



Rethinking the Origins of *Terra Nullius*

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This article questions the accepted view of how and when land inhabited by indigenous peoples came to be regarded as uninhabited or ownerless for legal purposes. It suggests that until the nineteenth century the predominant view was that such land was acquired through conquest or cession. This early legal interpretation was supported by government policy which recognised indigenous title to the land. The incorporation of the idea of terra nullius into British law in the nineteenth century seems to have been significantly influenced by the establishment of New South Wales and the debate in and about that colony.

ALTHOUGH THE DECISION in the *Mabo* case rejected the idea that the legal concept of *terra nullius* could be applied to Australia as it was in 1788, the history of how and when this concept came to be extended to land inhabited by hunters and gatherers is still wrought with much misunderstanding.¹ During the past sixty years or so it has often been claimed that such land was always, or at least from the early eighteenth century, seen as ownerless by the colonisers, thus falling within the category of land which could be acquired by settlement. This view has a long history among Australian jurists and historians; A.C. Castles, for example, has argued that 'by the beginning of the eighteenth century' it had been firmly established that 'a "settled" colony was a territory, which at the time of its occupation by the British, was uninhabited or inhabited by a primitive people whose laws and customs were considered inapplicable to a civilised race'.²

¹ The term and concept of *terra nullius* are complex and easily misunderstood. David Ritter has pointed out that the legal doctrine of *terra nullius* originates in international law rather than in the common law and he suggests that it was introduced into the latter very recently, chiefly through the reasoning in the *Mabo* judgment though he acknowledges a 'discourse of *terra nullius*' as having existed for much longer in Australia. This is a very useful point. As Ritter also points out, the Roman law doctrine of *terra nullius* and *occupatio*, which was the basis of the international law doctrine, had a counterpart in the common law doctrine of uninhabited land which could be acquired through settlement. Over the years the term *terra nullius* has come to be seen and used as a convenient shorthand term for 'uninhabited/ownerless land' and it is in this somewhat loose sense that it is used here. See David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis', *Sydney Law Review* 18, no. 1 (March 1996): 5–33. See also former Chief Justice H. Gibbs, 'Foreword', in *Mabo: A Judicial Revolution*, eds M.A. Stephenson and S. Ratnapala (St Lucia: University of Queensland Press, 1993), xiv. I am grateful to one of the anonymous readers of my article for drawing my attention to David Ritter's very interesting article.

² A.C. Castles, 'The Reception and Status of English Law in Australia', *Adelaide Law Review* 2 (1963–66): 2. See also by the same author, *An Introduction to Australian Legal History* (Sydney: The Law Book Company, 1971), 14–15. Other examples of this position (more or less explicitly stated) include E. Scott, 'Taking Possession of Australia—The Doctrine of "Terra Nullius" (No-Man's Land)', *Journal and Proceedings of the Royal Australian Historical Society* 26 (1940): 1; R. Else-Mitchell, 'The Foundation of New South Wales and the Inheritance of the Common Law', *Journal and*

Castles's aim was to show which laws applied at the foundation of a colony, not what the rights of the original inhabitants were, but the two merge in the application of the term 'settled colony'. In the reasons for judgment in the *Mabo* case, Brennan also indicated that the habit of claiming land inhabited by 'backward peoples' as *terra nullius* goes back a long time.³ Alan Frost has provided perhaps the most explicit statement of this perceived development:

[b]y the mid-eighteenth century the theoretical basis of a new convention of acquiring empire had emerged ... If the region were not already possessed by a rival, then a state might acquire it in one of three ways: by persuading the indigenous inhabitants to submit themselves to its overlordship; by purchasing from those inhabitants the right to settle part or parts of it; by unilateral possession, on the basis of first discovery and effective occupation.⁴

The third method amounted, as Frost points out, to regarding the territory as *terra nullius* even though the area was inhabited, a position which was considered reasonable because the people in question were regarded as 'having advanced beyond the state of nature only so far as to have developed language and the community of the family, but no further'; in particular they had developed no agriculture. Frost points to the Bible as well as such legal and political authors as Hugo Grotius, Samuel Pufendorf and John Locke as the sources of this view and clearly regards it as having been generally accepted by the time Europeans became acquainted with Australia, even to the point of stating that '[t]o Cook (and to Banks and their contemporaries) eastern New Holland was *terra nullius*' in this sense, though none of them ever made a statement to this effect.

Most recently Bain Attwood has proposed a similar understanding of this matter. Attwood refers to Frost but seems to rely even more on Nancy Williams's interpretation of ideas of property in European thinking as support for his view; he states that '[i]n the opinion of Grotius, Pufendorf, Locke and others, hunter-gatherers ... had no concept of property because they were in the

Proceedings of the Royal Australian Historical Society 49 (1963): 2; *Milirrpum and others v. Nabalco Pty Ltd and the Commonwealth of Australia, Federal Law Reports* 17 (1971): 201; R.D. Lumb, 'The *Mabo* Case—Public Law Aspects' in Stephenson and Ratnapala, 6ff.

³ *Mabo v. the State of Queensland, F.C. 92/014* (3 June 1992): 19–21 (printed in *Australian Law Reports* 107 (1992)). Brennan borrows the term 'backward peoples' from M.F. Lindley, *The Acquisition and Government of Backward Territories in International Law* (London: Longmans, Green and Co., 1926).

