

Why *Terra Nullius*? Anthropology and Property Law in Early Australia

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The British treated Australia as *terra nullius*—as unowned land. Under British colonial law, aboriginal Australians had no property rights in the land, and colonization accordingly vested ownership of the entire continent in the British government. The doctrine of *terra nullius* remained the law in Australia throughout the colonial period, and indeed right up to 1992.¹

Terra nullius is such a basic and well-known fact of Australian history that it is easy to lose sight of how anomalous it was in the broader context of British colonization. The British had been colonizing North America for two centuries before they reached Australia, but by the middle of the eighteenth century, imperial policy in North America had turned away from *terra nullius*. To be sure, there were advocates of *terra nullius* in Britain and North America, and settlers trespassed in large numbers on the Indians' land. But in the eighteenth century, as a matter of official policy the British acknowledged North American Indians as possessors of property rights in their land, and in practice settlers and colonial governments often acquired the Indians' land in transactions structured as purchases.²

1. *Mabo v. Queensland*, 175 CLR 1 (1992).

2. This account of British land policy in North America is at odds with some recent scholarship, such as Patricia Seed, *American Pentimento: The Invention of Indians and the Pursuit of Riches* (Minneapolis: University of Minnesota Press, 2001), 12–44; and David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University

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The British began colonizing New Zealand a few decades after Australia, but they did not treat New Zealand as *terra nullius* either. Instead they signed a treaty explicitly recognizing the Maori as owners of the land. As in North America, the practice of land acquisition in New Zealand at times looked rather different from the way it was envisioned in London, but there was no formal policy of ignoring Maori property rights.³ The existence of *terra nullius* in Australia is thus something of a puzzle. British land policy in Australia was different from land policy in otherwise similar colonies before and after. Why?

Terra nullius presents a second puzzle as well. The 1830s and 1840s saw the rise of an active British humanitarian movement seeking to improve the conditions of indigenous people throughout the empire. The movement achieved many successes, such as the abolition of slavery in the colonies. In Britain and Australia there were vocal, powerful people, both inside and outside the government, who urged that *terra nullius* had been a terrible injustice to the Aborigines.⁴ Yet at the end of this period *terra nullius* was as firmly a part of the law as ever. Decades of agitation—not just by fringe groups but also by well-placed insiders—had not changed a thing. Why not?

Despite all the recent work on early colonial land policy in Australia, particularly the work of Henry Reynolds and Bruce Kercher, these questions have never been fully answered.⁵ This article will try to answer them.

Press, 2000), 97. I discuss British land policy in North America in Stuart Banner, *How the Indians Lost Their Land* (Harvard University Press, forthcoming).

3. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987); Stuart Banner, "Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand," *Law and Society Review* 34 (2000): 47–96; Stuart Banner, "Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand," *Law and Social Inquiry* 24 (1999): 807–52.

4. Henry Reynolds, *This Whispering in Our Hearts* (St. Leonards, NSW: Allen & Unwin, 1998), 1–90.

5. See especially Henry Reynolds, *The Law of the Land* (Ringwood, Vic.: Penguin Books, 1987), a book to which I owe an enormous debt. The first question has not even been asked because previous authors have not recognized how different land policy in Australia was from land policy in North America and New Zealand. The second is raised implicitly throughout the work of Reynolds and Kercher (especially Reynolds), but because neither writer treats it explicitly, neither has any occasion to attempt an explicit answer.

The Consent of the Natives

In 1768 the Royal Society hired James Cook to take a ship to the South Pacific to observe the transit of Venus across the sun, the measurement of which, from several parts of the world simultaneously, would help astronomers determine the distance between the sun and the earth. James Douglas was the president of the Royal Society. He knew that Cook's expedition was likely to encounter "natives of the several Lands where the Ship may touch." He instructed Cook to "exercise the utmost patience and forbearance" when he met them. In particular, he warned Cook not to attempt the conquest of their land, because any such attempt would be unlawful. "They are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit," Douglas reasoned. "No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent. Conquest over such people can give no just title."⁶

These were not Cook's only instructions. The government was putting up the money for the trip, and the government had a motive of its own. Once Cook was finished with Venus, he was to head south to look for the southern continent that had long been suspected to exist. If Cook actually found such a place, the government's secret instructions read, and if there were any people living there, he was to "endeavour by all proper means to cultivate a friendship and alliance with them." Cook was *not* to seize the land if it was inhabited. He was told instead: "You are also *with the consent of the natives* to take possession of convenient situations in the country in the name of the king of Great Britain, or, if you find the country uninhabited take possession for His Majesty."⁷

Cook served two masters, but so far as indigenous people and their land were concerned, the Royal Society and the government gave him the same instruction. If he arrived in any populated places, known or unknown, the residents were to be treated as owners of the land.

Cook could hardly have been surprised, because such had long been British policy in North America, where settlers had been accustomed to purchasing land from the Indians since the early seventeenth century. Whether to treat North America as *terra nullius* had been a topic of lively debate in the seventeenth century, but by Cook's lifetime the debate had long been over. In 1763, only five years before Cook set sail, the imperial govern-

6. J. C. Beaglehole, ed., *The Journals of Captain Cook on His Voyages of Discovery* (Cambridge: Cambridge University Press, 1955–74), 1:514.

7. J. M. Bennett and Alex C. Castles, eds., *A Source Book of Australian Legal History* (Sydney: The Law Book Company, 1979), 253–54 (emphasis added).

ment had proclaimed that whatever land in North America had not yet been sold to the British still belonged to the Indians and could be acquired only by Crown purchase. In the same year the Earl of Egremont, Secretary of State, speaking of American Indians, had emphasized the importance of “guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only.” Members of the Royal Society and the government anticipated that if there really was an inhabited continent in the south Pacific, and if it turned out to be suitable for colonizing, Britain would buy it from the natives, just like it was buying North America. *Terra nullius* was not a standard feature of colonial land policy.⁸

Indeed, in the 1780s, when the British government initially chose west Africa over Australia as the place to which it would transport its convicts, its first step was to try to purchase land. Richard Bradley was sent to negotiate. He managed to secure the consent of a local chief to sell the island of Lemane, 400 miles up the Gambia River, for an annuity of 7 pounds 10 shillings a year. But “in conducting this business,” Bradley explained upon his return to England, “I experienced Difficulties which I had no Idea of when I engaged with Your Lordship to undertake it. The Principal Men of the Country disputed the right of the Chief to dispose of the Island, and to obtain their Consent the expence of the Purchase was increased.” The government had to reimburse Bradley for £375 worth of goods he distributed to satisfy these other claims. The government eventually rejected Lemane because of concerns about disease. The next choice was Das Voltas Bay, on the southwestern coast of Africa, in present-day Namibia. One of the advantages of this site, explained the government committee responsible for choosing the location of the penal colony, was that it was “highly probable that the Natives would without resistance acquiesce in ceding as much land as may be necessary for a stipulated rent.”⁹ In the end, Das Voltas Bay was rejected too, and the government turned to Australia. But the episode demonstrates a working assumption of the people responsible for managing Britain’s colonies: if a new colony was to be established in an inhabited area, the land would be purchased from the inhabitants.

This assumption did not survive Cook’s trips to Australia. As he and his

8. Clarence S. Brigham, ed., *British Royal Proclamations Relating to America 1603–1783* (1911; New York: Burt Franklin, 1964), 212–18; CO 5/65, p. 43, Public Record Office, Kew (hereafter PRO); Marete Borch, “Rethinking the Origins of *Terra nullius*,” *Australian Historical Studies* 117 (2001): 222–39.

9. Alan Frost, *Convicts and Empire: A Naval Question 1776–1811* (Melbourne: Oxford University Press, 1980), 32; Jonathan King, ed., “*In the Beginning . . .*”: *The Story of the Creation of Australia from the Original Writings* (South Melbourne: Macmillan, 1985), 76.

crew described the newly discovered southern continent, it was different in some critical respects from other places the British had colonized.

Australia, Cook reported, was very sparsely populated. “The Natives do not appear to be numerous,” he noted a week after landing at Botany Bay in 1770; “neither do they seem to live in large bodies but dispers’d in small parties along by the water side.” Joseph Banks, the naturalist who traveled on Cook’s first voyage, was more emphatic. “This immense tract of land,” he marveled, “considerably larger than all of Europe, is thinly inhabited even to admiration.” Banks admitted that he had seen only a small part of the coast and none of the interior. “We may have liberty to conjecture however,” he concluded, that the interior of the continent was “totally uninhabited,” because without a supply of fish “the wild produce of the Land seems scarce able to support them.” Tobias Furneaux, commander of one of the ships taking part in Cook’s second voyage, reported that on Van Diemen’s Land (present-day Tasmania) “we never found more than three or four huts in a place, capable of containing three or four persons each only.” Because of these accounts, Britons believed that Australia was mostly empty. As Arthur Phillip noted to himself in 1787, while preparing for the long trip to become the first governor of New South Wales, “the general opinion” was that “there are very few Inhabitants in this Country.”¹⁰

If a newly discovered area was scarcely populated, did the discoverers have the right to appropriate some of the land? This was not a new question. It had been debated in Europe ever since the discovery of North America, without ever really being resolved. Lawyers in England and throughout Europe agreed that settlers had a legal right to occupy uninhabited land.¹¹ But what about land that was inhabited very sparsely?

Many agreed that there had to be some limit to the amount of land a small group might claim, or else a single person could claim an entire continent. “Should one family, or one thousand, hold possession of all the southern undiscovered continent, because they had seated themselves in Nova Guiana, or about the straits of Magellan?” asked Walter Raleigh in

10. Beaglehole, ed., *Journals of Captain James Cook*, 1:312; J. C. Beaglehole, ed., *The Endeavour Journal of Joseph Banks 1768–1771* (Sydney: Angus & Robertson, 1962), 2:122–23; Beaglehole, ed., *Journals of Captain James Cook*, 2:735; King, ed., “*In the Beginning . . .*,” 115.

11. English cases discussing the proposition include *Geary v. Barecroft*, 82 Eng. Rep. 1148 (K.B. 1667), and *Holden v. Smallbrooke*, 124 Eng. Rep. 1030 (C.P. 1668). See also Thomas Wood, *An Institute of the Laws of England*, 3d ed. (London: Richard Sare, 1724), 216. European theoretical treatments include Hugo Grotius, *The Law of War and Peace* (1625), trans. Francis W. Kelsey (Indianapolis: Bobbs-Merrill, 1925), 202, and Samuel Pufendorf, *De Jure Naturae et Gentium* (1688), trans. C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934), 2:569–73.

the late sixteenth century. "Why might not then the like be done in Afric, in Europe, and in Asia?" The absurdity of the idea implied that a people could not legitimately claim property rights in too big an area. "[I]f the inhabitants doe not in some measure fill the Land," preached John Donne to the Virginia Company, the inhabitants had no right to exclude the English, "for as a man does not become proprietary of the Sea, because he hath two or three Boats, fishing in it, so neither does a man become Lord of a maine Continent, because he hath two or three Cottages in the Skirts thereof." By the time the British reached Australia, the most well known exponent of this view was the Swiss philosopher Emerich de Vattel, whose *Law of Nations* was published in French in 1758 and first translated into English in 1760. There was not enough space in the world for a small society to claim too large an area, Vattel reasoned. Such a society would "usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands."¹² In an enormous continent with a tiny population, there would be plenty of unowned land available for the taking.

