arguing that the right to exclude is best understood not so much as a “right,” but as a normative device, analogous to the promise in contract law, in which the right to exclude derives from property law’s norm of resource inviolability).

<sup>12</sup> See, e.g., Merrill, *supra* note 6, at 754 (defining property as “the right to exclude others from valuable resources, no more and no less”). But see Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions* 1 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper No. 07-38, 2007), available at <http://ssrn.com/abstract=1014161> (setting forth a theory of property law that accounts for more than the right to exclude, or any other single right, and instead accounts for “(1) the number of owners, (2) the scope of owner’s dominion and (3) asset configuration”); Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1231, 1280-96 (2006) (defending the argument that property law should develop an entitlement scheme to respond to associational collective action problems, such as the concentration of poverty in metropolitan areas, and that the absence of such a scheme in current property law derives from a dichotomous understanding of property law, as either belonging to everyone or no one); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 377 (2003) (understanding the right to exclude as an “essential but insufficient” element of the meaning of property law).

<sup>13</sup> Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1893 (2005).

property law is not an institution that excludes, but is instead “an institution that binds individuals together into normative communities.”<sup>14</sup>

## II. THE PRODUCTIVE ROLE OF PROPERTY’S OUTLAW

Professors Peñalver and Katyal view their article as one that builds upon a dialogic conception of property, which they and others have developed.<sup>15</sup> In *Property Outlaws*, Professors Peñalver and Katyal argue that intentional property outlaws—the “little people” and “have-nots” who “cannot afford to file civil suits or whose voice in the legislative process is too weak to attract the attention of lawmakers and thus unable to wrest a change in property relations from existing entitlements”—have “repeatedly played a powerful and visible role as catalysts for needed legal change.”<sup>16</sup>

The history that Professors Peñalver and Katyal reconstruct, in which outlaws have “played a key role in fostering both symbolic and substantive evolution within the law of private ownership,”<sup>17</sup> is persuasive because it is both compelling and intuitive. Professors Peñalver and Katyal organize their article by identifying three categories of property outlaws that have helped to make property law “a dynamic institution that is broadly reflective of evolving community values, as opposed to a fixed set of entitlements rooted in abstract moral and economic theory.”<sup>18</sup> Those categories are (a) “acquisitive outlaws,” (b) “expressive outlaws,” and (c) “intersectional outlaws.”<sup>19</sup>

Acquisitive outlaws break property laws in order to acquire a piece of property, typically the piece toward which their lawbreaking is directed.<sup>20</sup> Examples include adverse possessors and those who enter land under the doctrine of necessity. Expressive outlaws, like the black students in Greenville, South Carolina, who sat in at segregated

---

<sup>14</sup> *Id.* at 1972.

<sup>15</sup> See Peñalver & Katyal, *supra* note 3, at 1101 & n.19 (referring to and citing a “body of literature emphasizing the dialogic and social nature of property law and eschewing the . . . static, individualist conception of property rights”).

<sup>16</sup> *Id.* at 1099-1101.

<sup>17</sup> *Id.* at 1101.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1102-03 (internal quotation marks omitted).

<sup>20</sup> *Id.* at 1102 (defining acquisitive lawbreaking as “involv[ing] actions that are oriented primarily toward direct appropriation”).

lunch counters in August 1960,<sup>21</sup> did not trespass in order to appropriate the lunch counters in which they sat. In fact, even if the sit-in participants would have been allowed to eat at the lunch counters where they were sitting, their goals would not have been met without the passage of general prohibitions against segregated lunch counters.<sup>22</sup> Intersectional outlaws break property laws for motives that are both acquisitive and expressive. As Professors Peñalver and Katyal describe, the urban squatters of the 1970s were motivated not only by their desire to protest the government's failure to convert publicly owned, abandoned property into much-needed low-income housing, but also by their desire to own the dilapidated building in which they had squatted but which they could not afford to purchase.<sup>23</sup>

