Can we consider life as property?

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Axel Tiesen, writing in a journal article in 1914, lamented the fact that although ‘we have reached the point where products of your mind, whether literary, musical, artistic or inventive have been invested with the legal quality of property’, life, being the source from which ‘all other values spring’, has no property value. This essay wants to take a step back from Tiesen’s article and ask the more fundamental question of whether life can be considered as property. Tiesen’s lamentation that life, despite being the source from which ‘all other values spring’, has, by itself, no property value is true insofar as he is thinking about life as being private property. In a by-gone religious age, life was a divine property and in a post-religious age, life is best conceived of as a communal property. In either case, it is of no private value.

1. INTRODUCTION

Axel Tiesen, writing in a journal article in 1914, lamented the fact that although ‘we have reached the point where products of your mind, whether literary, musical, artistic or inventive have been invested with the legal quality of property’, life, being the source from which ‘all other values spring’, has no property value. This essay wants to take a step back from Tiesen’s article and ask the more fundamental question of whether life can be considered as property. This essay will begin by delineating the parameters of its investigation, especially with regard to the scope of the word ‘life’. Then, this essay will use a Lockean conception of property as its philosophical starting point before moving on to consider whether the modern ‘death of God’ has made the Lockean conception of the proprietorship of life irrelevant. If it has, the question to ask then is whether the Lockean conception can be salvaged and modified to suit modern realities. This essay will argue not only that the Lockean conception can be modernized, but that it must be modernized in the absence of any other viable alternatives.

2. WHAT IS LIFE?

Western philosophy has, at least since Descartes, conceived of the human person as consisting of physical and non-physical substances. According to Descartes, it is essential to everything physical that it has spatial extension, and being spatially extended implies having parts. As the body has spatial extension and is divisible into parts, it is accordingly classified as the physical component of the human person. On the other hand, as we cannot conceive of the mind as having those characteristics, it is accordingly classified as non-physical. This is not dissimilar to the anima–animus distinction drawn by ancient Greek philosophers: anima refers to the physical atoms that make up the body while animus refers to the rational, incorporeal substance that infuses the body and enables humans to have the capacity for self-reflection, a quality which Greeks believed to be lacking in animals. Human life comes into existence when there is an infusion of the animus, the non-physical substance, into the anima, the physical substance.

In this essay, the word ‘life’ will be used solely in reference to the mental element, or the animus, of the human person for two reasons. First, compared with the proprietorship of the human mind, the proprietorship of the human body has already been the subject of much judicial and academic

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2 This phrase is, of course, an oft-repeated quote from Friedrich Nietzsche, The Gay Science (Walter Kaufmann trans, 1974 ed) 181.
Can we consider life as property?

For a Man, not having the Power of his own Life, cannot, by Compact, or his own consent, enslave himself to anyone, nor put himself under the Absolute, Arbitrary Power of another to take away his life, when he pleases.\(^{11}\)

To Locke, a distinction is thus drawn between alienable and inalienable rights. Private property entails the right to alienate, by selling, giving or even destroying, what is owned.\(^{12}\) In the words of Laslett, private property is ‘something which a [human] can conceive of as distinguishable from himself [or herself]’.\(^{13}\) Consequently, we cannot alienate any part of our personalities that are constitutive of, and essential to, who we are, but we can alienate that with which we have chosen to mix our personalities. Under Locke’s labour theory of property, by mixing ones labour with some resources nature provides for the common use of the human species, one is entitled to appropriate not only the product of the earth and ones toil, but also the land one works upon.\(^{14}\) Things which are appropriated in this manner are considered to be private property because they remain accidental, or non-essential, to the human person and are therefore alienable.

This is to be contrasted with the parts of our personalities that are considered to be essential, in the sense of being integral to and constitutive of who we are, and thus are inalienable. The more essential it is, the more inalienable it is. For example, selling ones labour does not carry the social condemnation that is attached to selling ones sexuality because sexuality is considered an essential part of human personality and is thus not to be treated as a private property or a vendible commodity.\(^{15}\) If sexuality is considered essential, ones mind, being the seat of ones consciousness and vitality, will surely be as essential as sexuality, if not more.

If proprietorship of the mind cannot be vested in the individual, owing to its inalienability, what better, and safer, place is there to vest it if not in God? We
therefore end up with a situation where I have possession of life but God has proprietorship over it. Without intending to trivialize this point, we can nonetheless say that we hold our lives on lease from God. It is perfectly logically consistent to hold that one can possess an inalienable right to something which is not one’s property. In fact, it would be logically inconsistent to hold that one possesses an inalienable right over one’s property, for alienability is well-entrenched in our jurisprudence as an indispensable ingredient of proprietorship.

Hence, the reason why we cannot alienate our lives at will is none other than the elementary property law principle of nemo dat qui non habet. One cannot voluntarily renounce one’s conscience and consciousness because they are not one’s property. To be sure, there are a range of situations where people have argued for a right to renounce these mental faculties: suicide, euthanasia and drug-taking.

