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# Acceptable Deviance and Property Rights

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# Acceptable Deviance and Property Rights

## **Abstract**

Compliance with - or deviance from - law is often dependent upon the law's convergence with - or divergence from - normative sensibilities. Where the legality and social acceptability of behavior diverge, some deviance is socially acceptable. Property rights evolve in response to changes in normative sensibilities. Constructing a model of acceptable deviance and applying it to property rights, we can predict and actually observe the evolution of property rights in response to changes in normative sensibilities in areas as diverse as file-sharing, foreclosures, the use of public space, and fishing rights. We can also predict and observe stresses in legal institutions created by divergences in the legality and social acceptability of behavior with regard to property rights. Law functions as an anchor on behavior, providing stability, but also space for deviance which permits the evolution of property rights.

## **Keywords**

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## Article

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MARK A. EDWARDS

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## ARTICLE CONTENTS

I. INTRODUCTION .....	459
II. A MODEL OF ACCEPTABLE DEVIANCE .....	459
III. MODELS OF COMPLIANCE, DEVIANCE, AND THE EVOLUTION OF PROPERTY RIGHTS .....	464
A. COMPLIANCE AND DEVIANCE .....	464
B. THE EVOLUTION OF PROPERTY RIGHTS .....	470
IV. ACCEPTABLE DEVIANCE AND THE EVOLUTION OF PROPERTY RIGHTS .....	475
A. COPYRIGHT .....	477
B. USE OF PUBLIC SPACE .....	483
C. FORECLOSURE AND EVICTION .....	489
D. NATURAL RESOURCES .....	492
V. LAW'S ANCHORING FUNCTION .....	499
VI. CONCLUSION .....	500



# Acceptable Deviance and Property Rights

MARK A. EDWARDS\*

## I. INTRODUCTION

Where the legality and social acceptability of behavior converge, legal institutions function well. Where they diverge, it is ultimately the law, rather than the behavior, that changes. Why that is true tells us a great deal about the function of law and its relationship to the normative sensibilities of those who create it, enforce it, and live in its shadow.

This Article examines divergences between social acceptability and legality of behavior with regard to property rights and considers what those divergences tell us about the nature of law and property rights generally. Based upon the insight that behavior often occurs within limits of normatively acceptable deviance around law, rather than within the terms of the law itself, Part II constructs an “acceptable deviance” model of the relationship between the legality and social acceptability of behavior, focusing on instances in which legality and social acceptability diverge and either deviance becomes socially acceptable, or compliance becomes socially unacceptable. Part III explores and compares utilitarian and normative models of compliance and deviance with utilitarian and normative models of the evolution of property rights. Part IV then applies the acceptable deviance model to the evolution of property rights. The model allows us to predict and actually observe the evolution of property rights in response to changes in normative sensibilities in areas as diverse as natural resources, copyright, foreclosures, and the use of public space. We can also predict and actually observe stresses in legal institutions created by divergences in the legality and social acceptability of behavior. The Article concludes that law functions as an anchor on behavior, providing stability but also space for deviance, which permits the evolution of property rights.

## II. A MODEL OF ACCEPTABLE DEVIANCE

Law and behavior have a tenuous and sometimes tense relationship. They are influenced by each other’s gravitational pull. They do not merge,

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\* Associate Professor of Law, William Mitchell College of Law. My sincere thanks for their invaluable insights and generosity of time and spirit to Sonia Katyal, Eduardo Peñalver, my colleagues at the William Mitchell College of Law faculty works-in-progress colloquium, panel participants at the 2009 Law and Society conference, and commenters at PropertyProf, <http://lawprofessors.typepad.com/property/>.

but they cannot break free of each other. Sometimes law is enforced, sometimes it isn't; sometimes law is complied with, sometimes not.<sup>1</sup> Often regulators and the regulated seem to reach an implicit agreement about which laws will be enforced and complied with, and under what circumstances.<sup>2</sup> That agreement seems to be the product of innumerable day-to-day encounters between the state and its citizens.<sup>3</sup> I have referred to the limits of socially acceptable deviance around law as "parameters of acceptable deviance" or PADs.<sup>4</sup> Within these parameters are behaviors that are illegal but socially acceptable; their boundaries are the point at which law is actually enforced. Those boundaries become, in a sense, the informal but real law.

The simple model below provides a convenient illustration of the convergence and divergence of behavior's legality and its social acceptability. It helps to predict the movement of behaviors across boundaries of legality and social acceptability and to demonstrate the reaction of legal institutions to divergences between them.

#### Legality and Acceptability Model

	Legal	Illegal
Normatively Acceptable		
Normatively Unacceptable		

<sup>1</sup> Grattet and Jenness have observed that statutes "cast a shadow" over law enforcement, but do not control it. Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC'Y REV. 893, 935 (2005). As Tom Tyler explains, behavior diverges from law in many areas, "from tax evasion to drunk driving and drug abuse," despite enforcement efforts. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19 (1990) ("[P]olice officers and judges have been unable to stop" many types of illegal behavior); see also Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60-61 (1963) (noting that even within contractual relationships, norms rather than contracts are the primary governor of behavior).

<sup>2</sup> See Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 57 fig.1 (2006) (depicting "the effect of the relationship between legality and normative acceptability on enforcement").

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

The model works this way: in the upper left quadrant are behaviors that are both legal and socially acceptable. In the lower right quadrant are behaviors that are both illegal and socially unacceptable. Legal institutions generally work well in protecting behaviors in the upper left quadrant, while sanctioning behaviors are in the lower right quadrant.

Conversely, legal institutions often falter in reaction to behaviors in the opposite quadrants. In the upper right quadrant are behaviors that are illegal, but socially acceptable; interestingly, these tend *not* to trigger an enforcement response from legal institutions. In the lower left quadrant are behaviors that are legal, but socially unacceptable. No formal enforcement response is possible, since the behavior is not illegal. In the absence of a formal enforcement response, these behaviors may—and often do—trigger an informal enforcement response from the community in the form of social sanctions.

The model can be applied across several legal and behavioral boundaries. Consider, for example, the relationship between driving behavior and speed limits in a sixty-five m.p.h. zone.

#### Traffic Law and Driving

	Legal	Illegal
Normatively Acceptable	65 m.p.h.	65–79 m.p.h.
Normatively Unacceptable	< 65 m.p.h.	> 79 m.p.h.

As the model above suggests, it is generally both legal to drive sixty-five m.p.h. and socially acceptable (although just barely). On the other hand, it is both illegal and generally socially unacceptable to drive at speeds much over eighty m.p.h. Doing so might trigger both informal social sanctions—such as harsh looks from other drivers or muttered curses—and a formal enforcement response from the state, in the form of a speeding citation.

More interesting, however, are the instances in which the legality and social acceptability of behavior diverge. It is here that deviance may occur within parameters of acceptability. Again, consider speeding: it is formally

deviant but socially acceptable to drive between sixty-five to seventy-nine m.p.h. Interestingly, that behavior, though illegal, is very unlikely to trigger a formal enforcement response. On the other hand, driving much under sixty-five m.p.h., though legal, is socially deviant and is *very* likely to trigger an informal enforcement response through social sanctions in the form of tailgating, flashing headlights, or obscene gestures. In other words, behavior that is formally deviant but socially acceptable does not generate an enforcement response from the state; behavior that is formally compliant but socially unacceptable generates an enforcement response from society.

Take a moment to consider how extraordinary this common-place behavior really is. The state goes to the highly unusual effort of informing its citizenry about the content of the law. Yet each person knows, without being told, that the law as written does not, ultimately, set the boundaries of behavior. The social acceptability of behavior sets its boundaries. Even more extraordinary, the state implicitly acknowledges that system, and actually sanctions behavior that is outside the boundaries of social acceptability, rather than merely outside the law. It is all so common-place that most of us have lived with it our entire lives and never even noticed.

In addition to demonstrating the convergence and divergence between the legality or social acceptability of behavior, the model can be used to test predictions about the evolution of law in reaction to changes in normative sensibilities. Behaviors should tend to rotate in a counter-clockwise direction through the model. As behaviors move toward social acceptability they usually move toward legality. When behaviors become socially unacceptable, they may soon become illegal. As Roscoe Pound observed more than a century ago, “[i]n all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end.”<sup>5</sup>

Until legality and social acceptability converge, there can be serious and predictable malfunctions triggered in legal institutions. Because behaviors that are legal but socially unacceptable, or illegal but socially acceptable, tend to stress legal institutions, they can each create pathways for abuse. These two dangers—which might be called “popular justice” and “selective enforcement”—are represented in the model below.

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<sup>5</sup> Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907).

**Malfunctions Triggered by Divergence of Legality and Acceptability**

	Legal	Illegal
Normatively Acceptable		<b>Selective Enforcement</b>
Normatively Unacceptable	<b>Popular Justice</b>	

Recall that behaviors which are legal but socially unacceptable do not generate a formal enforcement response, but instead generate informal social sanctions. That sanctions are informal “does not mean that they are less effective than direct enforcement by the courts and/or by the police.”<sup>6</sup> These sanctions may be as mild as hard stares or as extreme as vigilantism. An example from our nation’s recent past might be a mixed-race relationship. The danger here is obvious: in the absence of a formal enforcement response, the ugliest form of “popular justice”—vigilantism—is always a threat.

Conversely, behaviors that are illegal but socially acceptable generally do not generate a formal enforcement response because legal institutions generally sanction behaviors that are outside of PADs, rather than outside the law. An ill-motivated enforcement officer, however, can selectively enforce the law against some people because of factors other than their behavior, and immunize themselves against charges of unlawful motivation because of the behavior’s formal illegality.

Consider again the example of speeding. Driving seventy-five m.p.h. in a sixty-five m.p.h. zone is socially acceptable and is therefore unlikely to generate a formal enforcement response. But assume the driver is African American and the police officer is a bigot. Because the speeding is formally illegal, an unlawfully-motivated police officer could stop a minority driver and, according to the Supreme Court, immunize himself from the charge of unlawful motivation through the formal illegality of the

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<sup>6</sup> UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 6 (2000).

behavior.<sup>7</sup>

The next Part examines existing models of deviance and compliance and compares them with models of the evolution of property rights. After that, I apply the PADs model of acceptable deviance to the evolution of four very different property rights and interests.

### III. MODELS OF COMPLIANCE, DEVIANCE, AND THE EVOLUTION OF PROPERTY RIGHTS

#### A. *Compliance and Deviance*

Scholars have identified three models of decision-making that may be applied to the decision whether to comply with a law or regulation: (1) cognitive, in which actors make decisions based upon “taken-for-granted roles and scripts” without conscious considerations of alternatives; (2) instrumental or rational choice, in which actors make decisions primarily based on their material self interest; and (3) normative or moral, in which actors make decisions based on ingrained beliefs about the acceptability of behavior.<sup>8</sup>

Cognitive models emphasize taken-for-granted cultural rules that make decision-making seem unnecessary.<sup>9</sup> Mark Suchman offers the example of a man’s decision about what to wear to a professional conference; chances are, he does not consciously decide—regardless of whether it is a matter of rational choice or normative sensibility—to forego wearing a skirt. Instead, he unconsciously follows cultural rules that render such conscious decision-making unnecessary.<sup>10</sup>

Rational choice models, of course, suggest that actors will choose to comply when the cost of deviance exceeds its benefits. The cost of deviance can be calculated by discounting the penalty that will be assessed for non-compliance by the likelihood of its assessment, and then

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<sup>7</sup> See *Whren v. United States*, 517 U.S. 806, 813 (1996). In *Whren*, the Supreme Court held that the actual motivation of police in stopping two African American men for a minor traffic violation was irrelevant under the Fourth Amendment. See *id.* at 812 (“Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”). The minor traffic violation was a pretext used by the police to search the two men for drugs because the officers lacked either reasonable suspicion or probable cause to believe the men possessed drugs. *Id.* at 808–09. The defendants were not permitted to introduce evidence that allegedly showed that the police rarely stopped vehicles for such minor violations. *Id.* at 815. The Court held that as long as the police were justified in initiating the stop because of illegal driving behavior, it would not consider the true motivations of the officers. See *id.* at 813 (stating that the Court has been “unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers”). In other words, the formal illegality of the driving behavior immunized the police from charges of unlawful motivation, despite the driving behavior’s social acceptability.

<sup>8</sup> Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 475–76.

<sup>9</sup> *Id.* at 476.

<sup>10</sup> *Id.* at 475.

subtracting from that amount the benefit of non-compliance.<sup>11</sup> In order to deter prohibited behavior, regulators must work the calculation backwards. First, regulators must assign a value to the benefits of non-compliance; then assess a penalty, discounted by the probability that it will be assessed, that outweighs the benefit.<sup>12</sup>

The problem with this model is that, in reality, it generally does not work well.<sup>13</sup> It is based on two unlikely assumptions about the regulated: first, that they can instantaneously and accurately perform a cost-benefit analysis of compliance (in other words, that they can calculate the deterrence value of a regulation); and second, that they will then rationally choose whether to comply or not, based upon that calculation. It also depends on two unlikely assumptions about regulators: first, that they can accurately calculate the benefits of non-compliance; and second, that they can assess penalties, correctly discounted by the likelihood of enforcement that will deter the unwanted behavior.<sup>14</sup> There is scant empirical evidence that these assumptions are correct; in fact, much empirical evidence suggests just the opposite.<sup>15</sup> Moreover, for regulators, the system operates against itself. Deterrence value depends enormously on the likelihood of enforcement, but the relative benefit to society of compliance compared to the cost of harmful behavior is lessened by every dollar devoted to enforcement.

Yet people are—or at least appear to be—generally law-abiding.<sup>16</sup> If deterrence does not produce compliance, then what does? It turns out that compliance is not a product primarily of the threat of penalty for non-compliance; it is primarily a product of the regulated's agreement that the prohibited behavior is unacceptable. "Simple deterrence will often fail to produce compliance commitment because it does not directly address . . .

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<sup>11</sup> For example, if the penalty is \$100,000, and the likelihood of its assessment is ten percent, then the deterrence value of the regulation is \$10,000. In theory, if the benefit of non-compliance is less than \$10,000, then the regulated will comply.

