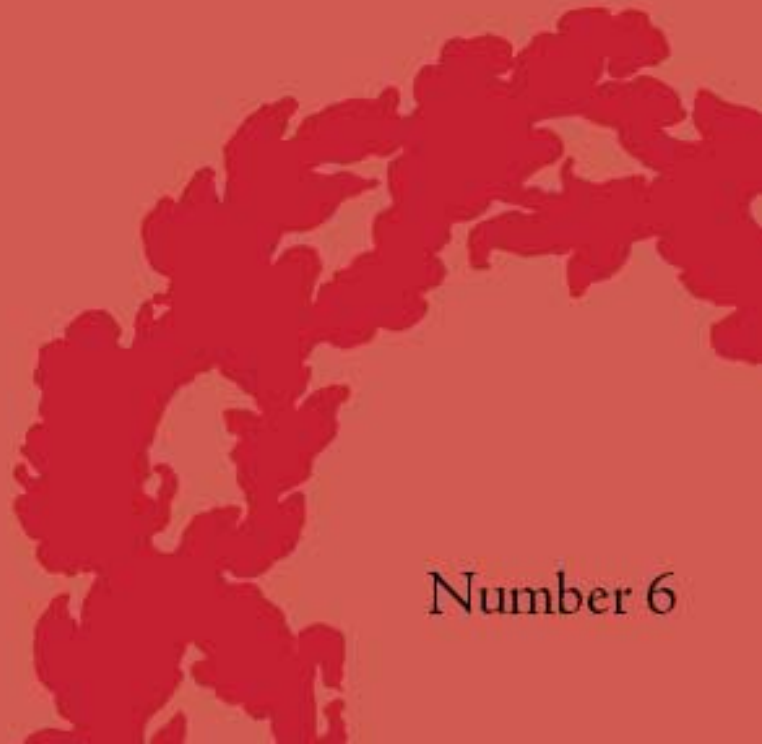


Empire of Political  
Thought  

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*Bruce Buchan*



Number 6

THE EMPIRE OF POLITICAL THOUGHT:  
INDIGENOUS AUSTRALIANS AND THE  
LANGUAGE OF COLONIAL GOVERNMENT

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BY

Bruce Buchan



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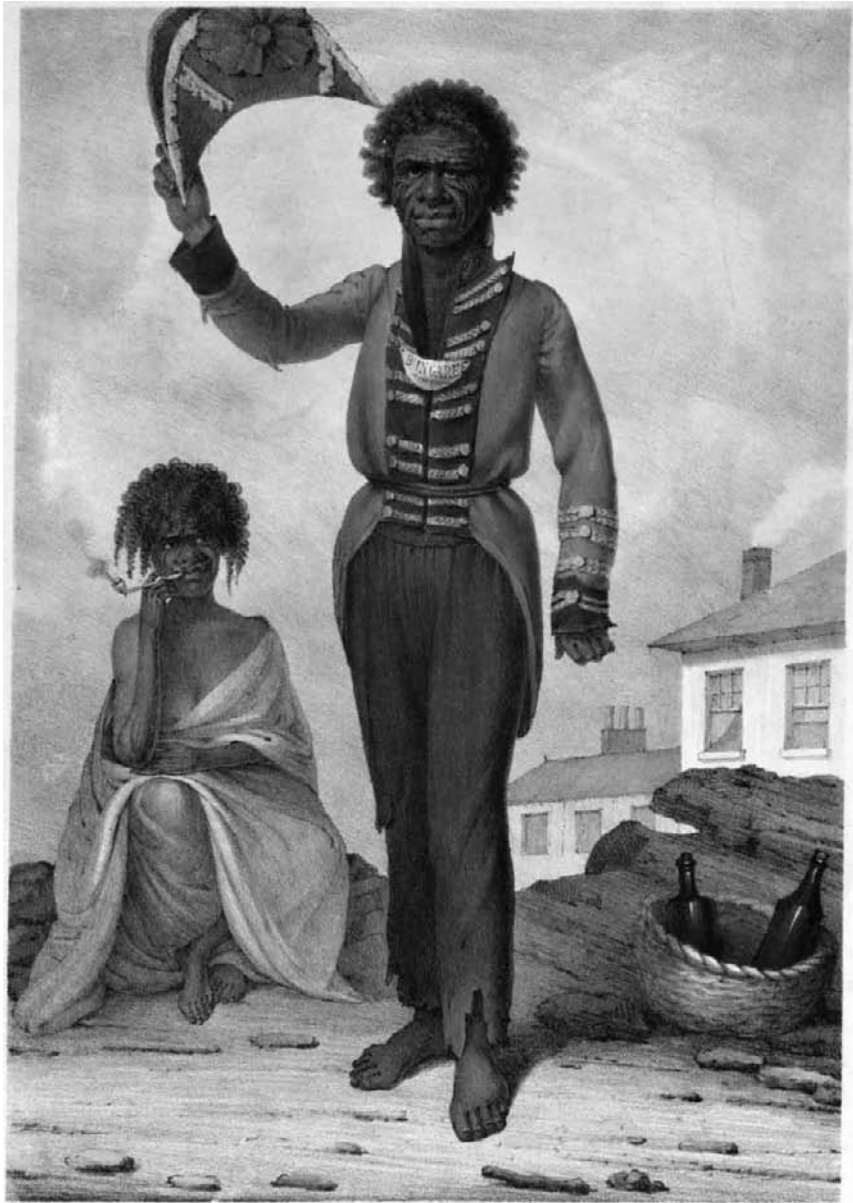
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A. Barle.