There was another side to the argument that took place during the colonization of North America. Parts of Britain were also thinly populated, and yet no one thought it lawful for strangers simply to move in. The sparser the indigenous population, moreover, the cheaper it would be to buy land, which made purchase a more attractive alternative to conquest. In North America, for these reasons, there had been many purchases of tracts so enormous that they must have included large thinly populated regions. But Australia, from Cook's and Banks's reports, seemed to present sparseness of an entirely different magnitude. North America had some empty places, but Australia sounded like an empty continent.

The Aborigines were not just few in number, Cook and his colleagues explained. They were also less technologically advanced than other indigenous people the British had encountered. They had no clothing. They built only the most rudimentary kind of shelter, "small hovels not much bigger than an oven, made of pieces of Sticks, Bark, Grass &c., and even these are seldom used but in the wet seasons." And most important of all, Cook explained, "the Natives know nothing of Cultivation." Unlike the Indians

12. Walter Raleigh, "A Discourse of the Original and Fundamental Cause of Natural, Arbitrary, Necessary, and Unnatural War," in *The Works of Sir Walter Raleigh, Kt.* (Oxford: University Press, 1829), 8:255; John Donne, "A Sermon Preached to the Honourable Company of the Virginian Plantation" (London: Thomas Jones, 1622), in *The Sermons of John Donne*, ed. George R. Potter and Evelyn M. Simpson (Berkeley: University of California Press, 1959), 4:274; Emerich de Vattel, *The Law of Nations* (1758), ed. Edward D. Ingraham (Philadelphia: T. & J. W. Johnson, 1853), 36.

of eastern North America, and unlike the Polynesians Cook met on the way to Australia, the Aborigines were not farmers. They were hunter-gatherers, who, as Furneaux described them, “wander about in small parties from place to place in search of Food.”¹³

The absence of aboriginal farms was crucial, because the British were heirs to a long tradition of thought associating the development of property rights with a society’s passage through specific stages of civilization. Greek and Roman writers were unanimous in holding that property was a man-made institution.¹⁴ “There is,” Cicero declared, “no such thing as private ownership established by nature.” They agreed that there had once been a time, long ago, when property was unknown, when, as Seneca put it, “the bounties of nature lay open to all, for men’s indiscriminate use.”¹⁵ They knew of far-off primitive peoples like the Scythians, who lacked property even while the Greek and Roman civilizations were at their peak.¹⁶ And they agreed that it was the invention of agriculture that gave rise to property rights in land. The reason the Scythians and other primitive tribes did not divide up the land they occupied, the classical writers believed, was that they were nomads who had never learned to cultivate the land. The Scythians “have no fixed boundaries,” observed the second-century writer Justin, because “they do not engage in agriculture. . . . Instead they pasture their cattle and sheep throughout the year and live a nomadic life in the desolate wilds.” It was only when “Ceres first taught men to plough the land,” Virgil explained, that land was first divided. When there were “[n]o ploughshares to break up the landscape,” Ovid agreed, there were “no surveyors [p]egging out the boundaries of estates.”¹⁷ Humans had once

13. Beaglehole, ed., *Journals of Captain James Cook*, 1:312, 396, 393, 2:735.

14. Arthur O. Lovejoy and George Boas, *Primitivism and Related Ideas in Antiquity* (1935) (New York: Octagon Books, 1965); Thomas Cole, *Democritus and the Sources of Greek Anthropology* ([Cleveland]: American Philological Association, 1967), 36–38.

15. Cicero, *De Officiis*, trans. Walter Miller (Cambridge: Harvard University Press, 1947), 23; Seneca, *Ad Lucilium Epistulae Morales*, trans. Richard M. Gummere (New York: G. P. Putnam’s Sons, 1920), 2:423. See also Tibullus, *Elegies*, trans. Theodore C. Williams (Boston: Richard G. Badger, 1905), 23–24; Ovid, *Metamorphoses*, trans. A. D. Melville (Oxford: Oxford University Press, 1986), 4–5; Edith Hamilton and Huntington Cairns, eds., *The Collected Dialogues of Plato* (Princeton: Princeton University Press, 1961), 1037; Richard McKeon, ed., *The Basic Works of Aristotle* (New York: Random House, 1941), 1138.

16. *The Geography of Strabo*, trans. Horace Leonard Jones (Cambridge: Harvard University Press, 1917–32), 3:207; Horace, *The Complete Odes and Epodes with the Centennial Hymn*, trans. W. G. Shepherd (Middlesex: Penguin Books, 1983), 155; Julius Caesar, *The Gallic War*, trans. H. J. Edwards (Cambridge: Harvard University Press, 1917), 347.

17. Justin, *Epitome of the Philippic History of Pompeius Trogus*, trans. J. C. Yardley (Atlanta: Scholars Press, 1994), 27; Virgil, *Georgics*, trans. Smith Palmer Bovie (Chicago: University of Chicago Press, 1956), 10; Ovid, *The Erotic Poems*, trans. Peter Green (London: Penguin Books, 1982), 153.

been wanderers, without property in land, but when they settled down and began farming, they simultaneously established property rights.

The classical association of agriculture and property in land persisted through the medieval era and into the early modern. The link was familiar to seventeenth-century theorists like Locke, Grotius, and Pufendorf, who endorsed it. By the time the English got to Australia, many writers had used the connection between agriculture and property to develop a framework for understanding the development of societies. All societies progressed through four stages, Adam Smith (among others) explained: “hunting, pasturage, farming, and commerce.” Each stage corresponded to a particular set of political and economic institutions, including the institution of property. Hunters knew no property. Pastoralists needed, and thus developed, property in their animals. Farmers developed property in their land. And a commercial people like the English invented more complex property arrangements, to suit their needs. In the mind of an educated Englishman, property in land went along with agriculture. As William Blackstone noted in his ubiquitous legal treatise, published just a few years before Cook returned from Australia, “the art of agriculture . . . introduced and established the idea of a more permanent property in the soil.”¹⁸

In the late eighteenth century, many believed that a society without agriculture was therefore a society without property rights in land. The most familiar statement of this view was again from Vattel, who held that nonagricultural peoples’ “unsettled habitation in these immense regions cannot be accounted a true and legal possession” and that European farmers accordingly might lawfully settle on their land.¹⁹ Vattel was writing with reference to North America—like many eighteenth-century European intellectuals he erroneously believed that American Indians were not farmers—but his words obviously applied to Australia as well.

Under different circumstances, the British might nevertheless have purchased the land. American Indians were not just farmers; they were also formidable military opponents, whose land could have been conquered only

18. Thomas Aquinas, *Summa Theologica* ([Cambridge, Eng.]: Blackfriars, 1964–), 37:13; John F. Moffitt and Santiago Sebastian, *O Brave New People: The European Invention of the American Indian* (Albuquerque: University of New Mexico Press, 1996), 69–75; Peter Stein, “The Four Stage Theory of the Development of Societies,” in *The Character and Influence of the Roman Civil Law: Historical Essays* (London: Hambledon Press, 1988), 395–409; Adam Smith, *Lectures on Jurisprudence* (delivered 1760s), ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Clarendon Press, 1978), 459; Ronald L. Meek, *Social Science and the Ignoble Savage* (Cambridge: Cambridge University Press, 1976); William Blackstone, *Commentaries on the Laws of England* (1765–69), 9th ed. (London: W. Strahan et al., 1783), 2:7.

19. Vattel, *The Law of Nations*, 100.

at an enormous cost in money and in British lives. This calculation played a part in the British decision to purchase land rather than seizing it and, after the American Revolution, in the American government's decision to continue doing so. As Henry Knox, the United States's first Secretary of War, advised Congress, "it may be wise to extinguish with a small sum of money, a claim which otherwise may cost much blood and infinitely more money." The British government was accordingly interested to hear whether the Aborigines would put up much resistance to the occupation of Australia. On this point, Cook and Banks had a firm opinion. "I do not look upon them to be a warlike People," Cook explained. "On the Contrary I think them a timorous and inoffensive race, no ways inclinable to Cruelty." The government committee responsible for choosing a location for the new penal colony asked Banks directly: "Do you think that 500 Men being put on shore there would meet with that Obstruction from the Natives which might prevent their settling there?" Banks replied: "Certainly not." He predicted that "they would speedily abandon the Country to the New Comers."²⁰ Not long after this colloquy, the government of the United States would begin purchasing land from nomadic, nonagricultural tribes on the North American plains, in part because of the long American tradition of obtaining Indian land by purchase, but also in part because of the calculation described by Henry Knox. Regardless of who owned what, it was cheaper to buy the plains than to conquer them. In Australia, the same calculation suggested the opposite policy. The Aborigines were not thought capable of fighting back.

The Cook voyages brought back one final piece of information about the Aborigines that also played a role in setting land policy. Members of the expeditions tried to engage the Aborigines in trade, but reported no success. Unlike other peoples the British had encountered, the Aborigines seemed to show no interest in British manufactures. "We never were able to form any connections with them," Cook admitted, because "they had not so much as touch'd the things we had left in their hutts on purpose for them to take away." Despite the crew's best efforts, the Aborigines "set no Value upon any thing we gave them, nor would they ever part with any thing of their own for any one article we could offer them." Banks concluded that there would be no way to purchase land from them, because "there was nothing we could offer that they would take" in return.²¹

20. Colin G. Calloway, ed., *Revolution and Confederation* (1994), vol. 18 of *Early American Indian Documents: Treaties and Laws, 1607–1789*, ed. Alden T. Vaughan (Washington: University Publications of America, 1979–), 452–53; Beaglehole, ed., *Journals of Captain James Cook*, 1:396; King, ed., "In the Beginning . . .," 60–61.

21. Beaglehole, ed., *Journals of Captain James Cook*, 1:312, 1:399; King, ed., "In the Beginning . . .," 55–56.

Such was the picture Britons had of Australia at the end of Cook's voyages. It was enormous and populated by only a handful of hunter-gatherers, people so primitive that they did not farm or show any interest in trade, people who could offer no meaningful military resistance. These were attractive characteristics for a potential colony—so attractive, and in some respects (as we will see) so misleading, that one may suspect some wishful thinking on the part of Cook, Banks, and the various audiences for their reports. James Matra, who proposed placing a colony there in 1783, argued that among Australia's advantages was that it was "peopled by only a few black inhabitants, who, in the rudest state of society, knew no other arts than such as were necessary to their mere animal existence." A pamphlet of the mid-1780s urging colonization emphasized that the continent was "the solitary haunt of a few miserable Savages, destitute of clothing."²² Unlike most parts of the world, Britons could believe, Australia really was *terra nullius*.

By 1787, when Arthur Phillip was getting ready to travel to New South Wales as the colony's first governor, nineteen years had passed since James Cook had been told not to take land without the consent of the natives. Phillip's instructions were very different. He was *supposed* to seize the land by force. "Immediately upon your landing," Phillip was ordered, "after taking measures for securing yourself and the people who accompany you as much as possible from any attacks or interruptions of the natives . . . , proceed to the cultivation of the land." Cook's voyages had persuaded the British government that there was no need to buy Australia.²³

The Miserablest People in the World

The early British residents of Australia exhibited a far greater contempt for the Aborigines than British colonists showed toward indigenous peoples in other places. Settlers in North America made their share of disparaging remarks about Indians, to be sure, but they also praised Indian technology,

22. Paul Carter, *The Road to Botany Bay: An Exploration of Landscape and History* (Chicago: University of Chicago Press, 1987); *Historical Records of New South Wales* (Sydney: Charles Potter, 1892–1901), 1(2):1; *A Description of Botany Bay, on the East Side of New Holland* (Lancaster: H. Walmsley, [1787]) (Sydney: National Library of Australia, 1983), 8.

