



# 'Aboriginal Welfare' and the Denial of Indigenous Sovereignty

Copyright of Full Text rests with the original copyright owner and, except as permitted under the Copyright Act 1968, copying this copyright material is prohibited without the permission of the owner or its exclusive licensee or agent or by way of a licence from Copyright Agency Limited. For information about such licences contact Copyright Agency Limited on (02) 93947600 (ph) or (02) 93947601 (fax)

## Introduction<sup>1</sup>

In his finding against the State of Queensland in the *Mabo* case, which upheld the validity of Native Title to ancestral lands, Justice Brennan claimed that the common law in Australia would:

perpetrate an injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.<sup>2</sup>

This finding is significant for two reasons. First, Justice Brennan correctly identified the assumed social primitiveness of the Indigenous peoples as providing the rationale for their dispossession by Europeans. Secondly, in referring to the

1. This article was written while working with Christine Helliwell and Barry Hindess as part of a collaborative project entitled 'Government, Social Science and the Concept of Society', supported by the Australian Research Council at the ANU, and completed at Griffith University. I would like to thank the participants at a seminar in the political science program, RSSS, ANU, and at a postgraduate seminar in the Institute of Social Change and Critical Enquiry at the University of Wollongong. I am also very grateful to Barry Hindess, Jim Tully, Tim Rowse, Robert van Krieken, Maria Bargh, Brett Bowden and Manu Barcham for their generous comments on earlier drafts, and Paul Patton for access to an unpublished paper. I would also like to thank an anonymous reviewer for *ARENA*. As always, most thanks to Kathryn Seymour.
2. J. Brennan, *The Mabo Decision*, Sydney, Butterworths, 1993, p. 41.

'indigenous inhabitants of the Australian colonies', he implicitly recognized their subjection to British sovereignty.<sup>3</sup> What is significant about the *Mabo* decision is that while challenging the doctrine of *terra nullius* in Australian law, it did not challenge the sovereignty of the Australian state based upon the assertion of British sovereignty over the Indigenous peoples.<sup>4</sup> No acknowledgement of an Indigenous sovereignty was ever made or treaty signed between the Indigenous people of this land and representatives of the British Crown.

In explaining why this should have been the case, it is tempting to blame the naked self-interest of the British.<sup>5</sup> It would be easy to interpret the absence of a treaty with the Indigenous peoples as a 'failure' by successive British, colonial and Australian governments to acknowledge a prior Indigenous sovereignty, but the Europeans did not merely 'fail' to respect prior Indigenous sovereignty; they denied its possibility from the beginning. For the British, collective sovereignty was thought to inhere only in those peoples who had formed themselves into properly constituted societies. The belief that the Indigenous peoples of Australia had not so constituted themselves, and were thus a people without sovereignty, helped shape government policies towards Indigenous peoples into the twentieth century.

In this article I want to examine why and how Indigenous sovereignty was denied in Western thought, and to trace the implications of this denial for the formulation of policy in the nineteenth and early twentieth centuries.<sup>6</sup> The discourse of sovereignty that informed colonization, and later policies of Indigenous administration by Australian governments, was based on the view that sovereignty could never be exercised, claimed, or granted to a people who did not live in properly constituted societies. Australian governments today, despite the existence of some institutions of Indigenous self-government, still hold to the view that no Indigenous sovereignty has ever existed in the past or

---

3. Brennan, pp. 51 and 58.

4. As Webber suggests, the decision in *Mabo* involves a 'mediation of sovereignty' based on greater recognition of the survival and continuation of Indigenous societies separate from white society. J. Webber, 'Beyond Regret: *Mabo's* Implications for Australian Constitutionalism', in D. Ivison, P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge, Cambridge University Press, 2000, pp. 62, 84.

5. See for instance, P. H. Russell, 'Doing Aboriginal Politics', *Canadian Political Science Association Bulletin*, vol. 30, no. 2, 2001, pp. 7-11.

6. The focus of this article is on the non-Indigenous tradition of legal and political thinking about the concept of sovereignty and Indigenous sovereignty, and does not therefore incorporate the non-Indigenous response to that tradition. For an example of that literature see R. A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, New York, Oxford University Press, 1997. Similarly, the article does not address ongoing efforts to articulate a substantive Indigenous sovereignty. For an example of the literature on this aspect see T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, Ontario, Oxford University Press, 1999.

view that no Indigenous sovereignty has ever existed in the past or can ever exist in the future.<sup>7</sup>

### Conditions of Collective Sovereignty: 'Aborigines' and 'Society'

How are we to explain the fact that when Europeans arrived on these shores they failed to recognize that the Indigenous people, already here for thousands of years, possessed any claim to the land or to sovereignty over it and themselves? According to one influential view, the answer lies in the doctrine of *terra nullius* and the consequent denial by Europeans that any recognizable system of property laws existed among the Indigenous people.<sup>8</sup> Huggins goes further. She argues that 'assuming the absence of people' on this land was advantageous for the British, but that once it became clear there were substantial numbers of Indigenous inhabitants, it was claimed they were 'too primitive to be regarded as the actual owners and sovereigns'.<sup>9</sup> For Reynolds, the answer is to be found in the nature of contemporary discourses of sovereignty. Thus British annexation of Australia was buttressed by a notion of sovereignty in which acts of possession derived from the supreme authority of the state (or Crown). Indigenous peoples were thought

7. For a sovereign government to cede self-government to Indigenous people is not in itself incompatible with the denial of Indigenous sovereignty. According to the scheme proposed by Fleras, Australian Aboriginal self-government may be seen as compatible with a kind of 'functional' or 'nominal' sovereignty based on greater recognition of Indigenous jurisdictions and decision-making structures. Important though this may be, it hardly amounts to an endorsement of effective sovereignty, namely, the recognition that Indigenous people constitute an independent nation or nations which deserve acknowledgement of their right and capacity to determine their own affairs. As Christine Fletcher points out, this problem continues to bedevil ATSIC, currently the major institution of Indigenous self-government in Australia, an organization intended to serve its Aboriginal constituents while also being accountable to a Commonwealth Government Department and Minister. It is for reasons such as this that Havemann concludes that Aboriginal self-government may offer little to those who seek recognition of Indigenous sovereignty, unless a broader notion of Indigenous 'self-determination' encompassing the 'the assertions of indigenous peoples, not the concessions that the State is prepared to make' is pursued. See, A. Fleras, 'Politicising Indigeneity; Ethno-politics in White Settler Dominions', in P. Havemann (ed.), *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, Auckland, Oxford University Press, 1999, p. 199; C. Fletcher, 'Living Together but not as Neighbours: Cultural Imperialism in Australia', in Havemann, p. 345; and Havemann, 'Indigenous Peoples, the State and the Challenge of Differentiated Citizenship: A Formative Conclusion', in Havemann, p. 473. As James Tully has written, Indigenous self-government needs to be based on the firm recognition of Indigenous sovereignty, such that Indigenous and non-Indigenous peoples may 'treat each other as equal, self-governing and coexisting entities' in order to negotiate 'mutually binding relations of autonomy and interdependence', rather than of superiority and dependence. J. Tully, 'The Struggles of Indigenous Peoples for and of Freedom', in Ivison *et al.*, p. 53.
8. See, for example, B. A. Hocking and B. J. Hocking, 'Australian Aboriginal Property Rights as Issues of Indigenous Sovereignty and Citizenship', *Ratio Juris*, vol. 12, no. 2, 1999, p. 200.
9. J. Huggins, 'Cook and the New Anthropology', in M. Lincoln (ed.), *Science and Exploration in the Pacific: European Voyages to the Southern Oceans in the Eighteenth Century*, Woodbridge, The Boydell Press, 1998, p. 202.
10. H. Reynolds, 'Sovereignty', in N. Peterson and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge, Cambridge University Press, 1998, p. 209.

to possess no equivalent conception of political right.<sup>10</sup> On this view, the fallacy of British possession can be challenged by showing that 'the Aboriginal tribes exercised a form of sovereignty that could have been recognised by the international law of the late eighteenth century and early nineteenth century'.<sup>11</sup>

These views are premised on the conviction that the original inhabitants of this land possessed a sovereignty that those who came later did not recognize. They attribute this latter development to British (and European) dishonesty or self-interest, maintaining that an Indigenous sovereignty even by the standards of the time could and should have been acknowledged.