Printed by C. Bullock.

**BUNGAREE .**

a Native Chief of New South Wales .

London, Published August 10<sup>th</sup> 1830, by J. Cross, 48, Holborn, opposite to Perceval's Inn.

Figure 1. Augustus Earle (1793–1838), 'Bungaree, A Native Chief of New South Wales', hand coloured lithograph (London: J. Cross, 1830), Rex Nan Kivell Collection, NK 2652, National Library of Australia.

## INTRODUCTION

Few concepts in Western political thought have been more closely entwined with the history of empire, colonization and colonial policy than ‘civilization’ and ‘savagery’. While these concepts are likely to be considered today as superannuated or unfashionable, it was not always so. In 1837 a writer in the *Edinburgh Review*, who was probably Herman Merivale, the then Drummond Professor of Political Economy at Oxford University, wrote that,

Savages – ‘septs of hunters and fishers’, – are of great use to political economists, as well as to political philosophers; their condition serves as a sort of zero in the thermometer of civilization, – a point from which there is a gradual rise towards perfection. They are thus very valuable in hypothetical reasoning ...<sup>1</sup>

Here, some ten years before he became Permanent Undersecretary of the Colonial Office and before the publication of his celebrated *Lectures on Colonization and Colonies* (1839), Merivale captured the conceptual significance of ‘savagery’ and ‘civilization’ in European political thought. That significance rested on their dualistic nature. Both concepts hovered uneasily between fiction and reality or, as Merivale put it, between ‘hypothesis’ and ‘condition’. ‘Savagery’ served as both a real condition of social life (exemplified by ‘septs of hunters and fishers’) and as the foundation for claims to civilization.<sup>2</sup> This foundation was conceived as both historical (in the sense that progress towards civilization began in savagery) and normative (in the sense that the notion of civilization was deemed superior to savagery).

*The Empire of Political Thought* traces the discursive construction of ‘savagery and civilization’ in relation to Australia’s Indigenous peoples from 1788 to the end of the nineteenth century.<sup>3</sup> The Australian colonial context has characteristically received less attention from scholars of political thought than the more familiar Atlantic colonial heritage.<sup>4</sup> Typically, Australia’s colonization has been seen as an ‘exception’ to the Atlantic pattern (and to the later colonization of New Zealand) due to the absence of any treaties between the colonizers and Australia’s Indigenous inhabitants.<sup>5</sup> Perhaps because of this, most political theoretical studies of empire and colonization have consigned the Australian

colonial context to little more than a footnote.<sup>6</sup> I will argue, however, that the Australian colonial experience can be used to highlight theoretical issues of global relevance. Indeed, lying behind Australia's apparently 'exceptional' absence of a treaty, is a long inter-colonial history of construing Indigenous peoples as a problem for colonial government.

