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Savagery and civilization

From terra nullius to the 'tide of history'

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ABSTRACT This article argues that the colonization of Australia was justified by denying that Indigenous peoples possessed recognizable societies, law, property rights or sovereignty. This denial, in turn, rests upon the supposition that Indigenous Australians were living in a 'savage', pre-civilized state: the state of nature of liberal theory. Such concepts, deeply embedded in western political thought, informed the view that Australia was a *terra nullius* or unowned land. Consequently, the contrast between 'savagery' and its counterpart, 'civilization' formed a critical element of colonial arguments that Australia could be colonized without either a war of 'conquest', or making a treaty. We argue here that more than 14 years after the rejection of *terra nullius* in Australian law, its legacy and the assumptions that underpinned it persist in the concepts more recent debates deploy as well as in the concept of *terra nullius* that some of these debates rehabilitate.

KEYWORDS Australia ● colonization ● Indigenous Australia ● property ● state ● society ● sovereignty

INTRODUCTION

> Savages are of great use to political philosophers; their condition serves as a sort of zero in the thermometer of civilisation, – a point from which there is a gradual rise towards perfection. They are thus very valuable in hypothetical reasoning. (Merivale, 1837: 87)

Herman Merivale, then Professor of Political Economy at Oxford University, wrote these words 10 years before becoming Permanent Undersecretary of the Colonial Office. They serve as a clear example of 'savagery' used as a foil for 'civilization' in western political thought: 'savagery' forming one end of a hierarchy of social progress with colonial 'civilization' at its apex (Langton, 1998).

Contemporary debates have largely turned away from the overt language of 'savagery' and 'civilization'. Nonetheless, the recent work of controversial revisionist Australian historian, Keith Windschuttle, shows much less reticence. According to him (2002: 185–6), colonization in Australia can be described as a perfectly legal action (by the standards of the time), in which the British replaced the 'political void' of Indigenous Australia with 'the gift of civilization' and new 'techniques for living'. In doing so, Windschuttle's work has become emblematic of a national reaction against more critical appraisals of Australia's colonial history, some of which informed the historic 1992 *Mabo* v. *Queensland (No. 2)* decision (Attwood, 2004: 13–18).

The *Mabo (No. 2)* decision famously rejected *terra nullius* as part of Australian law, and the High Court of Australia described colonization as leaving 'a legacy of unutterable shame' (Deane and Gaudron JJ in *Mabo* v. *Queensland (No. 2)*, 1992). However, in the years since that decision, Australian political debate has continued to interrogate the colonial past and its legacies. The influence of ideas of civilization and savagery form part of the contested backdrop to more recent debates such as that over the 'stolen generations' of Aboriginal children, removed from their families by government policies aimed at their 'civilization', and the current Australian government's refusal to make an official apology to them.

In this article, we argue that the construction of 'the savage' is thoroughly implicated in the colonial project, both historically and in the contemporary Australian context.[1] To the colonial imagination, colonization is not seen as 'insufferable arrogance' (King, 1986: 86), 'an act of dispossession' or law breaking (Watson, 1998a: 2), nor even as a foreign imposition in an Indigenous landscape. Rather, in its own conception of 'the savage', the colonial imagination sees white, western culture reflected back as 'civilization'; a beneficent gift to the colonized (Blaut, 1993; Staves, 1994).

This article focuses on early colonial Australian constructions of 'savagery' and 'civilization' and their roles in justifying the appropriation of Indigenous land through the non-recognition of Indigenous social forms, modes of governance and relationships to land. In each of these domains, non-recognition provided the rationale for declaring the continent to be *terra nullius* (unowned land), its colonization demanding neither conquest nor cession. In contrast to Windschuttle (2002: 32), we argue that 'savagery' and 'civilization' are not mere descriptions of social facts – as colonial texts often imply – but rather, discursive constructions implicated in colonial

projects, including the application of the doctrine of *terra nullius*. As such, we contend that they *construct*, rather than *describe*, their subject matters, and then present those constructions as merely descriptive. The very language of 'civilization' cast Indigenous peoples in a role in which there could not, by definition, be mutuality, but only a relationship of superior with inferior. European societies formed the benchmarks of 'civilization' against which Indigenous peoples could only be assessed as lacking civil property rights and sovereignty. Fourteen years after the rejection of *terra nullius* in *Mabo*, intense debate continues over white Australia's entitlement to pride and capacity for shame. The nature of the historical record and the project of history itself have also been subjected to prolonged scrutiny (Manne, 2003). In the wake of these 'history wars', the assumptions underlying *terra nullius* and their resurgence in Australian public debate require re-examination.