<sup>12</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968) (explaining calculations used to deter prohibited behavior).

<sup>13</sup> See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1842 (2000) (noting that "[i]t is a potential offender's perception of whether he or she can manipulate the system, not the reality, that matters").

<sup>14</sup> This collection of unlikely assumptions is sometimes referred to as "the deterrence trap." See John C. Coffee, Jr., "No Soul to Damn, No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 389–92 (1981) (explaining the application of the deterrence trap); Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591, 591–603 (2006) (describing the application of deterrence and compliance traps as regulatory enforcers).

<sup>15</sup> See Robinson, *supra* note 13, at 1843 ("Punishment will not deter one who cannot make the logical connection between criminal conduct and punishment or one who cannot resist the impulse to commit the criminal conduct no matter how clear the resulting liability or how unpleasant the consequences.").

<sup>16</sup> See TYLER, *supra* note 1, at 3 ("Americans are typically law-abiding people.").

perceptions of the morality of regulated behavior.”<sup>17</sup> Tom Tyler has shown that “[t]he most important normative influence on compliance with the law is the person’s assessment that following the law accords with his or her sense of right and wrong.”<sup>18</sup> When it does, he concludes, people become self-regulating, and “[s]elf-regulating people are law-abiding [people].”<sup>19</sup> In other words, compliance is the result of law’s convergence with normative beliefs.

Recognizing the limits of the instrumental model of compliance, some rational choice theorists have acknowledged the importance of norms in compliance decisions, but have tried to place them within a rational choice framework.<sup>20</sup> This effort generally takes one of two forms. Some rational choice theorists have argued that the decision whether to obey or defy a norm is just another cost-benefit decision.<sup>21</sup> An actor might weigh, for example, whether the cost to his reputation of disobeying a norm is less than the one-time economic benefit of doing so. If the benefit exceeds the cost, the actor would be expected to disobey the norm. For example, Robert Cooter regards both law and norms as means of imposing costs on unwanted behavior. In his view, “[t]he state can impose law from the top down by enacting novel obligations, as illustrated by most regulatory law; or, alternatively, law can grow from the bottom up by enforcing social norms.”<sup>22</sup> Interestingly, Cooter suggests the appropriate role for the state with regard to norms is to use law to “correct failures in social norms.”<sup>23</sup> “Social norms are ‘perfect’ when law cannot improve upon them relative to . . . standards of efficiency.”<sup>24</sup> In other words, norms fail when they fail to produce behavior that maximizes economic efficiency. In such cases, law must be used as an instrument to produce a better result, but used sparingly because “[s]uccessful state enforcement typically requires a close alignment of law with morality, so state officials enjoy informal support from private persons.”<sup>25</sup>

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<sup>17</sup> Parker, *supra* note 14, at 592.

<sup>18</sup> TYLER, *supra* note 1, at 64.

<sup>19</sup> TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS xiii (2002).

<sup>20</sup> See Amitai Etzioni, *Social Norms: Internalization, Persuasion and History*, 34 LAW & SOC’Y REV. 157, 164–65 (2000) (“[A] social order based on laws can be maintained without massive coercion only if most people, most of the time, abide, as a result of supportive social norms, by the social tenets embedded in the law. It can be maintained only if the majority of the transactions engaged in are sufficiently undergirded by social norms, and thus do not require constant intervention by public authorities. Above all, laws work best and are needed least when social norms are intrinsically followed.”).

<sup>21</sup> See, e.g., Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 972 (1997) (“[T]he social norm must have a punishment-induced equilibrium with an efficient level of deterrence.”).

<sup>22</sup> *Id.* at 947.

<sup>23</sup> *Id.* at 949.

<sup>24</sup> *Id.* at 972.

<sup>25</sup> *Id.* at 979.

Other rational choice theorists have attempted to fit norms within the rational choice model by suggesting that even if an individual's discrete decision to obey a norm is not the product of cost-benefit analysis, norms are the product of an unconscious collective cost-benefit decision, whereby a society evolves norms that embody economic efficiency.<sup>26</sup> Norms are, in this view, an extrinsic or environmental force that are either entered into the rational choice calculus, or produced by it.<sup>27</sup> For example, Robert Ellickson, in his well-known study of the relationship between legal rules and norms with respect to the maintenance of boundaries between cattle ranchers, regards both law and norms as types of rules that produce efficient results, where a "rule" is defined as a "guideline for human conduct" that "actually influences the behavior either of those to whom it is addressed or of those who detect others breaching the guideline."<sup>28</sup> According to Ellickson, norms are rules that emanate from "social forces" and laws are rules that emanate from governments.<sup>29</sup> Law is enforced by the state; norms are enforced through sanctions imposed by private parties.<sup>30</sup> While norms and law differ in the source of their creation and in the identity of their enforcers, they are nonetheless the product of rational choice decision-making.

But norms are not encompassed within rational choice theory quite so easily. As Amitai Etzioni points out, regarding norms solely as an extrinsic force misses their intrinsic and possibly non-rational nature.<sup>31</sup> Non-rational sources of norms might include "tradition, institutions, customs, and habit."<sup>32</sup> Norms, therefore, may be in part the fruit of extrinsic rational choice, but are also in part created and enforced without regard to rational choice.<sup>33</sup> In this way, norm-based decision-making often arrives at the same result as cognitive decision-making, but through a different process. In other words, like the rational choice model, normative

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<sup>26</sup> See *id.* at 953 (explaining that efficiency in common law rules might be explained by judicial enforcement of social norms, which "evolve towards efficiency"); Etzioni, *supra* note 20, at 176 ("Behavior that is endorsed by social norms and also rewarding in narrow economic terms is likely to be the most stable. Conversely, behavior that is censured by social norms and economically unrewarding is most likely to be abandoned.").

<sup>27</sup> See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 128, 167 (1991) ("[W]hen social conditions are close-knit, informal norms will encourage people in non-zero-sum situations to make choices that will conjoin to produce the maximum aggregate objective payoff."); Etzioni, *supra* note 20, at 172 (citing Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358 (1997)) (describing the conditions that produce a norm).

<sup>28</sup> ELLICKSON, *supra* note 27, at 128.

<sup>29</sup> *Id.* at 127.

<sup>30</sup> *Id.* at 127–28.

<sup>31</sup> Etzioni, *supra* note 20, at 173.

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* at 175 (stating that "social norms themselves are in part the fruits of rational choice" and once this is accepted, "one can then explore the ways in which the factors modeled by law and economics and law and society may be effectively combined into a socioeconomic perspective").

and moral models presuppose conscious choices by decision-makers, but the influence of normative beliefs is intrinsic, not extrinsic. Based on those beliefs, “people rarely act in ways that they, themselves, genuinely believe to be morally wrong.”<sup>34</sup> Normative models suggest that “when morality and law concur, people behave in ways that comply with the law,”<sup>35</sup> when they diverge, deviance results.<sup>36</sup>

This intrinsic process has an extrinsic effect: law evolves to embody norms. “Law often grows from social norms that create order from consensus obligations.”<sup>37</sup> Lior Jacob Strahilevitz describes how, “[a]s a consensus develops within a group or community that a certain type of behavior is undesirable, the consensus begins to form a baseline level of expectation.”<sup>38</sup> Thus the real meaning of law—that is to say, how it is lived—is determined not only by regulators, but by the regulated, “across the traditionally understood boundaries between ‘inside’ and ‘outside’ of the legal system.”<sup>39</sup>

The intrinsic power of norms has important implications for compliance with—and enforcement of—law. Intrinsic willingness to obey the law is strongest “when the law faithfully reflects broadly shared values.”<sup>40</sup> On the other hand, “social order based on laws can be maintained without massive coercion only if most people, most of the time, abide, as a result of supportive social norms, by the social tenets embedded in the law.”<sup>41</sup> In short, “laws work best and are needed least when social norms are intrinsically followed.”<sup>42</sup> It is not surprising, therefore, that scholars have found that regulatory enforcement works best when accompanied by “extraregulatory factors” including a “sense of

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<sup>34</sup> Suchman, *supra* note 8, at 480.

<sup>35</sup> *Id.* at 487.

<sup>36</sup> Normative sensibilities that could lead to formal deviance may be overcome by an intervening belief in the legitimacy of the legal system itself, and the consequent belief that one should obey the law even if one normatively or morally disagrees with its requirements. Moreover, by regarding the legal system as legitimate, one may be persuaded that the law itself is moral, and adjust one’s normative sensibilities to match the law. *Id.* at 488.

<sup>37</sup> Cooter, *supra* note 21, at 978.

<sup>38</sup> Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 *IND. L.J.* 1231, 1280 (2000).

<sup>39</sup> Grattet & Jenness, *supra* note 1, at 935; see also Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 *AM. J. SOC.* 406, 406, 409 (1999) (explaining that, with regard to employment law, regulatory practices, as well as those regulated by those practices, are what give law its meaning). Law is not given meaning only in regulatory practices. It is also given meaning by the regulated. As Edelman has observed with regard to employment law, the real meaning of law is created in part within the “realm that it seeks to regulate.” Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH* 337, 339 (Laura Beth Nielson & Robert L. Nielson eds., 2005).

<sup>40</sup> Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 *U. PA. L. REV.* 1095, 1147 (2007).

<sup>41</sup> Etzioni, *supra* note 20, at 165.

<sup>42</sup> *Id.* If compliance with law and norms depends, as rational choice theorists suggest, upon a cost-benefit decision-making process, then externally imposed deterrence costs will be enormous, dependent upon a credible threat of enforcement.

commitment” and “the influence of peer and other group pressures.”<sup>43</sup>

Recognizing, at least implicitly, that compliance often reflects the complier’s agreement that a regulation accurately defines acceptable behavior, regulators have begun more openly to attempt to prevent unwanted behavior by modifying perceptions of behavior’s acceptability, rather than by attempting to deter that behavior by threat of penalty.<sup>44</sup> “[L]aws supported by social norms are likely to be significantly more enforceable.”<sup>45</sup> “Responsive regulation,” as it has been labeled, attempts “to build moral commitment to compliance” first and then attempts to deter non-compliance through the threat of penalty assessment only if regulators are unable to build that commitment.<sup>46</sup>

Responsive regulation envisions enforcement techniques arranged in a pyramid with persuasive techniques forming the base of the pyramid and more coercive techniques toward the top.<sup>47</sup> “The objective is that firms and individuals will comply, even without enforcement action, through internalization and institutionalization of compliance norms, informal pressure and the indirect threat of the ‘benign big gun’ at the top of the pyramid.”<sup>48</sup> “In order for responsive regulation to even be possible, regulators must have the capacity to convince people that regulatory offenses represent shared values.”<sup>49</sup> But, as Christine Parker has found, regulators cannot simply unilaterally create newly drawn boundaries of socially acceptable behavior. Unless the regulated agree with “the moral seriousness of the law,” they regard attempts at its enforcement as unfair, which has “a negative influence on long-term compliance.”<sup>50</sup> The decision to comply or not with any law or regulation is shaped in part by whether the regulated party considers herself a party to that implicit “social contract,” that itself is the product of “repeated, reciprocal interactions” between regulators and the regulated, which act as a type of negotiation over shared expectations.<sup>51</sup>

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<sup>43</sup> Chris Koski & Peter J. May, *Interests and Implementation: Fostering Voluntary Regulatory Actions*, 16 J. PUB. ADMIN. RESEARCH & THEORY 329, 330 (2006).

<sup>44</sup> See Parker, *supra* note 14, at 592 (suggesting that regulators should use mixes of regulatory styles to improve compliance, including addressing perceptions of the morality of the regulated behavior, rather than relying on deterrence alone).

<sup>45</sup> Etzioni, *supra* note 20, at 159.

<sup>46</sup> Parker, *supra* note 14, at 592.

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 614.

<sup>50</sup> *Id.* at 591–92.

<sup>51</sup> *Id.* at 614; see also Peter J. May, *Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities*, 27 LAW & POL’Y 317, 337 (2005) (defining the social contract as “a set of shared norms about acceptable behaviors on the part of regulated entities and regulators”).

### B. *The Evolution of Property Rights*

The debate over how property rights evolve mirrors with remarkable consistency debates over motivations for compliance with, or deviance from, law. Just as scholars have constructed cognitive, instrumental, and normative models of decision-making, they have posited public choice, economic, and normative models of the evolution of property rights. By applying theories of compliance and deviance to theories of property rights evolution, both are illuminated.

James Krier states that the concept of property and property rights must have preceded the existence of the state; therefore, state action cannot explain every instance of the development of property rights.<sup>52</sup> There are two possibilities that explain the emergence of property rights. First, property rights might be “the product of intentional undertakings: property is ‘designed.’”<sup>53</sup> Conversely, however, property rights regimes might result from the “unintended consequence of individual actions: property arises ‘spontaneously.’”<sup>54</sup> In other words, property rights can be produced “formally by a government or informally by the cooperation of individuals.”<sup>55</sup> The self-organization of property rights regimes may be analogous to the spontaneous emergence of complex systems that has generated a great deal of recent attention in the biological and physical sciences: “The most provocative claim of the prophets of complexity is that complex systems often exhibit spontaneous properties of self-organization.”<sup>56</sup> “Institutions, including property rights, emerge and develop in response to evolving economic and political conditions . . . .”<sup>57</sup> “The state has a passive role [in a process of establishing property rights] and supplies rules in response to pressures [from the grassroots level] . . . .”<sup>58</sup> As Ugo Mattei puts it, “property law does not need the existence of the state.”<sup>59</sup>

Once established, property rights are often described as providing stability that allows economically efficient transactions.<sup>60</sup> But property rights are not static. Eduardo Peñalver and Sonia Katyal note that, “there

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<sup>52</sup> James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139, 143–44 (2009).

<sup>53</sup> *Id.* at 145.

<sup>54</sup> *Id.*

<sup>55</sup> Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S360 (2002).