By focusing attention on the political theoretical aspects of colonization, I seek to contribute to the efforts of activists, scholars and jurists to redress the legacies of colonialism in Australia and elsewhere.<sup>7</sup> In doing so, they must come to grips with the intellectual framework of European colonization. In speaking of an 'intellectual framework', I mean to highlight the ways in which the conceptual language spoken by the colonists framed their understanding of the policies and techniques of government they adopted. In particular, when colonists used terms drawn from the traditions of Western political thought, such as 'government', 'property', 'sovereignty', 'society', 'savagery' or 'civilization', they did not only use them simply as descriptions. Rather, these terms formed part of a wider discourse in which moral and political claims about themselves and others were advanced.<sup>8</sup> In this sense, colonial 'descriptions' of Indigenous peoples as 'savages' with no 'society' or a limited 'government' also operated as a foundation for advancing claims about how they should be treated in the new colonial order. Consequently, the ongoing struggle of Indigenous peoples for genuine recognition of the continuity of their evolving identities has been one fought as much against the *language* as against the *institutions* of colonization.

Much attention in this regard has been devoted to the contested role of *terra nullius* in Australia's colonization. The term *terra nullius* originated in the discourse of international law, where it had been used since the nineteenth century to describe lands declared to be vacant or unowned, even when obviously inhabited. In the landmark *Mabo v. State of Queensland* decision (1992), the Australian High Court officially recognized the continuity of native title over some traditionally owned lands and waters.<sup>9</sup> In doing so, the Court explicitly overturned *terra nullius* in Australian law. Since its application by the Privy Council in 1889, this doctrine effectively established that, at the time sovereignty was asserted in Australia by the British Crown in 1788, the land was not owned by the Indigenous peoples then living upon its entire surface. In overturning that doctrine Chief Justice Brennan, as well as the concurring Justices Deane, Gaudron and Toohey, claimed that Australian law must now 'recognize' what had long been denied; the fact of prior Indigenous occupation of the land, and the continuity of rights that followed from that occupation. In making this finding, the High Court decided that the common law could recognize native title in some cases, but that this limited acknowledgement implied no recognition of Indigenous sovereignty.<sup>10</sup>

Much debate has hinged ever since on whether *terra nullius* really did play a role in early Australian colonization, or whether the High Court fell under the influence of historians (especially Henry Reynolds) who asserted that it had.<sup>11</sup> I will argue that we need to look beyond *terra nullius* to other deeply entrenched European concepts, ideas and assumptions that were applied in the colonial dispossession of Indigenous Australians. In order to understand how these ideas and concepts were applied, it will be argued that Australia's colonization needs to be understood in light of the development of Western political thought. The traditions of Western political thought provided the conceptual resources that colonists employed in their interpretations of Australia's Indigenous peoples. In arguing so, I want to emphasize that colonists in Australia were not simply 'anthropologists' who dispassionately observed the Indigenous inhabitants. Rather, they constructed images of the Indigenous peoples they found already inhabiting the land based on a series of concepts associated with European understandings of 'savagery and civilization'.<sup>12</sup>

Civilization is not an easy term to define. The term itself emerged in European discourse in the eighteenth century, but its origins lay in a range of sources in European thought in the sixteenth and seventeenth centuries focused on defining the qualities of European 'civility' and 'civil' life. A primary aim of these sources was a desire to distinguish 'civil' or 'cultivated' Europeans from other peoples (both inside and outside Europe) on the basis of their own 'superior' attainments in manners, refinement, wealth or social and political development. 'Savages' by contrast were identified with Indigenous peoples whose communities, cultures, traditions and aspirations were assessed in terms of a conceptual scheme imbuing pervasive assumptions about 'civilized' 'superiority' and 'uncivilized' 'inferiority'. This opposition could be deployed as a means to critique European societies and customs by drawing attention to the corruption of civilization, or the nobility of 'savages'. As I will show (especially in chapters 1 and 2), however, such critique was hedged by pervasive assumptions about 'savage' deficiencies and especially their assumed 'primitiveness'.<sup>13</sup> I will also argue (especially in chapters 3 to 6) that ideas of 'savagery' and 'civilization' played a key role in shaping the formulation of colonial policies for the government of Indigenous peoples in Australia by framing the problems they were thought to present to European settlement.

