

## CONCLUSION



The opposite of dispossession is not possession, it is deep, reciprocal, consensual *attachment*. Indigenous bodies don't relate to the land by possessing or owning it or having control over it. We relate to the land through connection—generative, affirmative, complex, overlapping, and nonlinear *relationship*. The reverse process of dispossession within Indigenous thought then is Nishnaabeg intelligence, Nishnaabewin. The opposite of dispossession within Indigenous thought is grounded normativity. This is our power.

—LEANNE SIMPSON (MICHÍ SAAGIIG NISHNAABEG), *As We Have Always Done*

From the standpoint of a higher economic form of society, private ownership of the globe by single individuals will appear quite as absurd as private ownership of one man by another. Even a whole society, a nation, or even all simultaneously existing societies taken together, are not the owners of the globe. They are only its possessors, its usufructuaries, and, like *boni patres familias*, they must hand it down to succeeding generations in an improved condition.

—KARL MARX, *Capital: Volume 3*

In writing this book, I have endeavored to demonstrate how a set of historical processes related to the reorganization of landed property in the Anglophone colonial sphere of the nineteenth and early twentieth centuries

was attended by a concomitant transformation in the basic vocabulary of political life such that these same processes have come to be defined by a terminology that is significantly indebted to them. The long arc of the preceding chapters has worked to uncover how a dynamic and fragmentary set of legal processes regarding the classification of land as an object of ownership and exchange could serve as a medium for the articulation of categories of political identity such as “European” and “Indian,” which not only eventually congealed into a structure of domination in which the latter was subordinated to the former but was also buttressed by a whole vocabulary that served to set the terms of its own critique. The end result of this has been that the language of property and possession now functions as a dominant mode of political expression to the extent that it has become difficult to voice opposition to these processes without drawing upon the conceptual and normative frameworks they have generated. This is the dilemma of dispossession.

My concern with this has been both practical and theoretical. On the first level the project is motivated by a sense that the predicament of dispossession is a serious, real world problem for racialized and colonized peoples (and their allies), who seek to leverage a critique of these ongoing processes but often find they must do so in a manner that is constrained by the dominant vocabularies available to them. Thus, I have sought to diagnose the sources of this dilemma while remaining cognizant of the ways in which racialized and colonized peoples have thwarted its constrictions (and continue to do so). Secondarily, the project is also animated by a set of more abstract theoretical considerations. In this register, I am concerned with the general implications for thinking through what I am calling *recursivity*, not only between theft and property, or law and illegality, but also more generally between historical processes and the conceptual categories used to describe and critique them. In other words, the proper object of study here has not been dispossession per se but rather the broader looping effect that organizes politics *as if* it were a matter of dispossession. As I have argued throughout, when Anglo settler colonizers reorganized property relations, they did not simply steal a stable, empirical object called “land” from Indigenous peoples. Rather, as they transferred control over the land, they also recoded its meaning, rendering it a relatively abstract legal entity. So, unlike ordinary cases of theft, dispossession created an object in the very act of appropriating it: making and taking were fused. When it comes time to adjudicate the critical claims by Indigenous peoples, then, ownership over this legal object is commonly attributed to them retroactively. As a result,

the claims of the dispossessed frequently appear contradictory or question-begging, since they appear to both presuppose and resist the logic of “original possession.” In sum, the recursive logic at work in this movement can be plotted as transference, transformation, and retroactive attribution.

At the more general level, my concern has partially also been methodological. Much of what passes for contemporary critical theory fails, in my view, to pose, let alone adequately grapple with, the predicaments presented by the problems of recursive meaning. Despite near continuous invocations of historicity or the social embeddedness of thought, much critical theory today advances in a decidedly presentist, ahistorical, analytic mode. Meaning is assigned to terminology rather than reconstructed from the history of its uses. Although frequently posturing as political, this work often turns out to be meretricious: insofar as it fails to historicize the terms of present conflicts, it further tethers us to them. With these worries in mind, I have approached the current problematic not by constructing an ideal, analytic “theory of dispossession.” Instead, my instinct has been to historicize the concept, to explore the cause and consequences of its rise as a term of art in critical theory and radical movements. Investigating this involves opening up questions pertaining to the relation between the figurative and the historical, or between modes of political articulation and those practices and institutional arrangements that anchor them and provide them with their substantive content. At this most general level, the project is concerned to explore the very form and function of critical theory.