<sup>56</sup> Paul Krugman, *Complex Landscapes in Economic Geography*, 84 AM. ECON. REV. 412, 415 (1994). Studying phenomena as diverse as the spatial and social division of city neighborhoods and the routes ants take in gathering food, researchers have discovered that “starting from disordered initial conditions they tend to move toward highly ordered behavior.” *Id.*

<sup>57</sup> Leonid Polishchuk & Alexei Savvateev, *Spontaneous (Non)emergence of Property Rights*, 12 ECON. OF TRANSITION 103, 104 (2004).

<sup>58</sup> THIRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 261 (Mark Perlman & E. Roy Weintraub eds., 1990).

<sup>59</sup> MATTEI, *supra* note 6, at 4, 5.

<sup>60</sup> Peñalver & Katyal, *supra* note 40, at 1098.

can be no doubt that, once a robust system of private property has been established, the precise content of that standard bundle of property rights shifts over time in response to varying pressures and incentives, both internal and external to the institution of ownership.”<sup>61</sup> But exactly why and how property rights evolve is a matter of considerable debate. Scholars have posited public choice, economic, and normative models of changes in property rights.

Public choice theorists argue that the evolution of property rights is dependent primarily upon political power. Simply put, “societies reallocate property rights when some exogenous political realignment enables a powerful group to grab a larger share of the pie.”<sup>62</sup> As a result, public choice theorists tend to be skeptical of economic theories that suggest property rights evolve toward optimal economic efficiency. Saul Levmore, for example, has noted that because “optimal rules may be impossible to ascertain” any claim that property rights evolve toward optimal efficiency is necessarily suspect.<sup>63</sup>

Unlike the public choice model, economic and normative models do not presuppose that property rights emerge from deliberate acts of political power. According to Harold Demsetz, property rights move from common usage to private property when some external factor makes common usage less economically efficient than private property—in other words, when the benefits of adopting private property rights outweigh the costs of doing so.<sup>64</sup> Demsetz predicted that private property rights would replace open access commons when the benefits of internalizing, through the allocation of private property rights, the externalities resulting from common use of a resource outweigh the costs of creating and defending private property rights.<sup>65</sup> This might occur when increased demand for a resource increases the cost of externalities associated with common usage, relative to the cost of allocating private property rights. Alternatively, it might occur when developments in technology reduce the cost of allocating private rights relative to the cost of externalities associated with common usage.<sup>66</sup> Drawing upon accounts of the fur trade among Native Americans during and after increased demand for furs following contact with Europeans, Demsetz predicted that property rights would move from common usage to private property when increases in the complexity and magnitude of

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<sup>61</sup> *Id.* at 1100.

<sup>62</sup> Banner, *supra* note 55, at S360.

<sup>63</sup> Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 185 (2003).

<sup>64</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967).

<sup>65</sup> See Abraham Bell & Gideon Parchomovsky, *The Evolution of Private and Open Access Property*, 10 THEORETICAL INQ. L. 77, 78 (2009) (discussing Demsetz's theory that private property would replace open-access property regimes when the “benefits [of] internalizing externalities exceeded the costs of formalizing and defending private property rights”).

<sup>66</sup> Demsetz, *supra* note 64, at 350.

economic relationships resulted in increased scarcity of valuable resources.<sup>67</sup>

In the aftermath of Demsetz's seminal work, scholars have critiqued and refined his cost-benefit model. Barry Field has noted that the transition between open access commons and private property rights is not a one-way journey following the evolution of societies from primitive to complex, but rather a two-way street; that is, private property rights sometimes transition to open access commons.<sup>68</sup> Other scholars have noted that even with Fields's additional insight, the Demsetz cost-benefit model does not seem to capture the dynamic changes in property rights observable in the real world.<sup>69</sup> Stuart Banner, for example, has stated that "[p]roperty rights cannot simply be assumed, like other goods, to be produced in a pattern that responds to the changing costs and benefits of producing them."<sup>70</sup> Regardless of whether the right is produced formally or informally, its production "is necessarily a collective endeavor."<sup>71</sup> Therefore, transitions in property rights regimes, according to Banner, will inevitably face collective action problems.<sup>72</sup> Banner is persuaded, like Demsetz, that transitions in property regimes do seem to move toward efficiency.<sup>73</sup> His objection is that Demsetz fails to describe a means by which the transition occurs, and in particular fails to identify a means of overcoming two obstacles: collective action and transaction costs.<sup>74</sup> As Banner states, "[a]n initial allocation of property rights gives rise to a certain amount of path dependence."<sup>75</sup> That path dependence is, in Banner's characterization, a type of transaction cost: it makes reallocation of rights more difficult, whatever the economic efficiencies.<sup>76</sup> To overcome those obstacles, the expected payoffs to the winners under the new regime must be sufficient to overcome the cost. Such was the case, according to Banner, when English colonists reallocated property rights in

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<sup>67</sup> See *id.* at 352 (proposing that the rise of the fur trade increased the value of furs to the Indians and increased the scale of hunting activity, thus increasing the importance of externalities associated with free hunting and changing the property right system in such a way as to "take account of the economic effects made important by the fur trade").

<sup>68</sup> See Barry C. Field, *The Evolution of Property Rights*, 42 KYKLOS 319, 320 (1989) (arguing that factors such as population growth and increases in demand do not invariably cause society to move away from common toward individual property institutions but in fact sometimes "encourage greater use of common property").

<sup>69</sup> See, e.g., Bell & Parchomovsky, *supra* note 65, at 84 (stating that "Demsetz's one-way evolutionary account is not fully supported by history").

<sup>70</sup> Banner, *supra* note 55, at S360.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at S361.

<sup>74</sup> See *id.* (stating that Demsetz's theory is missing an "account of how a society can overcome the obstacles that might block a transition to a more efficient property regime" as well as an "account of the mechanism by which efficiency gets translated into political action").

<sup>75</sup> *Id.* at S364.

<sup>76</sup> *Id.*

Maori lands to their own benefit.<sup>77</sup>

Bell and Parchomovsky, responding to Demsetz and his critics, have refined the economic model of property rights evolution by positing a three dimensional cost-benefit model of property rights evolution, along axes of the number of owners, asset configuration, and extent of the owner's dominion.<sup>78</sup> They note that the number of owners can run on a continuum from open access to a single owner and everything in between.<sup>79</sup> Similarly, the extent of dominion over property can expand or contract in reaction to changing circumstances or sensibilities.<sup>80</sup> In response to changing economic incentives, the configuration of assets can and does change frequently. For example, tracts of real property are divided or combined<sup>81</sup> and, in a contemporary example, music may be sold on a per-track basis rather than in whole albums.

But perhaps the primary driver in the evolution of property rights is neither political nor economic. As Carol Rose stated, "property begins in a social context."<sup>82</sup> Peñalver and Katyal agree:

Ownership of land and the structures attached to land provide the spaces and places in which we carry out our social existence . . . . Accordingly, property rights and the social norms that accompany (and are often reinforced by) property ownership play an important role in ordering our interactions with other human beings.<sup>83</sup>

In this way, property rights are "broadly reflective of evolving community values."<sup>84</sup> Rose noted that the destruction of the property rights claims of people who exist outside of social groups is "a matter of relative indifference" to those within.<sup>85</sup> Demsetz himself recognized that changes in property rights regimes might result not from economic incentives but from "changes in social mores."<sup>86</sup>

Joseph Singer argues that normative sensibilities must play a crucial

<sup>77</sup> *Id.* at S363.

<sup>78</sup> Bell & Parchomovsky, *supra* note 65, at 86.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 87–88 ("[T]he dominion of property owners may be restricted either by narrowing the rights and privileges owners enjoy with respect to their property or by limiting the list of duty bearers who must respect the rights of property owners.").

<sup>81</sup> *Id.* at 87.

<sup>82</sup> Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 *YALE J.L. & HUMAN. (SPECIAL ISSUE)* 1, 6 (2006) [hereinafter Rose, *Property and Language*].

<sup>83</sup> Peñalver & Katyal, *supra* note 40, at 1132.

<sup>84</sup> *Id.* at 1101.

<sup>85</sup> Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 *UTAH L. REV.* 1, 29 [hereinafter Rose, *Property and Expropriation*]. For the seminal case demonstrating Rose's point, see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 570 (1823), holding that under authority of the crown, absolute title to land vested in civilized persons discovering barbarous countries, and that Indians maintained only a right to occupancy.

<sup>86</sup> Demsetz, *supra* note 64, at 350.

role in the recognition of property rights.<sup>87</sup> He notes that most people hold two, somewhat contradictory, conceptions of property rights.<sup>88</sup> The first is what he calls the “castle conception,” which views restrictions on free use of private property as presumptively illegitimate.<sup>89</sup> The second is the “environmental conception,” which views property rights not just as private rights but also as a set of social obligations that legitimately restrict the use of property.<sup>90</sup> Deciding between them requires “normative reflection” through which we weigh “the legitimacy of claims and the significance of harms.”<sup>91</sup> Accordingly, we rely upon property norms to “shape our understanding of the *meaning* of property rights and the *legitimate contours of social relationships*.”<sup>92</sup> Norms do that by defining “who is an ‘owner’ and who is a ‘non-owner’” with regard to property, and then identifying social obligations, if any, that inhere in that ownership interest.<sup>93</sup>

Normative property rights systems seem to arise with reference to, but separate from, formal legal systems without planning, through the cumulative effect of individual acts. In many ways, they are self-organizing systems—“systems that, even when they start from an almost homogeneous or almost random state, spontaneously form large-scale patterns.”<sup>94</sup> Those “local, short-range interactions can create large-scale structure.”<sup>95</sup> Normative property systems “may be considered ‘natural’ products of a spontaneous order whose idea is usually conveyed by the term ‘customary law.’ . . . Many customary rules are at play, both very old or very new. Often these rules are in competition with official rules recognized by the modern state.”<sup>96</sup>

Singer offers an example from the law of nuisance to demonstrate the primacy of normative sensibilities over instrumental considerations in defining property rights. Rational choice theorists might tell us that all nuisance is reciprocal<sup>97</sup>: if noise from my factory interferes with your use and enjoyment of your residence, then your insistence on quiet at your residence interferes with my use and enjoyment of my factory. But “[t]ry as the economists might to argue that the imposition of pollution on

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<sup>87</sup> See Joseph William Singer, *How Property Norms Construct the Externalities of Ownership* 3 (Feb. 14, 2008) (unpublished research paper, No. 08-06, Harvard Law School), available at <http://ssrn.com/abstract=1093341> (discussing the good neighbor conception of property).

<sup>88</sup> *Id.* at 2–3.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 3.

<sup>91</sup> *Id.* at 5.

<sup>92</sup> *Id.* at 6.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> PAUL KRUGMAN, *THE SELF-ORGANIZING ECONOMY* 3 (1996).

<sup>95</sup> *Id.* at 17.

<sup>96</sup> MATTEI, *supra* note 6, at 5–6.

<sup>97</sup> See, e.g., R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–2 (1960) (describing the social cost problem as a “problem of a reciprocal nature”).

homeowners is morally and legally equivalent to the homeowners' desire to limit the factory's polluting activity, there is something in us that wants to rebel and not to see the actions as equivalent."<sup>98</sup> That thing in us, according to Singer, is the cultural power of both "conscious and unconscious norms."<sup>99</sup> Norms lead us to regard the factory's pollution, rather than the homeowner's limit on the pollution, as an externality that the law should make internal to its creator.<sup>100</sup>

#### IV. ACCEPTABLE DEVIANCE AND THE EVOLUTION OF PROPERTY RIGHTS

Here I apply the socially acceptable deviance model to compliance with, and deviance from, particular property rights and interests. Three preliminary issues should be addressed. The first is whether there is anything that makes *property rights* and interests a particularly fertile ground for this analysis. After all, while it is true that property rights depend upon compliance and enforcement,<sup>101</sup> the same can be said of other types of rights. There are a number of reasons why property rights offer a particularly useful subject of analysis. First, while the gap between formal law and law-as-lived has been studied in insightful depth by sociologists and political scientists with regard to criminal law<sup>102</sup> and the regulation of businesses,<sup>103</sup> less attention has been paid to the gap between property rights and behavior regarding property.<sup>104</sup>

Second, property is a uniquely social institution. After all, "what makes something 'property' is precisely that others routinely recognize and respect one's claims,"<sup>105</sup> with or without state enforcement of those claims.

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<sup>98</sup> Singer, *supra* note 87, at 10–11.

<sup>99</sup> *Id.* at 11.

<sup>100</sup> *Id.*

<sup>101</sup> See Banner, *supra* note 55, at S363 ("The organizers of a property system can deny the system's benefits to certain people simply by refusing to enforce those people's claims.")

<sup>102</sup> See, e.g., KENNETH CULP DAVIS, *POLICE DISCRETION* 1 (1975) (discussing the selective enforcement of laws by the police); Robinson, *supra* note 15, at 1841 (examining the divide between the traditional aims of criminal law, and modern deference to lay institutions of justice).

<sup>103</sup> See, e.g., Peter J. May, *Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities*, 27 *LAW & POL'Y* 317, 317 (2005) ("In recent years regulatory scholars have turned attention from studying the enforcement actions of regulatory agencies to consideration of the motivations of regulated entities for complying with regulations."). It is not surprising that scholars have devoted particular attention to compliance with business regulation, given the vast regulatory apparatus that operates with regard to commercial activity in most advanced economies. As Coglianese and Kagan have stated, "regulatory agencies and the rules they promulgate have become prominent components of contemporary legal systems, often eclipsing legislative and judicial rules in their economic and social effects." *Introduction to REGULATION AND REGULATORY PROCESSES* xi, xi (Cary Coglianese & Robert A. Kagan eds., 2007). Regulators oversee, to a greater or lesser extent, "workplace safety, financial security, air and water pollution, fire and accident prevention, earthquake protection, health and elder care delivery, food and drug quality, and proper maintenance of airplanes, elevators, school buses and railroad tracks." *Id.*

<sup>104</sup> *But see* ELLICKSON, *supra* note 27, at 123 (providing a careful study of normative and legal constraints on behaviors regarding property in a rural community).

