

John Locke on the Possession of Land:  
Native Title vs. the ‘Principle’ of *Vacuum domicilium*

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**Abstract**

The early paragraphs of John Locke’s *Second Treatise* describe a poetic idyll of property acquisition widely supposed to have cast the template for imperial possessions in the New World. In the state of nature ‘nobody has originally a private dominion exclusive of the rest of mankind.’ Yet by ‘the labour of his body and the work of his hands...whatsoever then he removes out the state that nature has provided...he has mixed his labour with, and joined to it something that is his own, and thereby makes it is property....’

Few theorists of sovereignty and international law have read much farther in Locke’s brief treatise, thus saving themselves (and their assumptions) from the surprises lurking in the later chapters on conquest, usurpation and tyranny. There Locke sets forth a robust defence of native rights to lands and possessions that survive to succeeding generations. Thus ‘the inhabitants of any country who are descended and derive a title to their estates from those who are subdued and had a government forced upon them against their free consents retain a right to the possession of their ancestors.... Their persons are free by a native right, and their properties, be they more or less, are their own and at their own disposal, and not at his.’

Locke himself observed that doubtless this ‘will seem a strange doctrine, it being quite contrary to the practice of the world.’ His doctrine of native right is equally strange to the practice of contemporary scholars who see in Lockean theory the ideological prototype of imperial colonialism in the ‘vacant lands’ of North America. This paper views Locke’s complex thinking against the background of England’s early sixteenth-century experience of Amerindian agriculture, territorial jurisdiction, widely acknowledged native property rights and another strange principle, *vacuum domicilium*.

## Introduction

John Locke's *Second Treatise of Government* (1690) has been widely condemned by contemporary scholars for devising a seductive new rationale to promote English colonial expansion in the New World. Yet the 'planting' of English colonies had been growing apace for well over a century before the work appeared. The 'imagined' New World was already a dynamic reality in imperial policy, commercial practice and English law. 'Justifications' for colonial possession appealing to theology, sovereignty and natural law were fully deployed, needing no assistance from Locke. Yet the New World as a poetic genealogy of England's ancient origins provided Locke with a metaphorical origin of *natural* private rights and free consent. This strengthened his *domestic* advocacy of parliamentary constitutionalism. But Locke must have known, as did the colonists, that a state of nature in the New World endured only in a mythic form. If appropriation in the state of nature meant anything, the American Indians already faced the dilemma of dispossession: dealing in the sharing and sale of land; or facing usurpation and tyranny worse than that experienced by their new colonial neighbours who fled England's oppression.

After a brief exegesis of Locke's account of property and native right, this paper reviews the actual colonial experience of property and possession, together with its modes of representation and justification. The chronology itself, and informed speculation about Locke's own awareness of Indian and colonial property dealing, suggest that recent 'post-colonial' critique of Locke is anachronistic, not only mistaking Locke's rhetorical intentions but obscuring his arguments for native right. It remains speculative, but plausible, that Locke himself acknowledged and implicitly condemned the emerging dispossession of the Amerindians in his robust defence of native right. Modern and postmodern scholarship has, nevertheless, seized upon a peculiar misnomer, *vacuum domicilium*, retrofitting it to Locke's theory to suggest a brutally legalistic rationale for England's theft of a continent from its native owners.

## Property and possession

*Origins in nature.* The early paragraphs of Locke's *Second Treatise* are a rhapsody on human life in a state of nature; why in mutual agreement we departed its inconveniences; and how in the civil state we still possess, by the full right of nature, differing proportions and kinds of private property: some in lands and possessions, some in the labour of their bodies only. Modern political theorists interpret Locke's poetic idyll of property acquisition as a clever, perhaps cynical, template for imperial possessions in the New World. The same

theorists tend to gloss over, or ignore, a significant difference between a theory of the origins of private property and a theory of political sovereignty.

In the state of nature, Locke (1988) assures his reader, ‘nobody has originally a private dominion exclusive of the rest of mankind.’ Yet by ‘the labour of his body and the work of his hands... whatsoever then he removes out the state that nature has provided... he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property.... [Picking up acorns and gathering apples] added something to them more than nature, the common mother of all, had done; and so they became his private right’ [¶¶ 26-28].

¶ 28. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself.... That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right.

Anyone familiar with modern Lockean scholarship and the relatively new domain of post-colonial and international relations theory will be familiar with Locke’s discussion of the move from ‘all things in common’ to private property, even if they have not carefully read Locke’s *Second Treatise*. Its seductive portrait appeals easily to the imagination: its vivid pastoral and agrarian imagery of heaths and forests, wild fruits and game, the vast landscapes of an unspoiled new world, and amiable village trade, childlike fancy for the glitter of shiny metal and stones.

Caution and heightened curiosity are required when a sophisticated philosopher writes about plums, apples, deer, sparkling pebbles, babbling brooks and richly ploughed fields (¶¶ 30, 46). These engaging metaphors introduce very different, much less pastoral and rustic, things. Many contemporary theorists have used insufficient caution, perhaps also insufficient imagination, in the face of Locke’s colourful tableau of the origins of property. Thus Locke’s property theory and the related labour theory of value have elicited scathing criticism for what is supposed to be Locke’s influential justification for dispossessing indigenous peoples first in the Americas and eventually in the farther reaches of British imperialism and capitalism generally. If labour increases the value of all things, especially land, then it would follow that valuable commodities like tobacco and sugar must require the labour of many more bodies than England’s few good honest yeoman farmers who after all cannot realistically be spared at home.

