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James E. Krier

University of Michigan Law School, jkrier@umich.edu

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THE (UNLIKELY) DEATH OF PROPERTY

JAMES E. KRIER*

Is property dead? Thomas Grey has argued that it is.¹ If he is right, we have an answer to the principal question of this symposium panel, which asks whether regulation and property are allies or enemies. If Professor Grey is right, they are neither—because property no longer exists. If he is wrong (as I believe he partly is), then, I argue, regulation and property are allies and enemies alike, and will remain so.

I.

Professor Grey observes that at one time, about 200 years ago, the idea of property thrived in the one-dimensional, absolute, fixed, and concrete terms of thing-ownership.² Property designated relationships between people and tangible objects. Over these objects, owners had essentially exclusive control. Interference with property, by the state in particular, required the weightiest justification. Property marked out a rather inviolable space, a fortress for each against all. It stood for and advanced the freedom and equality of individuals. It rested on a dominant liberal ideology whose philosophical foundations had been laid down by Locke³ with his theory of labor, and by Kant⁴ and Hegel⁵ with their theories of individual will.

The vital idea and ideal of this conception were reflected in Blackstone's description of property as a man's place of "sole and despotic dominion"⁶ and by the declarations in early American state constitutions that property is a natural right.⁷ According to Professor Grey, this conception of property "disintegrated" with the growth of capitalism, the industrial economy, and the activist welfare state. The process started innocently, as people, through purely voluntary transactions,

* Earl Warren DeLano Professor of Law, University of Michigan. My thanks to Greg Alexander, Rick Pildes, and Peter Westen for helpful comments on an earlier draft.

1. See Grey, *The Disintegration of Property*, in 22 *NOMOS: PROPERTY* 69 (1980).

2. See *id.* at 74.

3. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* (P. Laslett rev. ed. 1963) (3d ed. 1698).

4. See I. KANT, *PHILOSOPHY OF LAW* (1887).

5. See G. HEGEL, *PHILOSOPHY OF RIGHT* (1896).

6. 2 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (11th ed. 1791).

7. See R. SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 188-89 (1951).

began to fragment property and ownership for the sake of the division of labor and for the sake of economies of scale in developing industrial capitalism. An unanticipated result was that property evolved into an abstraction of many dimensions, the familiar "bundle of rights" that lawyers and other specialists speak of today. The working conception changed from one of a relationship between a person and a thing to one of relationships among people with respect to things, with many people "owning" many interests (sometimes contingent, deferred, or both) in the same "thing" at the same time. "Things," moreover, extended beyond tangibles to include metaphysical, intangible claims, like the stocks and bonds invented to advance industrial organization and finance.

In this process, Professor Grey says, property necessarily lost its distinctive characteristics; it was no longer about real thing-ownership, no longer absolute and exclusive, no longer fixed and concrete. The old conception was dead.⁸

Professor Grey sees the "death of property"⁹ as having various consequences, two of which are related to the topic of this speech. First, "the specialists [lawyers and economists, for example] who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all."¹⁰ Second, property ceased to be "a central category of legal and political thought."¹¹ I regard the first assertion as essentially correct. The second, in my view, is wrong.

II.

From the standpoint of managing an economy, property might indeed be said to have lost much of its old distinction, precisely because of its disintegration into a bundle of rights. It has become, arguably, just another adaptable means, along with regulation, of conducting the everyday business of (re)distributing and (re)allocating power, resources, and wealth. In this sense, regulation and property can be seen as little more than different tools for doing the same things; they

8. See Grey, *supra* note 1, at 74.

9. *Id.* at 77.

10. *Id.* at 73.

11. *Id.* at 82; see also *id.* at 81 ("property ceases to be an important category in legal and political theory").

are in the same toolbox, which belongs to the state. The choice between them turns little on ideology, unless one counts as ideology the narrow utilitarian calculation of what works best (or most efficiently) in a given situation.

The conventional analysis of determining what works best can be summarized as follows. If we can count on relatively fluid transacting, then it is best to manage by defining property rights (which we might do in a way sensitive to distributive desires), permitting trades, and counting on market forces to generate efficient allocations through a decentralized system of control. If, on the other hand, transaction costs are high (if there is “market failure”), and a system of centralized regulation is relatively cheap, then centralized regulation through the government suggests itself as the better alternative. We need to bear in mind, of course, that the government too can fail, but we also should not ignore the fact that government intervention can, at times, improve on even a rather smoothly functioning market. These considerations complicate the choice between property rights and regulation in practice, but not in principle.¹²

The foregoing suggests that most economies, whatever their dominant ideology, will manage by a mix of means, with reliance in some instances on property rights and in others on regulation. This mixture is exactly what we observe. The mixture is not usually quite so simple, of course, because property and regulation can be combined into hybrids created to manage any given situation. There are many instances of hybridization, a prominent one today being the system of “marketable pollution rights” devised as a means of controlling environmental problems.¹³ The idea behind this hybrid is that the government sets the total amount of pollution that sources can produce,

12. Choice will no doubt be affected by predisposition. A society bent in an activist direction might choose the government absent a convincing showing that state intervention fails; a society bent toward laissez faire might choose the market absent proof of market failure. Given uncertainty, the mix of means in the two societies will obviously be very different. See M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 290-95 (1987) (discussing “Privileged Positions”—for example, where we “say that regulation corrects for market failure, not that we regulate social interactions through ‘free’ markets when conditions allow us to”).

