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Imagining a Post-Growth Jurisprudence of Property

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Abstract

Directed toward advanced capitalist societies, this jurisprudential paper proposes that when an economy has grown so large that it has reached or exceeded the threshold point beyond which any further growth is 'uneconomic' (i.e. socially or ecologically counter-productive), property relations should no longer be defined and defended in order to grow the economy. Instead, property relations should be constructed or reconstructed in order to achieve more specific welfare-enhancing objectives – such as eliminating poverty and protecting the environment – and the efficient growth of GDP or lack thereof should be treated as a by-product of secondary importance. On that basis, this paper will refer to a 'post-growth' property system, a system which will be broadly considered and defended as the central project of this paper. After laying the groundwork, the argument of this paper will be structured around an examination of the 'property rights' objection to degrowth.

Keywords

private property; property beyond growth; post-growth jurisprudence; public / private distinction; degrowth

1 Introduction

Paul Mahoney, a distinguished legal economist, recently examined how economic growth, measured by increases in Gross Domestic Product (GDP), differed between common law and civil law jurisdictions during the years 1960-92. Evidence was presented that during the period under examination, common law countries generally experienced faster economic growth than civil law countries (Mahoney, 2001). In the tradition of Friedrich von Hayek, Mahoney argued that this finding was due to the ability of common law systems to ensure greater security of property and contract rights, and better constrain government interference in the economy, than civil law systems (Hayek, 1973). What is most interesting about Mahoney's argument is not so much his stated thesis but rather than unstated assumption upon which his thesis is based, namely, that economic growth is unquestionably a good thing and the more of it the better. Mahoney is hardly alone in making this assumption, of course. The desirability of economic growth is arguably one of the deepest and most widely held assumptions of our age, providing a common background to modern political ideologies, whether on the Left or the Right.

It is that assumption which this paper will bring into question in the context of the jurisprudence of property. This context provides a particularly appropriate space within which to deconstruct the notion of economic growth because the system of government which has proven to be most conducive to economic growth – capitalism – is founded upon the legal recognition of property rights and their market exchange. One of the many functions of a property system is to provide a basis of expectation regarding the use and control of particular resources (Alchian and Allen, 1969), and for hundreds of years jurists have highlighted how such a basis of expectation promotes economic activity. Canonical figures such as Thomas Hobbes, William Blackstone, Adam Smith, and Jeremy Bentham, all argued in various ways that property rights provide an incentive to engage in economic activity by ensuring that one will reap where one has sown¹. In the modern era, legal economists have developed this line of thinking, arguing that well-defined and secure property rights give traders and creditors confidence that their interests are known and enforceable, which in turn serves to promote efficient or 'wealth maximizing' market exchanges². More recently still, Hernando de Soto has argued that establishing a system of property rights is a prerequisite to releasing the economic potential of 'dead capital' which he claims is wasted in the absence of any formalized property system³. Within this long, formidable, and extremely influential tradition, property rights are variously defined and defended on the basis that they promote economic activity and function as an engine for growth.

This paper does not seek to reject the notion of property rights or oppose outright the idea of market exchange. It does, however, seek to reconsider the assumption that growing the economy should always be an underlying aim when structuring or restructuring a property system. The chief problem with treating property law solely or primarily as an economic tool is that doing so neglects the fact that a property system does much more than provide a legal structure to the economy. Property law does not just create legal relations between people and things, as commonsense may suggest; nor does it simply

¹ Thomas Hobbes, *Leviathan* (Cambridge [England]; New York: Cambridge University Press, 1991 [1651]) 88-9; William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Abingdon, England: Professional Books, 1982 [1765-69]) 2; Adam Smith, *Lectures on Jurisprudence* (Oxford [Oxfordshire] New York: Clarendon Press; Oxford University Press, 1978 [1776]). 83; Jeremy Bentham, *Principles of the Civil Code*, in Jeremy Bentham, *The Works of Jeremy Bentham*, 11 vols. (Edinburgh: William Tait, 1843) 310.

²For example, see Arman Alchian and Harold Demsetz, "The Property Rights Paradigm," *Journal of Economic History* 33, no. 1 (1973). See also, Harold Demsetz, "Toward a Theory of Property Rights," *The American Economic Review* 57, no. 2 (1967); and Richard Posner, "Wealth Maximization Revisited," *Notre Dame J.L. Ethics & Pub. Policy* 2 (1985).

³Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). De Soto even compares the ability of property rights to release the economic potential of otherwise 'dead capital' with the release of energy in an atomic explosion, at 37. See also, Douglass North, *Structure and Change in Economic History*, 1st ed. (New York: Norton, 1981) (anticipating de Soto's argument that the creation of enforceable property rights is one of the most important institutional prerequisites to economic growth).

create legal relations between people with respect to things, as the legal realists argued (Hohfeld, 1923). More significantly, recent scholarship reveals how property law also shapes the contours of social relations and implies a vision of the 'proper' social world (Singer, 2000). By shaping property law into a tool that maximizes economic growth, therefore, lawmakers should recognize that, in ways that are not always obvious, they are also shaping the social order. Of equal importance, they are also defining the relationship between human beings and the natural world, implying a vision of the 'proper' way to relate to that greater context in which we live, on which we rely, and of which we are a part (Burdon, 2010).

In advanced capitalist societies today, and increasing throughout the world, property relations seem to be animated by a vision of the social world in which sustained economic growth will eventually lead to a life of material abundance for all⁴. This vision of abundance treats nature as a limitless resource to be exploited for human gratification and it promotes a materialistic attitude to life which equates happiness and well-being with the proliferation of comforts and luxuries. Whatever utility it may have had in the past, today there are compelling grounds for contesting this vision as well as the conception of property it both shapes and is shaped by. Not only are the materialistic values endemic to consumer cultures proving to have a caustic effect on personal and social well-being⁵, but the process of globalizing Western-style consumption habits is degrading the health and integrity of Earth's ecosystems and diminishing their capacity to support life in the future⁶. A new vision is urgently needed, and with it a new conception of property.

This paper explores one such vision – the vision of a property system beyond growth (Alexander 2010a, 2010b, 2010c). To even consider looking 'beyond growth' would seem rather premature, of course, if the analysis were to be directed toward the poorest nations on the planet, where the need for further economic development, *of some form*, is immediate and obvious. But when the analysis is focused, as it will be presently, on the richest nations – nations which over the course of the twentieth century evolved from scarcity economies to surplus economies and which now seem to be characterised by over-consumption rather than under-consumption – it is much less clear why economic growth should be a central policy objective of governments. Indeed, there are four main arguments, advanced forcefully by degrowth scholars, among others, for why the richest nations should give up the pursuit of economic growth and try to manage without growth (Victor and Rosenbluth, 2007): (1) Continued economic growth worldwide is no longer a sustainable option due to environmental and resource constraints, so the richest nations should leave room for growth in the poorest nations where the benefits of growth are evident (Meadows et al, 2004); (2) in the richest nations growth has become 'uneconomic,' in the sense that it detracts more from well-being than it contributes (Daly, 1999); (3) growth in the richest countries is neither necessary nor sufficient for meeting policy objectives such as full employment, elimination of poverty, and protection of the environment (Victor, 2008); and (4) seeking growth in the richest nations in order to solve global poverty by way of the so-called 'trickle down' effect is neither sustainable nor empirically likely (Woodward and Simms, 2006). Building upon these arguments, this paper explores how property relations within rich capitalist nations might evolve, how our thinking about those relations might evolve, and with what consequences, if economic growth lost its privileged position as the touchstone of policy and institutional success.

The notion of a property system 'beyond growth' arises out of the vast body of social and ecological research and new economic theory which ratifies what Manfred Max-Neef has called the 'threshold

4 It should be noted that socialist countries seem to be animated by the same vision. As Michel Foucault once pointed out, 'the universalization of the bourgeois model has been the utopia which has animated the constitution of Soviet society.' See Michel Foucault and Noam Chomsky, 'Human Nature: Justice versus Power' in Arnold Davidson, Foucault and His Interlocutors (Chicago; London: University of Chicago Press, 1997) 132.

5 See Tim Kasser and Allen Kanner, *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (Washington, D.C.: American Psychological Association, 2003); Tim Kasser, *The High Price of Materialism* (Cambridge, Mass.: MIT Press, 2002); Robert Lane, *The Loss of Happiness in Market Democracies* (New Haven: Yale University Press, 2000).