***Native right vs. conquest and usurpation.*** Few theorists of sovereignty and international law have read much farther than Chapter V in Locke’s brief treatise, thus saving themselves (and their assumptions) from the surprises lurking in later chapters on conquest, usurpation and

tyranny. There Locke presents a robust defence of native rights to lands and possessions, rights that survive to succeeding generations. Thus even in a just conquest

the inhabitants of any country who are descended and derive a title to their estates from those who are subdued and had a government forced upon them against their free consents retain a right to the possession of their ancestors...for the first conqueror never having had a title to the land of that country, the people who are the descendants of, or claim under, those who were forced to submit to the yoke of a government by constraint have always a right to shake it off and free themselves from the usurpation or tyranny which the sword has brought in upon them...' [§192]. 'Their persons are free by a native right, and their properties, be they more or less, are their own and at their own disposal, and not at his' [§194].

Locke doesn't mince words in opposing one ancient rationale of gaining new territory: 'If it be objected, This would cause endless trouble; I answer, no more than justice does, where she lies open to all that appeal to her.' (¶ 176) Locke is aware that he is treading on revolutionary grounds.

No damage therefore, that men in the state of nature (as all princes and governments are in reference to one another) suffer from one another, can give a conqueror power to dispossess the posterity of the vanquished, and turn them out of that inheritance, which ought to be the possession of them and their descendants to all generations....¶184 Their persons are free by a native right, and their properties, be they more or less, are their own and at their own disposal, and not at his. (¶194)

Locke scholars mainly argue that Chapters 17 and 18 on conquest and usurpation resonate with the particular concerns of European and especially English political concerns (Tully 1995, 150). But I draw attention to the fact that Locke's discussion comes against the backdrop of a more than a half-century of incipient revolt in the American colonies expressed precisely in the rhetoric of conquest, usurpation and tyranny. Moreover, Locke's definition of tyranny – '...the exercise of power beyond right...not for the good of those who are under it, but for his own *private separate advantage*' (¶ 199) – is uncannily indistinguishable from the express purpose of the colonial companies, abetted by the commercial aspirations of the royal grants and charters which authorised and supported them. Indeed, correspondence among colonial investors and participants a century earlier, and between these interests and the representatives of the crown dating to a full century earlier than Locke (in the chartered voyages of Cabot, Raleigh and Smith), reflect a callous and craven – one is tempted to say wanton – tone now associated with the spruiking of modern property speculators and local government development councils. Emblematic of such works is Richard Hakluyt's Preface to *Divers Voyages, 1582*, written to encourage Henry VIII with a 'Godley rationale for riches and taking lands and things.' (Hakluyt Society 1935 I, 178) The argument urged upon the king isn't subtle: 'The ends of this voyage are these: 1. To Plant Christian religion. 2. To

trafficke. 3. To conquer. Or to doe all three.’ (Hakluyt 1935 II, 331) Britain clearly did not need Locke’s theory of appropriation to promote and legitimate New World exploitation.<sup>1</sup>

The final chapter of the *Second Treatise*, Of the Dissolution of Government, is effectively a case for political resistance and ultimately revolution. Locke’s description of a lawless, anarchic community wherein ‘the people become a confused multitude, without order or connexion,’ certainly alludes to the forty years of English revolution and civil war. But intriguingly he observes that ‘a government without laws is, I suppose, a mystery in politics, unconceivable to human capacity, and inconsistent with human society.’ (§ 219)

This prognosis resonates tragically with contemporary Australian indigenous rhetoric and judicial reasoning, but I suggest a contemporaneous resonance. Locke could not have written this line – ‘society can never, by the fault of another, lose the native and original right it has to preserve itself’ (§ 220) – in ignorance of the well-known, feared and generally respected American Indian tribes, whose population, territorial claims, farming, fisheries, governance and military superiority had been the subject of colonial negotiations for seventy years before the *Second Treatise* was published.

These robust sentiments resonate down the centuries in the rhetoric of democratic revolution. It is therefore important to see them in the context of Locke’s theory of property appropriation, that is, as a function of first use and occupation with the rights flowing undiminished to successive generations. Similarly, these sentiments need to be tested in relation to what Locke wrote about the Indian ‘savages’ and the supposed uncharted ‘wastes of America.’ Locke indulged both the romantic imagery and the pragmatic estimates about the vastness and emptiness of the New World. But when he wrote the treatise there were more than twenty colonial settlements in the Massachusetts Bay area alone. All of them had negotiated with and bought land from the Indians, titles to which were certified by colonial governing councils and disputes adjudicated by colonial courts. No colonist or colonial government was under any illusions about lands being unused and unoccupied. The questions thus arise, What did Locke actually know about the colonial experience, and how might this our understanding of his views on the appropriation of property and the survival of native right?