23. Alex C. Castles, *An Australian Legal History* (Sydney: Law Book Co., 1982), 23; *Historical Records of New South Wales*, 1(2):87; Alan Frost, "New South Wales as *Terra nullius*: The British Denial of Aboriginal Land Rights," *Historical Studies* 19 (1981): 513–23; Robert J. King, "Terra Australis: Terra Nullius aut Terra Aboriginium?" *Journal of the Royal Australian Historical Society* 72 (1986): 75–91.

Indian social life, Indian political organization, and so on. Comments on the Aborigines, by contrast, were mainly variations on a single theme. The tone was set by William Dampier, who washed up on the north coast of Australia in 1688. "The Inhabitants of this Country are the miserablest People in the World," Dampier reported when he got back to England. "Setting aside their Humane Shape, they differ but little from Brutes." The men who sailed with the First Fleet had the same opinion. One marine called them "the most wretched of the human race"; another "the most miserable of God's creatures"; a carpenter found them "the most miserable of the human form under heaven." William Anderson, the surgeon on Cook's last voyage, opined that "with respect to personal activity or genius we can say but little of either." Anderson was hardly alone. The marine George Thompson thought the Aborigines "a lazy, indolent people, and of no ingenuity." One of the soldiers found them "a very dirty and lazy set of people." Even some of the missionaries thought so. "The Aborigines daily present more astounding proofs of their desperately low state," reported the Methodist missionary William Walker. By 1809, the naturalist George Caley, sent to New South Wales by Joseph Banks to gather botanical specimens, could sum up two decades of British observations. "I believe it is universally said," Caley told Banks, "that the natives of New South Wales are the most idle, wretched and miserable beings in the world."²⁴

Europeans arriving in a new land were, of necessity, anthropologists. The first Britons in Australia, like Europeans throughout the world, had to size up the people they encountered and make judgments about what they were like, because upon those judgments would rest many of their colonial policies, including policies about land. Colonial attitudes toward indigenous people were not formed entirely, or even mostly, in Europe. They were formed primarily in the colonies. Europeans arrived with pre-conceptions, to be sure, but these were often modified by experience.

Australia was perhaps the colony where Britons' perceptions of the indigenous inhabitants most closely matched their expectations. What exactly was wrong with the Aborigines? What was it about them that the British perceived as so wretched and miserable?

To begin with, many Britons found the Aborigines unbearably ugly.

24. Karen Ordahl Kupperman, *Indians and English: Facing Off in Early America* (Ithaca: Cornell University Press, 2000); William Dampier, *A New Voyage Round the World* (London, 1697) (London: Argonaut Press, 1927), 312; *Historical Records of New South Wales*, 1(2):222, 2:744, 2:748; Beaglehole, ed., *Journals of Captain Cook*, 3:786; *Historical Records of New South Wales*, 2:796, 2:818; William Walker to Richard Watson, 5 Dec. 1821, Bonwick Transcripts, 52:1047, Mitchell Library, Sydney (hereafter ML); George Caley to Joseph Banks, 16 Feb. 1809, in George Caley, *Reflections on the Colony of New South Wales*, ed. J. E. B. Currey (Melbourne: Landsdowne Press, 1966), 177–78.

"The features of these people are by no means pleasing," noted Daniel Southwell, one of the marines with the First Fleet. Other observers made the same point less politely. "The Native Blacks are I think the ugliest race I ever beheld," Ann Gore informed a friend back in England. George Worgan, a surgeon with the First Fleet, found it difficult "to touch one of them, for they are Ugly to Disgust." "The aborigines of New South Wales are the ugliest race of beings conceivable," declared the merchant Edward Lucett; "some monkees I have seen might feel injured by a comparison." Compounding Britons' disgust was what seemed a repulsive lack of hygiene. The Aborigines are "not very prepossessing," explained John Hunter, a naval captain with the First Fleet, "and what makes them still less so, is, that they are abominably filthy; they never clean their skin, but it is generally smeared with the fat of such animals as they kill, and afterwards covered with every sort of dirt."²⁵ British sailors were not known for being overly choosy about their sexual partners, but James Campbell found aboriginal women so repulsive as to be, "in my opinion, an antidote to all desire."²⁶ Robert Mudie had never been to Australia, but by 1829 he could confidently assert, based on his survey of firsthand accounts, that "the native Australians have certainly but slender claims to what we are accustomed to term personal beauty."²⁷

Disgust was more than skin deep. Britons perceived the Aborigines to be astonishingly primitive. They "seemed to be amazing stupid," marvelled the missionary William Pascoe Crook, who arrived in 1803. "They knew not how to put a cup to their mouth but when presented with anything to drink would put their chin in the vessel." And their unfamiliarity with cups was nothing compared with their utter lack of clothing or adequate shelter. "They go quite Naked," the naval lieutenant Newton Fowell was startled to discover, "and I believe have no proper place of abode." William

25. *Historical Records of New South Wales*, 2:663; Ann Gore to "My dear Mary Ann," 29 Sept. 1837, in Helen Heney, ed., *Dear Fanny: Women's Letters to and from New South Wales, 1788-1857* (Rushcutters Bay, NSW: Australian National University Press, 1985), 130; George Worgan to his brother, June 1788, C830, ML; [Edward Lucett,] *Rovings in the Pacific, from 1837 to 1849* (London: Longman, Brown, Green, and Longmans, 1851), 1:56; John Hunter, *An Historical Journal of the Transactions at Port Jackson and Norfolk Island* (London: John Stockdale, 1793), 58.

26. James Campbell to Dr. Farr, 24 March 1791, Doc. 1174, ML. British men would overcome their squeamishness. By the 1840s the colonial government was concerned that there were too many "half-caste" children being born and that many of them quickly became victims of infanticide in Aboriginal communities. *Report from the Committee on Immigration* (Sydney: W. J. Row, 1841), 36; William Westgarth, *A Report on the Condition, Capabilities, and Prospects of the Australian Aborigines* (Melbourne: William Clarke, 1846), 15.

27. [Robert Mudie,] *The Picture of Australia* (London: Whittaker, Treacher, and Co., 1829), 228.

Bradley was a lieutenant on the same ship as Fowell, and he was likewise taken aback by how the Aborigines “appear to live chiefly in the caves & hollows of the rocks.” Some blamed the Aborigines’ lack of clothing or shelter on their stupidity. “The people have not the most distant idea of building any kind of place which may be capable of sheltering them from the bad weather,” John Hunter reasoned; “if they had, probably it would first appear in their endeavours to cover their naked bodies with some kind of cloathing, as they certainly suffer very much from the cold in winter.” Others more charitably found the absence of clothing or houses among the Aborigines proof that in mild climates such things were unneeded. Arthur Phillip noted that while the Aborigines were “in so rude and uncivilized a state as not even to have made an attempt towards clothing themselves,” they nevertheless spent time carving stone statues. “Had these men been exposed to a colder atmosphere,” Phillip concluded, “they would doubtless have had clothes and houses, before they attempted to become sculptors.”²⁸ But whatever the reason for it, the Aborigines’ lack of clothing or proper houses was taken as proof of their primitiveness.

Most important of all from the perspective of property rights, British settlers confirmed that Cook and Banks were right in observing that the Aborigines lacked agriculture. “To the cultivation of the ground they are utter strangers,” reported the marine Watkin Tench. An English children’s book about “primitive races” around the world explained that the Aborigines “are too ignorant to think of cultivating any plant whatever.” Because they grew no crops, affirmed another account, the Aborigines were forced to subsist on the most unappetizing animals: “they scruple not to eat lizards and grubs, as well as a very large worm found in the gum-trees.”²⁹ The absence of agriculture implied the absence of any property rights the British were bound to respect and more broadly reinforced the prevailing belief

28. William Pascoe Crook to Joseph Hardcastle, 8 Nov. 1803, Bonwick Transcripts, 49:215, ML; Nance Irvine, ed., *The Sirius Letters: The Complete Letters of Newton Fowell, Midshipman & Lieutenant Aboard the Sirius* (Sydney: Fairfax Library, 1988), 90; *A Voyage to New South Wales: The Journal of Lieutenant William Bradley RN of HMS Sirius 1786–1792* (Sydney: Trustees of the Public Library of New South Wales, 1969), 140; Hunter, *An Historical Journal*, 59–60; *The Voyage of Governor Phillip to Botany Bay* (London: John Stockdale, 1789), 106–7.

29. Josephine Flood, *Archaeology of the Dreamtime*, rev. ed. (Sydney: Collins, 1989), 229–45; Watkin Tench, *A Narrative of the Expedition to Botany Bay* (London, 1789), reprinted in Watkin Tench, *Sydney’s First Four Years* (Sydney: Angus and Robertson, 1961), 48; Mrs. Percy Sinnett, *Hunters and Fishers: or, Sketches of Primitive Races in the Lands Beyond the Sea* (London: Chapman and Hall, 1846), 41; J. H. Tuckey, *An Account of a Voyage to Establish a Colony at Port Philip in Bass’s Strait, on the South Coast of New South Wales* (London: Longman, Hurst, Rees, and Orme, 1805), 180.

in the Aborigines' backwardness. No farms, no houses, no clothes—could a people be any more savage?

As a result, it quickly became conventional British opinion that the Aborigines were the most primitive people in the world. A report from 1791 characterized them as “certainly the Lowest Class of Human beings,” in part because of their lack of agriculture or houses, and in part because “they are the only people I ever heard of who did not Worship some Deity.” The shipwright Daniel Paine, who lived in New South Wales in the 1790s, agreed that “the Native Inhabitants are the most irrational and ill formed Human beings on the Face of the Earth.” When they were compared with other indigenous people the British had met, the Aborigines were always found wanting. In the contest for last place in the scale of civilization, “they may perhaps dispute the right of precedency with the Hottentots, or the shivering tribes who inhabit the shores of Magellan,” Watkin Tench observed. “But how inferior they show when compared with the subtle African; the patient watchful American; or the elegant timid islander of the South Seas.” British observers consistently ranked the Aborigines last in the hierarchy. They were “far behind other savages,” “the lowest link in the connection of the human races,” “the lowest of the nations in the order of civilization.”³⁰ They were compared unfavorably with the Maori, who were agriculturalists and were capable of being usefully employed by settlers, and with the Burmese and Malaysians, who, unlike the Aborigines, were “susceptible of civilization.” John Russell, the Secretary for the Colonies, contrasted the “half-civilized” Indians of Canada with the Aborigines, who were “little raised above the brutes.”³¹

If the Aborigines of continental Australia were not “the *last* link in the long chain of humanity,” that was only because there was one group that was even worse—“the aborigines of Van Diemen’s Land,” who “have

30. D. Blackburn to R. Knight, 19 March 1791, Ab 163, ML; R. J. B. Knight and Alan Frost, eds., *The Journal of Daniel Paine, 1794–1797* (Sydney: Library of Australian History, 1983), 39; Watkin Tench, *A Complete Account of the Settlement at Port Jackson* (London, 1793), reprinted in Tench, *Sydney’s First Four Years*, 281; Thomas M’Combie, *Australian Sketches*, 2d ed. (Melbourne: Gazette Office, 1847), 244; “Civilization of the Aborigines,” *Arden’s Sydney Magazine*, Oct. 1843, 66; John Henderson, *Observations on the Colonies of New South Wales and Van Diemen’s Land* (Calcutta: Baptist Mission Press, 1832), 152. See also Robert Gordon Latham, *The Natural History of the Varieties of Man* (London: John Van Voorst, 1850), 223.