6 See, generally, the Millennium Ecosystem Assessment publications, available online at <<http://www.millenniumassessment.org/en/index.aspx>>.

hypothesis' (Max-Neef, 1995). This hypothesis holds that 'for every society there seems to be a period in which economic growth (as conventionally measured) brings about an improvement in the quality of life, but only to a point – the threshold point – beyond which, if there is more economic growth, quality of life may begin to deteriorate' (Max-Neef, 1995, at 117). The basic idea, familiar to degrowth scholars, is that when macro-economic systems expand beyond a certain size, the additional social and ecological costs of growth begin to outweigh the benefits, making any further growth uneconomic. In arguing for this proposition, degrowth scholars regularly utilize the conceptual framework employed by many ecological economists, who have developed a number of indexes to measure and compare the benefits and costs of economic growth (e.g. the Index of Sustainable Economic Welfare and the Genuine Progress Indicator). To state the central finding here, in virtually every instance of where an index of this type has been calculated, the movement of the index appears to reinforce the threshold hypothesis (Lawn, 2005). Put more directly, there is an emerging body of evidence which indicates that many of the most developed regions of the world – including North America, Western Europe, Japan, and parts of Australasia – have entered or are entering a phase of uneconomic growth.

Focusing on those highly developed regions, this paper proposes that when an economy has grown so large that it has reached or exceeded the threshold point beyond which any further growth is 'uneconomic' (i.e. socially or ecologically counter-productive), property relations should no longer be defined and defended in order to grow the economy. Instead, property relations should be constructed or reconstructed in order to achieve more specific welfare-enhancing objectives – such as eliminating poverty and protecting the environment – and the efficient growth of GDP or *lack thereof* should be treated as a by-product of secondary importance. For these reasons this paper will refer to a 'post-growth' property system, a system which will be broadly considered and defended as the central project of this exploratory paper. This undertaking will be structured around an examination of the 'property rights' objection to degrowth, an objection which will now be situated within the degrowth literature, defined, and then discussed.

2 The 'Property Rights' objection to degrowth

Degrowth scholars and other growth sceptics have done a considerable amount of important work exposing the growth fetishism upon which capitalist economic systems are based. Serge Latouche has helped 'decolonize our imagination' of growth economics (Latouche 2009); Francois Schneider has shown how 'rebound effects' lead to increases in resource and energy use despite techno-efficiency improvements (Schneider, 2008); Herman Daly has provided an alternative and ecologically sane conceptual framework in his work on the 'steady state' (Daly, 1996, 1991); many sociologists have provided evidence that, in affluent societies, economic growth is no longer contributing much to overall well-being and may even be undermining well-being (Diener and Seligman, 2004; Lane, 2000); members of the New Economics Foundation have shown that growth in affluent societies is not an effective method for solving the problem of global poverty (Woodward and Simms, 2006); Peter Victor and Tim Jackson have each argued persuasively for the feasibility of a macro-economics beyond growth (Victor, 2008; Jackson, 2009). These theorists, among many others, have collectively presented a powerful case for degrowth.

There have been and are other growth sceptics also, arising out of various disciplines and focusing on different issues. One area that growth sceptics have not explored in any depth, however, is the question of property rights, and this paper seeks to contribute to the literature by taking up this challenge (van Griethuysen, 2009; Alexander 2010a, 2010b, 2010c). Private property is the central institution of market capitalism. Among other things, it provides a legally enforceable guarantee for credit, and credit functions to facilitate economic growth. Since property and credit in a market economy are commonly measured and valued in monetary terms, perhaps it is to be expected that GDP is given such weight as a measure of

policy and institutional success. As Francois Schneider et al. (2010: 5) note, 'GDP may not measure social welfare, but it measures well what matters for the market economy: profits, wages, and land rents'. But if growth scepticism were ever to take hold in advanced capitalist societies, what would become of the institution of property? Is private property compatible with a degrowth society? How might property relations need to evolve to facilitate the transition to a degrowth society?

Those are some of the questions touched on this paper, although the discussion of them, of course, will be incomplete. They are important questions, however, because even if degrowth (or something like it) one day gained acceptance in the cultural mainstream of advanced capitalist societies, it might still be objected that the politico-economic reforms needed to facilitate degrowth (whatever they may be) would violate established property rights and therefore be unjustifiable. After all, one of the most entrenched beliefs in neoliberal political thought today is that state institutions should protect private property rights and enforce contracts, but otherwise presumptively stay out of the 'free market' economy. According to this view, private property facilitates the maximization of economic growth and protects individuals from state power, and for those reasons, the argument goes, property rights should not be interfered with or regulated by the state. This 'property rights' objection to politico-economic reform has the potential to block any movement toward a degrowth society; indeed, it may be one significant reason for why the degrowth movement, or growth scepticism more generally, has had little politico-economic impact to date. It is surprising, therefore, that so little has been written on the subject of property rights from within this tradition. This paper focuses attention on the 'property rights' objection to degrowth in the hope of provoking more discussion about whether or in what ways property relations could evolve toward a degrowth society.

