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Chapter Eleven A Theory of Property

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Chapter 11

A Theory of Property

John Locke is the final figure to be treated in any detail in this book, with this chapter devoted to his *Two Treatises of Government* published in 1689. As you may recall from the Preface, this project of mine began with Locke, and so I find that this book's themes come together in the *Two Treatises*' influential theory of property, as well as in this work's sponsorship and its historical impact. I begin the chapter with the mystery surrounding Locke's writing of the *Two Treatises*. The intrigue illustrates the troubling side of learning's sponsorship, which almost costs Locke his life and raises important questions about sponsorship influences on his book. I go on to apply Locke's theory of property, set out in the *Two Treatises*, to what I have identified as the intellectual properties of learning. This allows me to further highlight the individual and collective property rights involved in learning, and in ways that set it apart from other human endeavors. And finally I hold up the example of the Locke scholar, James Tully, to demonstrate what strikes me as a remarkably responsible exercise of learning's right of use. Tully continues to adeptly use, as I will show, what he has learned and made of Locke to help others redress the direst consequences of this philosopher's theory of property.

The Two Treatises of Government

Over the course of his seventy-two years, Locke benefited from the three types of sponsorship that have played a part in this history up to this point, namely, institutional

endowment, personal patronage, and society membership. Locke was, first of all, a scholarship student, from his early days at Westminster School through the better part of his maturity at Christ Church in Oxford, only losing his royal fellowship at the age of fifty-two as a result of his involvement in anti-monarchist politics. Locke's political life began in 1667 when he found a generous patron in Lord Shaftesbury, a great landholder and Whig politician, who involved Locke in colonialism, slavery, and conspiring against the king. In 1668, Locke was elected to the Royal Society of London, for which he proved an inept researcher of barometric pressure, but did help to see through the Society's posthumous publication of Robert Boyle's *The General History of the Air* in 1692, in which he was able to include his semi-meticulous weather reports from Oxford, 1667-1683.

The university and the patron are of most interest on this question of the *Two Treatises*. The story behind the book brings the scholarly repose of Locke's Oxford fellowship into sharp contrast with the heated politics of Shaftesbury's patronage. It is complicated by how well its author obscured the book's origins. What is certain about the *Two Treatises of Government* is that it was licensed for publication in London by J. Fraser on August 23, 1689. Such licensing took place under an extension of the 1662 Act for Regulating Printing, which was part of the crown's ongoing efforts, as noted earlier, to combine press censorship and patronage by granting monopolies to members of the Stationers' Company. The book was printed for the London bookseller Awnsham Churchill (located at the Black Swan in Ave-Mary-Lane by Amen-Corner) with a publication date of 1690 and without an author.

No preliminary notes or drafts exist for the *Two Treatises*; no references to the

writing of the book have been found in Locke's letters and papers, as there are for his other books.¹ Nor does he explain at any point the mystery introduced in the book's Preface: "Reader, Thou has here the Beginning and End of Discourse concerning Government; what Fate has otherwise disposed of the Papers that should have filled up the middle and were more than all the rest, 'tis not worth while to tell thee."² Locke only acknowledged his authorship of the *Two Treatises* (and others of his anonymously published works) in his last will and testament.³

The book was published on the heels of the Glorious Revolution of 1688, which brought William of Orange and Mary to the British throne on February 13, 1689. In the Preface to the *Two Treatises*, Locke claims that the book is "sufficient to establish," as he puts it, "the Throne of Our Great Restorer, Our present King *William*; to make good his Title, in the Consent of the People, which being the only one of all lawful Governments, he has more fully and clearly than any Prince in Christendom."⁴ This is to make the book a manifesto for "the true original, extent, and end of civil government" (to cite the subtitle of the second treatise) and a guidebook for the Glorious Revolution.

What has since been discovered, or rather surmised – given Locke's successful cover-up – is that the *Two Treatises* contains more than a few clues, including Locke's secretiveness about it, to its earlier composition during the exceedingly dangerous times

¹ See also Peter Laslett, "The English Revolution and Locke's *Two Treatises of Government*," *Cambridge Historical Journal* 12, no. 1 (1956), 47.

² The *First Treatise* ends in mid-sentence with asterisks – "From Adam *****" (1.169).

³ John Locke, "Will," *Correspondence of John Locke*, ed. E. S. de Beer, vol. 8 (Oxford: Oxford University Press, 1989), 425-427, with more on this in the next chapter.

⁴ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 155. Henceforth, when I cite from this work, I will include the treatise and paragraph number immediately after the text.

of the Exclusion Crisis around 1680.⁵ The story begins during the latter half of the 1660s, when Locke was growing weary of Oxford's prevailing scholasticism, given to medieval disputation without end or import, or as Locke puts it in the *Essay*, the "running out of disputes into an endless train of syllogisms."⁶ This may help explain his willingness to take up the invitation of Anthony Ashley Cooper, later the First Earl of Shaftesbury, to join his household in London in 1667, first as a physician – involving the daring draining of his lord's hydatid cyst – and then as a political advisor.⁷ During his time with Shaftesbury, Locke retained his Royal Fellowship at Christ Church, as well as his rooms at the college, retuning in 1675 to complete the requirements of a bachelor degree in medicine.

In his service for Shaftesbury, Locke helped him and his fellow Lords Proprietors of the province of Carolina to compose the *Fundamental Constitutions of Carolina*, first issued in 1669. It served to introduce our philosopher to American colonialism and the slave trade, with the *Constitutions* recognizing a freeman's "absolute power and authority over his negro slaves," although they were allowed a freedom of religion.⁸ In 1672, Locke followed his patron's lead and counsel by investing for a three-year period in the newly formed Bahamas Company, and then the Royal African Company (which held a

⁵ After World War II, a large store of Locke's papers were sold to the Bodleian Library by the descendants of Locke's cousin, Peter King, to whom Locke had originally willed his papers. The papers revealed some of his involvement in the political intrigues of the Exclusion Crisis. Peter Laslett presents a detailed case for the conclusion that Locke "actually wrote the book for Shaftesbury's purposes," in his lordship's struggle against Charles II around 1680, which makes the book "an Exclusion Tract, not a Revolutionary Pamphlet"; "Introduction," in *Two Treatises of Government*, 61.

⁶ John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Oxford University Press, 1975), 4.7.11

⁷ Later in life, Locke arguably found a second patron in Lady Damaris Masham, at whose Oates estate outside of London he spent his final years on returning from exile abroad in 1689 and with whom he shared philosophical interests (if not something more than that at an earlier point); see Jacqueline Broad, "A Woman's Influence? John Locke and Damaris Masham on Moral Accountability," *Journal of the History of Ideas* 67, no. 3 (2006): 489-510.

⁸ *The Fundamental Constitutions of Carolina: March 1, 1669*, Avalon Project, Yale University, online.

monopoly over the English slave trade until 1712), resulting in profits that Shaftesbury turned into a generous annuity for Locke.⁹ This Middle Passage profiteering strikingly contradicts the *Two Treatises*' opening line – “Slavery is so vile and miserable an Estate of Man” – as well as its property principle holding that “every Man has a *Property* in his own *Person*: This no body has any right to but himself” (2.27). In that opening line of pamphlet bluster, Locke accuses the monarchist Robert Filmer of recommending that the English people be enslaved by the divine right of kings, while remaining insensitive to his own part in the actual horrors of the Atlantic slave trade, and to the abolitionist implications of his stand on people having a property in themselves. It serves as another warning of learning's limits in realizing the ideals it labors to articulate, often leaving it up to others to find their full force and proper application.

