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 unprofes-
sional 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 con-
tection 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 neces-
sary 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 sug-
gests that you might sell off particular aspects of your control—rights to cer-
tain uses, to profits from the thing, and so on. Finally, rights of use, profit, and
the like can be parcelled 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
  pp. 69–85.
1 See the excellent explication of the “ordinary” conception of property in Bruce A. Ackerman,
  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

---