Abstract

This chapter traces changing Anglo-European conceptions of property and their legal manifestations since John Locke, focusing on the common law world. Tracing this history of property requires an attentiveness to constructions of race. The chapter begins by outlining Locke's concept of property and its relationship to seventeenth- and eighteenth-century British colonialism. Engaging with Cheryl Harris's crucial insight that whiteness is property, it discusses conceptual and legal overlaps between having and being in dominant property regimes. The Lockean concept of property constructed land as an object essentially interchangeable with capital, a notion which found legal form in title registration and other legal initiatives which made land more alienable than it had previously been, thus assisting the colonial project of Indigenous dispossession. With the growth of the corporation and the credit economy since the nineteenth century, ownership has been divorced from control in ways that challenge the model of property put forward by Locke and other Anglo-European philosophers. In the culture of debt which pervades twenty-first-century capitalist economies, the subject of property is often also a debtor. This subject tends to be produced not through labor or metaphysical recognition but through increasingly algorithmic consumer surveillance and risk profiling which reproduces social categories including race. To understand property's changing formations, there is a need for approaches that take seriously property's white supremacist history and seek out alternative modes of having and being.

Keywords

property, racism, whiteness, colonialism, capitalism, subjectivity

Chapter 29

Property

Changing Formations of Having and Being

Sarah Keenan

Property is a concept central to Anglo-European law, culture and philosophy. It is also a concept that is difficult to define.[1] Property is used to denote belonging and justify exclusion in a wide array of contexts. It is at once a highly technical area of law, an everyday spatial marker, an overdetermined economic reality, a justification for colonialism, a strategy of resistance to environmental destruction, and a cultural indicator of what it means to be fully human. Property is a concept that travels between ordinary words and condensed theories.[2] That travel facilitates useful discursive reflections between disciplines, and shows that property "in the world" is a malleable reality. While concepts, as Meike Bal argues, are usually considered to be abstract representations of a "real" object, like all representations, they distort, unfix, and inflect the object.[3] At the same time, the object itself diverts and complicates concepts of it. Property as concept and property as object interact with and "speak to" one another; they cannot be clearly

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[1] See Kevin Gray, "Property in Thin Air," *Cambridge Law Journal* 50 (1991): 252–307.

[2] Mieke Bal and Sherry Marx-MacDonald, *Travelling Concepts in the Humanities: A Rough Guide* (Toronto: University of Toronto Press, 2002).

[3] Ibid., 22.

separated from each other.[4] A meaningful understanding of property thus requires an attentiveness to both its conceptual and practical lives and the relationship between the two.

In this chapter, I trace changing Anglo-European conceptions of property and their legal manifestations, from John Locke, focusing on the common law world. Tracing this conceptual and legal history of property necessarily involves an attentiveness to constructions of race. Building on Cheryl Harris's influential insight that whiteness is property, this chapter will argue that although over the centuries property has changed in conceptual and practical formation, its intimate connection with race has remained constant. I begin by outlining Locke's concept of property as being produced when subjects take possession and control of land, and its relationship to seventeenth- and eighteenth-century British colonialism and white supremacy.[5] I then outline a less discussed legacy of Locke's concept of property, which Nicole Graham refers to as the "dephysicalization" of property in land: the construction of land as an object waiting to

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[4] Ibid., 45.

[5] Following Cheryl Harris, I am using Francis Lee Ansley's definition of white supremacy: "By "white supremacy" I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings." Frances L. Ansley, "Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship," *Cornell Law Review* 129 (1989): 993–1077, 1024, cited in Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (1993): 1701–1791, 1714.

be controlled and essentially interchangeable with capital.[6] The objectification and increased alienability of land is exemplified by title registration systems, which assisted the colonial project of Indigenous dispossession. The dephysicalization of property in land was followed by the growth of the corporation and of the credit economy, both of which I argue divorced ownership from control in ways that challenge Lockean models of property based on a subject controlling an object. In the culture of debt which pervades twenty-first-century capitalist economies, the subject of property is often also a debtor. This subject tends to be produced not through labor or metaphysical recognition but through increasingly algorithmic consumer surveillance and risk profiling which reproduces social categories including race. To understand property's changing formations, there is a need for approaches that take seriously property's white supremacist history and seek out alternative modes of having and being.

29.1. "In the Beginning, All the World was America": Property, Enclosure, and Colonization

Examining the theory of property put forward by seventeenth-century English philosopher John Locke is helpful not only for understanding property law principles implemented throughout the

[6] Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon, U.K.: Routledge, 2011). Graham is building on theories regarding the dephysicalization of property put forward by C. B. McPherson, "Capitalism and the Changing Concept of Property," in *Feudalism, Capitalism and Beyond*, ed. E. Kameka and R. S. Neale (London: Arnold, 1975); Kenneth Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," *Buffalo Law Review* 29 (1980): 325–367.

former British Empire but also for understanding British colonialism and white supremacy. Locke famously put forward a justificatory theory of property whereby land could be legitimately appropriated by enclosing and cultivating it. Locke argued that at the beginning of time the world was given by God to men in common, "yet every Man has a Property in his own Person."[7] This property which "every Man" begins with, consists of "the Labour of his Body, and the Work of his Hands."[8] When a man mixes his labor with land given to men in common, that land becomes an extension of him: it is taken out of the commons and rightfully becomes the man's property. According to this theory, the mixing of land and labor to produce property applies to land in "the State of Nature"[9] by which Locke meant land that was not physically enclosed pursuant to an agreed set of laws. The "Civiliz'd part of Mankind" would posit such laws, while "the wild Indian who knows no Inclosure" would not.[10] Citing passages from the Bible, Locke asserted that "in the beginning all the World was America," by which he meant a wasteland improperly used by its native inhabitants, and waiting to be appropriated by civilized men.[11]

Locke's conceptualization of property provided a justification for the enclosure of common lands and a system in which title to land was based on possessive control of it. From the fifteenth

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[7] John Locke, "Of Property," *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), 328.

[8] Ibid.

[9] Ibid., 329.