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<sup>1</sup> ‘[I]f we doe procrastinate the plantinge, (and where our men have now presently discovered and found it to be the best parte of America that is lefte and in truth more agreeable to our natures, and more nere unto us then Nova Hispania), the frenche, the Normans, the Brytons, or the duche, of some other nation will not onely prevente us of the mightie Baye of St. Laurence where they have gotten the starte of us already...but also will deprive us of that goodd lande which nowe wee have discovered.’ (Hakluyt 1935 II, 279)

### **Locke's intellectual context**

Locke's arguments are enriched by taking account of the historical context of two centuries of European contact with the native populations in the New World prior to his writing the *Second Treatise* and England's more than twenty colonial settlements in Chesapeake and Massachusetts regions (named like all explored areas after the Indian nations and their territorial names). Indeed, by the mid-seventeenth century, Locke was as well informed of these matters as anyone in England or Europe. His personal library contained an extensive collection of 195 New World volumes, including accounts of voyages, explorations, travel diaries, atlases and geographical studies, and records of the colonies in South and North America, especially in Canada, Virginia and New England. His interest was keen enough for Lord Shaftsbury, Locke's friend and benefactor, to chide 'the credulous Mr. Locke' in relation to his love of these works (Harrison and Laslett 1971, 27; De Beer 1969, 36-37).

It is hardly plausible that Locke, with his experience as a diplomat, Secretary to the Carolina Company, Secretary to the Council of Trade and Plantations and a leading figure in Whig political circles, was unaware of the planning and 'planting' of the English colonies and, especially their political, legal, theological and commercial affairs. These matters were widely publicised in Puritan sermons and pamphlets, dissenting theological disputations and the commercial and well as political concern in London with the commercial, legal and sometimes dire military fate of the colonial companies. Indeed the colonial experiences with the American Indians embraced the full range of these concerns. So it is implausible to suggest that Locke was ignorant of the extensive, complex relations between the English settlers and the Indians (Wallace 1957, 315-19; Cronon 1983, 55-84). Those relations had much to do with property in land, and securing title to property. He would equally have known that negotiating for the purchase of land in the colonial settlements was a standard, long established practice, leading often to disputes over contracted agreements. The practice was described by the settlers in terms of rights, both in legal terminology and theological doctrine (Springer 1986). The negotiations for sale were supposed to be strictly regulated, according to both colonial and Indian law, and conducted under the exclusive authority of the colonial court or council and the relevant sachems (chiefs). Nevertheless, private agreements were often negotiated by an individual colonist and a minor sachem, not infrequently leading to fines and nullification when the purchaser sought the council's formal approval of title.

Ashcraft (1987, 162-63), while trying to argue that Locke viewed the Indians as savages still living in the state of nature, offers solid evidence that shows such a claim to be at least equivocal. In any case it attests to Locke's interest and familiarity with Indian culture.

In one of the many journal notes Locke made from his reading about the Indians, he writes that 'their kings are rather obliged by consent and persuasion than compulsion, the public good being the reason of their authority...and this seems to be the state of regal authority in its original in all that part of the world.'

The notes Ashcraft mentions confirm Locke's familiarity with contemporary works, almost certainly those of Roger Williams (1643; 1988 II, 453-54) and Thomas Morton (1632 I, 11-40), who published first-hand accounts of how sachems strive to rule by consensus (Davis 1970, 597-98; Gaustad 2005; Glover 2006). If those works were known to Locke, he would also know that these colonial writers were describing precisely how treaties, contracts and the sales of land were agreed between Indians and colonial settlers.

The plantations Locke, or any well-versed Englishman, would know most about would be the Boston, Providence and Connecticut colonies in New England (as it was already called). It had been well known from first English contact (indeed before, from Dutch, French and other expeditions) that distinct Indian tribes lived in established villages and cultivated corn and other crops on a large scale, just as some Indian settlements had constructed elaborate fishery catchments, weirs and other developments in rivers and lagoons (de Bry, 1578; Hariot 1590), the knowledge of which remains a proud tradition of fishermen using similar pound traps in the present day (Kilgannon, 2007). These had long been commented upon in published accounts by European explorers, travellers and colonists, and were illustrated in European maps. All visitors to this New World were greatly impressed by the ubiquitous cornfields, corn storages, vegetable gardens and orchards, and the game that supplied the Indians with a diet also large in meat. Colonists' letters and diaries unfailingly attested to the Indians teaching them to cultivate corn, in particular. Several settlements would not have survived if it were not for the Indians' gifts of corn to eat and sow, teaching colonists as a matter of survival how and when to plant (Cave 1988; Masefield n.d.; Muldoon 2001; Bradford 1908; Neuwirth 1986; Winthrop 1908).

Consequently, when Locke wrote this passage toward the end of the *Second Treatise*, it is difficult to believe that his explicit allusion to the ancient ways of the English people can be shorn from a wider frame of reference.

People are not so easily got out of their old forms, as some are apt to suggest. They are hardly to be prevailed with to amend the acknowledged faults in the frame they have been accustomed to. And if

there be any original defects, or adventitious ones introduced by time, or corruption; it is not an easy thing to get them changed, even when all the world sees there is an opportunity for it. (§223)

Indeed, this passage could easily be a description of the colonists' dealings with the Indians (or *vice versa*).

### **The 'principle' of *vacuum domicilium***

A surprise in researching the colonial context of Locke's theories of property and native right was the term *vacuum domicilium* (devoid of inhabitants) and its implied association with Locke's theory of private property. Its mysterious origins notwithstanding, the term has had a hypnotic effect on modern scholars as a short hand reference to Locke's property theory in Chapter 5 of the *Second Treatise* and Britain's justification for its colonial policy. *Vacuum domicilium* is variously described as a presumptive 'theory' of imperial claims to sovereignty; a 'common principle' underlying Britain's colonial policy and practice; 'and accepted rule' (Ellis 1885, 248); a concept of ancient or Roman law; an 'international legal doctrine' (Glover 2006, 444); a claim to right of possession or property title; Locke's own concept (Jennings 1971, 521-28; Cave 1988; White 1999; Dickason 2000; Glover 2006, 444). Attempts to document the origin and clarify the use of this term in the seventeenth century became reminiscent of another infamously elusive term, *terra nullius*. Indeed *terra nullius* and *vacuum domicilium* are sometimes used interchangeably (Tully 1995, 74; Sarson 2005, 26).

