ARTICLE

"THE NATURAL RIGHT TO PROPERTY AND THE IMPOSSIBILITY OF OWNING THE INTANGIBLE: A TENSION IN CATHOLIC THOUGHT"[1]

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I. PROPERTY & OWNERSHIP

Following the deep structure of standard early modern accounts of ownership and property,[2] I'll take "ownership" to be a relation borne by a person[3] to an object or an ensemble of objects. Such objects and ensembles might be animate or inanimate. The relation in question is, ideally, one of untrammeled right to sequester. To sequester is to remove what's to be sequestered from the public sphere to the private by exercising control over access, use, and disposal; on this understanding, the perfectly sequestered object is a thing to which only the owner has access, which only the owner can use, and which only the owner can dispose of—which is to say take out of existence—as and when the owner chooses. The right to sequester is

1. An early version of this essay was delivered orally at a symposium on intellectual property at the University of St. Thomas School of Law in Minneapolis on April 5, 2013. I am grateful for the discussion it received then, and for the improvements I have been able to make as a result. I am grateful, too, to Tom Berg for the invitation to participate in the event.

2. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 193–214 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). *Compare* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137–252 (1988) (discussing a classic analysis and critique of Locke's theory of property), *with* JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 40–43 (2010) (providing further analysis of Locke's theory of property).

3. "Person" may refer to individual human persons, or to any corporate or collective body by extension so designated. There are deep difficulties here, but since it has for a long time been established in law and ordinary political practice that there are corporate persons, and since there is precedent in theology and canon law for this view, I will not make any distinction between individual and corporate persons in what follows. It should be borne in mind, though, that the fundamental sense of *persona* for the Catholic intellectual tradition is theological: the *sanctissima trinitas* is comprised of three persons, and Jesus Christ is a person with two natures. These are the senses of *persona* in which all others participate and from which all others are derived.

untrammeled when it is unconstrained by agents or states of affairs external to the owner and the thing owned—anything other than the devices and desires of the owner and the properties of the object. To establish these relations with something intangible is to become the owner of a piece of intellectual property. In what follows I will trace what I take to be the Catholic tradition's main positions, positive and negative, on the ownership of tangibles in order to articulate, mostly by deduction, a Catholic perspective on the ownership of intangibles. The first will show how the properly "fallen" character of any ownership is based on the scriptural account of creation wherein the original harmony of creation becomes disordered as a result of humanity's sin. Even the positive view of ownership is necessarily predicated on this view of a devastated status—of man and earth at present. Augustine's distinction between private and public will help us consider further the proper lines of reasoning about ownership of things tangible (*sensibilia*) and intangible (*intelligibilia*). Finally, I will suggest that Catholics must deal honestly with the ambivalence within our tradition on these matters while resisting prescribed responses or resolutions that may fail to recognize other viable alternatives to either the extension or restriction of intellectual property rights.

It's easy enough to see how I might have a relation of ownership to a tangible thing, a thing that takes up space in the world. For example, were I to own Caravaggio's painting *Madonna dei Palafrenieri*, I would be able to make it unavailable for viewing to anyone other than myself. I could determine without consultation or constraint how it may be used and decide whether and under what circumstances to remove it from existence. It is less easy to see how it is possible to own something intangible in this way. There are puzzles about access and disposal in the case of intangibles, though fewer about use. It is not easy to know how to take an intangible out of existence or what it would mean to do so. For example, is it possible to destroy a word-sequence in English, a mathematical proof, a pattern of sounds, or a color-shade? And, because intangibles are types with infinitely many tangible tokens, it is difficult to know what control of access by sequestration means. What might it mean to sequester a particular shade of orange so that only its owner has access to it? There are perhaps ways of answering these questions, but it isn't obvious what they are. Therefore, analyses of what it means to own a piece of intellectual property—an intangible—are opaque to begin with, even if not opaque beyond possibility of clarification.

The account of ownership offered above isn't precisely reflected in any code of positive law. I own nothing in exactly this sense according to the law of the State of North Carolina, where I live, or according to that of the federal government of the United States. There are always external constraints and restraints of one kind or another upon my right and capacity to sequester the things I am by courtesy said to own. Nonetheless, it is this