[10] Ibid., 328.

[11] Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996), 39.

to the nineteenth century, English land formerly held in common was enclosed into privately owned lots, a violent process which fundamentally changed English social and economic structures, paving the way for the capitalist system that exists today.[12] Peasants forcefully displaced from common lands during the enclosures were forced to sell their labor to pay rent to landlords.[13] Their labor did not form the basis of property rights under Locke's formulation, because for Locke "labor" equated only to specific forms of possessive control.[14] Enclosure, Nicole Graham explains, had become so widespread in England by the nineteenth century that it formed an essential part of the basis of the shift from feudal to capital economies at the scales of both nation and empire.[15]

Locke's theory of property served as a justification for colonialism in America and beyond, but only with the assistance of other complementary theories. Locke's theory is often used to explain Britain's assertion of sovereignty over the continent now known as Australia in 1770 on the basis that the land was *terra nullius* (belonging to no one). Yet there was never any legal declaration that the land was *terra nullius* during the early decades of British settlement in Australia.[16] Rather, it was the operation of various discourses of power which explains why the common law failed to recognize Aboriginal rights to land, including the racist presumption that

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[12] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975).

[13] Karl Marx, *Capital Volume 1* (London: Penguin, 1990), 877–895.

[14] Graham, *Lawscape*; Arneil, *John Locke and America*.

[15] Graham, *Lawscape*, 60.

[16] David Ritter, "The Rejection of Terra Nullius in Mabo: A Critical Analysis," *Sydney Law Review* 18 (1996): 5–33; Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge: Cambridge University Press, 2017).

Aboriginal people were barbarous and thus incapable of owning land.[17] In reality, Aboriginal Australians, like Native Americans, had long operated a sophisticated, successful, and sensitive land management and farming regime integrated across the continent.[18] While the racist fallacy that Aboriginal people had no rights to land is consistent with Locke's writings, *terra nullius* only began to be articulated as a concept in Australian law in the 1970s following legal claims for Aboriginal land rights.[19] The Lockean conception of property only became a coherent justification for legal property regimes through decades of practical application, which have been reliant on broader power relations including, significantly, racism.

Analyzing centuries of American law since British colonization, Cheryl Harris has powerfully demonstrated how possession—the legal basis of title—has been defined only to include the cultural practices of white people.[20] Native Americans' prior relationship with land should, under common law principles, have given them property rights, but their racialization as native rendered their possession ineffective. In the Australian context, Aileen Moreton-Robinson argues that whiteness itself is built on a possessive logic.[21] That is, whiteness as a category has

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[17] Ritter, "Rejection of Terra Nullius in Mabo."

[18] Gary Paul Nabhan, *Enduring Seeds: Native American Agriculture and Wiild Plant Conservation* (Tuscon: University of Arizona Press, 2002); Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Crow's Nest, Australia: Allen & Unwin, 2012); Bruce Pascoe, *Dark Emu Black Seeds: Agriculture or Accident?* (Broome Australia: Magabala Books, 2014).

[19] Ritter, "Rejection of Terra Nullius in Mabo," 6.

[20] Harris, "Whiteness as Property," 1721.

[21] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (London: University of Minnesota Press, 2015).

been constituted by the violent, possessive practices of early British colonists and their descendants, whose national and cultural identity is formed through embodying these practices and disavowing the reality of Indigenous sovereignty. Property and whiteness have thus been mutually constituted through British colonialism. Indeed, Harris's argument is that whiteness is property: it is an exclusive, protected legal category which confers on those who have it an array of benefits including, historically, protection from being enslaved and colonized.[22]

Theories of property based on Locke's self-owning subject give rise to conceptual tensions over ownership and identity.[23] This tension arises because Locke's subject is a split self: as a self-owning person, he is both the owner/subject of property and the owned/object of property.[24] The split subject meant it was conceptually possible for a person to be the object of property, an idea which is consistent with the chattel slave trade in which Locke was both personally invested, and employed as an administrator throughout the late 1600s.[25] Bernasconi and Mann argue that

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[22] Harris, "Whiteness as Property."

[23] Janice Richardson, "Feminism, Property in the Person and Concepts of Self," *British Journal of Politics and International Relations* 12 (2010): 56–71.

[24] Margaret Davies, *Property: Meanings, Histories, Theories* (Abingdon, U.K.: Routledge-Cavendish, 2007), 90–92.

[25] Robert Bernasconi and Anika Maaza Mann, "The Contradictions of Racism: Locke, Slavery, and the Two Treatises," in *Race and Racism in Modern Philosophy* (Ithaca, NY: Cornell University Press, 2005), 89–107. For a detailed reading of the role of Locke's theories in the construction of the legal category of 'slaves' see Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Oxford, U.K.: Princeton University Press, 2011).

Locke's theory of property and its justification of the colonization of North America was also a defense of slavery, because slavery was understood to be indispensable to the profitability of the new American colonies.[26] Whatever Locke's personal motivations and beliefs, his theory of a split self allows for the conceptual possibility of slavery.[27] The theory found favor among British colonists during the period that Enlightenment methodologies of categorization and differentiation were being developed, alongside ideas about the "natural" inferiority of non-Europeans, and an increasingly profitable slave trade.[28] Title to slaves was manifested through possession, as title to land was. It is thus clear that Locke's theory of "every man" as a presocial subject who always already has property in his own person was also a theory of identity.

29.2. Dephysicalization and Alienation

Nicole Graham argues that while it has been much discussed that Locke's theory was used as a justification for the enclosures and colonization, "Locke's understated contribution to modernity is his rationalization of the physical severance of people and place."[29] For Locke, land is a passive object waiting to be enclosed and cultivated. Focusing on the colonial exportation of English land law to Australia, Graham argues that land was seen by colonists as "placeless" and

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[26] Ibid., 90.

[27] See also Carole Pateman, "Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts," *Journal of Political Philosophy*, 10 (2002): 20–53.

[28] Alana Lentin, "Race," in *The SAGE Handbook of Political Sociology*, ed. William Outhwaite and Stephen P. Turner (London: Sage, 2015), 860–877, 864.