During the 1670s, Shaftesbury was leading a movement to exclude the king's Catholic brother from the throne. By the end of the decade, Locke's patron was on the verge of insurrection, only to die from ill health, after escaping to Holland, in 1679. Four years later, Locke also fled to Holland, escaping arrest and the fate of Algernon Sydney, who was executed on the basis of his unpublished manuscripts in 1683. During the first year of Locke's exile, the Earl of Sunderland wrote to John Fell, Dean of Christ Church (whom you may recall from the previous chapter) to complain that Locke's studentship “was never intended for the maintenance and support of such as seek to overthrow the

⁹ William A. Pettigrew, “Free to Enslave: Politics and the Escalation of Britain's Transatlantic Slave Trade, 1688-1714,” *The William and Mary Quarterly*, Third Series 64, no. 1 (2007), 3, 5. Pettigrew points out that the Royal African Company was founded by Charles II, with his brother James having “vast holdings” in it; *ibid.*, 10. In Pettigrew's analysis: “Liberal institutions proved instrumental in escalating the worst brutalities of British imperialism. Lockean motifs operating in England, such as the sovereignty of Parliament, can be more directly implicated in the development of Atlantic slavery than slavery can in the increased interest in republican ideology in America less than a century later”; *ibid.*, 8.

government, and to bring the King's sacred person into contempt.”¹⁰ Locke was expelled in 1684, and his days at Oxford were over.

James II assumed the throne in 1685 on the death of his brother Charles, causing a revolt among the English that, under William of Orange's leadership, overthrew James II in 1688. William and Mary were placed on the throne in 1689 and only then did Locke feel it safe to return to London. Once back, this little-known 57-year-old unemployed scholar wasted little time in seeing not only the *Two Treatises* into print but also *An Essay Concerning Human Understanding*, which appeared under his name that same year. On top of that, a friend arranged to have Locke's *A Letter Concerning Toleration* printed anonymously in 1689, as well.¹¹

Lord Shaftesbury's patronage threw Locke headlong into the radical struggle for democracy in late seventeenth-century Britain. This shaped him as a political philosopher in ways that arguably shaped the world through the *Two Treatises*. Some judge it a work of considered political philosophy (reflecting in good part Locke's earlier Oxford life):

“Three hundred years after its publication,” writes James Tully, “the *Two Treatises* continues to present one of the major political philosophies of the modern world.”¹²

Others take it to exemplify his patron's commissioned pamphleteering, as if he had

“disinterred his Shaftesburyean tract and published it anonymously late in 1689,” as

¹⁰ Cited by Woolhouse, *Locke*, 208-10.

¹¹ Unbeknownst to Locke, his friend Philip van Limborch saw into print an English translation (by William Popple) of Locke's *Epsitola de Tolerantia* published in the Netherlands in April of 1689; Roger Woolhouse, *Locke: A Biography* (Cambridge: Cambridge University Press, 2007), 266-279.

¹² James Tully, “Rediscovering America: The *Two Treatises* and Aboriginal Rights,” in *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 137. Jeremy Waldron believes the *Two Treaties* not only stands among Locke's “mature” works and, as such, is “as well-worked-out a theory of basic equality as we have in the canon of political philosophy”; *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (Oxford: Cambridge University Press, 2002), 1.

suggested by John G. A. Pocock, a Johns Hopkins University historian.¹³

Locke may well have decided, on returning from his years of exile (1683-89) that the Glorious Revolution had created a place for the *Two Treatises* precisely because he knew it to be pitched in scope and ambition well above the largely vitriolic pamphleteering and lewd versifying that had swirled around the philandering crypto-Catholic Charles II in the late 1670s.¹⁴ That Locke became caught up in the firefight surrounding Charles may well have forged and tempered the Oxonian arguments, which he had begun to develop prior to meeting Shaftesbury, for a democracy founded on human rights and based on the consent of the people.¹⁵ The influences of Oxford and London on Locke speak to how learning fits in the world, to what it gains and risks as it is drawn out from under the cloisters and spires.

Still, it was always more than a matter of patrons leading the learned astray. Locke's was a period in which European imperialism was beginning to gain learned assistance in the colonial acquisition of flora and fauna specimens, historical artifacts, cultural icons, and art objects. In the ancient and new world universities, fine libraries and endowed colleges were to be built on the wealth extracted from sugar plantations and

¹³ J. G. A. Pocock, "The Myth of John Locke and the Obsession with Liberalism," in *John Locke*, eds. J. G. A. Pocock and Richard Ashcraft (Los Angeles: William Andrews Clark Memorial Library, 1980), 5. Maurice Cranston identifies Locke's book as "a revolutionary manifesto," and one which he finds "inferior to the [Hobbes's] *Leviathan*; it is not written as philosophy but propaganda – a party book against a party book" (referring to Locke's critique of Robert Filmer's *Patriarcha*); "The Politics of John Locke," *History Today* 2, no. 9 (1952), 621, 622.

¹⁴ Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and Politics from the Restoration until the Exclusion Crisis* (Cambridge: Cambridge University Press, 1987). The scurrilous verses circulated in manuscript form during the Crisis were only to be published in 1696 after the book licensing act lapsed (with more on this in Chapter 12); see Rachel Weil, "Sometimes a Scepter is Only a Scepter: Pornography and Politics in Restoration England," in *The Invention of Pornography: Obscenity and Origins of Modernity, 1500-1800*, ed. Lynn Hunt (New York: Zone, 1996), 125.

¹⁵ Before Shaftesbury entered his life, Locke composed at Christ Church a manuscript (which went unpublished until 1967) in which he does set out, if in a milder manner, democratic principles, including how "the magistrate's power" is "derived from, or conveyed to him by, the consent of the people" and that "man naturally [is] the owner of an entire liberty, and so much master of himself"; *Two Tracts on Government*, ed. and trans. Philip Abrams (Cambridge: Cambridge University Press, 1967), 122, 125.

human trafficking.¹⁶ What this imperial legacy means for the properties of learning and what we know about the world is something that we are still working through in the learned institutions that form part of its inheritance.¹⁷ What this history teaches is not that learning is inherently self-correcting with time and support, rather it suggests that learning is, at best, ever-correcting without end, but with moments of consensus and agreement. This could be said to follow from the intellectual property of (responsible) use, of which James Tully has something to teach us (in the final section of this chapter).

Of Property

The importance for my argument of Locke's ideas about property in the *Two Treatises* has to do with the timing and timelessness of his book. It appeared two decades before the British Parliament passed the first intellectual property legislation in 1710 (in which Locke played a lobbying role on behalf of learning, which is the subject of the next chapter). Yet the significance for this discussion of Locke's chapter on property has as much to do with how it remains a touchstone to this day for intellectual property jurisprudence. His book continues to be regularly cited, if somewhat less than every month, across a broad body of literature on copyright and patent law.¹⁸

¹⁶ As one who gained great advantage from spending time in the Codrington Library at All Souls, Oxford, let me cite from the historical note on its website about "a substantial legacy of £10,000 received by the College in 1710 from Christopher Codrington, sometime Fellow and governor general of the Leeward Islands. His family wealth principally derived from sugar plantations — worked by slaves — in Antigua and Barbados." As well see Craig Steven Wilder. *Ebony and Ivy: Race, Slavery, and the Troubled History of America's Universities* (New York: Bloomsbury, 2014).