31. “A Few Words on the Aborigines of Australia,” *New South Wales Magazine* 1 (1843): 58–59; Barron Field, “On the Aborigines of New Holland and Van Diemen’s Land,” in Barron Field, ed., *Geographical Memoirs on New South Wales* (London: John Murray, 1825), 202–4; Russell to George Gipps, 25 August 1840, *British Parliamentary Papers: Colonies: Australia* (Shannon: Irish University Press, 1968–), 8:73.

less ingenuity, and are more destitute of comforts and conveniences, than even the inhabitants of New South Wales.” As one learned article in the new *Tasmanian Journal of Natural Science* put it, “the Aborigines of Tasmania have been usually regarded as exhibiting the human character in its lowest form.” But the Aborigines of Tasmania and the continent were usually lumped together into a single group occupying the bottom rung of the ladder of humanity. The Reverend Joseph Orton, a Methodist missionary in Australia in the 1830s, summed up the prevailing view. “It is the universal opinion of all who have seen them,” he affirmed, “that it is impossible to find men and women sunk lower in the scale of human society. With regard to their manners and customs, they are little better than the beasts.”³²

Indeed, British writers often compared the Aborigines with monkeys. Sometimes the comparison was meant to be a metaphor. The marine Robert Scott, for example, told his mother: “I never saw such ugly people they seem to be only one degree above a beast they sit exactly like a monkey.” But some writers, decades before Darwin, wondered whether there might be more to the resemblance than just a resemblance. Might the Aborigines be “the connecting link between man and the monkey tribe?” asked the naval surgeon Peter Cunningham. “Really some of the old women only seem to require a tail to complete the identity: while the manner in which I have seen these aged beldames scratch themselves, bore such a direct analogy to the same operation among the long-tailed fraternity, that I could not, for the life of me, distinguish the difference.” Another writer likewise suggested that the Aborigines of Van Diemen’s Land “may almost be said to form the connecting link between man and the monkey tribes.” The idea was commonplace at least as early as the 1830s, when Charles Napier found it necessary to refute “all those who have called the natives of Australia ‘a race which forms the link between men and monkeys.’” By the 1840s, the point had been made so many times that James Dredge was becoming exasperated. Dredge (about whom more below) was one of the growing number of Britons critical of *terra nullius*. He opposed the popular British image of the Aborigines as occupying a “position at the very lowest point in the scale of rationality.” Too many Britons, he complained, declare

32. James Holman, *Travels in China, New Zealand, New South Wales, Van Diemen’s Land, Cape Horn, etc., etc.*, 2d ed. (London: George Routledge, 1840), 475; Matthew Flinders, *Observations on the Coasts of Van Diemen’s Land, on Bass’s Strait and its Islands, and on Part of the Coasts of New South Wales* (London: John Nicholas, 1801), 20; T. Dove, “Moral and Social Characteristics of the Aborigines of Tasmania,” *Tasmanian Journal of Natural Science* 1 (1842): 249; Joseph Orton, *Aborigines of Australia* (London: Thoms, 1836), 3.

“the native inhabitants of Australia to be neither brutes nor men, but an intermediate species of formation compounded of both.”³³

But whether the Aborigines were considered half-human or fully human, there was something close to a consensus among the early British residents of Australia that the Aborigines were the least civilized human beings they had ever seen—as Cunningham put it, they were “at the very zero of civilization.” James Grant, a naval lieutenant who arrived in New South Wales in 1800, made the same point in language that drew upon the discourse of late eighteenth-century anthropology. “The native of New Holland,” he concluded, “is found in the genuine state of nature.” David Collins, the first judge in New South Wales, used the same phrase. “The natives about Botany Bay, Port Jackson, and Broken Bay,” he recalled, “were found living in that state of nature which must have been common to all men previous to their uniting in society.”³⁴

The “state of nature,” as Europeans understood it, was a state in which humans had not yet appropriated land as property. Property in land required a minimum degree of social organization, of civilization, of law—property in land required a society to take the first steps to remove itself from the state of nature. All human societies had begun in the state of nature, but most of them had progressed since then, and one of the ways in which they had progressed was by assigning property rights in land. If the Aborigines were still in the state of nature, then by definition they did not own their land. The land was *terra nullius*.

When the British got to Australia, therefore, they did exactly what Phillip was told: they simply took whatever land they wished to use and used force to defend it from the Aborigines. At the start this task turned out to be nearly as easy as Joseph Banks had predicted. The “settlers have little to apprehend from the natives, against whom I have never thought any defense necessary,” Phillip reported back to England in 1790. Lieutenant Governor Philip Gidley King agreed that the Aborigines “shew no signs of resistance.” In some places in later years, Aborigines were able to fight back successfully for a time, but in the end they were defeated. Other

33. Robert Scott to his mother, 16 August 1801, Doc. 1109, ML; P[eter] Cunningham, *Two Years in New South Wales* (London: Henry Colburn, 1827), 2:46; [T. Betts,] *An Account of the Colony of Van Diemen's Land* (Calcutta: Baptist Mission Press, 1830), 95; Charles James Napier, *Colonization; Particularly in Southern Australia* (London: T. & W. Boone, 1835), 94; James Dredge, *Brief Notices of the Aborigines of New South Wales* (Geelong: James Harrison, 1845), 9–10.

34. Cunningham, *Two Years in New South Wales*, 2:46; James Grant, *The Narrative of a Voyage of Discovery, Performed in His Majesty's Vessel The Lady Nelson* (London: T. Egerton, 1803), 167; David Collins, *An Account of the English Colony in New South Wales* (London, 1798–1802) (Christchurch: Whitcombe and Tombs, 1910), 299.

indigenous peoples in British colonies, like American Indians earlier and the Maori later, were military opponents strong enough to fight the British to a standstill for long periods. But Aboriginal groups were too small, and at too much of a technological disadvantage relative to the British, to be as effective. “There is no reason to presume that the black natives are numerous,” one British official said of Van Diemen’s Land in the 1820s, “or that they will oppose any serious resistance to the extension of the future settlements.”³⁵ He could have been speaking about any part of Australia.

The establishment of *terra nullius* was aided by the fact that the earliest British contacts with Australia were large, well-armed expeditions controlled by the imperial government. The North American colonies and New Zealand, by contrast, were settled first by small, weak groups operating largely outside the reach of the government. When the first settlers arrived they were in no position to take land by force, and there were no government representatives on site to tell them not to buy it. So in North America and New Zealand, the earliest British settlers purchased much of their land from the Indians and the Maori. Had Australia not been a penal colony, the first British settlers might have been scattered missionaries and whalers, who would have been less able than the government to seize Aboriginal land by force. In Australia, however, the government got there first.

Terra nullius was put into practice for many years before it received formal expression as legal doctrine. From the beginning, Britons interpreted disputes about land between themselves and the Aborigines as evidence that the *Aborigines*, not the settlers, lacked sufficient understanding of ownership. When Aborigines ate the corn growing on settler farms, for instance, the settlers understood the cause as “their ignorance of our laws relative to the right of property” rather than the reverse.³⁶ *Terra nullius* was virtually uncontested in the early years of colonization, and the Aborigines had no legal standing to contest it, so there was no occasion for any declaration that it was part of the law.

35. Sharon Morgan, *Land Settlement in Early Tasmania: Creating an Antipodean England* (Cambridge: Cambridge University Press, 1992), 143–60; John C. Weaver, “Beyond the Fatal Shore: Pastoral Squatting and the Occupation of Australia, 1826 to 1852,” *American Historical Review* 101 (1996): 981–1007; *Historical Records of New South Wales*, 1(2):346, 2:769; Henry Reynolds, *Fate of a Free People* (Ringwood, Vic.: Penguin Books, 1995); Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Ringwood, Vic.: Penguin Books, 1982); *British Parliamentary Papers: Colonies: Australia*, 3:199.

36. Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Sydney: Federation Press, 1996), 85; James Scott, *Remarks on a Passage to Botany Bay, 1787–1792* (Sydney: Trustees of the Public Library of New South Wales, 1963), 34; H.W. Breton, *Excursions in New South Wales, Western Australia, and Van Dieman’s Land* [sic] (London: Richard Bentley, 1833), 219.

The earliest formal statements of *terra nullius* arose in legal contexts that on the surface had little to do with the acquisition of land. The first such statement appears to have been made in 1819, when a dispute arose between Lachlan Macquarie, the governor of New South Wales, and Barron Field, judge of the New South Wales Supreme Court, over whether the Crown, acting through Macquarie, had the power to impose taxes on the residents of New South Wales, or whether that power was reserved to Parliament, as was the case with taxes imposed on residents of Britain. Earl Bathurst, the Secretary for the Colonies, referred the question to Attorney General Samuel Shepherd and Solicitor General Robert Gifford, who concluded that Field was right. Parliament, not the Crown, had the authority to tax New South Wales. Conquered provinces, Shepherd and Gifford explained, fell within the king's prerogative power, and could thus be taxed by the Crown, but New South Wales was not a conquered province. Instead, "the part of New South Wales possessed by His Majesty, not having been acquired by conquest or cession, but taken possession of by him as desert and uninhabited," fell within the exclusive power of Parliament.³⁷ This was a question of constitutional law that did not concern the Aborigines directly, but it nevertheless provided an occasion for what seems to have been the government's first formal declaration of their legal status. Or rather their lack of status, as their land was deemed "desert and uninhabited" before the British arrived. Under English property law, the Aborigines did not exist.

A similar occasion arose three years later, when it became necessary to determine whether Macquarie's successor as governor, Thomas Brisbane, had the authority to make law in New South Wales by proclamation. The question landed on the desk of James Stephen, who would later play a big role in colonial policy as Undersecretary for the Colonies in the 1830s and 1840s, but who in 1822 was still a law clerk in the Colonial Office. Stephen based his opinion on the same reasoning Shepherd had used to resolve the question of taxation. The power of a colonial governor was delegated from the Crown, Stephen explained, and the Crown had no power to make laws without Parliament's consent, except in two situations. The first was in settlements that had been conquered by force, where the king could exercise power as conqueror; the second was in settlements that had been ceded to the Crown, in which the king would succeed to the legislative power of the former sovereign. New South Wales did not fall within either exception, however, because the colony "was acquired neither by conquest nor cession, but by the mere occupation of a desert

37. *Historical Records of Australia* (Sydney: Library Committee of the Commonwealth Parliament, 1914–), series IV, 1:330. There may be earlier formal statements of *terra nullius* lurking in unpublished court records. Continuous law reporting did not begin in New South Wales until the 1860s.

or uninhabited land.”³⁸ Again, in a dispute not involving the Aborigines, they were officially declared to have no property rights in land.

These legal opinions ratified a state of affairs that had existed ever since the first fleet arrived in 1788. Three decades of contact with the Aborigines had reinforced the assumption with which British colonization began—that the Aborigines were the most primitive people on the face of the earth, scarcely more civilized than animals. They had not managed to farm, or build proper houses, or do any of the tasks that established ownership of land. As a result, British lawyers and colonial officials concluded, Britons were no more bound to respect the property rights of Aborigines than they were to respect the property rights of kangaroos.

The Real Proprietors of the Soil

From the onset of British colonization, however, there were colonists who disagreed with this picture of the Aborigines and their lack of property rights. *Terra nullius* rested on some empirical assertions about Aboriginal life—that the Aborigines were few in number, that they roamed throughout the land without a sense of boundaries, that they claimed no particular territories as their own. In the earliest years of colonization, each of these assumptions came into question and, as they did, so did the doctrine of *terra nullius*.