⁴ Alan Frost, *Botany Bay Mirages* (Melbourne: Melbourne University Press, 1995), 177–8, 179, 185; the chapter is based on the article 'New South Wales as *Terra Nullius*: The British Denial of Aboriginal Land Rights', *Historical Studies* 19, no. 77 (October 1981): 513–23. Frost's interpretation of the history of *terra nullius* has been very influential; it is referred to and accepted by, e.g., Alan Atkinson, 'The First Plans for Governing New South Wales 1786–87', *Australian Historical Studies* 24, no. 94 (April 1990): 24; Bain Attwood, 'Aborigines and Academic Historians', *Australian Historical Studies* 24, no. 94 (April 1990): 130; A.G.L. Shaw, 'British Policy towards the Australian Aborigines 1830–1850', *Australian Historical Studies* 25, no. 99 (April 1992): 266. See also Atkinson's review of *Botany Bay Mirages*, *Australian Historical Studies* 27, no. 106 (April 1996): 197–8; Glyndwr Williams, 'The Pacific: Exploration and Exploitation' in *The Eighteenth Century*, ed. P.J. Marshall, *The Oxford History of the British Empire*, vol. II (Oxford: Oxford University Press, 1998), 560.

original state of nature'.⁵ Furthermore, in Attwood's opinion the combined efforts of Adam Smith, as one of the creators of the stage theory, and of the Swiss jurist Emerich de Vattel were important in shaping the views of William Blackstone, who must then also be understood to have supported the notion that the land of indigenous peoples could be acquired through settlement by an extension of the doctrine of *terra nullius*.⁶

In spite of the great scholarly weight behind them, these interpretations are open to question. When the wealth of material relevant to this issue is surveyed it seems much more likely that there was no legal doctrine maintaining that inhabited land could be regarded as ownerless, nor was this the basis of official policy, in the eighteenth century or before. Rather it seems to have developed as a legal theory in the nineteenth century.⁷ It also seems likely that the establishment of New South Wales and the legal debate in and about the colony played a significant role in this development. Furthermore, when discussing whether indigenous land was regarded as *terra nullius* in the eighteenth century, it is necessary to determine if this is to be seen within British law (as expressed by judges and jurists within the British legal system), in international law, in British government policy, as seen by scholarly writers in Britain or by interested people in the colonies who committed their thoughts to paper. Although there has been a certain amount of interaction between these areas, each of them is nevertheless marked by individual characteristics which cannot necessarily be transferred to the others: the legal system, for example, has always been governed by rules of precedent to which non-legal scholarly writers have not been subject, with consequences for the degree to which innovative thinking can take place; British and international law had different origins and have gone through relatively separate developments; law and government policy have to a certain extent been governed by different objectives; and so forth. Although the material cannot be reviewed at length or the development of these different fields discussed in any detail here, a few points will be made which suggest a different understanding of when and how the doctrine of *terra nullius* came to be applied to the land of hunters and gatherers.

⁵ Bain Attwood, ed., *In the Age of Mabo* (Sydney: Allen & Unwin, 1996), ix, based on Nancy Williams, *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* (Canberra: Australian Institute of Aboriginal Studies, 1986), chaps 7 and 8, in which she says; '[f]rom at least the mid-eighteenth century, English law regularly assumed that hunters and gatherers had no concept of property', 110.

⁶ The 'extended doctrine of *terra nullius*' refers to the legal theory that under certain circumstances the originally narrow concept of *terra nullius*/uninhabited land could be applied to land that was inhabited.

⁷ This is not a new proposition; more than seventy years ago M.F. Lindley, *Acquisition and Government*, recognised that the doctrine of *terra nullius* was not applied to inhabited land until the nineteenth century. In Australia, Henry Reynolds has discussed the relevant international law writers and common law jurists, in particular in *The Law of the Land* (Melbourne: Penguin, 1987) and *Aboriginal Sovereignty* (Sydney: Allen & Unwin, 1996), and has reached similar conclusions; see also Gerry Simpson, 'Mabo, International Law, *Terra Nullius*, and the Stories of Settlement: an Unresolved Jurisprudence', *Melbourne University Law Review* 19 (1993): 195–210.

I

When the English began to participate in European expansion, their legal system was confronted with the task of adapting the law to the new circumstances. In the course of the seventeenth and eighteenth centuries, British jurists made a number of statements about colonisation which amounted to a theory about the rights of indigenous peoples (in North America at first, but later extended to others); there is much to suggest that this was based on the assumption that their land had been or could be acquired through conquest (or cession).

This doctrine of conquest developed from the early dictum pronounced by Chief Justice Edward Coke in *Calvin's Case* (1608) that the English were always at war with non-Christians: 'for between them [the infidels], as with the devils, whose subjects they be, and the Christian, there is perpetual hostility and can be no peace'. In a later passage Coke stated that after conquest of an infidel country their laws automatically ceased to exist because they were 'not only against Christianity, but against the law of God and of nature'.⁸ Coke thus incorporated into British law medieval notions of the rights of Christians to conquer non-believers and made it the basis of the legal interpretation of interaction with the Indians in North America.⁹ It has been suggested that Coke's dictum was intended as the 'written legal justification' for taking possession of Virginia when the Virginia Company itself refrained from issuing any such legitimating statement;¹⁰ Coke's dictum together with the Virginia charter could thus be seen as the joint expression of the legal-official attitude towards acquisition in North America, the latter staking Britain's claim vis-a-vis other European nations, the former clarifying the position in relation to the existing inhabitants.

The doctrine of conquest was maintained, in adjusted form, in the eighteenth century. William Blackstone, certainly one of the most prominent expositors of the common law in the eighteenth century, based his widely known discussion of the categories of colonies on this doctrine, although much dispute has centred around his choice of words in describing the colonies to which it applied. In an often-quoted passage Blackstone said:

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them

⁸ *Calvin's Case* (1608) (Coke's Reports, part 7, 1A), *English Law Reports* 77 (1907): 397–8.

⁹ Pagden questions the significance of Coke's opinion by claiming that '[f]ew Englishmen were prepared to accept this [that the common law contained this doctrine of conquest]'; he does not, however, provide any references to support this claim so that it is difficult to test it against the use to which Coke's opinion was unquestionably put in the eighteenth century. see Anthony Pagden, *Lords of All the World* (New Haven: Yale University Press, 1995), 94 and also by the same author, 'The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700' in *The Origins of Empire*, ed. Nicholas Canny, vol. I, *The Oxford History of the British Empire* (Oxford: Oxford University Press, 1998).