¹⁷ See, for example, John Willinsky, *Learning to Divide the World: Education at Empire's End* (Minneapolis: University of Minnesota Press, 1998).

¹⁸ Between 2005 and 2010, the *Two Treatises of Government* was cited in the intellectual property literature forty-seven times; "Intellectual Property Collection," HeinOnline, Getzville, online. Let me offer two of the richer examples: In considering how a natural-rights theory of intellectual property can protect free speech interests, Wendy J. Gordon argues that a "Lockean concern with protecting the public from harm" offers a natural limit on "current intellectual property systems [that] give rights in excess of what a Lockean model would justify"; "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of

In the opening paragraph of the chapter, “Of PROPERTY,” Locke sets out the challenge that he addresses: “It seems to some a very great difficulty, how any one should ever come to have a *Property* in any thing” (2.25). It was to be Locke’s trick in the *Two Treatises* to, first of all, establish that the act of owning something needed to be explained and justified, and not just assumed, as it surely was with the divine right of kings. The second trick was to make ownership about having a property in something, rather than owning it outright and entirely. As for the “great difficulty” of explaining how this happens, he handles it by placing the origins of property rights within the scope of natural law, which can be amended by the consensual social contracts of communities, civil governments, moneyed economies, and other structures.¹⁹ This turn to natural law was seeing a revival during the early Enlightenment of Locke’s day. It had been championed centuries earlier by Thomas Aquinas, who treated natural law as Christian faith expressed through reason, with earlier roots of this concept traceable back to Plato.²⁰ Natural law is taken to reflect what is, at once, self-evident and reasonable about the world, while

Intellectual Property,” *Yale Law Review* 102 (1993), 1569, 1608; Benjamin G. Damstedt holds that “revisiting Locke for a theory of intellectual property has become vital” in establishing a more just patent system, for which he proposes what he terms “a Lockean fair use right” for drug patents to ensure greater equity of access to needed medications in the Global South; “Limiting Locke: A Natural Law Justification for the Fair Use Doctrine,” *Yale Law Journal*, 112 (2002-2003), 1180, 1183.

¹⁹ On the originality of these arguments, Tully points out that Locke “gathered together many of the arguments of the early seventeenth century,” while noting the force of this effective gathering was such that “his theory set the terms for many of the later theories that were used to justify the establishment of European property in America” (with more on this below); “Aboriginal Property and Western Theory: Recovering a Middle Ground,” *Social Philosophy and Policy* 11, no. 2 (1994), 158. Christopher Hill: “Locke’s philosophy is a workaday synthesis of the ideas of the more creative, more revolutionary thinkers of the earlier seventeenth century”; *The Century of Revolution, 1603-1714*, 2nd ed. (New York: Norton, 1980), 252.

²⁰ Thomas Aquinas: “Participation of rational creatures in the eternal law is called natural law”; “*Summa theologiae*” 1a2ae91 art 2, in *Political Writings*, ed. R. W. Dyson (Cambridge: Cambridge University Press, 2002), 86. On Locke’s link to Aquinas, see Frederick C. Copleston: “We can trace a connection between the medieval philosophy of law and that of John Locke, while the latter’s empiricism was not so entirely alien to medieval thought as one might be inclined to think”; *Medieval Philosophy* (London: Methuen, 1953), 2.

revealing God's hand on the world.²¹

In just that spirit, Locke begins his chapter on property with the two pillars on which his argument will rest: “Whether we consider natural *Reason*... Or *Revelation*” (2.25).²² In the *First Treatise*, he simply declares that, “the Law of Nature... is the Law of Reason” (1.101). Locke opens the chapter with the absence of property in the Biblical beginning of the world and he moves forward through various property developments to his own day.²³ His focus is on having a property in arable land, acorns, deer, cloth, silk ropes, and other items. As an avid collector and reader of “books of Travel,” he gathers evidence for property's natural law through what he imagines to be the case of the Indigenous peoples of the Americas.²⁴ He regards the historical introduction of money into property relations as a critical turning point, amounting to a social contract instituted through the consent of the people. He offers a political arithmetic by which to calculate the contribution that private property rights can make to the welfare of the whole community. In Locke's hands, individual property rights are grounded in natural law and people's consent, which provided a thorough check on the divine right of kings and the

²¹ Richard Tuck: “It is the clear-sightedness that made Locke's achievement (assuming it was largely his) so remarkable, and enabled him to publish the most satisfying work presented by anyone in this natural rights tradition”; *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 171. See also J. R. Milton, “Laws of Nature” in *The Cambridge History of the Seventeenth Century*, vol. 1, eds. Daniel Garber and Michael Ayers (Cambridge: Cambridge University Press 1998), 684.

²² Thomas Sprat declared in his early history of the Royal Society (to which Locke was elected in 1678): “The universal Disposition of this Age is bent upon a *rational Religion*”; *The History of the Royal Society of London, for the Improving of Natural Knowledge*, 3rd ed. (London: Knapton et al., 1722), 374.

²³ Stephen Buckle provocatively suggests that Locke is presenting, in his fifth chapter, “a natural history of property”; *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Oxford University Press, 1991), 188. This ties in with Locke's Royal Society membership and his earlier involvement with Oxford's Experimental Philosophical Club. As well, Locke's scientific interests led him to send out numerous natural history inquiries across the seas (in the corresponding scientific spirit of Bede, Newton, and later, Darwin), with the recipients kind enough to send him native specimens, descriptions of Native American remedies, and other notices of interest; Sarah Irving, *Natural Science and the Origins of the British Empire* (London: Pickering and Chatto, 2008), 121-122.

²⁴ John Locke recommends “books of Travel” in “Some Thoughts Concerning Reading and Study for a Gentleman” in *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), 353.

arbitrary exercise of power by the likes of Charles II.

Let me briefly set out what I take to be the seven principles of Locke's concept of property rights. I identify each principle with a phrase from Locke's fifth chapter, present a summary of its meaning and import, and then consider how it applies to what I have made of learning's intellectual property (while footnoting others' readings of the principle). This is intended to bring this history of the intellectual properties of learning into line with Locke's expression of late seventeenth-century thinking about property, which continues to have bearing on such thinking to this day.