The origins of *vacuum domicilium* have been sweepingly attributed to Roman law, Justinian's *Digest* or *Corpus juris civilis*, to Grotius and the Natural Law school, and even (bizarrely, but frequently) to Thomas More's *Utopia*.<sup>2</sup> Yet the term does not appear in any of these documents, either in their Latin originals or their English translations (McMillan 2003, 427-28). Nor can the term be found in legal dictionaries. What modern scholars call the common, dominant principle of British imperial policy is to be found nowhere except in very narrow early seventh-century Puritan theological doctrine as 'vacant soyle,' invariably controversial and always at odds with colonial practice even by its small handful of exponents. Despite the complacent scholarly assertions by contemporary scholars that it was the controlling principle of New World settlement, *vacuum domicilium* can only be traced to

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<sup>2</sup> More's *Utopia* (published in 1516) is invoked by several writers as if the book was, variously, a treatise extending Roman law into international law, an influential text either tracing or driving English imperial policy or, most bizarrely, a proposed model for British colonialism (Washburn 1959, 15; Cave 1988, 279; Schweitzer 2003, 182; Sarson 2005, 26). None of these references treat it for what it is, a work of satire, imagination and, most powerfully, a scathing critique of British and European monarchy, law and culture. Washburn (1959, 24) described *Utopia* as an expression by More of 'the justice of expansion.'



the idiosyncratic and inconsistent usages by John Winthrop, Governor of the Massachusetts Bay Colony, and one or two other invocations of biblical ‘justification’ for colonial plantation (Winthrop 1908 I, 294; II, 185-86). The term does not figure in the royal charters of the New World colonial companies, the contemporaneous documentation of colonial settlement or in the ethnographic literature associated with early colonial contact with native peoples; nor does it appear in centuries of legislative, treaty and judicial proceedings concerned with native lands and rights.

It has been, nevertheless, a seductive idea in recent decades, lending a condemnatory coherence to the European settlement of the New World. *Vacuum domicilium* is presented as an antique, culturally obtuse, racist explanation for the tragic, often violent, displacement, sequestration and banishment of the Indian population from their immemorial, and immemorially contested, tribal territories. A measure of the hypnotic power of a supposed precept of Roman law is its routine appearance in secondary school and university curricula, and on native American websites, as an on-line ‘resource’ for school teachers (Stanford University 2006; Memorial Hall 2007; *Native American Nations* 2007). Generations of students are now being taught that English colonists came to the New World fully armed to impose themselves on the native population, violently expel them, and feel fully justified in doing so on the grounds of an ancient, prestigious legal doctrine that was arrogantly blind to the rights and even the lives of semi-nomadic tribal peoples. Their lands were ‘void’ of people and their soil was ‘vacant’; therefore the land was *vacuum domicilium* – simply available for good Christian people to arrive in their obedience to God’s injunction to clear and fence the land, till the soil and bring forth bountiful harvests.

This makes a good story, it resonates with contemporary political morality, and at least the tragic consequences of the devastation of English settlement for Amerindian life and culture are profoundly true. The historical and theoretical difficulty is that the powerful guiding force of the concept of *vacuum domicilium*, and Locke’s central responsibility for conceiving and promoting the idea, is essentially pure fiction. Worse, it is bad scholarship.

Very slender evidence suggests that *vacuum domicilium* was used in the 1630s, at least by some colonial officials, pilgrim preachers all. The earliest documented occurrences are in the private journals and reminiscences of Governor John Winthrop of the Massachusetts Bay Colony (serving intermittently from 1630-1648). The term is invariably linked to the rare occasion of Winthrop’s use (Oliver 1856, 102) or an attribution by his contemporary colonial intimates; it is even possible that he invented it. His use of the term was rhetorical,

contradictory, and apparently invoked only when the governing council refused to certify *de facto* land sales between Indians and individual colonists. One can speculate that Winthrop was using his Cambridge Latin and erstwhile legal experience to generalise from Old Testament doctrine enjoining the redeemed to ‘subdue’ and ‘refresh’ the earth and make it plentiful (Higgenson 1689, 19; Polishook 1967, 51-55; Neuwirth 1986, 44, 52). Clearly he was struggling to dignify, with supposed legal terms of art, the Massachusetts Company’s charter to settle and govern in dangerous and always fractious circumstances. His rationale sometimes invoked the supposed ancient right of possession as a justification for the royal charter’s grant of land. Yet on other occasions he invoked that right *against* presumptions of royal possession on the grounds that colonial property had been rightfully purchased from its Indian owners (Winthrop 1908 II, 185-86).

Modern scholars, when they bother at all, source the term’s provenance to the nineteenth-century Boston divine and historian, George Edward Ellis, who asserted that *vacuum domicilium* was an ‘accepted rule’ upon which ‘much stress’ was laid.