It is the process by which Indigenous people were assimilated within the conceptual framework of 'savagery and civilization' that I refer to in this book as 'the empire of political thought'. In speaking of the 'empire of political thought' my aim is to emphasize how the development and articulation of colonial discourse in Australia made use of concepts drawn from the traditions of Western political thought that were applied in the effort to 'subject' Indigenous people to colonial law, government and knowledge. By using the words 'subject' and 'subjection', I

do not mean to imply Indigenous passivity. Nor do I mean to suggest that this 'subjection' was always effected. Rather, I want to explore how the language of colonization was used to construe Indigenous peoples as subject to colonial government. At times, as I will show in Chapter 4, even active Indigenous resistance could be construed as evidence of 'savagery', and of the supposed need to 'subject' them to government. Of course, I do not claim that this 'subjection' was self-consciously carried out by political theorists. Rather, I want to emphasize that the concepts of Western thought live beyond the rarefied realms of professional political theory. My aim is to locate how theoretical concepts were invoked, applied, often questioned, and sometimes transformed by a range of actors, including colonial governors and imperial administrators, missionaries, military officers and ordinary colonists.

The need to address the colonial uses and legacies of these concepts is reinforced by debates over their use in contemporary Australia. Indigenous peoples in Australia and elsewhere articulate their visions of political (and cultural) self-government and self-determination by employing concepts of Western political thought they recognize as both enabling and constraining.<sup>14</sup> Much more problematic are the recent efforts of revisionist historians to rehabilitate the image of 'civilized' British colonization. Keith Windschuttle, for instance, has recently argued that the purpose of British colonialism (since 1688) was oriented towards demonstrating 'by example the benefits of the civil and polite customs of Europe'.<sup>15</sup> In this sense, he interpreted British colonization of Australia as the process by which the 'gifts' of civilization and new lifestyles were bestowed on the Indigenous inhabitants.<sup>16</sup> This interpretation of the language of civilization, and the assumptions informing it, is peculiarly one-sided. Windschuttle understands civilization solely by reference to the claims made by its defenders, and fails to account for how it was used in colonial contexts to assimilate the presence and define the problems of governing Indigenous 'subjects'.

As Krygier and van Krieken have noted, Windschuttle's position rests on the highly contestable distinction between the 'Black Legend' of Spanish conquest and violence, and the supposedly pacific and highly civilized British 'empire of trade'.<sup>17</sup> Indeed, British efforts to construe their own imperial activities as peaceful were carried on in the face of considerable contrary evidence. Some contemporary British and European colonists and observers perceived the paucity of colonial claims to any superior 'civilization'. Indeed, the language of Western political thought has a dual-sided character. It has been used in apparently divergent ways both to sustain the claims of empire, and at times to support calls for its reform or removal.<sup>18</sup> Even in opposition to empire, however, the image of European 'civilization' was tied to the projection of its supposed opposite, 'savagery'. Crucially, these two images were never purely descriptive, nor simply terms of recommendation or castigation. Rather, they were used to *construct*

images of 'savagery' or 'civilization'. These images could then be projected onto others with the appearance of description, thereby assimilating these others into a Eurocentric conceptual framework.

'Civilization and savagery' were thus key concepts in the discursive strategies employed by Europeans in their colonial endeavours. In the Eurocentric language of Western political thought, Indigenous peoples were regularly portrayed as 'primitive', exhibiting a supposedly 'savage' or 'barbarous' condition over which Europeans could assert their 'superior' government, law and knowledge.<sup>19</sup> It was a language in which the complexity of Indigenous lives was effaced while Europeans projected their own image of Aboriginal 'savagery' and European 'civilization'. While the doctrine of *terra nullius* provides a convenient target for debate over colonization in Australia, arguments over its application have deflected attention from how a range of other concepts were deployed in this colonial context.<sup>20</sup>

### Whither Terra Nullius?

In the history of British imperial administration of 'subject peoples', Australia has often been seen as something of an exception. Arguably, this 'exceptionalism' has been reinforced by the post-*Mabo* focus on *terra nullius* and the widespread feeling that what set Australia apart from other imperial dominions was that here, possession and colonization were justified by the rigorous application of the doctrine of *terra nullius*.<sup>21</sup> For others, *terra nullius* was merely a 'convenient assumption' used by the colonists to deny Indigenous ownership of the land and assert that 'officially, Aboriginal peoples did not exist'.<sup>22</sup> At first glance, there seems much compelling evidence to support this view. No officially declared war of conquest was ever waged in Australia as in India or parts of Africa. No officially endorsed treaty was ever signed between British representatives and Indigenous peoples as in the former American colonies or New Zealand. No officially endorsed surrender of lands was ever signed by Indigenous peoples in Australia as in Canada. In short, there was no official acknowledgement of Indigenous property rights, nor any recognition of Indigenous polity or polities.<sup>23</sup>