LOCKE'S THEORY OF PROPERTY IN SEVEN PRINCIPLES

1. THE GREAT COMMON OF THE WORLD: In the beginning, according to Locke, "God gave the World to Men in Common" (2.34). The original state of nature is a world without property distinctions or ownership claims.²⁵ Locke not only relies on the reasonableness of this proposition but offers his readers its place in the Bible: "T'is very clear, that God, as King *David* says, *Psal. CXV. xvi. has given the Earth to the Children of Men*; given it to mankind in common" (2.25). By pointing out that God gave the world in common to

²⁵ Tully traces the world-held-in-common through Francisco Suarez, Hugo Grotius, Samuel von Pufendorf, John Selden, and Richard Cumberland, leading up to Locke's use of it; *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980), 66-79. Questions abound about Locke's encounter with Digger and Leveller radicalism, which he likely encountered through his Dutch friend Benjamin Furley's collection during his time in exile after Shaftesbury's death; John Harrison and Peter Laslett, *Library of John Locke* (Oxford: Oxford University Press, 1965), 50-54. To take one example, during the English Civil War, Gerrard Winstanley, failed cloth merchant and Diggers leader, insisted "that the earth was made to be a common Treasury of livelihood for all, *without respect of persons*, and was not made to be bought and sold: And that mankind... was not made to acknowledge any of his own kinde to be his teacher and ruler"; *A Letter to the Lord Fairfax and his Council Of War... That the Common People Ought To Dig, Plow, Plant, and Dwell Upon the Commons, Without... Paying Rent to Any* (London: Giles Calvert, 1649), 9. Ellen Meiksins Wood judges that Locke "both appropriates *and*, on critical issues, deliberately neutralizes the radical 'discourse' of his time"; "Radicalism, Capitalism and Historical Contexts: Not Only a Reply to Richard Ashcraft on John Locke," *History of Political Thought* 15, no. 3 (1994), 323.

humankind, Locke is making it clear that property rights need to be warranted, whether by natural law or the consent of all (to whom the world was given). Such rights need to honor the original gift while providing benefits that exceed what the original state provides. This first principle undermines the prevailing monarchical assumption that God entrusted the world to kings, as His representative on earth and a descendent of Adam.²⁶ is setting the groundwork for the equality promised by democracy through the principles of property rights.

This first principle plays a somewhat different role in this Western history of learning. The abbey book chest and scriptorium, in which learning had its origins in this history, were part of the monastic compact under the Rule of Benedict to recreate that original world held in common. This communal principle also plays a part in the medieval axiom that knowledge is a gift of God (not to be owned or sold), which Thomas Aquinas at the University of Paris and others felt should affect the payment of masters in the medieval universities, and which was still a point of reference for the Italian humanists.²⁷ Works of learning were certainly placed on sale, especially in the marketplace created by print, but this was always accompanied by private and institutional arrangements to have copies placed in the communal state of private and public libraries. Holding this learning in common proved to be productive, even as it was based on recognizing authors claims to their work. In this, learning was regarded as if it had always been given in common to all, as part of the original gift, even if those

²⁶ Locke is attacking this argument in Robert Filmer who wrote: "This lordship which Adam by creation had over the whole world and by right descending from him the patriarchs did enjoy"; "Patriarcha," in *Patriarcha and other Writings*, ed. Johann P. Sommerville, (Cambridge: Cambridge University Press, 1991), 6-7.

²⁷ On the medieval regard for the gift of knowledge (and introduced in Chapter 7) see Gaines Post, Kimon Giocarinis, and Richard Kay, "The Medieval Heritage of a Humanistic Ideal: 'Scientia donum Dei est, unde vendi non potest,'" *Traditio* 11 (1955), 195-234.

included in that *all* remains the ideal rather than the reality, even to this day.

2. A PROPERTY IN HIS OWN PERSON: Locke begins the process of establishing individual rights in property with a second natural law principle: “Though the Earth, and all inferior Creatures, be common to all Men, yet every Man has a *Property* in his own *Person*: This no body has any right to but himself” (2.27).²⁸ The principle of self-possession is complicated by Locke’s belief that God has a maker’s right over humankind: “For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker . . . they are his Property” (2.6).²⁹ We are each a joint shareholder with God in our own life.³⁰ Each person’s autonomy and self-possession, which is critical to governance by democratic consent, leads Locke to use the term *property* in a far more encompassing sense. Or as he puts it, “Property, that is, his Life, Liberty and Estate,” which each person holds “equally with any other Man,” by “all the Rights and Privileges of the Law of Nature” (2.87).³¹

To apply this second principle to learning is to highlight individual rights to education through which to develop and exercise this inherent property-in-oneself.

²⁸ The right of self-possession was to prove a basic concept in the fight for democracy, abolitionism, feminism. See Boston Women’s Health Collective’s *Our Bodies, Ourselves* (New York: Touchstone, 2005) first published in 1971. Anne Philips credits Locke in her recent work on this theme; *Our Bodies: Whose Property?* (Princeton: Princeton University Press, 2010), 20, 34. Carole Pateman calls for qualifying this Lockean property in oneself, as it can then be alienated in damaging ways for democratic life; “Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts,” *Journal of Political Philosophy* 10, no. 1 (2002), 20-53.

²⁹ An earlier example is found in Richard Overton who refers to self-ownership in a 1646 Leveller pamphlet written while imprisoned for pamphleteering: “To every Individuall in nature, is given an individuall property by nature, not to be invaded or usurped by any: for every one as he is himself, so he hath a self-proprietie”; *An Arrow Against All Tyrants and Tyranny, Shot from the Prison of New-gate into the Prerogative Bowels of the Arbitrary House of Lords* (London: Martin Claw, 1646), 3. Cf. n21.

³⁰ Waldron sees God’s ownership bearing on human equality: “Since our relation to God (the relation which grounds our equality) is to be understood in terms of our being owned by Him,” it forms part of Locke’s “commitment to basic equality [which] is an important working premise of his whole political theory”; *God, Locke, and Equality*, 162, 152.

³¹ A. John Simmons: “Locke characterizes all of a person’s rights as ‘property’”; *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 232.

Charlemagne was the first to honor this in the West by employing Alcuin to direct an empire's schooling program. This self-possession is also a right of independence (and against indoctrination) when it comes to learning, as it proved to be for Radegund and Hildegard, as well as a right of accreditation, for all they achieved. For many of the figures in this book, the identification of self and property led to an all-encompassing sense of learning as their Life, Liberty and Estate. Taken collectively, this right in oneself was the basis of the commonwealth of learning, much as it was the basis of the democratic state for Locke. This sense of property in oneself also drove the interest in comprehending a body of work as the expression of a single intellect, much as Averroes did with Aristotle. Still, that self was to be understood by building on the first principle of communality and following Bede, in what it contributes to others and that property of learning in them.

3. LABOR WAS TO BE HIS TITLE TO IT: Locke holds that, in the original state of nature, one gains a property in something by working on it. This I take to be his third principle of property: "The *Labor* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labor* with, and joyned to it something that is his own, and thereby makes it his *property*" (2.27).³² Or as Locke combines the second and third of these

³² In the eighteenth century, Adam Smith also found *labor* a convincing source of property rights: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable"; *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 1, ed. Edwin Cannan (London: Methuen, 1904), 1.10.2 123. In turn, Marx was to make much of the loss of this proprietary relationship between self-possession and labor: "External labor, labor in which man alienates himself, is a labor of self sacrifice, of mortification. Lastly, the external character of labor for the worker appears in the fact that it is not his own, but someone else's, that it does not belong to him, that in it he belongs, not to himself, but to another... it is the loss of his self"; *Economic and Philosophic Manuscripts of 1844*, trans. Martin Milligan (Moscow: Progress Publishers, 1959), 30. I find Nozick's famous objection

principles: “Man (by being Master of himself and *Proprietor of his own Person*, and Actions or *Labor* of it) had still in himself *the great Foundation of Property*” (2.44). A natural right to the fruits of one’s labor has long made sense to people.³³ For Locke, the principle is not merely a social convention, as it was for natural law theorists Hugo Grotius and Samuel de Pufendorf during that era.³⁴ Labor had a religious value for the Calvinist in Locke: “The strain of physical labor,” Cambridge historian John Dunn points out in his work on the *Two Treatises*, and “the sweat of their brow” is a “palpable index of salvation.”³⁵ Labor was a form of prayer among the monastics discussed earlier in this book, with the Calvinist difference being that labor leads to individual rather than communal ownership.³⁶ Yet this labored right of ownership is not without its limits, as will be discussed with the next two principles, which take the form of a *sufficiency proviso* and a *spoilage proviso*.

