

# The IP Law Book Review

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**PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP**, by **Eduardo Moisés Peñalver and Sonia K. Katyal**. Yale University Press, 2010. 304pp. Paperback \$45.00.

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Law professors Sonia Katyal (Fordham) and Eduardo Peñalver (Cornell) have produced a vivid and engaging chronicle of “the complex phenomenon of property disobedience.” Property disobedience is civil disobedience that has some relationship to property, be it real property, intellectual property, natural resources or even chattels. People who engage in illegal property disobedience are denominated property outlaws. Those who act decisively in spheres in which the law is less certain, such as by boldly asserting the right to make fair use of a copyrighted work, are denominated property “altlaws” by Peñalver and Katyal. They describe the objective of this project as an effort to identify some of the ways in which property disobedience has sometimes spurred innovation and actually strengthened the rule of law. They also implicitly suggest that almost any act of civil disobedience can be categorized and analyzed as property disobedience, using the tools and lenses they employ throughout the tome.

This book challenges the notion that rigidly fostering stability in the private ownership of property is the only appropriate goal of the legal system. The authors assert that dynamic sociopolitical responses to civil disobedience by lawbreakers sometimes propel beneficial legal reforms in a wide array of contexts. Property outlaws with clean hands and good hearts, they argue, can productively draw attention to the need to reform ossified property laws. In the words sometimes attributed to the historical rock star of successful civil disobedience Mohandas Gandhi: “First they ignore you, then they ridicule you, then they fight you, and then you win.”<sup>1</sup>

The book discusses the mechanics of social change in a number of contexts that often don't seem linearly linked to "property" in any traditional sense, until the authors connect the dots. It opens with a description of a lunch counter sit-in to protest racial discrimination in North Carolina in 1960, and moves smoothly to a discussion of the copyright law-based impediments to legal distribution of the 1987 documentary about the civil rights movement, "Eyes on the Prize," and the protests by anti-copyright activists that this triggered. The intersection of real property laws and racism is juxtaposed with the conflicts between intellectual property rights and an audiovisual documentary account of that intersection. Illegal acts led to changes in the law in the first instance, and to some increase in public access to an important source of historical information in the second.

Peñalver and Katyal's accounts of these and myriad other acts of civil disobedience that have effected changes in property laws are presented in an erudite and detailed but still accessible manner that makes this tome very appealing. I began reading it with a little bit of trepidation, because so many books touted as putting forth an "intriguingly counterintuitive proposition" (those words appear in a blurb on the back cover) are often riddled with caricatures of the status quo, crafted to artificially inflate the seeming intelligence and importance of the authors' observations. Like most areas of the law, property ownership is complicated, often inconsistent and sometimes completely incoherent. Anytime a work purports to be the Grand, Unified Theory of anything, my inner cynic is activated and on high alert.

But I never got the sense that these authors were choosing anecdotes to illustrate some purported monolithic "common wisdom" and build a case against its conveniently constructed flaws. Nor are they heavy handed with the conclusions they draw from their examples, nor the reactions and responses they recommend. They do not oversell their thesis, and give the reader room to independently process the stories they tell, which is a real strength of the tome. In fact, they claim not to have "a general theory of shifts in legal regimes, or even in property law" (p.15) at all. I found this really refreshing.

The authors sketch out a flexible taxonomy of outlawism that separates acquisitive from expressive disobedience, and intentional law breaking from actions taken in a shifting framework of legal uncertainty. They explain that context is important but rarely determinative and provide a rich and varied menu of potential responses to a range of ownership law transgressions. The open-minded reader will be persuaded that sometimes law breakers should be accommodated, rather than punished.

Peñalver and Katyal appropriately tell stories from many different regions of the world. Chapter 6, entitled “Acquisitive Altlaws: The Treatment Action Campaign, Patents, and Public Health” is particularly gripping in its account of struggles in South Africa and Brazil for access to drugs that treat HIV/AIDS. The authors make a succinct but convincing case that western patent law regimes literally privilege property over human life. Aggressive assertions of intellectual property rights across borders in general can look awfully colonial. It is hard not to pull for the outlaws in this scenario.