¹⁰ R.A. Williams, *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990), 204.

from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.¹¹

It has frequently been claimed that Blackstone's first category applied to colonies established in regions inhabited by hunters and gatherers whose land was regarded as 'desert' because it was 'uncultivated'. However, in the next passage Blackstone said, with reference to this first category, '[f]or it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws ... are immediately there in force'. This shows beyond reasonable doubt that Blackstone used the ambiguous phrase 'desert and uncultivated' to mean 'uninhabited'. Blackstone relied on a decision by the Privy Council from 1722 referring to 'a new and uninhabited country' which upon discovery by English subjects would be governed by English law. Again, it has been argued that this decision was meant to apply to land inhabited by hunters and gatherers; however, it is significant that the decision refers to Barbados since Barbados seems to have been truly uninhabited when the British settled it in 1625, and the phrase 'new and uninhabited country' cannot therefore without further evidence be taken to apply to inhabited land.¹² Neither the decision of 1722 nor the passage in Blackstone provides any proof of a change of opinion in this regard.

Blackstone also elaborated on his second category:

But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties.¹³

Here Blackstone makes it absolutely clear that he regarded the American colonies as held by conquest or cession.¹⁴ In this case, too, Blackstone followed precedent; the debt to Coke's doctrine of conquest is beyond doubt, even down to the idea that the laws of an 'infidel' country were extinguished immediately on conquest.

This latter idea, however, was rejected later in the century by Lord Mansfield. It had already been modified on earlier occasions, as when a royal commission in 1665 stated that 'no doubt the country is [the Indians'] till they give it or sell it,

¹¹ William Blackstone, *Commentaries on the Laws of England* (1756), book 1 (Philadelphia: Rees Welsh and Co., 1902), 93.

¹² Case 15—Anonymous (1722), *Peere Williams* 2: 75–6. Cf. K. McNeill, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), 136; P. Hulme and N.L. Whitehead, eds, *Wild Majesty* (Oxford: Clarendon Press, 1992), 63.

¹³ Blackstone, book 1, 94.

¹⁴ Neither Castles, *Australian Legal History*, 11 nor Nancy Williams, 133 include the sentence referring to the American colonies when quoting this passage. They both argue that Blackstone saw indigenous land as falling within the category of settled colonies.

though it be not improved' or when Lord Northey, the attorney-general, in 1703 said that the charter of Connecticut was not 'intended to dispossess the Indians who before and after the Grant were Owners and possessors of [their lands]'.¹⁵ In 1774 in *Campbell v. Hall*, Mansfield finally overruled what he called '[t]he absurd exception as to pagans' which he ascribed to the 'mad enthusiasm of the Crusades'; instead he reinforced the general application of Coke's main principle that in a country conquered by the British, the king could alter the laws of the inhabitants but until altered they continued in force. In rejecting the special rule about 'infidels' Mansfield also rejected the notion of a constant war between Christians and non-Christians and thus rid the common law of a significant remnant of medieval tradition. On the other hand, however, it is clear that conquest in Mansfield's view remained an important means of acquiring colonies; in another passage he mentioned with approval Coke's view that there were two means of doing so: conquest and inheritance.¹⁶

The application of the doctrine of conquest to inhabited land thus seems well established in British law by the second half of the eighteenth century. While the origins of this doctrine in the rights of Christians over others were extremely Eurocentric, it is important to notice that it was not based on the theory that these people had no title to their land—if that had been the case there would have been no need to develop the formal legal doctrine of conquest (there would have been nothing to conquer). The talk of conquest in itself shows a recognition of—though obviously no respect for—the territorial rights of the inhabitants and it is therefore irreconcilable with the idea that inhabited land could be regarded as ownerless, which allows no rights to exist in the inhabitants. As time passed, the doctrine of conquest was adapted to express the recognition of—and respect for—the existing rights of the original inhabitants; cession and purchase were both legal and political manifestations of this recognition.

This interpretation is supported by the *Mohegan Indians v. Connecticut*, the first legal case to deal specifically with the territorial rights of an indigenous people as against the British colonisers. As the case developed, two issues were of major consideration, firstly, whether the case should be heard in the colonial courts or by a special commission, and secondly, whether the Indians had been fraudulently deprived of their land, as the Indians claimed, or their lands had been voluntarily turned over to the colonists as the colonists maintained. In 1704 the first commission was established by royal order and this commission found in favour of the Indians and ordered the land to be returned to them; non-compliance with this order led to the establishment of a second commission

¹⁵ The first quotation cited in James Tully, 'Aboriginal Property and Western Theory', *Social Philosophy and Policy* 11 (1994): 171 from N.B. Shurtleff, ed., *Records of the Governor and Company of Massachusetts Bay in New England* (Boston: W.White, 1853–54), 213, the second quotation cited in G. Lester, *Inuit Territorial Rights in the Canadian North West Territories* (Nunavut: Tungavik Federation of Nunavut, 1984), 28.

¹⁶ *Campbell v. Hall* (1774), *All England Law Reports Reprint* (1558–1774): 254, 256.

in 1737 and a third one in 1743.¹⁷ A majority of this last commission agreed that because of the status of the Indians as a separate people, it would be inappropriate to hear the case in the colonial courts as if they were British subjects; Commissioner Horsmanden stated:

And it is plain, in my conception, that the Crown looks upon the Indians as having the property of the soil of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a colony, thereby impropriated in his subjects till they have made fair and honest purchase of the Natives.¹⁸

On the issue of the actual land in dispute the majority of the commissioners found in favour of the colony, apparently on the grounds that they held the disputed deeds to be valid. As far as can be judged, the colonial spokesmen seem to have based their argument not on the lack of title on the part of the Indians but on their having parted with that title through a number of grants to the colonists. In 1772 the Privy Council confirmed the decision of the third commission. Although finding against the Indians in the end, the case seems to confirm the idea that basically the British legal system at this time accepted that the indigenous peoples of North America had legally well-established rights to their land, and that British colonisation could only proceed after title had been acquired through conquest or cession.

II

Documents relating to British government policy in the eighteenth century show a similar acceptance of indigenous title to the land.