<sup>105</sup> Rose, *Property and Expropriation*, *supra* note 85, at 3.

The state often protects property rights through the enforcement of criminal sanctions, including sanctions for trespass, robbery, and fraud.<sup>106</sup> But formal enforcement of all property rights—like formal enforcement of the speed limit—is far beyond the capacity of the state. Instead, property rights depend upon some level of compliance: “One person’s property can only exist, by and large, because other people accept it.”<sup>107</sup> And compliance, as we have seen, is largely dependent upon whether law converges with normative sensibilities. We have also seen, where law and normative sensibilities diverge, it is often the limits of normatively acceptable deviance from law, rather than the law itself, that defines the limits of rights. In other words, it is the social acceptability of property rights claims, rather than their legality, that ultimately determines whether such rights are respected and, therefore, exist. The phenomenon of acceptable deviance is observable with regard to property rights—as are the attendant dangers caused by the stresses acceptable deviance places upon legal institutions: selective enforcement and popular justice.

Third, given the evolutionary and normative nature of property rights, their enforcement provides fertile ground for the study of the gap between the legality and social acceptability of behavior. If, as the theorists reviewed in the previous section have argued, property rights evolve over time, then gaps are likely to emerge between legality and social acceptability. The PADs model is a very useful tool for examining such gaps.

If it is correct that property rights are particularly suited to this analysis, then a second preliminary issue is whether there is anything compelling about *these* four types of property rights and interests—copyright, housing, the use of public space, and fishing rights—that merits close examination. Each of these rights and interests exists within a rapidly shifting, contested terrain, where norms of socially acceptable behavior may evolve earlier than, or in opposition to, the content of the formal law. These potential gaps between legality and social acceptability are, of course, the focus of the acceptable deviance model.

The last preliminary issue that merits discussion is whether the simple PADs model applied to these property rights and interests is *too* simple. It could, for example, be made more subtle and complex by examining instances in which changes in law drive changes in norms, rather than the reverse. In addition, it does not address contested norms of social acceptability between groups with different socio-economic statuses.

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<sup>106</sup> See Peñalver & Katyal, *supra* note 40, at 1098 (“Laws of criminal trespass protect the boundaries around real property established through market transactions. Laws prohibiting larceny, fraud, robbery, and burglary similarly wrap privately determined entitlements within the safety of the publicly enforced criminal law.”).

<sup>107</sup> Rose, *Property and Language*, *supra* note 82, at 3.

Those are phenomena that merit serious analysis, but they exceed the scope of this Article.

#### A. Copyright

“[P]roperty rights in ideas are up for grabs where no such rights seemed possible before.”<sup>108</sup> The right to exclude others is traditionally considered the most fundamental of all private property rights. But advances in digital technology have rendered what once was protectable through private property rights very difficult, and perhaps unwise,<sup>109</sup> to protect. Moreover, technological advances have created changes in normative sensibilities regarding property rights. Nowhere is that clearer than in the law of copyright. The development of digital technology that created ease in sharing files also helped to create new norms governing file-sharing. Bell and Parchomovsky note that the “[e]ase in digitizing information and expressions, and the shortcomings of encryption technology” have led to widespread unauthorized duplication of copyrighted materials.<sup>110</sup> Barry Field would predict that the increase in the cost of exclusion, and the resulting ineffective enforcement against trespassers, would push expressive content away from private property rights and toward open access.<sup>111</sup> In fact, Bell and Parchomovsky conclude, “this dynamic is present in the area of copyright law.”<sup>112</sup> In that unstable environment, non-commercial copying of music and film through digital technology may have moved from the illegal/socially unacceptable box to the illegal/socially acceptable box of the PADs model. As a result, new informal property rights regimes have arisen, but not without enormous controversy. The resulting confrontation has stressed legal institutions. Legal institutions come under increasing pressure to align their response to the society’s normative sensibility. Two recent cases that have attracted considerable publicity offer prominent examples of copyright owners pushing back against the increasing social acceptability of copyright violations.

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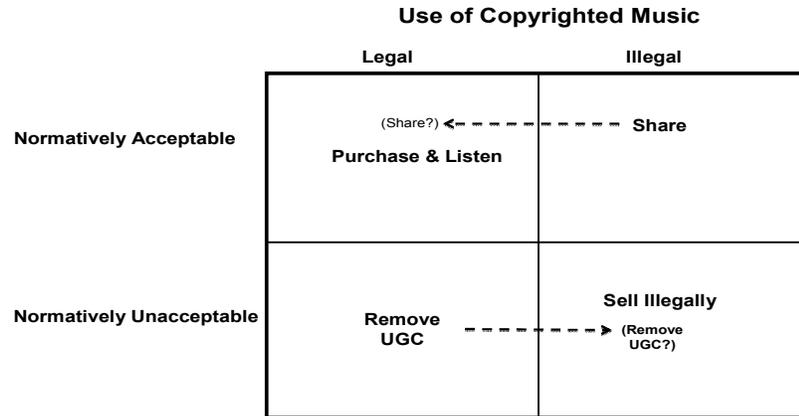
<sup>108</sup> Levmore, *supra* note 63, at 194.

<sup>109</sup> Bell and Parchomovsky note that holders of copyright have, in some ways, protected the existence of their private property rights by narrowing the scope of their dominion. For example, many holders of copyright have made their works available to users through a Creative Commons license agreement under which royalty-free uses are available to anyone in return for acknowledgement of the copyright. See Bell & Parchomovsky, *supra* note 65, at 94–95 (describing how “copyright holders voluntarily reconfigured their primary asset”).

<sup>110</sup> *Id.* at 92.

<sup>111</sup> See Field, *supra* note 68, at 328.

<sup>112</sup> Bell & Parchomovsky, *supra* note 65, at 92.



In *Capitol Records, Inc. v. Thomas*,<sup>113</sup> the defendant, Jammie Thomas, was sued for copyright infringement by Capitol Records because she had downloaded twenty-four songs to which Capitol Records owned the copyright without permission from Capitol, and then placed them on the peer-to-peer file-sharing network KaZaA, from which others could also download them without permission from Capitol.<sup>114</sup>

A jury found that Thomas had willfully infringed Capitol's copyright by reproducing and distributing the recordings.<sup>115</sup> The jury instruction under which Thomas was convicted stated that making copyrighted recordings available for downloading on a peer-to-peer network constituted distribution, regardless of whether actual distribution had occurred.<sup>116</sup>

Shortly afterwards, the court vacated the verdict because it concluded that distribution of copyrighted materials required some affirmative act beyond simply making the materials available for download by others.<sup>117</sup> It granted Thomas a new trial with jury instructions amended to reflect that understanding.<sup>118</sup>

Interestingly, the court acknowledged that the conduct of which Capitol complained was technically illegal but obviously commonplace and socially acceptable. As the court explained, "Thomas acted like countless other Internet users. Her alleged acts were illegal, but

<sup>113</sup> 579 F. Supp. 2d 1210 (D. Minn. 2008).

<sup>114</sup> *Id.* at 1212–13.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1213.

<sup>117</sup> *Id.* at 1226–27.

<sup>118</sup> *Id.* at 1227.

common.”<sup>119</sup> It was not simply the commonness of her conduct that left the court uncomfortable; it was the law’s evident failure to recognize that her conduct was not blameworthy enough to merit a substantial damages award.<sup>120</sup> In other words, the court found that her conduct was not just common, it was common because it was socially acceptable. The court expressly stated that it was being placed in a position that was awkward at best, and called upon Congress to change the law to better reflect the reality of social acceptability.<sup>121</sup> In fact, the court “implore[d] Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases” such as *Thomas*.<sup>122</sup>

The court clearly felt it was risking the obvious in stating that “it would be a farce to say that a single mother’s acts of using [KaZaA] are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market.”<sup>123</sup> The court noted that “Thomas not only gained no profits from her alleged illegal activities, she sought no profits.”<sup>124</sup> Instead she sought a most pedestrian and socially acceptable benefit: “free music.”<sup>125</sup> On re-trial, the jury was not kind to Thomas: it awarded \$1.9 million in damages.<sup>126</sup> The intensely negative public reaction to the damages award strongly suggests that much of the public does not consider Thomas’s conduct particularly blameworthy.<sup>127</sup> In fact, upon review, Judge Davis slashed the damages awarded to \$54,000, writing that it was unjust to award more when Thomas’s only goal was “obtaining free music.”<sup>128</sup>

Similarly, the case of confessed file-sharer Joel Tenenbaum has gained significant publicity recently. The Recording Industry Association of America (“RIAA”) filed suit against Tenenbaum in August 2007, alleging that he had illegally downloaded thirty songs.<sup>129</sup> Tenenbaum eventually

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<sup>119</sup> *Id.* at 1227–28.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1227.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010); *see also* Special Verdict Form at 17–20, *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010) (No. 006-CV-01497) (awarding \$80,000 for each copyright work infringed upon, totaling \$1.9 million).

<sup>127</sup> *See, e.g.*, Nate Anderson, *What’s Next for Jammie Thomas?*, ARS TECHNICA (June 21, 2009, 8:00 PM), <http://arstechnica.com/tech-policy/news/2009/06/whats-next-for-jammie-thomas-rasset.ars> (reporting that “the outrage isn’t confined to the blogosphere”); J.R. Raphael, *Has the RIAA’s Fight Against File-Sharing Gone Too Far?*, PCWORLD (June 19, 2009), [http://www.pcworld.com/article/167058/has\\_the\\_riaas\\_fight\\_against\\_file\\_sharing\\_gone\\_too\\_far.html](http://www.pcworld.com/article/167058/has_the_riaas_fight_against_file_sharing_gone_too_far.html) (reporting that in response to the verdict against Thomas, “the blogosphere, as well as Twitter users, are buzzing with outrage”).

<sup>128</sup> Memorandum of Law & Order at 2, *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010) (Civ. No. 06-1497), *available at* <http://docs.justia.com/cases/federal/district-courts/minnesota/mndce/0:2006cv01497/82850/366/>.

<sup>129</sup> *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 219 (D. Mass. 2009).

admitted that he used the peer-to-peer file-sharing network KaZaA to download and share the copyrighted songs.<sup>130</sup>

United States District Court Judge Nancy Gertner expressed similar misgivings as Judge Davis did in the *Thomas* case, expressly recognizing that a shift in digital technology had created a shift in norms that made formally illegal behavior common: “The advent of widespread internet access in the late 1990s threw a number of norms into disarray, offering sudden access to a wealth of digitized media and giving the veneer of privacy or anonymity to acts that had public consequences.”<sup>131</sup> She was clearly unhappy with the prospect of imposing civil liability on people who had acceded to the new norms, rather than obey the formal law, stating, “there is a huge imbalance in these cases,” “[a]t a certain point after 133 cases in my court and countless others around the country, the plaintiffs are going to realize this is making no sense and making them look bad,” “[the case] should be over in a rational world . . . ,” and “I can’t say this is a good situation or a fair situation, it is, however, the situation.”<sup>132</sup>

RIAA’s counsel, Eve Barton, defended its actions by declaring its frustration that, essentially, society was ignoring the law in favor of norms that permitted file-sharing<sup>133</sup>—in other words, that people were choosing to behave within parameters of acceptable deviance rather than within the law. As Judge Gertner noted, the *Tenenbaum* case was just one of many. In 2003, RIAA launched a litigation campaign that has targeted 35,000 file-sharers.<sup>134</sup> Interestingly, in the *Tenenbaum* case the voir dire process was described by Judge Gertner as “one very long, very tortured day,” in part because RIAA’s attorneys challenged each of the potential jurors who admitted to file-sharing themselves.<sup>135</sup>

In pre-trial proceedings, Judge Gertner ruled that *Tenenbaum* could not argue “fair use” as a defense.<sup>136</sup> As a consequence, with *Tenenbaum*

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<sup>130</sup> See *id.* (stating that *Tenenbaum* argued “his file sharing constituted a ‘fair use’ under the Copyright Act”).

<sup>131</sup> *Id.* at 237.

<sup>132</sup> Transcript of Motion Hr’g at 8–9, 25–26, *Capitol Records, Inc., v. Noor Alaujan*, 2009 WL 5873132 (2009) (No. 03-11661).

<sup>133</sup> *Id.* at 26–28.

<sup>134</sup> Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, ELEC. FRONTIER FOUND. (Dec. 19, 2008), <http://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes>.

<sup>135</sup> Ben Sheffner, *Tenenbaum Trial Begins with “Tortured” Jury Selection*, ARS TECHNICA (July 27, 2009), <http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-trial-opens-following-last-minute-dismissal-of-fair-use-defense.ars>. The challenges were successful, which may help explain why the jury was unsympathetic to *Tenenbaum*.

<sup>136</sup> *Tenenbaum*, 672 F. Supp. 2d at 220; see also Nate Anderson, *Judge Rejects Fair Use Defense as Tenenbaum P2P Trial Begins*, ARS TECHNICA (July 27, 2009, 12:05 PM), <http://arstechnica.com/tech-policy/news/2009/07/judge-rejects-fair-use-defense-as-tenenbaum-p2p-trial-begins.ars> (stating that Judge Gertner “granted the record labels’ request for summary judgment on the issue of fair use”). The doctrine of fair use, as described in 17 U.S.C. § 107 (2006), provides that it is not an infringement of copyright to copy an original work for purposes such as criticism, teaching, scholarship, and research. Factors to be considered in determining whether a particular use is fair

having admitted that he downloaded the files, Judge Gertner had little choice but to enter judgment against him.<sup>137</sup> The only issue left for the jury to decide was damages.<sup>138</sup>

Tenenbaum recognized that his only hope was that the jury would agree that his behavior was socially acceptable, even if formally illegal, and essentially nullify the directed verdict entered against him by assigning only nominal damages. His counsel openly appealed to the jury for nullification, prompting a sustained objection from RIAA and anger from Judge Gertner.<sup>139</sup> The phenomenon of jury nullification is, in many ways, an embodiment of the PADs model. It is an appeal to a jury, as in the *Tenenbaum* case, to privilege socially acceptable deviance above socially unacceptable enforcement of formal law.<sup>140</sup> Jury nullification has, at times, been regarded as a courageous embrace of norms over law: for example, the acquittals of violators of the Fugitive Slave Act and Prohibition.<sup>141</sup> In this case, the jury did not nullify the directed verdict.<sup>142</sup> Instead, it awarded damages of \$675,000, out of a possible \$4.5 million in damages permitted by the statute.<sup>143</sup> Judge Gertner, like Judge Davis, then slashed the award by ninety percent, reducing it to \$67,500.<sup>144</sup>

The popularity of file-sharing, and the courts' evident discomfort in sanctioning it, suggests that this use of copyrighted music has moved from illegal and socially unacceptable to illegal but socially acceptable. As predicted by the evolutionary model of property rights, a change in social

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include whether the use is commercial or not-for-profit, the effect of the use on the market value of the original work, whether the copying is limited or encompasses the original work as a whole, and whether it is in the public interest that access to the original work be unrestricted. 17 U.S.C. § 107 (2006). In *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit rejected the defendant's claim that copying music and sharing it on peer-to-peer networks was fair use of the copyrighted works, because the original works were copied in their entirety and the use had a negative effect on the market value of the original work and on the market for creative work generally. 239 F.3d 1004, 1015–17 (9th Cir. 2001).