In 1633 the Court ordered “that the Indians had a just right to such lands as they possessed and improved by subduing the same, Gen. I 28, ix. 1.” The condition demanded was actual occupation by tillage. The accepted rule was *vacuum domicilium cedit occupanti*. Plymouth devoted several necks of land to the Indians, and pronounced them inalienable. (Ellis 1885: 248)

Though Ellis doesn’t say so, the ‘accepted rule’ he postulates must be taken from Oliver (1856, 102), who cites a Massachusetts Bay General Court order of 1633: ‘what lands any of the Indians have possessed and improved, by subduing the same, they have just right unto, according to that in *Genesis*, ch. i, 28, and ch. ix, 1.’ Oliver baldly concludes: ‘Thus the argument used was *vacuum domicilium cedit occupanti*.’ I have not been able to determine whether that formula was actually used in 1633, or whether it is Oliver’s learned phrase.

A second usage by Ellis (1888, 279) also relates to the *recognition* rather than the *dispossession* of Indian property by the early colonial governments. It concerned ‘the relations between the Indian proprietors [*sic*] and the English colonists whom [Roger] Williams charged with an usurpation of their rights.’ ‘It is true,’ Ellis states

that we find the [colonists] laying much stress upon the opportunity of entering here upon a *vacuum domicilium*, – a large territory wasted and cleared by pestilence.... Before transfer of the government here, the Governor of the Company, writing from London to Endicott, their agent in Salem, instructed him thus: “If any of the salvages pretend right of inheritance to all or any part of the lands granted in our patent, we pray you endeavour to purchase their tittle that we may avoyde the least scruple of intrusion.” [Court Records, i. 394] The instruction was strictly followed.

Interestingly, Ellis's only direct quotation *vacuum domicilium* from a colonial source, refers to the Massachusetts colony's fraught dealings in 1633 with the dissenting Roger Williams. The usage is a ironic commentary on Williams's infamous diatribe against the 'lies' of the English king, the consequent illegitimacy of the colony's royal charter, and his staunch claim of Indian sovereignty over land, despite himself holding a title to a house and ten acres of land in the Salem settlement.

By a touch of humor rare in the pages of [John] Winthrop, it appears that the Governor took note of this fact. In his letter to Endicott he writes: "But if our title be not good, neither by patent, nor possession of these parts as *vacuum domicilium*, nor by good liking of the natives, I mervayle by what title Mr. Williams himselfe holds." (Ellis 1888: 280)

Winthrop (1587-1649) was a Cambridge educated, Gray's Inn lawyer in London before his fervent Puritan beliefs caused him to find shelter from God's wrath inevitably to be visited upon England for the popish subversion of the Anglican Church. His use of *vacuum domicilium* was noticed by Gummere (1933, 330), who notes that the Governor employed a number of legal phrases in managing affairs of colony.

A venerable colonial figure from the Massachusetts Bay Colony, the Reverend John Higgenson of Salem, also used *vacuum domicilium* in 1689 as a term of art when New England was on the verge of revolt against England (as Parliament was against the king) because of the king's invoking a royal right to the whole of the colonies' lands. Higgenson (1689: 18-19) swore an affidavit on the question '*Whether all the lands in New-England were not the king's?*'

I did not understand that the lands of *New-England* were the king's, but the king's subjects, who had for more than sixty years had the possession and use of them by a twofold right warranted by the word of God. 1. By a right of just occupation from the grand charter in *Genesis* 1<sup>st</sup> and 9<sup>th</sup> chapters, whereby God gave the earth to the sons of Adam and Noah, to be subdued and replenished. 2. By a right of purchase from the Indians, who were native inhabitants, and had possession of the land before the English came hither, and that having lived here sixty years, I did certainly know from the beginning of these plantations our fathers entered upon the land, partly as a wilderness and *Vacuum Domicilium*, and partly by consent of the Indians, and therefore care was taken to treat with them, and to gain their consent, giving them such a valuable consideration as was to their satisfaction.

Higgenson's testimony shows his awareness of *vacuum domicilium* as a concept, but also his firm conviction that it was not an adequate expression of how the settlers had come into possession of their property, considering the established policy of negotiation and purchase of land, and the adjudication of ensuing disputes, by the colonial councils and courts. Indeed, this was not only true of New England. Jennings (1971, 200) describes a small Puritan settlement 'in the midst of about 3,000 Wampanoag Indians' on Martha's Vineyard, New York in 1643:

On the Vineyard, Indian rights in property were fully respected. When Vineyard converts requested a tract of land to be set aside for a Christian village, they obtained it from the pagan sachems Josias and Wannamanhutt on promise of payment of an annual rent. The government of their town was committed to Governor Mayhew because it was Christian, but outside the town the non-Christian sachems kept their customary prerogatives to govern and to sanction property transfers.