For want of space, however, this paper cannot explore in any detail what concrete property reforms may be needed to initiate the transition to a degrowth society, although some broad proposals are suggested below⁷. Rather, the present inquiry focuses on the more fundamental issue of whether significant property reform is even a democratically available option, or whether, or the contrary, reform is objectionable on the grounds that it would involve illegitimate interference with established property rights.

3 Examining the 'Property Rights' Objection to Degrowth

As noted above, proponents of growth capitalism typically offer two main justifications for state non-interference with private property. The first arises out of the tradition of Adam Smith and Jeremy Bentham and holds that state non-interference with private property facilitates efficient economic activity and thereby promotes the common good (the 'economic' or 'utilitarian' justification). The second arises out of the tradition of John Locke and holds that state non-interference with private property protects individuals from state power (the 'libertarian' justification). Locke argued that property rights arise and exist independently of the state and that the very purpose of the state is to protect property rights from interference.

With evidence mounting that growth in the developed world is no longer contributing to social well-being and, indeed, that growth is destabilizing the life-support system we call Earth, any claims that the property structures of growth capitalism are 'utility maximizing' or 'economic' are increasingly hard to swallow, to say the least. In fact, Clive Hamilton seems to be quite justified in labelling the current political consensus on growth 'fetishistic' (Hamilton, 2003). It may be, then, that as the costs of growth become

⁷For a preliminary attempt at fleshing out what a post-growth property might look like in legal reality, see Samuel Alexander, "The Path to Entropia," in *Continuing the Great Work: A Tribute to Thomas Berry's Contribution to Earth Jurisprudence* (Orlando: Center for Earth Jurisprudence, 2010, forthcoming).

even more pronounced and harder to tolerate, the utilitarian and economic justifications for non-interference in the property system will appear increasingly flawed, if not perverse, and get rejected. The libertarian justification, however, may prove to be more robust, at least in the sense that it is not dependent on utilitarianism and orthodox economic theory, necessarily. For that reason, this paper will limit itself to examining aspects of the 'property rights' objection to degrowth which arise out of this libertarian tradition. A more comprehensive discussion must await another occasion.

Let us assume, then, for the purposes of the present analysis, that the utilitarian and economic justifications for non-interference in the property system lose some of the persuasive force they currently enjoy. If this were to happen, it could still be objected that the legal reform needed to initiate the transition to a degrowth society would interfere illegitimately with established property rights. As it stands, this libertarian objection cannot be answered because it is too vague, so for clarity's sake it will be broken down into two more precise objections: the 'conceptual' objection and the 'private sphere' objection (Robertson, 1997). The remainder of this paper will be dedicated to defining and then discussing these two sub-objections

4 The 'Conceptual' Objection

The post-growth jurisprudence of property being proposed in this paper does not seek to discard the central organizing concepts of 'private property' and 'the market,' but rather seeks to give them a radically new content. Critical jurist, Roberto Unger, would describe the approach of giving old concepts new content as 'internal development' or 'revolutionary reform' (Unger, 1983) and he has argued forcefully that this can bring about significant social change, not just reformist tinkering, given the political will. Proceeding faithfully on that basis, this paper proposes that a post-growth property system could be achieved by thoroughly reworking some basic grounds-rules of a private property / market system.

This approach, however, faces a 'conceptual' objection. The objection is that one cannot significantly alter the rights, powers, liberties, and duties which are commonly associated with the ownership of private property and blithely claim that what results is still a private property system. After all, one cannot significantly change the shape of a circle and be confident that one will still end up with a circle (Robertson, 1997). The objection, in other words, is that any notion of a private property / market system 'beyond growth' is misconceived, because the political reform needed to realize a degrowth society would move the system outside the concept of private property altogether; that is, outside the intrinsic institutional structure of a private property / market system.

This objection deserves attention because for the foreseeable future, at least, any political programme that seeks to abolish private property as a central institution of Western societies is not likely to gain much political traction. I believe degrowth scholars, even those of idealist or utopian persuasions, ought to bear this in mind when developing their political programmes. There needs to be a balance between the indispensable 'idealist' or 'utopian' strain which conceives of futuristic and 'wholly other' possible worlds, and the equally indispensable 'pragmatic' strain which focuses on being as politically effective as possible in the context we find ourselves in today.