The very first British residents of Australia realized immediately that James Cook and his colleagues had seriously underestimated the Aboriginal population. “The natives are far more numerous than they were supposed to be,” Arthur Phillip reported back to England.³⁹ Not only were there more on the coast than Cook had stated, but Joseph Banks’s speculation that the interior was uninhabited turned out to be utterly wrong. As members of the first fleet explored their new colony, they found, as the naval officer William Bradley noted in his journal, “an astonishing number of the Natives all around.” Australia was still much more sparsely populated than England. According to current estimates of the precontact Aboriginal population, between 1 and 1.5 million people were spread over the entire continent. But Australia was not nearly as empty as Cook and Banks thought it would be.⁴⁰

38. *Historical Records of Australia*, series IV, 1:414.

39. Phillip to Nepean, 9 July 1788, *Historical Records of New South Wales*, 1(2):153. Phillip had anticipated that such would be the case. Alan Frost, *Arthur Phillip 1738–1814: His Voyaging* (Melbourne: Oxford University Press, 1987), 144.

40. William Bradley, manuscript journal, 75 (4 Feb. 1788), A3631, ML; N. G. Butlin, *Economics and the Dreamtime: A Hypothetical History* (Cambridge: Cambridge University Press, 1993), 139.

Nor, as the early settlers quickly learned, did the Aborigines lack property. Within a few months of landing, the naval captain John Hunter recognized that “they have one fixed residence, and the tribe takes its name from the place of their general residence.” This fact was not evident to the casual observer, Hunter explained. “You may often visit the place where the tribe resides, without finding the whole society there,” but that was only because “their time is so much occupied in search of food, that the different families take different routes.” But in times of crisis, “in case of any dispute with a neighbouring tribe, they can soon be assembled.”⁴¹ It was not long before other British writers pointed out the same thing—that tribes were nomadic, but each within its own boundaries.⁴²

The Aborigines were even discovered to divide land among individuals and to pass property rights down from one generation to the next. “Strange as it may seem,” marveled the judge David Collins, “they have also their real estates. Ben-nil-long gave repeated assurances, that the island Memel . . . close by Sydney Cove, was his own property; that it had been his father’s, and that he should give it to By-gone, his particular friend and companion.” Collins recognized that this conception of the relationship between people and land was similar to the British conception. “To this little spot he appeared much attached,” Collins remarked. “He likewise spoke of other persons who possessed this kind of hereditary property, which they retained undisturbed.”⁴³ A few decades later, the Irish lawyer George Fletcher Moore, one of the first settlers in Western Australia, provided a similar observation. “It appears that among themselves the ground is parcelled out to individuals, and passes by inheritance,” he explained. “The country formerly of Midgegoroo, then of his son Yagein, belongs now of right to two young lads (brothers), and a son of Yagein.” George Augustus Robinson, the colonial government’s Protector of Aborigines in

41. Hunter, *An Historical Journal*, 62. Hunter’s book bears a publication date of 1793, but his observations are dated 1788.

42. Phillip to Sydney, 13 Feb. 1790, *Historical Records of New South Wales*, 1(2):309; Robert Dawson, *The Present State of Australia*, 2d ed. (London: Smith, Elder and Co., 1831), 63. For modern discussions of Aboriginal property systems in the first half of the nineteenth century, see L. R. Hiatt, *Arguments about Aborigines: Australia and the Evolution of Social Anthropology* (Cambridge: Cambridge University Press, 1996), 13–35; Jan Critchett, A “Distant Field of Murder”: *Western District Frontiers 1834–1848* (Carlton, Vic.: Melbourne University Press, 1990), 37–51; Sylvia J. Hallam, *Fire and Hearth: A Study of Aboriginal Usage and European Usurpation in South-Western Australia* (Canberra: Australian Institute of Aboriginal Studies, 1979), 41–43.

43. Collins, *An Account of the English Colony*, 327. The same story, probably copied from Collins, appears in a slightly later account published, probably pseudonymously, under the name of the pickpocket George Barrington, *The History of New South Wales* (London: M. Jones, 1802), 24.

Port Phillip, was struck that “when Tung.bor.roong spoke of Borembep and the other localities of his own nativity he always added, ‘that’s my country belonging to me!! That’s my country belonging to me!!’” When Robinson realized that the people under his protection evidenced a tie to their land little different from that experienced by residents of Britain, he was prompted to some pointed criticism of *terra nullius*. “Some people have observed,” Robinson remarked, “in reference to the natives occupying their country, what could they do with it? The answer is plain—they could live upon it and enjoy the pleasures of the chase as do the rich of our own nation.”⁴⁴

If there was any doubt that the Aborigines understood themselves to own their land, it was dispelled by the obvious fact that they did not acquiesce when the British occupied it. In 1804, when Governor Philip Gidley King asked a group of Aborigines about “the cause of their disagreement with the new settlers they very ingenuously answered that they did not like to be driven from the few places that were left on the banks of the river, where alone they could procure food.” By the 1820s, George Augustus Robinson learned, the Aborigines of Tasmania “have a tradition amongst them that white men have usurped their territory.”⁴⁵ As time went on, it became more and more apparent that *terra nullius* rested, in part, on a shaky empirical foundation. It was true that the Aborigines were not farmers, but they were more numerous and more property-conscious than had been expected.

As a result, early colonial officials sometimes seemed uncertain about *terra nullius*. William Bentinck, the Duke of Portland, would in a few years be the Prime Minister, but in 1800, while still Home Secretary, he sent instructions to New South Wales concerning an upcoming survey of portions of the Australian coast not yet visited by the British. After describing where the ship was supposed to go and what its captain and crew were supposed to do, Portland included a curious sentence. If the captain found any “places which appear to him of importance to Great Britain, either on account of the convenience of the shelter for shipping or the probable utility

44. George Fletcher Moore, *Diary of Ten Years Eventful Life of an Early Settler in Western Australia* (London: M. Walbrook, 1884), 259 (diary entry for 26 March 1835); Ian D. Clark, ed., *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate*, 2d ed. (Ballarat, Victoria: Heritage Matters, 2000), 2:311 (journal entry for 17 July 1841).

45. Peter Karsten, *Between Law and Custom: “High” and “Low” Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600–1900* (Cambridge: Cambridge University Press, 2002), 256–61; King to Hobart, 20 Dec. 1804, *Historical Records of Australia*, series I, 5:166; N. J. B. Plomley, ed., *Friendly Mission: The Tasmania Journals and Papers of George Augustus Robinson, 1829–1834* (Kingsgrove, NSW: Tasmanian Historical Research Association, 1966), 88 (journal entry for 23 Nov. 1829).

of the produce of the soil,” Portland instructed, “he is to take possession in His Majesty’s name, with the consent of the inhabitants, if any.”⁴⁶ At this point *terra nullius* had been in effect for twelve years, and yet here was an important official in Whitehall telling the governor of New South Wales not to take land without the Aborigines’ permission. Maybe this was simply a slip; maybe Portland was unaware that land policy in Australia was different from land policy in North America. Or maybe Portland doubted the right of the colonists to appropriate the Aborigines’ land.

The French explorer Nicholas Baudin was in New South Wales two years later, and he took the opportunity to give Governor Philip Gidley King a piece of his mind about *terra nullius*. “To my way of thinking,” Baudin declared,

I have never been able to conceive that there was justice and equity on the part of Europeans in seizing, in the name of the Governments, a land seen for the first time, when it is inhabited by men who have not always deserved the title of savages or cannibals which has been given them, whilst they were but the children of nature and just as little civilised as are actually your Scotch Highlanders or our peasants in Brittany, who, if they do not eat their fellow men, are nevertheless just as objectionable.

Baudin reproached King for “seizing the soil which they own and which has given them birth.”⁴⁷

A British colonial governor might not have been expected to pay much attention to the hectoring of a French explorer, but whether or not Baudin was responsible, King evidently had some misgivings about *terra nullius* in the years following. In 1807, while turning over the office to his successor, William Bligh, King gave Bligh some advice about the Aborigines. The colonists always urged him to punish the Aborigines severely when they stole crops, King related, but he could never bring himself to do it. “As I have ever considered them the real Proprietors of the Soil,” he explained, “I have never . . . suffered any injury to be done to their persons or property.”⁴⁸ Unlike Portland’s instruction, King’s could not have been a mistake. As governor, King was the man ultimately responsible for implementing the policy of *terra nullius*, by granting parcels of Crown land and coordinating the colony’s defense against the Aborigines. That King would call the Aborigines “the real Proprietors of the Soil” suggests he felt some discomfort in that role.

Bligh’s successor as governor, Lachlan Macquarie, seems to have felt a similar unease. In 1814 he set aside some land for a school for Aboriginal

46. Portland to Hunter, 26 Feb. 1800, *Historical Records of New South Wales*, 4:58.

47. Baudin to King, 23 Dec. 1802, *Historical Records of New South Wales*, 5:830.

48. King to Bligh, n.d. 1807, Philip Gidley King Papers, C189, p. 273, ML.

children and some more land to be occupied and farmed by Aboriginal adults. In the proclamation announcing these acts, Macquarie explained that appropriations of land were something “to which they are in some degree entitled when it is considered that the British Settlement in this Country” had been effected by “necessarily excluding the Natives from many of the natural advantages they have previously derived from the animal and other productions of this part of the Territory.”⁴⁹ His language was roundabout, but Macquarie’s point seems clear: the Aborigines were entitled to land in compensation for the territory that had been taken from them, an entitlement that presumed they had some kind of property right in the land the British now occupied. Macquarie had no need to say that. He had already justified setting aside land by citing the need to improve “the very wretched state of the Aborigines.” He could have stopped short of adding compensatory justice as a second reason. Like King, Macquarie may have felt some qualms about *terra nullius*.

Beginning in the 1820s, these doubts began to ripen into an apparently widespread belief, in both Britain and Australia, that *terra nullius* was an injustice toward the Aborigines. In 1827, for example, after some high-profile murders of settlers by Aborigines, the *Sydney Gazette* raised the question whether the murders were a “perfectly natural and justifiable” response to the British occupation of land belonging to the Aborigines. “Does the mere effecting a settlement by no other right but that of the strongest,” the paper asked, “and retaining possession owing to the physical weakness of the owners of the soil, for a period of forty years, does that divest them of their natural right to resist and expel the invaders, whenever they were in a situation to do so? We think not.” When Aborigines killed settlers, another writer pointed out, they were merely “following the example we have set them, and acting on the principle that *might is right*.” As time went on, more and more colonists came to believe, as one magazine put it in the late 1820s, that “our claim to the country was not exclusive, as the blacks had prior possession.”⁵⁰

Some of the early opposition to *terra nullius* came from the missionaries who worked among the Aborigines and the church organizations that supported them. “Their country has been taken from them,” George Augustus Robinson declared in 1830. “Can we wonder then at the hatred they bear

49. John Ritchie, *Lachlan Macquarie: A Biography* (Carlton, Vic.: Melbourne University Press, 1986), 132; Proclamation, 10 Dec. 1814, Supreme Court: Miscellaneous Correspondence Relating to Aborigines, 5/1161, 1:16–17, State Records New South Wales, Sydney (hereafter SRNSW).

50. *Sydney Gazette*, 20 April 1827, 2; *Australia: An Appeal to the World on Behalf of the Younger Branch of the Family of Shem* (Sydney: Spilsbury and M’Eachern, 1839), ix; “New Holland,” *South-Asian Register* 2 (1828): 115.

to the white inhabitants?" Robinson believed that "we should make some atonement for the misery we have entailed upon the original proprietors of this land." After twenty years as a missionary in New South Wales, Lancelot Threlkeld concluded that Britain owed the Aborigines "the price of the Land of their Birth." A Quaker committee in London pointedly asked why the British purchased land from nomadic tribes in other colonies but seized land from the Aborigines, who "consider themselves the real owners of the soil."⁵¹ Religious groups like these were at the peak of their influence on British colonial policy. In an era thick with religiously motivated reform movements of all kinds, the churches were helping to abolish slavery throughout the Empire and, in general, focusing attention on the welfare of indigenous people in the growing number of British colonies. Their attack on *terra nullius* was just one aspect of this broader goal.