[29] Graham, *Lawscape*, 46.

interchangeable with capital. During the eighteenth and nineteenth centuries, colonial land law was amended in various ways to "dephysicalize" property in land, ignoring the messy uncertainties and contestations of lived relationships between place and people, and thereby making property in land a far easier object to alienate, trade, and financially invest in than ever before.[30] Other work on the exportation of property law throughout "settler colonies" of the former British Empire supports Graham's argument.[31] While the law of primogeniture, for example, continued in England until 1925, it was abolished in the colony of New South Wales in 1862, disrupting the English class system and making it easier for women to inherit land.[32] And while prior to the seventeenth century it was difficult to alienate land through a debt transaction under English law, such alienation became widespread in early colonial America, with colonists inducing Native Americans to take out "loans" in exchange for mortgages over their land which were then foreclosed on.[33] As K-Sue Park argues, land in the colonies was treated as a money

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[30] Graham, *Lawscape*, 46.

[31] John McLaren, A. R. Buck, and Nancy E. Wright, "Property Rights in the Colonial Imagination and Experience," *Despotic Dominions: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005); Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham, NC: Duke University Press, 2018).

[32] A. R. Buck, "This Remnant of Feudalism": Primogeniture and Political Culture in Colonial New South Wales, with Some Canadian Comparisons," in *Despotic Dominions: Property Rights in Settler Societies*, ed. John McLaren, A. R. Buck, and Nancy E. Wright (Vancouver: UCB Press, 2005), 171.

[33] K-Sue Park, "Money, Mortgages, and the Conquest of America," *Law & Social Inquiry* 41 (2016): 1006–1035.

equivalent, a treatment which contributed to the dispossession[34] of Native Americans from their land, and which foreshadowed contemporary predatory lending practices.[35]

Property law reforms aimed at increasing the alienability of land in the colonieshave also been made, at a more gradual pace, in England. Attitudes toward English land and the traditionally slow pace at which it was conveyed began to shift following the Industrial Revolution. Title to land was based on possession, it was relative rather than absolute, and conveyancing was a complicated and time-consuming legal process. Alain Pottage explains that transmission of ownership involved proving a historical chain of possession back through previous owners.[36] Retrospection was thus key to common law conveyancing, and prospective purchasers would have to satisfy themselves that the genealogy or "chain" of the title had been proven back to a point in time after which it was unlikely that any rival claims to it could emanate. Throughout the 1800s, the labor-intensive process of constructing title deed chains

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[34] I use this term in the way that Robert Nichols explains: "[D]ispossession can be usefully reconstructed to name a unique historical process, one in which property is generated under conditions that require its divestment and alienation from those who appear, only retrospectively, as its original owners. In this formulation, the term therefore names not only the forcible transfer of property but transformation into property, albeit in a manner that is structurally negated for some, i.e., 'the dispossessed.'" Robert Nichols, "Theft Is Property! The Recursive Logic of Dispossession," *Political Theory* 46, no. 1 (2018): 3–26. This understanding is important because possession is not an accurate description of most Indigenous relationships with land.

[35] Park, "Money, Mortgages, and Conquest of America."

[36] Alain Pottage, "Evidencing Ownership," in *Land Law: Themes and Perspectives*, ed. by Susan Bright and John Dewar (Oxford: Oxford University Press, 1998), 139.

came to be regarded as an impediment to a free market in land.[37] An 1857 Royal Commission report proposed a title registration system in which an entry in the register would legally constitute the title. The proposal had the stated goal of enabling buyers and sellers "to deal with land in as simple and easy a manner . . . as they can now deal with moveable chattels or stock."[38] The proposal was strongly opposed by much of the landed aristocracy, who feared a registry would make conveyancing too easy, turning land into a commodity that *anyone* with the appropriate funds could purchase.[39] Despite this opposition, by 1897 registration of title was made compulsory for some transfers of English land.

While debates over the appropriateness of transferring land through a registry continued in England throughout the nineteenth century, title registration was implemented at far greater speed in Australia and other parts of the British Empire. For most English subjects, land in the colonies had a different social and political meaning from land in the mother country: colonial land was "in the State of Nature."[40] As Buck writes, while land in England was owned by a small aristocratic class, "in the colonies, by contrast, land seemed, in theory at least, to be open to all—

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[37] Avner Offer, *Property and Politics, 1870–1914: Landownership, Law, Ideology, and Urban Development in England* (Cambridge: Cambridge University Press, 1981), 11–22.

[38] *Report of the Commissioners on the Registration of Title with reference to the Sale and Transfer of Land* (CP 2215, 1857—session 2), ¶ XL, cited in Kevin J. Gray and Susan Francis Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2009), 187.

[39] Stuart Anderson, "The 1925 Property Legislation: Setting Contexts," in *Land Law: Themes and Perspectives*, ed. Susan Bright and John Dewar (Oxford: Oxford University Press, 1998), 107–128.

[40] Mabo v. Queensland (No. 2), (1992) 175 C.L.R. 1.

a source of wealth, not as a stable element in life, but transitory and transferable in its nature."[41] In 1858, the "Torrens system" of title registration was introduced in the colony of South Australia. Designed to facilitate a new and secure speculative market in cheap and legally unencumbered South Australian land, Robert Torrens's system set out the principles through which the registry would operate to be the independent source of title. Consistent with Graham's argument that land came to be dephysicalized and treated as interchangeable with capital during British colonialism, the Torrens system aimed to maximize the alienability of land by treating it like ships and shares.[42]

The principles of the Torrens system—commonly described as the "mirror," the "curtain," and insurance—block out historical and physical details about the land in order to conceptually produce land title as a clean, secure, easily alienable asset.[43] The "mirror" principle dictates that a publicly available register will accurately and completely reflect the interests which affect the land within its coverage. The "curtain" takes further the selective two-dimensional representation of land produced by the "mirror," by drawing a metaphorical curtain across all prior and existing interests in the land that do not appear in the "mirror" and rendering those interests

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[41] Buck, "This Remnant of Feudalism," 176.

