The Disintegration of Property

Thomas C. Grey

I

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned* by *persons*. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership.[1]

By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. Consider ownership first. The specialist fragments the robust unitary conception of ownership into a more shadowy "bundle of rights." Thus, a thing can be owned by more than one person, in which case it becomes necessary to focus on the particular limited rights each of the co-owners has with respect to the thing. Further, the notion that full ownership includes rights to do as you wish with what you own suggests that you might sell off *particular aspects* of your control—rights to certain uses, to profits from the thing, and so on. Finally, rights of use, profit, and the like can be parceled out along a temporal dimension as well—you might sell your control over your property for tomorrow to one person, for the next day to another, and so on.

Not only can ownership rights be subdivided, they can even be made to disappear as if by magic, if we postulate full freedom of disposition in the owner. Consider the convenient legal institution of the trust. Yesterday A

---

* This article originally appeared in *Ethics, Economics and the Law of Property* edited by J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980), pp. 69–85.

1 See the excellent explication of the "ordinary" conception of property in Bruce A. Ackerman, *Private Property and the Constitution* (New Haven and London, 1977), pp. 97–100, 113–67. *See also* A.M. Honore, "Ownership," in A.G. Guest, ed. *Oxford Essays in Jurisprudence* (London, 1961). [Relevant parts of the latter are summarized in Lawrence Becker's paper in the present volume (eds.).]

owned Blackacre; among his rights of ownership was the legal power to leave the land idle, even though developing it would bring a good income. Today A puts Blackacre in trust, conveying it to B (the trustee) for the benefit of C (the beneficiary). Now no one any longer has the legal power to use the land uneconomically or to leave it idle—that part of the rights of ownership is neither in A nor B nor C, but has disappeared. As between B and C, who owns Blackacre? Lawyers say B has the legal and C the equitable ownership, but upon reflection the question seems meaningless: what is important is that we be able to specify what B and C can legally do with respect to the land.

The same point can be made with respect to fragmentation of ownership generally. When a full owner of a thing begins to sell off various of his rights over it—the right to use it for this purpose tomorrow, for that purpose next year, and so on—at what point does he cease to be the owner, and who then owns the thing? You can say that each one of many right holders owns it to the extent of the right, or you can say that no one owns it. Or you can say, as we still tend to do, in vestigial deference to the lay conception of property, that some conventionally designated rights constitute "ownership." The issue is seen as one of terminology; nothing significant turns on it.[2]

What, then, of the idea that property rights must be rights in things? Perhaps we no longer need a notion of ownership, but surely property rights are a distinct category from other legal rights, in that they pertain to things. But this suggestion cannot withstand analysis either; most property in a modern capitalist economy is intangible. Consider the common forms of wealth: shares of stock in corporations, bonds, various kinds of commercial paper, bank accounts, insurance policies—not to mention more arcane intangibles such as trademarks, patents, copyrights, franchises, and business goodwill.

In our everyday language, we tend to speak of these rights as if they attached to things. Thus we "deposit our money in the bank", as if we were putting a thing in a place; but really we are creating a complex set of abstract claims against an abstract legal institution. We are told that as insurance policy holders we "own a piece of the rock"; but we really have other abstract claims against another abstract institution. We think of our share of stock in Megabucks Corporation as part ownership in the Megabucks factory outside town; but really the Megabucks board of directors could sell the factory and go

2 For modern property vocabulary, see Ackerman, op. cit., pp. 26–28. For the still common vestigial use of the notion of ownership by lawyers, see American Law Institute, *Restatement of the Law of Property* (St. Paul, 1936), vol. 1 pp. 25–27. Compare J.C. Vaines, *Personal Property*, 4th ed. (London, 1967), pp. 39–40.

into another line of business and we would still have the same claims on the same abstract corporation.