Each of the acquisitive, expressive, and intersectional outlaws highlighted by Professors Peñalver and Katyal has engineered social change. The outlaw's socially productive role in property law is different from her role in other areas of law. In property law, "outlaws are able to offer us a concrete vision of their alternative conception of the law. The property outlaw therefore provides the official decision maker with actual, rather than hypothetical, circumstances under which to evaluate the degree of her commitment to the status quo."<sup>24</sup> Moreover, "American property law is full of doctrines whose principal purpose appears to be the hindrance of nonconsensual alterations in existing property allocations and entitlements."<sup>25</sup> In light of the tension between stagnant property law doctrines and the positive social changes that property outlaws have historically engineered, Peñalver and Katyal argue that property law "should be careful not to protect property rights in such a way as to preclude outlaws from productively violating existing official legal norms."<sup>26</sup> Thus, property law should "retain a certain flexibility"<sup>27</sup> when dealing with property outlaws.

---

<sup>21</sup> See *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (holding that convicting black students for failing to leave a restaurant's whites-only lunch counter violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>22</sup> See Peñalver and Katyal, *supra* note 3, at 1115 ("[S]it-ins were aimed at achieving broad legal transformation of the social meaning of public accommodation, one that would permanently rearrange the property rights of all owners . . .").

<sup>23</sup> See *id.* at 1123-26 (explaining that city governments would either auction publicly owned properties to the highest bidder, or else hold them in their dilapidated states, despite strong local demands for low-income housing).

<sup>24</sup> *Id.* at 1139.

<sup>25</sup> *Id.* at 1134.

<sup>26</sup> *Id.* at 1130; see also *id.* at 1164 (where the authors express "concern[] that, in its strategies of punishment, the law may aim to preclude too much property lawbreaking").

<sup>27</sup> *Id.* at 1141.

Because of the productive role of property outlaws, Peñalver and Katyal propose to “legaliz[e] certain categories of forced transfers, temporarily or permanently.”<sup>28</sup> The counter-intuition that lawbreaking can actually promote rulemaking is overwhelmed by Peñalver and Katyal’s strong case that “creating a formalized process by which [outlaws] can accomplish the goal of ownership[] is ultimately an order-enhancing, not an order-destroying, strategy.”<sup>29</sup>

Their proposals center on expanding existing tools within property law so that sanctions in certain contexts can be reconfigured in proportion to the productive value of certain outlaw behavior. For example, they propose shortening the timeframe during which a trespasser can gain title to a tract of land through adverse possession,<sup>30</sup> and requiring courts to treat economic necessity in the same way they treat necessity caused by natural disaster.<sup>31</sup>

### III. PROPERTY OUTLAWS AND THE RIGHT TO EXCLUDE

In identifying property outlaws as positive agents of social change, Peñalver and Katyal explore an important and fascinating phenomenon. Moreover, the authors convincingly reconstruct the history of our nation’s most infamous property lawbreakers in arguing for the incorporation of selective outlaw behavior into the stubborn and socially unreflective institution of property law. Their work is illuminating, and its effects on the theory and practice of property law are sure to be profound and innumerable. This Response highlights in particular how the authors’ ideas impact the nature of the right to exclude in relation to its fellow sticks in the bundle of property rights.

#### A. *The Connection Between Outlaws and the Right To Exclude*

Each of Peñalver and Katyal’s outlaws is motivated differently, but all of them violate, and have violated, property law in socially productive ways. The acquisitive adverse possessor, the expressive sit-in participant, and the intersectional urban squatter have each broken

---

<sup>28</sup> *Id.* at 1150.

<sup>29</sup> *Id.* at 1151.

<sup>30</sup> *See id.* at 1171 (arguing that adverse possession requirements, like the customary seven-year notice requirement, are outdated considering that modern advances have made property monitoring much easier).