[42] Murray J. Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (The Hague, The Netherlands: Kluwer Law International, 2003), 27–36.

[43] Sarah Keenan, "Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration," *Law and Critique* 28 (2016): 87–108; Sarah Keenan, "From Historical Chains to Derivative Futures: Title Registries as Time Machines," *Social & Cultural Geography* (2018): 1–21.

unenforceable as property interests.[44] And under "the insurance principle" the state guarantees the accuracy of the register and will compensate any registered title-holder who suffers a loss due to a registry defect.[45] Much like a magician's smoke and mirrors, the registry's "mirror" and "curtain" block prior unregistered interests from legal view while the registry conjures up fresh, indefeasible titles.[46] Torrens titles are independent of their predecessors and free of the encumbrances of historically derived local land use patterns and custom. As famously described by Australian High Court Chief Justice Barwick in *Breskvar v. Wall*, Torrens is "not a system of registration of title but a system of title by registration"[47]: that is, registration in the Torrens system is not merely the recording of pre-existing title, it is the manufacturing of title—every title is new, indefeasible and guaranteed for the registered holder. Described as "the jewel in the Crown of colonial land management," after its inception in South Australia the Torrens system was quickly exported throughout large parts of the British Empire.[48] As it legally disappears precolonial relationships with land, the Torrens system has the effect of categorizing those who have precolonial relationships in a way which is both temporal and racial: those with precolonial

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[44] Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008), 13.

[45] Ibid., 14.

[46] Keenan, "Smoke, Curtains and Mirrors," 2018.

[47] (1971) 126 C.L.R. 376, at 381.

[48] Robert Home and Hilary Lim, *Demystifying the Mystery of Capital: Land Tenure & Poverty in Africa and the Caribbean* (New York: Routledge, 2013), 17.

relationships with land are "Indigenous," their rights to land consistently hidden by the curtain and their racial categorization defined by this legal disappearance.[49]

29.3. Financialization: Divorcing Ownership from Control

The increased alienability of property in the eighteenth and nineteenth centuries accompanied the increased role of credit in the British economy.[50] During that period, wealth had been extracted from the colonies at unprecedented levels, and the boom in trade and associated commercial activities was accompanied by the normalization of bills of exchange, bank checks, and other written financial instruments. The growth of economies of credit and, therefore, of debt, has implications for property. Examining these implications, Bill Maurer explores the argument put forward by commercial lawyers in the late 1990s that considering the quantity, pace, and patterns of contemporary stock exchange, "the property law construct is inadequate and unworkable."[51] That is, the very concept of property has become irrelevant in the modern day economy,

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[49] Keenan, "Smoke, Curtains and Mirrors"; see also Renisa Mawani, "Law as Temporality: Colonial Politics and Indian Settlers," *UC Urvine Law Review* 4 (2014): 65–96.

[50] Laura Brace, *The Politics of Property: Labour, Freedom and Belonging* (Edinburgh: Edinburgh University Press, 2004) 40**<AU: This is the first time you are citing Brace. Please provide complete citation here. Author first and last name, title of work, publisher and location; volume/issue and pp. range if a journal citation.>**; Mary Poovey, *Genres of the Credit Economy: Mediating Value in Eighteenth-and Nineteenth-Century Britain* (Chicago: University of Chicago Press, 2008).

[51] Bill Maurer, "Forget Locke? From Proprietor to Risk-Bearer in New Logics of Finance," *Public Culture* 11 (1999): 365–385, 383.

specifically in the USA but by extension in most of the world, where international stock markets have material effects on people's lives (whether directly or indirectly). At stake in the argument that property has become an inadequate and unworkable construct, Maurer argues, "is not merely a new definition of property but a new definition of personhood and a new form of governmentality."[52] In these new definitions, Maurer argues, the subject of property is not a bearer of rights but is instead a risk profile subject to the disciplinary practice of insurance.[53] Suggesting that it might be time for property theorists to forget Locke, Maurer argues that "the Lockean and Hegelian subject of property takes a back seat to a system of statuses based on one's investment in that temporality [of capitalism], as ownership itself evaporates into risk profiles."[54]

Unlike Locke's subject, who already has property in himself, nineteenth-century German idealist Georg W. F. Hegel's subject is not born with property but must acquire it in the process of becoming fully human/a proper subject. Hegel argued that the subject begins as an abstract free will, which is purely individual and thus not yet in a relation with the external world.[55] The subject "must translate his freedom into an external sphere"[56] by putting his will into external

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[52] Ibid., 365.

[53] Ibid., 366.

[54] Ibid., 385.

[55] G. W. F. Hegel and H. B. Nisbet, trans., *Elements of the Philosophy of Right*, ed. Allen W. Wood (Cambridge: Cambridge University Press, 1991): § 34, 67.

[56] Ibid., § 41.

objects and making them his own.[57] His externalized will is then taken back into himself in the form of property—the subject recognizes that "I, as free will, am an object to myself in what I possess."[58] As Davies summarizes, "I become an actual person by relating to myself through the external world."[59] Property for Hegel is thus an essential part of the process of becoming a proper subject. Though different from Locke's subject-object distinction, Hegel's starting point also assumes a clear separation between persons and things external to them.

Behind Maurer's analysis of the decreasing relevance of Lockean and Hegelian models of property is the economic reality of the growth, in early twentieth-century America, of widespread stock ownership and the ideal of an investor democracy, in which ordinary citizens could share in the wealth generated by corporations by becoming shareholders.[60] Maurer explains that many early twentieth-century commentators were troubled by the invention of the joint stock corporation because they felt that it might jeopardize the capitalist system "by separating ownership (founded in stocks) from control and management (founded in corporate executives' power and privilege) of corporations."[61] As Julia Ott argues, the ideal of an investor democracy arose alongside the corporatization of industry and the shift from an agricultural-

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[57] Ibid., § 44.

[58] Ibid. § 45.

[59] Davies, *Property*, 98.

