BOOK REVIEW

***Property In Contemporary Capitalism***

**By Paddy Ireland, Bristol, Bristol University Press, 2024, 301pp., £**

ROWAN ALCOCK[[1]](#footnote-1) AND HELEN CARR[[2]](#footnote-2)

INTRODUCTION

Paddy Ireland’s masterly exploration of the nature of property in contemporary capitalism argues that property is a major – and undertheorised – constituent of capitalism’s current crisis. For Ireland, property is inextricably linked to rising indebtedness, recurring economic crises, increasing inequality, environmental degradation and the accelerating climate crisis. Urgent and fundamental reform of the property /capitalism nexus is vital but property theory, stuck in a ‘new essentialism’, misunderstands contemporary property. Ireland observes that most property scholarship works from within an analytical jurisprudential tradition seeking universal truths about transhistorical and transcultural essence of property. This approach, so remote from empirical realities, is woefully inadequate to tell a different story of property. If a new story is to emerge, and for Ireland it must, because property ownership – and consequentially power – is destructively concentrated in the hands of extremely wealthy individuals and corporations, then that story must be interdisciplinary, historically informed and sufficiently eclectic to facilitate conceptualisations of property which highlight its contingency and malleability.

This review is structured as follows: it begins by sketching out the contents of the book, highlighting the breadth of Ireland’s scholarship. It then responds to the book’s stated goal, to widen the conversation about property, by considering how property’s contemporary significance might be further explored. Theoretically we ask what a more developed Polanyian perspective might add to Ireland’s analysis. Methodologically, we consider what might be required of an empirical approach to contemporary property problems. Finally we consider the implications for the teaching of property law?

THE CONTENT OF THE BOOK

The first part of the book explores and explains the entanglement of property and capitalism. Beginning with the problematic dominance of the Blackstonian model Ireland provides a historical account of the contested process by which intangible property, such as copyright and the increasingly abstract tool of credit, was given a place in Blackstone’s ‘rather old fashioned framework’ of property.[[3]](#footnote-3) His point is that there was, and continues to be, an iterative and productive relationship between the needs of capitalism and the development of property as a legal form, and that there was nothing inevitable about the reification and transformation of intangibles into objects of property. Ireland explains how the bundle of rights theory of property became a conceptual necessity during the nineteenth century because physicalist and absolutist concepts of property were not adequate to express property’s key role in capitalism. Ireland charts the radical twist given to the bundle of rights approach by Hohfeld; property is not only a bundle of rights but a social relation, which ‘highlighted the fact that property rights grant people *power* not only over things but over ‘other individuals in reference to things’[[4]](#footnote-4) (emphasis in the original). Chapter 2 closes with the tantalising argument, that, ‘the disaggregation of property inherent in the bundle of rights conception has, arguably, in some ways strengthened the idea of property as thing ownership’,[[5]](#footnote-5) to meet the needs of a resurgent free market capitalism.

In chapter 3 a parallel history of property is told. From a world where ‘property rights in land...were not only fragmented and divided, but still to a considerable extent bound up in intricate and visible social relations between people occupying different places in a hierarchically organised and inter-connected social whole’ [[6]](#footnote-6) via enclosures and the criminalisation of practices such as gleaning and lopping, a new world order emerged with a distinctive set of social property relations and a new economic dynamic. Property rights were quintessential private rights, but at the same time, ‘Property is …a publicly constituted and publicly enforced power relationship: all property rights, including private property rights, have a public law character; they are never truly private’. [[7]](#footnote-7) Ireland highlights how private property rights in productive resources - a critical element of contemporary capitalism – are defended because they are essential to economic prosperity. Yet such consequentialism is problematic; political repression, forced dispossessions and rights reallocations can be justified ‘on the grounds that, even if they seem directly and immediately to benefit a few to the detriment of the many, they do so in the service of the longer-term social good’. [[8]](#footnote-8)

Ireland explains what is unique about capital and investment in chapter 4, that profits arise from the efforts of others and he explores the ways in which this characteristic, most marked in financial property, is a source of appropriative power and significant financial gain. Problematically wealth generated is increasingly concentrated in the hands of the few and is increasingly insulated from the normal vicissitudes of economic life. Not only are wealth inequalities gendered, racialised and intergenerational, deregulation, privatisation and increasing government debt has led to rising private wealth and declining public wealth

Chapters 5 and 6 are probably the most contentious of the book, for it is here that Ireland expands upon his argument that analytical jurisprudence and the law and economics movement have become dangerously abstract in their efforts to capture what they believe to be the universal essentials of property. Such scholarship universalises Western market capitalist assumptions about ownership and exclusion.[[9]](#footnote-9) The danger lies in the erosion of difference and/or the creation of false similarities. As Ireland puts it,