As appealing as it may be to emphasize European dishonesty, such a viewpoint does not adequately account for the denial of Indigenous sovereignty in Australia,<sup>12</sup> nor does it convey the complexity of the concept of sovereignty and the dilemmas faced by the British in dealing with a people they had 'subjected' but not 'conquered'. If the British had embarked on a 'conquest' in Australia, then British subjecthood would have extended no further than the extent of British might.<sup>13</sup> Those who had been conquered would have been accorded status as 'subjects' while those who had not would have been considered to be subjects of either another foreign or an Indigenous power. This is not how the British saw it in 1770 or 1788, however, and despite later prevarication on the issue of whether they were engaged in conquest and warfare with the natives, and despite occasional queries from the courts, the official position remained unchanged throughout the nineteenth century.<sup>14</sup> And yet, if the Indigenous people in fact contested the arrival of Europeans, as they almost invariably did, and as even Cook admitted, why did the British not accord them status as sovereigns in their own land?

The answer lies in the very discourse of sovereignty that Europeans applied and developed in New Holland and Australia, a discourse that provided ample scope for Indigenous dispossession. It is usually the case today, as Quentin Skinner has observed, that we commonly regard 'the state as the holder of sovereignty'.<sup>15</sup> To speak of sovereignty in this sense is to speak of

11. Reynolds, p. 210.

12. A similar critique is made by B. Attwood, 'Aborigines and Academic Historians: Some Recent Encounters', *Australian Historical Studies*, vol. 24, no. 94, 1990, p. 130.

13. This issue and its implications are canvassed in B. Buchan, 'Subjecting the Natives: Aborigines, Property and Possession Under Early Colonial Rule', *Social Analysis*, vol. 45, no. 2, 2001, pp. 143-62.

14. As Hookey has pointed out, the courts raised doubts as far back as 1836 over whether New Holland had been peacefully settled or conquered, and what this entailed for the legal status of the Indigenous inhabitants. At least one of these cases will be briefly discussed below. J. Hookey, 'Settlement and Sovereignty', in P. Hanks and B. Keon-Cohen (eds), *Aborigines and the Law*, Sydney, George Allen and Unwin, pp. 1-18.

15. Q. Skinner, 'Hobbes and the Purely Artificial Person of the State', *The Journal of Political Philosophy*, vol. 7, no. 1, 1999, p. 2.

states as sovereign entities that interact, fight wars, make alliances and sign treaties with one another.<sup>16</sup> This reading of sovereignty, however, gives little idea of the complexities, not to say ambiguities, inherent in the development of the concept, and its particular application by Europeans in their dealings with non-European peoples.<sup>17</sup> A crucial feature in early modern thought was that sovereignty was treated as a quality inherent in a particular kind of collective structure.<sup>18</sup> Jean Bodin, for example, defined a commonwealth as 'a lawfull government of many families, and of that which unto them in common belongeth, with a puissant soveraintie'.<sup>19</sup> Such sovereignty is not simply a quality of the state or commonweal, but of a certain ordered association of individuals, groups, families and corporations, namely, a 'civil society'.<sup>20</sup> Thomas Hobbes, like other social contract thinkers, thought of sovereignty as a quality inherent in civil society, derived from the individual surrender of personal sovereignty which belongs to all in the state of nature, to form a collective sovereign body.<sup>21</sup> Importantly, he conceived civil society as relying on a series of mutual agreements (covenants) between individuals to establish one ruler (a sovereign) who exercises supreme power.<sup>22</sup> It was John Locke, more than any other, who elevated this conception of the relationship between civil society and sovereignty into an implicit justification for the dispossession of non-European indigenous peoples.<sup>23</sup> Locke was quite clear that

- 
16. J. Hoffman, 'Can we Define Sovereignty?', *Politics*, vol. 17, no. 1, 1995, p. 56; D. Strang, 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in T. J. Biersteker and C. Weber (eds), *State Sovereignty as Social Construct*, Cambridge, Cambridge University Press, 1996, p. 22-49; A. B. Murphy, 'The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations', in Biersteker and Weber, pp. 81-120.
17. C. Windler, 'Representing the State in a Segmentary Society: French Consuls in Tunis From the Ancien Regime to the Restoration', *The Journal of Modern History*, vol. 73, 2000, pp. 236-7.
18. Robert Latham has recently argued that the conventional understanding of 'state sovereignty' should be superseded by what he calls 'social sovereignty' based on the 'bodies of relations that effectively structure ... social life'. R. Latham, 'Social Sovereignty', *Theory, Culture and Society*, vol. 17, no. 4, 2000, p. 3. This approach, and his subsequent treatment of the early modern theorists of sovereignty, overlooks the extent to which sovereignty was in fact defined by many of those same theorists as an attribute of 'states' founded on appropriately ordered civil society. See Latham, pp. 5-7.
19. J. Bodin, *The Six Bookes of a Commonweale* [1606], facsimile reprint, trans. R. Knolles, Cambridge (Mass.), Harvard University Press, 1962, pp. 1, 160-1.
20. Bodin, pp. 361-5.
21. T. Hobbes, *Leviathan* [1651], Harmondsworth, Penguin, 1968, p. 228. Italics in original.
22. Hobbes, p. 224. Raia Prokhovnik argues that liberal notions of sovereignty, lifted from absolutists such as Bodin and Hobbes, are in tension with liberal aspirations to individuality and self-government. R. Prokhovnik, 'The State of Liberal Sovereignty', *British Journal of Politics and International Relations*, vol. 1, no. 1, 1999, pp. 70-1. My view, however, is that this 'tension', which is real enough when considering a literal interpretation of liberal and absolutist doctrines, expresses the deeper commitment in liberal thought to the existence of civil society as the foundation for the power and sovereignty of the state that protects it.
23. This use of Locke owes much to the approach taken by Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995, pp. 70-80. For Tully the crucial aspect of Locke's argument is his use of property as the distinguishing feature between 'civilized' Europeans and 'primitive' Americans. Without

sovereignty, or the 'Power of Life and Death', was alien to associations in the state of nature because, within that condition, each individual retained his or her own sovereignty.<sup>24</sup> Political and civil societies, on the other hand, were thought to be based on the resignation of this sovereignty to a common power that might adjudicate disputes and enforce laws binding upon all members.<sup>25</sup> Locke made this clear in his account of the invention and use of money, which he described as an invention intimately tied to the formation of societies and states. What this implied was that only those people who had engaged in voluntary agreements (giving consent to the use of money) could be regarded as a people with their own 'supreme power'. In his words:

... several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, by *Compact and Agreement*, settled the *Property* which Labour and Industry began; and the Leagues that have been made between several States and Kingdoms, either expressly or tacitly disowning all Claim and Right to the Land in the others Possession, have, by common Consent, given up their Pretences to their natural common Right, which originally they had to those Countries, and so have, by *positive agreement*, settled a *Property* amongst themselves, in distinct Parts and parcels of the Earth: yet there are still *great Tracts of Ground* to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent and of the Use of their common Money) *lie waste*, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.<sup>26</sup>

---

disagreeing with Tully's interpretation, I would place more emphasis on the distinction in the attainment of society implicit in Locke's arguments.

24. J. Locke, *Two Treatises of Government, Book II* [1704], Cambridge, Cambridge University Press, 1988, p. 322. Locke was reluctant to speak of this collective sovereignty in any clear and emphatic sense, preferring the less absolute but more ambiguous term 'supreme power'. J. T. Scott, 'The Sovereignless State and Locke's Language of Obligation', *American Political Science Review*, vol. 94, no. 3, 2000, pp. 548-50.
25. The whole structure of Locke's argument hinges upon the surrender of this personal sovereignty, which belongs to us in the state of nature, to provide political society with the 'supreme power' it requires to guard and protect property in civil society. In his refutation of Filmer in *The First Treatise*, Locke spoke of Filmer's view that the making of war and peace constituted 'marks of Sovereignty'. See Locke, p. 238. If this were so, Locke argued, then it could be said that any person who makes war can be described as sovereign, including pirates or mercenary captains, but Locke is here speaking of a very particular power, namely the power of war and peace, and it is clear that he is not speaking of the other power that is vital to the creation of political society, namely the power of making laws and punishing offenders. The distinction between civil and political society, although far from clear, resides, I take it, in the rather different connotations of the descriptions of each. 'Political' society consisted of the institutional, legal and penal arrangements of society, but 'civil' society consisted of the union of individuals who had such arrangements to which they could appeal.
26. Locke, p. 299. As Locke makes clear in remarks preceding and following this remarkable passage, such people who had not consented to the use of money were to be found in

The important point here was that, for Locke, consenting to the use of money indicated that a people had settled among themselves the agreements that bound civil and political society, such as laws and the delegation of authority. As a consequence, those people who had not consented to the use of money — and here Locke singled out the First Nations people in America — could not be considered to have established civil and political societies. The First Nations people were thus not entitled to claim substantive collective sovereignty, which was a quality only fully achieved in European civil and political societies.<sup>27</sup>