<sup>31</sup> *See id.* at 1173-74 (“In a predominantly market-based economy that relies almost exclusively upon consensual transactions to get property from one person to another, economic necessity can be as dire an evil as catastrophic flooding.”).

property laws. More specifically, these outlaws have each invaded an owner's right to exclude.<sup>32</sup> For the overwhelming number of subscribers to property law's axiomatic bundle-of-rights theory,<sup>33</sup> as well as those who favor the "sovereignty thesis,"<sup>34</sup> which elevates in importance the right to exclude above other sticks in the bundle, this shared characteristic may have profound implications for the fundamental conception of property law.

*B. Anything, but Not "That": The Problem with Situating the Right To Exclude in the Bundle*

Even the staunchest proponents of property law's sovereignty thesis concede that the right to exclude does admit exceptions. Cases where courts have awarded damages or issued injunctions on the basis of an owner's right to exclude must be reconciled with equal and opposite reactive cases where courts have not. What becomes difficult about admitting exceptions to the right to exclude is explaining—despite those exceptions—the right's status as property law's most important or defining right. And, as preeminent property scholars have noted recently,

As always when one has a basic rule (the right to exclude) subject to exceptions, there is a question whether the exceptions should be stated in a rule-like fashion, or whether the whole issue (right to exclude or not to exclude) should be resolved in a case-by-case fashion with more attention to the balance of interests in each case.<sup>35</sup>

---

<sup>32</sup> As opposed to, for example, invading an owner's right to use her property by creating a nuisance. Professor Lee Anne Fennell has observed that property outlaws who violate an owner's power to veto a transaction most effectively perform the information-generating function for which property outlaws' behavior is valuable. See Lee Anne Fennell, Response, *Order with Outlaws?*, 156 U. PA. L. REV. PENNUMBRA 269, 273 (2007), <http://www.pennumbra.com/responses/12-2007/Fennell.pdf> ("There is something special about an owner's ability to block a transaction, and hence something noteworthy about lawbreaking that is narrowly focused on removing a blockade."); *id.* at 275 ("A focus on blockades also offers a way to distinguish veto-challenging property violations . . . from violations that assert veto powers in areas where access has been legally mandated . . .").

<sup>33</sup> See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007) (calling the bundle-of-sticks conception of property a "familiar metaphor").

<sup>34</sup> THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 393 (Foundation Press 2007); see also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) ("[T]he essence of private property is always the right to exclude others.").

<sup>35</sup> MERRILL & SMITH, *supra* note 34, at 439.



The right to exclude is, of course, riddled with exceptions. In this way it is no different from many rules. However, much as Meat Loaf's statement that he "wo[uld]n't do that" would not have mystified listeners had he not said earlier that he "would do anything for love,"<sup>36</sup> the right to exclude's exceptions may not have caused such a stir in the property literature had it not been touted in the courts and on the pages of law journals as property's number one right.

Property casebooks often cover the right to exclude by discussing two conflicting seminal cases, *Jacque v. Steenberg Homes, Inc.*<sup>37</sup> and *State v. Shack*.<sup>38</sup> In *Jacque*, defendant Steenberg Homes wanted to deliver a mobile home via the easiest route, which happened to lie across Harvey and Lois Jacque's snow-covered field. The Jacques were "an elderly couple . . . [who] were sensitive about allowing others on their land because they had lost property valued at over \$10,000 to other neighbors in an adverse possession action in the mid-1980's."<sup>39</sup> As a result of their sensitivity, the Jacques repeatedly refused Steenberg Homes's requests to move the home across their farm field. Even offers to pay the Jacques in exchange for the right to move the home across their land were refused.<sup>40</sup> Steenberg Homes's employees ultimately ignored these refusals, and carried the home using a bobcat through the Jacques' snow-covered field to their neighbor's lot.<sup>41</sup> Though no damages could be calculated as a result of Steenberg Homes's intentional trespass, the Supreme Court of Wisconsin held that "in certain situations of trespass, the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual's right to exclude others from his or her property."<sup>42</sup>

In short, the *Jacque* court concluded that intentional trespass causes an inherent harm to landowners, and that by failing to award punitive damages to the Jacques, the court would "send[] the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another."<sup>43</sup> Steenberg Homes's conduct was, in the eyes of the *Jacque* court, "egregious"<sup>44</sup>—despite the absence of any

---

<sup>36</sup> MEAT LOAF, *supra* note 1.