[60] Maurer, "Forget Locke?," 373; Julia C. Ott, *When Wall Street Met Main Street: The Quest for an Investors' Democracy* (Cambridge, MA: Harvard University Press, 2011).

[61] Maurer, "Forget Locke?," 371.

based economy to one dominated by manufacturing.[62] This shift was accompanied by a decrease in the incidence of individual land ownership, which had been high among free white men in earlier colonial periods. Leading American economists saw the spread of corporate securities ownership as a way to preserve the ideal of individual property ownership which gave owners a vested stake in the success of the nation, even though the nature of property ownership shifted from direct control of physical assets to fungible financial claims.[63] Examining the war bonds issued by the US government to help fund World War I, Ott argues that "policy makers looked upon mass investment in federal war debt as a means of encouraging a widespread sense of identification with the war effort and the nation itself."[64] That is, ownership of this dephysicalized form of property was seen as productive of the subjectivity of a good citizen, replacing the older Lockean theory that tied good citizenship to the possessive use of land.

The early twentieth-century growth of popular stock ownership in the USA was followed by the significant growth of increasingly global financial markets in the 1970s, when deindustrialization made it more profitable for capitalists to invest in anticipated future production, represented in securities, rather than present production.[65] The 1970s saw the beginning of debt securitization (including, significantly, mortgage debt), that is, the practice of pooling together and repackaging debts to transform them into tradable securities that can be sold

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[62] Ott, *When Wall Street Met Main Street*, 10.

[63] Ibid., 25.

[64] Ibid., 57.

[65] Lisa Adkins, "Speculative Futures in the Time of Debt," *The Sociological Review* 65, no. 3 (2017): 448–462; Annie McClanahan, *Dead Pledges: Debt, Crisis, and Twenty-First-Century Culture* (Stanford, CA: Stanford University Press, 2017), 13.

to investors.[66] The securitization of mortgages grew rapidly in the 1990s in the USA, the UK, and other parts of the world. This growth was only possible with the newly innovated practical legal mechanisms and techniques used to transfer large numbers of securities at record speed. In his analysis of changing formations of property in the context of securitization, Maurer's focus is on the process of securities clearance—that is, the process by which orders for securities are matched with the parties who issue them.[67] Another innovation of this period was the Mortgage Electronic Registration System (MERS) which was designed by a number of prominent corporate and US government mortgage market players to facilitate the exploding number of mortgage assignments taking place for the purpose of securitization.[68] In reasoning similar to that put forward by Torrens and his supporters in the 1800s, the groups which innovated MERS in 1993 asserted that the paper-based process for transferring mortgages was too slow, time-consuming, and inefficient. Their solution was to introduce MERS, which today has more than

[66] Anastasia Nesvetailova, "A Crisis of the Overcrowded Future: Shadow Banking and the Political Economy of Financial Innovation," *New Political Economy* 20 (2015), 431–453; Josh Ryan-Collins, Toby Lloyd, and Laurie Macfarlane, *Rethinking the Economics of Land and Housing* (London: Zed Books, 2017), 138.

[67] Maurer, "Forget Locke?," 367.

[68] Shelby D. Green and Joann T. Sandifer, "MERS Remains Afloat in a Sea of Foreclosures," *Probate and Property* 27, no. 4 (2013): 18-25<**AU: Please provide pp. range of article, per style.**>. Keenan, "From Historical Chains to Derivative Future."

60 percent of all residential mortgages in the country registered on its system, including virtually all subprime mortgages.[69]

The technical legal innovations which facilitated the growth of securitization not only increased the speed at which property could be bought and sold, they also changed the nature of property, stretching it beyond the subject-object model theorized by Locke and Hegel. While nineteenth-century title registration and other colonial innovations served to dephysicalize property, making it easier to alienate, twentieth- and twenty-first-century financialization and securitization shifted the spatial and temporal make-up of the subject and object of property.[70] Maurer argues that "With investment entities like futures and options, the property interest does not precede the share in time but follows it; it is a trace of a future, not a past."[71] The subject of property Locke (and Hegel) envisioned was one who owned and controlled a whole, identifiable physical object (most relevantly, land) in the present. Today, the prevalence of financial property and of the corporate form which divorces ownership from control makes both the object and subject of property difficult to identify. In the USA, the UK, and elsewhere, many homeowners are in significant mortgage debt.[72] So while an indebted homeowner is the subject of property in the sense that she owns legal title to her house, her ownership is conditional on her ongoing

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[69] Joshua J. Card, "Homebuyer Beware: MERS and the Law of Subsequent Purchasers," *Brooklyn Law Review* 77 (2011): 1633–1664; Alan M. White, "Losing the Paper-Mortgage Assignments, Note Transfers and Consumer Protection," *Loyola Consumer Law Review* 24 (2011): 468–504.

[70] See also Mariana Valverde' chapter, "*Spacetime in/and Law[oxfordhb-9780190695620-e-22]*," in this volume].

[71] Maurer, "Forget Locke?," 385.

[72] McClanahan, *Dead Pledges*, 9; Ryan-Collins et al., *Rethinking the Economics*.

payments to her bank, which also has a property interest in her home, and which wields significant control over both her and it. When her debt is repackaged and sold to speculators, it is difficult to identify the precise bounds of her interest/the object of her property. In this context, Annie McClanahan identifies the deep contradiction "between the ideology of ownership as stability, self-sufficiency, and social commitment, on the one hand, and the material reality of credit arrangements and foreclosure law on the other."[73]

In her consideration of twenty-first-century debt culture, McClanahan discusses the debtor as the new subject of property, with ownership but without control.[74] This debtor/subject of property is produced not through labor (as Locke argued) or through metaphysical recognition (as Hegel argued) but through increasingly algorithmic consumer surveillance.[75] A subject's ability to access credit (and thus become, simultaneously, a debtor and an owner) is based on purportedly neutral data designed to predict the subject's likelihood of repaying the loan. However, the algorithms, data collection, and analysis used remain firmly socially embedded, because such access is calculated based on information such as the applicant's employment history, address history, health history, salary, and court judgments[76]—histories that are determined in part by social categories, race in particular.[77] Virginia Eubanks explains that most

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[73] McClanahan, *Dead Pledges*, 155.

