014

Locke’s Theory of Property at the Beginning of the 21st Century

Susumu MORIMURA

October 2005

http://cner.law.hit-u.ac.jp

Copyright Notice
Digital copies of this work may be made and distributed provided no charge is made and no alteration is made to the content. Reproduction in any other format with the exception of a single copy for private study requires the written permission of the author.
All enquiries to cs00350@srv.cc.hit-u.ac.jp
Locke’s Theory of Property at the Beginning of the 21st Century*

Susumu MORIMURA
Professor, Graduate School of Law
Hitotsubashi University

The following is a report of a presentation, titled “Proposition”, which I gave on 7 November, 2004, at the 43rd “Tetsugakukai” (Philosophy Society) Symposium entitled “Private property and justice - marking the tercentenary of Locke’s death and the bicentenary of Kant’s death”. After my proposition, Professor Takashi Kawamoto (Tokyo University) presented a proposition titled “Basis and responsibilities of tax---‘Connection’ of private property and justice?”. After this, there was a question and answer session. The oral style of presentation has been left as is.

I feel very privileged to be invited to this Philosophy Symposium “Tetsugakukai.” I believe the reason why I have been invited to present this “proposition” about Locke’s property theory is that I published a book called Locke Shoyuuron no Saisei (“The Rebirth of Locke’s Theory of Property”) in 1997. In fact, since that book was published, I have not been involved with Locke research. I did some “cramming” in order to prepare to follow up on that work for this presentation, and what I will now talk about is the result of that. If anyone would like to know in more detail my ideas about Locke, please read that book. Regarding the details in the book, there is almost nothing I want to change. For reasons of expedience, I shall abridge all titles of respect.

* This article first appeared in Japanese in Hitotsubashi Hougaku (一橋法学). It is reproduced here with the author’s and the publisher’s permission.
1. The significance of Locke’s political ideas has not diminished in the present age. If anything, his ideas are becoming more significant.

Three hundred years ago, John Locke died at the age of 72 on October 28, 1704, in Oates of Essex in the southeast of England. The political and social philosophy presented in his works *Two Treatises of Government* and *Letter Concerning Toleration* (both published in 1689), even today, at the beginning of 21st century, are often the focus of debate and interpretation. However, the phenomena that I will now touch upon are relatively recent developments.

In 1932, which fell on the 300th year since Locke’s birth, a young Michael Oakeshott, who would later become known as a conservative political philosopher, presented a paper titled “John Locke” in the *Cambridge Review* (Oakeshott [1932]). In that paper, Oakeshott takes up Locke’s *Essay concerning Human Understanding* and *Treatises of Government*. Oakeshott disregarded Locke’s talent as a philosopher, and negated the overall relevance of Locke’s ideas in the modern age. I first came across Oakeshott’s criticism in a book by Mikio Watanabe called *Hayek to Gendai no Jiyuushugi*. Watanabe quotes Oakeshott at length, so if Japanese readers are interested, please refer to the book (Watanabe [1996] p.171f). Here I shall only cite portions particularly concerning Locke’s political ideas:

Locke’s doctrines of toleration (a limited toleration), of liberty (a reasonable liberty), of individualism (not a fanatical individualism), of the sovereignty of the people (to be exercised sometimes) and of property, are the seeds from which modern liberalism sprang. […] But it is at least remarkable that at the present time the
The gospel of Locke is less able to secure adherents than any other whatever. […] And it appears likely that the fate now of this liberalism is to die of neglect. […] Democracy, parliamentary government, progress, discussion, and “the plausible ethics of productivity” are notions—all of them inseparable from the Lockean liberalism—which fail now to arouse even opposition; they are not merely absurd and exploded, they are uninteresting. […] Just now it [Locke’s liberalism] is not one which commands attention or indeed respect. (Oakeshott [1932], p.73).