<sup>37</sup> 563 N.W.2d 154 (Wis. 1997).

<sup>38</sup> 277 A.2d 369 (N.J. 1971).

<sup>39</sup> 563 N.W.2d at 156-57.

<sup>40</sup> *Id.* at 157.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 159.

<sup>43</sup> *Id.* at 161.

<sup>44</sup> *Id.* at 164.

actual harm to the Jacques' land—because intentionally trespassing on someone else's land violates “one of the most essential sticks in the bundle of rights that are commonly characterized as property,”<sup>45</sup> namely the right to exclude.

The Supreme Court of New Jersey decided *State v. Shack* very differently. In *Shack*, the court considered an owner's right to exclude a health service provider and a lawyer who wished to enter a camp on the owner's property where migrant workers lived and worked.<sup>46</sup> In deciding that “defendants . . . invaded no possessory right of the farmer-employer” and that “[t]heir conduct was therefore beyond the reach of the trespass statute,”<sup>47</sup> the *Shack* court held in a larger sense that

[a] man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another.<sup>48</sup>

In light of the relativity of property rights, the *Shack* court weighed the interests of the migrant workers who lived on the landowner's farm against the landowner's right to exclude individuals who could help them. Because “[p]roperty rights serve human values,”<sup>49</sup> the landowner's property rights did not “include dominion over the destiny of persons [he] permit[ted] to come upon the premises. Their well-being must remain the paramount concern of a system of law.”<sup>50</sup>

What emerges from a comparison of *Jacque*, *Shack*, and a number of other cases that have demonstrated exceptions to the right to exclude<sup>51</sup> is that the right to exclude is absolute, except when it is not.<sup>52</sup>

---

<sup>45</sup> *Id.* at 159-60 (internal quotation marks omitted) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)).

<sup>46</sup> 277 A.2d 369, 370 (N.J. 1971).

<sup>47</sup> *Id.* at 375.

<sup>48</sup> *Id.* at 373 (citations omitted).

<sup>49</sup> *Id.* at 372.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84, 88 (1980) (holding that a requirement by the California State Constitution that owners of a shopping mall permit pamphleteers to petition on shopping center property did not infringe on the owner's right to exclude); *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 371-72 (N.J. 1982) (holding that a casino, by opening its doors to the general public, loses its right to selectively exclude card counters); *Ploof v. Putnam*, 71 A. 188, 188-89 (Vt. 1908) (holding that a ship owner could sue the owner of the dock to which the ship owner

Of course, a rule that admits exceptions is not unusual, whether in property or another area of law. However, two principal factors make exceptions to the right to exclude stranger than other exceptions. First, the hyperbolic characterization of the importance of the right to exclude in cases like *Jacque*, *Kaiser Aetna*, and *Loretto*,<sup>53</sup> where courts have privileged it over a competing interest, seems not to contemplate anything but an absolute right.

Second, the right to exclude's exceptions involve cases in which a property right (e.g., an owner's right to exclude) is weighed against a non-property right (e.g., the right to the preservation of life during a natural disaster as in *Ploof*, or the right to free speech as in *Prune-Yard*<sup>54</sup>). One might attribute this phenomenon to the fact that, in general, non-property rights trump property rights. However, this approach to the right to exclude's exceptions is problematic for at least two reasons. First, to say that the law often cares more about protecting people than it does about protecting property is both overly simple and inaccurate. While at one point the purpose of criminal laws aimed at protecting property rights was to "defend[] society against [a] breach of the peace, rather than protect[] individual property rights,"<sup>55</sup> that purpose has evolved over time toward the general protection of property rights.<sup>56</sup> Second, even if it was true that the law, as a general matter, favored non-property rights over property rights, what remains unexplained is why the right to exclude, in particular

---

moored his ship during a storm, and from which the dock owner unmoored the ship, causing the ship to be driven onto the shore and the people and cargo on it to be tossed into the water).