13. On the prominence of the idea, see Passell, *Sale of Air Pollution Permits is Part of Bush Acid Rain Plan*, N.Y. Times, May 17, 1989, at 1, col. 1. See generally Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (supporting economic incentive systems as alternatives to centralized regulatory control of environmental problems).

just as it does in the case of conventional legislative and administrative control of pollution, but then, unlike the conventional approach, the market more or less takes over. The amount of pollution fixed by the government is divided into a number of transferable (marketable) pollution rights (for example, one right for each unit of a given pollutant that can be put into the environment per day). The rights are distributed by auction or some other means and are used as sources choose. If a source pollutes, it consumes its rights; if it controls its pollution, it retains them, leaving the rights available for sale to other sources. Sources for whom pollution abatement is relatively cheap will likely abate and sell their surplus of rights to others who find control more costly. It is easy to demonstrate that this system of marketable rights is, in principle, a better means of management than the conventional approach of "command and control" that dictates pollution limits for each source. Marketable rights require less information, they create more constructive incentives on the part of polluters, and they minimize the costs of achieving any given level of abatement.

Related to marketable rights are other hybrids, such as transferable development rights in land use, devices that would create a "market" in babies or in public versus private education, and so forth.¹⁴ What are we talking about in instances like these, regulation or property? Neither? Both? From the management perspective, it hardly matters. Regulation and property have become related means to the same end. They are simply variations in a more general category of operational techniques. Property is just a system of regulation, and vice versa. We can mix and choose in the name of what works best, not in the name of "regulation" or "property" as fundamentally distinct, value-laden concepts. The labels need not matter, just as Professor Grey suggests.¹⁵ We could manage as well without them.

III.

I suppose one could say from the foregoing that property is "dead"—that we no longer have to use the word and the con-

14. On transferable development rights, see J. DUKEMINIER & J. KRIER, *PROPERTY* 1089-92 (2d ed. 1988); on a market for babies, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 139-43 (3d ed. 1986).

15. See Grey, *supra* note 1, at 73.

cept (or the word and concept “regulation” either) when it comes to managing the material aspects of everyday life. Alternatively stated, regulation and property have become allies in matters of management. But are they, in any respect, enemies?

Ideologically, of course, regulation and property rights have long been opposed. Regulation is synonymous with active state intervention, whereas property rights are the historic and righteous obstacle to intervention. The fundamental role of property rights, in this context, is (as already suggested) to delineate and protect domains of individual freedom against other individuals and especially against the government. In Professor Grey’s view, though, the obstacle has disintegrated. Property is dead not simply as a term of art, but as an ideology as well; it is no longer “a central category of legal and political thought.”¹⁶ The label has become so diluted that it has lost its rhetorical power in confrontations with the activist state.

Oddly enough, Professor Grey offers little evidence in support of this assertion. He does point to recent important political theory in which the ideology of property figures little, if at all.¹⁷ Obviously, though, establishing what some people do not think about property proves nothing with regard to what other people do think about it. I suppose that Professor Grey presents little evidence simply because he believes that the transformation of property into a bundle of rights must necessarily lead, as a matter of logic, to the end of the old ideology. Because we no longer have “a clearly comprehended unitary concept” of property, “the forceful intuitions behind the moral arguments for simple thing-ownership” must lose their force in our political lives.¹⁸

Does it follow that if property has become, from the perspective of management, something of a dead letter, it must become as much from the standpoint of ideology, too? It certainly doesn’t follow logically,¹⁹ nor does it seem to follow in fact.

16. See *supra* note 11 and accompanying text.

17. See Grey, *supra* note 1, at 81 (stating that the concept of property rights plays little part in J. RAWLS, *A THEORY OF JUSTICE* (1971)).

18. Grey, *supra* note 1, at 78. The notion of logical necessity is suggested later: “formulation of . . . economic entitlements in something like the bundle-of-rights form . . . must lead to the decline of property as a central category of legal and political thought.” *Id.* at 82 (emphasis added).

19. Consider also that property had, in many respects, “disintegrated” well before its ideological dominance in the Eighteenth Century, yet it dominated anyway. Present and future, vested and contingent, common and several, and other fragmented inter-

There is, for example, contemporary political theory in which the traditional conception of property does play an important role²⁰ (some of this theory is even mentioned by Professor Grey in another context).²¹ There are influential figures like Milton Friedman, who underscores the ideological place of property when he says that its managerial advantages are but a happy circumstance, that the true role of property is to protect liberty without regard to such matters as efficiency.²² Finally, as Professor Grey acknowledges, the common folk hold in their own minds the traditional ideology of property. Surely the common mindset influences political discussion, political thought, and legal development, and influences it powerfully. This would be the case even if political and legal specialists did not share the traditional ideology, so long as they had to be responsive to it. Professor Grey's concession that specialists also subscribe to the old and common view "in their unprofessional moments"²³ simply provides another reason to be skeptical of his claim.