Early observations by the British of the Indigenous inhabitants of New Holland, despite some prevarication, conform very closely to this image of a people without society. Cook observed that the inhabitants lived in 'small parties', had 'no fixed habitation, but move from place to place like wild beasts in search of Food', living 'wholly by fishing and hunting, but mostly by the former, for we never saw one Inch of Cultivated land in the whole Country'.<sup>28</sup> Hawkesworth's original edition of *Cook's Journal*, although more literary creation than naval officer's professional prose, was even more emphatic:

All the Inhabitants that we saw were stark naked; they did not appear to be numerous, nor to live in societies, but like other animals were scattered along the Coast, and in the Woods. Of their manner of life, however, we could know but little, as we were never able to form the least connection with them.<sup>29</sup>

There was much debate at the time over the reliability of Hawkesworth's rendering of Cook's account, but more reliable first-hand accounts of the colony, even those sympathetic to the

---

America, supplying him with an image of a veritable state of nature: '[t]hus in the beginning all the World was *America*'. See Locke, p. 301. It is worth noting Vattel's definition of a sovereign nation state as a 'society of men who have united together' for mutual benefit. E. Vattel, *The Law of Nations or the Principles of Natural Law* [1758], trans. C. G. Fenwick, Washington, Carnegie Institution, 1916, p. 11. He argued further that sovereignty was intimately connected to the formation of 'civil society', and that because natives who did not cultivate the soil could not be said to live in a civil society, there was a just claim that they may be confined 'within narrower bounds' by those best placed to make better use of the soil, pp. 84–6.

27. Locke, pp. 339–40. See also T. C. Jacques, 'From Savages and Barbarians to Primitives: Africa, Social Typologies, and History in Eighteenth-Century French Philosophy', *History and Theory*, vol. 36, no. 2, 1997, pp. 203–6.

28. J. Cook, *Captain Cook's Journal During his First Voyage Round the World Made in H. M. Bark 'Endeavour', 1768–1771*, London, Elliott Stock, 1893, facsimile, Adelaide, Libraries Board of South Australia, 1968, p. 320.

29. J. Hawkesworth, *An Account of the Voyages Undertaken by the Order of His Present Majesty for Making Discoveries in the Southern Hemisphere*, quoted in A. Dalrymple, *A Serious Admonition to the Public on the Intended Thief Colony at Botany Bay* [1786], Sydney, D. S. Ford, 1943, p. 25. Interestingly, Hawkesworth referred to the Indigenous people of New Zealand as excelling in 'tillage', possessing chiefs with 'dominions' incorporating 'subordinate chiefs', and living in 'little societies'. The Indigenous people of New Holland, however, he described as

Indigenous peoples, tended to bear out rather than diverge from Hawkesworth's judgement. Watkin Tench, for example, reports that he did not know of 'any civil regulations' or observe any subordination among the Indigenous people.<sup>30</sup> Collins' *Account* is even more explicit, referring to the Indigenous inhabitants as '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'.<sup>31</sup> What is implied by such comments is that the Indigenous people merely 'associated', that there was no structure of authority, no political ordering of a distinct society, and no permanent settlement. While early observers noted the existence of quite large tribes, and even of relations between tribes, they also noted a general antipathy between and unwillingness of tribes in general to live together for any length of time. On the basis of such 'evidence', it was assumed that the Indigenous inhabitants of New Holland did not possess any collective sovereignty and that they belonged entirely within the legal category of 'British subjects' or 'subjects of the Crown'.<sup>32</sup>

### Peoples without Sovereignty, Subjects without Treaty

As a result of this view attempts were made throughout the nineteenth century to form Indigenous peoples into separate native communities where traditional ways of life could be modified and shaped to suit European administration. This seemed to be the thrust of the House of Commons Select Committee on the treatment of 'Aborigines' in British settlements in 1836–1837, which led to the establishment of 'the Protectorate' (1837–1849) system of administration.<sup>33</sup> One main problem that preoccupied

---

having neither town nor village in the whole country. Hawkesworth, *An Account*, vol. 3, London, W. Strahan and T. Cadell, 1773, pp. 61, 62, 230.

30. W. Tench, 'A Narrative of the Expedition to Botany Bay' [1789], in T. Flannery (ed.), 1788, Melbourne, The Text Publishing Co., 1996, p. 57.

31. D. Collins, *An Account of the Colony in New South Wales* [1798], vol. 1, facsimile, Adelaide, Libraries Board of South Australia, 1971, p. 544.

32. It may be worth noting here that as far as Dalrymple seems to have been concerned in his *Serious Admonition*, the question of sovereignty was only an issue between the British Crown and the East India Company. According to the Company's Charter, New Holland lay within its mandate, and he was at best unconvinced that the Crown could claim it back, especially for so base a purpose as the establishment of a convict colony, which could not fail to become a source of piracy and smuggling injurious to trade, and where punishment would be ineffective. Dalrymple, pp. 17–18, 24, 26–7.

33. In the words of the Select Committee Report, the aims of Aboriginal policy throughout the British Empire should be to recognize that Aborigines lived in a 'less advanced state of society'. In relation to Australian Indigenous people, the Report stated that they were 'the least-instructed portion of the human race in all the arts of social life ... and so entirely destitute ... of civil polity' that it recommended Protectors be appointed who could form and manage native communities dedicated to 'that species of industry which is least foreign to the[ir] habits and dispositions'. Report from the Select Committee on Aborigines (British Settlements) With Minutes of Evidence, *British Parliamentary Papers, Anthropology, Aborigines*, vol. 2, Shannon, IUP, 1968. Quotations from pp. 75, 46, 80, 82–3. (Subsequently BPP).

British and colonial authorities during the period of the Protectorate was the issue of Indigenous amenability to British law, as shown by an aborted murder trial involving an Indigenous defendant in 1841.<sup>34</sup> In this case, Justice J. W. Willis seemed about to make a finding that the case was not one of simple malice but of the observance of native laws, and hence did not fall within his jurisdiction. If it were to be admitted that Indigenous peoples possessed 'laws and usages of their own', he claimed, then the basis of British possession would be immediately called into question unless 'treaties should be made with them'.<sup>35</sup> The commission establishing the colony, Willis argued, asserted 'the sovereignty of the crown ... over the whole of the territory comprised within the limits it defines' but did not provide 'any specific recognition ... of the claims of the aborigines, either as the sovereigns or proprietors of the soil'.<sup>36</sup>

The conclusion toward which Willis was heading before the trial was aborted was not that there should be an end to British supremacy but, on the contrary, that it should be securely and lawfully established.<sup>37</sup> This entailed recognition of the collective

34. In the mid-1840s Edward John Eyre, then employed as resident Magistrate and Protector of Aborigines at Moorunde on the River Murray, gave a clear idea of the dilemma: 'In declaring the Natives British subjects, and making them amenable to British laws — they have been placed in the anomalous position of being made amenable to laws of which they are quite ignorant, and which at the same time do not afford them the slightest redress for any injuries they may sustain at the hands of Europeans. This arises from their being unable legally to give evidence in a Court of Justice, and from its rarely happening that any aggressions upon them take place in the presence of other Europeans who might appear as witnesses for them'. He went on to note that there were several cases of violence against Indigenous people that he was unable to act upon because of 'my inability to receive their evidence, and from the impossibility of procuring any other than Native evidence'. E. J. Eyre, *Reports and Letters to Governor Grey From E. J. Eyre at Moorunde, Adelaide, Sullivan's Cove, 1845*, pp. 48–9 (Letter dated 1 February 1843). More important than this difficulty, Eyre subsequently wrote, was the problem of using British law to shield the young from the 'brutal violence of the elder or the stronger' thus allowing them to enjoy 'protection' not only from Europeans but from one another as well. See Eyre, p. 61.
35. BPP, *Colonies, Australia*, vol. 8, p. 151. Prior to his arrival in Australia, Willis had worked in Canada and was no doubt familiar with the Cherokee cases of Chief Justice Marshall in the United States. Willis, however, did not refer to Marshall, but to the Treaty of Waitangi. In *Worcester v Georgia* (1832) Marshall affirmed the substance of his earlier finding in *Cherokee Nation v Georgia* (1831) that the Cherokee peoples were a 'distinct political society' deemed 'capable of managing its own affairs and governing itself'. While also affirming the 'superior policy' of the United States Government, Marshall referred to the Cherokees as 'domestic dependent nations' under the Federal Government's 'pupillage'. In *Worcester v Georgia* Marshall clarified this relationship by referring to the history of treaty making as ample recognition that the Cherokee nation exists as 'a distinct community, occupying its own territory ... in which the laws of Georgia can have no force' because they failed to 'recognise the pre-existing power of the [Cherokee] nation to govern itself'. See *Cherokee Nation v Georgia*, 1831; and *Worcester v Georgia*, 1832, in F. P. Prucha (ed.), *Documents of United States Indian Policy*, Lincoln, University of Nebraska Press, 1990, pp. 58–62.
36. Willis even referred to the British destruction of their 'existence as self-governing communities', BPP, *Colonies, Australia*, vol. 8, p. 152.
37. It is worth remembering that any treaty that may have been offered to Indigenous people on the basis of their dependent ally status may have had 'potentially disastrous consequences' for them because any such recognition would more than likely have been an 'Act of State beyond the jurisdiction of the ordinary courts', thus rendering it immune to consolidation in the courts and liable to executive removal. See Hookey, p. 7. 'Act of State'