<sup>137</sup> Ben Sheffner, *Fate of "Hardcore, Habitual" Infringer Tenenbaum up to Jury*, ARS TECHNICA (July 31, 2009, 3:20 PM), <http://arstechnica.com/tech-policy/news/2009/07/fate-of-hardcore-habitual-infringer-tenenbaum-up-to-jury.ars>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1256 (2003) (describing past cases where jury nullification was used and "heralded as [a] courageous example[] of political protest and moral integrity").

<sup>141</sup> *Id.*

<sup>142</sup> Ben Sheffner, *Oy Tenenbaum! RIAA Wins \$675,000, or \$22,500 Per Song*, ARS TECHNICA (July 31, 2009, 5:34 PM), <http://arstechnica.com/tech-policy/news/2009/07/o-tenenbaum-riaa-wins-675000-or-22500-per-song.ars>.

<sup>143</sup> *Id.*; see also 17 U.S.C. §§ 501–13 (2009). Hannaford-Agor and Hans distinguish between nullification that results from disagreement about the content of law, and nullification that results from perceived unfairness about the punishment associated with its violation. Hannaford-Agor & Hans, *supra* note 140, at 1277. The relatively small amount of damages awarded, when compared to the potentially liability, may suggest that the jury was more concerned about the fairness of punishment than the fairness of the law itself. *Id.*

<sup>144</sup> See Jonathan Saltzman, *Judge Slashes Downloading Penalty*, BOS. GLOBE, July 10, 2010, at 1.

acceptability of file-sharing behavior has placed pressure on the boundaries of legality. Only time will tell whether that behavior will migrate across the boundary of legality, so that file-sharing becomes both socially acceptable and legal. There is one indication that holders of copyright may indeed be reluctantly bending to this pressure. Recently, RIAA announced its decision to end its five-year campaign of lawsuits against file-sharers.<sup>145</sup> The campaign did not ultimately reduce file-sharing.<sup>146</sup> In fact, file-sharing sites such as Limewire and BitTorrent have increased in hits, and have become some of the most visited sites on the Internet.<sup>147</sup> Peer-to-peer networks now comprise forty-five percent of all internet traffic.<sup>148</sup> According to the Electronic Frontier Foundation, by conservative estimates, one in five American Internet users “is an active file-sharer.”<sup>149</sup> If the regulated, by refusing to comply with the law, and the regulators, by declining to enforce the law, implicitly agree that this form of deviance is socially acceptable, that deviance becomes the de facto law for most of us. As long as the practice remains formally illegal, however, the danger inherent in the divergence between the legality and social acceptability of behavior—selective enforcement—is very real. And that danger, predicted by the PADs models, is evident in the cases of Jammie Thomas and Joel Tenenbaum in the outrage that greeted the verdicts against them and the frustration of Judges Davis and Gertner.<sup>150</sup>

In another example of property rights evolving to reflect changes in normative sensibilities prompted by developments in digital technology, “sampling” has become a recognized form of artistic expression. In sampling, user-generated content piggybacks on copyrighted material, and creates a new and, according to Lawrence Lessig, essentially democratic form of expression not previously possible.<sup>151</sup> Copyright owners have reacted by taking steps to protect their rights. One prominent example of this effort is the removal of copyrighted works from user-generated content posted to YouTube (that is, self-made videos set to copyrighted music).<sup>152</sup> Due to pressure from copyright holders, YouTube developed a technology that permits copyright holders to discover use of their property on

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<sup>145</sup> von Lohmann, *supra* note 134.

<sup>146</sup> ELECT. FRONTIER FOUND., *RIAA V. THE PEOPLE: FIVE YEARS LATER 1* (2008), <http://www.eff.org/wp/riaa-v-people-years-later>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> von Lohmann, *supra* note 134.

<sup>150</sup> See *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (D. Mass. 2009) (stating that the court is “very, very concerned that there is a deep potential for injustice in the Copyright Act as it is currently written”); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (urging Congress to amend the Copyright Act).

<sup>151</sup> Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 968–70.

<sup>152</sup> ELECT. FRONTIER FOUND., *A GUIDE TO YOUTUBE REMOVALS: SO MY VIDEO WAS REMOVED FROM YOUTUBE . . . WHAT DO I NEED TO KNOW?* (2009), <http://www.eff.org/issues/intellectual-property/guide-to-youtube-removals>.

YouTube.<sup>153</sup> The technology identifies brief portions of songs used in user-posted videos, even if the song is never mentioned in the materials describing the video.<sup>154</sup> If the technology discovers copyrighted material, it automatically removes it from the user-posted videos.<sup>155</sup> Users have responded to this practice with fury and disgust.<sup>156</sup> This outrage and derision at attempts to enforce the law is similar to the anger one might expect from a driver issued a speeding ticket for driving sixty-seven m.p.h. in a sixty-five m.p.h. zone.

Lawrence Lessig insightfully traces historical parallels to the current controversy in the development of previous recording and distribution technologies.<sup>157</sup> He notes that the 1888 invention by George Eastman of the Kodak camera made photography economically and technologically accessible to large numbers of people and set off a similar crisis regarding whether one could capture and copy the image of someone else without the permission of that person.<sup>158</sup> Lessig posits that had courts not found that one could photograph and print without the subjects' permission, the viability of photography as a means of expression among non-professionals would have been in grave jeopardy.<sup>159</sup> Whether music sampling finds similar protection remains to be seen.

### B. *Use of Public Space*

Communities are often self-organized in the face of growth.<sup>160</sup> This self-organization takes two primary forms: the creation of communities self-organized by the race and economic status of their inhabitants, and the informal delineation of appropriate and inappropriate behaviors in shared public spaces.<sup>161</sup>

Another word for the first type of self-organization might be informal

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* As a personal example, in 2008, I posted on YouTube two videos of highlights of my eleven-year-old son's baseball season so that his grandparents, who live several states away, could see them. On the first, I included Jimi Hendrix's version of the song *Voodoo Child (Slight Return)* as accompaniment; on the second, I included the Average White Band's song *Pick Up the Pieces*. I then found a notice from YouTube informing me that I had violated copyright with regard to the second video. As of this writing, my son can no longer pick up the pieces, but is still a voodoo child.

<sup>156</sup> See, e.g., Matthew Humphries, *Universal Sued by Angry Mother over YouTube Video Removal*, GEEK.COM (July 23, 2008, 10:52 AM), <http://www.geek.com/articles/law/universal-sued-by-angry-mother-over-youtube-video-removal-20080723> (describing how "[a]n angry mom has decided to go to the courts after Universal has demanded a YouTube video of her son dancing be removed from the popular site").

<sup>157</sup> See Lessig, *supra* note 151, at 961 (describing the history of camera technology).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 961–62.

<sup>160</sup> See JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 4 (1991) (stating that new urban centers "contain all the functions a city ever has").

<sup>161</sup> See *id.* at 4, 282 (stating that the new urban communities are world of pioneers and immigrants, as well as "a set of customs, behaviors, or attitudes").

segregation. Los Angeles, for example, has self-organized into at least twenty-six different communities, most based on function and the race of their inhabitants.<sup>162</sup> This segregation is a form of self-organization that today may emerge despite, rather than because of, zoning laws. Self-segregation occurs regardless of law because social sanctions are applied to unacceptably socially “deviant” behavior, regardless of its legality.<sup>163</sup> That socially “deviant” behavior unfortunately may include, for example, a minority moving into a majority neighborhood. The social sanctions applied to such “deviance” can include shunning<sup>164</sup> and vandalism.<sup>165</sup> On that basis, neighborhoods may tend to self-segregate.

Similar self-organization emerges with regard to the use of public spaces. Less attention has been directed to this phenomenon. For example, the use of public sidewalks may be divided into uses along vectors of legality and social acceptability. Window shopping is a use of public sidewalks that is both legal and socially acceptable. Drug dealing, by contrast, is a use of public sidewalks that is both illegal and generally socially unacceptable. Enforcement to prevent this behavior is both accepted and expected.

More interesting are instances in which the legality and social acceptability of the use of public sidewalks diverge. Religious proselytizing is a legal use of public sidewalks that usually cannot generate a formal enforcement response, since it is behavior protected by the First Amendment.<sup>166</sup> However, because it may be generally socially unacceptable, it often evokes informal social sanctions in the absence of formal ones. Proselytizers may find themselves the object of hard stares, and other sidewalk users may cross the street to avoid them or to confront them.

For example, members of the Westboro Baptist Church have garnered infamy for proselytizing on sidewalks across from soldiers’ funerals.<sup>167</sup> They display signs at the mourners and passersby, with messages such as,

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<sup>162</sup> *Id.* at 283.

<sup>163</sup> *See id.* at 281 (“[F]orbidding walls around subdivisions make a kind of sense . . . . They are social boundaries. They define ‘community’ and give it an entry point, financially and socially: only certain people can get in.”).

<sup>164</sup> *See* MARSHALL B. CLINARD & ROBERT F. MEIER, *SOCIOLOGY OF DEVIANT BEHAVIOR* 37 (12th ed. 2004) (discussing a conservative Mennonite community’s practice of shunning women who deviate from the community’s strict dress code).

<sup>165</sup> For example, minority homeowners are sometimes targeted with racist graffiti. *See, e.g., Vandals Target Happy Valley Home with Racist Graffiti, Threaten To Burn Down Their House*, THE OREGONIAN, (Sept. 3, 2010), [http://www.oregonlive.com/happy-valley/index.ssf/2010/09/happy\\_valley\\_family\\_victims\\_of\\_racial\\_harassment.html](http://www.oregonlive.com/happy-valley/index.ssf/2010/09/happy_valley_family_victims_of_racial_harassment.html).

<sup>166</sup> *See, e.g.,* Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 153, 165–66, 168 (2002) (holding an Ohio ordinance regulating door-to-door canvassing, as applied to religious proselytizing, to be in violation of the First Amendment).

<sup>167</sup> Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14.

“Thank God for I.E.D.’s,” “Thank God for Dead Soldiers,” and “You’re Going to Hell.”<sup>168</sup> The sect claims that God is punishing the United States for tolerating homosexuality.<sup>169</sup> Because the behavior of the sect is legal, formal enforcement response is unlikely. Indeed, the United States Court of Appeals for the Fourth Circuit has held that the First Amendment protects the group from a suit for emotional distress brought by the father of a soldier killed in Iraq, after the group picketed his son’s funeral.<sup>170</sup> However, because the behavior is socially unacceptable, informal social sanctions in the form of popular justice and vigilantism is predictable and, in fact, have occurred.<sup>171</sup> A motorcycle club has launched a concerted campaign to drown the sect out at funerals.<sup>172</sup> More ominously, there have been vigilante-style attacks on their demonstrations by outraged on-lookers.<sup>173</sup>

On the other hand, performing on public sidewalks—such as by musicians or magicians—is a behavior that is often formally illegal but generally socially acceptable. Because this use is socially acceptable, a formal enforcement response might be unlikely—people enjoying a sidewalk performance would be unhappy to see the performer driven off by a police officer. In other words, sidewalk performances are illegal but well within the parameters of acceptable deviance, and legal institutions bend to accommodate that normative sensibility. The same might be true for simple aimless wandering.

The danger here is the “selective enforcement” malfunction caused by behavior that is socially acceptable but formally illegal. Consider, for example, the well-known *Papachristou v. City of Jacksonville* case.<sup>174</sup> In *Papachristou*, the Supreme Court heard the cases of eight people arrested for “vagrancy” by Jacksonville, Florida police.<sup>175</sup> All were convicted, and their separated cases were consolidated for appeal.<sup>176</sup> Four of the defendants—Margaret Papachristou, Betty Calloway, Eugene Melton, and Leonard Johnson—were arrested together and convicted of “vagrancy—‘prowling by auto.’”<sup>177</sup> The four were on a double-date, driving on

<sup>168</sup> *Id.*

<sup>169</sup> See Westboro Baptist Church, *FAQ*, GODHATESFAGS, <http://www.godhatesfags.com/faq.html> (last visited Sept. 3, 2010).

<sup>170</sup> See *Snyder v. Phelps*, 580 F.3d 206, 210–11, 226 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

<sup>171</sup> *5 Arrested for Attacks on Anti-Gay Protesters at Military Funeral*, ASSOCIATED PRESS, May 22, 2006, available at <http://www.foxnews.com/story/0,2933,196487,00.html>.

<sup>172</sup> Ryan Lenz, *Motorcycle Club Blocks Protesters*, WASH. POST, Feb. 19, 2006, at A09.

<sup>173</sup> See *5 Arrested for Attacks*, *supra* note 171 (stating that when members of the Westboro Baptist Church protested at a military funeral, “a man broke through the police line and began assaulting two of the Westboro protesters”).

<sup>174</sup> 405 U.S. 156 (1972).