But the missionaries were hardly alone in opposing *terra nullius*. "It may be doubted," a correspondent to the *Sydney Herald* asserted in 1835, "that a people can be justified in forcibly possessing themselves of the territories of another people, who until then were its inoffensive, its undoubted, and ancient possessors." As one correspondent to the *Southern Australian* newspaper complained in 1839, "it is now in vain to talk about the injustice of dispossessing the natives," because it had become so clear that colonial land policy was based not on justice but "upon the principle of expediency and self-interest." The complaint was repeated many times through the 1840s and 1850s. *Terra nullius* was "sophistry of law," declared the scientist P. E. de Strzelecki, after four years of exploring Australia and discovering that the Aborigines were "as strongly attached to . . . property, and to the rights which it involves, as any European political body." James Dredge resigned in protest as Assistant Protector of Aborigines, in part, he explained, because "they have been treated *unjustly*; their country has been taken from them, and with it their means of subsistence—whilst *no equivalent has been substituted*." Again and again, commentators asked: "Has the Government a right to take possession of the country, and, without any consent from the original proprietors, sell the land" to settlers?⁵²

51. Plomley, ed., *Friendly Mission*, 202–3; Lancelot E. Threlkeld, *Report of the Mission to the Aborigines at Lake Macquarie, New South Wales* (Sydney: Herald Office, [1838]), 2; *The Report of the Aborigines' Committee of the Meeting for Sufferings, Read at the Yearly Meeting 1840* (London: Harvey and Darton, 1840), 9.

52. *Sydney Herald*, 16 Feb. 1835, 2; *Southern Australian*, 8 May 1839, 3:4; Paul Edmund de Strzelecki, *Physical Description of New South Wales and Van Diemen's Land* (London: Longman, Brown, Green, and Longmans, 1845), 348 n.*, 340; Dredge, *Brief Notices*, 14; [Thomas M'Combie,] *Adventures of a Colonist* (London: John & Daniel A. Darling, [1845]), 267. For similar doubts, see Arthur Westmacott, "The 'Australian Aborigines,'" *Colonial Magazine and East India Review* 21 (1851): 398; *A Plea on Behalf of the Aboriginal Inhabitants of Victoria* (Geelong: Advertiser Office, 1856), 5–6.

Australian judges encountered attacks on *terra nullius* in a series of cases beginning in the late 1820s.⁵³ The first of these appears to have been the 1827 prosecution of the soldier Nathaniel Lowe for killing an Aborigine the settlers called Jackey Jackey. Lowe's lawyer must have been aware of the growing controversy surrounding *terra nullius*. He used the arguments against it to mount a roundabout challenge to the jurisdiction of the court. Lowe could not be prosecuted, his lawyer contended, because Lowe was only punishing Jackey Jackey for a murder Jackey Jackey had committed. Such privately inflicted punishments were necessary, the lawyer continued, because Aborigines could not be tried in colonial courts. And the reason Aborigines could not be tried in colonial courts, finally, was that the British occupation of Australia was contrary to natural law. "It seems to me almost doubtful," Lowe's lawyer argued, "whether taking possession of a country under these circumstances we have a right to establish empire among ourselves, and that our civil polity is for this reason repugnant to the law of nations." By that logic, the lawyer conceded, the court lacked the jurisdiction to try *anyone*, not just Lowe, but at the very least, he claimed, the Aborigines, being "the free occupants of the demesne or soil," could not be tried in colonial courts.⁵⁴

The argument was unsuccessful in Lowe's case, but it was quickly picked up by lawyers representing Aboriginal defendants in criminal cases, who could put it to a much more straightforward use in arguing that the court lacked jurisdiction over their clients. "The aboriginal natives were the primary tenants of the soil," insisted one defense lawyer; "they subsisted in the woods by fishing and hunting, and it was illegal for any one to disturb them in the possession of these natural rights." His client's killing of a white man, he argued, should accordingly be classified as a defensive act of war rather than a civil homicide. When an Aboriginal man named Legome was prosecuted for robbing the settler Patrick Sheridan, Legome's lawyer turned his cross-examination of Sheridan into a brief lecture on the justice of *terra nullius*. Wasn't Sheridan aware, the lawyer inquired, "that he had been a squatter for some time on Legome's ground, and had frequently committed great depredations on his kangaroos[?]" Sheridan's response—

53. Bruce Kercher, "Native Title in the Shadows: The Origins of the Myth of *Terra nullius* in Early New South Wales Courts," in *Colonialism and the Modern World: Selected Studies*, ed. Gregory Blue et al. (Armonk, N.Y.: M. E. Sharpe, 2002), 100–19; Bruce Kercher, "The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes, CJ, 1824–1836," in *Land and Freedom: Law, Property Rights and the British Diaspora*, ed. A. R. Buck, John McLaren, and Nancy E. Wright (Aldershot: Ashgate, 2001), 83–102.

54. *R. v. Lowe* (1827), in *Decisions of the Superior Courts of New South Wales, 1788–1899*, ed. Bruce Kercher, www.law.mq.edu.au/scnsw (visited 10 June 2002).

“he believed the ground belonged to Government”—suggests he understood the point the lawyer was trying to make. Australia had neither been conquered by Britain nor ceded to Britain by the Aborigines, contended defense counsel in a third case. “We had come to reside among them,” he reasoned, “therefore in point of strictness and analogy to our law, we were bound to obey their laws, not they to obey ours.” These arguments did not prevail. In one 1836 case they had the opposite effect—they elicited an extended judicial defense of *terra nullius*, resting on the standard justification that the Aborigines had not attained a sufficient level of civilization and social organization to possess any property rights the earliest British settlers were bound to respect.⁵⁵ But the fact that such arguments could be made at all in this context is evidence of their growing respectability among Australian lawyers.

Indeed, criticism of *terra nullius* came from the highest reaches of government, in both the Colonial Office and Parliament. The men who ran the Colonial Office in the 1830s and 1840s were sympathetic to arguments that the indigenous people inhabiting British colonies should be better treated. In 1837, a Select Committee of the House of Commons found it unconscionable that land had been allocated to settlers “without any reference to the possessors and actual occupants. . . . It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however, which seems not to have been understood.” The Aborigines’ “undisputed property” had been taken from them, the committee declared, “without the assertion of any other title than that of superior force.”⁵⁶

In the mid-1830s, when Britain began setting up the new colony of South Australia, these attacks on *terra nullius* appeared to be on the verge of changing colonial land policy. In 1835, the Colonial Office instructed the South Australian Colonization Commission that it could not sell unexplored land to settlers, because the new colony “might embrace in its range numerous Tribes of People, whose Proprietary Title to the Soil, we have not the slightest ground for disputing. Before His Majesty can be advised to transfer to His Subjects, the property in any part of the Land of Australia,” the Colonial Office warned, “He must have at least, some reasonable assurance that He is not about to sanction any act of injustice towards the Aboriginal Natives.” This letter marked a complete revolution

55. *R. v. Jackey* (1834); *R. v. Lego'me* (1835); *R. v. Murrell* (1836), all in Kercher, ed., *Decisions*. For a similar claim, with a more ambivalent judicial response, see *R. v. Bonjon* (1841), in Kercher, ed., *Decisions*.

56. Paul Knaplund, *James Stephen and the British Colonial System 1813–1847* (Madison: University of Wisconsin Press, 1953), 83–84; *British Parliamentary Papers: Anthropology: Aborigines* (Shannon: Irish University Press, 1968–69), 2:4, 5, 82–83.

in the colonization of Australia. For the first time, the imperial government recognized the Aborigines as owners of their land.⁵⁷ The advocates for Aboriginal land rights might well have believed they had accomplished a substantial victory.

The change was not lost on members of the South Australian Colonization Commission. "In the Colonization of Australia," they protested, "it has invariably been assumed as an established fact, that the unlocated tribes have not yet arrived at that stage of social improvement, in which a proprietary right to the soil exists." The Commission pointed out that the land in every other colony in Australia had simply been allocated to settlers, regardless of whether it was inhabited by Aborigines. Thenceforth the Commission worded its correspondence carefully to give the appearance of respecting Aboriginal property rights without actually committing itself to doing so. In its first annual report to the Colonial Office, sent in 1836, the Commission promised to protect the Aborigines "in the undisturbed enjoyment of their proprietary right to the soil," but immediately added: "wherever such right may be found to exist." The Commission likewise declared that "the location of the colonists will be conducted on the principle of securing to the natives their proprietary right to the soil, wherever such right may be found to exist." One can almost see the commissioners smiling, secure in the knowledge that they, at least, would be quite unlikely to find an Aboriginal tribe with a property right in land. The Commission instructed its agents in South Australia to "see that no lands, which the natives may possess in occupation or enjoyment, be offered for sale until previously ceded by the natives to yourself" and to "take care that the aborigines are not disturbed in the enjoyment of the lands over which they may possess proprietary rights, and of which they are not disposed to make a voluntary transfer."⁵⁸ Again, whether the Aborigines would actually be found to *possess* any of the land they occupied was a decision largely within the Commission's own control.

57. Grey to Torrens, 15 Dec. 1835, CO 13/3, p. 112, PRO; Julie Cassidy, "A Reappraisal of Aboriginal Land Policy in Colonial Australia: Imperial and Colonial Instruments and Legislation Recognising the Special Rights and Status of the Australian Aborigines," *Journal of Legal History* 10 (1989): 365–79.

58. Torrens to Grey, Dec. 1835, CO 13/3, p. 161, PRO; "First Annual Report of the Colonization Commissioners for South Australia," 14 June 1836, *British Parliamentary Papers: Colonies: Australia*, 4:480; "Second Letter of Instructions by the Colonization Commissioners for South Australia to James Hurtle Fisher, Esq., Resident Commissioner in South Australia," 8 Oct. 1836, *British Parliamentary Papers: Colonies: Australia*, 5:192. See also "Letter of Instructions by the Colonization Commissioners of South Australia to his Excellency Lieutenant-Colonel George Gawler, Resident Commissioner in South Australia," 25 May 1838, *British Parliamentary Papers: Colonies: Australia*, 5:347.

In the end, the government of South Australia “complied” with the Colonial Office’s instructions, not by purchasing land from the Aborigines, nor even by recognizing that the Aborigines had the right to refuse to cede it, but by authorizing the Protector of Aborigines, a colonial official, to participate in the process by which settlers selected plots of land. The Protector, explained Governor George Gawler in 1840, would have “the privilege of selecting before all other claimants small portions of land,” which he would hold for the “use & benefit” of the Aborigines. Gawler proudly cited this procedure as evidence of his awareness “that these people possess well defined & very ancient rights of proprietary & hereditary possession of the available lands.”⁵⁹ The Colonial Office gave its approval. Setting aside small parcels for Aborigines was nothing new; by 1840 the government of New South Wales had been doing so for some time. Despite the apparent change in land policy in the mid-1830s, the colonization of South Australia looked just the same as in the older Australian colonies. *Terra nullius* survived.