PROPERTY AND POSSESSION: THE PREMISES OF *TERRA NULLIUS*

> We [Indigenous peoples] were made invisible by the colonists as was our connection to law and place. (Watson, 1998a: 4)

When Botany Bay, the first British colony in Australia, was initially proposed, it was one of several potential colonies under consideration. Despite the controversial, sometimes disingenuous and frequently exploitative nature of the negotiations and transactions that took place in other parts of the British Empire, Australia was the only colony in which land was obtained without being bought or leased for a fee, and in which arrangements for purchase or lease were thought unnecessary (King, 1986: 75–7). There was no official acknowledgement of Indigenous property rights, nor any recognition of Indigenous polities. As a result, some authors have argued that: 'If, as the *terra nullius* doctrine claimed, Australia was uninhabited or desert and belonged to no one in 1788, then the Aborigines simply had to vanish from state calculations' (Davidson, 1997: 189). The 'convenient assumption' of *terra nullius* (Armitage, 1995: 16) meant that the British could impose English law and colonial government and take Aboriginal land. However, *terra nullius* was not applied uniformly and effectively from the establishment of the colony in 1788. There was no clear and settled application of the concept of *terra nullius* in Australia until 1889. In the meantime, doubts persisted as to the nature and extent of Indigenous rights to property or possessions (Kercher, 1995).

By the time of Australian colonization, the central assumptions informing the later application of *terra nullius* were established in European

political discourse and increasingly reflected in conceptions of civilization as a process of historical development. John Locke, for instance, maintained that the native inhabitants of North America had no state, and thus no effective sovereignty. They had not fully exploited the land and had neither consented to nor conceived the use of money, and therefore could not be said to have ownership of land. He saw these things as prerequisites for civil society and as outcomes of a process of historical development that had rendered Europeans 'civiliz'd' (Locke, 1988[1690]: Book II, section 20, 45). Without them, he conceived the First Nations of North America to exemplify the state of nature.

Seen from this colonial and Eurocentric perspective, any form of society other than one centred around a European style of state making and law enforcement was deemed inferior. Land use other than settled agriculture was declared 'waste', rather than industrious and rational use, and incapable of forming the basis of property rights. This Eurocentric framework establishes Indigenous social forms as inferior and reduces their distinctive features to a derisory comparison with European social forms (Tully, 1993). As Europeans applied this framework to First Nations peoples of North America, it left them able to claim possession of food, clothing and tools on the basis of use; but unable to claim secure ownership of the land upon which they depended (Michael, 1998; Tully, 1995).

The principles Locke employed were later relied upon by William Blackstone, whose *Commentaries on the Laws of England* described the right of possession as 'a kind of transient property' lasting for the duration of use 'and no longer' (Blackstone, 1983[1765–69]: 3). Private property, on the other hand, 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe', was an attribute solely of civil societies. Private property had 'inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties' (Blackstone, 1983[1765–69]: 8).

The assumptions informing the doctrine of *terra nullius* thus had nothing to do with denying the palpable existence of the Indigenous people or trying, as some have suggested, to make them literally 'vanish' (Armitage, 1995: 14). Rather, they justified colonization of land that was *occupied*, but not recognized as *owned* without the consent of the 'occupants' (Muldoon, 1994; Pagden, 1995). By the later 18th-century, this view was framed by an implicit standard of cultural and material advance in which western European societies represented the highest known standard of 'civilization' (Bowden, 2004; Buchan, 2005). The foundation of this standard was the presence or absence of settled, law-governed societies based on agricultural production (Pagden, 1995). As the Swiss jurist Emmerich de Vattel put it, agriculture was an 'obligation imposed upon man by nature'. Consequently, he argued, peoples who subsisted on the 'fruits of the chase' without

cultivating the soil 'may not complain if other more industrious Nations should come and occupy part of their lands' (de Vattel, 1916[1758]: 37–8). If European-style agriculture was not being practised, it followed that the land was unowned, 'waste' and available for industrious use, defined as European-style agriculture. It was this kind of understanding of what constituted a 'savage' people that informed British colonization in Australia from 1788.

When Governor Phillip established the colony, the sovereignty of British law was proclaimed. No other law or sovereignty, native or foreign, was recognized. Indigenous peoples were rendered 'subjects of the Crown' not by conquest or cession, but as a consequence of the colonial construction of Indigenous peoples as 'savage': without society, sovereignty or private property. To the colonizer, this seemed an act of refined and compassionate majesty. The guarantee of protection under British law had been given to a people who had evidently never known such 'protection'. For the Indigenous peoples of Australia, however, to be subjects of the Crown was to be instantly shorn of any recognition of sovereignty, prior right to land or future guarantee of cultural survival.

In rendering Indigenous Australians subjects of the Crown, the British appealed to a distinction between taking possession of territory by conquest and possession through occupation of 'unowned' land. If the acquired territories were inhabited by peoples who cultivated the soil, it followed that they must possess some form of civil society and thus could only be subdued by conquest or their sovereignty 'ceded by treaties' (Blackstone, 1983[1765–69]: 104). In 'conquered or ceded' territories, Blackstone explained, the prior inhabitants possessed a polity and laws that continued to apply *unless and until* the new imperial authorities changed them, with the exception of those laws that contradicted 'the law of God' (Blackstone, 1983[1765–69]: 105). If, however, the land was inhabited by peoples who did not practice cultivation, conquest was not possible. Such peoples were regarded as having no 'polity' to conquer. They were not recognized as owning or occupying the land, but rather, 'merely' roaming over it. According to both Blackstone and Vattel, in such a case colonial law immediately applied across the unowned land (Blackstone, 1983[1765–69]: 105; de Vattel, 1916[1758]: 86). This was the category applied to Australia. The overall effect of this account of natural property rights is to ensure that peoples construed as living in the state of nature have no property rights. Colonial discourse established that industry and rationality were tied to a specific, European form of cultivation and enclosure, as well as to a capacity for specific forms of commerce, including a money economy, and the protection of private property (Arneil, 1994, 1996; Locke, 1988[1690]). Indigenous social forms are constructed, not simply as *different* or incommensurable, but insufficiently developed and therefore *inferior* to European social forms: 'savage', rather than 'civilized'.

