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ARTICLE

“THE NATURAL RIGHT TO PROPERTY AND  
THE IMPOSSIBILITY OF OWNING THE  
INTANGIBLE: A TENSION IN  
CATHOLIC THOUGHT”<sup>1</sup>

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I. PROPERTY & OWNERSHIP

Following the deep structure of standard early modern accounts of ownership and property,<sup>2</sup> I’ll take “ownership” to be a relation borne by a person<sup>3</sup> 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 untrammelled right to sequester. To sequester is to remove what is 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

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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 is 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 is not 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 is not 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

right that essentially constitutes ownership according to standard early modern accounts. The degree to which it is present and untrammelled in particular cases is the degree to which persons approach the condition of being property owners. In life—life in the devastated world we live in—ownership is always a matter of degree. Thus, the ideal type of ownership I have sketched is principally a tool for analytical purposes.

The Catholic intellectual tradition exhibits a profound ambivalence about creaturely ownership in general and creaturely ownership of intangibles in particular. I mean “ambivalence” in the strict and proper sense: there are elements in the tradition that speak strongly for the desirability of creaturely ownership and elements that speak strongly against it. First, I will treat the most significant threads in the tradition that speak against it and then those that speak for it.

## II. CONTRA CREATURELY OWNERSHIP OF TANGIBLES

According to the account of ownership I have just given, there is one ideal owner, one who occupies the position of owner in relation to every particular thing other than himself. That owner is the LORD, the God of Israel, who became incarnate as Jesus Christ and whose bride is the Church.<sup>4</sup> Indeed, the account of ownership given is derived exactly from an understanding of the relation the LORD bears to all creatures. He brought all creatures into being *ex nihilo*—out of nothing—and without constraint by anything external to himself, can sequester any one of them, or all of them together, without impediment.<sup>5</sup> Ownership, in its pure form, belongs to the LORD. It can be replicated by creatures, to whatever limited extent that is possible, only by participation in and imitation of the LORD’s ownership of his creatures; by derivation this means imperfectly and with the sanction of short-lived earthly laws that grant nothing beyond what they immediately legislate.<sup>6</sup>

4. The Catholic Church, together with most Christians, understands God as three persons (Father, Son, and Spirit) in one substance. See AUGUSTINE, *THE TRINITY* 175–241 (Stephen McKenna trans., Catholic Univ. of Am. Press 1963) (providing a classic exposition of the meaning and conceptual structure of this view).

5. For the scriptural creation accounts, see *Genesis* 1–3 and the recapitulation in *John* 1:1–14.

6. Variations on these points are everywhere in the Christian tradition. Consider the following (perhaps over-excited) example: “Vnde quisque possidet quod possidet ? nonne iure humano ? Nam iure diuino, Domini est terra et plenitudo eius [Psalm 23:1]; pauperes et diuites Deus de uno limo fecit, et pauperes et diuites una terra supportat. Iure tamen humano dicit : Haec uilla mea est, haec domus mea, hic seruus meus est. Iure ergo humano, iure imperatorum. Quare ? Quia ipsa iura humana per imperatores et reges saeculi Deus distribuit generi humano. Vultis legamus leges imperatorum, et secundum ipsas agamus de uillis ? Si iure humano uultis possidere, recitemus leges imperatorum ; uideamus si uoluerunt aliquid ab haereticis possideri. Sed quid mihi est imperator ? Secundum ius ipsius possides terram. Aut tolle iura imperatorum, et quis audet dicere : Mea est illa uilla, aut meus est ille seruus, aut domus haec mea est ?” AUGUSTINE, *TRACTATUS IN IOHANNIS EVANGELIUM* CXXIV 66 (Radbobus Willems ed., Typographi Brepols 1954); see PETER BROWN, *THROUGH THE EYE OF A NEEDLE: WEALTH, THE FALL*

