Chapter III

Locke and Intellectual Property Rights

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ABSTRACT

This chapter considers certain features of Locke’s account in Chapter V of his Second Treatise concerning how a natural right of ownership can arise in previously unowned goods. We note that some take this theory to be still applicable in our own day in situations of original acquisition of ownership in intellectual property. The chapter explains how a quasi-Lockean theory could support a very limited natural right to a species of intellectual property. But it also notes that this theory by itself is not strong enough to support a natural right in an intellectual property of the sort given by copyright. Such property rights must be provided as a result of positive law.

LOCKE ON PROPERTY ACQUISITION

Many people think that something like the theory of natural acquisition of property rights in John Locke’s Second Treatise of Civil Government can provide a basis for an entitlement theory of property. Such an entitlement theory is defined by Robert Nozick in Anarchy, State, and Utopia (1974). As Nozick expresses the idea, an entitlement theory has three parts: one is an
account of justice in original acquisition, i.e., making what had previously been unowned the property of an individual; a second is an account of justice in property transfer, e.g., through sale, inheritance, gift, forfeiture, etc. These first two elements embody a notion similar to the notion of “good title” in U.S. real estate laws; i.e., that I properly got my house and land from someone who properly got it from someone else, and so on back to some (perhaps mythic) original event when the previously unoccupied land was (somehow) justly appropriated. The idea is that if the original appropriation was good, and each step of transfer was good, then my “title” in my current property is good.

The third and last feature in an entitlement theory of justice in property ownership, according to Nozick, is an account of justice in rectification. This is rooted in the observation that in any actual long chains of entitlements, there are bound to be steps that don’t meet the standards of justice. An account of justice in rectification is supposed to tell me what to do when I discover that my entitlement to my house and land is faulty because of an event that happened, unbeknownst to me, a hundred years ago.

Quite a few people have thought that Locke’s ideas about acquisition of property in the state of nature (1690, Ch. V) can form the core of an account of the principles of original acquisition. This is often thought to be the trickiest of the three sets of principles. Nozick himself, while endorsing entitlement theories of property rights (as opposed to Rawlsian theories), declines to flesh out the content of the three sorts of principles. In particular, he argues that Locke’s treatment of principles of original acquisition is inadequate. Whether or not Nozick or someone else could have provided us with a plausible entitlement account of ownership, Thomas Mautner (1982) made the important point that it wouldn’t really matter. This is assuming that people engage in such discussions in order to throw light on the justice of actual property distributions in our present world. If we were to take seriously the multistep view of derived rights to property, few homeowners in North America, such as myself, could confidently assert a just title in their property.¹ One has, of course, the doubtful justice of the acquisition of territory by Europeans where Native Americans were already living. But even aside from that, given a 100- to 400-year history of property transfers, something questionable by reasonably strict standards of justice is bound to occur. As Mautner puts it:

A clean record can hardly ever be established. Force and fraud have reigned supreme in the history of mankind. And records without any known unjust steps in them are in most cases not fully known and there is

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