The latent promise of historical-reconstructive critique is that it can help free us from the constrictors of the present. This often happens not by winning a contestation according to its original parameters but by moving obliquely to it. Complete consideration of how this is being done relative to dispossession would require at least another whole book-length study. It is not possible in the space of a conclusion to give it full treatment. Nevertheless, I think it important to conclude by turning to some of the more positive, creative responses that have emerged in reply to the predicaments sketched in previous chapters. If the preceding has mostly been about what it means to lose something that you never really “had” to begin with, these concluding thoughts will focus on what it means to reclaim something that was never really “yours.”

In what follows, I highlight a set of relevant examples as instances of what I will term the *expressive insurgency* of Indigenous struggles. In referring to these as “expressive,” I am highlighting their non-instrumental character. As I read them, Indigenous struggles have specific, concrete goals, which often

entail the (re)appropriation of particular objects of concern that have been lost in the process of colonial dispossession. This is the instrumental dimension of their politics. However, they also contain an expressive dimension, by which the form of political articulation is reconfigured on new terms. The first is about struggling *for* something; the second is struggling *over* that struggle. So political action is expressive if the mode of articulation already models the substantive content of its claims and ends. In characterizing this expressive politics as “insurgent,” I mean to emphasize that these long-term struggles take place on a grossly asymmetrical field of contestation.<sup>1</sup> In featuring these practices and processes, my aim is not necessarily to endorse or promote any one of them in particular. Instead, my concern here is with reflecting on what is at stake theoretically and practically in these projects, aimed as they are at reconfiguring the very terms of dispossession.

## I

Near the eastern coast of the island Te Ika-a-Māui (North Island), nearly 400 kilometers southeast of Auckland in Aotearoa/New Zealand, lives Te Urewera. An imposing figure, Te Urewera spans some 212,672 hectares (821 m<sup>2</sup>) and is world-renowned for its beautiful lakes and forests. In addition to providing shelter and sustenance for countless species of non-human plants and animals, Te Urewera is home to the Tuhoe. Known as the “Children of the Mist” (they trace their ancestry to the spirit Hinepuhokurangi), the Tuhoe are an *iwi* (nation or tribe) of the Māori and have fiercely defended Te Urewera for centuries. They continue to do so today. Te Urewera is a unique personality in many ways, not least because it recently experienced a rebirth of sorts. For sixty years, it was a national park. In 2014 the park was dissolved and replaced by a new figure. Te Urewera was then recognized as a legal entity with “all the rights, powers, duties, and liabilities of a legal person.”<sup>2</sup> Described as “a fortress of nature, alive with history . . . a place of spiritual value, with its own mana and mauri,” Te Urewera is now recognized as possessing “an identity in and of itself,” which inspires “people to commit to its care.” Although all people are called to this work of care, particular duties are imposed on the Tuhoe, who, along with a board of governance, are charged “to act on behalf of, and in the name of, Te Urewera.”<sup>3</sup> As of 2014, the territory within Te Urewera has ceased to be vested in the Crown and is no longer managed under the rubric of “conservation lands.” Instead, the land is kept in a distinctive

inalienable fee simple form, held by Te Urewera itself.<sup>4</sup> In effect, Te Urewera exercises a form of self-ownership.

Although unique, Te Urewera is not alone. In 2017 it was joined by two other nonhuman legal persons: Mount Taranaki, a stunning, 2,518 meter tall volcanic cone mountain; and Whanganui, the third-largest river in Aotearoa. Each has been, or will be, accorded legal rights akin to those afforded human beings, protecting them from defilement and degradation.<sup>5</sup> Each has its defenders. In the case of Mount Taranaki, a coalition of eight local Māori tribes shares guardianship of the sacred mountain with the government of New Zealand.<sup>6</sup> The struggle to defend the river has been spearheaded by the Whanganui iwi, who view it as both their ancestral home and relative.<sup>7</sup> In the course of debates over the status of the river, Gerrard Alberta, lead negotiator for the Whanganui iwi, explained their position: “The reason we have taken this approach is because we consider the river an ancestor and always have. . . . We have fought to find an approximation in law so that all others can understand that from our perspective treating the river as a living entity is the correct way to approach it, as an indivisible whole, instead of the traditional model for the last 100 years of treating it from a perspective of ownership and management.”<sup>8</sup>

Although recent developments are, in one sense, a continuation of nearly two hundred years of Māori resistance to British colonialism (the longer history of which was discussed in chapter 1), they are also more immediately the fruits of a particular reinvigoration of Māori activism in the 1960s and 1970s. Much of this political mobilization was organized around a return to the Treaty of Waitangi.<sup>9</sup> Signed in February 1840, the Treaty of Waitangi was intended to serve as the primary legal statement and normative guide regulating the relationship between the Māori and Pākehā (people of European descent, in this case the British). It was, however, all but totally ignored by British and New Zealand authorities for nearly one hundred years before being revived.