Creaturely ownership is thus dependent in the order of being upon divine ownership, just as any account of creaturely ownership capable of being offered in the conceptual order is parasitic upon an account of divine ownership. These are fundamental features of the Catholic intellectual tradition's treatment of property and ownership.<sup>7</sup> They provide some difficulties and account for some of the ambivalence within the Catholic tradition about creaturely property and ownership. If ownership in its strict and proper sense is a divine prerogative, then to what extent should human creatures seek to imitate and participate in it? What should an account of creaturely ownership look like given that creatures lack all the powers and capacities that make it possible for the LORD to own? Might it not be better simply to deny that creatures can own property as a way of marking the distinction between creatures and the LORD—which is *the* fundamental distinction in Catholic thought? And even if this route is not taken, as it certainly has not been by the mainstream Catholic tradition, the primacy of the LORD's ownership, together with its predication upon the distinction between the LORD and creatures, means that affirmations of creaturely ownership are always and necessarily elaborated by the tradition with reserve—theological reserve, we might say.

A second thread in the fabric of what we might call Catholic anti-ownership thought is the standard view that there was no ownership in Eden. This is close to commonplace among the fathers of the Church and is therefore present as well in the high-medieval tradition<sup>8</sup> and in the broadly magisterial tradition: creaturely approximations of ownership—deeply imperfect simulacra of the LORD's relationship to creatures as they must al-

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OF ROME, AND THE MAKING OF CHRISTIANITY IN THE WEST, 350–550 AD 148–84 (2012) (providing an excellent recent study of Augustine on wealth and property).

7. See Leo XIII, *Rerum Novarum* [Encyclical Letter on Capital and Labor] ¶¶ 4–57 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html); Pius XI, *Quadragesimo Anno* [Encyclical Letter on Reconstruction of the Social Order] ¶¶ 44–131 (1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html); Paul VI, *Populorum Progressio* [Encyclical Letter on the Development of Peoples] ¶ 23 (1967), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html); John Paul II, *Centesimus Annus* [Encyclical Letter on the Hundreth Anniversary of Rerum Novarum] ¶¶ 30–43 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html); Benedict XVI, *Caritas in Veritate* [Encyclical Letter on Integral Human Development in Charity and Truth] ¶ 22 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html) (providing doctrinal formulations of this understanding of property and ownership).

8. See BONIFACE RAMSEY O.P., *AMBROSE* 117–44 (Carol Harrison ed., 1997) (providing a patristic example). Compare THOMAS AQUINAS, COMMENTARY ON THE SENTENCES 4.33.2.2 (1858), available at <http://www.corpusthomicum.org/snp4027.html#20008>, with 38 THOMAS AQUINAS, *SUMMA THEOLOGIAE: INJUSTICE* 64–69 (Marcus Lefebure trans., 1975) (providing Thomas Aquinas' views on individual ownership).

ways be—are, without exception, a result of the fall.<sup>9</sup> This means that ownership is an accommodation to disaster, to the primordial cataclysm of the fall. Absent the fall, there could be no competition for resources, no necessity for property to support life and human flourishing, no tendency on the part of one creature to attempt expropriation of the goods of another and therefore no need for the sequestration that belongs to ownership.

And similarly for heaven: ownership is absent there because the needs of all creatures are fully met without ownership. This is clear from the mainstream tradition's assumption that any creatures there might be in heaven, animate or inanimate, are not capable of being owned. Even were there some creatures in heaven capable of being owned—inanimate objects of a small size, for instance (a position sometimes entertained on the margins of orthodoxy)—there could be no need for rational creatures like us or the angels to own them, for in heaven there are no material or other needs that could require or make sense of such ownership.