This is how Oakeshott, in 1932, dismissed the contemporary significance of Locke’s liberal political philosophy. But what sort of “gospel” was Oakeshott thinking of to replace Locke’s ideas? Seven years later in 1939, Oakeshott published a collection called Social and Political Doctrines of Contemporary Europe. The political doctrines he deals with there (according to a commentary by the Japanese translator of his book Rationalism in Politics and Other Essays, Itaru Shimazu) are representative democracy, Catholicism, communism, fascism, and Nazism. Among these doctrines, representative democracy is part of the current of Lockean liberalism, but as for the rest, it would be quite difficult to say that any one of them has the support of many people. To us, who are living now at the beginning of 21st century, all of the constitutive elements of Lockean liberal ideas are far from uninteresting. Whether we agree with them or not, we cannot ignore them. The idea that the rights of individuals are inviolable, popular sovereignty theory based on the notion that the state’s legitimacy is derived from the will of its citizens, constitutionalism which asserts the necessity of systematically limiting the power of the state, religious tolerance, the system of private ownership—some of these ideas and systems are now seen as natural, while others are matters of heated controversy.
Nozick’s *Anarchy, State, and Utopia*, for example, revitalized discussion about Locke’s labor theory of property in addition to pointing out its ambiguities and problems. Prompted mainly by Nozick, for the past thirty years many careful examinations have been conducted of Locke’s property theory, from both historical and analytical perspectives (some of which are summarized in Morimura [1997]). Readers familiar with these studies today (particularly the analytical studies), may even understand Locke’s ideas of ownership better than Locke himself did, as he was not that critical of his own views.

However, in my view, many of these studies are helpful in pointing out gaps and difficulties in Locke’s property theory, but on the whole they tend to assume an overcritical stance, and I feel they underestimate Locke’s creativity and persuasiveness. Locke’s notion that the object of one’s labor can be owned by mixing it with that labor has been repetitively criticized, but in my opinion, the expression “mixing labor” is nothing more than a metaphor for productive activities.

Rather, the insight that since labor creates new value, the appropriation and exchange of resources is not limited to a “zero sum game”, but can become a “plus sum game” in which everyone profits, is much more important. Concerning this insight, no one (not even Locke himself in his earlier period, e.g. in *Essays on the Laws of Nature*) had made this point explicitly before *Two Treatises of Government*, and in the theories of property of Hume, Adam Smith, and Kant (all after Locke), this insight is absent. Moreover, Locke’s property theory has considerable persuasive power because it insists that in addition to his own body, man is aware of his rights to the products of his labor, but there are more than a few modern ethicists and political philosophers who speak as if no such awareness exists.

In light of this, it is quite difficult to evaluate how far theories of property and ownership have progressed since Locke. Locke was especially proud of his arguments regarding ownership.
He wrote unabashedly in a letter of August 25th 1703 to Richard King, “Propriety (sic), I have no where found more clearly explain’d than in a Book intituled (sic), Two Treatises of Government” (Locke did not confess to being the author until just before dying). I myself don’t think this self-evaluation to be that unreasonable.

Even if we separate ourselves for the moment from the issue of the theory of property rights, here in Japan there is at least one very important reason that we should research Locke’s political philosophy. The Constitution of the United States, which by way of American drafters had a large influence on the formation of the Japanese Constitution, is largely based on Locke’s political philosophy. For this reason, though it may not be to the same degree as American constitutional scholars or constitutional government historians, Japanese constitutional scholars should have interest in Locke’s Two Treatises.

To avoid being misunderstood, I should add that I do not think that all of the assertions and arguments in Locke’s philosophy are just as important today. From a contemporary perspective, there are some ideas among Locke’s works that are clearly wrong or are hard to accept. His assertion that the human mind is tabula rasa in Essay on Human Understanding, and his assertion that since atheists do not recognize morals they should not be the object of religious tolerance in his Letter Concerning Toleration are two such examples. The former has been proved wrong by modern biology and psychology, which has shown the importance of innate abilities and genetics. The latter assertion is something that originates in a religious moral framework that has dominated many societies even into the present age. As Parfit notes in the last section of Reasons and Persons, “non-religious ethics” is a comparatively new and undeveloped field (Parfit [1984], sec.154).