‘When all property institutions are viewed through an ownership prism in terms of individual person-thing relationships and authorised self-seekingness… we risk downplaying the differences between different sets of property institutions and between the societies of which they were/are part’.[[10]](#footnote-10)

Ireland pays attention to the work of James Penner in his analysis of the limitations of analytical jurisprudence, particularly Penner’s rejection of the bundle of rights and his reassertion of thing-ownership as lying at the core of property. Ireland acknowledges that Penner seeks to locate property in its practical setting, but points out that for Penner, property’s natural environment is the legal system. As Ireland observes ‘(Penner’s) ideas about the ‘environment’, ‘context’ and ‘practice’ of property are therefore highly attenuated. He operates with what we might call a second separability thesis in which law and legal systems are separated from the wider economic, political and social systems of which they are part’. [[11]](#footnote-11) For Ireland, Penner’s theory of property is contextually blinkered, providing ‘not only an incomplete but a misleading picture both of property in contemporary capitalism and of the social order from which his concept of property is drawn. It conceals as much as it reveals’.[[12]](#footnote-12)

In chapter 6 Ireland contextualises the law and economics school of thought, placing it within a broader intellectual movement seeking ‘to counter suggestions that corporations should be regarded as social or quasi-social institutions, shareholders rights curtailed, and directors tasked with balancing a range of different interests’.[[13]](#footnote-13) Although conservatism is a consequence of both analytical jurisprudence and the law and economics movement, this suggests a difference in motivation; where analytical jurisprudence has an overriding concern with enabling judges to make correct decisions, law and economics justifies and legitimises ‘the property status quo, particularly in relation to corporations and shareholder rights – and therefore, in relation to key productive resources and the fruits of productive activity’.[[14]](#footnote-14)

Ireland provides a powerful and scholarly critique of the key tenets of law and economics thinking. So for instance he remarks on the implausibility of contractual theories of the corporation which in reverting to the nineteenth century, ‘turns a blind eye to the many qualitative changes that have taken place in the nature of productive activity and in the nature of public corporations and corporate shareholding’.[[15]](#footnote-15) He highlights how ‘(i)t is the residual proprietary rights still attached to shares – that contractual theories of the corporation have sought to protect – that have made possible the resurgence of private appropriative power and the ruthless pursuit of financial gain whatever the negative impacts on other stakeholders an society as a whole’.[[16]](#footnote-16)

Chapter 7 considers the ways in which legal mechanisms have developed to protect property- as-capital. This chapter is important, as Ireland argues, because property protection provides a useful prism through which to view neoliberalism. It serves to undermine claims that the contemporary property system is natural, inevitable and working well. On the contrary, financial property in particular is vulnerable, ‘To everything from changes in the general economic outlook and business climate to changes in policy that raise labour and/or environmental standards or otherwise alter the relative bargaining strength of capital and labour’.[[17]](#footnote-17) Vulnerabilities require bailouts and austerity measures such that the financial crash of 2008 and the Covid-19 pandemic resulted not in a disruption of capitalism but a ‘dramatic upward redistribution of wealth’. [[18]](#footnote-18) Vulnerabilities justify international investment law, a new form of constitutionalism, to ‘discourage a wide range of state activity by enabling investors to claim damages for policies that, even if supported by the local population adversely impact on the value of their investments’.[[19]](#footnote-19) What property protection in contemporary capitalism requires in short is ‘derisking’, ‘states acting to smooth the way for private investment and to guarantee acceptable revenue streams’.[[20]](#footnote-20)

The final chapter of the book is open-ended. Ireland does not seek to complete his project but to provide the foundations for empirically grounded and theoretically rich accounts of property that bring capitalism back in. He tells us the why, and the leaves it to us, the readers, to decide exactly how we might take his project forward. In the final section of the review we engage with this challenge.