These thought-experiments about Eden and heaven are standard in the Catholic tradition. Their purpose is to distinguish what is an effect of the fall from what belongs properly to undamaged human beings severally and collectively. Ownership belongs clearly to the former category. That it does explains why, with a remarkable degree of consistency, the Catholic tradition has regarded lives lived in poverty on earth—which is to say, without ownership—as superior to lives lived entangled by the sequestration of inanimate corporeal goods. A life without ownership is better than a life with it, in something like the same way that the celibate life is better than the sexually active life.<sup>10</sup> The Catholic tradition has consistently asserted this belief. This judgment is reflected in the intimacy with which poverty and celibacy are linked in the long Western tradition. Most religious orders require their vowed members to bind themselves to both, and the connections between them are sufficiently obvious that they need little comment. An important distinction between them, however, is that the Church has never sanctified and sacramentalized property ownership as it has sex. There is nothing like the sacrament of marriage to bind owners to their property as spouses are bound to one another, and therefore the elevation of the life of poverty above that of ownership is less nuanced than that of the celibate life above the sexually active one. To put the same point differently: the goods

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9. “The fall” refers to that moment in the narrative of Genesis chapter 3 when the original harmony of creation becomes disordered through Adam and Eve’s disobedience to God. The dominion granted to humanity in the state of original justice entails a responsibility toward creation as expressed in the account of Adam’s naming other creaturely life. *Genesis* 2:19–20. The broken order of relationality between God and humanity, and humanity and the rest of creation—occasioned by humanity’s first act of disobedience—may be indexed to humanity’s wrongful desire to own that which properly belongs to God. Thus, ownership becomes the expression of humanity’s abuse of original freedom which is itself gifted.

10. See generally AUGUSTINE, MARRIAGE AND VIRGINITY 68–107 (John E. Rotelle & David G. Hunter eds., Ray Kearney trans., 1999) (providing his treatise “Holy Virginity”).

present in property ownership are of lesser significance for the Catholic tradition than those present in married sex, even though the renunciation of the one typically accompanies the renunciation of the other.

There is dominical insistence upon the value of renouncing property as well. The rich man who comes to Jesus and asks what he must do to inherit eternal life is told that since he already keeps the commandments he lacks only one thing, which is to sell what he has and give the proceeds to the poor.<sup>11</sup> Then, Jesus says, he will have treasure in heaven.<sup>12</sup> The young man cannot do this, and his incapacity prompts Jesus to emphasize how difficult it is for those who own much to enter the kingdom of heaven.<sup>13</sup> This episode serves as the paradigmatic, though by no means the only, scriptural basis for the Catholic tradition's elevation of poverty over the propertied life. It has been among the principal scriptural texts appealed to as encouragement and support for forms of life, both solitary and social, that attempt to do altogether without property. The Catholic tradition has been marked at various times by large-scale attempts to give institutional form to a life without property owned by individuals—and, sometimes, without ownership understood as untrammelled sequestration at all. The complex history of the foundation and reform of the Church's religious orders circles around this question.

All this is about ownership of corporeal goods—land, money, and portable property of various kinds. It is not about ownership of intangibles. Different things have to be said about that, which I'll come to in a moment. It is important to bear in mind at this stage that the theological reserve about creaturely ownership of property I have identified carries with it the elevation of poverty over property ownership and does so because the latter is a feature of the fall. It is not proper to human creatures as such. It is in this context that the positive things the tradition has to say about ownership must be placed. To forget this is to forget something of fundamental importance.

### III. CONTRA CREATURELY OWNERSHIP OF INTANGIBLES

Questions about whether it is possible to own intangibles, and if so under what conditions and for what purposes, are much less prominent in the Catholic intellectual tradition than are questions about ownership of tangibles. That is not surprising. Neither Roman law nor canon law has much to say about intangibles, while both have a lot to say about tangibles. Theologians and canonists, therefore, have rarely addressed the topic directly. But they have done so indirectly, mostly by way of thought about what belongs to the public sphere and what to the private, and about the

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11. *See Matthew 19:16–30; Mark 10:17–22; Luke 18:18–30.*

12. *Id.*

13. *Id.*

nature of each. The remarks that follow are based mostly on Augustine's version of this pattern of thought; because of the depth of his influence on the Latin West, he can reasonably be taken as representative on this question. Further, the pattern of thought he provides does have direct relevance to the question of owning intangibles.