While some colonial observers were prepared to recognize limited Indigenous rights to land, the weight of colonial opinion rested heavily on the assumptions that later informed *terra nullius*.[2] In a public address in 1842, leading colonial barrister and later member of the New South Wales Parliament, Richard Windeyer, argued that Indigenous peoples merely 'range[d] over' the land rather than 'inhabiting' it, and had 'never tilled the soil, or enclosed it, or cleared any portion of it, or planted a single tree, or grain or root' (Windeyer, c.1842: 32). Windeyer cited both Blackstone and Vattel in contending that the 'appropriation of land' relied upon the 'individuals or communities bestowing their *labour upon* particular portions of ground' (Windeyer, c.1842: 31). In Australia, he maintained, Indigenous peoples subsisted 'without laws, without government, without making the land produce by labour what it would not produce spontaneously' (Windeyer, c.1842: 32). Windeyer's vision of Indigenous peoples was framed within an understanding of civilization premised upon a certain view of historical progress. In the 'state of nature', he considered the Indigenous population to exemplify, populations multiply until hunting and gathering cannot support their needs, requiring them to tame animals, cultivate crops, and 'form together to restrain the hunter' from harming their herds or 'breaking the[ir] fences', thus constituting the 'first society' (Windeyer, c.1842: 37–8).

Windeyer's views were not universally held, but neither was he alone in holding them. William Hull (1846: 21), a 'colonial magistrate', observed that:

> It is an axiom of civil life, that no nation or tribe can acquire or maintain a right to the soil, unless it profitably occupies or tills it. Admitting such a rule – the nomadick tribes of Australia cannot be said to be dispossessed of *their* country.

Justifications for colonization based on the supposed superior efficiency of European-style agriculture offered a pretext for appropriating Indigenous land. However, they did not address the fact that Indigenous peoples were forcibly and progressively deprived not only of their customary means of life, but even of the land and technology that would have been necessary for them to adopt British-style agriculture.

Arguably, Australian Indigenous land use, mediated by sophisticated spiritual beliefs and superbly adapted techniques for sustaining life, presented the greatest conceivable contrast to the commercial practices Europeans imposed (Mulvaney, 1990; Tully, 1993; Watson, 2000). Irene Watson suggests one alternative, Indigenous, perspective:

> Traditional Aboriginal mainland cultures saw gardening cultures as supporting an inferior means of livelihood and a desecration of the soil, the mother. . . . In a way it was not 'a thought alien to our culture. A rape never before contemplated' but rather a confidence that maintaining diversity, travelling for knowledge, hunting, gathering, firing, and maintaining ceremonial obligations is 'best practice'. (Watson, 1998b: 21)

The colonial imagination could not grasp such techniques as being 'best practice'. At least part of the reason lay in the hold that the idea of civilization – as both a process of becoming 'civilized' and the end point of that process – had on European thought.

The colonial construction of 'savagery' assimilated Indigenous peoples within a language of civilization in which they could only appear as inferior. This represents a failure of the colonial imagination to recognize that Indigenous peoples have lives and laws and ways among themselves, for themselves, irreducible to comparisons with colonial lives, laws and ways (Watson, 1998b). The colonial imagination certainly does not contemplate the Indigenous gaze holding the colonizer to account (Watson, 2002). Instead, the colonizer appears as a civilizing influence and colonization as a gift bestowed by colonists, who, like the early 'explorer' John McDouall Stuart, saw themselves as bearers of 'civil and religious liberty, civilization, and Christianity' to 'the natives' (Stuart, 1998: 258). Civilization is made to appear as a progressive gesture of colonization, rather than a rationale for invasion, dispossession and destruction (Blaut, 1993; Parekh, 1994; Staves, 1994). As Thomas has argued, colonizers were able to represent their activities as 'civilising, progressive [even] necessary', but the application of Eurocentric benchmarks for society, governance and land use was also subject to 'anxieties' over the 'apparent intractability' of Indigenous beliefs and practices (Thomas, 1994: 14–15). The application of these benchmarks in Australia made the eventual application of *terra nullius* possible in the face of Indigenous occupation, law and custodianship of the land.

Windeyer and Hull may exemplify the hold of 'civilization' on the colonial imagination, but it would be misleading to take them as evidence of a universal application of the doctrine of *terra nullius* in Australia at the time. While the assumptions informing the doctrine of *terra nullius* were quite clear by the time of Australia's colonization, its application was much more complex.