[74] Ibid., 132.

[75] MaClanahan, *Dead Pledges*, 65; see also Josh Lauer, *Creditworthy: A History of Consumer Surveillance and Financial Identity in America* (New York: Columbia University Press, 2017).

[76] McClanahan, *Dead Pledges*, 64.

[77] See Kimberle Crenshaw, Luke Charles Harris, and George Lipsitz., *The Race Track: Understanding and Challenging Structural Racism* (New York: New Press, 2018).

people are targeted for digital scrutiny as members of marginalized social groups, rather than as individuals, and this targeting then reproduces the social group.[78]

Consistent with Maurer's argument that "ownership itself evaporates into risk profiles," the financial identities produced by digital surveillance and used to determine a subject's access to credit are risk profiles which necessarily pre-exist the subjects who are given them. A risk profile is a likelihood of repayment on a hypothetical future loan, a fictional subject-like figure which becomes self-actualizing through the corporate and state authority afforded to it.[79] The risk profile, like Locke's subject of property, claims to pre-exist social categories which it in fact reproduces.[80] An example is the reproduction of race through subprime mortgage lending: black and Hispanic lenders (women in particular) deemed high risk had minimal access to credit. The only loans they could access were therefore made to them on terms which charged higher rates of interest to cover the lenders' increased risk, and fined them significant fees for late payments. For most, these "subprime" loans became impossible to repay, leading to their mass dispossession and to the reclassification of black and Hispanic populations as high risk.[81]

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[78] Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile. Police and Punish the Poor* (New York: St. Martin's Press, 2017), 6. See also Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: New York University Press, 2018).

[79] See Poovey, *Genres of the Credit Economy*.

[80] McClanahan, *Dead Pledges*, 100; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abindgdon, U.K.: Routledge 2015), 67.**<AU: This is the first time Keenan, 2015 is cited. Please provide the entire citation here, and then use short form hereafter.>**

[81] Paula Chakravartty and Denise Ferreira da Silva, "Accumulation, Dispossession, and Debt: The Racial Logic of Global Capitalisman Introduction," *American Quarterly* 64 (2012): 361–385.

The evaporation of ownership, and with it the traditional subject of property could, in theory, be something to celebrate from a social justice perspective. The Lockean and Hegelian subject of property to which Maurer refers has long been critiqued for being based on racialized and gendered assumptions about who is capable of being a subject. Those assumptions have in turn provided conceptual justifications for white supremacist and patriarchal property practices including colonialism, slavery, and coverture. But the new forms of ownership being generated by finance are derivative of property's past. Even as commercial lawyers seek the abandonment of property as a concept, and risk profiles and abstract instruments replace subjects and objects of property, whiteness is again reconstituted as a category of power. The factors and surveillance techniques used to calculate risk profiles are already racialized, meaning whiteness contributes to a low-risk profile, better access to credit on favorable terms, and thus increased chances of having material security.

As the "subject of property" has changed over the twentieth- and twenty-first-centuries, so too has the "object of property." As mentioned above, there are now new kinds of financial assets that can be owned, assets which are difficult to define and which have their value dependent on future transactions. The reality that much land is owned subject to mortgage not only diminishes the ideal of a subject in control; it also diminishes the ideal of a definable object: what is it that heavily mortgaged homeowners, many of whom have conditions in their mortgage restricting how they can use their homes, actually "own"?

Even for subjects who own title to land free of a mortgage, various legal developments over the past century put into question what land title amounts to in a practical sense. States tend to

reserve the right to the fossil fuels that lie below the surface of title,[82] and courts grant owners only so much airspace on their land "as is necessary for the reasonable enjoyment" of it, usually around 200 meters above roof level.[83] With drone activity of various kinds and underground hydraulic fracturing for the mining of fossil fuels both expanding as industries, there is an increasing likelihood that title-holders will be affected by these practices whether they consent to them or not. As Emma Waring has shown, in the English context legal changes leading up to the criminalization of squatting in 2002 bolstered an absolutist concept of registered title to land, yet the actual content of that title—that is, the enforceable rights it gives owners over the land—has been progressively eroded through other legislation.[84] While the registered title and thus the key to resale value is heavily protected, control over the land for owners who want to physically use it has, in some significant ways, been diminished.

While this era of financialization is causing traditional understandings of ownership to be challenged, ownership itself is also a state of being which is increasingly unattainable for many subjects. In relation to land, forms of tenure inferior to individual freehold title are increasing in

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‹[82] See Elen Stokes, "Regulatory Domain and Regulatory Dexterity: Critiquing the UK Governance of "Fracking,'" *Modern Law Journal* 79 (2016): 961–986; Sharon Christensen et al., "Regulation of Land Access for Resource Development: A Coal Seam Gas Case Study from Queensland," *Australian Property Law Journal* 21 (2012): 110–146.

[83] Kevin J. Gray and Susan Francis Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2009), 23.

[84] Emma Waring, "Adverse Possession: From Relativity to Absolutism," in *Moral Rhetoric and the Criminalisation of Squatting: Vulnerable Demons?*, ed. Lorna Fox O'Mahony, David O'Mahony, and Robin Hickey (New York: Routledge, 2014), 178–202.

incidence and in practical relevance. With urban density reaching new levels in many cities, "strata title," "condominium," and other forms of moderated freehold title are increasingly common,[85] and the design and administration of housing for those who cannot afford either to buy or to pay market rent has become an urgent issue.[86] These forms of tenure involve varying levels of shared control which must be managed collectively by owners, and which defy Lockean and Hegelian models of the property-owning subject in full control of his object. In the UK, private renting has more than doubled since 2000, as housing prices prohibit first-time buyers from purchasing homes, and state-subsidized council housing has also been significantly reduced.[87] In the USA, a significant number of the houses foreclosed in the recent crisis are now

[85] Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (London: Routledge, 2017); Douglas C. Harris, "Owning and Dissolving Strata Property," *UBC Law Review* 50 (2017): 935–970.