We can begin with a representative quotation, and then very briefly trace its implications:<sup>14</sup>

[W]hat is proper [*proprium*] and in a sense private [*quasi privatum*], should be understood as what belongs to each one of us alone; it is experienced by each one alone in himself as belonging properly to his own nature. By contrast, what is common [*commune*] is in a sense public [*quasi publicum*], and is experienced by all those who experience, without change or corruption.<sup>15</sup>

Augustine here distinguishes what is proper and private from what is public and held in common. He first makes the distinction in terms of ownership: if something is private, you alone hold it, whereas if something is public, it is freely available to all. The second facet of the distinction has to do with knowing: a privately held thing can be known only by its owner, whereas a public thing is known by all. For Augustine, the distinction is not only descriptive but also normative: truly public things are not subject to change or corruption, while all private things are inevitably corrupted merely by being privately held. The normative part of the distinction holds, because public things have not been forcibly sequestered from their proper participation in the LORD, while private things have been so sequestered and have thereby been corrupted.

Augustine assumes an ontology here. It is one whose essential distinction is between *intelligibilia* on the one hand, which are noncorporeal, changeless, and without beginning or end; and *sensibilia* on the other hand, which are located in time and extended in space. The easiest examples of *intelligibilia*—things that can be objects of the intellect—are mathematical: numbers and all their relations. These, if they exist,<sup>16</sup> are beyond the reach of time and change. The same can be said, thinks Augustine and the vast majority of the Catholic tradition (we are all good Platonists about this), of everything that can be known—which is just what the word *intelligibilia* means. Objects of sense, *sensibilia*, are those things located in space-time and, thus, apprehensible by one or another of (or some combination of) our senses. This ontology is of course debatable, but it is fundamental to the

14. PAUL J. GRIFFITHS, *INTELLECTUAL APPETITE: A THEOLOGICAL GRAMMAR* 139 (2009).

15. *Id.* “*Proprium ergo et quasi privatum intellegendum est, quod unus quisque nostrum sibi est, et quod in se solus sentit, quod ad suam naturam proprie pertinet: commune autem et quasi publicum, quod ab omnibus sentientibus nulla sui corruptione atque commutatione sentitur.*” *Id.*

16. Not everyone—not all mathematicians, even—thinks that there are such things as numbers. It is possible to be a nominalist about these things, though I doubt that Christians can be.



Catholic intellectual tradition. To abandon it would be close to abandoning the tradition altogether.

Augustine connects this ontology to a thesis about ownership. Intelligibles belong to the public sphere, to the commons, as Augustine explicitly says in the quotation given above. Such things cannot be sequestered in any real sense. For instance, if I know the proof of Goldbach's Conjecture—that every even number greater than two can be expressed as the sum of two primes (I do not)—then the content of my knowledge is in principle incapable of sequestration. Its mode of being is definitively public. To attempt sequestration of it would be to treat it as if it were sensible, as if I could lock it up in a room and control access to it. Attempts to do this, Augustine thinks, are evidence of a disordered appetite for knowledge,<sup>17</sup> an appetite that wants not merely to know but also to own what is known, to act toward it as only the LORD can act—for he, of course, has exhaustive knowledge of all intelligibles and contemplates them *totum simul*, all at once.<sup>18</sup> But short of this, to attempt sequestration, which is essential to ownership, of an intelligible is to attempt a performatively incoherent act, rather as if one were to assert the impossibility of assertion or to eat like a sumo wrestler with the idea of becoming a jockey.

This position on the ownership of intangibles, scarcely more than sketched here, is more radical than the critique of the ownership of tangibles set forth in part two. It sees the attempt to sequester and control *intelligibilia* as in principle impossible, a performatively incoherent act that damages those who attempt it by altering their relations to what it is they hope to know. Those who try to own intelligibles, on a broadly Augustinian view, are attempting to consume and make their own what they would be better off contemplating.<sup>19</sup>

There is a question about the degree of overlap between the kinds of things that Augustine calls *intelligibilia* and the kinds of things that can be owned under the rubric of intellectual property in American positive law. The two categories are not identical, but in my estimation there is significant overlap between what is covered by each. Consider the example of a particular ensemble of words, such as those found in this essay. According to our current legal habits, such an ensemble can be copyrighted, which

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17. Augustine standardly distinguishes *studiositas*, the well-formed and virtuous appetite for knowledge, from *curiositas*, its ill-formed and vicious opposite number. See generally JOSEPH TORCHIA, *RESTLESS MIND: CURIOSITAS & THE SCOPE OF INQUIRY IN ST. AUGUSTINE'S PSYCHOLOGY* (2013) (providing a detailed study of Augustine's views on the topic).