'THE STATE OF NATURE' AND 'SOCIETY'

Some colonial accounts drew quite overtly on the assumptions we have described as underpinning *terra nullius*. Lieutenant (later Captain) James Cook, commander of the first British expedition to take possession of what is now Australia, described the continent as exemplifying 'the state of nature'. Even after his first encounters with Indigenous peoples, Cook was able to declare:

> We are to Consider that we see this Country in the pure State of Nature, the Industry of Man has had nothing to do with any part of it and yet we find all

> such things as nature has bestowed upon it in a flourishing state. (1969[1768–80]: 85)

In European political thought, the state of nature was counterposed to 'civilized' societies, created by entering by mutual consent into a social contract to create a state: a form of social organization clearly modelled on a European template. The fact that the state of nature had been constructed at least in part on colonial representations of Indigenous social forms dictated the conclusion that they would be quite unable to meet the 'superior' Eurocentric criteria for state and civil society (Arneil, 1994, 1996; Tully, 1993).

More importantly, however, Europeans were increasingly representing their 'superiority' in terms of a conception of civilization in which particular social forms were understood by reference to their placement on a scale of historical progress from 'savagery' toward 'civilization'. Within this framework, European societies formed the standard against which all others could appropriately be measured. The state of nature and civil society were not merely alternatives or opposites, but indexes of social progress away from savagery – understood as an absence of state and society – and toward state-governed civilization. Since Eurocentric conceptions of sovereignty turned on recognition of a state with law-making and law-enforcement capacities, the determination that Indigenous people were living in a state of nature effectively precluded the recognition of Indigenous sovereignties (Keal, 2003: 34–5).[3]

This judgement was implied by the persistent representation of Indigenous Australians as living in tribes controlled by older men.[4] Judge Advocate of the early colony, David Collins followed Cook in claiming:

> We found the natives about Botany Bay, Port Jackson, and Broken Bay, living in that state of nature which must have been common to all men previous to their uniting in society, and acknowledging but one authority. These people are distributed into families, the head or senior of which exacts compliance from the rest. (Collins, 1971[1798]: 544)

Collins's description contrasts the single, legitimate authority of the civilized state with the non-consensual, and therefore illegitimate, brute authority of the patriarch. The formation of 'society' represented by the voluntary union of the social contract is contrasted with the violent despotism of the state of nature. Indigenous social organization was portrayed as familial:

> The natives were first found, in tribes, as all must do in a state of nature, previously to further civilization. They are distributed into families, the head of which is called Beanna (father), and extracts obedience from all the rest. The Highlanders of Scotland displayed the same system of patriarchal government, which all the nations of the human race seem to have originally established. (Leigh, 1839: 164–5)

In each of these accounts, 'families' are contrasted with 'civilized' social forms. Kinship is conceptualized as the primary social form prior to the establishment of 'society' and state. As Locke had argued, societies with states were more 'civilized' because of the (mythical) consensual basis of their 'uniting in one society' by entering into the social contract, thereby formulating written laws for mutual protection in contrast to the uncivilized, arbitrary rule of savage patriarchs (Locke, 1988[1690]: Book II, sections 105–12).

Windeyer once again exemplified this derogatory view of Indigenous Australian social organization, arguing:

> [S]ociety can hardly be said to have struggled into existence among the aborigines. Indeed if we are to apply to them [the] conclusion that 'no human Society ever has subsisted or ever could subsist without being protected by government and bound together by Laws' we cannot help denying that they have a society at all. (Windeyer, c.1842: 29)

Windeyer's argument makes the colonial rationale for dispossessing the Indigenous peoples brutally explicit. However, it merely makes overt what is implicit in many other accounts. Without a state, there can be no civil society, no law, and hence no property rights. Windeyer makes clear that, in his view, the Indigenous peoples of Australia are not organized into societies *without* states. Without states, they have no *societies* at all (Windeyer, c.1842: 29–30).

The colonial construction of Indigenous peoples as 'savages' living in a state of nature locates colonization as a process by which 'savages' were 'rescued from the state of nature' (Bennett, 1834: 43). Thus early colonial administration focused on the 'civilization' of 'the natives', conceived as the inculcation of habits designed to equip Indigenous people for productive lives of service in white society. So conceived, civilization required the break-up of Indigenous social organization and the wholesale introduction of Indigenous individuals to the instruction of missionaries and teachers (Watson, 2002). This, in turn, implied that the British regarded 'society' as a social form built on a European template. The task of colonization was to fit Indigenous people to take their (subordinate) place in 'civilized society' by obliterating distinctively Indigenous social forms.

This understanding of colonization has one contemporary parallel in the works of the revisionist historian Keith Windschuttle. He has attempted to construe the purpose of British colonialism (at least since 1688) as oriented toward opening trade networks with Indigenous populations and 'demonstrat[ing] by example the benefits of the civil and polite customs of Europe' (Windschuttle, 2002: 32). This distinctly British civilization, in his view, was far superior to the brutality of Spain. He sees it as eschewing forcible conquest, and seeking peaceful 'subjection' of the inhabitants of the colony – Indigenous and otherwise – to British law, offering them universal

protection and a legitimation of 'the ownership of things, not people' (Windschuttle, 2002: 31). The contention that British law was a prerequisite to property relations implies a Eurocentric conception of property that precludes the recognition of distinctive Indigenous relationships to land. One critic has argued that in proposing such arguments, Windschuttle seeks to restore the idea of Australia as *terra nullius*, subject neither to Indigenous ownership nor to Indigenous governance prior to colonization (Reynolds, 2003).