EXPANDING THE CONVERSATION - THEORETICAL, METHODOLOGICAL AND PEDAGOGICAL INSIGHTS

*Theory*

We agree that theory is vital to instigate pertinent accounts of property which reveal its social relational dimensions. One strand of theory that is a key influence for Ireland is Polanyi’s understanding of the fictitious commodification of land and the disembedding process of land privatisation. Ireland describes this as the process of more and more land being ‘turned into pure private property’, increasingly ‘disembedded from social relationships’ and being ‘less subject to regulation by custom and the community’.[[21]](#footnote-21) Further engagement with Polanyi, a social theorist and economic anthropologist whose work dating from the mid 20th century is of continued relevance, provides insight into the emergence of economic liberalism and its potential to descend into more anti-democratic forms.[[22]](#footnote-22) There is more to be said on Polanyi’s understanding of why disembeddedness began in the mid-19th century. For Polanyi, the ‘nature’ of the market economy ‘cannot be fully grasped unless the impact of the machine on a commercial society is realized’.[[23]](#footnote-23) Machines, he argues, ‘do not pay unless large amounts of goods are produced’ and thus can only be ‘worked without a loss’ if ‘the primary goods necessary to feed the machines’ are readily available – land and labour.[[24]](#footnote-24) Therefore, ‘[m]achine production in a commercial society involves, in effect, no less a transformation than that of the natural and human substance of society into commodities…the dislocation caused by such devices must disjoint man’s relationships and threaten his natural habitat with annihilation’.[[25]](#footnote-25) Technology was a crucial factor in Polanyi’s theory of the privatisation of land (and labour). Commercial society prior to industrial society was consistent with Polanyi’s idea of embeddedness.[[26]](#footnote-26) Only in industrial civilization did a commercial society threaten the fabric of society:

‘What appears to our generation as the problem of capitalism is, in reality, the far greater problem of an industrial civilization’[[27]](#footnote-27)

This understanding of the process of commodification is a prescient warning. It is not just the concentration of property owned by the few which creates crises in inequality of wealth and power; the productive capacity of technology poses a similar danger. Nationalisation or co-operative control of key industries, which now include such things as AI, may change the balance of power and enhance equality, but if society is permeated with the logic of ‘the machine’, making efficiency and productivity paramount, technology can still threaten human annihilation. Climate break-down is an obvious example of this threat. The difficult, and necessary, task of reconstituting property rights might not be enough. There is a dual task for contemporary society – one that Polanyi articulated in 1947 – challenging the entrenchment of property inequality and the logic of market society at the same time as challenging the totalitarian nature of technology and efficiency. We suggest that Polanyi’s words provide an excellent starting point for further enquiry;

‘Today, we are faced with the vital task of restoring the fullness of life to the person, even though this may mean a technologically less efficient society’[[28]](#footnote-28)

*Empirical research*

Conventional approaches to property law ignore, as Ireland argues, the contestations at the heart of property conflicts. Empirical research has the potential to challenge accounts that suggest current property settlements are natural and inevitable and reveal the hidden politics.

One of the examples Ireland mentions, as an alternative to the sole dominion of property conception, is the Chinese ‘household responsibility system (HRS)’.[[29]](#footnote-29) This, he suggests, is an institution that disperses the bundle of rights that make up ‘ownership’ between individuals and collective entities. It is a topic Ireland has co-written on previously as ‘post-capitalist property’ [[30]](#footnote-30) and something that has been argued by Alcock as providing a potential foundation for a Polanyian future that would take the ‘fictious commodity’ of land outside of the market mechanism.[[31]](#footnote-31) We agree that the HRS should be brought to the attention of a wider audience and we would point to other interesting legal forms in China that included strong collective elements such as Township and Village Enterprises (TVEs).[[32]](#footnote-32) However, while the HRS still exists in China, significant reforms, as well as land grabs, have undermined its potential to secure livelihoods outside of the market.[[33]](#footnote-33) Rather than ‘post-capitalist’ the HRS, in many cases, has become a transitional institution helping to bridge the gap between state-socialism and state-capitalism. Empirical and especially anthropological research is important not solely therefore to identify alternative property institutions but also to understand how to protect these institutional formations with post-capitalist potential, so they don’t succumb to capitalist countermoves. In China academic and social organisations have mobilised to protect the complex institutional framework in rural China including the HRS. [[34]](#footnote-34) However these movements have been argued to have lost their radical potential in the face of political constraints.[[35]](#footnote-35)

Political constraints for genuine alternatives are not reserved to China, and Ireland makes clear the necessity for work which reveals what lies behind the property status quo that is taken for granted in the West. Socio-legal scholarship, such as Cowan et al’s work on shared ownership, [[36]](#footnote-36)Bright’s work on leasehold[[37]](#footnote-37) and Whitehouse’s work on housing debt during Covid-19[[38]](#footnote-38) are all useful in uncovering the ways in which property rights have been constructed and maintained. What Ireland’s monograph clarifies for us is that empirical work should become standard and not exceptional in the study of property.