Notwithstanding all that, it would be misleading to suggest that the doctrine of *terra nullius* was applied by the British in 1788 or in 1770 when Captain James Cook took possession of the east coast of the continent then known as New Holland.<sup>24</sup> Nor would it be accurate to claim that simply because of that doctrine, Indigenous Australians were denied political rights such as citizenship, or recognition of their own laws. Nonetheless, this view is not uncommon:

The invasion of Australia was justified even before 1788 by the lie of *terra nullius*. Even in 1788 many whites recognized it to be a lie. It caused immense complications for the Aboriginal people, whose citizenship should have been automatic according



to the British rules of citizenship. 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.<sup>25</sup>

This view poses some serious problems (explored in Chapter 3), not least in the dubious assertion that the British in 1788 possessed ‘rules’ by which ‘citizenship’, a term that many Englishmen at the time associated with the opprobrium of the American and French revolutions, could be accorded to Indigenous peoples.<sup>26</sup> More importantly however, this view implies that the British expressly justified their possession and colonization of Australia by the doctrine of *terra nullius* which facilitated the deliberate attempt to make the Indigenous inhabitants ‘vanish’.

Such a view is compounded by those who have similarly claimed that *terra nullius* allowed the British to ignore the evidence of occupation. In other words, had the British found that,

... the Aborigines were not truly nomadic, that they had indeed mixed their labour with the land, and that they lived within a complex social, political, and religious framework – that is, had the British *not* seen New South Wales to be *terra nullius*, then they *would* have negotiated for the right to settle ...<sup>27</sup>

Did the British simply choose to ‘ignore’ the evidence of Indigenous habitation and occupation in Australia? Did they employ the doctrine of *terra nullius* to obscure those inhabitants and the evidence of their occupation of the land from sight? To argue that they did, one sustains a kind of incipient ‘Australian exceptionalism’, by which Captain Cook’s failure to ‘obtain the consent of the natives’ to annexation in 1770, and Governor Phillip’s failure to obtain their consent to colonization in 1788, is contrasted to the history of negotiation elsewhere. Indeed, there are important differences between the stories of each colonial dominion’s imperial rule, but it is not clear that the supposed application of *terra nullius* in Australia’s case is one of them.

What is more, to suggest that the British used the doctrine of *terra nullius* to obscure the visibility of Australia’s Indigenous people, to make them ‘vanish’, is to misunderstand how the colonizers and their successors construed what they ‘found’ there and their responses to it. I will argue in this book that the language of political thought the British employed was premised on Indigenous *visibility* rather than *invisibility*. In doing so, my aim is not to provide a history of colonial policy formulation. Rather, my objective is to trace the operation of the often unstated, though sometimes quite explicit, assumptions, ideas, normative claims and conceptual terminology that framed the colonial representation of Indigenous peoples in Australia. I do not claim that Western political thought provided the tools that determined colonial policy. As Phillip Curtin observed long ago, however, any study of policy must ‘take account’ of the ‘world’ of

assumptions, concepts and values, and thus come to see that such assumptions and ideas, no less than the dry formulations of policy itself, 'helped to influence the course of future history'.<sup>28</sup> In seeking to refocus attention on the conceptual analysis of Australian colonization, I will not seek to deny that there were many 'exceptional' qualities to the colonial experience in Australia. Rather, I want to suggest that in emphasizing the exceptional, we lose sight of the continuities in European discursive constructions of Indigenous peoples in different colonies.

### Colonization and Political Thought

The relationship between political theory and imperial practice was rarely if ever determinative. Political theorists did not provide an 'ideological' blueprint for imperial adventurers, governors or administrators. In fact, the relationship is notoriously difficult to define. Edward Said has argued that European nations were 'impelled' to empire, at least in part, by 'impressive ideological formations' within Western culture that reduced non-European 'subjects' to an 'inferior' status.<sup>29</sup> What was, and in Said's view remains, distinctive about Western culture was its reliance upon and 'symbiotic' development alongside the experience of imperial rule of subject peoples. The self-image of Western culture hinged, he thought, upon a conceptual language that 'occlude[d]' that relationship.<sup>30</sup> As a range of recent commentators have shown, however, there was little 'occlusion' of the relationship in the work of a host of political thinkers who were explicitly concerned with questions of imperial conquest, acquisition and rule.<sup>31</sup> One could, for example, quite predictably draw attention to the work of John Locke or John Stuart Mill, or less predictably to thinkers such as John Millar or Adam Ferguson, whose work was less obviously imperialist, but nonetheless reflected a deep awareness of the conceptual implications of the imperial experience.<sup>32</sup>