Because there are obvious rhetorical disadvantages to rejecting private property, a suspicious reader might think that the critical methodology being applied in this paper – that of giving old concepts new content – is merely a transparent attempt at what Charles Stevenson would call 'persuasive definition,' that is, 'an attempt to give a new conceptual definition to a familiar word without substantially changing its emotive meaning... with the conscious or unconscious purpose of changing, by this means, the direction

of people's interests⁸. Such a suspicion, however, rests upon the assumption that private property once had a settled descriptive meaning that is now being altered, which is false. There is not and never has been a settled descriptive meaning of private property, though defenders of the status quo might insist otherwise.

4.1 Response to the 'Conceptual' Objection

A picture held us captive. And we could not get outside of it, for it lay in our language and language seemed to repeat it to us inexorably. – Ludwig Wittgenstein

In philosophical terms, the 'conceptual' objection arises out of a 'conceptualist' or 'essentialist' view of private property. Put simply, this view holds that there is a concept of private property that, in fact, is the right one or the only one; in other words, that there is a conception of private property that is the concept of private property (Radin, 1986). Prominent libertarian property theorist, Richard Epstein, is one of those who have articulated such an essentialist view. He thinks it is obvious that private property means 'the exclusive rights of possession, use, and disposition' with respect to a particular resource (Epstein, 1985). This conception of property has its roots in the work of the 18th century English jurist, William Blackstone, who famously defined the right of private property as 'that sole and despotic dominion that one man claims and exercises over the external things of the world' (Blackstone, 1982). The assumption which Blackstone, Epstein, and most neoliberal ideologues seem to share is that private property essentially means individual freedom to 'do as one pleases' with the resources one owns and that the state must not interfere with that freedom, except in very rare circumstances⁹.

This view is simplistic and misleading, as the legal realists showed long ago. In the context of property theory, legal realism received one of its most famous expressions in Tony Honore's article, 'Ownership' (Honore, 1961). Honore argued that owning private property is a much more complicated affair than simply having 'sole dominion' over a particular resource. Private property is not a single, determinate right to control a resource, he argued, but a 'bundle' of rights, liabilities, powers, and duties. With respect to any particular resource, that bundle could include some or all of the following 'standard incidents' of ownership: (1) A right to the possession of resource X; (2) A right to use X; (3) A right to manage X (that is, determine the basis on which X is used by others if it is so used); (4) A right to the income that can be derived from permitting others to use X; (5) A right to the capital value of X; (6) A right to security against the expropriation of X; (7) A power to transmit X by sale, or gift, or bequest to another; (8) The lack of any term on the possession of any of these rights, etc; (9) A duty to refrain from using X in a way that harms others or the property of others; (10) A liability that certain judgments against the owner may be executed on X (for example, having X taken away for repayment of a debt); (11) Some sort of expectation that, when rights that other people have in X come to an end of their term or lapse for any other reasons, those rights will automatically return to the owner.

One important feature of Honore's article is that it does not claim that the 'standard incidents' listed above are *necessary* or *intrinsic* to the concept of private ownership. In fact, Honore made a particular point of noting that he was describing what he called the 'full liberal conception of ownership,' acknowledging that there could be different conceptions of ownership. He also noted that often an owner can still be identified even though particular incidents or 'sticks' in the bundle have been disaggregated from the bundle. For example, an owner of a house may disaggregate the right to possess (or occupy) the house by leasing it to someone for a specified period. The leaseholder then acquires one of the incidents of ownership but does not thereby become the owner.

⁸ Charles Stevenson, 'Persuasive Definitions' (1938) 47 *Mind* 331. See also, Walter Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56 (1955); Jeremy Waldron, *The Right to Private Property* (Oxford [England]: Clarendon, 1988) 51.

⁹ As Epstein asserts, 'All regulations, all taxes, and all modifications of liability rules are takings of private property *prima facie* compensable by the state.' See Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass., Harvard University Press, 1985) 95.

Honore's 'bundle of rights' conception of ownership is hardly a complete or uncontroversial picture of private property (Penner, 1995). Indeed, it has significant limitations of its own¹⁰. Nevertheless, what even its critics find hard to deny is that it shows that owning private property does not necessarily imply a certain, specified set of rights, powers, liberties, and duties. In other words, it shows that private ownership is a concept that has many conceptions (Waldron, 1988). This means that ownership can take the shape of many different 'bundles' and so it should not be conceived of as a fixed, static, or homogenous category, especially since each bundle can be disaggregated into isolated sticks. Furthermore, the sticks themselves – such as the 'right to use,' the 'power to transfer,' or the 'duty not to harm' – are far from absolute or self-defining, making the institutional meaning of private property all the more malleable by lawmakers.