### **Locke as imperial theorist, apologist, ideologue?**

It is *possible* that Locke was unaware of the half-century of property dealings and judicial proceedings in New England. Consequently his references to the vast wastes of the New World – and such literary allusions as ‘once all the world was America’ – *might* represent his literal ignorance and obsolete convictions. It is doubtful that any hard evidence could be a conclusive register of his, ignorance, knowledge or, for that matter, his intentions.<sup>3</sup> Of course the assumption that Locke was a callous ideological apologist for British imperial oppression and capitalist exploitation, ignoring or running roughshod over native peoples, is also speculative and suffers from evidentiary lacunae. Nevertheless, the critiques of Locke as imperial apologist, enthusiastic colonialist and even racist are increasingly frequent in modern scholarship (Sarson 2005, 26; Arneil 1994, 1996, 1996a; Ivison 2003, 93; Peacock 1984, 40; Tomlins 2005, 45; Armitage 2000, 98; Thompson 2002, 56-58; Tully 1995, 78-79).<sup>4</sup>

For example, James Tully associates theories of acquisition and possession by early English colonists with Locke’s ideas on property in the state of nature (Tully 1993, 150-52). Tully argues that their ideas ‘function’ in Locke’s work to relegate the native population on the basis of a lesser psychological capacity: ‘Because the Amerindian political and property system is tied to a world of limited desires and possessions it is unsuited to the development of modern states and systems of property.’ In effect, Tully argues that the early settlers’ essentially theological defence of English plantation on the basis of ‘vacant soyle’ or *vacuum domicilium* had a greater impact on the practical experience of property relations among the English settlers, courts, colonial governments and the Indians because of Locke’s thinking *a half-century later*.

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<sup>3</sup> Tully (1993, 151) provides a brief but undocumented acknowledgement of Locke’s appreciation of Indian affairs: ‘Locke was aware that the native peoples did not govern themselves in the wholly individual and independent manner laid out in his description of the state of nature, but were organized politically into nations.’

<sup>4</sup> A bibliography of twenty-two scholarly articles ‘focused particularly on debates about the presence of racism in Locke’s writings’ prepared for The Race Roundtable (13 November 2004) sponsored Philosophy Department, Oregon State University, is available at <http://oregonstate.edu/~cloughs/RaceRefs.html>

Tully does not seriously entertain Locke's forthright doctrine of the survival of native rights upon usurpation and conquest. 'Locke's theory of conquest,' Tully dismissively asserts, 'was written for another purpose.'<sup>5</sup> Locke's reference to 'more land than the inhabitants can make use of...thereby [brings] his theories of conquest and appropriation into harmony' (155). Such a comment is risible considering that Locke was writing a damning critique, not a 'theory' of conquest.

In a subsequent study, Tully (1995, 78) again sees Locke through the prism of blame.

Locke's account [of 'Aboriginal government' compared to a 'modern constitution'] covers over the real history of the interaction of European imperialism and Aboriginal resistance. The invasion of America, usurpation of Aboriginal nations, theft of the continent, imposition of European economic and political systems, and the steadfast resistance of the Aboriginal peoples are replaced with the captivating picture of the inevitable and benign progress of modern constitutionalism.

Tully reflects the entrenched anachronism of attributing Locke's overweening influence on colonial ventures by offering 'evidence' that indiscriminately conflates Locke's *Second Treatise* with ideas published a half-century earlier that were articulated in terms of biblical scripture and supposed concepts of Roman law that Locke himself never mentioned. Tully writes, 'Hence, land used for hunting and gathering is considered vacant and, as John Cotton concluded fifty years earlier

'in a vacant soil [terra nullius] [sic], he that taketh possession of it, and bestoweth culture and husbandry upon it, his right it is'. Consequently, hunters and gathers possess no rights in lands they have used and occupied for centuries and so have 'no reason to complain or think themselves injured' by European 'incroachment.' (Tully 1995, 74)

It is apposite to note Cotton never used the phrase *terra nullius*, as Tully implies. Tully's supporting footnote cites Locke's *Second Treatise*, ¶¶ 42, 45 and 32, as if he had somehow influenced John Cotton's published sermon (Cotton 1634), a theological diatribe against a never published essay that asserted a robust defence of Indian rights of property and territoriality by Roger Williams (1963 II, 47).

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<sup>5</sup> Tully (1995, 150) implies that Locke's discussion of conquest and usurpation is merely a commentary on relations (claims, counterclaims and war) between sovereign states, and was therefore unrelated to the narrower diplomatic concepts of discovery and possession advanced by European powers. Paradoxically, Locke's same passages are condemned for justifying European invasion and dispossession of indigenous peoples in the guise of exploration, discovery, possession and Christian evangelism.

Even a scholar as eminent as Richard Tuck (1999, 177-78), is anachronistic in discussing William Penn's acknowledgment of Indian native rights circa 1681, ignoring identical arguments by William Rogers in New Providence a half-century earlier.<sup>6</sup>

Penn's whole approach was diametrically opposite to that of Locke [who would not publish the *Second Treatise* for a decade, and then anonymously], and the founding of Pennsylvania represented a major challenge to the principles upon which the English colonies had so far been planted in America. Locke seems to have been suspicious not only of Penn's generosity to the Indians, but also of the absolutist tendencies displayed by Penn.

Tuck implies as exceptional what had been the general policy and judicial practice of the earlier New Providence and Massachusetts Bay land purchases.

Condemnations of Locke often take the form of a ritual that requires, and receives, no argument. Maurice Cranston (1975, 119) summarily judged that 'Locke was easily infected with Ashley's [3<sup>rd</sup> Earl of Shaftsbury] zeal for commercial imperialism.' Barbara Arneil (1992, 603) assumes complicity:

Locke's *Two Treatises* was an attempt to undermine the Indian's claims to land by creating a new definition of property. Aware that Indians in the New World could claim property through the right of occupancy, Locke developed a theory of agrarian labour which would, through the right of agricultural labour, specifically exclude the American Indian from claiming land.