## status of Indigenous communities as 'dependent allies':

I repeat that I am not aware of any express enactment or treaty subjecting the aborigines of this colony to the English colonial law; and I have shown that the aborigines cannot be considered as foreigners in a kingdom which is their own. From these premises ... I am at present strongly led to infer that the aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs.<sup>38</sup>

The conclusion to be drawn from Willis' arguments was that the Indigenous peoples possessed their own form of society with its own internal laws of operation and development. Colonial administrators could thus either protect and preserve native tribes and communities as 'nations' or 'dependent allies' — as was the case with the tribes of the Six Nations in Canada — which required some form of agreement or treaty or, as recommended by Captain George Grey, the Indigenous peoples could be entirely subjected to British law, requiring the elimination of all native laws and customs.

Grey was an archetypical British imperialist, enthusiastically committed to the view that he and his European colleagues were in the best position to know what to do for the Indigenous people under their control.<sup>39</sup> Grey's 'Report on the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia' was based in part on his own disastrous contacts with Indigenous people during his two expeditions.<sup>40</sup> He began by noting that the great error of British policy was to regard the natives as British subjects while allowing native laws to persist so long as these did not affect Europeans.<sup>41</sup> He was convinced that:

---

doctrine rested on a view of sovereignty expounded by Sir George Cornwall Lewis, former Secretary of War, who argued that the measure of sovereignty was the 'arbitrary' power of the state to make and break whatever commands it chooses, from which he derived the view that there cannot be 'anything in the form of any government, which will afford its subjects a legal security against an improper, arbitrary exercise of the sovereign power'. G. C. Lewis, *Government of Dependencies* [1841], Washington, M. Walter Dunne, 1901, p. 12.

38. *BPP, Colonies, Australia*, vol. 8, p. 155.

39. At the time he submitted his Report, Grey had managed to survive two less than successful expeditions of discovery in Western Australia, and on the strength of this was to be appointed as Governor of South Australia, serving subsequently on two occasions as Governor of New Zealand — once during the period of the Maori Wars — and Governor of the Cape Colony in South Africa. J. Rutherford, *Sir George Grey, K.C.B., 1812-1898: A Study in Colonial Government*, London, Cassell, 1961.

40. The journals he produced from this experience were to provide some of the more detailed ethnological accounts of Indigenous social structure since the early sketches of Collins and Tench, and informed the work of figures such as Lubbock, Tylor and Morgan. M. Spriggs, 'Who Taught Marx, Engels and Morgan About Australian Aborigines', *History and Anthropology*, vol. 19, no. 2-3, 1997, p. 190.

41. *Historical Records of Australia*, vol. 21, October 1840-March 1842, p. 34. Report dated 1840 (Subsequently HRA).

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 ...<sup>42</sup>

One of the main problems associated with allowing native laws and customs to survive was that the Indigenous peoples would be unable to appreciate the nature of crime. Prosecution for murder, rape or theft, for example, would be pursued when such acts were committed against Europeans but not when perpetrated upon other Indigenous people. As a consequence, Indigenous people would be led to believe that 'their criminality consists not in having committed a certain odious action, but in having violated our prejudices'.<sup>43</sup> Grey thus recommended the complete and universal subordination of Indigenous people to British Law. In order to accomplish this end he recommended a policy of cultural obliteration, suggesting the payment of bounties to any settlers able to prove that they had 'reclaimed' an 'aboriginal' from their 'wild state'.<sup>44</sup>

Grey's proposals elicited different responses from administrators in Britain and Australia. Lord Russell at Westminster latched on to them immediately as a way of advancing British administration and recommended them to colonial governors.<sup>45</sup> Governor Gipps in New South Wales, however, diplomatically paid homage to the author's good intentions while rejecting the proposals as a slight on his administration and as unworkable. Gipps maintained that he was committed to upholding the sovereignty of British Law, and that 'no Law, save English law ... the Law of the Colony founded on English Law, is recognised as being of any force in it'.<sup>46</sup> Governor Hutt's reaction reflected the realities of white settlement in Western Australia in which there were even greater limits on the capacity to enforce British law than in New South Wales. Hutt claimed that it was unwise to regard all Indigenous people as British subjects:

I conceive that the aborigines are not in a position to be treated in all points as British subjects; that we have not the means to supervise and control their dealings with one another in the bush and in the wild districts ... and that to attempt to make them at all

---

42. *HRA*, vol. 21, pp. 34-5.

43. *HRA*, vol. 21, p. 36.

44. *HRA*, vol. 21, pp. 38-9.

45. *BPP, Colonies, Australia*, vol. 8, Shannon, IUP, 1969, p. 99-100, 392.

46. *HRA*, vol. 21, pp. 312-15, quote from p. 312. Dispatch dated 24 January 1842.

times and under all circumstances in their habits and customs amenable to our laws, would be frequently next to impossible, and might have the effect of a teasing and tiresome persecution, estranging them from us, and rendering them only more tenacious of their own rude and barbarous observances.<sup>47</sup>

Hutt thus proposed that Indigenous peoples living beyond effective white control be left to their own customs, until by gradual influence they could be brought under more rigorous subjection.

While such a policy could fit the expediencies of governing a remote and widely dispersed population, the recognition of native customs and laws in the courts, as Justice Willis had proposed, threatened the foundation of British sovereignty. Gipps proposed to introduce legislation to settle the matter and instructed the Colonial Secretary, Edward Deas Thomson, to compile a brief précis of the colonial government's position on the issue of British sovereignty. This letter was sent to Chief Justice Sir James Dowling and the other judges of the Supreme Court in order to elicit their advice, without, he claimed, 'any view to biasing the opinion of the Judges'.<sup>48</sup> Thomson's letter stipulated the grounds upon which British sovereignty rested, including the argument that 'upon British Territory, no Law save British Law can prevail, unless by virtue of some Treaty' and that no such treaty 'has ever been made either with or in respect to the Aborigines of New South Wales'.

Thomson's letter makes it clear that the claim to British sovereignty rested on no more than the practice of British sovereignty, but as the colonial administrators knew, their ability to exercise that sovereignty only extended so far. Beyond a few days' ride from each centre of settlement, Her Majesty's Indigenous subjects were invariably maintaining their own customs and laws. While the persistence of native customs had to be admitted, the continuing crisis in British administration — marked by the collapse of the Protectorate in 1849 — was that, despite all efforts, no way had yet been found to incorporate native tribes into the structure of white rule.<sup>49</sup> As Lord Russell had observed in 1840, '[w]e should run the risk of entire failure' to govern Indigenous peoples properly:

if we should confound in one abstract description of aborigines the

47. BPP, *Colonies, Australia*, vol. 8, Hutt to Russell, 10 July 1841, p. 392.

48. HRA, vol. 21, p. 655. Letter dated 4 January 1842.

49. The attempt to do so elsewhere, notably in Africa, culminated in Lord Lugard's policy of the 'Dual Mandate' resting on 'indirect rule'. Lugard, *The Dual Mandate in British Tropical Africa* [1922], London, Frank Cass, 1965, pp. 200–1. No such system was ever employed in Australia, but continual efforts to administer tribalized Indigenous people according to their own customs were made in the early part of the twentieth century (see Section IV below).

various races of people, some half-civilised, some little raised above the brutes ... One tribe in Africa often differs widely in character from another at 50 miles distance; the red Indian of Canada and the native of New Holland are distinguished from each other in almost every respect. We indeed, who come into contact with these various races, have one and the same duty to perform towards them all, but the manner in which this duty is to be performed must vary with the varying materials upon which we are to work. No workman would attempt to saw a plank of fir and cut a block of granite with the same instrument, though he might wish to form each to the same shape.<sup>50</sup>

The apparent 'inaptitude' of the Indigenous people to 'change their desultory habits and learn those of settled industry' led Russell to believe that the 'unequal contest' between the natives and Europeans, with their 'superior' civilization, must lead to the 'disappearance' of the former.<sup>51</sup> Consequently, he suggested that the 'best chance of preserving the unfortunate race of New Holland lies in the means employed for training their children', and thus recommended that the Governor be made guardian of the 'more promising' children, thereby facilitating their removal and institutionalization.<sup>52</sup> Such policies were intended to subject Indigenous people to constant observation and control.<sup>53</sup> They were policies designed to fit an entirely subjected people. The effort to conceptualize why this should be the case occupied the minds of a series of administrators, pioneer ethnologists, anthropologists and even eminent legal theorists throughout the remainder of the nineteenth century.