This 'bundle of rights' theory is the great legacy of legal realism to which absolutist and essentialist property theorists have never developed a satisfactory response (Radin, 1993). It is also the legacy from which a post-growth jurisprudence of property could emerge, because it promisingly suggests that there could be private property / market systems that are radically different from growth capitalism, since ownership does not mean one thing and neither does the 'the market.' The following two examples are intended to suggest that these insights from legal realism could give rise to a post-growth jurisprudence of property.

The Paris Declaration on degrowth states that a politics of degrowth will need to involve, among other things, some redistribution of wealth, both within and between countries. One reason that wealth is not easily redistributed today is because huge concentrations of wealth are passed down within family lines from generation to generation by virtue of the property laws governing inheritance and bequest. Although it can be argued that these laws entrench arbitrary privileges and keep concentrations of wealth in tact for reasons other than merit or desert, libertarian theorists like Epstein think that those laws are an essential feature of any private property system¹¹. But essential they are not. Ownership, we have seen, is a concept that has many conceptions. The laws of inheritance and bequest may be essential to the 'full liberal conception of ownership,' but the bundle of rights conception of ownership shows that different conceptions of ownership are possible by reconfiguring the bundle. One way to redistribute wealth would be to disaggregate from the bundle the power to bequeath one's property upon death (a power which is implicit to the incident of ownership Honore labelled the 'power to transmit'). If this particular disaggregation were to transpire, wealth concentrations would not be passed down family lines (as they were in feudal times and generally still are today), but be redistributed by the state to eliminate poverty or used to properly fund health services, education, or environmental protection programmes, etc. This would mean that one incident of ownership would be disaggregated from the full bundle, but the property system would still clearly fall within the category of a private property / market system. People could still own and exchange private property rights much as they do today. The difference would be that that when they died their estates would become public funds. It deserves pointing out, perhaps, that this proposal is not as radical as it may first appear, since many governments in advanced capitalist societies already appropriate large portions of estates through taxation, or have done so in the past. The above proposal just goes one step further.

Consider a second example. The Paris Declaration states that a politics of degrowth will also need to involve 'right-sizing' global and nation economies, noting that in wealthy parts of the world 'right-sizing' implies reducing ecological footprints (including carbon footprints) to a sustainable level within a reasonable timeframe. I would argue that this aspect of degrowth could also be achieved, not by rejecting the notion of private property, necessarily, but by reconceptualising it. Honore noted that the 'full liberal conception of ownership' entailed the duty to refrain from using resources in such a way that harms

¹⁰ One noteworthy limitation of the 'bundle of rights' theory is that it dematerializes the meaning of property and in doing so can obscure the fact that what is often being discussed is the use of a natural resource. See Nicole Graham, *Landscape: Property, Environment, Law* (London: Routledge, 2010).

¹¹ See Epstein, *Takings*, above n 9, 304 ("The conception of property includes the exclusive rights of possession, use, and disposition. The right of disposition includes disposition during life, by gift, or by sale, and it includes disposition at death...").

others or the property of others. Even hard-nosed libertarians like Epstein accept that owning private property entails a 'duty not to harm' (Epstein, 1985), since private property would be obviously self-defeating if people could use their property in ways that harmed others or the property of others. Contention arises, however, when it comes to the question of how to define the 'duty not to harm,' since it does not define itself.

Epstein, for example, defines harm extremely narrowly, arguing that 'each person can do with his own land what he pleases as long as he does not physically invade the land of another' (Epstein, 1985, at 60). He also seems to think that a bright line can be drawn between harm-causing activities and normal activities, suggesting that value judgments do not need to enter into the equation. But as Eric Freyfogle correctly points out, 'Harm... is an elastic, vague concept that we can define in whatever way we deem wise' (Freyfogle, 2007: 115). The indeterminacy of what constitutes 'harm' means that every society based on a system of private property must make difficult, value-laden decisions about how harm is going to be defined. Furthermore, as contexts change and new forms of harm arise – such as harm from carbon emissions or loss of biodiversity – new forms of restrictions may need to be imposed on the uses of private property (Alexander, 2010a). For example, perhaps one day coal mining, logging, and intensive farming will be widely considered a 'harmful' or 'improper' use of property? Leaving the intricacies of such an evolution aside – and to say nothing of the vested interests which would oppose any such evolution – my immediate suggestion is simply that by redefining what constitutes harm, democratic citizens have the power and the right to prohibit uses of private property that they judge to be improper. This method of 'internal development' or 'revolutionary reform' has the potential to lead to significant reductions in ecological footprints (including carbon footprints), again, not by abolishing private property, but by reconceptualising it. Moreover, this method would not involve the violation of private property rights, since property has never included the right to cause harm, a point which even Epstein accepts (Epstein, 1985). As new forms of harm emerge, therefore, lawmakers ought to respond by narrowing the scope of property rights, even if this gives rise to a very different (e.g. post-growth) property system.