At the same time, the authors acknowledge that too little law enforcement can also be problematic, which resonated powerfully with me. Moreover, the intersection of this book and my real space life somewhat complicated my reaction to it. I am spending the year in China on a Fulbright grant. One of the defining characteristics of Shanghai, where I currently reside, is the chaos one often finds in public spaces, despite China’s reputation for being a highly authoritarian nation. Simply crossing city streets in every Chinese city I have visited is an extremely dangerous endeavor. As another Fulbrighter put it, in China you have to repress everything you think you know about traffic rules, traffic patterns, and traffic safety, or death awaits you. Bus drivers plough through crowds and red lights with seeming impunity. Motorists rarely wear seat belts, and tend to impinge on designated bike lanes. Bicyclists do not wear helmets, and expect pedestrians to cede right of way to them on sidewalks.<sup>2</sup> I pay a lot more attention to my surroundings as a pedestrian in Shanghai than I ever have before, but that hasn’t kept me entirely safe, and every day I walk in fear of getting hit by a bicycle yet again, or sideswiped by a peddler’s cart, or pulverized by a bus that routinely runs a red light, or flattened by a taxi taking a shortcut over the sidewalk. It did not surprise me at all to read in the New York Times that “traffic accidents are the leading cause of death for people in China under the age of 45.”<sup>3</sup>

I’m further informed, and believe, that there are laws that would regulate transportation-related conduct if they were enforced; but for reasons economic and political, they are not. As a general matter traffic probably flows far faster in a city of 23 million people when it is largely unpoliced. However, individuals who are adversely affected by the self-serving behaviors of others pay a heavy price for this anarchic efficiency.

Social scientists could provide more nuanced explanations for the dangerous state of China’s roads, and economists more erudite buzz words, but the bottom line is that everyone tries to get where they are going as quickly and conveniently as possible. They don’t follow any discernible set of proscribed rules, nor expect any one else to. And it is profoundly clear

that obeying rules as a lone actor will not make you or anyone else any safer. People have to believe in the justicial and pragmatic validity of traffic laws for them to have any effect, especially if the government is not going to enforce them energetically. The same is true of property and intellectual property laws, as Katyal and Peñalver explain far more elegantly.

The authors refer to Robert Cover's famous essay<sup>4</sup> "Nomos and Narrative"<sup>5</sup> periodically in their text (per index, pp.25, 32, 77, 141; 234-35), and it seems clear they were, like so many legal scholars, greatly influenced by Cover's trenchant observations about laws and social norms. They build from Cover's assumption that when people align their behaviors with their personal perceptions of right and wrong and that puts them in conflict with the legal system, productive challenges to the exigent laws sometimes ensue, while other times justice may simply be achieved in an alternative sphere, outside the world of courts or police officers. And of course there is at least one more possibility, which is that there can be negative consequences when people ignore the law in favor of their own preferences, see e.g. the dangerous roads of China. As Greg Lastowka has noted in his own review of this book,<sup>6</sup> lawbreaking isn't always heroic and sometimes outlaws are just bad news.

The book closes with a description of San Francisco Mayor Gavin Newsom's decision in 2004 to provoke a legal fight about the boundaries of California citizenship rights by issuing marriage certificates to same-sex couples in contravention of existing law. This dramatically ratcheted up the legal and civic debates about discrimination against lesbians and gays. Whether this rather profound act of civil disobedience will result in positive and permanent legal changes remains unclear, but the authors, and this author, too, are optimistic.

If the volume had been written to my personal specifications rather than reflecting the authors' own interests and desires, it might have included a few more examples of acts of well intentioned civil disobedience that backfired, further entrenching socially undesirable property laws. Sometimes that can happen, as outlaws who meaningfully threaten the positive and peaceful aspects of property stability tend to inspire cautionary tales when they come to regrettable ends, because history is usually written and controlled by the machinery of the status quo. But it is still a terrific book as-is, and I emphatically recommend it to readers.

## ENDNOTES

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<sup>1</sup> [www.quotedb.com/quotes/2776](http://www.quotedb.com/quotes/2776).

<sup>2</sup> The U.S. State Department explained the situation as follows:  
“Traffic is chaotic and largely unregulated, and right-of-way and other courtesies are usually ignored. The average Chinese driver has fewer than five years’ experience behind the wheel and the rate of traffic accidents in China, including fatal accidents, is among the highest in the world. Cars, bicycles, motorbikes, trucks, and buses often treat road signs and signals as advisory rather than mandatory. Pedestrians never have the right of way, and you should always be careful while traveling in, or even walking near, traffic. Child safety seats are not widely available in China, and most taxis and other cars do not have seat belts in the back seats. Motorcycle and bicycle accidents are frequent and often serious. If you decide to ride a bike or motorcycle, wear a helmet.”  
[http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1089.html#traffic\\_safety](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1089.html#traffic_safety).

<sup>3</sup> [www.nytimes.com/2011/07/27/world/asia/27rail.html](http://www.nytimes.com/2011/07/27/world/asia/27rail.html).

<sup>4</sup> Actually it was a law review issue foreword, which makes all the attention it has garnered in the years since its publication even more remarkable.

<sup>5</sup> Cover, Robert M., “The Supreme Court, 1982 Term—Foreword: Nomos and Narrative” (1983). Faculty Scholarship Series. Paper 2705.  
[http://digitalcommons.law.yale.edu/fss\\_papers/2705](http://digitalcommons.law.yale.edu/fss_papers/2705).

<sup>6</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1939899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939899).

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