With learning, a number of Benedictine nuns and monks were able to establish

to the labor-mixing property principle – illustrated by pouring a can of tomato juice into the ocean and claiming said ocean – unpersuasive, as it misses Locke’s concern for “the Industrious and Rational, (and [whose] *Labour* was to be *his Title* to it;)” (2.34); *Anarchy, State, and Utopia* (New York: Basic, 1974), 175. Cf. John Donne: “A man does not become proprietary of the sea because he hath two or three boats fishing in it”; “Sermon... to the Honorable Company of the Virginia Plantation” (1622).

³³ Roscoe Pound: “In modern times, however, the claim of him who creates has been urged by a long line of writers beginning with Locke and culminating in the socialists”; *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1954), 110. For Jeremy Waldron, Locke’s labor theory suffers “a slight lacuna... [that] Hume and Kant have been quick to exploit,” which is that one takes possession of a thing prior to investing labor in it; *The Right to Private Property* (Oxford: Oxford University Press, 1988), 173. Tully points out how, in the nineteenth century, “the early English and French socialists took it [*Two Treatises*] as the major philosophical foundation of modern socialism: the worker’s right to the product of their labor and possession regulated by need,” while in the twentieth century, he has been held up as champion of private property rights; *Discourse on Property*, x.

³⁴ Waldron: “Alienation of original rights by consent... was the solution favored by Locke’s predecessors in the natural law tradition, Hugo Grotius and Samuel Pufendorf”; *Right to Private Property*, 149-151.

³⁵ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government* (Cambridge: Cambridge University Press, 1969), 220.

³⁶ The Benedictine motto was *ora et labora* (pray and work) and its corresponding *laborare est orare* (to work is to pray). Dunn only adds to this association, by picking up, more than once, on Locke’s assignment of the day’s hours to work and study, in an eerie resemblance to the Rule of St. Benedict; *ibid.*, 231 n6, 235. In an essay on labor that Locke left unpublished from 1693, he recommends spending “half the day employed in useful labor” which would “supply the inhabitants of the earth with the necessities and conveniences of life,” and “six hours in the day well directed in study would carry a man as far in the improvement of his mind as his parts are capable of”; “Labor” in *Political Essays*, 326, 327.

that study was a form of labor that fulfilled their monastic vows by creating a communal good that sustained the pious community, rather than leading to ownership or prideful vanity. Yet both Jerome and Erasmus made bold proprietary claims for their scholarly labors to the word of God and, in Erasmus' case, to Jerome's works. Gerard of Cremona, who worked on so many texts during the Latin translation movement, left his work unsigned, only to have his students properly credit his work. It speaks to how having a property in a work does not exclude others from further contributing to its value through their scholarly efforts.³⁷ The Locke scholars, whose labor occupies this chapter's footnotes, demonstrate how others' right of use with Locke cannot be exhausted.³⁸ They seek to bring order to this proliferation within the commons by discrediting and correcting others' labors. Locke certainly recognizes the "labor of thought," as he puts it in the *Essay*, as well as "learned and laborious inquiries," but makes no reference to property claims, as he does with the labor invested in harvesting acorns and apples.³⁹

4. ENOUGH, AND AS GOOD: Locke identifies a natural limit to the property claims that can be made in the name of self and labor with what is referred to as a sufficiency proviso. It asserts that one person's property claims cannot impede others' ability to do the same:

"For this *Labor* being the unquestionable Property of the Laborer, no Man but he can

³⁷ In the *Essay*, Locke defines the labor involved in knowledge work as "*the perception of the connexion and agreement, or disagreement and repugnancy of any of our Ideas*"; *Essay*, 4.1.2 525.

³⁸ Among all of these differences of opinion over Locke, it is good to keep in mind Gordon J. Schochet's point: "Locke himself was not nearly so clear as our beliefs about him would suggest." "Introduction," in *Life, Liberty and Property: Essays on Locke's Political Ideas*, ed. Gordon J. Schochet (Belmont, CA: Wadsworth, 1971), 1.

³⁹ Locke, *Essay*, 2.11.2 156, 4.20.2 707. At another point, he makes the proprietary point that language is "no man's private possession, but the common measure of commerce and communication"; *ibid.*, 3.11.11 514. He shows sympathy for those who cannot afford books (or the leisure and languages to read them); *ibid.*, 4.20.2 707. He also refers to the *possession* of ideas: "So much as we ourselves consider and comprehend of truth and reason, so much we possess of real and true knowledge"; *ibid.*, 1.3.24 66.

have a right to what that is once joyned to, at least where there is enough, and as good, left in common for others” (2.27). Although while what counts as *enough, and as good* is open to interpretation, he does state that “he that leaves as much as another can make use of, does as good as take nothing at all” (2.33). It is easy enough to imagine that the original state of nature offered enough, and as good of pretty well everything for everyone.⁴⁰ In Locke’s day, it was common, and all too convenient, to think that the New World still offered to enterprising Europeans some part of that original state of sufficiency: “In the beginning all the world was *America*” (2.49) is how Locke puts it, with more on this assumption below. Still, this proviso advanced the equality of individual rights, against the presumption that property rights are all-you-can-take.

The sufficiency proviso is of considerable importance to the learned. To ensure that there is enough and as good, however, is not for them a check on acquisitiveness. Rather, it is the goal of cooperation and coordination within the commonwealth of learning. From the monastic book chest to the university stacks, the library has been constructed to ensure that each scholar has *enough, and as good* as any other for their studies. The Benedictine scriptorium made copying a pious act of provision for just such a principle. Al-Ma’mun sponsored a multilingual translation movement to make Islamic learning the equal of any in the world of his day. Books were chained to library shelves to ensure that the best editions were available, with copying permitted. And Bodley sought to fulfill the sufficiency proviso, by doing his best to arrange for a copy of each book printed to be in the library, while Bodleian regulations at Oxford continue to prevent

⁴⁰ Jeremy Waldron argues that *enough, and as good* is not a proviso or limit at all but “is seen by Locke as a *fact about* acquisition in the early ages of man” and “thus the ‘enough and as good’ clause cannot be construed as a necessary condition, or as a restriction, on appropriation without concluding that it is downright inconsistent with what Locke claimed to be the fundamental duty of the law of nature”; “Enough, and as Good Left for Others,” *Philosophical Quarterly* 29, no. 117 (1979), 321-22, 326.

books being signed out of the library, so that readers there will never go without.