### 'Aborigines' in Late Nineteenth-century Thought

The almost universal admission in the often prolix reports of the Protectors, and the more cursory reports of the Commissioners of Crown Lands, throughout the 1840s was that the Indigenous people were unable to submit to civil or political arrangements, and that no advance in their social condition could be evinced.<sup>54</sup> The official discourse of the time reflected a growing sense of division between the attainment of society, and the social arrangements of Indigenous peoples. The two most detailed

50. *BPP, Colonies, Australia*, vol. 8, p. 73. Lord J. Russell to Governor Sir G. Gipps, 25 August 1840.

51. *BPP, Colonies, Australia*, vol. 8, pp. 73-4.

52. *BPP, Colonies Australia*, vol. 8, p. 74.

53. As Russell described it, regular reports were to be submitted to Parliament by Protectors and Commissioners of Crown Lands relating to the number of Indigenous people, 'their residence at any particular spot, the changes in their social condition, the schools, and all other particulars, including the state and prospects of the aboriginal races', *BPP, Colonies, Australia*, vol. 8, p. 74.

54. See for example, *HRA*, vol. 21, p. 745; and vol. 22, pp. 64, 170, 172, 648-54.

contemporary accounts of Indigenous social structure, compiled by explorers who subsequently became colonial administrators, were George Grey's *Journals of Two Expeditions of Discovery* in 1841, and Edward John Eyre's *Journals of Expeditions of Discovery* in 1845. Unlike earlier observers, Grey in particular was willing to concede that the Indigenous tribes possessed some 'social habits', engaged in 'social intercourse and conversation', and even had 'institutions',<sup>55</sup> but both Grey's and Eyre's journals confirm that whatever social habits the Indigenous peoples possessed they did not have any kind of recognizable society. Eyre, for instance, who also incorporated the observations of Grey and the South Australian Protector of Aborigines Matthew Moorhouse, spoke of the inability of Indigenous people to make 'social ties and connections' because the power of the elders drives them back 'among the savage hordes'.<sup>56</sup> What distinguishes these hordes from society was the fact that the former did not possess 'any form of government' and any member of the tribe 'is at liberty to act as he likes, except, in so far as he may be influenced by the general opinions or wishes of the tribe'.<sup>57</sup> This general opinion, unlike the civilized influences of civil society, had the force of 'immemorial' custom which had 'usurped the place of laws' and was 'more binding', exerting an 'irresistible sway ... a chain that binds in iron fetters'.<sup>58</sup> Society thus connoted an artefact of governmental activity held together by a delicate framework of norms toward which each individual member was able to orient their activity through their own processes of reason. The way in which the Indigenous people lived prior to or beyond white contact was emphatically *not* society, because the individual was entirely subject to the thrall of custom or tradition. As Grey put it:

to believe that man in a savage state is endowed with freedom either of thought or action is erroneous in the highest degree. He is in reality subjected to complex laws, which not only deprive him of all free agency of thought, but, at the same time by allowing no scope whatever for the development of intellect, benevolence, or any other great moral qualification, they necessarily bind him down in a hopeless state of barbarism, from which it is impossible for man to emerge, so long as he is enthralled by these customs ... so ingeniously devised ... [to resist] any effort that is made to overthrow them.<sup>59</sup>

55. G. Grey, *Journals of Two Expeditions of Discovery* [1841], Adelaide, Libraries Board of South Australia, 1964, pp. 219–20, 251, 253.

56. E. J. Eyre, *Journals of Expeditions of Discovery Into Central Australia* [1845], Adelaide, Libraries Board of South Australia, 1964, p. 430.

57. Eyre, *Journals*, p. 315.

58. Eyre, *Journals*, p. 384.

59. Grey, pp. 217–8.

The relevant distinction here between savage hordes and civilized society was the predominant view of Aborigines and their tribes until well into the twentieth century. According to this view it was improper even to consider Indigenous sovereignty when the level of social development in the Indigenous population was considered so primitive that any political consciousness could hardly be said to exist. This view was elevated to the status of legal doctrine by the highly influential one-time administrator of the *Raj*, and founder of British comparative jurisprudence, Sir Henry Maine. Maine is today most remembered for his dictum that modern 'progressive' society had originated in the transition 'from *Status to Contract*'.<sup>60</sup> That is, while ancient society was characterized by the solidity of status underpinned by relations within the family unit,<sup>61</sup> in modern progressive societies' relations between individuals are organized on the basis of contract, or the free agreements between autonomous individuals.<sup>62</sup> Only this latter quality of 'contract-autonomy' was compatible with the existence of political sovereignty, whereas status and the family were incapable of grounding true sovereignty.<sup>63</sup> Only in Western Europe, Maine argued, did the 'Aryan race' develop political communities through processes of amalgamation, federation and confederation of smaller communities, eventually creating legislative authority.<sup>64</sup> Such authority was based on the recognition of sovereignty, the right to make laws, to legislate and thereby end the reign of custom and any other 'habits having no sanction from law'.<sup>65</sup>

Perceptions of Australia's Indigenous peoples were shaped by and helped to sustain this view. The Indigenous peoples of

60. H. S. Maine, *Ancient Law* [1861], Bristol, Thoemmes Press, 1996, p. 170, also 168–70.

61. Maine, pp. 135–8.

62. Maine, p. 169. As he put it elsewhere: 'Each individual in India is a slave to the customs of the group to which he belongs; and the customs of the several groups, various as they are, do not differ from one another with that practically infinite variety of difference which is found in the habits and practices of the individual men and women who make up the societies of the civilised West'. Maine, *Village Communities in the East and West*, 3rd edn, London, John Murray, 1876, pp. 13–14.

63. Maine illustrated this distinction with examples drawn from Indian and European history respectively in distinguishing his own conception of sovereignty from an alternative account of the origins of sovereignty in the 'authority of the Patriarch or Paterfamilias over his family'. Such authority could be found, Maine asserted, in recent Indian history in which the authority of rulers was purely despotic, that is, it expressed itself in extractive commands and not in the formulation of laws. Maine, *Lectures on the Early History of Institutions* [1888], Buffalo, William S. Hein, 1987, p. 379–82. See also Austin, *Lectures on Jurisprudence*, vol. 2, p. 774. It is worth noting here that for Austin, every sovereign government is 'free from legal restraints: or ... every supreme government is legally despotic', vol. 1, p. 283: He goes on to disparage the distinction between free and despotic governments on the basis that they signify no more than a conceptually loose value judgement that the former are popular and democratic (hence good), and the latter personal and autocratic (hence bad), pp. 284–5.

64. Maine, *Lectures on the Early History*, pp. 388–9.

65. Maine, *Lectures on the Early History*, p. 390.

Australia were thought to exemplify a kind of primitive condition illustrative of the origins of humankind. Such a view was to prove influential in the development of the evolutionary foundations of British and American social anthropology, partly through the work of the two pioneers of Australian ethnological studies, Lorimer Fison and A. W. Howitt.<sup>66</sup> Their work was to serve as a 'scientific' foundation for the delimitation of the boundaries of native capacity to participate in society, and thus was to help buttress the assumptions that informed the period of legislative control of Indigenous people in the late nineteenth and early twentieth centuries.<sup>67</sup> Howitt thought there was a clear delineation between society and Indigenous tribes, noting that in these tribes each individual was entirely subject to a structure of invariable corporate membership, whereas:

civilised man is now an 'individual'. He is no longer a mere member of a corporate community. His whole life's training, his domestic and social relations, are strictly in accord with his individualised condition.<sup>68</sup>

Referring to Maine as his authority, Howitt claimed that Indigenous tribes provided the clearest example of the most primitive condition of human beings in which all social organization was based on the communal family (consanguinity) with descent in the female line. Only when the 'individual family' superseded this structure, as had occurred long ago among 'Aryan' peoples, he argued, with 'descent through the father', was

66. Spriggs, pp. 192–202; and T. Murray, 'Aboriginal (pre)History and Australian Archaeology: The Discourse of Australian Prehistoric Archaeology', in B. Attwood and J. Arnold (eds), *Power, Knowledge and Aborigines*, Melbourne, La Trobe University Press, 1992, p. 5. This is not to say that they alone, or even in particular, were responsible for what was done during this period. Rather, that the understanding of Aboriginal development, and their present and future limitations found in their work, provided a necessary back-drop to the policies of 'welfare' and 'care' of Indigenous people, which expressed themselves in policies of reservation, removal, child separation, and cultural obliteration.