Apart from the charters there are few sources to indicate the attitude of the Crown to the Indians in the seventeenth century; however, in the eighteenth century the increasing concern with the political and military position of Britain in North America led to the establishment of two superintendents of Indian affairs. Correspondence between the Board of Trade, the Secretary of State and the superintendents leaves little doubt as to their attitude towards the Indians bordering on or living within the colonies. Thus in 1760 when a proposal had been made to form certain new settlements within the colony of New York, the members of the Board of Trade approved of this 'provided it be done with proper regard to our engagements with the Indians'. It was envisaged that the Indians 'may possibly claim part of them [the lands] as their hunting grounds reserved to them by the most solemn treaties, upon an exact observance of which, not only our interests, but our rights in regard to the claims of other foreign powers do greatly depend'.¹⁹ The passage is evidence of

¹⁷ J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), 422–42.

¹⁸ Quoted in James Youngblood Henderson, 'The Doctrine of Aboriginal Rights in Western Legal Tradition', in *The Quest for Justice*, eds Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985), 195.

¹⁹ Lords of Trade to Pitt, 21 February 1760, in *Documents Relative to the Colonial History of the State of New York*, eds E.B. O'Callaghan and B. Fernow, vol. 7 (Albany, New York, 1853–81), 428–9.

the belief that sovereignty over the area had been ceded by the Indians to the British through the signing of a number of treaties. The same interpretation is inescapable in a passage from a report by the Board of Trade from 1761 on settlements on the Mohawk River; reference was made to 'the cruelty and Injustice with which they [the Indians] had been treated with respect to their hunting grounds, in open violation of those solemn compacts by which they had yielded to us the Dominion, but not the property of those lands'.²⁰ It is noticeable that the Indians were perceived to have retained their property rights while ceding their sovereignty. After the end of the Seven Years' War, the British believed that they had acquired sovereignty over the country between the colonies and the Mississippi; this is apparent from the Royal Proclamation of 1763 in which an 'Indian territory' was established in that region 'under our Sovereignty, Protection and Dominion'. In this case sovereignty was believed to have been acquired from the French through conquest, though the Indians never accepted this. However, the proprietary rights of the Indians were respected; the Indians 'should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them ... as their hunting grounds'.²¹

Although it is difficult to distinguish between sentiments which are sincerely felt and those which are merely expressed for reasons of expediency, the tone in the correspondence is so consistent that it seems probable that it was in fact widely believed in government circles that the original inhabitants of North America had had title to the whole of the region, that much of this title had been acquired through cession (or conquest in certain cases), and that the Indians retained property rights to the land on which they lived. Indeed, one may add that even if expediency was the determining factor in shaping government attitudes, this was the policy that came out of it and was consistently adhered to in the course of the century.

Although the American colonies provided the major context for British policy formation towards indigenous peoples, the recognition of rights was not confined to the Indians, as is shown by government action in other areas towards the end of the eighteenth century. On the west coast of Africa, for example, the British purchased areas from the Africans in which to establish their trading posts; so when they considered also establishing a penal colony there in 1785 (on the island of Lemain in the Gambia), a man was immediately dispatched 'with Instructions for entering into Engagements with the native Chiefs for obtaining, upon the payment of such Annual Custom as may be agreed upon, the Island of Lemain'.²² Similarly, when the government at the same time considered the possibility of acquiring an interest in the Andamans and Nicobars, directions

²⁰ Order of the King in Council on a Report of the Lords of Trade, 23 November 1761, *ibid.*, 472.

²¹ By the King. A Proclamation, in *Documents relating to the Constitutional History of Canada, 1759-1791*, eds A. Shortt and A.G. Doughty, vol. 1 (Ottawa: Canadian Archives, 1918), 163-8.

²² Sydney to Treasury, 9 February 1785, PRO HO 35/1, Public Record Office, London (hereafter PRO).

were given to 'obtain their [the tribal inhabitants'] consent'.²³ When the Nootka Sound crisis developed in 1790, an expedition was proposed to be sent out to make a settlement there and thus establish British claims beyond any doubt; the instructions prepared for the captain contained the following passage:

if you find any person or number of persons among them [the Indians] who appear to have any right or sovereignty over the Territory ... you are to endeavour to purchase their consent to the formation of the Settlement, and a Grant of Land for that purpose, by the presents with which you are furnished.²⁴

That negotiation for cession of land and sovereignty was a common procedure is also shown by the comments and questions asked by the Commons Committee on Transportation in 1785. When recommending Das Voltas Bay the Committee said '[t]hat it appears to them highly probable that the Natives would without resistance acquiesce in ceding as much Land as may be necessary for a stipulated Rent';²⁵ and when questioning Joseph Banks on New South Wales, the committee readily asked if Banks believed that 'in Case it was resolved to send Convicts there any District of the Country might be obtained by Cession or Purchase'.²⁶ The same assumption is of course evident in Cook's instructions to take possession of certain locations 'with the consent of the natives'.²⁷

In other words it may be suggested with some force that by the time of the establishment of New South Wales, there was no precedent in eighteenth century British policy for taking possession of inhabited land as if it was uninhabited, nor was there any legal doctrine in British law at the time which supported such action.²⁸

III

Scholars who maintain that land inhabited by hunters and gatherers was regarded as *terra nullius* in the eighteenth century or even earlier often move beyond the material discussed here, and point to international jurists or to other writers within Britain or in the colonies as evidence for their position.

²³ India Board to Governor-General and Council at Bengal, 9 April 1785, PRO FO 41/1

²⁴ Instructions to the Captain of the Frigate to be dispatched from the East Indies, March 1790, PRO HO 28/61.

²⁵ Report, 21 June 1785, PRO HO 42/7, 17.

²⁶ Banks' evidence, 10 May 1785, PRO HO 7/1, 72-3.

²⁷ J.C. Beaglehole, *The Voyage of the Endeavour 1768-1771* (Cambridge: Cambridge University Press, 1950), cclxxxii. As is well known, Cook did not obey his orders in this respect; he refrained from negotiating with the inhabitants and merely claimed New South Wales for Britain through a series of symbolic acts. In his journal Cook mentioned that the inhabitants did not seem to have any 'fix'd habitations' (396). On this basis he may have concluded that it was not necessary to negotiate. However, it may also be that Cook, in view of the—to him—alien nature of Aboriginal society and the difficulties of communication, simply limited himself to taking possession of the area as against other Western nations in the accepted formal fashion (see John Juricek, 'English Territorial Claims in North America under Elizabeth and the Early Stuarts', *Terra Incognitae* 7 (1976): 7-22).