Written in both English and Māori, the two versions of the treaty have significant differences, which have led to long-standing conflicts of interpretation. Most famously, article 1 of the English text cedes (a) “all rights and powers of sovereignty” to the British Crown, while article 2 protects (b) “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties” of the Māori but grants the British an effective monopoly over acquisition through the right of (c) “preemption.” In the Māori version, however, article 1 confers “kāwanatanga” and “hokonga” to the British (also rendered as “governorship” and “sales”) while

retaining “te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa” for the Māori. This latter phrase has been alternatively translated as “the unqualified exercise of chieftainship over their lands over their villages and over their treasures all” and, since its original signing, Māori leaders have contended that the treaty therefore affirms, rather than extinguishes, their ultimate governance over the space and underlying title to the land.<sup>10</sup> Conflicts of interpretation have periodically spilled out into physical violence, most spectacularly in the New Zealand Wars (1845–72) but also in lower-level clashes and standoffs through to the present.

Since the Treaty of Waitangi Act 1975 revived the document as a central guide governing Aotearoa/New Zealand, there has emerged no definitive resolution to the debate of whether Pākehā kāwanatanga (governorship) takes priority over Māori rangatiratanga (chieftainship), or vice versa. Despite the deadlock in this ongoing material and interpretative contestation, however, new figures have emerged on the field. Recognition of Whanganui River, Mount Taranaki, and Te Urewera as legal persons with interests that need to be protected and defended comes as a result of 140 years of struggle to hold the British and New Zealand governments to account, to restore right relations between Māori and Pākehā, and to reverse the terms of dispossession. It is revolutionary in terms of the implications for both decolonization and ecological revitalization. The result of these victories has been the emergence of a nascent regime of stewardship and care of the earth, guided by Indigenous leadership.

While developments in Aotearoa/New Zealand provide a particularly clear, concrete example of this combined resistance and innovation, they are not isolated from a broader set of global movements. The granting of legal personhood to the earth there comes on the heels of similar developments around the world. In Bolivia, for instance, the Ley de Derechos de la Madre Tierra (Law of the Rights of Mother Earth) was passed by Bolivia’s Plurinational Legislative Assembly in December 2010. A longer, revised version was passed in October 2012 as La Ley Marco de la Madre Tierra y Desarrollo Integral para Bien (Framework Law of Mother Earth and Integral Development for Living Well). Together these laws define Mother Earth as a “sujeto colectivo de interés público” (collective subject of public interest) and empower a new ombudsman office (Defensoría del Pueblo) to prosecute cases in defense of both Mother Earth and the “life systems” (including human communities within their nonhuman ecosystems). In Canada, such mechanisms of legal innovation and inversion also proliferate, as Shiri Pasternak’s extensive documentation of the struggles of

the Algonquins of Barriere Lake clearly demonstrates.<sup>11</sup> Meanwhile, in the United States, a coalition of five Indigenous nations is currently gearing up for a major confrontation with the federal government over the proposed radical reduction of Bears Ears National Monument.<sup>12</sup> What is emerging from these struggles is a distinct form of stewardship, one in which the historical relationship of Indigenous peoples is recognized but expanded to include a diverse range of human and nonhuman life. Collectively, these constitute an experiment in unraveling the proprietary logics of dispossession. One way to effect this transformation has been to designate the land formation (a space, river, mountain, or other topographical feature) as an animate entity, an “indivisible whole” or living form and legal person with its own rights and responsibilities.