In summary, my response to the conceptual objection is that private property is a concept that has many conceptions, meaning that it is possible for there to be private property systems that are radically different to growth capitalism as we know it. My suspicion is that those who think otherwise may be 'held captive' (to borrow Wittgenstein's phrase) by a particular, unduly narrow picture of private property (see Fotopoulos, 2007). I have tried to show that new space opens up for a post-growth jurisprudence of property when we decolonize our imaginations of the view that a private property system necessarily implies growth capitalism.

5 The 'Private Sphere' Objection

The second objection to post-growth property reform which will be considered in this paper arises out of the private / public distinction. Liberal theorists, from Locke through Kant to Rawls and beyond, have sought to limit the role of the state by dividing social space into a 'public sphere,' where democratically mandated state action is legitimate and often desirable, and a 'private sphere,' where the coercive apparatuses of the state have no right to enter and where individual freedom is said to reign supreme. According to this extremely influential perspective, the economy falls firmly within the 'private sphere,' implying that the state must 'stay out' of the economy and not interfere with an individual's property and contract rights. On that basis it could be objected that any politico-economic reform aimed at initiating the transition to a degrowth society – which presumably would require the state to enter the so-called

'private sphere' and reconfigure property and market rights – would exceed the proper boundaries of state action. A short response to this objection is all that is necessary to express the critical point.

5.1 Response to the 'Private Sphere' Objection

There is no non-arbitrary way to differentiate the law constituting the market, from the law supposedly *regulating* or *intervening* in the market. – **Stuart Banner**

In the context of property theory, at least, the 'private sphere' objection to state intervention in the economy is confused and analytically outdated (Kennedy, 1982). The objection assumes that in the absence of state involvement, a private property / market system would be 'self-regulating,' in the sense that pre-existing and determinate property rights would either be enjoyed in private or exchanged through voluntary contracting in the 'free market.' The 'nightwatchman' state would only need to get involved to protect and enforce those pre-existent property and market rights.

The problem with this way of looking at things is that it relies on the very same 'essentialist' reasoning which the previous section showed was defective. The only way that the state could 'stay out' of the private property / market system would be if the organizing concepts 'private property' and 'the market' had determinate institutional structures built into their essential meanings. But if those organizing concepts are indeterminate concepts that have many diverse conceptions, as they undoubtedly are, then for those concepts to become concrete conceptions in legal reality the state must be always and necessarily involved in defining property rights and market structures. 'Hands off' simply is not an option, as the following hypothetical seeks to make clear.

Imagine X buys some land next to a river, erects a sawmill on the land, and then dams the river to supply hydro-power for the mill. One year later, however, a competitor, Y, constructs a similar dam and mill one kilometre upstream, reducing river flow to X's mill and thereby damaging X's business. X sues, complaining that his property rights and expectations are being illegitimately interfered with by Y. In defence, Y claims that she is simply exercising her property rights in the same way X is, which she claims is reasonable. Suppose further, perhaps, that an environmental organization, Z, brings an action claiming that the dams of X and Y are illegitimate uses of their property because cumulatively they have reduced the river flow so greatly that it no longer reaches the sea, harming biodiversity and ecosystems in potentially irreversible ways. How is this case to be justly decided?

Libertarians would claim that the state should stay out of the private sphere unless property rights are in need of protection, but that explanation gets us absolutely nowhere. In the above hypothetical – which, given a moment's thought, could represent a thousand examples in the murky waters of everyday legal reality – how do we know who has what property rights or whether they are being interfered with? Should X be protected from Y's actions or would that require 'state interference' with Y's private property? Should Y be free to act as she has or is she interfering with X's private property? Is the harm that X and Y are causing to the river system an acceptable consequence of their use of private property? Conceptual analysis alone cannot answer these questions, because, as we have seen, private property is a concept that has many conceptions. That is, we cannot just think carefully about the concept of private property and expect the institutional details to follow as a matter of logic. Those institutional details do not exist independently of the state but must be created by the state, and in a modern market society (even a so-called 'unregulated' or 'deregulated' or 'free market' society) those institutional details consist of an evolving and incredibly complex legal framework¹². When examining such a complex legal framework it is often impossible to differentiate the law *constituting* a property system from the law

