Law & Social Inquiry
Volume 47, Issue 3, 1061–1067, August 2022

The Re-Combinatory Nature of Property within Racial Regimes of Ownership

Andrea Ballestero

BRENNA BHANDAR. *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*. Durham, NC: Duke University Press, 2018.

At a time when enduring and entrenched structures of racial inequality and oppression have become public objects of concern in Euro-America, it is easy to feel as if those historical legacies and structural forces are too powerful to be challenged. And yet, it is precisely at this kind of historical moment that it is crucial to not only diagnose existing structures, but also identify the specific legal and institutional mechanisms through which those legacies and forces are entrenched. Racism, dispossession, and cultural erasure come to be through very concrete institutions and practices that are far from fully coherent. Challenging their legacy requires paying attention to the specific techno-legal devices that cement them in time. Techno-legal devices channel political work in a way that welds practices and desires with long-standing assumptions about sociality that have been embedded in technical languages (Ballestero 2019). Without those techno-legal devices, legacies of racism and property cannot be enacted in the everyday. And yet, while reproducing a racist social order, these devices are also points of weakness. They can create instability to upend that social order.

Brenna Bhandar's *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke 2019) is a powerful book. It provides an arresting account of the devices through which a violent and naturalized sense of property emerges from colonial contexts, along with its concomitant racism. The book combines thorough legal history with careful critique of the institution of property as a racial formation. It offers a textured empirical picture while expanding our imagination of the worlds we would like to see in its place. Brenna Bhandar has provided a theoretical tour de force centered on the rationalities that make possible the convergence of property, identity, race, and gender—a convergence that excludes and dispossesses indigenous peoples around the world.

Andrea Ballestero (aballes@usc.edu) is Associate Professor of Anthropology and Director of the Ethnography Studio at the University of Southern California, Los Angeles, US. Her current research examines property, finance, and underground worlds in Costa Rica.

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press

RACIAL REGIMES OF OWNERSHIP

The core of the book's argument is that ownership and racism endure through a relation of constitutive integration: one is inherent to the other. The book examines in detail three settler colonial societies (Canada, Australia, Israel/Palestine) and organizes the investigation around four components of said integration: property use, the abstraction of ownership, improvement as a foundation for property, and status as a precondition for ownership. The detailed empirical cases show "the uneven and sometimes contradictory ways in which juridical formations of race and property law appear in different settler colonial contexts" (11). Importantly, the cases reveal the uneven historical endurance of such formations. That is, these configurations of race and property law take fragmentary, nonlinear, and sometimes contradictory empirical forms.

The guiding analytic that the book develops is the concept of a "racial regime of ownership." This describes a juridical architecture that classifies individuals into racial categories and legitimizes certain forms of possession and place-making at the expense of others. This formation is thoroughly rooted in colonial forms of occupation, including their racialized allocation of subjectivity, recognition, and membership. Thus, racial regimes of possessive ownership take form through imperial and colonial expansion in Asia, Africa, and the Americas, rather than with the advent of capitalism. Building on Cedric Robinson's (2007) work, Bhandar shows this racial regime to be more than a mercurial formation. Rather, this regime is built on racism as "the constant and persistent factor characterizing the modern racial regime."

But this should not make us think that dispossession and racism follow a coherent trajectory. Drawing on Stuart Hall (1986), Bhandar warns us about the desire for a monolithic historical account and instead shows the constantly shifting means by which ownership is integral to race-based forms of dispossession. Rather than coordinated systems expressing an "elective affinity," as Weber would have it, private property and racial regimes co-constitute each other in dynamic, and sometimes contradictory, ways. In some instances these regimes recognize selfhood widely; in others they deny it. In some instances they value improvements to land; in others they misrecognize improvements. In some instances these regimes valorize physical possession; in others they dispense with possession in order to recognize property.