## II

Reflection on these examples drives us back to a question that was deferred in chapter 1. There, I noted that, in addition to the rather narrow and specific critique of colonial landed property systems as structures of “dispossession,” there also exists a range of Indigenous intellectual resources that refuse the language of possession more completely by, for instance, drawing upon the language of deracination or desecration. These arguments frame the matter not in terms of possession and theft but as a one of care and responsibility. In the words of Mohawk scholar Patricia Monture-Angus, this is a “fight to be responsible.”<sup>13</sup> Drawing upon his own context and history of struggle, Dene political theorist Glen Coulthard theorizes this as “grounded normativity,” arguing that “indigenous struggles against capitalist imperialism are best understood as struggles oriented around the question of *land*—struggles not only *for* land, but also deeply *informed* by what the land as a mode of *relationship* ought to teach us about living our lives in relation to one another and our surroundings in a respectful, non-dominating and non-exploitative way.”<sup>14</sup> Coulthard’s work finds confirmation in earlier writings by such central figures in Native American studies as Vine Deloria Jr. (Oglala Lakota) and Winona LaDuke (White Earth Ojibwe).<sup>15</sup> It has also been echoed by a host of non-Indigenous scholars from various disciplines.<sup>16</sup> Indeed, for many decades now, an impressive archive has been amassed that meticulously documents not only *that* many Indigenous societies have sophisticated institutions for apportioning ecological and territorial responsibility but also *how* and *under what conditions*

these institutions can be sustained, repaired, and renewed. This work is so extensive now that it has become almost trite to observe that millions of people on earth still do not consider the land to belong to them, but that they belong to it.<sup>17</sup> It is in light of this long history that I interpret the meaning of Leanne Simpson's words (which open this chapter) when she says, "The opposite of dispossession is not possession, it is deep, reciprocal, consensual *attachment*. . . . This is our power."<sup>18</sup> What all these movements and thinkers have in common is their insistence that we do not think of struggles over land only as conflicts of property and/or territory. Instead, we must also think of them as struggles over the very meaning of the relationship between human societies and the broader ecological worlds in which they are situated.

The stakes of current struggles could not be higher. Although these groups are relatively small minorities in their individual respective contexts, taken collectively, they have a global significance beyond their numbers. Indigenous peoples manage or have tenure rights over approximately thirty-eight million square kilometers, or one-quarter of the Earth's land surface. Found in at least eighty-seven countries on all inhabited continents, Indigenous title lands intersect "about 40% of all terrestrial protected areas and ecologically intact landscapes (for example, boreal and tropical primary forests, savannas and marshes)."<sup>19</sup> Given this, defending Indigenous systems of land stewardship will be key to long-term global ecological sustainability.

Grasping the meaning of these movements is a more complicated matter. This complication is inherent to the contestations themselves. In them, participants not only pursue different interests pertaining to the same object of concern; they also hold distinct and competing interpretations of the basic terms of reference. While state and corporate actors often frame them in relatively narrow terms (for instance, as matters of zoning or property ownership), Indigenous peoples frequently situate them in a significantly expanded frame, for instance, as the continuation of a centuries-long struggle against colonization, which implicates matters of culture, tradition, spirituality, and environmental stewardship. In cases where antagonists such as these share no background understanding of the nature of the disagreement itself, conflict seems intractable.

As I read them, movements to (re)animate the earth with forms of personhood and subjectivity are attempts to move obliquely to the settled (and settler) parameters of struggle. They are working to free us from the grip of a particular vocabulary, part of the process Joanne Barker (Delaware) terms "decolonizing the mind."<sup>20</sup> The full implications of such a move are not



yet visible to us, however. That is what it means to experiment with something truly radical, to engage the avant-garde. Perhaps as a function of this, these movements have also been met with considerable skepticism. The bulk of this resistance comes from fully unsympathetic critics: opponents who cling to the (now fanatical) belief that only *more* privatization and unregulated capitalist appropriation can save us from the twinned threats of growing material inequality and looming ecological collapse. These critics would call not for an order of care and responsibility but for a new allotment era, one that would break apart the remaining pockets of collective property and inalienable lands for individual, private ownership. As Shiri Pasternak has noted, for these thinkers capitalism is meant to salvage the legacies of colonialism.<sup>21</sup> There is, however, also a set of more sympathetic critics, those who support the *ideal* of releasing us from the grips of dispossession but may nevertheless question the method, language, and logic of movements for stewardship and responsibility toward the earth as a subject of care. Let me briefly consider three.