Property rights cannot any longer be characterized as "rights of ownership" or as "rights in things" by specialists in property. What, then, *is* their special characteristic? How do property rights differ from rights generally—from human rights or personal rights or rights to life or liberty, say? Our specialists and theoreticians have no answer; or rather, they have a multiplicity of widely differing answers, related only in that they bear some association or analogy, more or less remote, to the common notion of property as ownership of things.

Let me briefly list a number of present usages of the term property in law, legal theory, and economics.

1. The law of property for law teachers and law students typically is the whole body of law concerned with the use of land: the doctrines of estates in land, title registration and transfer, the financing of real estate transactions, the law of landlord and tenant, public regulation of land use (including zoning and environmental regulation), and public subsidy and provision of low-income housing. The only thing these doctrines have in common with each other is that they concern real estate as distinguished from other aspects of the economy.[3]
2. Lawyers (and some economists) identify property rights with rights *in rem* (rights good against the world), as distinguished from rights *in personam* (rights good against determinate persons). This distinction does not fit closely with popular notions of property; for example, the rights to life, bodily security, and personal liberty protected by criminal laws against murder, assault, and kidnapping are on this account "property rights." Neither the application of the distinction nor its purpose is very clear; for example, *in personam* contract rights shade into property rights as they become freely assignable, and assumable, and as "interference with contractual relations" is recognized as a tort.[4]
3. Some economists seem to adopt, implicitly, a purposive account of property, including among property rights all and only those entitlements whose purpose (in some sense) is to advance allocative efficiency by allowing individuals to reap the benefits and requiring them to bear the

3 I draw this point from conversations with colleagues who teach law school courses in property. Some of them do deal with a few aspects of the law of "personal property," particularly rules concerning original acquistion.

4 For the *in rem* vs. *in personam* distinction, *see, e.g.*, Felix Cohen, "Dialogue on Private Property," 9 *Rutgers Law Review* 373–74 (Fall 1954).

costs generated by their activities. Again, on this account rights to life, liberty, and personal security are included within the field of property. On the other hand, legal entitlements to transfer payments, such as are conferred by welfare and social security laws, are presumably excluded.[5]

4. By contrast, some modern legal theorists have stressed that a traditional purpose of private property has been to protect security and independence, and that public law entitlements to social minima serve this purpose in the modern economy, and hence should be considered a "new property."[6] This view has been embodied in the construction the courts have given to the constitutional requirement that persons not be "deprived of . . . property without due process of law." Protections offered to property have been extended to entitlements conferred by, for example, welfare and public education law.[7]
5. Another contrasting view of property is suggested by the prevailing interpretation of another constitutional provision, the prohibition against "taking" private property except for a public purpose and upon the payment of just compensation. Here, the kind of property that can be taken is confined to those conglomerations of rights that, in the popular mind, have been reified into "things" or "pieces of property." Thus, the Supreme Court recently held that designation of Grand Central Station as a historic monument, and the consequent prohibition of construction of a skyscraper over the station, did not "take" any property of the landowners—the right to use the airspace over the building, an economically valuable entitlement, was not sufficiently thing-like to be subject to the just compensation requirement.[8] (This body of "takings" law, which most nearly corresponds to popular conceptions of property as thing ownership, is difficult to rationalize in the terms of modern legal and economic theory.)[9]
6. Another specialized usage distinguishes between "property" and "liability" rules according to the nature of the sanctions imposed upon their violation. Property rules are enforceable by injunction or criminal

5 *See, e.g.*, Richard Posner, *Economic Analysis of Law*, 2d ed. (Boston and Toronto, 1977), pp. 27–31; Harold Demsetz, "Toward a Theory of Property Rights," 57 *Am. Econ. Rev. Papers and Proceedings* 347 (1967).

6 *See* Charles A. Reich, "The New Property," 73 *Yale Law Journal* 733 (April 1964).