67. As an example one may cite the *Aborigines of Victoria* compiled by R. Brough Smyth when he was serving as Secretary to Victoria's Central Board for the Protection of Aborigines, the first centrally administered state agency responsible for Aboriginal administration and the first to have its own legislative framework in 1869. The work clearly shows the intimate association between the development of ethnological knowledge and the extension of administrative power. Among Brough Smyth's correspondents was A. W. Howitt, along with others directly involved with Aboriginal administration, such as Board member A. C. Le Souef, and station manager and missionary F. A. Hagenauer. Much of the temper of the book is prefigured in the comment from the introduction to the effect that: 'The customs of the natives of Australia are so like, in many respects, those of other existing savage or barbarous races and those of the people of ancient times, that one feels more and more the necessity of a classification, in which would appear every known custom and the place where it is practiced, exactly after the manner that the geologist elaborates his system of the classification of rocks'. R. Brough Smyth, *The Aborigines of Victoria* [1876], Melbourne, John Currie O'Neill, 1972, p. xxv.

68. A. W. Howitt and L. Fison, *Kamilaroi and Kurnai*, Melbourne, George Robertson, 1880, p. 332.

the solidity of the communal family weakened and the conditions created for the emergence of 'individuals'.<sup>69</sup> To illustrate the difference, Howitt used the example of tribal understandings of 'crime'. Within the tribes, he maintained, any offence was not suffered individually but by all as members of a body corporate; similarly, redress might be sought not only against the particular perpetrator, but also against any members of the perpetrator's tribe.<sup>70</sup> The authority for this was once again Maine, whose reflections on India led Maine to the conclusion that there is no 'right or duty in an Indian village community; a person aggrieved complained not of an individual wrong but of the disturbance of the order of the entire little society'.<sup>71</sup>

According to the celebrated American ethnologist, Lewis Henry Morgan, with whom Howitt and Fison had corresponded, their work provided evidence of the 'gens', an original and extremely primitive form of social organization based on kin 'with descent in the female line'.<sup>72</sup> Morgan claimed that this structure was the universal social condition of human beings at the most primitive stage, and that it had been superseded elsewhere by social organizations based on descent in the male line, before development into a political society among 'Aryan' peoples based on private property ownership.<sup>73</sup> It was the Greeks, Morgan

69. Howitt and Fison, pp. 334, 340. As Howitt described it, his and Fison's research provided grounds for 'the belief that the individual family only came into existence when descent through the father had become a possible belief, through the breaking up of the communal family, with its female line of descent. The boundary line separating these two social conditions marks, I think, one of the most momentous stages in the progressive development of human society', pp. 334-5.

70. Howitt and Fison, pp. 330-1.

71. Maine, *Village Communities*, p. 68. Maine went on to note the disruptive influence that codified British law was having on these unwritten communal laws. The expanded sense of individual right within British law would not be such a bad thing, he wrote, if the British had managed to instil in native Indians 'a corresponding improvement in moral judgement' by which means 'popular opinion could be brought to approve of the gradual amelioration of ... custom', p. 73. It should be noted that Maine referred to two types of evidence gleaned from the study of India and Indians, the first of archaic 'aboriginal' peoples, the second of the 'more advanced assemblages of men' elsewhere in India, which appear to be at the stage at which the power of the 'patriarchal family' asserts itself through the 'village community' as a necessary step toward the creation of modern society, pp. 14-19. It was in this latter sense that he referred to India as an example of the 'arrested' development of 'Aryan' institutions and ideas that had developed to full fruition in Western Europe, p. 220.

72. L. H. Morgan, Prefatory Note in Howitt and Fison, p. 6.

73. Morgan, *Ancient Society* [1877], Cambridge, Mass., Belknap Press, 1964, pp. 62-3, 305. According to Morgan, the idea of government evolved through three relatively discrete stages, the first characterized by a council of elected tribal chiefs, the second by the council and a military commander, and the third and highest stage, by a council of chiefs, an assembly of the people, and a general military commander. Only in this latter stage is it proper to speak of the beginning of distinct political institutions. Morgan argues that this evolution was driven by the development of the notion of property. Prior to the development of property, all relations between individuals were mediated socially by the immemorial customs of the tribe (or gens) on the basis that each member possessed roughly equal property. As the idea of property began to develop, it became necessary, Morgan asserted, for 'primitive' peoples to construct political relationships that were

argued, who made the transition from the 'gens' to the 'deme' or township as the basis of organization and thus began to develop sovereign political institutions, separate from and able to act upon the social relations of the gens, thus initiating the distinction between state and society.<sup>74</sup> Howitt and Fison applied this framework to the Indigenous peoples of Australia, describing that section of a matrilineal Indigenous tribe occupying a certain territory as a 'horde' or a very primitive version of the ancient Greek deme.<sup>75</sup> The hordes that Howitt and Fison claimed to identify in the tribes were a starting point for the development of more sophisticated territorial organizations of patrilineal families in which law, political authority and sovereignty begin to develop.<sup>76</sup> While the germ of the modern state — the incarnation of father-right — could be located in the horde, it had still to separate itself from the social relations within the tribe — the realm of mother-right — and to subordinate, act upon, and shape the latter. As far as Howitt and Fison were concerned, then, it was premature to speak of Indigenous people living in 'society', understood as a realm of autonomous individual interaction regulated by laws and political authority emanating from a separate sovereign state. 'In our own day', they concluded:

modern notions and institutions exist side by side with old beliefs and regulations — the one in civilisation, and the other in contemporaneous savagery — running merely in parallel lines, not touching or in any way affecting one another, so long as the superior race does not come into collision with the inferior.<sup>77</sup>

The fact that such a collision had occurred in Australia was a matter of the deepest import, as both were aware. The problem, as seen by Howitt and Fison, was that the Indigenous people did not yet possess sufficiently evolved institutions, such as chieftainship, which could be used by European administrators in the task of governing them.<sup>78</sup> They were, as Fison observed in his Presidential address to the Australasian Association for the Advancement of

---

capable of establishing and maintaining distinctions on the basis of property through laws and regulations.

74. Morgan, *Ancient Society*, p. 189–90. On property within the gens see, p. 70. As Austin defined it, the gens was equivalent to the looser term 'nation', denoting 'an aggregate of persons, exceeding a single family, who are connected through blood or lineage ... And, thus understood, a "nation" or "gens" is not necessarily an independent political society', and thus cannot be the crucible of sovereignty. Austin, *Lectures on Jurisprudence*, vol. 1, p. 250.

75. A. W. Howitt and L. Fison, 'On the Deme and the Horde', *Journal of the Anthropological Institute of Great Britain and Ireland*, vol. 14, 1885, p. 143.

76. Howitt and Fison, 'Deme and Horde', pp. 150–1.

77. Howitt and Fison, 'Deme and Horde', p. 167.

78. In his later *The Native Tribes of South-East Australia*, Howitt refers to 'tribal government' to denote the fact there had to be 'some authority and restraint' and even 'executive power by which ... offences ... are dealt with and punished', but he was by no means clear in

Science in 1892, entirely trapped within the confines of custom which has 'all the force of divine law, the breach of which will certainly be followed by terrible consequences'.<sup>79</sup> This innate conservatism, as others observed, rendered the Indigenous inhabitants of Australia ill-adapted to meet the challenges of confrontation with the vigour and dynamism of superior races, and hence explained their 'inevitable demise'.<sup>80</sup>

### Policies of Subjection: 'Protection' and 'Welfare'

This perception of Indigenous people as entirely lacking any kind of sovereignty informed the development of policies of Indigenous 'welfare', 'care', and 'protection' in the late nineteenth and early twentieth centuries, including child separation and cultural obliteration.<sup>81</sup> Victoria was the first colony/state to develop a centrally administered policy framework through the Central Board for the Protection of Aborigines (CBPA), and the *Aborigines Protection Act* of 1869. The aim of the CBPA's policy was to administer a series of stations designed to impart the physical and psychological features of an ordered village society.<sup>82</sup> Early reports of station life were taken as evidence that different tribes could be made to live together amicably, conform 'to progress, and active industry', and inculcate proper habits of social life, such as labouring and expending their earnings 'judiciously'.<sup>83</sup>

To facilitate this endeavour, the Board called for and received specific legislation enabling them to take 'half-caste' women and

---

identifying what that power was, and went to some pains to differentiate Aboriginal government from that of other Indigenous peoples, choosing 'the term Headman as being less likely to be misunderstood than that of Chief, which has associations not applicable to the Australian savage'. The power of Aboriginal 'headmen' was described as being limited by the power of other elders, and of the whole body of adult males in the tribe, indicating once again the view that the Indigenous people had not progressed beyond the stage of primitive 'equality'. Howitt, *The Native Tribes of South-East Australia* [1904], Canberra, Aboriginal Studies Press, 1996, pp. 295, 297, 320.