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In the second half of the twentieth century, a large and unwieldy set of debates emerged in social, legal, economic, and political thought concerning the status of the (somewhat mythical) entity known as “the commons.” The locus classicus of these debates remains Garrett Hardin’s famous 1968 article, “The Tragedy of the Commons.” There, Hardin proposed a game theoretic dilemma in which the free, spontaneous regulation of common resources seemed all but impossible. Since each individual person who has access to common resources is (supposedly) rationally driven to maximize his or her use of them, soon the commons are themselves depleted such that no one at all can benefit from them. In short, unrestricted access to communal resources leads to overexploitation. Accordingly, Hardin argued that, however unjust it may be by other measures, the extant system of private property ownership is the only practicable solution: “The alternative of the commons is too horrifying to contemplate. Injustice is preferable to total ruin.”<sup>22</sup>

Decades of work on Hardin’s sweeping (and almost entirely empirically unsupported) claims have attended to the deeply racist undertones of his concern with the “overbreeding” of impoverished “genetically defective populations.”<sup>23</sup> They have likewise pointed out that Hardin’s thesis (and the reception of the idea of a “tragedy of the commons” in popular discourse more generally) labors under the “fallacious assumption that ‘common’

means ‘unregulated.’” This untenable conflation is, however, belied by a surfeit of “historical and contemporary research that demonstrates the stringent, if not legally codified, regulations to which common property has been subjected.”<sup>24</sup> Of particular importance in this regard is Elinor Ostrom’s work on self-regulating cooperative action. In her landmark study, *Governing the Commons* (1990), Ostrom argues that “neither the state nor the market is uniformly successful in enabling individuals to sustain long-term, productive use of natural resources systems” and that “communities of individuals have relied on institutions resembling neither the state nor the market to govern some resource systems with reasonable degrees of success over long periods of time.”<sup>25</sup> Although she took Hardin’s methodological individualism and game-theoretic modeling to heart, Ostrom arrived at an entirely different conclusion: collectively built and maintained institutions that function to constrain and condition the behavior of egoistic individuals were both theoretically possible and empirically demonstrable. Accordingly, the so-called tragedy of the commons is not a foregone conclusion but rather the product of a very particular set of institutional conditions governing access, ownership, exclusion, and the like.

A wave of new research followed from Ostrom’s study.<sup>26</sup> Perhaps most famously, Carol Rose provided an influential classification scheme for differentiating management techniques that could be employed to regulate common resources. Situated along a continuum from least to most stringent, they included (a) “do-nothing,” or the absence of regulation; (b) “keepout” controls that merely determine *who* can access the resource in question; (c) “rightway” regulations that determine *how* users may exploit the commons; and (d) a full system of “property,” which disaggregates the collective resource into individual entitlements. Inverting Hardin’s paradigm, Rose argued that collective management techniques could lead to the “comedy of the commons,” whereby open source use of shared resources could benefit all beyond what could be accomplished by them as individuals.<sup>27</sup>

In the 1990s and early twenty-first century, this rather narrow and technical debate in game theory literature was joined by a host of new contributions that were at once more methodologically eclectic and yet more politically focused. Prominent examples include E. P. Thompson’s *Customs in Common*, the writings by the Midnight Notes Collective, and Michael Hardt and Antonio Negri’s trilogy of *Empire*, *Multitude*, and *Commonwealth*.<sup>28</sup> Essentially neo-Marxist in political orientation, this work framed the essential matter as one of partisan struggle, pitting “the commons” against the persistent threat of privatization and “enclosures.”

Viewed from the vantage of the current investigation, much of this previous work appears haunted by questions of colonialism and Indigenous resistance. Although ostensibly treating many of the same themes and objects of concern, debates over settler colonialism and the “global commons” have, until very recently, run along strangely distant parallel tracks.<sup>29</sup> From the standpoint of this history of emancipating the commons, Indigenous spaces of inalienable stewardship may seem either impracticable or, given their protectionist logic, even detrimental to more generalized efforts to retake the commons for all humanity. This group of critics would raise concerns then with the normative defensibility of “special” Indigenous claims to sacred spaces, claims that appear competitive with other, ostensibly more universal claims to recognition and redistribution.<sup>30</sup>