What is clear is that racial regimes of property are characterized by the noninevitable, yet nonarbitrary, nature of property as a juridical formation. Property, as a social institution, needs continuous renewal if the appropriation of indigenous lands is to persist. The book's objective is not to produce a new overarching theory of ownership. Rather, Bhandar wants to "trace the legal and philosophical justifications for appropriation and private ownership as they appear at the distance of historical conjunctures of colonial settlement" and to show how they "persist as hegemonic juridical formations in liberal democracy settler states and beyond" (18). These justifications operate as conditions of possibility, and as such, their unsettling is essential for restitution and reparations. The simultaneous coherent and recombinant nature of property expressed in four sociolegal institutions: use, abstraction, improvement, and status.

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press

LAND USE IN IRELAND AND CANADA

The significance of land use (Chapter 1) for the institution of property in common law is often traced back to Lockean ideas of cultivation, a notion that performs an alchemical transformation that takes territory from wasteful to virtuous. This transformation becomes the ultimate mediator between legitimate and illegitimate possession across different colonial jurisdictions. And yet, determining what is productive use of the land and what is not requires quantifying both land and the value yielded from it. Such quantification is only possible once techniques for surveying the land are in place.

As a political, legal, and technical device, the survey was perfected by William Petty in colonized Ireland. Petty improved the survey as a technology for quantification that yields a numeric representation not only of the extension of the land, but also of people's labor, and more broadly of the productivity of a nation. Bhandar notes how "Petty's political arithmetic is striking of the rather explicit and unabashed reduction of human life (and people's relation to land and labor) to economic criteria" (47). Colonizers use this numeric representation of productivity to certify the English property owner as the subject capable of using the land to yield wealth. In contrast, colonizers invent the colonized Irish as an unproductive subject in need of "civilizational" transformation. The survey is a device essential to produce differentiation between humans with "intrinsic capabilities" to make land productive and those lacking such capabilities. But the implications of these racial classifications go further. The survey enables the dispossession of the Irish and the transfer of property to the English. In this way, colonial procedures are integral to the invention of property as a liberal common law institution.

As colonizers move to what is today called British Columbia, Canada, they build on the same logic of productivity to design a settler government that determines "how to live a rational and productive life" (54). In this case, the implication is that "Indians do not have a right to land because they do not use it, and thus, they bring no value or utility out of it" (57). In order to guarantee productive use of the land, colonizers turn to homesteading as an efficient mechanism of appropriation. If First Nations want to use common law to resist their dispossession, their only avenue is to "assimilate" into settler colonial society, drop their relations to land, change their kin relations, and settle as colonizers do: using land "productively." But this commitment to use as a means for appropriation is not straightforward, as it gives the appearance of being open to indigenous ownership. Aboriginal title, for instance, tactically combines two notions of appropriation. On the one hand, it enacts Anglo-Canadian concepts of exclusive ownership. On the other hand, it appears to embrace First Nations' historically preexisting relations to land. The latter, however, can only be recognized if they fit with the central tenets of Anglo-Canadian ownership: exclusivity and clarity of use. In Anglo-Canadian property, relations to land must be exclusive, that is, they must consist of a type of occupation whereby only one group can be recognized as entitled to the land and whereby said entitlement is tied to use and improvement (67). Thus, we see a seeming openness to indigenous ownership, but only as long as it replicates Petty and Locke's liberal imagination of the connection between humans and land.

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press

LEGAL ABSTRACTION IN SOUTH AUSTRALIA

Bhandar also documents variations in the use of property title as a device to consolidate colonial forms of dispossession and settler ownership (Chapter 2). Here, physical possession and title registration are two arbitrators of ownership (81). The critical point is that the idea that title registration has replaced physical possession as a form of control is not completely true. Bhandar calls for much needed historical and geographic precision given the fragmentary, contradictory, and recombinant character of the institution of property within racial regimes of ownership.

To chart the significance of title by registration for settler governments, Chapter 2 takes the reader to nineteenth-century South Australia where colonizers implement, for the first time outside of England and Wales, the Torrens system of title registration. Before Torrens, possession of title was equal to possession of land. The alternative, the conveyance system—entailing the physical transfer of title from one owner to the next in place—relied on local knowledge, as it required assessing the plausibility of a physical title against a local history of land possession and place-specific forms of land use (87). With title by registration, things change. In the Torrens system, owners register their title with a government-run office that guarantees its legitimacy. Through this system, "possession became an irrelevance" (108) and physical presence on the land becomes secondary to legal abstraction.