<sup>175</sup> *Id.* at 156.

<sup>176</sup> *Id.* at 156–57.

<sup>177</sup> *Id.* at 158.

Jacksonville's main thoroughfare from a restaurant where they had eaten dinner.<sup>178</sup> Eugene Melton and Leonard Johnson were African American; Margaret Papachristou and Betty Calloway were white.<sup>179</sup>

The vagrancy ordinance which the four were convicted of violating prohibited “[r]ogues and vagabonds . . . persons who use juggling . . . common night walkers . . . [and] persons wandering or strolling around,” among many other things.<sup>180</sup> Oddly, “prowling by auto,” the crime for which the defendants were convicted, was not on the list of prohibited activities, but Florida asserted that “prowling by auto” was encompassed within “wandering or strolling around.”<sup>181</sup> The Supreme Court struck the ordinance down under the Fourteenth Amendment Due Process doctrine of “void for vagueness.”<sup>182</sup> The Court explained that the Jacksonville vagrancy ordinance was unconstitutionally vague in two senses.<sup>183</sup> First, it failed to give adequate notice of what it prohibited.<sup>184</sup> Second, just as the PADs model suggests, the ordinance was ripe for selective enforcement, since it outlawed behavior that was common and socially acceptable—and which generally did not generate a formal enforcement response—despite its formal illegality.<sup>185</sup>

		<b>Use of Public Sidewalks</b>	
		Legal	Illegal
<b>Normatively Acceptable</b>		<b>Shopping</b> (Day Labor Markets) ↓ ↓ ↓	<b>Performing for \$</b>
<b>Normatively Unacceptable</b>		<b>Day Labor Markets</b> --- <b>Funeral Demonstrations</b> --- --- <b>Proselytizing</b>	--- → (Day Labor Markets) --- → (Funeral Demonstrations?)  <b>Drug Dealing</b>

<sup>178</sup> *Id.* at 158–59.

<sup>179</sup> *Id.* at 158.

<sup>180</sup> *Id.* at 156–57 n.1.

<sup>181</sup> *Id.* at 168 n.11.

<sup>182</sup> *Id.* at 162.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* at 163 (“The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent.”).

A contemporary embodiment of the *Papachristou* problem may involve the use of public space for informal markets for day laborers.<sup>186</sup> Each morning in public spaces throughout the United States, men and women gather hoping to be hired for short-term employment, primarily in construction and landscaping.<sup>187</sup> Although the practice has existed for decades,<sup>188</sup> anti-immigration sentiment has produced a backlash against it<sup>189</sup> because unemployment is rising and in recent years the day labor market participants are disproportionately Latino immigrants.<sup>190</sup>

Groups representing day laborers have challenged the enforcement of ordinances prohibiting day labor markets on public property on the same grounds raised in the *Papachristou* case, arguing that the ordinances are so vague that selective enforcement is inevitable, and they impinge on free speech rights.<sup>191</sup> In response to concern about the presence of day laborers, the city of Redondo Beach, California enacted an ordinance prohibiting standing on sidewalks or other public ways in order to solicit employment or business of any kind.<sup>192</sup> The court found that the ordinance was much broader than necessary to promote the city's legitimate interests in traffic safety, crime prevention, and aesthetics.<sup>193</sup> The court noted that, interpreted literally, the ordinance would prohibit not just day labor markets, but also people hailing cabs and children selling lemonade.<sup>194</sup> That breadth invited selective enforcement against the real targets of the ordinance: day laborers.<sup>195</sup> Moreover, the city had not provided an adequate alternative space for the day laborers to gather, in that it had banned them from all public property in the city.<sup>196</sup>

As is often the case, where behavior is legal but socially unacceptable,

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<sup>186</sup> See Gregg W. Kettles, *Day Labor Markets and Public Space*, 78 UMKC L. REV. 139, 140 (2009) ("Those who favor exclusion lobby local government to stop building shelters and start enforcing laws against street-side day labor markets.").

<sup>187</sup> ABEL VALENZUELA JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 1 (2006), available at [http://www.sscnet.ucla.edu/issr/csup/uploaded\\_files/Natl\\_DayLabor-On\\_the\\_Corner1.pdf](http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf).

<sup>188</sup> See *id.* at 2 (stating that historically, employers in the United States have relied on day labor to fill jobs in various occupations).

<sup>189</sup> See *id.* at 23. At earlier periods in our history, anti-immigration sentiment has expressed itself through attempted restrictions on the use of public space for day labor markets. At the turn of the century, for example, anti-Chinese immigration attitudes led to the enactment, by Los Angeles, of restrictions on the ability of laborers to solicit work from public spaces. See Renia Ehrenfeucht & Anastasia Loukaitou-Sideris, *Constructing the Sidewalks: Municipal Government and the Production of Public Space in Los Angeles, California, 1880–1920*, 33 J. HIST. GEOGRAPHY 104, 117 (2007).

<sup>190</sup> VALENZUELA ET AL., *supra* note 187, at 1, 17.

<sup>191</sup> Complaint for Injunctive and Declaratory Relief at 2–4, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952 (C.D. Cal. 2006) (No. CV 04-9396 CBMPJWX), available at [http://maldef.org/assets/pdf/redondo\\_beach\\_complaint.pdf](http://maldef.org/assets/pdf/redondo_beach_complaint.pdf), *rev'd*, 607 F.3d 1178, 1196 (9th Cir. 2010).

<sup>192</sup> *Comite de Jornaleros*, 475 F. Supp. 2d at 962–63.

<sup>193</sup> *Id.* at 964–66.

<sup>194</sup> *Id.* at 965 & n.8.

<sup>195</sup> *Id.* at 965.

<sup>196</sup> *Id.* at 967–68.

the danger of “popular justice” is very real. Recently in Riverside, California, local neo-Nazis massed at the site of an informal day labor market with the express goal of shutting it down.<sup>197</sup> Violence erupted between the Nazis and members of a Latino activist group.<sup>198</sup> In a second California community, anti-immigration groups sponsored a rally in support of the arrests of day laborers for soliciting work on public land, after immigrant rights groups sued to stop the arrests.<sup>199</sup>

Other jurisdictions have enacted anti-day labor ordinances that have yet to be challenged in court. The town of Oyster Bay, New York, for example, has resorted to increasingly stringent measures to prevent immigrants from using public space to secure day labor employment.<sup>200</sup> It recently enacted an ordinance which prohibits “solicitation of employment” by, among other things, “waving arms, making hand signals,” or standing in public roads in the direction of oncoming traffic.<sup>201</sup> The town of Huntington Station, New York, recently went a step further: it ordered a private landowner who had allowed immigrant laborers to live in makeshift homes on his lot next to a hiring center to “clear it of garbage and debris.”<sup>202</sup> The workers’ tents were leveled, although many of their possessions remained on the land.<sup>203</sup> Town officials suggested that without a place to live, the day laborers might “seek employment in other locations.”<sup>204</sup>

As the PADs model predicts, with regard to the use of public spaces, behavior like performing that is formally illegal may be socially acceptable, while behavior like day labor markets that are formally legal may be socially unacceptable. Those divergences produce unique stresses in legal institutions. Where day labor markets are recognized as legal, but are socially unacceptable because of the perceived immigration status of their participants, the danger of popular justice may manifest itself in violent acts such as those committed by the neo-Nazis in Riverside. On the other hand, as the court in *Comite de Jornaleros* recognized, a broad

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<sup>197</sup> Lora Hines, *2 Arrests in Brief Violence at Neo-Nazi Rally*, PRESS ENTERPRISE (Riverside, Cal.), Oct. 25, 2009, at C1 (“Jeff Hall, a Riverside resident and state director of the National Socialist Movement, said the group met its goal—to shut down the day labor site. ‘We’re going to be here again and again,’ he said.”).

<sup>198</sup> *Id.*

<sup>199</sup> Dawnya Pring, *Rally Planned To Oppose Day Laborers*, REDONDO BEACH NEWS (Jan. 6, 2005, 9:22 AM), [http://tbrnews.com/articles/2005/01/06/redondo\\_beach\\_news/news14.txt](http://tbrnews.com/articles/2005/01/06/redondo_beach_news/news14.txt).

<sup>200</sup> Robin Finn, *Town Divides over Law Aimed at Day Laborers*, N.Y. TIMES, Dec. 27, 2009, at MBI.

<sup>201</sup> TOWN OF OYSTER BAY, N.Y., CODE § 205-32 (2010), available at <http://gcp.esub.net> (follow “PC/CodeBook—Code of the Town of Oyster Bay, NY” hyperlink; then type “205-32” in the search box).

<sup>202</sup> Karen Zraick, *For Suffolk Day Laborers, Times Get Tougher as Makeshift Homes Are Leveled*, N.Y. TIMES, Jan. 14, 2010, at A32.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

prohibition on common uses of public space—encompassing a wide range of behaviors that includes day labor markets—creates the very real danger of selective enforcement motivated by the race or ethnicity of the participants rather than by any actual disruption caused by their behavior.<sup>205</sup>

### C. Foreclosure and Eviction

The mortgage crisis—and the epidemic of foreclosures it has spawned—has destabilized norms regarding the social acceptability of behavior with regard to real estate possession. One of the most pernicious effects of the mortgage crisis has been the eviction of blameless tenants. Leases are usually terminated by foreclosure.<sup>206</sup> Tenants who have never missed a rent payment, and who have no idea that their landlord has not been applying rent payments to their mortgage obligations, suddenly face eviction—often with no notice.<sup>207</sup> The problem is so pervasive, and so normatively objectionable, that county sheriffs upon whom the burden of eviction falls have been refusing to carry out the evictions under some circumstances.<sup>208</sup> For example, Thomas Dart, the sheriff of Cook County, Illinois, unilaterally imposed a moratorium on the eviction of renters in foreclosed properties, over the howling objections of the banks.<sup>209</sup> Similarly, the sheriffs of Cuyahoga County, Ohio, and Wayne County, Michigan, have refused to evict blameless tenants.<sup>210</sup>

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<sup>205</sup> That may be particularly true of day labor markets since, as at least one researcher has found, day laborers tend to establish and enforce order amongst themselves, rewarding responsible behavior with referrals to, and priority placement with, employers. Carolyn Pinedo Turnovsky, *Doing the Corner: A Study in Immigrant Day Laborers in Brooklyn, New York* (Oct. 17, 2005) (unpublished Ph.D. dissertation, City University of New York, 2006) (on file with *Connecticut Law Review*).

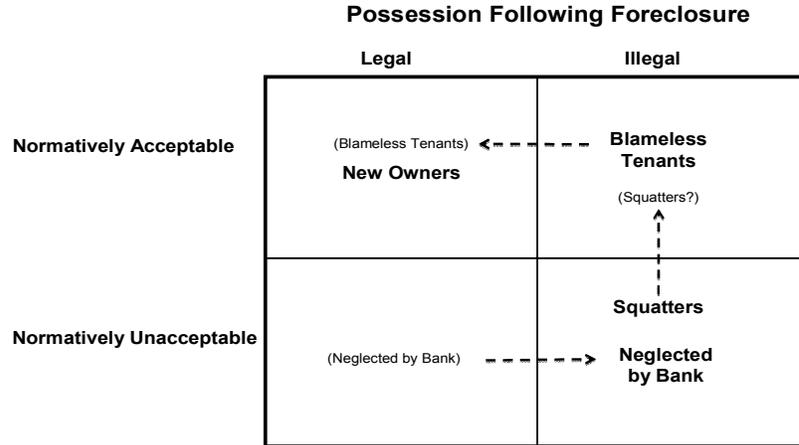
<sup>206</sup> For a state-by-state summary of the relevant law, see NAT'L LOW INCOME HOUS. COAL., FORECLOSURE AND EVICTION PRACTICES BY STATE: DRAFT 7/25/2008 (2008), available at <http://www.nlihc.org/doc/State-Foreclosure-Chart.pdf>.

<sup>207</sup> *Id.*

<sup>208</sup> See *US Sheriffs Don't Want People Evicted as Foreclosure Rates Expected To Soar in New Year*, PROPERTYWIRE (Dec. 12, 2008), <http://www.propertywire.com/news/north-america/us-sheriffs-foreclosure-rates-200812122249.html> (stating that county sheriffs are refusing to process property eviction orders).

<sup>209</sup> See *Illinois Sheriff Scolds Banks for Eviction of 'Innocent' Renters*, CNN (Oct. 8, 2008), [http://articles.cnn.com/2008-10-08/us/chicago.evictions\\_1\\_eviction-notices-mortgage-payments-mortgage-companies?\\_s=PM:US](http://articles.cnn.com/2008-10-08/us/chicago.evictions_1_eviction-notices-mortgage-payments-mortgage-companies?_s=PM:US) (quoting the Illinois Bankers Association as describing Dart's refusal to carry out evictions as "vigilantism at the highest level" and a "declaration of 'martial law'").

<sup>210</sup> Amy Goodman, *Facing Foreclosure? Don't Leave. Squat.*, ALTERNET (Feb. 6, 2009), <http://www.alternet.org/rights/125533/>.



Often institutions of enforcement do not enforce the law but instead enforce the limits of acceptable deviance around the law. When they are called upon to enforce the law in a manner that conflicts with standards of social acceptability, it is often the institutions that give way rather than the standards. Therefore, it is not surprising that some sheriffs are refusing to carry out evictions; they are bending to norms of acceptable deviance. Nor is it surprising that Congress and many state jurisdictions are enacting laws to limit the power of banks to evict blameless tenants in foreclosed properties.<sup>211</sup> The social acceptability of possession by blameless tenants following foreclosure is pressuring the law to evolve. Norms drive law.

In addition to the illegality but social acceptability of holdovers by blameless tenants, illegal squatting in foreclosed homes is becoming both more pervasive and, apparently, more socially acceptable.<sup>212</sup> Congresswoman Marcy Kaptur recently urged people whose mortgages have been foreclosed to become squatters in their former homes.<sup>213</sup> According to the National Coalition for the Homeless, advocacy groups around the United States are taking possession of foreclosed properties for the homeless—often openly.<sup>214</sup>

<sup>211</sup> See Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, § 702, 123 Stat. 1632, 1660–61 (2009) (permitting renters of foreclosed properties to remain in possession for ninety days, or until the property is sold to someone who will occupy it).