79. Fison, 'Address by the President, Section G, Anthropology', *Report of the Australasian Association for the Advancement of Science*, 1892, p. 148.
80. The history of the 'doomed race' theory is well covered in R. McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*, Melbourne, Melbourne University Press, 1997.
81. The discussion that follows explores some of the implications of the assumptions about Indigenous people in Western political thought discussed in previous sections. As such, it draws on the established historiographic literature on Indigenous 'welfare' and 'protection'. In addition to the works of Haebich and Attwood listed below, see R. Kidd, *The Way We Civilise: Aboriginal Affairs — the Untold Story*, St Lucia, University of Queensland Press, 1997; A. Markus, *Governing Savages: The Commonwealth and Aborigines, 1911-1939*, Sydney, Allen and Unwin, 1990; G. Reid, *A Picnic With the Natives: Aboriginal-European Relations in the Northern Territory to 1910*, Melbourne, Melbourne University Press, 1990; and P. Brock, *Outback Ghettos: A History of Aboriginal Institutionalisation and Survival*, Cambridge, Cambridge University Press, 1993.
82. B. Attwood, *The Making of the Aborigines*, Sydney, Allen and Unwin, 1989, p. 7.
83. *Fifth Report*, CBPA, 1866. Votes and Proceedings of the Legislative Assembly, 1866, vol. 2, p. 8. Something of the flavour of the social experiment the CBPA was attempting can be found in the Report of the 1877 Royal Commission. The Report emphasized that the stations be

children from their tribes. The CBPA's *Sixth Report* claimed that such powers would enable it to 'train and educate black and half-caste children' to 'make them useful members of society' by removing Indigenous people's liberty to leave the stations.<sup>84</sup> Once separated, these 'half-castes' were to be subject to a series of new regulatory powers vested in the Governor, including the supervision of places of residence and supply of rations, the licensing and apprenticing of children, and the compilation of progress reports. While the passing of the 1886 *Amending Act* marked a shift in administrative thinking in relation to the 'half-caste problem' — requiring the separation of those Aborigines of mixed from those of pure descent, and the integration of the former as self-supporting members of white society — it did not, however, signal any softening of the view that administrative and legislative centralism was the key to the continuing successful management of the Indigenous population. Such centralism had been and would continue to be based on the assumption that whatever was done by the Board to the Aboriginal population, would also be done for them in their best interests. Indeed, just as the Board's *Twenty-fourth Report* in 1888 trumpeted the success with which they had farmed out many of those of mixed descent from the stations, the missionary-manager at Ramahyuck, F. A. Hagenauer, called upon the Board to 'frame regulations for the better care and management of the blacks'.<sup>85</sup>

While Victoria was the first state to pass its own Aboriginal Act, the other states eventually followed — Western Australia in 1886 and 1905, Queensland in 1897, New South Wales in 1909, South Australia in 1910, and finally the Commonwealth (for the Northern Territory) in 1911 and 1918. These Acts reveal the substance of 'Aboriginal protection' to have been a more effective control by white administrators of the intimate details of the lives of Indigenous people.<sup>86</sup> In order to effect this control, the Acts and their formulators often made use of highly repressive techniques, none more ominous than that of child separation.<sup>87</sup> Western Australia's 1905 *Aborigines Act*, drafted in 1900 by the Head of that state's Aborigines Department, Henry Prinsep, provides a clear

---

kept tidy, noting that the 'effect of tidiness, and *per contra* of untidiness, on the Aboriginal mind, is very important; the inculcation of tidiness forms part of civilisation as well as of discipline'. *Royal Commission on the Aborigines, 1877, Votes and Proceedings, Legislative Assembly, 1877-8*, vol. 3, p. viii-xvii. (The Votes and Proceedings will subsequently be referred to as VPLA.)

84. *Fourth Report*, CBPA, 1864, VPLA, 1864, p. 17; and *Sixth Report*, CBPA, 1869, VPLA, 1869, vol. 4, p. 8.

85. *Twenty-fourth Report*, CBPA, 1888, VPLA, 1888, vol. 3, pp. 3, 10.

86. B. Chesterman, and B. Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge, Cambridge University Press, 1997.

87. A. Haebich, *Broken Circles: Fragmenting Indigenous Families, 1800-2000*, Fremantle, Fremantle Arts Centre Press, 2000, p. 207-8. This particular policy had a long history, and though it did not become a settled policy until well into the twentieth century, many had called for it

example of this technique. The main provisions of the 1905 Act augmented the powers of the Aborigines Department, and were intended to drive a wedge between those Indigenous people of mixed descent, who were encouraged to merge with the white population, and those of pure descent who were to be kept on reserves.

In his Report of 1902, Prinsep was in no doubt that his chief problem was that 'half-castes' had to be protected from the 'wandering habits of their black mothers' or they would become a 'disgrace' and a 'menace to our civilisation'. He lamented that while he had tried to gain the consent of the mothers to take their children away for their children's own 'benefit and education', the 'natural affections of the black mothers have stood very much in my way'.<sup>88</sup> Consequently, one of the main clauses of the Bill he insisted upon was that which made him, as Chief Protector, the legal guardian of all Aboriginal and half-caste children.<sup>89</sup> In his report of 1904, Prinsep had argued that this power was essential because:

there were now growing up in the State probably more than 515 half-caste children ... and, unless action is taken, [they] will grow up to be as wild, lazy, and dirty, and probably more criminal, than the aborigines hitherto dealt with. There is no law at present to enable me to withdraw them from the black race, and in nearly all cases persuasion fails to obtain the mother's consent. By the power which the new Bill will give me I shall be able to do so, but you may rest assured that it will be done gradually and with as much kindness as possible.<sup>90</sup>

---

well before that time. In doing so, those who made the call were fully cognizant of the hardships it would involve. To provide one example, a South Australian Select Committee Report from 1860 made the following recommendation: 'The Committee, however, submit, as their strong conviction, that permanent benefit, to any appreciable extent, from attempts to Christianise the natives can only be expected by separation from children from their parents and evil influences of the tribe to which they belong. However harshly this recommendation may grate on the feelings of pseudo-philanthropists, it would in reality be a work of mercy to the rising generation of aborigines'. *Report of the Select Committee of the Legislative Council of South Australia Upon 'The Aborigines'*, 1860, South Australian Parliamentary Papers, 1860, vol. 3, paper no. 165, p. 6.

88. 1902 *Aborigines Department Report*, Western Australia Votes and Proceedings, 1902, vol. 2, p. 3 (subsequently, WAVP). As he made clear in his evidence to the Roth Royal Commission in 1905, Prinsep held out no great hopes for the advancement of the inmates of these institutions, claiming that 'The instruction should be of such a nature as to bring them up as useful workers with merely such an amount of reading, writing and numbers as would be of service to them in their positions as humble labourers, the position which they cannot hope to rise from for at least two or three generations'. *Report of the Royal Commission on the Condition of the Natives*, 1905, WAVP, 1905, vol. 1, p. 40.
89. Other clauses empowered him to order the removal of Indigenous people to reserves (clause 12), authorize movement onto or out of Aboriginal reserves (clause 14-15), regulate the terms and conditions of Aboriginal employment and contracts of employment (clause 16-22), to control the property of Indigenous people of 'full' and 'mixed-descent' (clause 33), to declare 'prohibited areas', remove Indigenous people from towns and native camps (clause 37-39), and regulate the movement of Indigenous women (clause 40-44).
90. 1904 *Aborigines Department Report*, WAVP, 1904, vol. 2, no. 20, p. 4. The 1911 amendments

Under subsequent administrators, and especially A. O. Neville, the legislative control of Indigenous people, and their formation into native settlements, was carefully refined. In his 1919 Report, for instance, Neville spoke of the settlements as a 'sociological experiment' in which the inmates had settled down to 'a new life of peace, contentment, and usefulness' under Government control.<sup>91</sup>

Baldwin Spencer's landmark *Preliminary Report on the Aborigines of the Northern Territory* of 1913, recommended policies aimed at shaping native conduct as a whole, to be held together by the introduction of ideational norms of conduct.<sup>92</sup> The central problem, as Spencer saw it, was that the Australian Aborigines were nomads and possessed no indigenous 'village or compound' structure in which they lived 'permanently in association with one another', cultivating the soil or tending herds. This placed them much lower on the scale of civilization, he argued, than either Maoris or Papuans.<sup>93</sup> The nomadic and tribal patterns of Indigenous life thus posed three general problems for white government and administration: the traditional association with their own lands meant that removing Indigenous people to another location was very difficult; they possessed 'intensely communistic habits' with little idea of private property; and 'mutual suspicion and distrust' made any form of association between tribes difficult to attain. Such problems would affect the techniques of government but not its rationale. Spencer thus saw the chief task of Indigenous administration as one of minimizing contact between Indigenous and non-Indigenous populations, especially 'Asiatics', as it was quite clear to him that Indigenous peoples themselves possessed no way of regulating physical and sexual contact between their own and other races.