The Torrens system became law in South Australia in 1858. It incorporated instruments from commercial and mercantile law to produce a "general logic of contractual exchange" (91) for all commodities, fixed or not. With this system, new relations of exchange and forms of alienation become possible. Settlers claim property to Aboriginal lands, not necessarily by physical possession, but through titles registered under and guaranteed by colonial authorities. Said titles also make possible the use of Aboriginal land as collateral for loans that financed further colonization, enacting within a single legal and administrative system the myth of *terra nullius* and the expansion of financial mechanisms to fund further Aboriginal dispossession.

The Torrens system converts people and their historical relations to land into the abstract category of a "savage," someone that cannot participate in this new legal technocracy precisely because of their lack of title (100). This abstraction of the "Indian" or the "savage" occurs at the same time that scientific racism moves racial difference from physical variation to a difference in capacity that is scientifically measured and quantified. The biological inferiority that scientific racism proclaims also extends to indigenous lands, which settlers see as "free of encumbrance, malleable, and capable of being shaped into a new commodity" (108). In this conjuncture, dispossession is "both a prerequisite and a consequence" of the racial values that order property formation and of the racial subjugation of indigenous peoples along with their lands (102).

IMPROVEMENT IN PALESTINE/ISRAEL

While in Chapter 2 abstraction renders physical land occupation secondary to the registration of title, Chapter 3 presents a different situation. In the case of Palestine/Israel, physical possession, and use as its corollary, remains at the forefront of indigenous

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press

struggles over land (112). In this case, physical possession is a site of contestation. In some instances, colonial authorities disregard possession, use, and inhabitation to ignore indigenous claims. In other circumstances, authorities redirect the meaning of possession, use, and inhabitation to support settlement policies.

Israeli purchase of land in Palestine was modeled on joint-stock companies, such as the East India or the Dutch East India companies, that were at the helm of European colonial endeavors in the eighteenth and nineteenth centuries (127). These companies helped channel private investments through intermediary companies and associations in order to establish presence on the land (129). Unlike colonizers in South Australia or British Columbia, Israeli settlers could not impose a tabula rasa approach that ignored documented forms of ownership. In Palestine, for example, Ottoman legal systems were in place and these were legible to European legal rationalities. For this reason, colonization strategies had to explicitly build on, or tactically ignore, the existing property regimes.

The Naqab desert of southern Israel is a case in point. The Naqab is labeled as empty land without demonstrable inhabitation. Bhandar traces the justification behind this misrecognition to an early brand of Zionism that "marries political aspirations with territorial aspirations [that are] modeled after European colonialism" (119). Encoded as early as British Mandate Palestine, this ideology adopts the German Idealist program that understands soil as the organic foundation of the folk (volk) (147) along with Lockean presumptions of use and improvement as virtuous assertions of subjectivity.

The Bedouin, who historically inhabited the lands of the Naqab, can only make the argument of inhabitation by fitting their history under a narrow European sense of cultivation, use, and improvement. They are able to produce evidence by drawing on Ottoman records, using land classifications that are legible to European legal rationalities, and drawing on different forms of evidence such as photographs and plans. And yet, Israeli courts still reject their claims. In part, this is possible because courts date the history of land relations back to the second half of the twentieth century, regardless of the evidence that shows Bedouin presence since, at least, 1858–1921. Bhandar's detailed analysis of this case is a powerful example of "the recombinant and fractured nature of legal rationales [and how they are] used to dispossess indigenous persons of their land" (146).

LEGAL STATUS IN CANADA

Bhandar turns to the adjudication of legal status as a fourth device. While historically status could be gained, or lost, according to social mobility and shifts in position and work, at a certain point it becomes a fixed legal designation. This chapter offers a historical excavation of that shift of status from mobile to strict racializing juridical tool integral to racial regimes of ownership. Bhandar explores this transformation through what she terms the "identity-property nexus" and starts with mid-nineteenth-century colonial governments. The premise is that "the figure of the self-possessive individual, and the juridical counterpart found in Indian status, can only be undone in tandem" (179); one becomes impossible without the other.