7 Goldberg v. Kelly, 397 U.S. 254 (1970); Goss v. Lopez, 419 U.S. 565 (1975).

8 Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

9 See the discussion in Ackerman, op. cit., especially chap. 6. [*See also* Ackerman's essay in this volume (eds.).]

> sanctions or both—sanctions designed to prevent violation even when it would be cost-justified in terms of market valuation. Liability rules are enforced only by the award of money damages, measured by the market valuation of the resources lost to the victim. This conception departs widely from popular usage; thus, a person's ownership of his car, for example, is protected by both liability rules (tort doctrines of conversion and liability for negligent damage to property) and property rules (criminal laws against theft).[10]

The conclusion of all this is that discourse about property has fragmented into a set of discontinuous usages. The more fruitful and useful of these usages are those stipulated by theorists; but these depart drastically from each other and from common speech. Conversely, meanings of "property" in law that cling to their origin in the thing-ownership conception are integrated least successfully into the general doctrinal framework of law, legal theory, and economics. It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term "property" at all.

II

It was not always so. At the high point of classical liberal thought, around the end of the eighteenth century, the idea of private property stood at the center of the conceptual scheme of lawyers and political theorists. Thus, Blackstone wrote: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property."[11] And the French Civil Code had as its "grand and principal object" (in the words of one of its authors) "to regulate the principles and the rights of property."[12] Kant began his discussion of law in the *Metaphysics of Morals* with an analysis

10 This usage was introduced by Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972).

11 Sir William Blackstone, *Commentaries on the Laws of England* 11th ed. (London, 1791), vol. II, p. 2.

12 Quoted by Richard Schlatter, *Private Property: The History of an Idea* (New Brunswick, N.J., 1951), p. 232, from J.G. Locre, *La Legislation Civil de la France* (Paris, 1827), vol. 31, p. 169.

and justification of property rights.[13] The earliest American state constitutions proclaimed property as one of the natural rights of man.[14]

The conception of property held by the legal and political theorists of classical liberalism coincided precisely with the present popular idea, the notion of thing-ownership. Thus, Blackstone described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[15] And, in perfect concord, the French Civil Code defined property as "the right of enjoying and disposing of things in the most absolute manner."[16]

It is not difficult to see how the idea of simple ownership came to dominate classical liberal legal and political thought. First, this conception of property mirrored economic reality to a much greater extent than it did before or has since. Much of the wealth of the preindustrial capitalist economy consisted of the houses and lots of freeholders, the land of peasant proprietors or small farmers, and the shops and tools of artisans.[17]

Second, the concept of property as thing-ownership served important ideological functions. Liberalism was the ideology of the attack on feudalism. A central feature of feudalism was its complex and hierarchical system of land tenure. To the rising bourgeoisie, property conceived as a web of relations among persons meant the system of lord, vassal, and serf from which they were struggling to free themselves. On the other hand, property conceived as the control of a piece of the material world by a single individual meant freedom and equality of status. Thus Blackstone denounced the archaisms of feudal tenure.[18] The French Civil Code marked the culmination of a revolution that abolished feudal property.[19] Hegel wrote that the abolition of feudal property in favor of individual ownership was as great a triumph of freedom as the abolition of slavery.[20] Jefferson contrasted the free allodial system of land titles in America with the servile English system of feudal tenure.[21]

---

13 Kant, *Philosophy of Law*, trans. W. Hastie (Edinburgh, 1887), pp. 81–84.

14 Quoted in Schlatter, op. cit., pp. 188–89.

15 Blackstone, op. cit., p. 2.

16 Code Civil, Art. 544, quoted in Schlatter, op. cit., p. 232.

17 *See* R.H. Tawney, *The Acquisitive Society* (New York, 1920), pp. 55–60.

18 Blackstone, op. cit. p. 77, where he said of the feudal institution of tenure by knight service: "A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom."

19 *See* Schlatter, op. cit., p. 222.

20 Hegel, *Philosophy of Right*, trans. W.W. Dyde (London, 1896), pp. 65–68.

21 Jefferson, "A Summary View of the Rights of British America," in Boyd et al., *The Papers of Thomas Jefferson* (Princeton, 1950–), vol. l, pp. 121–135.

