

## THE TRANSITION TO CIVIL SOCIETY: TWO INTERPRETATIONS OF LOCKE'S THEORY OF PROPERTY RIGHTS

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In *A Discourse on Property: John Locke and his Adversaries* James Tully lays out an interpretation of Locke's theory of property in which he claims that Locke did not believe that individuals could have the right to private property in a state of nature, and that private property in a Lockean civil society is purely conventional. In *The Right to Private Property* Jeremy Waldron takes issue with Tully's interpretation and attempts to refute both of Tully's central claims by showing that Locke believed that individuals in the state of nature had a right to private property and that the right to private property was not surrendered upon the move into civil society. In what follows I shall examine both interpretations of Locke's view, focusing mainly on the controversy over the nature of property rights in civil society. I shall argue that Waldron's interpretation is more plausible given the structure of the *Treatise* and the supporting evidence that Waldron provides.

Tully's claim that property in the state of nature does not constitute private property is important because if private property is something that persons in the state of nature have a right to, then any purely conventional system of property established upon the move to civil government would be illegitimate (unless the established government respected the pre-governmental property rights of the individuals, but if the system acknowledged the prior property rights of the individuals it would not be purely conventional).<sup>1</sup> Thus, the interpretation that Tully proposes is consistent with itself in that it makes the property right that individuals have in the state of nature weak enough that alienating or abrogating them will not be a problem in the move from the state of nature into civil society.

On Waldron's interpretation of Locke's account of property rights there is private property (in the sense in which we now use the term) in the state of nature. Waldron distinguishes two different senses in which Locke uses the term "property": first, he uses the term 'property in' to characterize rights relating to resources which are held in common or more than one person

has a right to; and second, he uses the term 'property of' to characterize rights which are held by one person to the exclusion of all others. Thus, to say that a person has property in something is to say that someone else may have property in that thing as well (although it may be the case that no one else has property in the thing), but to say that something is the property of someone is to deny that anyone else has property in that thing (in this case others are excluded from having property in the thing) (RPP 159).

Although Waldron agrees with Tully that property rights in the state of nature do not include the right of abuse, and that in that way they are not similar to our current conception of private property, he does believe that the right of individuals to hold property as the 'property of' them is sufficiently strong for us to consider them as having the right to private property in the state of nature. On Waldron's interpretation private property is characterized by **the privilege of an individual to use and exclude others from using some resource**—with three qualifications: first, the property owner may not waste or let his property spoil; second, the demands of desperately needy persons take precedence over the right; and third, that the property owner must look to benefit his family as well as himself (RPP 160-162). Thus, Waldron interprets Locke as asserting that private property as 'property of' is pre-positive law and that the primary end of government is to protect the property rights that individuals carry with them from the state of nature (RPP 162).

Thus far we have examined the different ways that Tully and Waldron interpret the concept of private property in Locke's state of nature. The purpose of this examination was to look at what property rights individuals carry into civil society on each interpretation in order to understand better the differences between Tully and Waldron concerning the question of what happens to property rights in the transition from the state of nature to civil society. Are they retained (unchanged) in civil society (limited conventionalism) or are they surrendered to the state for possible redistribution (pure conventionalism)? This is the area of strong controversy between Waldron and Tully, with Waldron favoring the former interpretation of Locke, and Tully favoring the latter.

As Waldron points out "It is a matter of some importance which is the correct interpretation", because if Tully is correct

then the Lockean system is not the kind of limited government favored by Nozick (and I presume Waldron as well), since original property rights are not maintained as a prior constraint on the redistributive or welfarist efforts of government (RPP 232). A government unconstrained by the prior property rights of its citizens may choose to establish an entirely new set of rights based not on the fundamental right to private property, but on some other fundamental principle like the public interest, and the government may also choose to occasionally review, change and even perhaps redistribute the rights of its citizens (RPP 233).

Tully wants to defend the view that all prior property is surrendered on the move into civil society, but he also wants to defend a stronger view, the view that "The society Locke envisages, in which the share of the goods of the community belonging to each is determined by the labour of each for the public good" (DP 168). He interprets Locke's right of subsistence as the right to the means necessary for comfortable subsistence and access to the means of production.

Tully's interpretation relies on six passages which have always posed problems for the traditional (Waldron's) view:

(1) In II.30 Locke suggests that 'the Civiliz'd part of Mankind . . . have made and multiplied positive Laws to determine Property'.

(2) In II.35 Locke indicates that in a country 'where there is Plenty of People under Government, who have money and commerce', consensual arrangements may be made to certain pieces of land as 'common by Compact'.

(3) In II.38 Locke says when nomadic herdsmen settled into cities, 'by consent, they came in time, to set out the bounds of their distinct Territories, and agree on limits between them and their Neighbours, and by Laws within themselves, settled the Properties of those of the same Society'.

(4) A similar suggestion is found in II.45. Once land became scarce, 'the several Communities settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, by Compact and

Agreement, settled the Property which Labour and Industry began'. Similarly, the 'several States and Kingdoms' by the 'Leagues' that they have made 'have by positive agreement, settled a Property amongst themselves, in distinct Parts and parcels of the Earth'.

(5) In II.50 Locke says bluntly that 'in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions'.

(6) Finally, much later, in II.120 Locke asserts that when anyone joins a civil society by consent, he necessarily 'submits to the Community those Possessions, which he has or shall acquire, that do not already belong to any other Government.' (RPP 234-235)

Tully builds an interesting case using these quotations and it is easy to see that even if we can interpret Locke as a non-conventionalist he has used the terms in the above passages in such a way as to leave himself open to a conventionalist reading.