5. NOTHING WAS MADE TO SPOIL: Locke adds a second natural-law curb on property rights, which is a prohibition against waste: “Nothing was made by God for Man to spoil or destroy” (2.31). Without proper use, there is no right of property in, say, the apples picked from a tree: “But if they perished, in his Possession, without their due use... he offended against the Common Law of Nature” (2.37). Restating this principle, Locke advises that if anything is “to be looked on as Waste... [it] might be the Possession of any other” (2.38). For “he took more than his share, and robb’d others” (2.46). Taken together, the sufficiency and spoilage provisos place a strong limit on absolute or unqualified property claims under natural law.

The spoilage proviso also takes on a certain priority with learning. Petrarch and his humanist colleagues devoted themselves to recovering, assembling, and preserving the artifacts of classical learning that were otherwise lost and left to molder away. Print only added to their revitalized use. More generally, the efforts of Isidore of Seville, Alfarabi, Grosseteste, and Erasmus, which went into classifying, indexing, compiling, and annotating texts, were directed toward ensuring that works can be located, comprehended and used to their full advantage. Again, the libraries of Islam and the West discussed here were devoted to collecting and preserving what had been achieved for purposes of access and use. The accumulation of learned works, with many that will go uncited and unused, does not so much represent waste as the surplus capacity that is necessary to support breakthroughs in learning.

6. FROM THE CONSENT OF MEN: The sixth principle moves Locke's property theory from natural law to social contract. Locke advises that people can put "an end to the State of Nature between Men" by "agreeing together mutually to enter into one Community, and make one Body Politic" (2.14). The point of this agreement, for Locke, is the protection of property: "The great and *chief end*, therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*" (2.124). This preservation is facilitated by "the *Invention of Money* and the tacit Agreement of Men to put value on it" and this "introduced (by Consent) larger Possessions, and a Right to them" (2.36). And if "the *Use of Money*... had made Land scarce" (2.45), then the resulting "larger possessions" (2.36) can still satisfy the sufficiency proviso, by providing enough, and as good for others through employment opportunities, tax revenues, and the production of a greater variety and quantity of goods at cheaper prices.⁴¹ Money can also help people avoid the spoilage proviso: "A man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver" (2.50). With the formation of political communities by consent, natural law is not abandoned but supplemented by human laws that serve all: "The positive Laws of the Society, [are] made conformable to the Laws of Nature for the public good," Locke writes of property in the *First Treatise*, "*i.e.* the good of every particular Member of that Society, as far as by common Rules it can be provided for" (1.92).

This history of learning has long been about people entering into compacts that either inadvertently, with the Rule of Benedict, or through intention, with the *studium generale*, further their studies. The Rule of Benedict sought to recreate through the

⁴¹ See James Tully, "Property, Self-government and Consent," *Canadian Journal of Political Science* 28, no. 1 (1995), 121.

consent of men and women that original condition of a world given in common, which with time proved of such value to learning. This history of these learned incorporations, which were increasingly explicit in their learned interests, always involved a compact with the larger world. The world consented – if more in principle than practice; if never sufficiently nor consistently – to an endowment of monasteries, schools, and colleges that afforded the learned a degree of autonomy in the service of learning. More specifically, Federico Cesi reached a temporary accord with the church on behalf of Galileo’s risky work; William Laude and John Fell traded in printing privileges with the Stationers’ Company; John Wilkins and friends convinced King Charles II to charter their Royal Society. The purpose of “uniting into Commonwealths [of learning], and putting themselves under Government,” as Locke had it, may well have been “the Preservation of their [intellectual] Property,” which is to say the life, liberty, and estate of learning.

7. INCREASE THE COMMON STOCK: What I take to be the seventh and final principle of Locke’s theory of property represents his proto-utilitarian justification of “the increase of lands, and the right imploying of them” by property owners (2.42).⁴² This principle enables the modern improving landowner (think: Locke’s patron, Lord Shaftesbury) to continue to acquire land as long as the accumulation can be shown to offer a bounty to all humankind. Locke is thinking here of the most efficient exercise of property rights for the greatest good: “God and his Reason commanded him to subdue the Earth,” as it will “improve it for the benefit of Life” (2.32). In an early instance of political arithmetic,

⁴² David Resnick: “One way of understanding the significance of Locke’s rationalism is to approach him as a social theorist and to see the two sides of Locke – the natural law rationalist and the utilitarian rationalist – not as competing philosophical theories but as complementary aspects of a coherent social theory”; “Rationality and the *Two Treatises*,” in *John Locke’s Two Treatises of Government: New Interpretations*, ed. Edward J. Harpham (Lawrence: Kansas University Press, 1992), 88.

Locke does the math on “the Benefit Mankind receives from” such “husbandry” (2.43):

He who appropriates land to himself by his labor, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compasse) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common. And therefore he that incloses land, and has a greater plenty of the conveniencies of life from ten acres, than he could have from an hundred left to Nature, may truly be said to give ninety acres to Mankind... I have here rated the improved land very low, in making its product but as ten to one, when it is much nearer an hundred to one. (2.37)

Locke only added this section on the yield-gain calculus to the *Two Treatises* in preparing his final and fourth edition of the book (published posthumously in 1713). He seems intent, in this final consideration, on emphasizing the public payoff of appropriation, enclosure, and cultivation against the undermining of human equality resulting from land accumulation. Everyone is the beneficiary of a tenfold, make that a hundredfold, increase in agricultural productivity. This is why, then, “Men have agreed to a disproportionate and unequal Possession of the Earth” (2.50). Now, one might want to consider the corollary of this principle, namely, that acts of enclosure and privatization that lead to anything less than this hundredfold level of public benefit are on less solid ground.⁴³

⁴³ This hundred-fold test may be in part why Richard Ashcraft holds that, “Locke’s chapter on property” is “one of the most radical critiques of the landowning aristocracy produced during the last half of the seventeenth century”; *Revolutionary Politics and Locke’s Two Treatises of Government* (Princeton: Princeton University Press, 1986), ix.

This seventh principle again has its parallel within the commonwealth of learning. Whereas the act of enclosing land, Locke insists, “does not lessen but increase the common stock” (2.37), so efforts to preserve, attract, and protect the learned holdings of a library are intended to increase the common stock of learning.⁴⁴ The difference between the learned and landed enclosure is that the library increases productivity by opening access for the many of this commonwealth, which is not the case with private property. Those who glossed the manuscripts also sought to increase the common stock with their annotations and commentaries. Or take the example of Henry Oldenburg, who greatly multiplied the reach of the membership-only transactions of the Royal Society by employing the press. Print multiplied access, and the spread of learning followed. Now, it needs to be recognized that to increase what the commonwealth of learning gives to humankind “ten times more,” if not “much nearer an hundred,” as Locke claims for the cultivation of land (2.37), may take “such Masters, as... the incomparable Mr. Newton, with some other of that Strain,” to step back to the era of Locke’s *Essay*.⁴⁵ In the cultivation of learning – the history that I have set out in this book tells us – increases to the common stock result from people exercising the intellectual property rights of access, accreditation, autonomy, communality, sponsorship, and use. So it was then and as it is now by those who represent, if not yet sufficiently, a far more diverse, global commonwealth of learning.