2. Locke’s property theory at the turn of the century: from A to Z
To prove that even now Locke’s property theory is indeed an issue of heated debate among philosophers and constitutional scholars, I would like now to give examples of works on Locke that give considerable attention to this issue. However, because I have only followed a small portion of the enormous amount of Locke research done, and because of time constraints, I will list only works that have published after my *Locke Shoyuuron no Saisei* (“Rebirth of Locke’s Theory of Property”), that is 1997. (Regarding research in the ten years or so prior to 1997, refer to discussions in Morimura [1997],[1999].) I will now cite eight books in order of publication date: *Jinkaku Chishikiron no Seisei—John Locke no Shunkan* by Masaki Ichinose (Ichinose [1997]), *John Locke no Shiminteki Sekai Jinken Chisei Shizenkan* by Nagamitsu Miura (Miura [1997]), *John Locke no Seiji Shakairon* by Toyomitsu Okamura (Okamura [1998]), *John Locke no Jiyuushugi Seijitetsugaku* by Kiyoshi Shimokawa (Shimokawa [2000]), “Justification and Legitimacy: Essays on Rights and Obligations” by A. John Simmons (Simmons [2001]), *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* by Jeremy Waldon (Waldron [2002]), *Launching Liberalism: On Lockean Political Philosophy* by Michael Zuckert (Zuckert [2002]), and *Kindai Rikken-shiso no Genzo –John Locke Seiji Shiso to Gendai Kenpougaku* written by Koji Aikyo (Aikyo [2003]).

As you can see, books such as these are being published at the rate of about one a year. The authors of the books in English above have published research books about Locke’s natural rights before. "From A to Z" is actually deceptive because I have merely taken initials from their names to come up with a catchy title. Among these books there are studies that do not treat “the philosophy of Locke” so much as they treat “Lockean” philosophy, which is a reconstruction of the former. But since the border between the two is sometimes hard to
Ichinose makes an interesting attempt to connect the concepts of knowledge and person in *Essay Regarding Human Understanding* to the labor theory of property and theory of punishment in *Two Treatises of Government*. I have not read Locke’s *Essay Regarding Human Understanding* carefully enough to speak with any confidence on this matter, but the first question I have concerning this work one concerning equivocation. Specifically, that the word “person” in *Two Treatises* is not the same as “person” (i.e. an entity possessing rights and duties) as it is used in *Essay Regarding Human Understanding* (See Shimokawa [2000], Chapter Two, three. In *Essay Regarding Human Understanding*, the word “body” is often used, and in *Two Treatises* the word “person” is often used in that sense, and as in the sense of the possessor of rights or obligations, “man”, and not person, is used). My second comment is that the author seems to neglect the importance of the natural character of property rights and exaggerates the necessity of “agreement”.

Miura discusses Locke’s property rights in chapters titled “natural rights and property rights” and “natural rights and different ethnic groups” in his book, and Okamura discusses Locke’s property rights in a chapter called “property” in his book. They are different in that Miura emphasizes class restrictions in Locke’s theory and Okamura emphasizes the relative relationship with Filmer, yet both examinations are mostly from a socioeconomic perspective, and while the influence of Macpherson’s *Political Theory of Possessive Individualism* is apparent, little of the analytic research of Nozick and later is utilized.

Shimokawa, in his book, conducts thorough analytical interpretive research, and examinations concerning property rights take up over half of the book. Shimokawa meticulously discusses each argument behind the justification of individual ownership rights. I agree with the majority of it, but where it differs widely from my point of view is that he does
not think that the creative nature of labor value should be seen as part of the argument to justify property rights (Shimokawa [2003] Chapter Three, fn.33 and corresponding text). I still think that Locke’s insistence that labor creates values in the latter part of the chapter “On property” (after Section 40) is difficult to understand unless it is a basis of argument for property right justification.

Simmons’s collection of papers I will introduce next deals with Locke’s private property as a natural right in the last three papers among 12. Simmons supports Locke’s property theory by answering frequent criticisms to the effect that “although Locke’s primitive acquisition theory was meaningful in his age, it has lost its significance because there is no un-owned land now” and by insisting that Lockean “historical title” theory may be meaningful for righting past wrongs, such as the looting of land from Native Americans.