<sup>212</sup> See Goodman, *supra* note 210 (describing how Congresswoman Kaptur has advised homeowners facing foreclosure to stay in their property instead of leaving).

<sup>213</sup> *Id.*

<sup>214</sup> John Leland, *With Advocates' Help, More Squatters Call Foreclosures Home*, N.Y. TIMES, Apr. 10, 2009, at A1.

The advocacy groups report that they sometimes get support from neighbors, in part because occupied houses stay in better condition, and attract less crime than abandoned, foreclosed homes.<sup>215</sup> Abandoned homes may become havens for drug use and targets for copper thieves, who rip out walls to get copper plumbing and wire.<sup>216</sup> By contrast, Take Back the Land, a Florida-based advocacy group, screens squatters it helps to find abandoned homes, and requires them to earn “sweat equity” by cleaning and repairing the homes.<sup>217</sup> “As far as the neighbors are concerned, the current tenants—squatters though they are—are a vast improvement over the crack den the vacant house had become.”<sup>218</sup>

It is reminiscent of the squatters’ rights movement of the 1970s and 1980s in cities in the northeastern United States.<sup>219</sup> The movement placed members of the growing homeless population in a large number of abandoned and condemned buildings. Squatters, though acting illegally, brought order rather than disorder into swaths of cities that stood abandoned. In Peñalver and Katyal’s words, “[u]rban squatters were fixing broken windows, not breaking them. It is perhaps for this reason that neighborhood residents were typically supportive of squatting efforts, notwithstanding their illegality.”<sup>220</sup>

Even in utilitarian terms, formally illegal behavior with regard to property rights may be justified if the actor places a higher value on the property than the true owner, and is unable to transact because, for example, they have been evicted through foreclosure.<sup>221</sup> As Peñalver and Katyal succinctly put it, “[o]n a cold night, at least as a purely subjective matter, the homeless man almost certainly values the sheltered entrance of a large shopping center more highly than even the most attentive owners value their right to exclude him.”<sup>222</sup>

The same banks that are socially sanctioned for evicting blameless tenants are also socially sanctioned for boarding up foreclosed properties that they own.<sup>223</sup> In fact, a number of local governments have recently

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<sup>215</sup> See Tristram Korten, *Foreclosure Nation: Squatters or Pioneers?*, MOTHER JONES (May–June 2008), <http://www.motherjones.com/politics/2008/05/foreclosure-nation-squatters-or-pioneers> (stating that the neighbors believe the current tenants, though they are squatters, are better than letting the vacant houses become crack dens).

<sup>216</sup> Kristin Kloberdanz, *Foreclosed Homes: A Local Blight*, TIME, Mar. 18, 2008, available at <http://www.time.com/time/nation/article/0,8599,1723193,00.html>.

<sup>217</sup> Leland, *supra* note 214, at A1.

<sup>218</sup> Korten, *supra* note 215.

<sup>219</sup> Peñalver & Katyal, *supra* note 40, at 1125–27.

<sup>220</sup> *Id.* at 1152 (footnotes omitted).

<sup>221</sup> *Id.* at 1145.

<sup>222</sup> *Id.* at 1146.

<sup>223</sup> See Luke Mullins, *The Run-Down Foreclosure Next Door: What You Can Do*, U.S. NEWS & WORLD REP. (Oct. 23, 2008), <http://money.usnews.com/money/personal-finance/real-estate/articles/2008/10/23/the-run-down-foreclosure-next-door-what-you-can-do> (advising neighbors to pressure banks to maintain foreclosed homes by calling them in close sequence and threatening to change banks).

proposed or enacted laws either prohibiting banks from neglecting foreclosed properties, or at least assessing them for the upkeep of the properties performed by local governments.<sup>224</sup>

Interestingly, some state and federal court judges are resisting foreclosures not by resisting application of the formal law, but by insisting upon it to the letter.<sup>225</sup> For example, Judge Arthur M. Shack of the New York State Supreme Court has made it a personal mission to throw sand on the tracks of the foreclosure process by insisting that each and every requirement of the formal law is satisfied.<sup>226</sup> In the words of Judge Shack, “[i]f you are going to take away someone’s house, everything should be legal and correct.”<sup>227</sup>

In summation, then, possession of foreclosed properties by blameless tenants is moving from illegal but socially acceptable to legal and socially acceptable. Occupation of foreclosed homes by squatters may be moving from illegal and socially unacceptable to illegal but socially acceptable. And neglect of foreclosed homes by banks is moving from legal but socially unacceptable to illegal and socially unacceptable. As predicted, these behaviors with regard to property move counter-clockwise around the PADs model, with changes in normative sensibility re-defining the scope and meaning of property rights.

#### D. *Natural Resources*

There are two generally accepted, forceful utilitarian arguments that support the existence and protection of the right to exclude others from one’s property: the prevention of overuse on the one hand, and the creation of proper incentives for resource development as costs and benefits accrue to the owner of the resource, on the other.<sup>228</sup> Of course, neither argument has force unless the object in question can be treated as property from which others may be excluded. The Roman property law category of *res communes* refers to resources whose character makes them “incapable” of exclusively appropriating.<sup>229</sup> Resources in this category are—in utilitarian thought—not treated as property because they cannot be, not because they

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<sup>224</sup> See Nicholas Casey, *Banker: “What’d I Do Wrong, Officer?” Cop: “You’ve Got Algae in the Pool, Sir,”* WALL ST. J., May 1, 2009, at A1 (“[B]ig cities like Cleveland and Buffalo had fashioned laws of their own to browbeat banks into taking care of urban blight.”); Carolyn Said, *Empty Houses Spawn Trouble; Home Foreclosures*, S.F. CHRON., May 3, 2009, at A1 (discussing ordinances in San Jose and Oakland forcing banks and lenders to maintain foreclosed properties).

<sup>225</sup> See Michael Powell, *A “Little Judge” Who Rejects Foreclosures*, *Brooklyn Style*, N.Y. TIMES, Aug. 31, 2009, at A1 (discussing Justice Schack’s insistence that everything be “legal and correct” for a bank to foreclose on someone’s property).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Carol M. Rose, *Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 90 (2003).

<sup>229</sup> *Id.* at 93.

should not be. As Carol Rose has noted, however, advances in both legal thought and scientific measurement have turned things once thought exempt from ownership into objects that can be appropriated.<sup>230</sup> Things once thought to fall well within the category of *res communes*—such as the air—are now amenable to appropriation—for example, through the purchase or sale of a portion of it for use as a receptacle for pollution through cap-and-trade systems. As the controversy surrounding cap-and-trade systems demonstrates, now that such resources can be treated as property, we are forced to consider the question of whether they should be.<sup>231</sup>

The allocation of rights in natural resources frequently displays divergences between legality and social acceptability. Consider fishing rights. In the absence of private rights, over-exploitation threatens the common fish stock, “a problem inherent in the uncontrolled exploitation of common property resources everywhere.”<sup>232</sup> To prevent over-exploitation, some governments sell fishing rights as “a payment for the exploitation of common fishing grounds.”<sup>233</sup> Formal property law, however, “works in the background of many different systems of rules presiding over the allocation of scarce resources,”<sup>234</sup> including informal and deviant systems.

In an insightful observational study of fishing communities in Norway and Newfoundland, Stig Gezelius noted this phenomenon.<sup>235</sup> He found that compliance with fishing regulations depended upon notions of social acceptability.<sup>236</sup> Some illegal behaviors were socially acceptable and some were not; some legal behaviors were socially acceptable and some were not. The model below suggests how some behaviors are categorized.

<sup>230</sup> *Id.* at 95.

<sup>231</sup> See Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. §§ 204(b), 205(b) (2009) (treating energy as property that may be distributed); American Clean Energy and Security Act, H.R. 2454, 111th Cong. § 726(c) (2009) (providing “emission allowances for sale”). In many ways, the improvements in scientific measurement that make cap-and-trade systems in natural resources possible are the flipside of improvements in digital technology that make file-sharing possible. In the case of natural resources such as air and fish, things which were once thought impossible to subject to private property rights can now be allocated to private owners. In the case of file-sharing, however, works that once were considered easily protectable through private property rights can no longer be held exclusively.

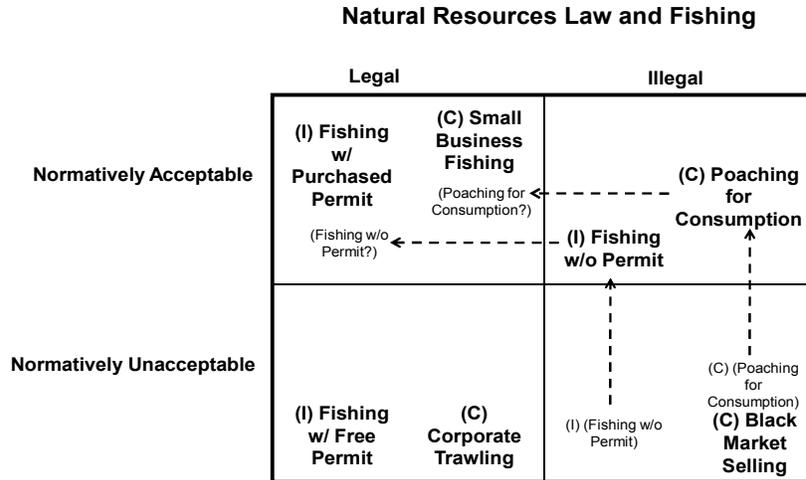
<sup>232</sup> Thorvaldur Gylfason, *Iceland on the Outskirts of Europe: The Common Property Resource Problem*, 32 EUR. FREE TRADE ASS’N BULL., no. 2, 1991, at 23, 24 [hereinafter Gylfason, *Iceland on the Outskirts*].

<sup>233</sup> Thorvaldur Gylfason, *The Pros and Cons of Fishing Fees: The Case of Iceland*, 33 EUR. FREE TRADE ASS’N BULL., nos. 3–4, 1992, at 6 [hereinafter Gylfason, *Fishing Fees*].

<sup>234</sup> MATTEI, *supra* note 6, at 6.

<sup>235</sup> See Stig S. Gezelius, *The Morality of Compliance in Coastal Fisheries: Cases from Norway and Newfoundland* 3 (IASCP Northern Polar Regional Meeting, Conference Paper, 2003) <http://dlc.dlib.indiana.edu/dlc/handle/10535/526> (describing how a moratorium on groundfish stocks “generated [a] social crisis in great parts of rural Newfoundland”).

<sup>236</sup> See *id.* at 4 (“Protecting the cod stock was regarded a collective responsibility, and a perceived moral obligation to take one’s share of the protection of a common good was strongly reflected in Little Spruce Harbour’s fishers’ morality of compliance.”).



The Newfoundland village was almost entirely dependent upon fishing for its economic survival.<sup>237</sup> Severe reductions in the cod stock in Canadian waters, however, led to drastic restrictions on fishing rights.<sup>238</sup> The restrictions resulted in real economic hardship for the people of the village, but were generally accepted as necessary to restore the stock for the future.<sup>239</sup> Therefore, it was both legal and socially acceptable to fish within the limits set by the regulators.

By contrast, some fishermen had developed reputations as cheaters, over-fishing and selling their excess catch on the black market.<sup>240</sup> The cheaters were subject to both informal social sanctions—gossip, hard stares, injured reputations—and formal ones. They were informed upon to authorities, who punished them.<sup>241</sup>

More complex, and more interesting, were behaviors where the legality and social acceptability of behavior diverged. For example, corporate trawlers—large commercial business operations based offshore, just beyond the reach of Canadian territorial waters—were engaged in legal activity.<sup>242</sup> Nonetheless, they were scorned and generally despised by the village fishermen. Despite a lack of hard evidence, they were blamed for

<sup>237</sup> See *id.* at 2 (“Fishing and fish processing are the only significant industries in the community, and there are few employment opportunities besides these.”).

<sup>238</sup> *Id.* at 3.

<sup>239</sup> *Id.* at 3–4.

<sup>240</sup> *Id.* at 4.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 3–4.

overfishing the cod stock and causing the crisis regulations.<sup>243</sup> Because the corporate trawlers were engaged in legal behavior, no formal enforcement response could occur. In its place, the corporate trawlers were subject to informal, albeit ineffective, social sanctions—popular anger, disparaging rumors, and occasional threats.<sup>244</sup> Elsewhere, however, Canadian fishers resorted to “popular justice” measures against perceived transgressors, including blockading ships from other nations.<sup>245</sup>

On the other hand, in light of the restrictions, where before poaching had been both illegal and socially unacceptable, now the village residents found it socially acceptable, albeit still illegal, to catch cod for personal consumption.<sup>246</sup> The villagers considered consumption morally justifiable, while selling cod was reprehensible.<sup>247</sup> Interestingly, because catching cod for personal consumption was socially acceptable, little enforcement action was taken to prevent it by authorities, despite its illegality.<sup>248</sup> Where legality and social acceptability diverged, legal institutions enforced property rights against behaviors that were outside the parameters of socially acceptable deviance, but not against behaviors that were illegal but within parameters of acceptable deviance.

Iceland decided to protect fish stocks by allocating fishing permits and implementing catch quotas.<sup>249</sup> When the law<sup>250</sup> was implemented, only ships which had been fishing during the period between November 1980 and October 1983 were eligible for an allocation of fishing rights.<sup>251</sup> Permits were issued to fishing vessel owners based on their average catches during that time.<sup>252</sup> The permits are tradable.<sup>253</sup> Later entrants to the market would have to buy their way in by purchasing or leasing rights from those who received the initial allocation.<sup>254</sup>

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See *Canadian Fishing Boats Block Ferry for 3rd Day*, ORLANDO SENTINEL, July 22, 1997, at A6 (“Angry Canadian fishermen maintained a hull-to-hull blockade of a U.S. ferry for a third day Monday in a dispute about salmon fishing quotas.”).