The Indigenous American scholar Robert Williams has spoken of 'Europe's will to empire' expressed in the application of supposedly 'universally' binding legal doctrines to Indigenous peoples, emanating from the medieval heritage of Papal and later humanist assumptions of the 'superiority' of European power and knowledge.<sup>33</sup> Among the 'Cambridge School' of historians of political thought, some have spoken of the 'ideology of empire'. Armitage, for instance, defined the purpose of his insightful enquiry, not in terms of showing that the 'origins of the British Empire' were to be found 'only in ideology', but of how the 'constitutive elements of various conceptions of the British Empire arose in the competitive context of political argument'.<sup>34</sup> Similarly, Anthony Pagden has claimed that what he was interested in was to 'understand how Europeans thought about the empires which they had created' and 'how that thinking changed over time'.<sup>35</sup> 'Thought about empire' however, has a rather different connotation to 'ideology of empire'. Subsequently, Pagden claimed that '[i]nsofar as ... [later] European

imperialists possessed any declared ideological objectives ...' at all, they were defined in terms of the 'transfiguration' of earlier *anti*-imperial discourses into a discourse of 'world-wide civilization based upon European political and social principles.'<sup>36</sup>

*The Empire of Political Thought* takes its cue from these studies, but has different objectives. I do not seek to uncover any 'ideology of empire' or 'will to empire' in the history of Western political thought. Rather, I seek to study how key concepts in Western political thought were deployed and developed in the interpretation, representation and articulation of colonial policies for the government of Indigenous peoples in Australia. This does not suggest that colonial administrators were always motivated by political theoretical considerations. The relationship between political thought and action in imperial history is, as Marshall and Williams point out, often 'confused' and far from 'simple.'<sup>37</sup> Nevertheless, all colonial actors made sense of their situation by using a language of concepts imbued with a real, though often unexplored, moral and political significance. This is as true of us in the twenty-first century in speaking of 'terrorism' or 'globalization' as it was for colonists in the eighteenth century in speaking of 'savagery' or 'civilization'. This does not mean that when colonists used these terms they did so unthinkingly. Any study of the conceptual language of politics must be attuned to the nuances of usage, to delineate blind adherence from reflective employment or critical appraisal of those concepts.

At times, theoretical concepts clearly shaped European perceptions of Indigenous peoples, the representation of the 'problems' they were thought to present, and the conceptualization of the tasks of governing them. At other times, however, the concepts themselves were not simply transplanted, but were shaped and developed in the context of their application in imperial contexts. The meanings of these concepts can often be traced to major schools of political thought, or even to individual thinkers. More often, however, we find a complex development of the language and its concepts in which they were applied and found wanting, and had to be redefined not by acknowledged political theorists, but by colonists themselves, whether governors, functionaries, farmers, missionaries or administrators. Such a study tells us something of the development and meaning of the central concepts in the Western tradition of political thought but, perhaps more importantly, it suggests that key concepts in our language need to be translated afresh.

### Empires of Difference or of Uniformity?

There has been a strong tendency for Australian scholars to deny the centrality of Western political thought to the experience of colonization in Australia.<sup>38</sup> Australia, it has often been argued, was settled at a time when discourses of

natural law that had been used to justify colonization in America and elsewhere were in decline. Australia's colonization by contrast was overshadowed by a less scholastic, more technocratic, and even 'non-ideological' commitment to the maximization of utility.<sup>39</sup> Perhaps partly as a result of this, relatively few Australian scholars have joined the debate, hotly contested in other countries, over the relationship between the traditions of Western political thought and the experience of empire and imperial administration.<sup>40</sup> Much of this debate has been shaped by a concern that also figures in this book, namely, how the representation of difference in Western European political thought, and especially in liberal thought, provided strategies for the extension of imperial government.<sup>41</sup>