²⁸ I have discussed British policy during this period in greater detail in: 'Conciliating their Affections: The Development of Official British Attitudes and Policy towards Indigenous Peoples in the Colonies of Settlement, 1763-1814', PhD thesis, University of Copenhagen, 1997.

As suggested at the outset these sources are not immediately indicative of the position in British law, but that does not mean that they should be ignored or that they may not have had an influence in the long term on the development of law or policy; it is suggested here, though, that although the origins of the extended doctrine of *terra nullius* is probably to be found here, these works provide less evidence for the existence of the idea in the eighteenth century than has sometimes been assumed.

One of the British writers most frequently cited in this context is John Locke; his prominence in Whig circles in the late seventeenth century and his writings on political theory gave him great influence on the thought of his day. His theory on property contains a number of suggestions as to how the rights of the North American Indians should be understood. In this section, Locke synthesised and elaborated on the many, very diverse views on this topic current among the educated elite in the seventeenth century.

The central idea in this part of Locke's work was that individual property arose as a consequence of applying one's labour to something and therefore private property rights in land only existed when one worked the land—as the Indians did not in his view; in Locke's opinion this was the logical conclusion to be drawn from divine commandment:

God when he gave the World in common to all mankind, commanded Man also to labour ... God and his Reason Commanded him to subdue the Earth, *i.e.* improve it for the benefit of Life ... He that in Obedience to this Command of God, subdued, tilled and sowed any part of it thereby annexed to it something that was his *Property*.²⁹

Most scholars argue that Locke's theory provided—and was intended to provide—legitimation and even justification for taking the land on which the Indians lived. Locke's stress on appropriation without consent and the importance of agriculture is seen as an argument for regarding the Indians as having no rights to the land whatsoever and for seeing America as ownerless, as completely vacant for proprietary purposes, as *terra nullius* in its extended meaning.³⁰ While it is undoubtedly true that Locke attributed great significance to private property, its basis in agriculture and therefore its pre-eminence over hunting and gathering, Locke's reference to the law of nature as his point of departure should not be overlooked: before men joined together in political society they lived in a state of nature governed by the law of nature. In this state 'the World [was given] to Men in common' and 'the wild *Indian*, who knows no Inclosure, ... is still a Tenant in common'; in other words while the Indian had no individual rights in land, he still had the common right granted by God; other references such as to 'Nations

²⁹ John Locke, *Two Treatises on Government* (1690; Cambridge: Cambridge University Press, 1970), 309. Emphasis in original text.

³⁰ See e.g., Pagden, 'The Struggle for Legitimacy'; James Tully, 'Placing the "Two Treatises"', in *Political Discourse in Early Modern Britain*, eds Nicholas Phillipson and Quentin Skinner (Cambridge: Cambridge University Press, 1993); David Armitage, 'The New World and British Historical Thought' in *America in European Consciousness*, ed. K.O. Kupperman (Chapel Hill: University of North Carolina Press, 1995).

of the *Americans* ... who are rich in land' or to the '[Indian] King of a large and fruitful territory' further indicate that Locke recognised that the Indians continued to have certain rights to the land on which they lived.³¹ Locke did not argue in favour of removing the soil from under the feet of the Indians; he several times repeated the view that 'enough, and as good' land must be left for others when a man enclosed his own property.

In this light it is suggested that when Locke said: 'let him [agricultural man] plant in some in-land, vacant places of *America*, we shall find that the *Possessions* he could make himself upon the *measures* we have given, would not be very large, nor, even to this day prejudice the rest of Mankind, or give them reason to complain',³² his statement was based on the belief that there existed truly vacant land in America, that is, places which were not inhabited by anyone, including Indians, who were also part of Mankind.³³ Because Locke believed this to be the case he could argue that such land as the Indians did not or would not need could be appropriated—through occupation and without consent—by the eminently justifiable claims of European agriculturalists. In this way, Locke (like others before him who had also believed in the agriculturalist argument)³⁴ assumed that it would be possible to settle in America without disturbing, or at least displacing, the Indians. This view was to become complementary to and just as influential as the primary one that agriculture provided a superior claim to acquiring property in the land.

International law has been seen to offer a more varied range of arguments in favour of the view that indigenous peoples were regarded as having no rights to their land, but many of these arguments depend on the interpretation of passages which make no direct reference to such peoples, which seems a somewhat dangerous way of proceeding. In fact, on closer inspection it is difficult to see that any of the frequently quoted international jurists provided argumentation for seeing indigenous land as *terra nullius* either during the eighteenth century or before it.

The early writers on international law were led by their denial of the temporal powers of the pope to reject the idea that the mere discovery of a country inhabited by non-Christians would give the discoverer title to their land; as Francisco de Vitoria said in 1539: 'by itself it [discovery] gives no

³¹ Locke, 304–5, 314, 315. Emphasis in original text.

³² *Ibid.*, 311.

³³ Tully claims that Locke specifically says that vacant land means all uncultivated land ('Aboriginal Property', 162); however, Locke also says that 'there are still *great Tracts of Ground* to be found, which ... lie waste, and are more than the People who dwell on it do, or can make use of, and so still lie in common' (317), which clearly seems to suggest that it is indeed this 'surplus' land which is considered 'vacant' and free for the taking.

³⁴ For example, Samuel Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes* (1625; New York, 1965), 222; Robert Gray (in *A Good Speed to Virginia* (London, 1609) cited in Pagden, 'The Struggle for Legitimacy', 51; or John Winthrop in 'Reasons to Be Considered for Justifying the Undertakers of the Intended Plantation in New England and for Encouraging Such Whose Hearts God shall Move to Join with Them in It', in *Massachusetts Historical Society Proceedings* 8 (1864–65): 420–5, cited in Peter C. Mancall, 'Native Americans and Europeans in English America, 1500–1700', in Canny, 339.

support to a seizure of the aborigines any more than if it had been they who had discovered us'. Hugo Grotius in the next century followed suit: 'Equally shameless is it to claim for oneself by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.' His reference to Vitoria as authority for this statement shows that Grotius regarded this as applying to the American Indians. Similarly, Alberico Gentili distanced himself from what he regarded as a Spanish doctrine: 'they regarded it as beyond dispute that it was lawful to take possession of those lands which were not previously known to us; just as if to be known to none of us were the same thing as to be possessed by no one'.