Third, ownership of things by individuals fitted the principal justifications for treating property as a natural right. In England and America, the dominant theory was Locke's; rightful property resulted from the mixing of an individual's labor with nature.[22] The main rival to Locke's theory within liberal thought was the German Idealist conception of Kant and Hegel, who saw original property resulting from the subjective act of appropriation, the exercise of the individual will over a piece of unclaimed nature. On this view, property was an extension of personality. Ownership expanded the natural sphere of freedom for the individual beyond his body to part of the material world.[23]

III

We have gone, then, in less than two centuries, from a world in which property was a central idea mirroring a clearly understood institution, to one in which it is no longer a coherent or crucial category in our conceptual scheme. The concept of property and the institution of property have disintegrated. I want to offer first a partial explanation of this phenomenon, and then some suggestions about its political significance.

My explanatory point is that the collapse of the idea of property can best be understood as a process internal to the development of capitalism itself. It is, on this view, not a result of the attack on capitalism by socialists, and not a result of the modifications of laissez-faire that we associate with the coming of a mixed economy or a welfare state. Rather, it is intrinsic to the development of a free-market economy into an industrial phase. Indeed, it is a factor contributing to the declining prestige, the decaying cultural hegemony, of capitalism. To say this is not to deny that the causation may run the other way as well. The decline of capitalism may also contribute to the breakdown of the idea of private property, so that the two phenomena mutually reinforce each other; but my purpose is to isolate a sense in which the disintegration of property follows from the workings of an idealized market economy.

The development from an economy of small property owners to an industrial economy proceeds by the progressive exploitation of the *division of labor or function* and the *economies of scale*. This development can be pictured as taking place through a series of free economic transactions, with the state playing only its classically liberal, neutral, facilitative role. Proprietors subdivide and recombine the bundles of rights that make up their original ownership,

22 Locke, *Second Treatise of Government* (London, 1964). chap. 5, "Of Property."

23 Kant, op. cit., pp. 62–64; Hegel, op. cit., pp. 48–53.

creating by private agreement the complex of elaborate and abstract economic institutions and claims characteristic of industrial capitalism, particularly the financial institutions and the industrial corporations. With very few exceptions, all of the private law institutions of mature capitalism can be imagined as arising from the voluntary decompositions and recombination of elements of simple ownership, under a regime in which owners are allowed to divide and transfer their interests as they wish.[24]

The few aspects of the modern private economy that require state action beyond the enforcement of private agreements are the newer forms of originally acquired intangible entitlements, such as patents, copyrights, and trademarks on the one hand, and on the other hand the privilege of corporate limited liability against tort claims. (Limited liability against claims by employees and creditors could be created by contract, as could the rest of the structure of the modern corporation.)[25] The intangible entitlements are of nontrivial but relatively peripheral significance to the functioning of mature capitalism. And although the corporation is the central institution of the modern economy, it is not likely that the corporate economy would collapse without limited liability in tort.

The transformation of a preindustrial economy of private proprietors into an industrial economy by the process suggested here presupposes that the entrepreneurs, financiers, and lawyers who carry the process through have the imagination to liberate themselves from the imprisoning concept of property as the simple ownership of a thing by an individual person. They must be able to design new forms of finance and control for enterprise, which can take maximum advantage of the efficiencies of scale and division of function, forms that fractionate traditional ownership and that create claims remote from tangible objects. Similarly, if the process is to go forward smoothly, the courts will have to free themselves from stereotypes about the appropriate forms of

24 The free creation of property interests by proprietors has in fact never been allowed to go this far; the types of property interests that could be carved out has typically been limited, often in the name of facilitating market transactions by prohibiting unduly complex holdings. See the discussion in F.H. Lawson, *The Law of Property* (Oxford, 1958), chap. 6. In the civil law systems of continental Europe, the law has allowed only quite limited formal freedom to create new property interests; this apparently is the outgrowth of a Roman law heritage, combined with a prejudice in favor of simple thing-ownership arising out of the association of complex forms of property with feudalism. See generally, John Merryman, "Ownership and Estate," 48 *Tulane Law Review* 916, 924–29 (June 1974).