18. See generally 1 THOMAS AQUINAS, *SUMMA THEOLOGIAE: THEOLOGY 4–9* (Thomas Gilby trans., 1964) (discussing the LORD's omniscience); 4 THOMAS AQUINAS, *SUMMA THEOLOGIAE: KNOWLEDGE IN GOD 2–61* (Thomas Gornall trans., 1964) (discussing the LORD's omniscience).

19. Simone Weil's formulation underlies this sentence: "It may be that vice, depravity and crime are nearly always . . . in their essence, attempts to eat beauty, to eat what we should only look at." SIMONE WEIL, *WAITING FOR GOD* 166 (Leslie A. Fiedler ed., Emma Craufurd trans., 1951).

means that the copyright holder has rights over the use of any instance of the ensemble. This is close to what I mean by a right to sequestration. Augustine would say that what the word-ensemble expresses is—if true—a feature of the world, a state of affairs that comes under the heading of *intelligibilia*. To attempt sequestration of the words that express it is exactly to attempt privatization-by-control of something that by definition cannot be so controlled. Therefore, the Augustinian position, which is also the broadly Catholic position, has at least some purchase on the question about owning intangibles.

#### IV. PRO CREATURELY OWNERSHIP: A NATURAL RIGHT?

So far we have before us an ambivalence about creaturely ownership of *sensibilia* and a principled rejection of creaturely ownership of *intelligibilia*, all of which are intangibles. Both are deeply characteristic of the Catholic intellectual tradition; a strong affirmation of something like a natural right to the ownership of property, however, is also deeply characteristic of the tradition, at least with respect to tangibles. How can this be? How is it possible for the tradition to generate such a tension?

The Catholic tradition's strong affirmation of a right to ownership is evident from at least the fourth century on.<sup>20</sup> Accounts of what it is to own, and why there is a right to do so, reached a high point of sophistication and precision in the thirteenth century debates following the Franciscan reforms and began to be enshrined in the magisterial tradition at that time.<sup>21</sup> Later, in the nineteenth century, in part as a response to broadly Marxist critiques of the idea of private property (and indeed of ownership of any kind), the magisterium returned to this topic and again affirmed the right to own property as a natural right that belongs to the nature of human persons on earth. This is clear, for example, in Pope Leo XIII's encyclical of 1891, *Rerum Novarum*, and it has become a standard item in Catholic social teaching since then.<sup>22</sup> There are two essential points to keep in mind about this affirmation of a natural right to property ownership.

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20. See *supra* text accompanying notes 14–19.

21. See generally Giorgio Agamben, *ALTISSIMA POVERTÀ: REGOLE MONASTICHE E FORMA DI VITA* (Neri Pozza ed., 2011) (discussing the debates about property and ownership following the Franciscan reforms).

22. The formulation is: "For, every man has by nature the right to possess property as his own. This is one of the chief points of distinction between man and the animal creation, for the brute has no power of self direction [sic], but is governed by two main instincts, which keep his powers on the alert, impel him to develop them in a fitting manner, and stimulate and determine him to action without any power of choice. One of these instincts is self preservation [sic], the other the propagation of the species. Both can attain their purpose by means of things which lie within range; beyond their verge the brute creation cannot go, for they are moved to action by their senses only, and in the special direction which these suggest. But with man it is wholly different. He possesses, on the one hand, the full perfection of the animal being, and hence enjoys at least as much as the rest of the animal kind, the fruition of things material. But animal nature, however perfect, is far from representing the human being in its completeness, and is in truth but