In the view of all of these writers, lawful title to land inhabited by others could only be based on conquest after a 'just war' which could be waged if the inhabitants had violated the laws of nature. The just causes for war varied from author to author: to Vitoria war would be legitimate if the Indians for example denied the Spaniards the right to travel among them, to trade with them, or to teach the gospel; both Gentili and Grotius rejected the idea that Christianity as such gave any rights to war, whereas they accepted causes such as cannibalism or refusal to trade or let strangers pass through their territory. Later in the seventeenth century, Samuel Pufendorf limited the number of just causes: he generally insisted that only if a nation had received a direct injury would it be justified to make war. Punishment for disobeying the law of nature in general was no longer regarded as sufficient reason for conquest.

It is difficult to find evidence for the claim that these writers did not recognise some form of indigenous property rights. Rejection of discovery as a lawful means of acquisition was always linked with recognition of the property rights of the 'non-Christians'; Vitoria made it absolutely clear that 'the aborigines undoubtedly had true dominion in both public and private matter, just like Christians' and Grotius maintained that 'for the exercise of ownership neither moral nor religious virtue, nor intellectual excellence, is a requirement'. While it is true that both Grotius and Pufendorf focused on the rise of 'private ownership' or 'proprietaryship' in their discussion of property rights, they both accepted the existence of 'community of property' at an earlier stage or in other societies. Pufendorf maintains that 'we have not sinned against the law of nature in entirely doing away with primitive community, nor have backward peoples in retaining to this day many of its features', a statement hard to read as endorsing the mere takeover of land inhabited by hunters and gatherers.³⁵

In the eighteenth century this tradition was further developed by Christian Wolff. In a long section Wolff defined the rights of 'separate families dwelling

³⁵ Francisco de Vitoria, *De Indis et de Jure Belli Relecciones* (1557; Washington: Carnegie Institution of Washington, 1917); 139, 128; Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* vol. 2, book 2 (1625; Oxford: Clarendon Press, 1925), 187, 505–6, 515–17, 550; Alberico Gentili, *De Iure Belli Libri Tres* (1598; Oxford: Clarendon Press, 1933), 89, 122; Samuel Pufendorf, *De Jurae Naturae et Gentium Libri Octo* (1672; Oxford: Clarendon Press, 1934), 364–5, 370, 554. Nancy Williams, chap. 7 does not agree with this interpretation of Grotius's and Pufendorf's view of property.

together in a certain territory'; specifically referring to non-agriculturalist peoples he said:

Since lands subject to private use or to the use of individuals in that territory in which separate families wander hither and thither are subject to the mixed community-holding of those families, and consequently since those who are not in the number of those families are excluded from the ownership which they have in those lands, those lands can be occupied by no one coming into the territory inhabited by these families, even if at the time those who inhabit the territory are not using those lands. Ownership is not lost by non-user. And if separate families wander through uncultivated places, they intend a use of the places only in alternation, a thing which is readily evident, if only you turn your attention to the reason which impels them to wander through uncultivated places.³⁶

Wolff distinguished between the original state in which all land was in common ('primitive community-holding') and the actual joint ownership of some peoples ('mixed community-holding') which he clearly recognised as a form of proprietary right. He rejected the idea that it would be justifiable to take such land because the people did not cultivate the land or because it would be better for them to be ruled by a 'civilised' nation.

Wolff's pupil, Emerich de Vattel, on the other hand, has always been put forward as the great apologist for colonisation; it is claimed that he adopted the agriculturalist argument to such an extent as to deny the indigenous inhabitants any rights to the land. This interpretation is based on a rather selective reading of Vattel. There is no doubt that he believed in the duty to cultivate the land even as part of the law of nature, and consequently argued that the Indians 'occupy more land than they would need under a system of honest labour' and that they therefore had no grounds for complaint if others settled on part of their land. However, it is equally clear that Vattel did not sanction the wholesale takeover of indigenous land. He firmly maintained that the land on which the newcomers settled had to be land which the Indians 'have no special need of and are making no present and continuous use of'; the colonisers were permitted to 'restrict the savages within narrower bounds' and to 'occupy part of their lands', but it was not justifiable to dispossess the Indians of the land on which they lived.³⁷ In a passage rarely quoted by modern scholars Vattel recognised the communal ownership of 'wandering families, like those of pastoral tribes'; probably realising that he was in danger of contradicting himself, he hastened to add:

But let us repeat again ... that the savage tribes of North America had no right to keep to themselves the whole of that vast continent; and provided sufficient lands were left to the Indians, others might, without injustice to them, settle in certain parts of a region, the whole of which the Indians were unable to occupy.³⁸

³⁶ Christian Wolff, *Jus Gentium, Methodo Scientifica Pertractatum* (1740; Washington: Carnegie Institution of Washington, 1934), 159.

³⁷ Emerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758; Washington: Carnegie Institution of Washington, 1916), 38, 85.

³⁸ *Ibid.*, 143.

In other words, Vattel like Locke believed that it would be possible to colonise America without dispossessing the Indians; although they both believed that private property in land was founded in agriculture, they nevertheless recognised that peoples like the Indians had a right to their land which was based on the law of nature. While these writers thus opened up the possibility that land could be acquired through settlement (as opposed to conquest, which was in any case becoming severely limited as a doctrine of acquisition in international law by the eighteenth century), this position was not based on an absolute denial of the rights of the existing inhabitants.