Absent more compelling evidence, then, it seems unlikely that the old ideology of property is dead and gone. The fact that we can do without the label for purposes of management does not mean that the concept has lost its fundamental appeal in political argument. Professor Grey concludes otherwise, I think, because he fails to recognize the different roles that property plays in various aspects of discourse, including the discourse of specialists. Even a specialist can effectively lose a sense of property with regard to one role while keeping it alive with regard to another.

ests in property already existed for several centuries prior to Blackstone, for example, but he and the common folk nevertheless thought about property in an absolute and unitary way.

20. See, e.g., R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (an example that appeared prominently in print well before Professor Grey wrote his essay in 1980). Post-Grey writings would include R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). For Professor Grey's strident views on Professor Epstein's book, see Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986).

21. See, e.g., Grey, *supra* note 1, at 72, 82 n.6 (discussing Reich, *The New Property*, 73 YALE L.J. 733 (1964)). Charles Reich stressed the role of property in protecting security and independence.

22. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962) (private property is essential to political freedom).

23. Grey, *supra* note 1, at 69.

IV.

None of this means, of course, that the fragmentation of property has been without cultural and political consequences. Important among these is a certain very complicated tension in modern deliberations about “regulation” versus “property rights.” The tension results not merely because regulation and property rights can be seen as standing starkly against each other (as perhaps they once did) but because they stand for and against at one and the same time—managerially allied, ideologically opposed. In a society that values both efficiency and liberty, utilitarianism and rights, management and ideology, this is bound to create complications. Both modern liberals and modern conservatives (old-fashioned liberals) will find themselves confounded when forced to choose between good principles and sound practices.

Go back, for example, to the idea of marketable rights mentioned in section II. Should a conservative favor these because they promote efficiency and seem to “rely on the market,” or oppose them as just another instance of regulation (perhaps a cleverly seductive instance designed to co-opt libertarian objections)? In the same vein, should a liberal favor marketable rights because they strengthen the hand of the activist state, or indict them as a measure that treats the environment as just another commodity and fails to stigmatize the illicit motives of polluters?²⁴

If all that mattered were management, if the old ideology of property were indeed dead, choices between property and regulation still would be difficult ones; that property lives as ideology makes them only more so. The choices would be difficult even if managerial efficacy were the only measure of good government, simply because relative efficacy is such a difficult thing to establish. It is generally impossible to know what works best as a means of managing a given situation. It commonly seems that we have so much information about what works best that we might as well have no information at all; the sheer abundance of “facts” on either side often makes the matter of managerial success essentially indeterminate. If, for example, an enthusiast of the activist state wants to show that regulation of land use through zoning is a good thing, he has

24. See generally S. KELMAN, *WHAT PRICE INCENTIVES?* 27-91 (1981).

an abundance of data by which to make out his case. If a skeptic wants to show otherwise, and show that a property approach works better, the data are available for him as well.

Consider as an illustration of this an item from *The New Republic*, a magazine that occasionally reprints self-cancelling headlines garnered from the newspapers. The magazine reported that on January 1, 1989, the *Boston Globe* announced "Massachusetts Anti-Snob Zoning Found Ineffective." On the next day the same paper said "Massachusetts Anti-Snob Rule Called a Success."²⁵ I have no reason to doubt that both of these headlines were correct in the sense that each was supported by enormous amounts of evidence. It seems that no matter what the claim about managerial success or failure, there are plenty of facts on either side. People go to graduate school for years just to learn to gather these so-called facts and use them to support any viewpoint. In interesting cases there are bound to be many competing realities, much empirical thrust and parry.²⁶ Seldom can we get to a vantage point that allows us to see the actual, incontestable truth—not even with the help of computers, which are in my view unlikely to alleviate the paradoxical poverty of fact amidst such factual plenty. Computers simply contribute what the term "artificial intelligence" suggests.

The foregoing implies more than managerial confusion; it virtually guarantees that the old ideal of property will remain a standard component of political discourse. To what, after all, do we resort when we cannot determine the decisive facts? Isn't it, among other things, to faith, to ideology? Ideology almost always shapes the search for and interpretation of facts in any event.²⁷ Indeterminacy simply forces ideology into the open.

V.

Speaking generally, sheer uncertainty makes it difficult to imagine a world without ideology. Speaking particularly, the ide-

25. THE NEW REPUBLIC, Feb. 20, 1989, at 11.

26. See, e.g., Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); see also Hirschman, *Reactionary Rhetoric*, ATLANTIC MONTHLY, May 1989, at 63 (advancing, but not approving, the thesis of the "perverse effect," whereby "opponents of progressive impulses in society" attempt to show "that reformist measures . . . invariably have effects that are contrary to the ones intended").

27. This line is pursued, in the context of regulation versus property, in Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988).

ology of property can for this reason alone hardly be thought to have passed. Announcements of its death are premature. Property will continue to serve, though with ups and downs, as a vital symbol of appropriate relationships between the individual and the state.