The doctrine survived another challenge in the mid-1830s as well. The possibility that the Aborigines might be deemed to own their land provided an incentive for speculators to purchase parts of it from them and then claim title to what they had acquired. It did not take long. In 1835 a consortium led by John Batman bought more than half a million acres from a group of tribes near Port Phillip Bay, in exchange for annual payments of blankets, knives, clothing, and other goods.⁶⁰ The would-be purchasers conceded that the purchase required confirmation by the Crown, but they argued that the Aborigines, not the Crown, were the ones with the right to sell the land. To make their case before the Colonial Office, they retained the well-known barrister and MP (and future judge) Stephen Lushington, who opined that he did “not think that the right to this Territory is at present vested in the Crown.”⁶¹ But the government countered with lawyers of its own. They pointed out that private land purchasing from indigenous people had long been prohibited in the British colonies, so the Batman purchase was void regardless of whether the land was owned by the Aborigines or the Crown.⁶²

59. Gawler to Russell, 1 August 1840, CO 13/16, p. 56, PRO.

60. C. P. Billot, *John Batman: The Story of John Batman and the Founding of Melbourne* (Melbourne: Hyland House, 1979), 79–102; Alistair H. Campbell, *John Batman and the Aborigines* (Malmesbury, Vic.: Kibble Books, [1987]), 84–98. The treaties by which Batman believed he had purchased the land are published in James Bonwick, *John Batman: The Founder of Victoria*, 2d ed. (Melbourne, 1868), ed. C. E. Sayers (Melbourne: Wren Publishing, 1973), 84–87.

61. Enclosure in Mercer to Glenelg, 6 April 1836, *Historical Records of Australia*, series I, 18:389.

And even that was too moderate for the Colonial Office, which, just when it was defending the property rights of Aborigines in South Australia, insisted that no such property rights could exist in the older Australian colonies. In response to Lushington's opinion, Lord Glenelg maintained that he was "not aware of any fact or principle which can be alleged in support of such a conclusion" and suggested that Lushington was laboring "under a misapprehension of some of the most material parts of the case."⁶³ Again, *terra nullius* remained in force.

Indeed, despite all the controversy surrounding Aboriginal land rights in the middle decades of the nineteenth century, whenever the question of land ownership came up, the government always resolved it in favor of *terra nullius*. In 1834, for example, when a dispute arose as to whether the governor of New South Wales was obliged to provide the colonial legislature with an accounting of the revenues from the sale and rent of Crown lands, Chief Justice Francis Forbes concluded that the governor was under no such obligation, because the revenues belonged to the Crown, not to the colony. That was true, Forbes explained, because New South Wales had been "acquired by the act of His Majesty's subjects settling an uninhabited country." The same year, in litigation over the ownership of a parcel of land in Sydney, Forbes held that "the right of the soil, and of all lands in the colony, became vested immediately upon its settlement, in his Majesty." In 1839, when some doubted the authority of the colonial government to charge a fee for pasturing on Crown land, Lord Normanby, the Secretary of State for the Colonies, instructed Governor George Gipps that ownership of the "Waste Lands in the Colony"—that is, the lands not yet granted to settlers—was "clearly in the Crown" and not anyone else, including the Aborigines. The Supreme Court of New South Wales registered its agreement in 1847. In denying a new trial for a defendant convicted of stealing coal from land to which the Crown had reserved the mineral rights, the court affirmed that all the ungranted land in Australia belonged to the Crown.⁶⁴ No matter the context, *terra nullius* proved impossible to dislodge.

Why?

62. This is the opinion of the lawyer and MP William Burge, 16 Jan. 1836, reprinted in William Westgarth, *Australia Felix* (Edinburgh: Oliver & Boyd, 1848), 394–97.

63. Grey to Mercer, 14 April 1836, *Historical Records of Australia*, series I, 18:390.

64. A. G. L. Shaw, "British Policy Towards the Australian Aborigines, 1830–1850," *Australian Historical Studies* 25 (1992): 265–85; J. M. Bennett, ed., *Some Papers of Sir Francis Forbes* (Sydney: Parliament of New South Wales, 1998), 228; *R. v. Steele* (1834), in Kercher, ed., *Decisions*; Normanby to Gipps, 29 June 1839, CO 202/40, p. 127, PRO; *Attorney-General v. Brown*, 1 Legge 312 (1847); A. R. Buck, "'Strangers in Their Own Land': Capitalism, Dispossession and the Law," in A. R. Buck et al., eds., *Land and Freedom*, 39–56.

No Title to Their Land

Some of the doctrine's staying power can be attributed to the simple fact that there was another side to the debate. Every bit of land not in the possession of Aborigines was one more bit available for settlement. The standard arguments in favor of *terra nullius* thus still had their appeal.

Decades after the British arrived, the Aborigines were still not farming nearly as much as the British would have liked. "I am not aware that they have shown any disposition to till the ground," the physician Alexander McShane informed a Parliamentary committee in 1841. Among the settlers, this lack of progress tended to be ascribed to the Aborigines' "invincible aversion to labour and to abiding in one place more than a few days together." This view was not unanimous. Some could see the Aborigines' side of things. "What great inducement does the monotonous and toilsome existence of the labouring classes in civilized communities offer," wondered the government surveyor Clement Hodgkinson, "to make the savage abandon his independent and careless life, diversified by the exciting occupations of hunting, fishing, fighting, and dancing?" But most British Australians seemed to think that the Aborigines possessed an incapacity for improvement rather than a genuine preference for traditional ways. "They are frequently set down as too stupid to be taught, and barely raised above brutes," remarked the Reverend Henry William Haygarth. While Haygarth thought that verdict a bit harsh, he was nevertheless certain that "their idleness is unquestionable, and their dislike to all restraint seems bred in the bone."⁶⁵

If the Aborigines were nonfarming nomads, then by conventional European standards they had still not acquired property rights in land. For every colonial writer who doubted the justice of *terra nullius*, there was another ready to defend it on the familiar ground that the Aborigines "were the *inhabitants*, but not the *proprietors* of the land." They had no property, declared the barrister Richard Windeyer, because "they have never tilled the soil, or enclosed it, or cleared any portion of it, or planted a single tree or grain or root." When the British arrived, Australia was still in its primordial, unowned state, open to the claims of whoever cultivated it first. "In our opinion, we have exactly the same right to be here, that the

65. *British Parliamentary Papers: Colonies: Australia*, 2:147; Campbell to Burton, 22 June 1838, Supreme Court: Miscellaneous Correspondence Relating to Aborigines, 5/1161, 2:492, SRNSW; Clement Hodgkinson, *Australia, from Port Macquarie to Moreton Bay* (London: T. and W. Boone, 1845), 242; Henry William Haygarth, *Reminiscences of Bush Life in Australia, During a Residence of Eight Years in the Interior* (London, 1848) (London: John Murray, 1861), 107. See also Thomas Bartlett, *New Holland: Its Colonization, Productions & Resources* (London: Longman, Brown, Green, and Longmans, 1843), 70.

older inhabitants have,” explained the *Southern Australian* in 1839. “We found the country in the state in which ages before the black people had found it—its resources undeveloped, unappropriated! In landing here, we exercised a right which we possessed in common with them.” The point was made again and again: the British, not the Aborigines, had been the first people to perform the acts necessary to convert the occupation of land into ownership. Britons “cannot but feel ourselves delighted at the sight of smiling harvests taking place of naked wastes,” applauded one far-off observer, “since man’s business, as an inhabitant of this world, is to improve and cultivate the face of the earth.”⁶⁶

Even if *terra nullius* had been unjust, others argued, there was no point worrying about it because the Aborigines were dying out. The land would belong to the British soon enough anyway. Belief in the eventual extinction of the Aborigines has of course proven false, but in the first half of the nineteenth century the Aboriginal population was declining. It was not unreasonable to conclude that the decline would continue.⁶⁷

In any event, some reasoned, the spread of an advanced, Christian civilization over the face of the earth was an end that might justify some otherwise distasteful means. William Pridden was an Essex minister who was no supporter of *terra nullius*. “In most instances in which a country is taken possession of, and its original inhabitants are removed, enslaved, or exterminated,” he noted, in a tone heavy with sarcasm, “the party thus violently seizing upon the rights of others is considered the superior and more civilized nation of the two.” But that did not mean the British ought to leave Australia. “It is a gain to the cause of truth and virtue for Christian England to possess those wilds, which lately were occupied by miserable natives,” Pridden reasoned; “and, while we own that it is wrong to do evil that good may come, yet may we, likewise, confess with thankfulness the Divine mercy and wisdom which have so often brought good out of the evil committed by our countrymen in these distant lands.” To say that *terra nullius* was wrong was only to raise, not to answer, a difficult ethical question.

66. *Sydney Gazette*, 19 August 1824, 4:1; Richard Windeyer, “On the Rights of the Aborigines of Australia” (ca. 1842), A1400, 32, ML; *Southern Australian*, 8 May 1839, 2:5; “The Aborigines of New Holland,” *The Blossom* 1 (1828): 46–47; *Sydney Herald*, 5 December 1838, 2:1; Richard Howitt, *Impressions of Australia Felix, During Four Years’ Residence in that Colony* (London: Longman, Brown, Green, and Longmans, 1845), 277; Samuel Kittle, *A Concise History of the Colony and Natives of New South Wales* (Edinburgh: Oliver & Boyd, [1815]), 7.

67. *Report from the Select Committee on the Aborigines and Protectorate* (Sydney: W. W. Davies, 1849), 20; Edward Stone Parker, *The Aborigines of Australia* (Melbourne: Hugh M’Coll, 1854), 30; N. G. Butlin, *Forming a Colonial Economy, Australia 1810–1850* (Cambridge: Cambridge University Press, 1994), 210–13.

For virtually all Britons of the period, colonization was an unalloyed good, the humanitarian thing to do, a way of bringing to others the benefits of European civilization. As an editorial from a contemporary South African colonial newspaper put it, “civilization is a toilsome, a laborious, and a *progressive* work.” It was “the sacred duty of government to put forth all its energy and influence so that the movement may be productive of the greatest amount of good.” But how could the British lift up the Aborigines if the British couldn’t come to Australia? Would the British be helping or hurting the Aborigines by allowing them to deny colonists access to land? Would the Aborigines be better off, in this life and the next, as primitive pagan nomads or civilized Christian farmers? There were probably many who, considering themselves hard-headed pragmatists, took Pridden’s point of view, and concluded that *terra nullius* was unjust but necessary. Lachlan Macquarie accordingly had no doubt of “the justice, good policy, and expediency of civilizing the aborigines, or black natives of the country and settling them in townships,” where they could stay in one place and be taught agriculture, freeing up the rest of the continent for Britons.⁶⁸

Terra nullius thus had its supporters as well as its critics. But there was another reason the doctrine had so much staying power, a reason that may have been even more important. Even the critics of *terra nullius* tended not to argue in favor of recognizing Aboriginal property rights. They proposed two remedies for the injustice of *terra nullius*: compensating the Aborigines, and setting aside parcels of unallocated land as permanent Aboriginal reserves.⁶⁹ But the one thing they generally did not advocate was treating the Aborigines as the true owners of their land.

Saxe Bannister, for example, the former Attorney General of New South Wales, found it unconscionable that Britain had taken the Aborigines’ land. “The unjust seizure of it,” he argued, was contrary to “the natural sense of right, and the feelings of independence” possessed by the Aborigines. But his solution was not to give the land back, or to change the law so as to prohibit future seizures. He proposed instead to compensate the Aborigines, with part of the increment by which British occupation had increased the value of the Aborigines’ former land. “The soil, daily increasing in value, is a most important fund,” Bannister concluded. “Where we gain possession, the value of the land should at least be set apart for establishments

68. William Pridden, *Australia, Its History and Present Condition*, 2d ed. (London: James Burns, 1845), 72–73; *Graham’s Town Journal*, 22 February 1844, CO 386/155, p. 164, PRO; Lachlan Macquarie, *Journals of His Tours in New South Wales and Van Diemen’s Land 1810–1822* (Sydney: Trustees of the Public Library of New South Wales, 1956), 160.