[86] See Helen Carr, "Utopias, Dystopias and the Changing Lawscapes of Social Housing: A Case Study of the Spa Green Estate London UK," *Australian Feminist Law Journal*, 38 (2013): 109–127; Phil Jones et al., "Localism, Neighbourhood Planning and Community Control: The MapLocal Pilot," in *After Urban Regeneration: Communities, Policy and Place*, ed. Dave O;Brien and Peter Matthews (Bristol, U.K.: Policy Press, 2015), 165–180.

[87] Ryan-Collins et al., *Rethinking the Economics*, 106–107; Julie Rugg and David Rhodes, *The Evolving Private Rented Sector: Its Contribution and Potential* (York, U.K>: Centre for Housing Policy, 2018), 18. See also David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Oxford: Routledge Cavendish, 2006).

rental properties owned by absentee investor landlords.[88] The UN Special Rapporteur on Adequate Housing has stated that "we are today in the grip of a global tenure insecurity crisis"[89] as people around the world increasingly lack control over the places where they live.

29.4. Beyond the Subject and Object: The Spaces Where Property Happens

With property changing in formation to the extent that analyses based on subjects controlling objects are losing their purchase, alternative approaches are needed. One approach is to shift focus from the subject and object of property and onto the spaces through which property is constituted.[90] Legal geographers argue that law, space, and identity are interconnected to the extent that they are constitutive of each other, an interconnection that is relevant for understanding property.[91]

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[88] Desiree Fields, "Constructing a New Asset Class: Property-Led Financial Accumulation after the Crisis," *Economic Geography*, 94 (2018), 118–140, http:// doi.org/10.1080/00130095.2017.1397492.

[89] Raquel Rolnik, *Special Rapporteur's Statement at the 22nd Session of the Human Rights Council* (2013), 2.

[90] Keenan 2015. **<AU: use short form here; see note 80.>**

[91] See Nicholas Blomley, "Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid," *Annals of the Association of American Geographers* 93 (2003)::121–141.

Davina Cooper offers a spatial understanding of property in her empirical-based study of property practices at an alternative boarding school in England.[92] Cooper describes property practices as involving a number of intersecting dimensions, of which belonging is the most important. Cooper considers belonging in two ways: first, the relationship whereby an object, space, or rights over it belong to a subject ("subject-object," "having," or "ownership"), and second, the constitutive relationship of part to whole whereby attributes, qualities, or characteristics belong to a thing or a subject ("part-whole," "being," or "membership").[93] Both types of belonging implicate social relations and networks that extend beyond the immediate subject and object of property; property is instead understood as "a set of networked relations in which the subject is embedded."[94]

Cooper's analysis of property is spatial in that it focuses on the networks in which the subject is embedded rather than primarily on the subject herself. Networks are necessarily spatial; as particular arrangements of intersecting forces or things that necessarily extend beyond the subject, different networks (whether they be social, conceptual or physical) constitute the reference systems through which we locate ourselves in the world. Focusing on these networked relations, I have argued that in order to form property, they must not only include a relation of belonging between either subject and object or part and whole but must also be structured in such a way that that relation of belonging is conceptually, socially, and physically supported or "held

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[92] Davina Cooper, "Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property," *Law & Social Inquiry* 32 (2007): 625–664. See also Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Durham, NC: Duke University Press, 2013).

[93] Cooper, "Opening up Ownership," 629.

[94] Ibid., 636.

up."[95] That is, the set of networked relations that Cooper describes must form a space that holds up the relation of belonging. My understanding of space is informed by geographer Doreen Massey, whose work refutes associations between space and the fixation of meaning and instead conceptualizes space as the product of inter-relations. [96] Space is therefore dynamic, multiplicitous, and always under construction.

Using this analysis of property as spatially contingent belonging, whiteness can be understood as property in the sense that whiteness belongs to the white subject (subject-object belonging/having/ownership), and also in the sense that the white subject belongs to the complex relations and networks that form whiteness (part-whole belonging/being/membership). This analysis suggests the intertwining of questions of ownership and membership or having and being, as well as the crucial role which space—in all its networked and relational multiplicity—plays in constituting property.[97] In policy terms, this analysis means that if the normative goal is to challenge the way whiteness (or another identity category) operates as a structure of exploitation and oppression, then it is the relations and networks that form whiteness which must be undermined rather than the narrower project of liberating or disciplining the individual subjects who belong to them. The whole and the part constitute each other, as do the subject and object, and property is understood as a malleable spatial formation.

In her recent work, Margaret Davies draws on actor-network theory to highlight the co-constitutive nature of property relations and to challenge property's distinction between subject

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[95] Keenan 2015. **<AU: use short form here; see note 80.>**

[96] Doreen Massey, *For Space* (London: Sage, 2006).

[97] Keenan 2015, 6. **<AU: use short form here; see note 80.>**

and object.[98] Davies argues that contrary to traditional Anglo-European theories of property, in reality rational human subjects do not simply control lifeless objects; rather, objects have their own vitality and themselves control and constitute subjects. The material reality of life on earth is that as humans, we are interconnected with and dependent upon the environments in which we live and of which we are also a constituent part. Davies argues that what is required is "a non-exploitative understanding of property, one where objects are not categorized according to who owns them but in a way which recognizes their significance in an ecology of both living and non-living things."[99] Such an understanding is increasingly necessary as the effects of climate change destroy the Lockean fallacy that land is an inert object waiting to be enclosed and cultivated by white men.

The understanding Davies puts forward is radically different from traditional Anglo-European understandings of property and the extractive and exploitative practices that these understandings have fostered. It is, however, consistent with many Indigenous philosophies and practices.[100] As dominant theories of property struggle to maintain relevance in the context of financialization, corporatization, and climate change, it is both politically and practically

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[98] Margaret Davies, "Material Subjects and Vital Objects—Prefiguring Property and Rights for an Entangled World," *Australian Journal of Human Rights* 22 (2016): 37–60.

[99] Ibid.