Thus it will be seen that international law as a whole by no means offers ready evidence for the view that indigenous land was there for the taking, and that even writers such as Locke and Vattel who have been seen as the strongest promoters of this idea did not in their work argue that such land should or could be equated with *terra nullius*.³⁹

IV

The question then is: what happened in the case of New South Wales? The answer is: to begin with, nothing. The few official documents available concerning the decision to establish the penal colony show that one aspect which British officials made note of in reports of this 'newly discovered' land was that it seemed to be very sparsely inhabited, most likely leading to them to conclude that this was, indeed, a practically uninhabited country;⁴⁰ consequently Phillip's instructions concerning the relationship with the inhabitants were not as great an aberration from the earlier policy in North America as is usually assumed. For besides the cultivation of their friendship and their protection, Phillip was directed to ascertain their numbers and report on the best way to deal with these people.⁴¹ Working on the assumption that there were very few inhabitants, who might even abandon the area when the British arrived (as suggested by Joseph Banks to the 1785 Commons Committee), the government seems to have believed that there would be room for everybody without further arrangements; however, revision of this policy in the light of better knowledge of actual conditions was clearly allowed for.

The deviation from earlier policy was precipitated by Phillip's response to these orders. He almost immediately noted that there were many more people than he had been led to expect and—somewhat later—that they did not seem very pleased with the presence of the colonists.⁴² Nevertheless, he failed to reach

³⁹ It is also significant that Vattel treats the question of acquisition through discovery of uninhabited land as an entirely separate issue, *ibid.*, 85.

⁴⁰ Africa, Convicts, Memorandum, undated, PRO HO 42/5, 412–13 (c. April 1779); Nepean to Sackville-Hamilton, 21 October 1786, PRO HO 100/18, 369–73. These two official documents are the only ones to refer to the indigenous population and in both cases mention is made of their anticipated small numbers. Reynolds also concludes that this was how the British saw the situation (*Aboriginal Sovereignty*, ix–x), whereas Frost strongly disagrees (*Botany Bay Mirages*, 189).

⁴¹ Instructions to Arthur Phillip, 25 April 1787, *Historical Records of Australia*, series 1, vol. 1 (Sydney: Library Committee of the Commonwealth Parliament, 1914–25), 11–13.

⁴² Phillip to Nepean, 9 July 1788, *ibid.*, 56; Phillip to Sydney, 28 September 1788, *ibid.*, 76–7.

the conclusion—and therefore failed to suggest—that a settlement ought to be made with the original inhabitants about the land on which the colony was placed. Why Phillip looked at the situation in this way is of course difficult to say; he was clearly concerned with establishing friendly relations with the Aboriginal inhabitants and wrote much about it to his superiors both before his departure from Britain and during his stay in New South Wales. However, neither his background nor his education and work as a naval officer would have prepared him for the intricacies of developing such a relationship, and it was obviously difficult for him to understand the more profound consequences of the encounter between the two groups. Had Phillip had some experience of government policy and practice towards indigenous peoples in another colony of settlement, he might have approached the situation very differently. The British government, not overly interested in New South Wales, did not show any concern about this matter at the time. Apart from the slow passage of communication, which tended to dampen concern, and the fact that this was a penal colony inspiring few visions about the future, there is little doubt that the situation in France and subsequently war with that country and radical challenges at home consumed most of the time and energy of the government.⁴³

Phillip's departure from established theory and practice was consolidated when the legal status of the colony began to be discussed in some of the judicial cases of the first half of the nineteenth century. In *Rex v. Murrell* defence for the accused said that New South Wales did not fall within any of the existing categories of colonial acquisition—it had neither been 'originally desert', nor conquered, nor ceded;⁴⁴ Judge Willis in the case of *Bon Jon* followed a similar line in his reasons for judgment.⁴⁵ The implication in both cases would have been that the Aboriginal peoples retained some measure of jurisdiction over their own affairs.⁴⁶ However, both the conclusion and the argumentation came to be rejected by the majority of the legal profession in the colony and in Britain. Justice Burton seems to have played a significant role here. In his decision in *Rex v. Murrell* he said that 'although it might be granted that on the first taking possession of the Colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty.'⁴⁷ Burton also stressed the belief that the Aboriginal peoples had not 'appropriated the territory' and that it

⁴³ In the late eighteenth and early nineteenth centuries official British attitudes to indigenous peoples were marked by a degree of indifference; the period was transitional from a recognition of indigenous rights to a fundamental aim of changing these peoples—Christianise them, 'civilise' them, assimilate them (see 'Conciliating their Affections').

⁴⁴ *Rex v. Jack Congo Murrell*, 1836, *Legge Supreme Court Cases, NSW*: 72.

⁴⁵ Case of *Bonjon* (1841), reasons for judgment, enclosure in despatch from Governor Gipps to Lord Stanley, January 1842, *Parliamentary Papers, Papers Relative to Aborigines, Colonies, Australia* 8 (1844), 148–55.

⁴⁶ See Reynolds, *Aboriginal Sovereignty*, 62–74 on the series of cases in the 1830s and 1840s which wrestled with the question of Aboriginal jurisdiction.

⁴⁷ *Rex v. Jack Congo Murrell*, 72.

could therefore be 'taken into the King's possession'.⁴⁸ Already in 1822 James Stephen, then legal council for the Colonial Office in London, had reported with approval from a New South Wales case the view that the country had been acquired through 'occupation of a desert or uninhabited land'.⁴⁹ In the course of these decades, then, it became settled in law that the land inhabited by Aboriginal peoples, who subsisted on hunting and gathering, could be regarded as ownerless and therefore taken possession of as if it had been uninhabited. The original misunderstanding that the country was so sparsely inhabited as to be practically empty was translated into a legal fiction which served to justify British colonisation of a group of peoples whose political and legal organisation remained unfathomable to colonial officials. The Privy Council confirmed this in *Cooper v. Stuart* from 1889.⁵⁰

Judge Burton and his contemporaries had several sources of inspiration for their innovative interpretation of the law. Henry Reynolds points to Burton's borrowing from the theory put forward by Vattel; Burton was an early example of the kind of use Vattel was put to in the nineteenth century.⁵¹ The development of American law may also have been significant in this respect, as in the years following the independence of the American colonies, American jurists reformulated the legal foundations of their country, claiming that the colonies had been acquired through discovery and occupation and that the conquest theory consolidated in Blackstone's work had been a misrepresentation.⁵² Chief Justice Marshall's decisions in the 1830s further elaborated this change.