*Pedagogy*

It would be wrong to conclude our review of Ireland’s monograph without some reflection on pedagogy, bearing in mind the importance that Ireland has attached throughout his career to critical legal education. Teaching students basic black letter rules at the same time as a critical awareness of the social construction of those rules has proved problematic in the core legal subjects such as land law which are dominated by professional requirements. In addition, the almost universal separation of land law from property law assists in the masking of the differences between tangible and intangible assets and between personal property and property in productive resources which has allowed property’s excesses to go unchecked. And even within land law itself the coverage of non-contractual property rights tends to be limited to the common intention constructive trust and promissory estoppel, omitting community based rights. The result is that the Blackstonian model makes sense to students who are given no alternative so that they are not outraged by the outcomes of cases like *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52. However the increasing unlikelihood of young people acquiring property, together with the calls for the decolonising of the curriculum may make the conventional approach to teaching property law unstable. Perhaps a place to start is to include the *Land for the Many* report published by the Labour Party in 2019 [[39]](#footnote-39) together with a discussion about why its proposals were so unpopular with the press. Unless property lawyers are prepared to expose the problems of property law and explore possible alternatives they risk being irrelevant in the future of property, or worse, being recognised as complicit in the destructive societal consequences of the current property status quo.

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3. Ireland, op.cit., n.3 p.16. [↑](#footnote-ref-3)
4. Ireland, op.cit., n.3 p. 33 [↑](#footnote-ref-4)
5. Ireland, op.cit., n.3 p. 38 [↑](#footnote-ref-5)
6. Ireland, op.cit., n.3 p. 39 [↑](#footnote-ref-6)
7. Ireland, op.cit., n.3 p. 48 [↑](#footnote-ref-7)
8. Ireland, op.cit., n.3 p. 55 [↑](#footnote-ref-8)
9. Ireland, op.cit., n.3 p. 111 [↑](#footnote-ref-9)
10. Ireland, op.cit., n.3 p. 115 [↑](#footnote-ref-10)
11. Ireland, op cit n.3 p 127 [↑](#footnote-ref-11)
12. Ireland, op cit n.3 p 130 [↑](#footnote-ref-12)
13. Ireland, op cit n.3 p 142 [↑](#footnote-ref-13)
14. Ireland, op cit n.3 p 133 [↑](#footnote-ref-14)
15. Ireland, op cit n.3 p 151 [↑](#footnote-ref-15)
16. Ireland, op cit n.3 p 165-6 [↑](#footnote-ref-16)
17. Ireland, op cit n.3 p 202 [↑](#footnote-ref-17)
18. Ireland, op cit n.3 p 202 [↑](#footnote-ref-18)
19. Ireland, op cit n.3 p 207 [↑](#footnote-ref-19)
20. Ireland, op cit n.3 p 211 [↑](#footnote-ref-20)
21. Ireland, op cit n.3 p 42 [↑](#footnote-ref-21)
22. A brief introduction to the continued relevance of Polanyi can be found at: J Smith, How Polanyi Best Explains Trump, Brexit and the Over-Reach of Economic Liberalism, *Prime Economics* (2017). The authors have themselves used Polanyi as a tool to theorise the reregulation of private renting in Carr, H. and Alcock, R., 2020. Understanding the (re-) regulation of private renting in England: Karl Polanyi, the rogue landlord, the responsible tenant and the decent home. n TT Arvind and J Steele (eds), *Contract Law and the Legislature* (Hart 2020) 297–328 [↑](#footnote-ref-22)
23. K Polanyi, *The Great Transformation:The Political and Economic Origins of Our Time* (2001) p 42-43 [↑](#footnote-ref-23)
24. Polanyi, op cit n.15 p 43 [↑](#footnote-ref-24)
25. Polanyi, op cit n.15 p 44 [↑](#footnote-ref-25)
26. Polanyi, op cit n.15 p 73 [↑](#footnote-ref-26)
27. K Polanyi, Our Obsolete Market Mentality, *Commentary* (1947) p 117 [↑](#footnote-ref-27)
28. Polanyi, op cit n.19 p 116 [↑](#footnote-ref-28)
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31. R. Alcock, Polanyi in rural China: beyond the double movement, *New Political Economy* (2023) [↑](#footnote-ref-31)
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34. A Day, *The Peasant in Postsocialist China: History, Politics, and Capitalism* (2013) [↑](#footnote-ref-34)
35. A Day & M Schneider, The end of alternatives? Capitalist transformation, rural activism and the politics of possibility in China, *Journal of Peasant Studies* (2017) [↑](#footnote-ref-35)
36. D Cowan, H Carr, & A Wallace, A *Ownership, narrative, things*  Palgrave Macmillan UK. [↑](#footnote-ref-36)
37. S Bright, "Tower block refurbishment, flats, and understandings of ownership." *Journal of Law and Society* 48, no. 4 (2021): 524-548. [↑](#footnote-ref-37)
38. L Whitehouse, and S  Liosi, *Assessing the court system’s response to the COVID-19 pandemic in housing possession cases in England and Wales* (2022)  University of Hull  [↑](#footnote-ref-38)
39. Available at https://landforthemany.uk/ [↑](#footnote-ref-39)