[100] For a discussion of some of these philosophies and practices in the context of contemporary property disputes, see Moreton-Robinson, *The White Possessive*; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham, NC: Duke University Press, 2014); Irene Warson, "Buried Alive," *Law and* Critique 13 (2002): 253–269.

imperative to turn to different theories of the world, human subjectivity, and ways of being. Anglo-European conceptions of property and their legal manifestations have always been met with resistance, notably from the various nations and cultures categorized as Indigenous. "Indigenous" is itself a generalizing colonial term: no Gurindji, Arrente, or Mohawk people defined themselves as "Indigenous" before the imposition of colonial rule,[101] but their precolonial relationship with land and survival of and resistance to colonial property regimes provides them with a shared political identity. Indigenous philosophies include ways of understanding human relationships with land and with non-humans that are radically different from the proprietary understandings discussed above. These philosophies not only challenge property's distinction between subject and object but also offer world views which elide such categories. Glen Coulthard explains in the context of the Dene nation that in Indigenous place-based perspectives, land is an ontological framework for understanding relationships.

> It is a profound misunderstanding to think of land or place as simply some material object of profound importance to Indigenous cultures (although it is this too); instead, it ought to be understood as a field of 'relationships of things to each other . . . humans held certain obligations to the land, animals, plants and lakes in much the same way as we hold obligations to other people.[102]

Although Coulthard is writing here in the past tense, he and other scholars make clear that while Indigenous relationships with land have been violently disrupted by colonial forces, the

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[101] See Irene Watson, "In the Northern Territory Intervention, What Is Saved or Rescued and at What Cost?," *Cultural Studies Review* 15 (2009): 45–60, 49.

[102] Coulthard, *Red Skin, White Masks*, 60–61.

philosophies and practices which form the basis of those relationships remain alive today.[103] Discussing some of the mistakes made by Australian courts in their interpretation of Aboriginal connections to land, Moreton-Robinson writes that "Indigenous people are the human manifestations of the land and creator beings; they carry title to the land through and on their bodies. . . . The relationship between people and their country is synonymous and symbiotic."[104] The objectification of land which is necessary for Lockean ownership does not make sense according to such understandings, because land is the framework for life rather than an inanimate object; it is ontologically connected to human "subjects," it cannot be owned by them. Such understandings also require a conception of land as physical, unique, and alive, rather than a dephysicalized abstract entitlement iteratively produced upon registration. And such understandings demand a conception of personhood as ontologically connected to the non-human world, rather than a conception of personhood as calculable through financial risk indicators.

29.5. Conclusion

As well as Indigenous philosophies and practices, there is much to be learned from studying the spaces maintained by other groups that have had to struggle to survive in a system in which they

[103] Moreton-Robinson, *The White Possessive*; Simpson, *Mohawk Interruptus*; Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Against the State* (Minneapolis: University of Minnesota Press, 2017).

[104] Moreton-Robinson, *The White Possessive*, 84.

have little to no legal control over land, capital, or other objects,[105] and have not been regarded as proper subjects. Reversing the usual direction of education by reflecting on what those who signed up to subprime mortgages at the height of the crisis have to teach those now analyzing the crisis aftermath, Sarita See argues that "the contractually illiterate spelled out for all of us what was and is so clearly a systemic hoax."[106] By buying houses with subprime mortgages, these subjects exposed the illusion of the property-owning subject with rights, and showed the devastation that divorcing ownership from control in the context of financialized housing can wreak. Studying a contemporary cultural space of Filipino North America, See shows how subprime debtors have survival strategies that the privileged do not: "It is the illiterates who insist on finding better ways to cohabit and live with one another."[107]

Writing in the South African context, Andre Van der Walt argued that "sometimes we should forget about the big property developments and focus our attention on the squatter huts and slave cottages that also represent powerful and significant property loci."[108] While Indigenous philosophies such as those of the Dene nation provide a basis for rejecting the very concept of property, Van der Walt is arguing for an approach to property which retains it as a

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[105] For a study of the alternative property narratives of political squats, see Lucy Finchett-Maddock, *Protest, Property and the Commons: Performances of Law and Resistance* (Abindgon, U.K.: Routledge, 2016).

[106] Sarita Echavez See, "Gambling with Debt: Lessons from the Illiterate," *American Quarterly* 64 (2012): 495–513, 496.

[107] Ibid., 512.

[108] A. J. Van der Walt, "Property and Marginality," in *Property and Community*, ed. Gregory S. Alexander and Eduardo M. Peñalver (Oxford: Oxford University Press, 2010), 105.

concept but with the hope that understanding it differently might allow for it to have unexpected political effects. If, as suggested in 29.4 above, property is understood as being dependent not so much on "the subject" but on a set of networked relations in which subjects exist, then there is no reason why that set of networked relations must necessarily hold up relations of belonging that are conservative, exploitative, or oppressive. As Massey has shown, relations, networks, and the spaces they constitute are not fixed in time. The spaces of apartheid survival which Van der Walt describes involve relations of belonging that could be understood as property, as do Aboriginal town camps in Australia, and other sites of survival, resistance, and protest.[109] Perhaps subversive property exists, and new political possibilities lie in producing spaces in which such property occurs.

Where subversive property exists, it will not only involve political spaces distinct from the white supremacist, capitalist ones which have developed around the Anglo-European conceptions of property traced in this chapter, it will also involve different subjectivities. McClanahan suggests that among young Americans there is "an emergent subjectivity," one which cannot and will not repay their debts.[110] Such a refusal undermines the premise of the credit economy and carves out a different future. As McClanahan argues, "An economy founded on credit depends on deferring payment into the future, but it depends even more on the premise that those payments will not be deferred forever. To be in debt forever is thus to refuse to be in debt at all."[111] As the concept of property travels into the twenty-first century, perhaps it will take

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[109] Keenan 2015. **<AU: use short form here; see note 80.>**

[110] McClanahan, *Dead Pledges*, 197.

[111] Ibid.

on new forms through the wisdom and practices of those who have traditionally been deprived of it.

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