Related to this, an important source of influence must have been the growing significance from the late eighteenth, early nineteenth century onwards of positivist thinking in the legal system. The ideas of natural law and natural rights which had been so important (but also politically dangerous) in the eighteenth century were increasingly rejected in favour of a strictly 'scientific' view of the law which separated law and morality, and maintained that the area of concern to the jurist was simply the laws as they were laid down by the sovereign and applied in political entities defined as states.⁵³ Indigenous societies, such as those of the Indians or Aborigines, did not qualify as states

⁴⁸ Quoted in B. Bridges, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829–1842', *Journal of the Royal Australian Historical Society* 59 (1973): 265. Bridges relies on the Supreme Court Papers in the New South Wales State Archives; this part of the judgment is not reported in *Legge*. See also McNeil, *Aboriginal Title*, 121 for comments on another early case (*Macdonald v. Levy*, 1833) with a similar decision.

⁴⁹ V. Harlow and F. Madden, eds, *British Colonial Developments 1774–1834* (Oxford: Clarendon Press, 1953), 161.

⁵⁰ *Cooper v. Stuart* (1889), *Law Reports, Appeal Cases, House of Lords and Privy Council* 14 (1889).

⁵¹ Reynolds, *Aboriginal Sovereignty*, 52–3, 71–2.

⁵² Cf. note 23 in Blackstone, book I, 94 where the editor, William Draper Lewis, quotes from an earlier edition by Sharswood (1878) to the effect that 'Sir William Blackstone considered the British colonies in North America as ceded or conquered countries ... But this was an error. The claim of England to the soil was made by her in virtue of discovery ...'.

⁵³ Cf. Frederika Hackshaw, 'Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi', in *Waitangi, Maori and Pakeha Perspectives on the Treaty of Waitangi*, ed. I.H. Kawharu (Auckland: Oxford University Press, 1989), 100–1.

because they had no sovereigns and no 'settled system' of laws, in short, because they were not organised like European societies.⁵⁴ Thus on several levels the transition from natural law to positivism heralded a change of attitude to other peoples which rejected the possibility that they could have the same rights or legal standing as European peoples.

When the natural rights based perception of the law disappeared, the way was open for the legal implementation of the Lockean 'agriculturalist argument' which had been 'brewing' since the seventeenth century, particularly among the colonists themselves and people in Britain who were in favour of active colonial expansion. The transformation of this 'argument' into legal doctrine was part of a general trend; in the course of the nineteenth century, theories about the economic and political evolution of human society from the previous century were increasingly supplemented by ideas of biological difference. These ideas seemed to offer evidence that, far from being governed by the same basic form of humanity (as had formerly been assumed), mankind was in fact divided into different racial categories with different characteristics and abilities.⁵⁵ Aboriginal peoples whose way of life was so difficult for Europeans to understand seemed to exemplify these differences better than most. Ultimately, the racial determinism of much nineteenth century thinking gave rise to notions of European superiority which seemed to legitimate the legal discrimination inherent in the doctrine that land could be regarded as uninhabited merely because the inhabitants did not cultivate the land or conform to Western notions of political and legal organisation.

V

Thus it will be seen that neither law nor policy in eighteenth-century Britain nor even international law at that time supported the proposition that inhabited land could be dealt with as if it was uninhabited or *terra nullius*. Throughout the century, acquisition of inhabited land continued to be regarded as falling within the category of conquest and cession.

On the other hand, it is equally clear that the extended doctrine, which proclaimed land inhabited by hunters and gatherers to be ownerless, became fairly widespread in legal thinking in the nineteenth century. Exactly when the change took place is difficult to say; it would seem that attitudes on this point were beginning to change at the end of the eighteenth century and it is suggested that the establishment of New South Wales played an important role in this development. The initial belief that the country was practically uninhabited, and the subsequent encounter with a people whose culture was radically different from anything met with before, created a context which seemed to justify the departure from legal precedent. The new ideas were taken up in other common law countries in the Empire, although they were sometimes tempered in the

⁵⁴ Cf. for example John Austin, *The Province of Jurisprudence Determined* (1832; London, 1968), 209.

⁵⁵ Cf. for example Nancy Stepan, *The Idea of Race in Science* (New Haven: Yale University Press, 1982).

first half of the century by humanitarian concern for indigenous peoples and their rights to the land.⁵⁶

Given the prominent place of Australia in this development, one may wonder at the insistence with which Australian scholars have ascribed it to earlier centuries. There are probably several reasons for this; one may be that this historical inaccuracy was part of the legacy of nineteenth-century legal reasoning on this matter. Once it had become established that inhabited land could be acquired through settlement as if it was uninhabited, legal writers went to great lengths to find precedents for this, since it is of vital importance for the common law system to appear firmly rooted in past practices and not to be subject to whimsical change. In the process, eighteenth century and earlier legal perceptions were reformulated and reinterpreted in important ways, as illustrated, for example, by the changing understanding of Blackstone's categorisation of the colonies.

One may also speculate that given the sensitive nature of the whole issue of original acquisition in Australia, modern scholars have found no reason to question the convenient assumption that taking possession of land in this fashion was a well-established practice in 1788; the finding that this method was to some extent 'invented' for the occasion would have further emphasised the precarious nature of the legal justifications for white settlement and thus have served to highlight the injustice not only of dispossession but also of the continuing denial of native title. The rejection of the idea of Australia as *terra nullius* in the Mabo judgment went some way towards rectifying the misrepresentations of the past. Yet ultimately the better understanding of the legal history of acquisition leads to a questioning of the very foundations of the nation, a problem which can only be addressed by a mobilisation of the political will to negotiate.

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⁵⁶ Cf. Reynolds who has drawn attention to Colonial Office attempts to protect Aboriginal rights to land (e.g., in *The Law of the Land*, and 'Native Title and Historical Tradition: Past and Present' in Attwood, *In the Age of Mabo*).