¹² See John Braithwaite, "Neoliberalism or Regulatory Capitalism," (Oct., 2005, Occasional Paper 5), Regulatory Institutes Network (arguing that those who think we are in an era of 'unregulated' neoliberalism are wrong, for the reciprocal relationship between corporatization and regulation creates a world in which there is more governance of all kinds).

supposedly *regulating* or *intervening* in a property system (Banner, 2000).

This means, in summary, that the libertarian demand for state ‘non-interference’ in the so-called ‘private sphere’ – where property rights are said to be sacrosanct and self-regulating – is an impossible demand, and therefore incoherent. The state is *necessarily implicated* in the property system because (among other things) it must provide details on which incidents of ownership will form the ‘bundle,’ what each incident entails, and in which circumstances. The state must also determine other ground-rules to the economy, such as ‘What can be property?’ ‘What kind of entities can be agents in the market?’ ‘What constitutes harm?’ and ‘What happens when property rights conflict?’ Radically different private property systems could emerge, through democratic processes, depending on the answers given to these questions. As Joseph Singer puts it, ‘The question is not whether to regulate; the question is what kind of property system to create in the first place’ (Singer, 2000, at 7). The laws defining and governing private property, therefore, are a public, political creation. Talk of ‘private’ property makes that easy to forget.

6 Conclusion

Debates about how private property systems should be constructed or reconstructed are often surreptitiously constrained by the assumptions of libertarian reasoning, and it is those assumptions, those modes of thought, which the analysis in this paper has sought to bring into question. Such an exercise is important because those modes of thought obscure and disguise entrenched structures of wealth and power, insulating them from democratic reconsideration and making growth capitalism as we know it seem like the only alternative to state communism. Libertarian thought, which some have argued dominates popular thinking about property (Murphy and Nagel, 2002), deflects attention away from the political choices benefiting some individuals, groups, and interests at the expense of others, and it unduly limits what reformative options appear democratically available. This can make the existing property regime seem ‘natural’ or ‘right’ or ‘just the way the world is,’ when, in fact, that regime is a contingent creation of our choosing, which we have made, and which can be democratically remade.

The aim of this paper has obviously not been to resolve the analytical controversies surrounding what the concept of private property means; rather, the aim has been to articulate that concept in such way that does not unduly limit, as essentialism does, the range of possible choices that can be made in respect to the institution of private property in advanced capitalist societies and beyond. It has been suggested that the problems of growth fetishism today are not problems of ‘private property’ or ‘the market,’ as such, but of the dominant *forms* of those institutions which presently exist. Private property and the market are concepts that have taken many forms in the past and, even today, capitalist countries exhibit significant variation. What is clear is that even the variety of past and present forms of private property / market systems do not come close to exhausting the range of possibilities. By imagining a post-growth jurisprudence of property, then, the aim is not so much to offer a new ontology of what private property is. Rather, on the basis of the preceding discussion, the more important issue seems to be: What shall private property become? That is a question of immense and urgent public importance, which one can only hope is answered democratically, for the common good. There is no reason, in theory, at least, why existing private property / market systems cannot be radically reconfigured to serve degrowth, given the political will.

Nevertheless, it is difficult to be hopeful. First of all, vested interests in the status quo will surely offer fierce resistance to any movement toward anything resembling a post-growth property system, and the influence of those vested interests on democratic processes should not be underestimated. Second, Pascal van Griethuysen has argued with considerable insight that the current forms of property institutions in capitalist societies are functioning to systematically ‘lock-in’ growth economics (van Griethuysen, 2009),

and this situation presents another significant challenge for the realization of a post-growth property system; again, not to be underestimated (and a problem deserving of more attention than it has received here). Perhaps the greatest challenge, however, is cultural (Alexander, 2009, 2010d). So long as most people in the developed world vote and act as if a higher material 'standard of living' is needed to increase 'quality of life,' growth capitalism will be politically safe. After all, a degrowth society will seem decidedly unattractive to all those who think and act as if increased well-being consists in increased opportunities for consumption and accumulation. But that which is kept alive by the citizenry can also, through a change in consciousness, be transformed by it. In order to be revolutionary, then, it would seem that we must first revolutionize ourselves.

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