The first is that it is a right accommodated to the conditions of a damaged cosmos and a damaged social order. The right does not belong to human nature as such. It belongs only to human nature as fallen, as is evident from the thought-experiments mentioned in part two regarding the absence of property in Eden and heaven. When things are as they should be there will not be property. Therefore, the natural right in question has the form of a conditional: if the social and material orders have become chaotically violent and competitive, and if individual human persons have similarly become concupiscently aggressive, then property is essential as one among many means of constraining further damage. That is what the natural right to ownership means. In this case, the conditional's antecedent is affirmed; there has in fact been damage of this sort, so the right obtains. However, the right is temporary: it does not belong to the proper end of human persons.<sup>23</sup> Given this proviso, however, the right is genuine and deep. Without it, human persons and the human social order cannot flourish here below.

The second essential point in regard to the Catholic tradition's affirmation of a natural right to property ownership is that the right to property is—usually<sup>24</sup>—predicated on a particular understanding of what it means to own something significantly at odds with the early modern standard view with which I began this article. Ownership must indeed include sequestration for use, but it also necessarily includes consideration of what we sequester for our use “as common in the sense that [the goods we own] should be able to benefit not only [us] but also others.”<sup>25</sup> This notion of the commonality of property is intrinsic to the tradition's treatment of it. It means that sequestration is always and necessarily ordered by, and to, a consideration of the nature of what is sequestered; the sequestered is good only if it

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humanity's humble handmaid, made to serve and to obey. It is the mind, or reason, which is the predominant element in us who are human creatures; it is this which renders a human being human, and distinguishes him essentially from the brute. And on this very account—that man alone among the animal creation is endowed with reason—it must be within his right to possess things not merely for temporary and momentary use, as other living things do, but to have and to hold them in stable and permanent possession; he must have not only things that perish in the use, but those also which, though they have been reduced into use, continue for further use in after time.” Leo XIII, *supra* note 7, at ¶ 6. This theme has been taken up and elaborated in virtually all the magisterial documents of Catholic Social teaching since. See, e.g., John Paul II, *Laborem Exercens* [Encyclical Letter on Human Work] § 14 (1981), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html).

23. Thomas Aquinas tends to locate the right to property ownership in the *ius gentium* rather than in the *ius naturale*, though there are complications here. See 28 THOMAS AQUINAS, *SUMMA THEOLOGIAE: LAW* 90–95, 111–17 (Thomas Gilby trans., 1966); see generally 38 THOMAS AQUINAS, *SUMMA THEOLOGIAE: INJUSTICE* 69 (Marcus Lefebure trans., 1975).

24. The tradition is not of one voice on this matter, but the majority position—and certainly the authoritative magisterial position—is as I will go on to describe.

25. Pope Paul VI, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] ¶ 69 (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html).

benefits its owner as well as the whole. To return to the quotation from Augustine given in part three, even material goods sequestered for ownership remain, in a sense, public goods—common goods for the benefit of all. To understand owned goods differently would be to misunderstand them.

#### V. A CATHOLIC WAY FORWARD?

What does all this yield for a properly Catholic understanding of the ownership of intangibles?

First, there are deep difficulties in giving a coherent account of what it means to own an intangible. Second, providing a system of positive law so that ownership of intangibles is made possible in some sense is a necessary accommodation to the fall and therefore something to be lamented. Third, even when such a system of positive law is in place—as it is for us—sequestration of intangibles by individuals or corporations must be understood to have the common good as an essential element in it. Fourth, because of the special difficulties for Catholics in accounting for the ownership of intangibles and in working within a legal system that provides for such, we Catholics should actively seek other legal means of providing for the goods that intellectual-property law supports. Among those goods is the thought that the social and political orders must find ways to support intellectual and artistic work in a violent and degraded world of short commons in which such work and those who do it are otherwise likely to get short shrift.