Next, Waldon’s book puts emphasis on the egalitarian character of Locke’s political philosophy overall and at the same time cast doubts on modern non-religious liberalism by stressing how deeply Locke’s political philosophy was influenced by Christian elements. In a chapter titled “Disproportionate and Unequal Possession”, taken from Section 50, Book Two of Two Treatises of Government, he particularly makes a point of the religious character of Locke’s labor theory of property. According to Waldon, Locke’s labor property theory is connected with two aspects that he says are inseparable from Locke’s theological inclinations: 1) “the teleology of the creation of natural resources”, and 2) “the special significance of labor in relation to that teleology” (p.159 of ch. 6, Waldron [2002].) Concerning the first point, in Section 26 of Book Two of Two Treatises, Locke states, “The earth and all that is therein is given [by God] to men for the support and comfort of their being.” Waldon insists that securing support and comfort for their being is not just a right, but a duty to God. Point two is based on such statements as “In the Sweat of thy Face thou shalt
“eat thy Bread, says God to him” in Book One, Section 45 of Two Treatises (emphasis in original; same below). He is saying that diligent labor (the typical example being farming) is a duty that God has commanded.

However, as a matter of historical fact, though it cannot be denied that Locke’s political thought (at least on the surface) had religious elements to it, I believe that it is possible to translate most of the elements that comprise Locke’s philosophy into secular language without losing its intent. Regarding the two aspects of Locke’s theory of property, the first can be reworded as “For the support and comfort of human beings, the use of natural resources is indispensable.” And the second can be restated, “Without the added value of labor, a comfortable life for human beings would be impossible.” Even in their non-religious, altered forms, these two assertions in and of themselves would be hard to disagree with, even for people who do not hold the same Christian faith as Locke.

Speaking generally—and this applies not only to property theory—Locke’s political philosophy is not merely formed from one or two original ideas. Quite the contrary, it is made up of numerous premises and arguments. It is true that they include some elements peculiar to Christianity or religious belief. The majority of these elements, however, can be replaced by secular equivalents leading to the same conclusions. And it is my opinion that such a secular reconstruction would actually strengthen them.

I would now like to move on to Zuckert’s work. This collection of papers stresses the modern nature of Locke’s liberalism and its influence on the American Revolution, breaking with the trends of the “Cambridge school”, which has been quite influential recently in the field of the history of political philosophy. However, this book does not stop at philosophical history. In three papers in the fourth section, “Locke in Late Modernity”, Zuckert holds that Lockean liberalism has the inherent strength to withstand contemporary critiques of
liberalism (he lists MacIntyre as a representative “human rights” critic), and calls for its reinstatement. What Zuckert emphasizes most in this argument is Locke’s idea of natural rights based on the right of self-ownership. He compares this with the rights theories of contemporary American philosophers John Rawls and Alan Gewirth.

According to Zuckert, in Rawls’ version of liberalism, a right is not a fundamental concept, but one that is born from “justice as fairness” among people who share common practices. As a result, this suggests that people who live in accordance with different practices have no rights, which is quite a counterintuitive conclusion. Contrary to this, Locke’s idea of the right to self-ownership (the exclusive right to one’s own person), based on a self-awareness inseparable from the body and extended in time, is far more in accord with our intuitive sense of justice. Rawls’ whole argument of “justice as fairness”, from the start, depends on the implicit assumption that an individual has rights. It is based on reasoning such as this that Zuckert judges Locke’s theory of rights to be sounder than that of Rawls (Zuckert [2002], ch. 12).

Zuckert does hold Gewirth’s theory of rights in higher regard than that of Rawls. To begin with, Gewirth’s ideas have much in common with Locke’s, and on this point it, he says, Gewirth’s work is more useful for understanding Locke. However, Zuckert nevertheless recognizes some differences between their respective theories of rights. First, while the possessor of rights in Locke’s philosophy is characterized by a “self” which extends temporally to the past and future, the possessor of rights in Gewirth’s philosophies is characterized by rational agency. While in Locke’s philosophy it is thought that self-ownership is treated somewhat off-handedly, i.e. as a given premise, Gewirth goes so far as to recognize in it basic goods that are necessary for the realization of the agency of the right-bearer. According to Zuckert, in these differences, Locke’s philosophies are
superior because the awareness of rights to one's body is more fundamental than those to abilities as an agent. We do not consider our lives our property simply because they are means or premises for action. Gewirth did not succeed in his proof that any rational person should recognize the positive claim-right to “basic goods”, Locke, by reason of preventing a decline in living standards of non-owners due to the privatization of natural resources, was able to justify social assistance to a certain extent. (Ibid., ch. 13, esp. pp.353-361).