25 See the analysis in Posner, op. cit., pp. 292–96.

control over the economic resources of the community, stereotypes founded on an economy of artisans, tradesmen, and family farms.[26]

The creation of new forms of enterprise and new structures of entitlement would require doctrinal formulation, at least by lawyers and courts. And where law, business, and finance are subjects of theoretical study, these new legal structures of economic organization would eventually become the focus of examination by commentators and scholars, particularly as they come to replace older forms of property as the chief economic institutions of the society. Leaving ideological considerations aside for the moment, it would not be surprising if the replacement of thing-ownership by abstract claim structures in the real world should eventually lead some theorists to the kind of analysis of the concept of property I sketched in the first section. Even if the analysis did not go that far, the basic need to teach lawyers the technical tools of their trade would suggest if not require some movement toward a bundle-of-rights formulation of property, as against the historical and popular thing-ownership conception. The main point is that all of these developments—the new economic structures, the legal forms through which they are organized, and the theoretical analysis of property that they suggest—can be plausibly seen as entirely *internal* to the capitalist market system; entirely consistent with full loyalty to that system; in no way fueled by the ethics, politics, or interests of socialism, collectivism, paternalism, or redistributive egalitarianism.

I must repeat that this account is not offered as an accurate narrative of historical events. (No society has practiced as pure an economic liberalism as this; industrial development has been subsidized, retarded, and actively shaped by government throughout.) But this account is intended to abstract out a plausible *partial* explanation, based on simplified assumptions, of the collapse of the idea of property between 1800 and today. I now want to turn to the ideological factors this simplified account has left out. If the internal logic of the market tends to fragment the concept of property in the ways I have suggested, what does a recognition of this development mean in political terms?

IV

The dissolution of the traditional conception of property erodes the moral basis of capitalism. Capitalism has commonly been conceived, by friends and enemies alike, as a system based on the existence and protection of private property rights. Given this conception, the view that property rights have intrinsic

26 See n. 24, above.

worth must strengthen the case for capitalism—at least so long as "property rights" are viewed as a single coherent category. But the phenomenon of the "death of property" breaks the connection between simple thing-ownership and the legal entitlements that make up the framework of the capitalist organization of the economy. And it is simple thing-ownership that has been justified in classical liberal theory, and I think in popular consciousness, as having intrinsic worth.

The theories that support an intrinsic moral right to property can be roughly divided into the labor and personality justifications for private ownership. The labor theory expresses the intuition that the individual owns as a matter of natural right the valued objects he has made or wrested from nature. Thus, the farmer naturally owns the land he has cleared and the crops he has grown; the artisan owns the tools he has fashioned, the raw materials he has gathered, and the products he has made.[27] The idealist "personality" theory rests on the different but no less powerful idea that human beings naturally come to regard some objects as extensions of themselves in some important sense. This idea gains its intuitive force from the way most people regard their homes, their immediate personal effects, and other material things that play a double role as part of their most immediate environment in daily life and at the same time as expressions of their personalities.[28]

Insofar as capitalism connotes a general regime of protection of private property, it enlists these still potent justifications on its side. Conversely, attacks on capitalism engender the sense of outrage that most people feel at a threat to their simple possessions and the immediate fruits of their labor. Marx and Engels realized this well when they sought to dissociate the socialist case for abolition of private property from any threat to the security of ordinary possessions:

> We communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labor. . . . Hard-won, self-acquired, self-earned property! Do you mean the

27 This is, roughly, Locke's theory of property. See above, n. 22. It must be noted that Locke did not confine the scope of his natural right to property to objects with which the individual mixed his labor, but argued that the invention of money justified a natural right of unlimited accumulation. See the discussion in C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (London, 1962), pp. 197–220.