4. DEATH OF GOD AND RISE OF HUMANS

As Nietzsche’s prophecy of the impending death of God\(^\text{16}\) appears to be reaching its fulfillment, at least among the Western intelligentsia, the tenability of Locke’s model of the ownership of life will inevitably be called into question. The transcendental site which was thought to be a safe and secure place to vest the proprietorship of life has now been fractured by modernity. Life is well and truly bona vacantia.

In the absence of a transcendental proprietor, the most obvious site in which the proprietorship of life can revert to is humans themselves. This emancipation of natural rights from natural law is exactly what Nozick is trying to achieve in Anarchy, State and Utopia:

A person may choose to do himself…the things that would impinge across his boundaries when done without his consent by another…Voluntary consent opens the border for crossings. Locke, of course, would hold that there are things others may not do to you by your permission; namely, those things you have no right to do yourself…My nonpaternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third party not to do or allow it.\(^\text{17}\)

As the sub-narrative of natural rights disentangles itself from the meta-narrative of natural law, there is a concomitant privatization of rights, including the right to life. For example, Hart writes that ‘rights are typically conceived of as possessed or owned by or belonging to individuals’, ‘as a kind of moral property of individuals’.\(^\text{18}\) Life is thus conceived of as a private property and is therefore alienable.

By vesting proprietorship of life in the individual, Nozick presents a radically libertarian position whereby anyone can do anything to his/her life. Taken to its logical conclusion, this position will illegitimize any laws restricting the voluntary surrender of one’s consciousness; it follows then that there will be no basis for any laws controlling euthanasia, illicit drug-taking or the sale of one’s mind for scientific experimentations. Nozick’s position will, as a matter of course, open the floodgates to a whole range of issues which society might, at the moment, have no stomach for.

There is, at least, one other huge philosophical problem raised by the vesting of the proprietorship of life in human persons themselves: the ownership of infants. While Locke posits that we own what we produce, he deftly circumvents the problem of the ownership of infants by arguing that God retains proprietorship over all lives,\(^\text{19}\) and parents are mere custodians of the lives of their infants until they reach maturity.\(^\text{20}\) If God were to be eliminated and the proprietorship of life be vested in the individual himself/herself, this would raise intractable problems: At which point do you acquire ownership of your mind? If your parents produce you through intercourse, or if a scientist produces you through a test-tube, will you not then be owned by your parents or the scientist?

5. WHAT ABOUT SOCIETY?

If the proprietorship of life cannot be vested in humankind, we then have to look for a new locus in

\(^{16}\) Nietzsche, above n 2, 181.


\(^{18}\) H L A Hart, ‘Are There Any Natural Rights?’ (1955) 64 The Philosophical Review 175, 182 (emphasis in original).

\(^{19}\) Locke, above n 10, 197.

\(^{20}\) Ibid 199.
Can we consider life as property?

which life can be vested. To find that new locus, it would be wise to revisit Locke's theory and see what modifications can be made to it to make it more acceptable to present realities. Instead of throwing the baby out with the bathwater, I would suggest that we could easily substitute society in place of God in the Lockean scheme, whereby an individual will possess an inalienable right to his life but society will retain proprietorship over it. I will give two reasons to support its conceptual viability.

First, we are social products anyway. Dworkin has argued that the value of life must be understood in terms of natural and human investment in life. Natural investment implies that nature itself makes an investment in terms of natural resources when life is created and that investment increases in a linear way as the life continues. In the case of human investment, there is both the investment of the human whose life it is and that of the other people who invest time, effort and resources in creating and sustaining that life.21 On this view one has no right to squander this natural and human investment.

Second, this is not unlike modern democracy where everyone owns a part of everyone else. Democracy, viewed through the lens of proprietorship, is a system where there is ownership of the people, by the people, for the people. And where everybody owns everybody, one can be excused for thinking that nobody owns anybody.22 As a result, society as a whole can, as the ultimate proprietor of life, lay claim to certain features of ones personality and designate them as ones inalienable possessions and in so doing, hopefully achieve the original Lockean goal of ‘preserv[ing] and enlarg[ing]’23 the conditions for freedom.

6. Conclusion

Tiesen’s lamentation that life, despite being the source from which ‘all other values spring’, has, by itself, no property value24 is true insofar as he is thinking about life as being private property. In a by-gone religious age, life was a divine property and in a post-religious age, life is best conceived of as a communal property. In either case, it is of no private value.

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21 Harris, above n 9, 626. See also Ronald Dworkin, Life’s Dominion (1993) 213-4.
22 This ingeniously insightful observation has to be credited to Jean-Jacques Rousseau, The Social Contract (Maurice Cranston trans, 1968 ed) 59-62.
23 Locke, above n 10, 324 (emphasis in original).
24 Tiesen, above n 1, 59.
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