We Catholics are not utopian in our approach to positive law or politics. There is no immediate prospect that positive law governing the ownership of intangibles will wither away, and there are genuine goods that it supports. Thus, we need not advocate revolution or disobedience—even principled disobedience—to positive law about these matters already in place. What we can and should do first is gain clarity about what the Catholic tradition has to offer on these matters (what I have written here is no more than a first step). Second, we should consider whether there are other ways in which, in a devastated world such as this, the goods supported by intellectual-property law might be nurtured. Third, if there are other ways that are not subject to the kinds of critique just offered, we should advocate them in principle and support instances of them when they appear and seem practicable.

Are there other ways in which the good work done by intellectual-property law might be undertaken? Certainly. There is a deep affinity between the Catholic tradition on property and the patronage system for the support of those engaged in intellectual and artistic work. Virtually all artistic work in Europe until the Reformation was supported by church patronage. Under that system, what is discovered or made by intellectual or artistic workers (words, images, sounds, proofs, and so on) need not belong

to those who do the work to discover or make it. Rather, they are supported by patrons in doing that work, and ideally what they make becomes part of the commons. This was the usual way in which such workers were supported before the development of laws governing the principal forms of intellectual property (copyright, patent, trademark, trade secret, and so on). Those laws have an effective history of not much more than three centuries and have had deep and wide reach for much less time than that.<sup>26</sup> Yet such work has been done for most of human history and has been supported in other ways, mostly by patronage. Therefore, positive law that assumes the possibility and propriety of the ownership of intangibles is not the only way in which such work can be supported.

And not only this. The patronage system is not entirely dead even in the United States. Those whose work has principally to do with intangibles are often employed by universities, and it may be a condition of their employment that some among the fruits of their intellectual labors are not owned by them, but rather by their employer. This is quite often the case, for example, for curricular materials. Syllabi and other course-related materials are often owned and at the disposal of the educational institutions for which those who produce them work. In such cases (and there are similar instances in the for-profit corporate world), the patron is a corporate body and the discoverer or producer of intangible goods the recipient of corporate largesse. Admittedly, these instances do not altogether remove the intangible goods in question from the economy of ownership: typically, ownership is shifted from the corporate body to the individual. However, they do provide examples of how someone might be supported in doing the work she does without owning the results of her work.

Whether by individuals with resources to spare, for-profit corporations, or non-profit entities, moving patronage away from the economy of ownership may provide a model for Catholics to support intellectual work that is without some of the deep difficulties proper to the very idea of intellectual property. Of course, patronage is not without its own problems, but that is also true of all methods of supporting those whose work has to do principally with intangibles.

The recovery of a property-free patronage system for intellectual work is not the only thing we Catholics might advocate in this connection. When we observe theorists or activists calling into question either the desirability of intellectual property rights per se or the dramatic extension of those rights currently under way in most of the world, we might treat them as potential allies and examine closely whether what they argue or do can be

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26. *See generally* JOSEPH LOEWENSTEIN, *THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* (2002) (discussing an authoritative history of the early development of copyright law).

actively supported by Catholics.<sup>27</sup> After all, we live in a time of ferment about the scope and bite of such things as copyright law. There are strong pressures to strengthen and extend such laws, while at the same time there are technological and theoretical solvents corroding the force of such laws. Catholics who want to think about such things ought to support reductions in the scope and force of such laws in general and do so in light of the convictions we have about the importance of the commons and the firm location—as a matter of principle—of intangible goods therein. We might find allies in unexpected places in seeking these goals.

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27. *See generally* GARY HALL, *DIGITIZE THIS BOOK!: THE POLITICS OF NEW MEDIA, OR WHY WE NEED OPEN ACCESS NOW* (2008) (discussing a radical critique of intellectual property rights); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) (discussing a modern critique of intellectual property rights); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2003) (discussing another modern critique of intellectual property rights). For the work of activists, see the recent careers of Julian Assange and Aaron Swartz. The latter's suicide early in 2013 has made him a martyr in the eyes of some opponents of intellectual property rights.