28 See works cited in n. 23, above; *see also* the discussion in T.H. Green, *Lectures on the Principles of Political Obligation*, reprinted in C.B. MacPherson, ed, *Property: Mainstream and Critical Positions* (Toronto, 1978), pp. 103–17.

> property of the petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is destroying it daily.[29]

I have argued in this essay that we no longer have any coherent concept of property encompassing both simple thing-ownership, on the one hand, and the variety of legal entitlements that are generally called property rights on the other. If correct, this argument means that the forceful intuitions behind the moral arguments for simple thing-ownership can no longer be as readily transferred to the legal institutions of the capitalist economy, as they could when private property was a clearly comprehended unitary concept.[30]

Of course, the legitimacy of capitalism does not rest solely, or perhaps even predominantly anymore, on the notion of intrinsic moral rights to private property. Especially among the professionals and intellectuals for whom the breakdown of the concept of property is most likely to be apparent, the moral basis of capitalist institutions is likely to be found in other, more instrumental, values. Thus, capitalism is more commonly defended today on the basis of its capacity to produce material well-being and its tendency to protect personal liberty.

However, the belief that capitalist economic organization is especially protective of personal liberty is itself linked in a subtle way to the traditional conception of property. The connection is suggested by the theory of capitalist private law offered by the Austrian legal sociologist Karl Renner.[31] Renner described the fundamental structure of the capitalist legal order as made up of two basic elements: the right of ownership and the right of personal liberty. Ownership defines the relationship between man and nature, which consists of the control by separate individuals of separate parcels of the material world.

---

29 Marx and Engels, *The Communist Manifesto*, trans. Moore (Chicago, 1969), pp. 41–42.

30 Compare the interesting passage in Joseph Schumpeter, *Capitalism, Socialism and Democracy*, 3d ed. (New York, 1950), p. 142:

> "The capitalist process, by substituting a mere parcel of shares for the walls of and the machines in a factory, takes the life out of the idea of property. It loosens the grip that once was so strong—the grip in the sense of the legal right and the actual ability to do as one pleases with one's own. . . . Dematerialized, defunctionalized and absentee ownership does not impress and call forth moral allegiance as the vital form of property did."

31 What follows is a quite free interpretation of the argument of Renner's *The Institutions of Private Law and their Social Functions*, ed. O. Kahn-Freund, trans. A. Schwarzschild (London, 1949). Renner's discussion at pp. 81–95 captures the main thrust of his theory.

The right of personal liberty defines the relations between persons—a relation of independent equality, in which each person is free to do as he likes, consistent with respect for the rights of others. The interaction of the two rights creates a structure in which atomistic individuals stand, on the one hand, in a vertical relation of domination to the things they own, and on the other hand, in a horizontal relation of mutual independence to all other individuals. The only legal relations among the individuals, then, are those created by their voluntary agreements.[32]

The ideological significance of this simple and compelling picture of civil society is that it masks the existence of private economic power. The only relation of domination it recognizes is the relation of *dominium* or ownership over things. The danger of domination over persons—infringement of liberty—arises only when the state and public law are introduced, creating the power of sovereignty, or *imperium*. Thus, liberty can be threatened only by the state, and by the state only in its public law role, not in its role as neutral enforcer of the private law relations of ownership and contract.

This structure depends for its plausibility upon the obsolete thing-ownership conception of property. Acceptance of the bundle-of-rights conception breaks the main institutions of capitalist private law free from the metaphor of ownership as control over things by individuals. Mature capitalist property must be seen as a web of state-enforced relations of entitlement and duty *between persons*, some assumed voluntarily and some not.