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press

This chapter includes a detailed account of how the status of a property-owning European subject endures, and of how by ascribing capabilities on the basis of race and gender, the status of Indian helps dispossess indigenous populations. Building on Locke's corpus, Bhandar delineates the figure of the appropriative subject and shows how it works as a point of contact between propriety and property (165). As such, the ideal of an appropriative subject entwines two registers. First, there is an external register oriented toward the appropriation and accumulation of objects in relation to other individuals—an external projection of the self toward the material substrate of life. And, second, there is an internal register where selfhood grants an identity that mirrors the racialized and gendered capabilities that society ascribes to an individual or a group.

With this dual formation in mind, legal regimes produce the status of the Indian, a subject that lacks an inner world and is not capable of asserting external relations through property. The result is the colonial image of a static person who exists outside the logic of appropriation, and hence needs patronizing and patriarchal guidance.

The Indian Act of 1886 in Canada is an example of this. The Act creates the legal architecture that renders the Indian the opposite of the self-possessive liberal subject (171). It accomplishes this status through a series of violent restrictions. For instance, there is the provision that money or securities resulting from indigenous land had to be supervised by the Indian Governing Council and that their exchange had to be controlled by colonial structures. Or the fact that any person that transgressed these controls was subject to a fine and/or imprisonment (172). In this opposition between the "Indian" and the possessive subject, practices such as potlatch were not only criminalized culturally. They were outlawed economically, as for the settler mind they are "inappropriate" uses of property that create "inefficient" distribution of resources and "distract" people from proper work.

The status of Indian was the crux of this settler partition between an economy inside the reservation and another outside. Such partition yielded relations of economic dependency for indigenous populations at the same time that they provided the labor for flourishing settler industries including fur trade, salmon canning, and gold mining. The only way in which indigenous life could be assimilated into settler economy was as cheap labor.

UNDOING RACIAL FORMATIONS OF PROPERTY

Bhandar concludes with reflections on how to undo enduring racial formations of property by asking how to "resist contemporary forms of possession without replicating logics of appropriation and possessiveness that rely upon racial regimes for their sustenance" (18). To break that relation, it is crucial to recognize that racial regimes of property are not absolute or transhistorical (183). Their empirical configuration is recombinatory. This opens the possibility of alternative, and place-specific, configurations. Bringing those configurations forward entails (a) reviving ontologies of property relations that have been suppressed by colonial regimes of dispossession, (b) opening our imagination to alternative forms of holding and relating to land, and (c) transforming

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press

the notion of self, namely its possessive interiorities and exteriorities, as a precondition for wider transformations.

Bhandar's book is historically grounded, conceptually creative, and politically important. *Colonial Lives of Property* inspires. It will leave an indelible footprint in analyses of private property and processes of decolonization. The book is a generative companion to analyses of the genealogy of property. While this is not Bhandar's project, the book inspires many questions about property beyond common law traditions. And here it reminds us of the endurance of a chasm between analysis of legal institutions in common law versus civil law systems. While legal orders continue to blend and hybridize, challenging any radical contrast between these two legal cultures and histories, we very often see the partition in historical analyses. Bhandar's book would be a generative partner for a genealogy of contemporary property and racial formations in civil law traditions.

Furthermore, by comparing techno-legal devices—their power to cement racial formations and the instable and contradictory ways in which they are deployed—we can envision a comparative project that transcends geopolitical boundaries and inspires concrete and collective action against dispossession and racist erasure.

REFERENCES

Ballestero, Andrea. *A Future History of Water*. Durham, NC: Duke University Press, 2019.

Hall, Stuart. "Gramsci's Relevance for the Study of Race and Ethnicity." *Journal of Communication Inquiry* 10, no. 2 (1986): 5–27.

Robinson, Cedric J. *Forgeries of Memory and Meaning: Blacks and the Regimes of Race in American Theater and Film before World War II*. Chapel Hill, NC: University of North Carolina Press, 2007.

https://doi.org/10.1017/lsi.2022.30 Published online by Cambridge University Press