<sup>52</sup> See Laura S. Underkuffler, Response, *Lessons from Outlaws*, 156 U. PA. L. REV. PENNUMBRA 262, 267 (2007), <http://www.pennumbra.com/responses/12-2007/Underkuffler.pdf> ("The underlying problem that theorists and others face is that property embodies a deep and inherent paradox. On the one hand, property *by its very nature* embodies conscious, brutal, distributive decisions. . . . And yet—and here is the paradox—protection is also the essence of property.").

<sup>53</sup> See cases cited *supra* note 9.

<sup>54</sup> See *supra* note 51.

<sup>55</sup> See *People v. Olivo*, 420 N.E.2d 40, 42 (N.Y. 1981) (explaining the historical development of the crime of larceny).

<sup>56</sup> See George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 519-20 (1976) (contending that this evolution was part of a process of "classifying all crimes as intrusions against specific socially protected interests"); see also Nicole Stelle Garnett, Response, *Property In-Laws*, 156 U. PA. L. REV. PENNUMBRA 279, 287 (2007), <http://www.pennumbra.com/responses/12-2007/Garnett.pdf> ("It may be the case that most trespasses are relatively minor offenses . . . . But, all the same, . . . most wars are fought over territory. Property does matter, as centuries of battles, large and small, to defend it show.").

(as opposed to the other property rights in the bundle), is excepted in this way.

Admitting exceptions to the right to exclude is uncomfortable. The exaggerated rhetoric of its prominence by Blackstone, and in cases like *Jacque*, complicate an understanding of how the right to exclude maintains its dual identity—being at once absolute and non-absolute.

### C. Understanding Exclusion by Way of the Outlaw

Reconciling exclusion's centrality with its exceptions has led some to explain that an owner has the right to exclude individuals from her property not as a rule, but instead as a standard.<sup>57</sup> Rules decide matters *ex ante*, while standards decide matters *ex post*. Rules have been argued to be more costly to create but cheaper to apply than standards.<sup>58</sup>

*Shack* seems to invoke a standard something like this: If a stranger crosses the boundary of an owner's property, then the owner can have the stranger evicted—provided the owner's interest in protecting his autonomy is sufficiently great and the interests of other persons in abrogating the owner's right to exclude are not more important.<sup>59</sup>

Professor Joseph Singer has further developed the contours of that standard by arguing that “non-owners have a right of access to property based on need or on some other important public policy.”<sup>60</sup> Singer believes that “owners have no right to exclude non-owners from their property when access to that property is necessary to prevent serious harm to them or to others.”<sup>61</sup> He argues that property law's “reliance interest”—essentially, the idea that property rights serve human values<sup>62</sup>—was at work in *Shack*, *Uston*, and *PruneYard*. There, the courts “created a public policy exception to the right to

---

<sup>57</sup> See MERRILL & SMITH, *supra* note 34, at 405 (“One important difference between *Shack* and decisions such as *Jacque* is that the court implicitly treats the owner's right to exclude not as a rule but as a standard.”).

<sup>58</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 608-17 (1992) (comparing the effort and time required to create and apply standards versus rules).

<sup>59</sup> MERRILL & SMITH, *supra* note 34, at 406.

<sup>60</sup> Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675 (1988).

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 751 (“Property rights allocate power . . . . Those without power are vulnerable. Thus the relation between power and vulnerability should be at the heart of our analysis of property rights.”).

exclude under [the] trespass doctrine”<sup>63</sup> because, in exceptional cases, “property rights are shared or shifted to non-owners when [non-owners] have relied on relationships of mutual dependence that made access to such property available in the past.”<sup>64</sup>

While some of those past relationships emanated from agreements between owners and non-owners where owners expressly permitted non-owners access to the owners’ properties, some of them did not. Of those relationships that did not, like the relationship between the health services provider, lawyer, and farm-owner in *Shack*, the operative question is why, despite the centrality of the right to exclude in some cases, non-owners without express agreements with owners would rely on access to owners’ land.