Given this conceptual shift, the neutrality of the state as enforcer of private law evaporates; state protection of property rights is more easily seen as the use of collective force on behalf of the haves against the have-nots. It then becomes a matter for debate whether the private power centers of the unregulated capitalist economy, on the one hand, or the augmented state machinery of a socialist or mixed system, on the other, pose the more serious threat to personal liberty. The conflict between capitalism and socialism can no longer be articulated as a clash between liberty on the one side and equality on the other; both systems must be seen as protective against different threats to human freedom.

32 See the interestingly similar interpretation of Locke's *Second Treatise* in Louis Dumont, *From Mandeville to Marx: The Genesis and Triumph of Economic Ideology* (Chicago and London, 1977), chap. 4. C.B. MacPherson, n. 27 above, has argued persuasively that in early liberal theory the category of "equal individuals" was confined to property owners.

V

The breakdown of the traditional conception of property serves at the same time to undermine traditional Marxism, and to suggest that the natural development of industrial capitalism is toward a mixed economy. To put the point briefly: private property need not be *abolished* by revolution if it tends to *dissolve* with the development of mature capitalism.

Marxists have tended to view the transition from capitalism to socialism as necessarily a convulsive, qualitative transfer of ownership of the means of production from the bourgeoisie to the proletariat—a revolution. This revolution might under certain historical circumstances take place peacefully,[33] but the end of capitalism cannot, on a Marxist view, be gradual or partial.[34] There can be no compromise or halfway house between forms of social system; people live either under capitalism or under socialism.

This world view is strongly compatible with a thing-ownership conception of property—indeed, perhaps influenced and reinforced by such a conception. Marxist definitions of the forms of social system tend to focus on who owns the means of production.[35] Marxists sometimes note that this does not necessarily mean formal or juridical ownership, but rather real or economic

---

33 For a discussion of Marx's view that socialism might be achieved without violence in some advanced capitalist countries, see Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge, 1968), pp. 211–20.

34 The classic Marxist account of the transition to socialism is the celebrated passaged from *Capital*, vol. 1, trans. Moore and Aveling (London, 1887), pp. 788–89:

> "Along with the constantly diminishing number of magnates of capital, who usurp and monopolise all advantages of this process of transformation, grows the mass of misery, oppression, slavery, degradation, exploitation; but with this too grows the revolt of the working-class, a class always increasing in numbers, and disciplined, united, organized by the very mechanism of the process of capitalist production itself. The monopoly of capital becomes a fetter upon the mode of production, which has sprung up and flourished along with, and under it. Centralisation of the means of production and socialisation of labor at last reach a point where they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated."

35 See, for example, the definition of advanced capitalist countries in Ralph Miliband, *The State in Capitalist Society* (New York, 1969), p. 7: "They have in common two crucial characteristics; the first is that they are all highly industrialized countries; and the second is that the largest part of their means of economic activity is under private ownership and control."

ownership.[36] Nevertheless both real and formal ownership have in common an all-or-nothing character. Something owned is either mine or thine, but not a little bit of each.

The Marxist approach is then substantially undermined by the demonstration that the category of all-or-nothing ownership has become increasingly unimportant as a form of legal thought in modern capitalist economies, where legal control over resources is increasingly fragmented into particularized entitlements. This fragmentation of property is most strikingly evident with respect to the large publicly held corporations that control the chief means of production. I am not speaking here primarily of the much-debated "separation of ownership and control."[37] The growth of power of non-shareholding management is only one aspect of the more general phenomenon of the dispersion of lawful power over the resources involved in a modern corporation. Not only managers and common shareholders, but also other classes of shareholders, directors, bondholders, other creditors, large suppliers and customers (through contractual arrangements), insurers, government regulators, tax authorities, and labor unions—all may have some of the legal powers that would be concentrated in the single ideal thing-owner of classical property theory.