I, for the most part, agree with Zuckert’s high evaluation of Lockean self-ownership theory, though there are certainly a large number of people who do not. However, there is no denying that Locke’s right to self-property theory is much closer to the ordinary citizen’s awareness of rights than the theories of rights of modern philosophers.

The last book I will take up is a book written by Koji Aikyo. Actually, the main purpose of this book, as is clear from the title to those who read Japanese, is to historically clarify Locke’s constitutionalism, and mention of Locke’s property theory is scarce. Despite that, one may ask why I would choose to take up such a work here. To put it simply, it is because in this book are criticisms of my book *Locke Shoyuuron no Saisei* (“Rebirth of Locke’s Theory of Property”). The author criticized my libertarian reconstruction of Locke’s property theory on two accounts. The first issue concerns a less than positive evaluation concerning my constitutional theory of property rights, where Aikyo says, and I quote with liberty, that if the preamble of the Japanese Constitution and the intent of its enactors are to be premises, then the hurdle for justifying market-based property rights is far from high (Aikyo [2003] p.37). Concerning the second criticism, although I said I would avoid what Rorty calls “historical reconstruction” and adopt a “rational reconstruction”, Aikyo asserts that my work lacked “methodological consistency” (Ibid, p.38).

I accept the latter criticism. It is true that though in the first chapter in which I clarified my
methodology and proclaimed to adopt “rational reconstruction” instead of “historical reconstruction”, in the following chapters I became less conscious of my own methodology, and there are certain places where I unconsciously left room for doubt as to whether I continued to make that distinction. I should have used both these methods in a more explicit manner.

However, the former criticism is something which I cannot concede. Regarding the intent of lawmakers, the majority of the drafters of the Constitution of Japan at GHQ and the members of the Imperial Diet that revised and adopted the Constitution may not have been natural-rights libertarians. However—and this applies not just to the Japanese Constitution—thought the intent of the lawmakers is considered when interpreting articles of law, intent is not something that provides any guidelines for interpretation beyond that. And I think many Japanese legal scholars would probably agree with this. Furthermore, unlike ordinary legal articles, the articles of the Constitution are extremely vague, leaving room for wide interpretation. If one looks at the articles, they allow for a welfare state on one hand, and to the same degree on the other a classical liberal state with a small government. We do not have the time here to discuss the interpretation issues of the Constitution, but the assertion that Locke’s property right system is compatible with the Constitution of Japan makes more sense than the present interpretation that the existence of the Self-Defense Forces is constitutional. Even if the articles of the present Constitution are taken as givens, I think interpretation in accordance with classical liberalism is possible, and even desirable.

3. Explicit and implicit meanings in Locke property theory

Locke’s property theory not only justifies private property rights at an abstract level, but
also provides us with a tool for discussing topics which are important today concerning the property rights system. In the following, I would like to touch on two topics: taxation and intangible property rights.

1. The tax system: Taxation is a system under which governments appropriate the property of their citizens and residents, and this should be an unavoidable issue for any discussion of property rights.

It is sometimes said that killing one person is called murder but killing many is called war; but in a similar vein, we might say that forcibly taking one person’s property is called robbery, but stealing systematically from many people is called taxation.

Locke takes the rights of a state to levy taxes for granted in *Two Treatises of Government*, but on the mode of taxation he does not go into explicit detail. (As far as I know, the most detailed discussion of Locke’s view of taxation is in Simmons [1993], 95-98). This is what Locke says towards the end of Chapter 11, “Of the Extent of the Legislative Power” of the second book of *Two Treatises*:

It is true governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it [protection, according to Morimura]. But still it must be with his own consent - i.e., the consent of the majority, giving it either by themselves or their representatives chosen by them; for if any one shall claim a power to lay and levy taxes on the people by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may
by right take when he pleases to himself? (Section 140)

[The legislative] must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies. (Section 142)

In short, Locke does recognize the validity of levying taxes, but for that he imposes two conditions:

i. Amount of taxation must be in proportion to share of protection.

ii. Tax imposition requires the consent of a majority of representatives chosen by the people. (Locke insists that people who agree to participate in a political society also agree to the majority decision. Cf. Section 96.)