While Spencer thought that those Indigenous people living traditional lives beyond white contact — 'tribalised natives' — could manage their own affairs sheltered on large reserves,

---

to the Act provided that the guardianship of the Chief Protector superseded that of the mother of an illegitimate 'half-caste'. 1911 *Aborigines Department Report*, WAVP, 1912, vol. 1, no. 8, p. 7.

91. *Annual Report of the Chief Protector of Aborigines*, 1919, WAVP, 1919, vol. 2, no. 23, p. 11.

92. Elsie Masson, who later became Bronislaw Malinowski's wife, and was at that time governess to the children of the Northern Territory's Administrator, described this policy evocatively as an attempt to build 'a bridge for the black man' to cross the 'chasm of ages' between their primordial condition and white society. 'At the best', she reflected, such settlements 'can only be an imitation of civilisation', but if it can buy some time for the 'aboriginal' to 'survive for two or three generations, its savage instincts may be replaced by those of a civilised community'. E. R. Masson, *An Untamed Territory: the Northern Territory of Australia*, London, Macmillan, 1915, p. 151, 152-3.

93. H. Spencer, *Preliminary Report on the Aborigines of the Northern Territory*, *Commonwealth Parliamentary Papers*, 1913, vol. 3, p. 264-80. Unless otherwise stipulated, all quotations are taken from these pages.

'detrribalised natives' around the towns had to be segregated while awaiting a 'serious effort' for their 'betterment'. What this 'betterment' might entail is not clear, other than the already well-established practice of education in industrial habits and religious or moral training, and the administrative maxim that any long-term change for the better would involve child separation. As the subsequent Reports of the Territory's Administrator indicate, the native settlement or compound established at Kahlin just outside Darwin was used as an example of the 'humane treatment' detribalized natives would receive at the hands of the Commonwealth Government.<sup>94</sup>

Policies oriented to 'Aboriginal welfare' were based on and reinforced the position of Indigenous communities as people without sovereignty, a subject people whose destiny lay in the hands of a 'superior' sovereign people. When the policies of welfare culminated in the explicit avowal of assimilation, it became clear that the major figures involved in shaping such policies saw it in terms of the complete cultural obliteration of the Indigenous people. A. O. Neville, who took an active and prominent role in the development of a national policy of assimilation, spoke frankly at the 1937 conference on Aboriginal welfare:

Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any aborigines in Australia?<sup>95</sup>

In his report to the Commonwealth Government in 1928 on the 'Aborigines of Central and Northern Australia', J. W. Bleakley poured scorn on the Aborigines Protection League proposal that Indigenous people be entrusted with their own native state. To do this, Bleakley asserted, would be to foist upon Indigenous people a 'social machine they cannot understand':

They have no conception of democracy as understood by civilised nations. Their native laws and customs seem to utterly fail to conceive any idea of combination or federation of tribes for mutual

---

94. *Report of the Administrator, Northern Territory*, 1913, CPP, 1914-1917, vol. 2, p. 33. Kahlin is described on pp. 37-8.

95. *Aboriginal Welfare*, Initial Conference of Commonwealth and State Aboriginal Authorities, 21-23 April 1937, Government Printer, Canberra, 1937, p. 11. In reflecting on his long involvement in state and national Aboriginal policy, Neville congratulated himself on his pursuit of native settlements on which 'full-blood' children could be separated from 'half-caste' or 'coloured' children and the latter educated to a higher standard. The settlements were to be highly disciplined environments, which Neville himself described as 'utilitarian' insofar as they acted as 'clearing centres' of young and able-bodied Aboriginal labourers, and 'coloured' children who could be moved on to specialized institutions. A. O. Neville, *Australia's Coloured Minority: Its Place in the Community*, Sydney, Currawong Publishing, 1948, p. 77, 87-8.

government or protection. Each tribe is a separate and distinct group, with its own language, customs, and laws environing its peculiar totem, and has interest in nothing outside of those associations.<sup>96</sup>

Bleakley's position was thus an affirmation of the basic principle of British and Australian administration: that the Indigenous peoples of Australia had no conception of society and hence no political or collective sovereignty as a people. As he was later to express the problem, Indigenous peoples could not be expected to renounce their 'irresponsible wandering life' for that 'of the settled village dweller in one step', but had to be led from their 'savage mentality' to 'think white as well as talk white'.<sup>97</sup>

### Conclusion

From the perspective of the twenty-first century, a central problem for Australians today is the persistence of a view that whatever was done to Indigenous peoples in the past, was also done for them. The current prime minister's position on the issue of reconciliation and apology to the 'stolen generation' exemplifies this view.<sup>98</sup> He believes that no apology is owed by the Government to those who have suffered from the policies of child separation because the current Government was not responsible for implementing or supporting the policy. Similarly, it would be wrong for him, as prime minister, to apologize because he had nothing whatever to do with the policy and was therefore not responsible for its disastrous effects. This view goes hand in hand with the conviction, shared by many non-Indigenous Australians, that no matter how genuine the suffering that may have been caused by past policies, these practices were nevertheless well-intentioned and in the best interests of Indigenous people.

The 'welfare' that administrators claimed to pursue, however, was based on a complete denial of Indigenous sovereignty. This article is not the place to articulate a conception of Indigenous sovereignty, or to specify the nature and content of a Treaty, for

96. J. W. Bleakley, *The Aborigines and Half-Castes of Central Australia and North Australia 1928*, Government Printer, 1929, p. 30. Some idea of the Aborigines Protection League's proposal and the response of the Chairman, Colonel C. Genders, to Bleakley's Report can be found in *Australian Aborigines: A Statement by the Aborigines Protection League*, Adelaide, 1929. Genders and his native state proposal is discussed in K. Blackburn, 'White Agitation for an Aboriginal State in Australia (1925-1929)', *Australian Journal of Politics and History*, vol. 45, no. 2, 1999, 168-79.

97. Bleakley, *The Aborigines of Australia; Their History — Their Habits — Their Assimilation*, Brisbane, Jacaranda Press, 1961, pp. 187, 319.

98. For the prime minister's position consult *Hansard*, Commonwealth of Australia, House of Representatives, Tuesday 27 May 1997, pp. 4113-4.

this was not my intention.<sup>99</sup> What I have sought to do is to draw attention to the ways in which the denial of Indigenous sovereignty in Australia was based on firm assumptions in Western political and legal thought about the nature of Indigenous people and their social condition. These assumptions were expressed within discourses of civilization which represented Indigenous peoples as 'uncivilized' and in need of the virtues of non-Indigenous administration and welfare. Today, reconciliation will require an admission that no Australian Government has ever made: that by denying Indigenous sovereignty, the Indigenous inhabitants of this land were effectively rendered a subject people with no say in what was done to them or how it was done.

99. For more on the current Treaty debate see L. Behrendt, 'Foundations and Lessons: The Canadian Treaty Making Experience', AIATSIS Seminar Series: Limits and Possibilities of a Treaty Process in Australia, March–September, Canberra, [http://www.aiatsis.gov.au/rsrch/smnrs/smnr\\_treaty1.htm](http://www.aiatsis.gov.au/rsrch/smnrs/smnr_treaty1.htm), 2001; and L. Strelein, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate', AIATSIS Seminar Series: Limits and Possibilities of a Treaty Process in Australia, March–September, Canberra, [http://www.aiatsis.gov.au/rsrch/smnrs/smnr\\_treaty2.htm](http://www.aiatsis.gov.au/rsrch/smnrs/smnr_treaty2.htm), 2001.