

Defending Against Notions of *Terra Nullius* with the *Re.Past.Malaga* Performance

Danielle M. Conway

Under the manufactured construct of race, white men and women have weaponized their power and privilege over the centuries to orchestrate genocides, eugenics movements, forced migrations, slavery, racial subordination, and nationalism, all of which have contributed to societal distrust, fear, and contempt. These root causes of man's inhumanity to "the other" fester, as indignities and harms mount in the name of supremacy and superiority.

Critical evaluation, education, and an unencumbered soul are vital tools in defense of humanity. But the starting point to defend against the malady that is racism is the initial act of bearing witness to these offenses, and calling out the conduct—whether active, passive, or the result of inaction—that allows the assaults to continue.

The hate-inspired events that led to the forcible removal of the racially integrated community of indigenous, black, white, and mixed-race peoples of Malaga Island illustrate the cancer that is racial superiority. The State of Maine's dispossession of the Malaga residents was no less disruptive than the imperial actions of the British against Aboriginal Peoples and Kanaka Maori in Australia and Aotearoa (New Zealand), the United States government against the First Peoples of the Americas and the Kanaka Maui of Hawai'i, and the acts of other Western invaders against First Peoples around the globe. As with these assaults on humanity, *terra nullius* and the forcible, unlawful, and immoral dispossession of land by white men and women visited on the residents of Malaga Island require that we, too, bear witness.

Danielle M. Conway is Dean & Donald J. Farage Professor of Law, Pennsylvania State University's Dickinson School of Law. From 2015-2019, she was Dean & Professor of Law, University of Maine School of Law. Dean Conway was the inaugural Michael J. Marks Distinguished Professor of Business Law at the University of Hawai'i at Manoa, William S. Richardson School of Law. She is a member of the American Law Institute. Dean Conway was a Fulbright Senior Scholar in Australia; as well, she retired from the U.S. Army in the rank of Lieutenant Colonel.

Land dispossession is an intentional act having far and long reaching consequences. *Terra nullius*—the legal fiction of nonrecognition of prior owners or inhabitants of lands, once said to justify the exercise of dominion and control over such lands and resources, resulting in dispossession and eventual depopulation of prior owners or inhabitants—was a frequently applied doctrinal vehicle of Western imperial powers premised upon identifying prior owners and inhabitants as uncivilized savages. *Terra nullius* begets the erasure of identity, guarantees structural wealth deprivation, and assures the perpetuation of injustice.

Without so naming it, *terra nullius* was the governmental action exercised against the residents of Malaga Island. People who exercised the will and capacity to live and work according to humanistic principles drew the ire of the government and its strident belief in the rightness of white superiority. In practicing their humanity—one in which indigenous, blacks, whites, and mixed-race peoples found strength as a collective—the residents of Malaga Island were dehumanized through malicious renaming—“the peculiar,” “the degenerate,” and “the disgusting.” These renaming conventions were no different than the cruel references to “the savage.” In this way the simultaneous act of renaming alongside the application of the *terra nullius* doctrine disrupted the evolution of a community through malicious misidentification for the purpose of elevating one’s own position in society over another’s.

These are the thoughts that played like a reel in my head when our boat approached Malaga Island last summer, as we prepared to take part in the repast. With feet touching water then soil, I was overwhelmed by the loss of what the Malaga Island community could have taught us about equity, tolerance, liberty, and sustainability. Their loss continues to be our loss, as we struggle to address seemingly intractable issues of bias, racism, discrimination, homophobia, and xenophobia.

As we walked to the setting of the *Re.Past.Malaga* performance, I retreated even further into myself thinking about how the law can be used to do harm as much as to do justice. This hits at the intersection of law and humanity. Despite always critically questioning how law is used—and, at times, abused—I am always able to achieve equilibrium by recognizing that the rule of law is an impeccable tool that we must use with compassion and empathy to deliver on justice for all. With that thinking done, I rejoined *Re.Past.Malaga* fully engaged by the alignment between the purpose of the commemoration and the values embedded in human rights law.

One of the salient features of human rights law is self-determination, which includes defining one’s identity. Self-determination is a vested right, meaning it obligates the government to protect the rights of the individual. As is evident from so much of history, self-determination and connection to land are inextricably linked. Thus, unless reasonably justified, a government or an individual is not per-

mitted to interfere with the connection between person and land. As the dispossession of the Malaga residents illustrates, however, this right to self-determination, in practice, is bestowed on some and not on others. Making this example of dispossession that much more insidious is the faulty premise that socially constructed notions of race define the level of rights that one enjoys in society, including the right to remain on land to which one has a connection and a better right.

Such is the folly of those who embrace white superiority. To see one's own connection to humanity dismantled in order to exercise dominion and control by virtue of that which is malignantly inhumane and unjust is to eviscerate the pillars of justice so that eventually no one is protected.

Re.Past.Malaga presented yet another account of the suffering endured by the dispossessed, the colonized, and the disparaged. That said, it also revealed, by equally intentional act, the vigilance required of us as humans to bear witness for those who no longer have a voice in this world, but whose spirits we sense around us. The repast performance commemorated the identities that the government and its actors attempted to disparage. *Re.Past.Malaga* recaptured the narrative of the robust community of indigenous, blacks, whites, and mixed-race peoples who dared to strive for an integrated existence, with humanity as its guiding principle.

We owe a debt to the residents of Malaga Island. We pay that debt and we honor the sacrifices made on Malaga Island by opening our eyes to injustice, bearing witness to it, and calling it out—even in the face of certain derision—because our only choice in this world is to live according to the universal principle of self-determination. The *Re.Past.Malaga* performance facilitated our reconnection to a troubling past that will continue to plague our future unless we are all committed to pursuing racial justice. I will continue to walk the path of those who had their last meal on Malaga in 1912 before their removal, by rebuking *terra nullius* and by continuing to pursue justice through the promotion of equity and the rule of law for all peoples.



This work is licensed under the Creative Commons Attribution-NonCommercial-ShareAlike International 4.0 License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-sa/4.0/>; or, (b) send a letter to Creative Commons, 171 2nd Street, Suite 300, San Francisco, California, 94105, USA