GOVERNANCE, SOVEREIGNTY AND LAW

As we have argued, one of the key indexes of 'savagery' that justified *terra nullius* was the contrast between the state of nature in which Indigenous Australians were supposed to be living, and 'civil societies' organized around European-style states. The conceptions of civil society and the state are thus interdependent. Within this Eurocentric framework, the 'state of nature' was constructed as an absence of social organization: the epitome of 'savagery'. Without a state to make and enforce laws, there could be no effective governance. Further, without the capacity to legislate for and protect private property, industrious, commercial use of land would be impossible. Eurocentric and colonizing discourses about land use and ownership marginalized all forms of relationship to land other than settled cultivation as 'waste' rather than industry. As a result, non-recognition of Indigenous forms of governance as states was attended by non-recognition of institutions and processes Europeans conceived as requiring a state, in particular law, sovereignty and property.

Some European observers frankly admitted their inability to grasp Indigenous systems of governance. Sir Joseph Banks (who arrived with Cook), testified to the Committee on Transportation in 1785 that he had no 'Idea of the nature of the Government under which they lived' (King, 1986: 77).[5] This judgement echoed down through the colonial period, but it continues to be heard as recently, for instance, as the Federal Court of Australia decision against the land claim of the Yorta Yorta people (*Members of the Yorta Yorta Aboriginal Community* v. *The State of Victoria & Ors*, 1998).[6] Some colonial writers, such as Robert Dawson (see also Henderson, 1851; Nind, 1830–31: 40–1) speculated that institutional authority was quite absent from Indigenous societies:

> They have not, as far as I can learn, any king or chief. They have some customs and ceremonies common to all tribes, and they meet in large bodies to inflict punishment on members who offend against certain rules; but I cannot discover the authority that calls them together to judge of the measure of punishment, or the regulator of the ceremonies. (Dawson, 1831: 63–4)

Windeyer also described the 'egalitarian' Indigenous social forms he observed as an absence of governance:

> there is no bond of union between the families, one is not greater than the other, every man is independent of every other and although with notions of savage life derived from the American experience we have dubbed some of them Chiefs and others Kings they themselves know of no such distinctions. (Windeyer, c.1842: 3; see also Bennett, 1834)

However, the claim that Indigenous Australian peoples lacked recognizable governance was not uniformly accepted, even in the early colonial period. Some early colonial accounts described Indigenous peoples as having clearly understood rules, the transgression of which was punishable (Reynolds, 1996). Dawson, for example, seems to understand the punishments he describes as more than mere individual retribution. Colonial descriptions of complex diplomacy between different Indigenous groups, of rules governing conduct, relationships and ties to land, and descriptions of 'war' between different groups pointed to the exercise of legitimate coercion within a given territorial area (Reynolds, 1996). Such coercion may not have been institutionalized but was clearly evident to some colonial observers.

In the North American context, Tully has argued that although the functions of government were not achieved by Indigenous peoples in the same ways as in Europe, the First Nations have social forms which 'perform functions of government' in the absence of a state (Tully, 1993: 153). Henry Reynolds makes a related argument in the Australian context (Reynolds, 1996: 54–5). He argues that because 'individual tribes' achieved crucial functions of the state, including waging war and administering justice, Indigenous Australians should have been accorded sovereignty (Reynolds, 1996). Reynolds' argument works at strategically shifting the terms of the debate over sovereignty by wielding the language of the discursively dominant (European and colonial) construction of 'the state' to support his argument for Indigenous sovereignty. In doing so, however, he is compelled to translate Indigenous societies into a schema that we have argued was premised on their exclusion. The more profound question, as Indigenous critics (e.g. Alfred, 1999: 56) have suggested, is why Indigenous societies should be compelled to argue for their sovereignty through the application of Eurocentric and colonizing criteria designed to exclude recognition of their social forms.

The colonial imagination could only associate sovereignty with 'civilized' institutions – the state and written laws – but the very 'savagery' that colonial observers had projected onto the Indigenous peoples to justify their dispossession created difficulties in other spheres. Indigenous dispossession in Australia had been justified from 1788 on the basis that they did not make adequate use of the land, and had no recognizable form

of state. This meant that they could not be conquered in war, but nor could they cede land to the colonists by treaty.

The question, then, was whether Indigenous peoples had forms of law recognizable to the colonial power or whether Indigenous people should be fully subject to English law. In 1829, this issue arose when Chief Justice Forbes and Justice Dowling of the Supreme Court of New South Wales determined that English law *did not* apply to offences committed between Indigenous people (*R.* v. *Ballard or Barret*, 1829). Forbes CJ stated that he was 'not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves' (*R.* v. *Ballard or Barret*, 1829). Not only would such interference be an unwise policy, likely to cause further hostility, it would also intrude upon Indigenous forms of justice: 'The savage' he argued, 'is governed by the laws of his tribe – & with these he is content. In point of practice, how could the laws of England be applied to this state of society?' (*R.* v. *Ballard or Barret*, 1829). The implications of this argument were explored even more forcefully by Justice Dowling, who drew attention to the absence of any meaningful Indigenous consent to the sovereignty of English law:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions *even if such an interference were practicable*. (*R.* v. *Ballard or Barret*, 1829)