⁴⁴ Pound: “Roman jurists recognized that certain things were not subject to acquisition... It might be that from their nature they could only be used, not owned, and from their nature they adapted to general use. These were *res communes*”; *Philosophy of Law*, 110. Pound contrasts this with “nineteenth-century dogma that everything must be owned”; *ibid.*, 111.

⁴⁵ “Epistle to the Reader,” *Essay*, 10. In scholarly work, the multiples for increasing the common stock are calculated today by the number of times a work is cited; Eugene Garfield, “The History and Meaning of the Journal Impact Factor,” *Journal of the American Medical Association* 295, no. 1 (2006), 90-93.

Through these seven property principles, Locke delivers on his promise to explain how anyone might come to have a property in anything. In the process, he makes property rights the basis of individual sovereignty. This is a theory of the democratic state to which he sees all political organizations, including monarchies, as subordinate. Locke's adept combining of natural law, theology, and social contract in the *Two Treatises* is responsible, I imagine, for a good part of this theory's continuing appeal. If the sovereign individual is largely conceived by Locke as a male landholder of the sort represented by his patron Shaftesbury (or himself, with his small inherited landholding), his principles of liberal democracy and property rights have played their part in the spread of democratic governance, consistent with his statement – if not his beliefs and actions, according to our standards – that “the People have a Right to act as Supreme” (2.242). This is the note on which Locke concludes the *Two Treatises*.

The Right of Responsible Use

In overlaying what I have found to be the intellectual properties of learning on Locke's theory of property, I have set the history of learning atop a book that is, itself, hardly a stable structure. I have introduced the uncertainties surrounding its composition, purpose, and context, but there is another sort of controversy that remains, which is over its impact. The most famous instance of this is the influence that Locke may have had on

Thomas Jefferson and the founding of the United States.⁴⁶ In this final section of this chapter, however, I want to consider how Locke's theory of property contributed to the colonial dispossession of Indigenous peoples during the eighteenth and nineteenth centuries, following from his claims that the cultivation of land warrants property claims to it. For as much as I have made of the value that learning gains from its autonomy, does it not have a responsibility to deal with the consequences of its work on the world from which it stands apart?

In the course of working on this book, I came to realize that James Tully, Distinguished Professor of Political Science, Law, Indigenous Governance and Philosophy at the University of Victoria, is continuing to work out an exemplary path of responsible use in his work on Locke. His scholarly career to date holds its own set of lessons on the intellectual properties of learning, and I conclude this chapter with a review of Tully's inspired move from the study of Locke toward a scholarship that assists those who are repairing what Locke's work has wrought.

To appreciate James Tully's approach to Locke, let me first briefly present the prevailing interpretation of the *Two Treatises* in the 1970s that he inherited as graduate student in political philosophy at Cambridge. At the outset of the 1950s, Leo Strauss, political theorist and classicist at the University of Chicago, condemned Locke's *Two*

⁴⁶ Thomas Jefferson, reflecting in his final years on the Declaration of Independence: "All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."; "To Henry Lee, Monticello, May 8, 1825" in *Writings*, ed. Merrill D. Peterson (New York: Library of America, 1984), 1501. Isaac Kramnick argues of the *Declaration of Independence*, "Locke lurks behind its every phrase"; *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca: Cornell University Press, 1990), 293. Also see Stephen Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham: Duke University Press, 1990); Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1990); Jerome Huyler, *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence: University of Kansas Press, 1995).

Treatises, as a book that “justifies the emancipation of acquisitiveness” and did so in ways that betray his position as the “most famous and most influential of all modern natural right teachers.”⁴⁷ A decade later in the 1960s, political theorist C. B. Macpherson, at the University of Toronto, accused Locke of being the slippery promoter of “possessive individualism” and absolute property rights, following from Locke’s treatment of money as a matter of compact and consent.⁴⁸

In 1980, Tully published *A Discourse on Property: John Locke and His Adversaries*, proving himself to be, among students of Locke, far more cognizant of what is most learned and humane in the *Two Treatises*. In refusing both capitalist and libertarian readings of Locke’s book, Tully manages to do a number of things of relevance to my project with learning. He stresses the persistent moral limits that Locke places on property rights. As I have noted already in this chapter, these limits are particularly germane to learning’s intellectual properties, in which property rights are about collective standards around accreditation and use, rather than absolute or unqualified possession. He uncovers a communitarian strand in Locke’s property concept of use: “There is, therefore, no right in land, as such,” Tully writes, “but only a use right in improved land conditional upon the use of its products.”⁴⁹ While Tully’s original

⁴⁷ Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950), 165, 242. Strauss: “Locke still thought that he had to prove that the unlimited acquisition of wealth is not unjust or morally wrong”; *ibid.*, 246. Strauss, who would otherwise deny Locke’s claim on natural law, holds that “the need for natural right is as evident today as it has been for centuries and even millennia”; *ibid.*, 2. Strauss also ranked Locke (driven into exile) among the persecuted writers who as a result “concealed their views only far enough to protect themselves as well as possible from persecution; had they been more subtle than that, they would have defeated their purpose, which was to enlighten an ever-increasing number of people who were not philosophers”; “Persecution and the Art of Writing” *Social Research* 8, no. 4 (1941), 500.

⁴⁸ C. B. Macpherson: “Locke has justified the specifically capitalist appropriation of land and money”; *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962), 208. Macpherson has been much criticized for his portrayal of Locke, with Isaiah Berlin caricaturing Macpherson’s portrayal thusly: “Locke is a capitalist wolf in medieval, natural law, sheep’s clothing”; “Hobbes, Locke and Professor Macpherson,” *Political Quarterly* 35, no. 4 (1964), 461 n1.

⁴⁹ Tully, *Discourse on Property*, 123.

reading faced a barrage of criticism, to which he responded by altering some of his views, including those on the dominance of communal rights, he still places his emphasis on Locke's position that "the Regulating and Preserving of Property" is "only for the Publick Good" (2.3).⁵⁰

Over the course of a decade, he came to realize the extent to which Locke's theory of property had been influenced by the arguments put forward in New England pamphlets defending settler land claims against Indigenous peoples.⁵¹ As a result, Tully realized, Locke had constructed a theory of property that is premised on not having a property in the land they lived on. For want of cultivating that land, they were wasting it. In Tully's words, Locke failed to credit the "planning, coordination, skills and activities involved in native hunting, gathering, fishing, and non-sedentary agriculture," all of which "did not 'waste' the land" but used it in "more ecologically benign ways."⁵²

Yet Tully also points to how Locke's theory of civil government continues to

⁵⁰ G. A. Cohen, for example, refers to Tully's "welfarist intentions" as "a misuse of Locke's texts," and his "extravagant conclusion" on community ownership; *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), 188, 194. In response to his critics and changes in his ideas, James Tully writes: "This constant activity of working on and changing one's understanding – of past thought and one's relation to it, and using this exercise as a way of freeing oneself from the customary and stultifying ways of thought in the present – is what the history of political philosophy is about"; "Differences in the Interpretation of Locke on Property" in *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 125.