The source of this disjuncture may be the ambiguous relation between commons and colonization. David Schorr, for one, has argued that contemporary debates surrounding the commons frequently adopt many of Hardin’s baseline presuppositions, even if they take issue with his final conclusions. Work by Ostrom, Rose, and other contemporaries continues to adopt folk theories of Indigenous property relations, which imagine “primitive peoples” to exist in premodern conditions of simple, unreflective communal resource use—what used to be called, in a different language at a different time, “primitive communism.”<sup>31</sup> The result is a debate that continues to be organized around simplistic binary contrasts between, on the one hand, individualized private property and, on the other, rather generic and historically uninformed calls for a return to the commons.<sup>32</sup> What this oppositional pairing fails to countenance is the extreme mutability of colonial forms of dispossession. It ignores, for instance, the central role that forced collectivization played in imperial expansion, often operating alongside and in tandem with, rather than in necessary opposition to, privatization.<sup>33</sup> Even the most laudatory accounts of “public things” must come to terms with the fact that in a colonial context, these public things “may well be the results of prior thefts and appropriations.”<sup>34</sup> Without taking this into account, we are driven toward an insufficiently differentiated normative preference for more “open access,” which routinely invokes a rather amorphous and ill-defined collective subject or multitude, failing to take note of the incrustations of history and actually existing power relations.<sup>35</sup> Finally, such binary contrasts fail to contend with the possibility that Indigenous modes of relating to the land will not fit easily within either private or collective property systems because they will not simply rehearse the drama that has already unfolded in Western, European contexts. As the Māori

example above is meant to demonstrate, Indigenous responses to dispossession frequently reconfigure the relation between rights, property, and power in ways that do not sit neatly with received platitudes about privatization or the commons. They have generated and continue to sustain precisely those “institutions resembling neither the state nor the market” that Ostrom called us to identify and defend. As I hope to have shown by way of the exemplary case above, one important dimension of this has entailed moving obliquely to the logics of dispossession by adopting strategies that include treating the earth as a subject of moral concern, effectively a “person” who cannot be owned by anyone at all.

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Other attempts to move obliquely to dominant debates over privatization and the commons have typically done so by recovering minor voices within European legal and political theory. This strategy is perhaps best modeled in the work of Italian philosopher Giorgio Agamben. For instance, in his work *The Highest Poverty*, Agamben develops an analysis of the Franciscan monastic practices in the twelfth and thirteenth centuries as modes of resistance to an increasingly juridical and proprietized mode of governance imposed on them by papal order of the time. The arrangement sought by the Franciscans mirrors in some ways the Indigenous politics discussed above, since the former also renounced property while nevertheless advancing specific duty-based claims of care and stewardship. Agamben draws upon this historical example as a means of exploring “how to think a form-of-life, a human life entirely removed from the grasp of the law and a use of bodies and of the world that would never be substantiated into an appropriation. That is to say again: to think life as that which is never given as property but only as common use.”<sup>36</sup>

A more complete investigation of these alternative configurations of property within European legal and political thought might also include meditation on the diverse functions of the category of *res nullius*. Latin for “nobody’s thing,” in a general and abstract sense the category of *res nullius* has been used in the history of European legal and political thought to describe a range of unowned and unclaimed objects. It is, however, precisely the vacuity of this literal meaning that has made it a politically productive tool. In its historically dominant usage, the term refers to an object that does not *yet* have an owner. *Res nullius* in this sense is typically a temporary state of affairs: the object in question is awaiting a first claimant. In some jurisdictions, this sense lives on in private law in the form of *bona vacantia*:

goods that are without a particular property holder because they have been abandoned or otherwise disowned.<sup>37</sup>

There is, however, a second and more marginal history standing behind the concept of *res nullius*. The term has also been used to describe objects that lack an owner not because they have *yet* to be claimed but because they have been shielded from proprietary claims altogether or otherwise removed from the sphere of ownership. Importantly, this peculiar status of “ownerless property” did not prevent the assigning of special duties to protection and care to specifically designated individuals. The dominant instance of this was sacred spaces, such as temples or graveyards. While these spaces were not “owned” by anyone, they were placed under the care and protection of legally designated stewards.<sup>38</sup> For example, in Blackstone’s *Commentaries on the Laws of England* (1765–69), he periodically considers the problem of how we can adjudicate cases in which an inappropriable object has been stolen or violated. The classic instance of this, for Blackstone, is grave robbery. In this instance, it would be odd to suggest that a simple case of theft has taken place, since a corpse is not property in the normal sense of the term. Generalizing from this case, Blackstone comments that “no larceny can be committed, unless there be some property in the thing taken.”<sup>39</sup> No property ergo no theft. In this minor tradition of *res nullius*, then, we have a longstanding legal precedent for treating some spaces and objects of concern (e.g., temples, graveyards, the deceased) as unowned and unownable repositories of care and responsibility.