If Locke is hardly done by political theorists, the treatment is mild compared to the sweeping condemnations of colonial historians, ethno-historians and literary critics. For Ivison (1997, 166) Locke even bears responsibility for Australia's High Court finding in 1979 against Aboriginal territorial sovereignty:

the possession of sovereignty [hinges] on the existence of a particular form of civil and political society [that] neatly excludes any consideration of Aboriginal institutions and norms, and thus any reasonable consideration of their claims. Indeed it was invoked by Locke, amongst others, to justify the expansion of British colonization in the Americas.<sup>7</sup>

Ivison's (2002: 45) critique returns in postmodern dress when Locke

is said to have thickened out the anthropological minimalism grounding man's natural freedom from socio-cultural conceptions of rational competency and 'reasonableness' that ruled out taking the claims of indigenous peoples seriously. His concept of property...conveniently de-legitimated Native American sovereignty and landholding practices.

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<sup>6</sup> However Tuck (1999, 47-50) gives a fine scholarly account of the ancient origins and humanist revival of the legal and moral dimensions of the occupation of 'vacant land,' though nowhere does he use the term *vacuum domicilium*. Footnote 94 allows that Locke 'presumably' derived his idea of cultivation as a means of acquiring propriety of land from the canonist Franciscus [Accolti] Arieto's *Consilia* of 1536.

<sup>7</sup> Reflecting the cross-pollination of these arguments, Ivison supports this claim with references to Tully (1993 and 1995) rather than Locke.

In a slipshod and tendentious argument, Peacock (1984, 40) footnotes Locke with a reference to ‘pp. 3-143’ and Governor Winthrop with a lengthy passage in fact written by Francis Jennings (1975). Peacock implies that the *Second Treatise* ‘proposed’ concepts influencing the Puritan colonists sixty years before it was written:

In 1690 John Locke would propose on behalf of English Puritans that “the true original, extent and end of civil government” was to establish institutions for holding, transferring, protecting, and adjudicating disputes about private property and national territory.<sup>8</sup>

Anthony Pagden (1993, 117), not alone (Seleger 1969, 23), is taken in by Locke’s poetry, declaring that “America was still, in John Locke’s celebrated phrase, ‘in the beginning’ of the whole world, and its inhabitants, unlike the Asians of the Africans, had seemed *at first sight* to live in the ‘Golden Age of their customs’.” [Italics added.] The colourful image, however, is referenced to a work by Peter Martyr of 1530.

Thompson (2002, 65), refers mysteriously to ‘a Lockean deed of title’ and follows the conventional view of imputing dire consequences to Locke’s early argument about appropriating property while entirely ignoring Locke’s recognition of native right to property and possessions.

Locke’s theory, so often used by settlers and governments [*sic*] as a justification for expropriating the land of indigenous people, seems an unpromising basis for an attempt to ground the land rights of an indigenous community. (56)

Even Washburn (1959, 22-23), in a bracingly clear-sighted critique of attempts to justify Indian displacement, cannot resist an easy shot: ‘John Locke was perhaps its most famous exponent, although, characteristically, he did not develop the argument logically or clearly.’<sup>8</sup> Later, Washburn (1976, 14) inadvertently undermines Locke’s ‘influence’ on a policy of dispossessing ‘wandering hunters’ and the practical effectiveness of such a justification. Thus in the *early* decades of the seventeenth century:

Many of the Puritan divines and colonial governors sought to justify their claims to Indian lands by arguing that European farmers had a right to settle in areas that were incompletely possessed by nomadic hunters or insufficiently utilized by native agriculturalists. In such Puritan writings as John Cotton’s *God’s Promise to his Plantation*, this claim was grounded in divine sanction.... Despite such theologically tinged arguments most of the colonists’ dealings with the American Indian were effected through a variety of practical agreements.

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<sup>8</sup> John Dunn (1969, 72-72) notes the scholarly association of Locke with ‘the expropriation of the Indians by the laborious and God-fearing people of New England,’ but exonerates Locke from any direct influence on eighteenth-century ideas of property, in England or America, except rightly attributing to Locke the idea of the ‘moral dignity’ of labour as contrasted with the older natural law idea (both Roman and Grotian) of property by mere possession.

Washburn concedes that in John Cotton's own colonial milieu, a half-century before Locke's *Second Treatise*, the doctrine of 'vacant soyle' was a rhetorical expression of theological doctrine of doubtful practical relevance. Indeed, the idea was both absurd and dangerous to colonial experience, since the Indians were manifestly present in great numbers and enjoyed a far more stable livelihood than the newly 'planted' English settlers. The 'strange proximity' (White 1991; Thomas 1999) of the people whose lands they had entered created a 'balance of power' that was as easy for the settlers to feel as it has been convenient for modern scholars to underestimate or simply ignore. It is ironic that the biblical injunction of 'vacant soyle' and the supposed Roman law precept of *vacuum domicilium* have been more assiduously employed in contemporary historical interpretation and Lockean scholarship than they were in the actual experience of Indians and colonial settlers.