The implication of Justice Dowling's argument was that British sovereignty was *de facto*, but not *de jure*. The Aborigines of Australia, he argued, owed the British 'no fealty' (*R.* v. *Ballard or Barret*, 1829). Justice Dowling's language was strident, but the sleeper in his reasoning was the issue of practicability. The Aborigines may not have been legitimately (that is, consensually) subjected, but this did not alter the fact of their subjection *where and when the British had the means to effect it*. Neither Forbes nor Dowling believed that the British then had the means to effect Indigenous subjection beyond the limits of settlement. Consequently, the Aborigines remained ambiguous British subjects, amenable to British law for all offences except those committed among themselves within their own communities. Justice Dowling confirmed the substance of this finding in *R.* v. *Boatman or Jackass and Bulleye* in 1832, acknowledging the 'anomalous position' of the Aborigines as British subjects with some immunities from British law.

In 1836, however, the Supreme Court reversed this position. In *R.* v. *Murrell and Bummaree*, Justice Burton found that at the time of British settlement, the Aborigines:

> had not attained a position in point of numbers and civilisation, and to such a form of Government and laws, as to be entitled to be recognized as so many *sovereign states governed by laws of their own*. (emphasis in original)

The *Murrell* finding removed the lingering anomaly that His Majesty's Aboriginal subjects were amenable to British law only insofar as they committed offences against His Majesty's European British subjects. On this reasoning, the Indigenous inhabitants must be fully amenable to the imposition of English law. Without European-style institutions and legal processes, Indigenous people were constructed as having no law at all.

The idea that Indigenous peoples had no form of government, no political identity as nations, no claim to the land, and no legal status except as British subjects, was unsettled by Justice Willis' views in *R.* v. *Bonjon* in 1841. Though conceding that he thought the Aborigines 'ruder' than the 'American' First Nations, they nonetheless possessed 'laws and usages of their own'. The conclusion to which Willis's arguments were heading was that 'treaties should be made' with the Aboriginal peoples. The Aboriginal peoples were 'unconquered and free':

> their rights as a distinct people cannot, from their peculiar situation, be considered to have been tacitly surrendered. But the frequent conflicts that have occurred between the colonists and aborigines make it, I think, sufficiently manifest that the aboriginal tribes are neither a conquered people, nor have tacitly acquiesced in the supremacy of the settlers. (*R.* v. *Bonjon*, 1841)

Willis's appeal mirrored very closely that of Chief Justice John Marshall in the United States in the celebrated but controversial 'Cherokee cases' in the 1820s and 1830s (Norgren, 1996) that established the position of Indian peoples as 'dependent nations' within the Union. While Willis may have been influenced by Marshall's legal reasoning, he drew more support from the signing of the Treaty of Waitangi in New Zealand (6 February 1840) between the Indigenous Maori and the British Crown, arguing specifically that, 'I am quite at a loss to discover how the aborigines of New Zealand can be considered in a different light to those of Australia Felix'. The British were far from accepting the New Zealand Confederation of United Tribes established in 1835 or the North Island Maori generally as 'civilized', but they did concede that they possessed and were capable of exercising a real form of sovereignty. As Lord Glenelg expressed it in 1837, the Maori were 'not Savages living by the Chase', but rather:

> Tribes who have apportioned the country between them, having fixed Abodes, with an acknowledged Property in the Soil, and with some rude approaches to a regular System of internal Government. (Glenelg, cited in Pocock, 2000: 26)

What sovereignty might have meant in this context is open to some debate, for it clearly was not meant to be equivalent to that of Her Majesty's Government. Pocock has suggested that the ascription of a federative capacity to Indigenous peoples such as the Maori or the Iroquois, was a resource within the Western language of international law (*ius gentium*) by which their sovereignty could be recognized, even if routinely ignored or

circumvented in practice (Pocock, 2000). More significantly, perhaps, this form of 'recognition' takes place on colonial terms, fundamentally undermining the very sovereignty it supposedly 'recognizes'.

In the Australian context, Irene Watson has argued that:

> The European idea of that which constitutes sovereignty was a concept alien to Nungas [Aboriginal people, used in southern areas of South Australia]; we always had our own understanding of each other's sovereignty, and the krinkri's [non-Indigenous people's] way does not respect or recognise it, the Aboriginal law of ruwi [country, land or territory]. (Watson, 2002: 186, 191–2)

Willis concluded that because Indigenous Australians were never recognized as self-governing 'dependent allies', they had been subjected to laws without consent and their lands had been taken by force:

> the colonists, and not the aborigines, are the foreigners; the former are exotics, the latter indigenous; the latter the native sovereigns of the soil, the former uninvited intruders. I am at present strongly led to infer that the aborigines must be dealt with, as distinct, though dependent tribes governed amongst themselves by their own rude laws and customs. (*R.* v. *Bonjon*, 1841)

In the 1840s, Willis's arguments transgressed the boundaries of the colonial imagination. In speaking of the Aboriginal people as living in self-governing tribes with their own laws, Willis was invoking the imagery of Indigenous nations conspicuous for its near complete absence among observers in Australia in the 19th-century (Blackburn, 2002). One of the few observers to use the concept of nationhood reasonably consistently was the evangelist and later 'Protector of Aborigines' George Augustus Robinson, who spoke of the Indigenous peoples of Van Dieman's Land (Tasmania) waging 'war' on hostile tribes with the aid of 'confederates', making 'treaty' arrangements, and having their own 'chiefs' (Robinson, 1966: 257; see also Dredge, 1845: 6–7; Leigh, 1839: 162). These were, however, very pale and rare invocations of the language of nationhood compared to the officially recognized political understanding of Indigenous nationhood in North America and New Zealand.