There are clear structural similarities between this multiple institutional control and the mechanisms often suggested for controlling socialist enterprises—workers' councils, hired expert managers, central planners, suppliers, and buyers, each with influence, none with anything that might be called total power. Once the perspective of ownership is abandoned and the focus of inquiry shifts to particular legal rights and duties, on the one hand, and actual practical control, on the other, it seems natural to suppose that under any social system a variety of individuals, institutions, and interests are likely to share both the legal and the actual power over anything so complex as a major productive enterprise.[38]

On this view, capitalism and socialism become, not mutually exclusive forms of social organization, but tendencies that can be blended in various

36 *See, e.g.*, Nicos Poulantzas, *Political Power and Social Classes*, trans. T. O'Hagan (London, 1973), pp. 26–28.

37 In their classic account, *The Modern Corporation and Private Property*, rev. ed. (New York, 1967), p. 66, Berle and Means do suggest the important fragmenting and disintegrating effect of the recognition that "ownership" has become a formal and largely meaningless conception with respect to the modern corporation: "Control divorced from ownership is not . . . a familiar concept. . . . Like sovereignty, its counterpart in the political field, it is an elusive concept, for power can rarely be sharply segregated or clearly defined."

38 See the argument to this effect in C.A.R. Crosland, *The Future of Socialism* (New York, 1963), pp. 35–42.

proportions.[39] Important differences between profit-oriented market exchange and political collective decision as methods of organizing and operating enterprises remain. But the idea that natural necessity somehow imposes a stark choice between organizing an economy according to one or the other mode becomes less plausible, once the single-owner presupposition is dropped.

I do not want to overstate the extent to which the breakdown of classical property theory undercuts Marxist socialism. The central theoretical feature of Marxism remains the view that capitalist society is fundamentally divided into two sharply distinct and irreconcilably opposed classes, the bourgeoisie and the proletariat. Once this picture of society is accepted, it becomes a matter of detail that economic resources are controlled through complex and overlapping legal forms. As long as all rights of ownership are held within a compact and identifiable bourgeois class, it makes sense to characterize capitalism as ownership of the means of production by the bourgeois class as a whole. What analysis of the disintegration of property does is to indicate how totally Marxism depends upon the dubious reifications of its theory of class division and class struggle.

VI

The substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory. This in turn has political implications, which I have explored in the last two parts of this chapter. I believe that history confirms the centrist political tendency of the attack upon traditional conceptions of property. The legal realists who developed the bundle-of-rights notion were on the whole supporters of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.[40]

39 This approach to questions of economic organization has recently been given perhaps its most impressive and systematic treatment in Charles E. Lindblom, *Politics and Markets: The World's Political-Economic Systems* (New York, 1977).

40 The "bundle-of-rights" conception of property appears in well-articulated form for the first time (insofar as I have discovered) in Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied injudicial Reasoning," 23 *Yale Law Journal* 16 (1913). Thereafter, it became part of the conceptual stock-in-trade of the legal realist movement, often with a

The same point is illustrated by the most influential recent theoretical work on questions of economic justice, John Rawls's *A Theory of Justice*. The concept of property rights plays only the most minor role in that monumental treatise, which on the whole displays a welfare-state liberal orientation toward questions of the organization of economic life.[41]

I would want to deny, however, that the account and explanation of the breakdown of the concept of property offered here is in the last analysis ideological, in the pejorative sense of a mystifying or false apologetic. The development of a largely capitalist market economy toward industrialism objectively demands formulation of its emergent system of economic entitlements in something like the bundle-of-rights form, which in turn must lead to the decline of property as a central category of legal and political thought.

---

strong implication that "private" and "public" property were not as different as traditional property theory would suggest. *See, e.g.*, Cohen, op. cit., n. 4 above, pp. 357–59.

41 *See* John Rawls, *A Theory of Justice* (Cambridge, 1971), pp. 265–74. This is the place for a recantation. Some years ago I criticized Rawls for failing to treat property (in the classic thing-ownership sense) as a fundamental category within his theory of social justice. Thomas Grey, "Property and Need: The Welfare State and Theories of Distributive Justice," 28 *Stanford Law Review* 880–84 (May 1976). I now think that I was wrong, for the reasons implicit in this entire essay.