Nevertheless some historians, especially legal scholars, have documented the complex colonial property relations (Allen 1981; Anderson 1994; Glover 2006; Muldoon 2001; Konig 1974, 138-39, 176; Leavenworth 1999, 276-82; Osgood 1904, 225-26; Slattery 1991; Springer 1986; Thomas 1999; Wallace 1957, 315-19; Washburn 1959, 1976; Webber 1995). Their work serves as an important corrective to historians' (and Hollywood's) dominant focus on frontier violence, warfare and tragic dislocations. This is reflected in a revealing introduction to a collection of essays (Smolenski and Humphrey 2005, 6) whose editor seems to distance himself from his own colleagues:

It is in some ways difficult to see how one can reconcile John Locke's intellectual justifications for dispossessing Indians of their land – so central in David Armitage and Anthony Pagden's discussions of the English conception of empire – with the actual course of colonial settlement on the eastern coast of North America in which colonizers and Indians frequently lived side by side. Despite frequent outbreaks of violence, in practice the tenor of Anglo-Native relations was dictated more by extralegal customs governing social and economic exchange than by the formal justifications for English power.

Smolenski (2005, 283) discreetly credits two scholars not included in the book, David Silverman and Nancy Shoemaker, for suggesting 'that historians have exaggerated the differences between Indian and European notions of property, causing them to misunderstand conflict over this issue.'

A major reassessment of these matters was begun by James Warren Springer (1986, 25-26), who documents the myriad property relations between Indians and early English colonists. His analysis of the legal documentation – royal company charters, colonial governments, property deeds and court records – led him to distinguish between

general policy statements by colonial leaders, on theological and moral justifications for the English settlement of New England and occupation of Indian lands, or on philosophical speculations as to the



nature of primitive society. Such writings can easily mislead one as to the policies actually adopted by colonial governments, whereas the court records at least show the direct manifestation of the policies in specific cases.

Springer (1986, 55-56) observes of many colonial historians:

many works...have claimed that the Puritans either recognized no Indian rights to the land, or else recognized only rights to those small plots being used for fields or villages.... There is, indeed, some support for this view in the more extreme philosophical and theological statements from prominent Puritans, such as John Winthrop.... The Puritans self-justifications have provided ammunition for many polemics, among them Jennings's *The Invasion of America* [1975, 135-38].

Springer's meticulous examination of colonial records reaches a strikingly different assessment than studies relying on Puritan rhetoric of biblical injunctions (*Genesis* 1 and 8) and the mysterious pseudo-legalism, *vacuum domicilium*.

The court decisions...give a very different picture. They not only show that Indian rights to unimproved lands were generally recognized, but they evidence a concern for balancing the interests and the equities that is not present in the philosophical and political literature. In so doing, they provide a second and sounder basis for criticizing the view that the English recognized virtually no Indian rights in land. (Springer 1986, 58)

Springer (1986, 56) counters the Jennings indictment by quoting contemporaneous Puritan authorities. For example, the Governor of New Haven in 1647, rejecting the Dutch claim of title to Connecticut land in a letter to the Governor of Amsterdam: 'we first came into these partes, & vpon due purchase from the Indians, who were the true proprietours of the land (for we fownd it not a vacuum).' Similarly in 1662, the General Court of Massachusetts Bay upheld what they called 'native title':

such haue binn the encouragement of the Indians in their improvements thereof, the which, added to their native right, which cannot, in strict justice, be vtterly extinct, doe therefore order, that the Indians be not dispossessed of such lands as they at present are possessed of there.' (Springer 1986, 56)

### **Conclusion: Locke's rhetorical strategy to reconcile the irreconcilable**

The *Second Treatise* needs to be seen in the political context of Locke's critique of monarchical absolutism and arbitrary power (the central theme of the *First Treatise*). The fundamental check on arbitrary power arises from Locke's theory of the original, natural right to property. Locke repeats again and again in the *Treatise* that 'the great and chief end of men's putting themselves under government' is the preservation of property in the larger sense of 'the mutual preservation of their lives, liberties and estates.' (§123)

Just as the *Second Treatise* argues that private disputes are dangerous to lawful peace in the state of nature, so it follows that sovereign disputes (war and conquest) violate peace and

good order. Thus a colonial entry into the vast wastes of America must be carried out by lawful enterprises of constituted authority whose acquisition of property must be undertaken only by those who, on the one hand, are competent to grant it and, on the other, those able to secure its enjoyment. Locke's insistence that property is and always remains a *natural* right (that governments are formed to secure, not seize) is consistent with his argument that the native right to lands and other goods cannot be extinguished or alienated by an act of arbitrary power or the passage of time.

Thus Locke's supposed confusion, paradox, or downright defence of imperialist expropriation of native title charged by his critics can be seen in another light. Sovereign acts – whether of just or unjust conquest, usurpation, or outright tyranny – discussed in the later chapters of the *Second Treatise* do not and can never extinguish native rights of property and possession, such as they have been naturally and rightfully appropriated as set forth in the earlier chapters. Locke surely did recognise that the Indians' enjoyment of their property was meagre and did not engender the ease and bounty of a civil, laborious life. But Locke equally recognised that what was theirs was theirs. When the English treated with the Indians it was right and proper to do as the colonists did, which was to treat and deal with them – whether or not as separate nations – on the basis of natural right and Christian duty. Thus when Locke (1669) drafted the Constitution of Carolina Company, the Indians were repeatedly referred to as 'neighbours' to be treated accordingly. All dealings relating to land, commerce and other property were to be carried out, whether individually or tribally, by the lawful colonial authorities. Given that the Indians were considerably superior in numbers to the colony, enjoyed more assured provisions and moved more securely and familiarly in the land, it is easy to appreciate that *vacuum domicilium* did not easily spring to mind or fit the occasion.

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