The implications for colonial policy in Australia in the 1840s were thus to recognize some form of Indigenous 'nationhood', and negotiate for terms of 'surrender' or 'subjection' to British laws and sovereignty, or to sustain the image of Indigenous savagery and assert the supremacy of British law. The first option was advocated by the Aborigines Protection Society, but never gained ascendancy (Motte, 1840). The second option, recommended by Captain George Grey, was for the Aborigines to be entirely and totally subjected to British law, and pointed toward the application of the doctrine of *terra nullius*. Grey's 1840 'Report on the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia' began by noting that the great error of British policy was to regard the natives as British subjects, but to allow native laws to persist so long as they did not affect Europeans.

All Indigenous laws were, Grey asserted, merely 'barbarous customs . . . whilst those tribes, which are in communication with Europeans, are allowed to execute their barbarous laws and customs upon one another, so long will they remain hopelessly immersed in their present . . . state of barbarism . . . I believe that the course pointed out by true humanity would be to make them from the very commencement amenable to the British Laws, both as regards themselves and Europeans'.[7]

The recognition of native customs and laws proposed by Justice Willis threatened the foundation of British sovereignty.[8] A precis of the Australian colonial government's position on the issue of British sovereignty, drafted in response to Willis by the Colonial Secretary, was circulated to the Supreme Court. This summary entirely rejected recognition of Indigenous sovereignty. It referred to the British Parliament's 'unqualified dominion over New Holland', and to the legal recognition of 'the Aborigines of this Country' as 'Her Majesty's subjects'. The Colonial Secretary argued:

> even if the Aborigines be looked upon as a conquered people still no argument in favour of a separate Code of Laws for the Aborigines can be drawn therefrom, first, because the Aborigines never have been in possession of any Code of Laws intelligible to a Civilised People, and secondly, because their Conquerors (if the Sovereigns of Great Britain are so to be considered) have declared that British Law shall prevail throughout the whole Territory of New South Wales.[9]

This account suggests that the claim to British sovereignty remained tenuous and uncertain. As colonial administrators knew, their ability to exercise that sovereignty only extended so far. A few days' ride from each centre of settlement, Her Majesty's Aboriginal subjects were invariably maintaining their own customs and laws.

In 1992, the High Court of Australia finally overturned the doctrine of *terra nullius* in Australian law in *Mabo* v. *the State of Queensland (No. 2)*. Chief Justice Brennan found that although the 'tide of history' had swept away many Indigenous laws and titles, it had not swept away the title of the Meriam people of Murray Island to their traditional lands. Although *Mabo* reversed *terra nullius*, it did not rule on the question of prior or existing Indigenous sovereignty. It effectively separated subsequent determinations of native title from considerations of Indigenous sovereignty. In contrast, we would argue that since 1788 Europeans have tied the dispossession of Indigenous peoples to the denial of their sovereignty.

The Australian state came into existence as the result of an act of colonization that proceeded as if other sovereignties were impossible. Recognizing other systems of governance, law and adjudication would have required recognition of a 'savage' sovereignty. Repudiating *terra nullius* as implying an absence of sovereignty would undermine the very existence and authority of the Australian state. Yet the logic of *terra nullius* denies the existence

of property rights precisely because it denies the existence of a recognizable sovereign power. Consequently, while *Mabo* 'demolished the concept of *terra nullius* in respect of property, it preserved it in relation to sovereignty' (Reynolds, 1996: 3). For the High Court of Australia to have done otherwise would have corroded the basis of its very authority, calling into question an act of state and fracturing the skeleton that Justice Brennan referred to as giving Australian law its essential form (*Mabo*, 1992). However, by arrogating to itself power to make judgements about whether native title has continued existence, the High Court of Australia has presumed itself to have jurisdiction in the question. Doing so amounts to the most fundamental denial of Indigenous sovereignty possible.