Resurrecting marginal traditions of European legal and political thought is no doubt a valuable endeavor, one that holds out promise for expanding our vocabulary in unexpected ways.<sup>40</sup> This strategy may indeed help us move beyond the dilemmas of dispossession found in previous chapters. The recovered history of inalienability and the inappropriable *res nullius* nevertheless also points us toward the dangers of reconstruction without interrogation of the parameters this implies. Close examination of this body of work again reveals how much the imperial and colonial horizon is kept at bay in order to stabilize this project of recovery. Consider, for instance, that the imperial idiom of *terra nullius* is, in effect, a narrower species of the more general *res nullius* and that, historically, the colonial function of the former has operated precisely by taking advantage of the conceptual ambiguities resident in the heart of the latter. It is worth recalling, for instance, that the first move in the defense of colonial appropriation found in Locke’s *Second Treatise of Government* was to characterize the earth as an open commons. In so doing, Locke was adopting an older

language of common ownership to new purposes. When previous thinkers (such as those in the Thomist tradition) referred to the earth as part of the “common inheritance of mankind,” they typically understood this to mean that each human possessed part of a collective title, which was held in trust by God’s appointed agents (i.e., the sovereign). Locke inverted the meaning of this. His argument was that, while the earth was indeed held by all humanity in common, it was “common” only in a negative sense: it was not owned by anyone in particular and thus open to appropriation by each and all (“no body has originally a private dominion, exclusive of the rest of mankind”).<sup>41</sup> In this way, Locke played with the diverse valences of these terms, redescribing “common inheritance” and “inappropriable” as “not-yet appropriated.”<sup>42</sup>

In short, in their search for alternative normative horizons, many contemporary critical theorists continue to look backward to antiquity rather than sideways to non-Western forms of life. That major European intellectuals must reach back to Rome or early modern monasticism is surely symptomatic of a studious Eurocentricism. If we could look beyond the European horizon, we might notice that there are literally hundreds of millions of Indigenous peoples who have long cultivated a deep practice of care as counterdispossession and, unlike Roman law or medieval monasticism, these Indigenous forms of life endure in the present.

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As is hopefully becoming clear by now, no particular legal or political form can be shielded from the abuses of power. Neither the commons nor an inappropriable *res nullius* is innocent relative to practices of domination. Nor should we expect incorruptibility from models of care, stewardship, and responsibility. This is the caution of the third “sympathetic critic.” While organized systems of ecological projection and care do pose significant challenges to more prevalent proprietary frameworks, they are nevertheless also compromises with extant legal and political orders. Such projects often must appeal for legal protection from the very states that have historically dominated and dispossessed Indigenous peoples. They moreover risk reifying “nature” as a static object that can be protected and preserved rather than a dynamic set of living relations that exceed any particular legal codification, or as a “subject” who must prove its worth through the moral evaluation of personhood. David Delgado Shorter voices this concern when he argues that “calling something ‘spiritual’ or ‘sacred’ to win a land claim in a colonial court of law is an absurd tactic as the precedent in American

courts has tended toward the capitalist, and thereby object orientated, use and production of land for profit.”<sup>43</sup> When Gerrard Alberta speaks of granting legal personhood to the Whanganui River as an “approximation in law” of a set of long-standing Māori normative commitments, he is perhaps drawing our attention to these dilemmas: the highly constricted and constrained—or, in Audra Simpson’s words, “strangled”—conditions of Indigenous political articulation.<sup>44</sup> This objection is perhaps the most challenging, since it strikes at the heart of questions of agency in the context of asymmetrical relations of domination.

These challenges drive us back to the basic question of form and content, of how legal and political forms function as mediating devices for social movements, and how change can be effected under highly constrained conditions. Structures of stewardship, care, responsibility, and legal personhood for land are not, in and of themselves, definitive solutions to the challenges facing us with regard either to ecology or the contemporary legacies of colonial dispossession. That is because each of these “solutions” enters into a field of power already saturated with meaning and striated by relations of domination. However, if these forms are imperfect approximations at justice, it does follow that they are useless or unnecessary. It may be that the radical potential of such movements does not reside exclusively in their achieving a narrow objective (e.g., the protection of this river or that mountain) but in the manner with which they challenge the broader vocabularies at work. Theirs is an expressivist politics of resignification, one that works to reconfigure the relation between subjects, objects, and the connections between them. Rather than entirely rejecting existing institutions, practices, and modes of signification, these projects work to disassemble and then reassemble their nodal features: law, rights, property, and personhood. These are imperfect, incomplete, and aspirational projects of collective resignification of the basic terms of political order.