⁵¹ Tully uncovers likely sources for Locke's line of argument in a series of colonial pamphlets responding to New England land disputes from 1630 to 1690, composed by John Winthrop, John Cotton, and other Puritans, who were defending their "natural rights" to the territories of Native Americans without their consent: "The arguments and the very terms used in the pamphlets [advocating 'appropriation by cultivation'], Tully writes, 'are strikingly similar to chapter five [Of Property] of the *Two Treatises*. No author puts forward an account that is as theoretically sophisticated as Locke's, but the basic terminology, premises, and conclusions for such a theory are present"; "Rediscovering America: The Two Treatises and Aboriginal Rights," in *An Approach to Political Philosophy*, 149.

⁵² Ibid., 156, 163. Locke could have known better, having in his collection, Gabriel Sagard's *Histoire du Canada et Voyages Que les Frères* (Paris: Claude Sonnius, 1636), a record of missionary life among the hospitable and compassionate Huron people who educated Sagard in the fruitful, productive use of the land; Anne Talbot, "*The Great Ocean of Knowledge*": *The Influence of Travel Literature on the Work of John Locke* (Leiden: Brill, 2010), 21-44. As for the academic influence of Locke's misreading, see Laslett crediting Locke as a founder of "the field of comparative anthropology," with the larger nod to the *Essay*; "Introduction," 98; and Waldron names him "a pathfinder" of "political anthropology"; "John Locke: Social Contract versus Political Anthropology," *Review of Politics* 51, no. 1 (1989), 9.

provide Indigenous peoples with a basis for actively resisting the abrogation of their rights. They are exercising their right of use with Locke's work "once again to criticize and transcend the ideological constraint that he placed upon it," Tully writes, "and serve to expose injustice and justify resistance to it."⁵³ Learning's right of use enables this transcendence of Locke's moral imagination in the *Two Treatises*. Using it, in this way, both to critique its failures and build on its principles, which is to play it against itself, has the further advantage of addressing generations of readers who share this work in common. It offers an argument for returning to emblematic works to understand how they went wrong, not to somehow correct them retroactively, but to work with the prevailing and pervasive interpretations held by the many.

Tully was able to direct his reinterpretation and new understanding of the *Two Treatises* to some greater public use by serving as advisor to the Mohawk people and the Royal Commission on Aboriginal Peoples established by the Canadian government in 1991. At one point, the *Report of the Royal Commission* cites Tully on how "Locke draws the immensely influential conclusion that Europeans are free to settle and acquire property rights to vacant land in America by agricultural cultivation without the consent of the Aboriginal people."⁵⁴ Tully went on to work out a political philosophy in which "a just and practical relationship of negotiation between the Aboriginal and non-Aboriginal people of Canada" can be established "that brings reconciliation."⁵⁵ In 1999, he joined forces with Bear Clan Mohawk scholar, Taiaiake Alfred, to found the Indigenous

⁵³ Tully, "Rediscovering America," 176. Tully emphasizes Locke's checks and balances in his "enduring delegation of constitutional government, limited by the popular rights to dissent from and resist abuses of political power"; *ibid.*

⁵⁴ *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Department of Indian and Northern Affairs, 1996), 48, which is citing James Tully's "Aboriginal Property and Western Theory," 159.

⁵⁵ This is from the modified version of the paper James Tully prepared for the Royal Commission; "The Negotiation of Reconciliation," in *Public Philosophy in a New Key*, Vol. 1 (Cambridge: Cambridge University Press, 2008), 224.

Governance Program at the University of Victoria. The program is preparing a new generation of Indigenous leaders, even as the long overdue treaty negotiations between the First Nations peoples and the Canadian government are taking place in the province of British Columbia. In Tully's work with the Nisga'a Nation and the Haida Nation on the treaty negotiation process, he notes how political *consent* and *dissent*, so critical to Locke's project, are now being redefined in a recognition of rights beyond anything Locke had dreamt of in his philosophy.⁵⁶ By the same token, Indigenous scholars are introducing new ways and means of learning into the universities, where once their people were, at best, objects of sympathetic ethnological study, much as Locke cast them in the *Two Treatises*.⁵⁷

While working on this book, I had the chance to sit down with Professor Tully in his office at the University of Victoria to discuss what I saw as his shift from the close study of Locke's political philosophy and context to the application of that scholarship to the property rights of First Nations peoples in Canada. I explained to him that I saw something heroic in his own turn from Locke to those who suffered his misuse. The shift on his part seemed a particularly responsible exercise of the scholar's right of use. That is, in uncovering the extent to which Locke's *Two Treatises* had been used to legitimate government and private land claims made against Indigenous peoples, this leading Locke scholar (which is to say, James Tully) felt compelled to set a corrective course for his

⁵⁶ James Tully, "Conclusion: Consent, Hegemony, and Dissent in Treaty Negotiations," in *Consent Among Peoples*, eds. J. Webber and C. MacLeod (Vancouver: UBC Press, 2010), 248-249.

⁵⁷ See, for example, Sandy Grande, *Red Critical Theory: Native American Social and Political Thought* (Lanham: Roman and Littlefield, 2004); Devon Abbott Mihesuah and Angela Cavender Wilson, eds. *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004); and Linda Tuhiwai Smith, *Decolonizing Methodology: Research and Indigenous Peoples*, 2nd ed. (London: Zed Books, 2012). See, as well, on property and intellectual property issues, Catherine Bell and Val Napoleon, eds. *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2009).

scholarship so that he was working on righting this wrong with each study he published. No one was more knowledgeable or articulate about Locke, but to continue to work directly on Locke's political philosophy was no longer a responsible use of this expertise after he had realized the influence Locke's work continued to have on the people who were indigenous to the land on which he was living.

When I had finished explaining my theory of his course, he smiled kindly, and then proceeded to firmly caution me against imposing too schematic a reading on his scholarly output. He had not so much deliberately turned away from Locke in his work, he pointed out to me, as picked up on opportunities and invitations to help in the ongoing political fight for Indigenous rights, first on behalf of the Mohawk people near Montreal while he was teaching at McGill University, and then with the Coast Salish peoples in British Columbia, after he had moved to the University of Victoria, in part for family reasons. It was my turn to smile, as I could not help but agree with his rightful cautioning of my all-too-tidy approach to his life. Still, he allowed that the arc of his work, when viewed from a distance, might reflect this change of course, in what David Armitage characterizes as Tully's "public philosophy with a practical intent."⁵⁸ And to be fair, in this period he has extended this public philosophy to encompass the additional themes of the European Union, global citizenship, civic freedom, ecology, and the list goes on.⁵⁹

Within a few years of his publishing the *Two Treatises of Government*, John Locke became involved in the reform of printing regulations in Britain. He mounted what was, in effect, a lobbying campaign to put an end to book censorship and the perpetual

⁵⁸ David Armitage, "Probing the Foundations of Tully's Public Philosophy," *Political Theory* 39, no. 1 (2011), 125.

⁵⁹ See, for example, James Tully, *Public Philosophy in a New Key*, 2 Vols. (Cambridge: Cambridge University Press, 2008).

monopolies of the Stationers' Company, while proposing that it be replaced with legislation far more sympathetic to the interests of learning. Although Locke died in 1704, his campaign was a part of all that can be said to have contributed to what is regarded as the first modern intellectual property law, which is to say, the Statute of Anne 1710. His lobbying for learning, as well as the passing of this piece of legislation, occupy the next and concluding chapter of this prehistory of intellectual property.