Current efforts to understand the right to exclude focus on the right’s exceptions. Unfortunately, a theory aimed at unifying exceptions to the right to exclude offers little insight into the peculiar nature of the right itself. After analyzing its exceptions, the most that we know is that some interests are not so important, some are really important, and if a non-owner has an interest of the latter sort, she has the right to access an owner’s land. We do not know, however, why some interests weigh more than others when balanced against the right to exclude, the constant variable.

By shifting focus from the right’s exceptions to the right itself, we may understand more about both the exceptions and the right. Each of Peñalver and Katyal’s outlaws presents an opportunity to understand these important aspects of property law.<sup>65</sup> Each outlaw has violated an owner’s right to exclude.<sup>66</sup> Notably, each outlaw has violated an owner’s right to exclude when the owner invoked no other right in the property bundle as justification for her complaint. For example, acquisitive outlaws, like the adverse possessor, “win”<sup>67</sup> against the owner who does not, within the statutory period, use, possess, or transfer his property. Intersectional outlaws, like the urban squatter, won access to the dilapidated buildings in which they squatted against the city-owners who did not use, possess, or transfer them.

---

<sup>63</sup> *Id.* at 676.

<sup>64</sup> *Id.* at 678.

<sup>65</sup> See Fennell, *supra* note 32, at 278 (“The work of refining property law to strike the right balance between access and exclusion is always ongoing, and Peñalver and Katyal skillfully show us that outlaws can offer useful, if unconventional, guidance.”).

<sup>66</sup> See *supra* note 32 and accompanying text.

<sup>67</sup> I use the term “win” to refer to property law’s determination that a non-owner has the right to violate the property rights of an owner.

The acquisitive outlaw who seeks access to an owner's property for purposes of necessity and the expressive outlaw are both slightly more complicated. Each of them wins access to an owner's property,<sup>68</sup> but each has violated an owner's right to exclude while the owner was, in fact, using, possessing, or transferring his property. However, in each of these cases the owner's exclusion was not related to its use, possession, or transfer of his property. Of course, the owners in each of these cases could have argued that their need to exclude, for example, black students from sitting at their lunch counters or ship owners from mooring ships to their docks, infringed on their use, possession, or ability to transfer their property. Under the current conception of the right to exclude, whose violation in *Jacque* caused inherent harm, owners would not need to so argue.<sup>69</sup>

Thus, through property law's outlaw, the right to exclude is understood as the right that protects owner from non-owner. However, the outlaw tells us that an owner cannot invoke such an important right if he wishes to invoke it in isolation. The message is an important one—exclusion is central to property, but property is also central to exclusion. The right to exclude is ultimately the most important of the sticks in the property bundle. However, to invoke such an important right, an owner must demonstrate his commitment to property by excluding while, or for the purpose of, using the bundle's other sticks.

#### CONCLUSION

The right to exclude is not only one of the most important rights in the property bundle; it is the most puzzling. Its mysterious dual identity has generated a need within the legal community for explanations. This Response has sought to provide an explanation of the right to exclude that embraces its duality. I have argued that the right is absolute, so long as its exercise is coupled with the exercise of another right in the property bundle.

The theory's honesty—its respect for the right's simultaneous absoluteness as well as its exceptions—promotes a clearer understanding of the right to exclude, as well as its neighboring sticks. Property outlaws demonstrate that the right to exclude allows an owner to do anything to protect her property, even though it does not allow her to . . . do *that*.

---

<sup>68</sup> See *supra* notes 20-22 and accompanying text.

<sup>69</sup> Of course, in the case of the lunch counter owner, a plea to exclude blacks would be denied today even if backed by a property-related reason.

---

Preferred Citation: Elizabeth M. Glazer, Response, *Rule of (Out)Law: Property's Contingent Right To Exclude*, 156 U. PA. L. REV. PENNUMBRA 331 (2008), <http://www.penumbra.com/responses/01-2008/Glazer.pdf>.