CONCLUSION

> The *muldarbi* [demon spirit] *terra nullius* can be equated with 'the erasure of the indigenous being an historical process which continues today'. (Watson, 1998a: 4)

We have argued that *terra nullius* depends upon arrogant and denigrating accounts of Indigenous peoples as a template for 'the state of nature' implicitly contrasted with colonial 'civilization'. The distinction between 'savagery' and 'civilization' was not a disinterested, descriptive account of social reality. Colonial imperatives shaped its nature and form. At the same time, it shaped understandings of Indigenous peoples as inferior and European societies as superior. Colonial perceptions of Indigenous societies as 'savages' living in a state of nature became part of the justification for treating Australia as *terra nullius* and disregarding the rights, property interests and sovereignty of Indigenous Australians. Some commentators have treated *terra nullius* as merely a logical conclusion following from the application of a set of neutral criteria for 'civilization': 'had the British *not* seen New South Wales to be *terra nullius*, then they *would* have negotiated for the right to settle . . .' (Frost, 1980–81: 522). We have argued that *terra nullius* was based on colonial discourses about 'savage' social forms, governance and relationships to land. Consequently, Indigenous peoples could never meet the colonizer's standards of 'civilization'. This benchmark was built upon a solidly Eurocentric template for each of these domains: civil society, the state and its laws, private property and settled cultivation. Such principles were articulated as basic elements of an emerging, though contested body of international law. Ultimately, they appear and reappear in justifications and rationales for Australian colonization throughout the colonial period. Their legacy reverberates today in native title determinations following the now famous *Mabo (No. 2)* (1992) case.

After *Mabo*, the recognition of native title in Australia depends on

establishing the continuity of 'traditional laws' and 'traditional customs' of Indigenous peoples who have a connection with particular lands or waters (Webber, 2000). While *Mabo* thus removed *terra nullius* from Australian law, it also established that where 'traditional' customs had been altered by colonization, the native title of claimants may be considered to have been swept away 'by the tides of history' (Brennan CJ in *Mabo* v. *Queensland (No. 2)*, 1992). As the subsequent *Members of the Yorta Yorta Aboriginal Community* v. *Victoria* (2002) case showed, Courts were thus empowered not only to locate native title solely in customs deemed to be 'traditional', but to determine those 'traditional' customs by reference to white colonial 'authorities' such as pastoralists and missionaries. The 'evidence' of such writers, who did not hesitate to describe Indigenous customs as 'savage', and contrast them to European-style 'government' and the advantages of a superior 'civilization', formed the basis of the *Yorta Yorta* decision. The Court found against the claimants in this case because it was concluded that Indigenous lifestyles had been irrevocably changed by colonization. The claimants, it would seem, had no other way of demonstrating their observance of traditional customs than by living exactly in the manner described by the colonial authorities (so heavily relied upon by the Court) who depicted them as 'savages' living without order, government, or sovereignty. Indigenous adaptation to the circumstances of colonization was thus interpreted as an effect of civilization and hence a definite rupture of traditional customs and an irreparable loss of native title.

In 1842, Windeyer described what he saw as 'the grand fundamental law' of Indigenous Australians: 'that those should take who have the power and those should keep who can' (Windeyer, c.1842: 16). We suggest that his statement better encapsulates the 'fundamental law' of colonization. Over 10 years after *Mabo*, separating the denial of Indigenous sovereignty from determinations of native title has precluded consideration of how the 'taking' and 'keeping' of Indigenous land was legitimized. Like the early colonial accounts of Indigenous 'savagery', the contemporary Australian state's refusal to contemplate Indigenous sovereignty amounts to a refusal of the colonial imagination to examine itself. *Mabo* declined to investigate colonial constructions of Indigenous peoples and their implications for Indigenous sovereignty, contemporary Australian identity and the Australian state. Rather, *Mabo* insists that the complexity of political and property relationships between Indigenous peoples and colonial responsibility for their erosion or destruction have in most cases simply been swept away by the cleansing 'tide of history'.

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Notes

1 The extent to which western political thought is heavily imbued with colonial assumptions has motivated recent efforts by scholars to adapt the concepts of western political theory to the realities of Indigenous sovereignty, citizenship and native title (for example see the essays in Ivison et al., 2000).
2 David Collins acknowledged that Indigenous peoples possessed 'real estates' as 'hereditary property' (Collins, 1971[1798]: 598–9). His contemporaries, John Hunter and Governor Phillip merely spoke of Indigenous peoples 'residing' in particular localities (Hunter, 1968[1798]: 62; Phillip, 1914a[1790]: 160).
3 Although Cook had been dispatched to the South Pacific to 'take possession' of new lands with 'the consent of the natives', he seems to have concluded that he could not or did not need to try to do so. By 1788, Governor Arthur Phillip was merely instructed to attempt to 'conciliate the affections' of the Indigenous inhabitants ('Additional Instructions' in Beaglehole, 1955: cclxxiii; Phillip, 1914a[1790]: 13).
4 See for instance Governor Arthur Phillip's letter to Lord Sydney of 13 February 1790, Phillip, 1914b[1790]: 160–1.
5 This impression was confirmed by early colonists such as Collins (1971[1798]) and Tench (1996[1789]).
6 The *Yorta Yorta* 1998 decision was informed by an implicit assumption, derived in part from the Native Title Act, but also from the previous *Mabo* finding, that the validity of native title was to be measured by the continuity of Indigenous 'customs'. Where these 'customs' had been interrupted by European colonization, native title was held to be lost. As became clear in the *Yorta Yorta* case, however, considerable weight was placed on depictions of 'primitive' Indigenous 'customs' that were contrasted to European-style 'government' by colonial agents who identified themselves with 'civilization'.
7 'Report on the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia', Grey, 1924[1840]: 34–40.
8 On the use of 'native laws' by imperial administration see Fisch, 1992: 15–38.
9 Thomson (1924[1842]): 655.

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