<sup>246</sup> See Gezelius, *supra* note 235, at 5 (“While Little Spruce Harbour residents requested more enforcement in terms of commercial poaching, they reacted with indignation and fury when household poachers were arrested and fined.”).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Gylfason, *Iceland on the Outskirts*, *supra* note 232, at 24.

<sup>250</sup> See Fisheries Management Act (Act No. 116/2006) (Ice.), available at <http://www.fisheries.is/management/fisheries-management/the-fisheries-management-act> (“The objective of this Act is to promote [fishing banks’] conservation and efficient utilization . . .”).

<sup>251</sup> Public Prosecutor v. Kristjánsson, No. 12/2000, at pt. V (Apr. 6, 2000) (Ice.) Vessels that replace decommissioned ones that were active between November 1980 and October 1983 assume the rights originally allocated to the decommissioned vessels.

<sup>252</sup> See Gylfason, *Iceland on the Outskirts*, *supra* note 232, at 24 (“Based on catches in earlier years, 1981–83, fishing permits in Icelandic waters have been allocated to individual ships by the government . . .”).

<sup>253</sup> See *id.* (“[T]he quotas can be traded domestically under close government supervision . . .”).

<sup>254</sup> *Id.* at 25.

The Icelandic quota system has been successful in reducing the overall catch, thus conserving the common fish stock in Icelandic waters.<sup>255</sup> But it has generated controversy among Icelanders, because the initial allocation of tradable fishing permits was made free of charge.<sup>256</sup> As a result, potential new entrants into the industry find that they must buy the right to compete from their potential competitors,<sup>257</sup> even though the Supreme Court of Iceland has declared that “stocks of ocean life are the common property of the Icelandic nation.”<sup>258</sup> As economist Thorvaldur Gylfason posed the question, “does a government have an unqualified right to discriminate among citizens by giving a relatively small group of individuals free and marketable access to a valuable natural resource which is, by law, the common property of the nation?”<sup>259</sup>

The Icelandic courts have upheld the system, but not without some obvious misgivings. In the words of the Icelandic Supreme Court, “a significant part of the Icelandic nation was barred in advance from enjoying . . . a comparable share of the common property . . . as the comparatively few . . . who possessed ships active in fishing at the time limitations to fishing were originally imposed.”<sup>260</sup> In fact, the court has strongly implied that its patience with the system is not indefinite:

Although temporary measures of this kind [allocating rights without charge to some market participants, but forcing subsequent market participants to purchase rights from those who received rights for free] . . . to avert the collapse of fish stocks may have been justifiable . . . providing permanently by law for discrimination . . . cannot be regarded as logically necessary.<sup>261</sup>

The perception that the system is unfair has led to open defiance. In an extraordinary case before the Icelandic Supreme Court, one fishing company openly defied the rights allocation system after discovering that it could not afford to purchase fishing rights on the Icelandic Quota Exchange.<sup>262</sup> In order to challenge the system in court, the defendants notified the Ministry of Fisheries that they would violate the law, and told

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<sup>255</sup> *Id.*

<sup>256</sup> *See id.* (“[T]hey do not like the idea of fishing firms being charged for rights that many of them have hitherto been granted for free.”).

<sup>257</sup> *Id.*

<sup>258</sup> *Johanesson v. Iceland*, No. 145/1998, at pt. III (Dec. 3, 1998) (Ice.) (translated from Icelandic).

<sup>259</sup> Gylfason, *Iceland on the Outskirts*, *supra* note 232, at 26.

<sup>260</sup> *Public Prosecutor v. Kristjánsson*, No.12/2000, at pt. V (Apr. 6, 2000) (Ice.) (translated from Icelandic).

<sup>261</sup> *Johanesson*, *supra* note 258, at pt. IV.

<sup>262</sup> *See Kristjánsson*, *supra* note 251, at pt. I (“After the voyage had been commenced it had come to light that the price for catch quotas . . . increased significantly. They had then decided to continue fishing without a catch quota.”).

the authorities when and where their ship would be docking.<sup>263</sup> They were charged with having caught approximately 34,000 kilograms of cod over the course of a week-long fishing trip, without rights to catch any.<sup>264</sup> The head of the company admitted the charge, but argued that as an Icelandic citizen he was entitled to use the common fish stock on an equal basis with other citizens, without having to lease rights from other private citizens who had received them for free.<sup>265</sup> He claimed he had been unable to afford to purchase rights from private parties on the Quota Exchange, and that to require him to do so would deny him right to choice of profession, and his right to equal treatment by the government, in violation of the Icelandic Constitution.<sup>266</sup> The Icelandic Supreme Court agreed with the defendants that the system was unfair to them, but held that it did not rise to the level of a constitutional violation.<sup>267</sup>

The case was subsequently brought before the United Nations' Human Rights Committee under the International Covenant on Civil and Political Rights.<sup>268</sup> The United Nations Committee disagreed with the Icelandic Supreme Court, finding that the system did, in fact, violate the defendants' constitutionally protected right to pursue employment freely and to be free from discrimination by the Icelandic government.<sup>269</sup> The Icelandic government ignored the United Nations ruling, however, and continued to use the same rights allocation system.<sup>270</sup> According to attorney Ludvik Kaaber who represented the defendants, defiance of the system is increasingly common and enforcement against violators is difficult and rare.<sup>271</sup>

It is interesting to note that the Icelandic experience undermines the Coasean idea that in the absence of transaction costs, the initial allocation of property rights does not matter, because subsequent trade among private parties will produce an efficient outcome.<sup>272</sup> Transaction costs, of course,

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<sup>263</sup> See *id.* ("The defendant Guðnason issued a declaration 10 February 1999, stating that ships owned by Hymnó Ltd. would be sent to fish even if they had no catch quotas for the species of catch brought ashore.").

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at pt. I.

<sup>267</sup> *Id.* at pt. II.

<sup>268</sup> Haraldsson & Sveinsson v. Iceland, U.N. Human Rights Comm., Communication No. 1306/2004, U.N. Doc. CCPR/C/91/D/1306/2004 (2007).

<sup>269</sup> *Id.* at 203.

<sup>270</sup> Interview with Ludvik Kaaber, attorney for Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson (Feb. 1, 2010) (on file with author).

<sup>271</sup> *Id.*

<sup>272</sup> See Coase, *supra* note 97, at 15–16 ("Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the arrangement is greater than the costs which would be involved in bringing it about.").

are inevitable in the allocation of property rights,<sup>273</sup> but it is not transaction costs that have produced resistance to the Icelandic system. The Icelandic experience suggests that an initial allocation that is perceived as unfair may result in a common view that the law itself produces behavior that is socially unacceptable, and that defying it is socially acceptable. In that situation, as we have seen, people tend to be governed by norms of social acceptability rather than law. In other words, the efficient outcome envisaged by the new property rights system is undermined because people act outside the law. It is perhaps the initial allocation of rights itself that is the transaction cost that a fair and efficient market cannot overcome.

Peñalver and Katyal find a similar example in the role of settlers of land in the American west.<sup>274</sup> Settlers routinely engaged in formally illegal behavior in grabbing land to which they were not entitled.<sup>275</sup> The position of the settlers and a large part of society was that those willing to work the land should own it, regardless of whether legal title was held by absentee land speculators in the eastern states.<sup>276</sup> Their activity was more than socially acceptable, despite its formal deviance—it was seen in some quarters as heroic.<sup>277</sup> Thus, though their behavior was formally deviant, the settlers “remained true to their normative community . . . .”<sup>278</sup>

As Peñalver and Katyal make clear, eastern politicians reacted with outrage, calling the settlers “lawless rabble” and insisting they be prosecuted for criminal trespass.<sup>279</sup> To overcome formal law, settlers successfully appealed to juries to nullify verdicts against them, privileging socially acceptable deviance over formal law.<sup>280</sup> In addition to defiant juries, state courts and legislatures expanded common law doctrines such as adverse possession to favor settlers.<sup>281</sup> Eventually, the “settlers’ continued refusal to recognize the rights of absentee owners rendered the federal government’s pro-speculator stance untenable.”<sup>282</sup> The federal government eventually went so far as to enact the Homestead Act, legalizing settlers’ once deviant seizure of federal lands.<sup>283</sup>

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<sup>273</sup> See Banner, *supra* note 55, at S365 (stating that there are “one-time administrative costs inherent in valuing and assigning rights”).

<sup>274</sup> Peñalver & Katyal, *supra* note 40, at 1105–06.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1107.

<sup>277</sup> See *id.* at 1109 (“Western public opinion, among squatters and nonsquatters alike, favored squatters over absentee landlords, public and private.”).

<sup>278</sup> *Id.* at 1130.

<sup>279</sup> *Id.* at 1109.

<sup>280</sup> *Id.* at 1108.

<sup>281</sup> *Id.* at 1111.

<sup>282</sup> *Id.* at 1110.

<sup>283</sup> *Id.* at 1113.

## V. LAW'S ANCHORING FUNCTION

Property, an inherently social institution, is influenced not just by law, but by norms of the social acceptability of behavior. Where property law and norms of social acceptability converge, legal institutions function well. Where they diverge, legal institutions tend to falter, and social acceptability rather than law tends to control behavior. Applying the acceptable deviance model to the normative evolutionary theory of property rights, we see that behaviors that are socially unacceptable but legal generate informal sanctions and, eventually, may become illegal. Behaviors that are socially acceptable but illegal tend not to generate sanctions, despite their formal illegality, and may eventually become legal. In this way, property rights evolve with changes in normative sensibilities, rotating counter-clockwise through the acceptable deviance model.

As the PADs model predicts, eventually the law must change to reflect normative sensibilities. And that is, in fact, what we see. In the case of copyright, sharing music is moving across the normative boundary from illegal-and-socially-unacceptable to illegal-but-socially-acceptable. As the controversy over the *Thomas* and *Tenenbaum* cases suggests, the next movement may be crossing the boundary from illegality to legality. Rising unemployment and anti-immigration sentiment are pushing day labor markets first from the legal-and-socially-acceptable quadrant to the legal-but-socially-unacceptable quadrant, and now in some jurisdictions into illegal-and-socially-unacceptable quadrant. In response to the foreclosure crisis, we see squatting moving across the normative boundary from socially unacceptable to socially acceptable, and possession of foreclosed property by blameless tenants moving from illegality to legality. Finally, in the case of fishing rights, behaviors such as poaching for consumption that were once both illegal and socially unacceptable became socially acceptable, pressuring the law to follow.

Deviance from law, in favor of social acceptability, is not necessarily harmful. In fact, it can protect important community values embedded within property law regimes, such as norms of sharing, utilizing natural resources to feed one's family, interacting with one's community in public spaces, and protecting blameless victims of the foreclosure crisis. As Peñalver and Katyal say, "[p]roperty scholars should be attentive to the criminal enforcement of property laws and the ways in which that enforcement may unfairly punish or overdeter justified and useful lawbreaking by property outlaws."<sup>284</sup> In one sense, acceptable deviance is similar to Daniel Markovits's concept of "democratic deficits."<sup>285</sup> According to Markovits, illegal behavior is both justified and unavoidable

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<sup>284</sup> *Id.* at 1186.

<sup>285</sup> See Daniel Markovits, *Democratic Disobedience*, 114 *YALE L. J.* 1897, 1902 (2005).

when there is a “democratic deficit”—when the law has not changed to reflect popular sentiment because of a flaw in the democratic process.<sup>286</sup>

These divergences can also have serious negative effects to which legal institutions are ill-prepared to respond. Behavior that is legal but socially unacceptable cannot generate a formal enforcement response from the state. In the state’s absence, “popular justice” measures such as vigilantism may be taken by some in the community. Thus day laborers in California may be confronted by violent neo-Nazis, and the religious fanatics from the Westboro Church are confronted by enraged mobs.<sup>287</sup> On the other hand, behavior that is illegal but socially acceptable usually does not generate an enforcement response. Unlawfully-motivated state actors, however, may enforce formal law and immunize themselves from the consequences of unlawful motivation because of the formal illegality of the behavior. Thus, because of their race or ethnicity, some loiterers or day laborers might be arrested and not others; some blameless tenants may be evicted and not others.

Recognizing the role of acceptable deviance both enriches our understanding of property rights and enhances our ability to detect the predictable malfunctions in legal institutions triggered by divergences between the legality of behavior with regard to property, and the social acceptability of that behavior. It also allows us to recognize that although behavior with respect to property rights—and thus the evolution of property rights—may occur within parameters of normatively acceptable deviance around law rather than according to the law itself, the evolution of property rights is not chaos. Behavior may not mirror law, but neither does it exist without reference to law. Law seems to function as an anchor on behavior. Anchors allow a limited amount of drift. The anchor provided by law allows enough deviance to permit evolution in response to changes in normative sensibilities and economic incentives, while at the same time providing enough stability to support a functioning society. Perhaps in the end that is the beauty of the relationship between acceptable deviance and property rights—it provides both stability and the freedom to evolve.

## VI. CONCLUSION

Property rights evolve in response to changes in normative sensibilities. Similarly, compliance with, and deviance from, law is often dependent upon the law’s convergence with, or divergence from,

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<sup>286</sup> See *id.* at 1928 (“The republican theory of democracy, and in particular its idea of a democratic deficit, has therefore created space for a characteristically democratic challenge to government authority that the liberal view cannot recognize.”).

<sup>287</sup> See *supra* Part IV.B for a discussion of day laborers in California and the Westboro Baptist Church congregation.

normative sensibilities. Where the legality and social acceptability of behavior diverge, deviance is socially acceptable. By applying a model of acceptable deviance to property rights, we can predict and actually observe the evolution of property rights in response to changes in normative sensibilities in areas as diverse as natural resources, copyright, foreclosures, and the use of public space. We can also predict and observe stresses in legal institutions created by divergences in the legality and social acceptability of behavior with regard to property rights. Law functions not as a straightjacket but rather as an anchor on behavior, providing stability, but also space for deviance which permits the evolution of property rights.