Before moving on to Waldron's criticism of Tully, I would like to suggest a line of criticism that Waldron does not employ, yet seems to be a natural correlate to the line of argument that he takes.<sup>2</sup> If we examine the context of the above passages, we find that all but (6) are taken from chapter five of the second treatise, and that only (6) is taken from chapter seven which is the chapter devoted to the transition from pre-government (not the state of nature, as Locke thought that there was an intermediate step during which the invention of money removed people from the state of nature) to political or civil society. If we look at Locke's work at an organizational level we see that the treatise begins with a chapter on the state of nature (not counting the first chapter, which is a summary of the points shown in the first treatise) and moves through discussions on the state of war, slavery, property, the formation of government, concluding with a chapter on the dissolution of government. Viewed from this level we can see that Locke considered the issue of property prior to the formation of government, and that, when answering the question posed above (p. 3) the most weight should be given (6) because it most clearly occurs within the context of Locke's discussion of the move to civil society. In my opinion, a

better way of interpreting the text is to assume that the comment on convention from chapter seven is conclusive and interpret the first five passages in light of the account Locke provides in chapter seven.

This is also an argument against Tully's view that private property, for Locke, can only take place within civil society. If Locke had meant for private property to be limited to the conventions of civil society, why did he not forego discussion of it until his chapter on the transition to civil society? On this level, the more charitable reading of Locke would be the reading that establishes private property pre-governmentally, and thus forces the interpreter to explain those passages from chapter five in terms other than those of pure conventionalism. If I am correct, then the challenge for Tully is to show that even if private property can be established pre-governmentally, that Locke believes that individuals must surrender their private property upon the move into civil society, which is what (6) above is intended to show (I will discuss the failure of [6] to support Tully's view below).

In arguing against Tully's interpretation Waldron suggests two distinctions Locke makes that we must keep in mind if we are to interpret these passages correctly: the first is between resources that were left unappropriated at the time civil society was set up and those that were not; and between the property rights of individuals and the territorial jurisdiction of competing states (RPP 236).

Waldron points out that nothing Locke says suggests that when civil society is set up, all of the resources of that society's area will have been appropriated. The nomadic herdsmen in passage (3) would not have cultivated the land over which they roam, and thus, on Locke's account they would not own the land upon which they would set up their civil society. Waldron claims that in all of the passages except (6) Locke is clearly attempting to answer the question of what is to be done with previously unappropriated resources upon the move into civil society. With this in mind, if we look back at (2), the passage takes on a much different meaning, and the land left as 'common by Compact' could be used for common farming or could be placed under the jurisdiction of the state government to be distributed on the basis of what best serves the common good (RPP 236).

The second distinction is related to the first in that the

Lockean political society may deal with the resources in its vicinity in the ways outlined above, but it does not really have a vicinity except in the sense of the approximate territory around the parcels of land that have been appropriated by its citizens. On Waldron's interpretation when a person joins a civil society the government of that society acquires a territorial jurisdiction over the land that person owns, but if some land is unowned the question of which government has jurisdiction over it is to be settled by treaty, as Locke suggests in passages (3) and (4). Thus, the purely conventional process that Tully finds in these passages is not an intra-societal process, but an inter-societal process, and the passages do nothing to support Tully's claim, they only serve to "mislead the reader as to the force of the quoted passage, certainly in terms of the distinction we have just drawn." (RPP 237).

With the two distinctions made, Waldron considers the possibility that there is still something left in the quoted passages which could support Tully's interpretation. He finds the claim that positive law or government serves to **determine**, **regulate**, and **settle** property among the members of a civil society, and also the claim that citizens must '**submit**' their possessions to the community (RPP 238).

Waldron finds the concept of determination the most straightforward of these. To determine an individual's rights is simply to find out what they are. The function of the law is, for Locke, to settle disputes as to who is entitled to what, and to determine entitlements not on the basis of the public good but on the basis of natural entitlement. Likewise, the regulation of property is not a matter of the confiscation and redistribution of property by the legislature; it is a matter of the legislature setting rules of property and property exchange (whatever they may be) among the subjects of the state. Waldron admits that there is a sense of the term 'settlement' which might support Tully's interpretation, but that a more plausible reading (more plausible given the evidence and arguments supporting Waldron's interpretation of the other passages) takes 'settlement' to mean the setting up of a system wherein property relations can become the basis of economic relations, i.e., the setting up of a system to settle title disputes, and the establishment of agencies to resolve difficulties and secure entitlements against violations. (RPP 239).

Finally we have come to the question of the seemingly explicit stipulation in passage (6) that the citizens must 'submit' all possessions to the community. This passage is extremely important given the fact that, as I noted above, it is the only passage that occurs within Locke's discussion of the transition to civil society in chapter seven. Tully interprets this passage as meaning that each individual must surrender all his possessions upon the move into civil society, and that his possessions become the possessions of the community (DP 164). Waldron simply points out that later in the same paragraph Locke states that "By the same act therefoere, whereby anyone unites his Person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free to it also; and they become both of them, Person and Possession, subject to the Government and Dominion of the Commonwealth" (RPP 240). The consequence of this passage for Tully's interpretation is that the individual also becomes the possession of the community and is also redistributed as the legislature sees fit. Thus, Waldron says that Tully's interpretation is hopeless, and that Locke uses subjection here, as he does elsewhere, to mean that "[t]he citizen is to be governed by the legitimate laws of the community." (RPP 240)

## REFERENCES

- Tully, James, *A Discourse on Property: John Locke and His Adversaries*. Cambridge: Cambridge University Press, 1980.
- Waldron, Jeremy, *The Right to Private Property*. New York: Oxford University Press, 1988.

## NOTES

<sup>1</sup>This point is made in Tully's argument on pp. 98-100, but is also made elsewhere in Tully's book.

<sup>2</sup>Waldron suggests a line of argument similar to this on p. 235 but he does not develop it.