Of these, the second condition, decision by democratic majority, is seen as reasonable by those who espouse democracy, but the first condition, that the amount of taxation be proportional to the benefits of protection, tends today to be actively denied. Since the levying of taxes is often thought of not just a means of covering the costs of governance, but considered a means for the redistribution of wealth for egalitarian purposes, a graduated tax to that purpose tends to be thought fair. However, from a classical liberal point of view like that of lock Locke, it is not the duty of the government to redistribute wealth beyond that to relieve hardship for which it is responsible. Therefore, in accordance with the first condition, the burden of taxation is fair only when the tax is in proportion to the benefits received by each individual derived from the activities of the state. And while one may not equate that benefit with income, the two are closely related. The reason is that, as the contemporary classical liberal and legal scholar Richard Epstein states, “there is no necessity in avoiding the possible correlation between income (or wealth) levels and benefits received. In
voluntary markets the tastes of private parties are highly dependent upon income levels. A similar assumption seems equally plausible in the context of public good.” (Epstein [1985], p.297. For a more detailed defense of proportional taxation and concrete suggestions, see Epstein [1987], [2002]). Granted, under a tax system in which taxes are proportional to income, there may be the criticism that it is not fair in that it favors people who place a higher value on happiness not derived from money over those who do, but because of the difficulty (impossibility?) of assessing that subjective happiness and reasons of simplicity of management, one must admit that a proportional taxation system is the best solution.

In Locke’s England, the main forms of taxation were land taxes, customs duty, and commodity taxes, and income and inheritance taxes, which were later to play very important roles, were unknown at the time. These taxes were introduced at the end of the 18th century. However, if Locke’s philosophy were applied to the modern tax system, income or consumption tax would certainly be at proportionate flat rates. The difference between income tax and consumption tax is whether personal savings are subject to taxation or not. If one takes the point of view that assets bring real profit to the individual only when used, then only consumption should be taxed. But conversely, if savings bring in one way or another profit to the individual, then income should be taxed. On this point, I feel that either argument can be made fairly persuasively, and for this reason I reserve judgment.

2. Intangible Property Rights

Locke’s theories of ownership in Two Treatises of Government are often cited in debates in America over copyrights, patents, and other intangible property rights (commonly known as “intellectual property rights”). The reason is that, though Locke himself deals only with
tangibles in his argument—and even that mostly deals with rights to land—and makes no mention of intangible property rights, it is thought that the bases for Locke’s justification of personal property rights can also be applied to intangible property rights. For example, the labor theory of rights, which says that an individual has rights to objects to which through his labor he has created new value, does add moral weight to the system of intangible property. Unlike land and natural resources, which physically exist before their discovery or processing by humans, intangible property is created from nothing by invention or creation. For this reason, intangible rights would seem to fulfill the “Lockean proviso”, (“enough and as good left in common for others”, or a “sufficiency constraint”) the principle of not reducing another’s share, more easily than those to tangibles; hence, the right to intangible property seems even more easily justifiable than individual property rights to land or resources.

Recently, however, some people have conversely begun to use Locke’s theory of property rights to criticize the powerful system of intangible property rights, and I count myself among these people. In the last chapter of Locke Shoyuuron no Saisei, (“Rebirth of Locke’s Theory of Property”), I assert that since intangible property rights are rights that violate the right to one’s person (self-ownership), which is at the root of Locke’s property theory, they cannot be easily justified. To quote from my own book:

Intangible property rights are rights that exclusively control expressions or ideas that have no physical borders, and so they threaten the rights of self-ownership of the people who use these expressions or ideas. Rights to personal articles or land do not intrude upon the range of activities of another. No matter what someone does on public land or in one’s own house, those rights do not restrict that behavior. Copyrights, on the other hand, go so far as to forbid what one might do
using only one’s body and chattels on one’s own land. (Morimura [1997] p. 254)

This does not mean, however, that from the standpoint of Locke’s theory of property, intangible property rights cannot be recognized at all. It can be justified in a kind of consequentialist way by virtue of providing incentive for intellectual activities. In that case, though, the rights to intangible property cease to be inviolable, natural rights which exist independently of government. Locke himself seems to have accepted this idea. Locke writes of the “Licensing Act” in correspondence that the copyright is not a natural right, but a right to be established politically. (For details, see Morimura [1997], Chapter Six, two)

Thomas Jefferson, who was a follower of Locke’s natural rights theory, believed that rights to intangible property were not natural rights but political rights to be recognized as incentives for creation. We have a letter written by Jefferson to Isaac McPherson dated August 13, 1813, which is an extremely valuable source for understanding Jefferson’s thoughts on the matter. I shall quote only a small excerpt here:

If a person keeps an idea to himself, he can have it exclusively, but once the idea is published, it belongs to everybody and the receivers are not exceptions.