### III

We know from historical experience that expressive resignification can radically alter the terms of political struggle, but only when this politic is anchored in institutions and material practices. If this is correct, then the question is no longer *which* new forms are emancipatory but rather *under what conditions* they can so function. How can we ensure that new vocabularies and configurations of legal and political structure operate as we wish

them to? The specific answer to this will be highly localized, calibrated as it must be to the particular relations of power in a given time and place. A set of general postulates may perhaps nevertheless still help orient us.

If we are able to invent new configurations of property and power that are more emancipatory and just, it will not be because these forms in and of themselves can do the work of liberation. It will be, rather, because they are animated and energized by living social struggles. Here, the work of Joanne Barker is again useful. In her scholarship, Barker seeks to interrogate the “possibilities of *rearticulation*” in the legal idiom of collective rights to self-determination. Importantly, Barker shifts the framework away from the binary question of whether the law can be a medium for Indigenous self-determination to the more complex and variegated matter of when and under what conditions. As she puts it, “The question that lingers is not *why* Native peoples would use the law as a means of reformation . . . but *how*, in those uses, they seek to rearticulate their relations to one another, the United States, and the international community.”<sup>45</sup> This approach cautions against reifying law (or property, for that matter) as the static, self-contained, and internally consistent object that it presents itself to be. Instead, our gaze is directed from the *de jure* to the *de facto*. No change in legal or political institutions will ever complete the work of actualizing justice since, as feminist scholar Neera Chandhoke points out in a different context, “justice has to be *realised*, even wrested from, imperfectly just states through forms of collective action.”<sup>46</sup> In other words, if these new experiments in relating to the Earth eventually prove useful, effective, and just, then it will be because we have *made* them so through the labor of collective struggle.

To see this, it will be necessary and useful to distinguish between the instrumental and expressive functions of these novel forms of struggle. If I am correct to suggest that both of these aspects are at play in Indigenous movements such as the ones described above, then the success or failure of any particular moment or instantiation will be difficult to evaluate since the expressive dimension will have, in part, altered the success criteria themselves. Given the vast inequities of power that characterize Indigenous struggles against colonialism and dispossession, we can only expect partial, momentary, and tentative victories on the instrumental front. However, we may still hold out some hope that by keeping up the fight itself, Indigenous peoples may be transforming the constituent frame of reference. In this regard, I consider one of the most important features of Indigenous politics today to be its modeling of *expressive insurgency*: a long-term,



multigenerational struggle that operates under radically asymmetrical power conditions to reorient the very terms of contestation by forcing us to confront the possibility of relating to the earth as something other than an object to be possessed.

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In good recursive fashion, I should like to close with the opening. The cover image for this book is a work by the Oglala Lakota artist Donald F. Montileaux (Yellowbird). It is an example of “ledger art,” a distinctive style developed in the Plains region of the North American continent.<sup>47</sup> In the nineteenth century, Plains Indigenous peoples had little access to paper. What they could acquire was usually already used by Euro-American settlers, most frequently from deeds, titles, and accounting ledgers. Indigenous artists took these papers and painted over them, often in vibrant, graphic forms. In effect, they took the materials that had been used by settler colonizers to document dispossession and refashioned them into an expression of their own peoples’ experiences and forms of life. In the twentieth century this work has been revived by a whole new generation. Contemporary examples depict both major historic themes (such as important battles) and also the quieter, quotidian practices of survival, care, and flourishing. Montileaux explains that his artistic mission is motivated by a desire “to portray the Lakota, the Native Americans, in an honest way. To illustrate them as people who hunted buffalo, made love, raised children, cooked meals, and lived.”<sup>48</sup> As I read it, these artistic works are simultaneously *representations* and *instantiations* of expressive insurgency. They display and enact resistance. In and of themselves, they may not reconfigure overarching power relations, but they do sustain and vivify a people to continue the fight that will.