69. R. H. W. Reece, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s* (Sydney: Sydney University Press, 1974), 166–69.

to enable the native people to enjoy beneficially what is left.”⁷⁰ Others had the same idea. When “we deprive them of their lands and means of subsistence, in justice we ought to remunerate them,” declared a witness before a committee of the New South Wales Legislative Council in 1838; “the land being their property until usurped by us.” Colonization increased the value of the land so much, reasoned the penal reformer Alexander Maconochie, that even if part of the increase was paid to the Aborigines, “there will always be found in judicious colonization a large balance for ourselves.” Proponents of compensation conceived of the plan along the lines of the government’s power of eminent domain. The Aborigines might not have the right to oppose having their land taken, but they would have a right to be reimbursed for the land’s value afterwards. As John Bede Polding, the Roman Catholic Archbishop of Sydney, urged in 1845, “if it is necessary for the purposes of civilized life, to occupy his land,” the government should see that “it is not taken away without remuneration.”⁷¹

The idea of remuneration was certainly not foreign to the Colonial Office, long accustomed to administering colonies in which indigenous people were compensated for their land. Earl Grey, the Secretary of State for the Colonies in the late 1840s, believed that “in assuming their Territory the settlers in Australia have incurred a moral obligation of the most sacred kind” to compensate the Aborigines, if not in cash, at least by making “all necessary provision for the[ir] instruction and improvement.” In New South Wales, Governor Thomas Brisbane, at least, was amenable to paying the Aborigines as well. At a meeting with the Wesleyan missionary William Walker in 1821, Brisbane seemed positively enthusiastic. “Great things ought to be done,” Brisbane told Walker. “The Mother Country is transmitting annually from 30 to 40,000 £ of goods to the American Indians, as compensation for their country: we have taken the land from the Aborigines of this country, and a remuneration ought to be made.” Walker was so pleased with Brisbane that he told his employer “I cannot forbear loving him.”⁷² But compensation would never be awarded.

70. Saxe Bannister, *Humane Policy; or Justice to the Aborigines of New Settlements* (London: Thomas and George Underwood, 1830), 51, 87. See also Saxe Bannister, *British Colonization and Coloured Tribes* (London: William Ball, 1838), 277.

71. *Report from the Committee on the Aborigines Question* (Sydney: J. Spilsbury, 1838), 31, 33; Alexander Maconochie, *Thoughts on Convict Management* (Hobart: J. C. MacDougall, 1838), 192; Christopher Pemberton Hodgson, *Reminiscences of Australia, with Hints on the Squatter’s Life* (London: W. N. Wright, 1846), 76; *Report from the Select Committee on the Condition of the Aborigines* (Sydney: W. W. Davies, 1845), 10.

72. Quoted in Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia’s History* (Ringwood, Vic.: Viking, 2001), 99; William Walker to Richard Watson, 29 November 1821, Bonwick Transcripts, 52:1043–44, ML.

The other oft-proposed remedy for the injustice of *terra nullius* was to allocate reserves for the Aborigines. The merchant George Fife Angas was one of the founders of South Australia, but he believed that “positive injustice has been done to the natives” by the founding of the colony, because the Aborigines’ land had been taken from them. Questioned by a House of Commons committee in 1841, Angas made his view clear.

Were they not migratory tribes?—No, they had distinct limits; every family had a location.

Had they such a fixed residence previously to the settlement of any Europeans in the country?—Yes, it was accurately defined; not only was the district of the tribe defined, but the districts of the families of the tribe were so also.

Defined in relation to each other?—Defined in relation to each other.

Then did they recognise the rights of property in land?—In that sense they did.

They respected each other’s portions of land?—Clearly so. Those who trespassed upon others were put to death if they could be taken hold of.

Have they been dispossessed of those portions?—Certainly; in every instance where the whites have settled down, they have dispossessed the natives of the portion of land which they formerly occupied.

Has land been sold under the authority of the commissioners which was actually in the occupation of the aborigines?—Most unquestionably.

Have the aborigines been dispossessed in consequence?—I believe that to be the fact.

Angas could hardly have made the point more clearly or forcefully. The settlers of South Australia had robbed the Aborigines of their land. But after all his testimony, when the committee finally asked him what he proposed as a solution, all Angas could suggest was that ten percent of the colony’s land not yet sold to settlers should be set aside for the use of the Aborigines. And even that ten percent would not actually be owned by Aborigines. The land would be owned instead by a board of trustees, made up of settlers, which would establish villages where Aborigines would live with missionaries “and a few families of Christian people.” The colony’s land commissioner would have the authority to allocate land within these villages among Aboriginal individuals and families.⁷³

Unlike compensation, the allocation of Aboriginal reserves was a policy that the colonial government actually implemented. The remarks of colonial governors suggest that it was motivated by precisely the feeling Angas expressed—the sense that Aborigines deserved some land because Britons had taken that on which they formerly lived. When Macquarie set aside

73. *British Parliamentary Papers: Colonies: Australia*, 2:211, 2:216–17.

ten thousand acres in 1820, for example, he explained that it was because “the rapid increase of British population, and the consequent occupancy of the lands formerly dwelt on by the Natives, [had] driven these harmless creatures to more remote situations.” Two years later, Macquarie again reported that the Aborigines were “entitled to the peculiar protection of the British government, on account of their being driven from the sea-coast by our settling thereon, and subsequently occupying their best hunting grounds in the interior.” Governor George Gipps acknowledged the Aborigines as “the original possessors of the soil from which the wealth of the Colony has been principally derived.”⁷⁴ But when land was set aside, it was done in the manner Angas described, analogous to a trust with the Aborigines as beneficiaries and settlers as trustees, with the power to make the important decisions.

From the distance of more than a century and a half, the early critics of *terra nullius* are liable to be accused of lacking the courage of their convictions, or perhaps even of dishonestly assuming a posture of humanitarianism.⁷⁵ Why, if they thought the doctrine unjust, did they refrain from seeking to have it abolished? Why did they limit themselves to arguing for compensation, whether in the form of money or land? Why didn’t they simply try to persuade the government to treat the Aborigines as owners of their land?

The answer will be obvious to anyone familiar with present-day litigation over indigenous people’s land claims in former British colonies. Reversing *terra nullius* would have posed a terrible administrative problem for settlers and their government. The land titles of every single landowner in Australia were based on a purchase from the Crown. Every landowner had either obtained his land from the government or occupied the final link in a chain of conveyances that had originated with a grant from the government. And the Crown’s title to the land rested on the legal fiction that the Crown had instantly become the owner of all the continent in 1788. In short, every landowner in Australia had a vested interest in *terra nullius*. To overturn the doctrine would be to upset every white person’s title to his or her land. The result would be chaos—no one would be sure of who owned what.

Everyone from the Colonial Office to the bush knew this was true. In

74. Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770–1992* (St. Leonards, NSW: Allen & Unwin, 1996), 44–56; Macquarie to Bathurst, 24 February 1820 and 27 July 1822, *British Parliamentary Papers: Colonies: Australia*, 4:155 and 3:329; Proclamation, June 1838, Supreme Court: Miscellaneous Correspondence Relating to Aborigines, 5/1161, 2:495, SRNSW.

75. Cf. Bruce Kercher, *An Unruly Child: A History of Law in Australia* (St. Leonards, NSW: Allen & Unwin, 1995), 19.

London, Lord Glenelg had little difficulty recognizing that John Batman's ostensible purchase from the Aborigines could not be approved. "It is indeed enough to observe," he pointed out, "that such a concession would subvert the foundation on which all Proprietary rights in New South Wales at present rest." George Grey made the same point: to admit that the Aborigines owned any part of Australia was to admit that they owned all of it. And as a correspondent to the *South Australian Register* calling himself "An Old Settler" noted, even to suggest that the Aborigines owned their land was politically impossible. "If the land is indeed their own," he realized, "the Colonists of South Australia have no title to their land, for a 'voluntary surrender' of it has never been made." If *terra nullius* were abandoned, he wondered, and if the Aborigines were to try to reclaim their land, "would not the Colonists, as a matter of course, be at once called upon to rise en masse and resist so diabolical an attempt, and would not your newspaper be filled with glowing accounts of the bravery and skill displayed by the Colonists in repelling this atrocious native aggression?"⁷⁶ The number of landowners in Australia was steadily increasing, and all of them—every single one—depended on *terra nullius* for the security of their title.

The administrative problems involved in abandoning *terra nullius* were not insuperable as a logical matter, but each of the conceivable devices for solving those problems was politically infeasible. The government might have discarded the doctrine only prospectively, so that only Crown land would be returned to the Aborigines, and settlers would retain title to land the Crown had already granted to them. Something like this would become law in the 1990s after *Mabo*. In the nineteenth century, however, such a plan would have deprived the government of what was anticipated to be a major source of revenue, the sale and lease of Crown land. It would have hindered the government's efforts to attract more emigrants to Australia. It would not have benefitted the tribes that most needed help, the ones unlucky enough to have had the British reach their land first. These tribes might have been compensated for the land not returned to them, but of course some of the Britons most sympathetic to the Aborigines were already arguing for compensation, without any success. Many, in any event, believed that the land reserves being set aside were compensation enough. An alternative plan might have been to recognize Aboriginal ownership only of certain parts of the continent, thus freeing up the rest for British settlement, and not interfering with the land titles of any existing owners.

76. Glenelg to Bourke, 13 April 1836, *Historical Records of Australia*, series I, 18:379; Grey to Mercer, 14 April 1836, *Historical Records of Australia*, series I, 18:390; *South Australian Register*, 1 August 1840, 5:1.

Again, however, many of the humanitarians among the British would have contended that such a policy was already being carried out, in the form of setting aside reserves, and that the Aborigines' interests would be better served if the land allocated for them was managed by Britons.

The brute fact was that *terra nullius*, once underway, was extraordinarily difficult to reverse, because every British landowner in Australia depended on it. Indeed, for the same reason, any colonial land policy would have been difficult to reverse. The exact opposite situation had arisen more than a century before in North America, where the Indians had been recognized as owners of their land. Many of the seventeenth-century settlers of North America purchased land from the Indians. By the later part of the century, the land titles of a great many colonists rested on an initial purchase from the Indians. To deny the capacity of the Indians to sell land would have been to upset the settled expectations of a substantial number of settlers. In the 1680s, when the imperial government briefly reorganized the administration of the New England colonies, the government announced its intention to invalidate all land titles based on "pretended Purchases from Indians," on the theory that "from the Indians noe title can be Derived." The result was an uproar, led by some of the most prominent people in New England. If a purchase from the Indians could not serve as the root of a valid land title, declared a group of Boston merchants, then "no *Man was owner of a Foot of Land in all the Colony.*"⁷⁷ The imperial government had to back down.

Any colonial land policy, whether *terra nullius* or its opposite, produced a powerful political force to keep that policy in place. Once the government went down one path or the other, it could not change. In Australia, *terra nullius* began with an on-the-ground anthropology. Some of the early British perceptions of Aborigines were wrong—that the Aborigines were very few in number, and that they lacked a conception of property. Some were right—that they were not farmers and would not offer as much military resistance as other indigenous peoples the British had encountered. Had the British known more about the Aborigines from the start, they might have recognized Aboriginal property rights. But once *terra nullius* had been implemented, it could not be stopped, even when British opinion about the Aborigines began to change.

77. CO 1/63, pp. 119, 116, PRO; *The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston* (Boston, 1689), in *The Andros Tracts*, ed. W. H. Whitmore (Boston: Prince Society, 1868–74), 1:15–16 (emphasis in the original).

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