By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power
called an idea, which an individual may exclusively possess as long as he keeps it
to himself; but the moment it is divulged, it forces itself into the possession of every
one, and the receiver cannot dispossess himself of it. (Jefferson [1998], p.1291. It
should be noted that what Jefferson is thinking of are not copyrights but a patent
related to an invention.)

Here, for the reason that “one cannot exclusively posses an idea once divulged,”
Jefferson denies the “natural” nature of intellectual property. Locke, in several passages in
*Two Treatises*, appears to indicate that he took for granted that property can only be
controlled exclusively. (Book Two, Sections 32, 138). However, though it may be true that
ideas cannot be owned exclusively, since it is possible for intangible property right laws to
put into force systematic exclusivity, we cannot conclude that individual property rights to
ideas are impossible.

Returning to the topic of contemporary application of Locke’s arguments to copyright
laws, Wendy Gordon calls for a broadening of copyright restrictions and says that when one
considers that intellectual creation changes the world in which people live, and makes
certain ideas and works of art a part of their users, the “Lockean proviso” guarantees the
public the freedom to use existing works for self-expression. (Morimura [1997] p.258f.)

Also, Seana Valentine Shiffrin stressed the fact that the privatization of resources once
primitively shared is acceptable because only through that privatization can the value of
those resources be realized (for example the value of land dramatically increases when
someone exclusively works it), and says that unlike tangibles, intangible intellectual
products increase more in value when they are publicly released and widely used that when
they are monopolized, so justification of intellectual property rights is difficult. (Shiffrin [2002].
See also Morimura [2003]). William Fisher also pointed out various difficulties when Lockean labor theory of property is applied to intellectual property rights. For example, what kinds of activities are accepted as “intellectual creation”? To what extent can intellectual property rights restrict the uses of non-right-holding users? (Fisher [2002], pp.184-9)

The reality that Locke’s property theory is often brought up to either support or criticize intangible property rights proves the richness of Locke’s arguments.

Just by looking at the above examples, it becomes perfectly clear that Locke’s ideas are not some heritage of the past that belong in a museum, but provide us—even people who know little of Locke’s philosophy in other fields or people who are unfamiliar with English law and politics of his time—with an important and rich source of ideas when thinking about property rights today. If I have been able to show this, then this report has at least minimally served its purpose.

Bibliography


Ichinose, Masaki [1997], Jinkaku Chishikiron no Seisei——John Locke no Shunkan, University of Tokyo Press.

Shimokawa, Kiyoshi [2000], *John Locke no Jiyuushugi Seijietsugaku*, University of Nagoya Press.

Miura, Nagamitsu [1997], *John Locke no Shiminteki Sekai JinKen Chisei Shizenkan*, Miraisha

Morimura, Susumu [1997], *Locke Shoyuron no Saisei* (“The Rebirth of Locke’s Theory of Property”), Yuhikaku Publishing.


Morimura, Susumu [2003], “Gendai Zaisanken-ron no Saizensen”, in *America-hou* [2003–1] (a review of Munzer[2002]).

Watanabe, Mikio [1996], *Hayek to Gendai no Jiyuushugi*, Shunjusha Publishing


Jefferson, Thomas [1984], Writings, The Library of America.


The Lockean Theory of Property at the Beginning of the 21st Century

Morimura, Susumu

Contrary to Michael Oakeshott’s dismissive evaluation made in the tercentenary year of Locke’s birth (1932), John Locke’s theory of property, which was expounded in his Two Treatises of Government (1689), has not yet lost its relevance today, rather it became a focal point in contemporary discussion on economic justice and property rights. The revival owes much to Robert Nozick’s examination of Locke’s labor theory of property in his Anarchy, State, and Utopia (1974). After briefly reviewing 8 recent books on Locke’s political
theory, especially his theory of property, published in 1997-2003, the author shows Locke’s remarks on property rights shed light on such important problems as principles of taxation and foundations of intellectual property.