The themes of 'recognition' and 'difference' in the development of Western thought have been prominent in contemporary political theoretical scholarship. This is due largely to the compelling work of feminist theorists such as Iris Marion Young, who have argued that modern Western notions of universalizable morality, impartial reason and autonomy deny the 'particularity of situations', reducing real, lived and affective human differences to formal rules of conduct.<sup>42</sup> In championing a more inclusive 'politics of difference', these thinkers took aim at more 'conventional' normative defences of liberalism, typically centred on the priority of an assemblage of universalizable principles regulating social and political institutions including equality before the law, individual rights and the limitation of state power.<sup>43</sup> Throughout the 1990s, however, a variety of liberal thinkers retreated from this kind of universalism.<sup>44</sup> Broadly speaking, there have been two kinds of avowedly liberal response to the 'politics of difference' theorists. Both responses accept the empirical claim that difference and diversity are inescapable features of Western societies. The responses differ on the political and theoretical implications of this admission.

One response envisages a 'liberal neutrality' premised on the acceptance of cultural diversity within an overarching system of laws that are neutral towards particular group identities, and protect the rights of the individual. On this view, cultural groups are conceived as loose 'associations' in which membership, like the membership of a football club or a union, is represented as a matter of choice, freely undertaken and fully revocable at will.<sup>45</sup> The second 'cultural' liberal response to the 'politics of difference' view has been most consistently articulated by Will Kymlicka. Kymlicka argues that the recognition of group and cultural diversity have always been central to the liberal tradition. By means of the concept of a 'societal culture', Kymlicka attempts to ground the liberal aspiration to 'individual freedom' within the communal ties of common language, shared values and institutions. The emergence of 'societal cultures' is linked to modernization and the creation of territorially based national identities with standardized educational, political and economic institutions.<sup>46</sup> Kymlicka also claims that the acceptance of cultural diversity is intimately associated with the

liberal emphasis on equality. Significantly, Kymlicka suggests that a commitment to liberal equality requires addressing historic sources of disadvantage, exemplified by the failure of former settler-colonial states to honour treaty rights accorded to Indigenous peoples in Canada and New Zealand. Kymlicka's liberalism rests on the conviction that while liberalism historically has tended to ignore the rights and the collective identities of cultural minorities, its future now hinges on the recognition of diversity and the forging of common identities.<sup>47</sup>

Along with a great many liberal theorists, however, Kymlicka has very little to say about the implication of liberalism in imperial projects. Despite some oblique references to modernization and the history of colonization, Kymlicka pays scant regard to the implication of liberal political thought in the imperial administration of peoples regarded as 'culturally' and 'socially' (not to mention politically and economically) 'different'.<sup>48</sup> What Kymlicka does say implies that the ultimate failure of British liberal-imperial administration of the diverse peoples and cultures within the Empire led to liberalism's 'benign neglect' of cultural diversity in the wake of decolonization,

... liberals who went to administer or study British colonies found that the liberalism they learned in England simply did not address some of the issues of cultural diversity they faced ... There must have been generations of English thinkers who learned the essentials of liberal theory at universities in England, and who went overseas with the hope of transplanting those principles, but who were then faced with a set of issues regarding minority rights that they were unprepared to deal with ... With the decline of the Empire, however, liberals stopped thinking about these issues, and little of this experience was fed back into British liberal theory.<sup>49</sup>

*The Empire of Political Thought* aims to demonstrate that this kind of account pays too little regard to the ways in which the language of Western political thought was interwoven with the experience of empire.

Historians of political thought have been more willing to address the connection between political thought and the experience of empire. Nonetheless, doubt persists over whether Western political thought was ever able to accommodate 'recognition' of 'difference'. Anthony Pagden, for example, drew attention to the conceptual limitations in early modern European discourse that militated against any genuine 'recognition of *difference*' in the New World.<sup>50</sup> More recently, Carey has argued that Western philosophers such as John Locke helped to articulate theories of civilization in which human diversity merely represented various stages in the universal historical progress towards ever greater refinement and sophistication.<sup>51</sup> James Tully's *Strange Multiplicity* articulates a powerful critique of this provisional recognition of difference. Tully's explicit targets are the assumptions inherent in what he terms 'modern constitutionalism', and the three main languages in which it has been articulated: liberalism, nationalism

and communitarianism.<sup>52</sup> Tully's critique of 'modern constitutionalism' revolves around its implication in the project of colonization, and specifically in ongoing efforts in Canada to address and redress the legacies of British colonialism. In taking this approach, Tully contends that liberal constitutionalism was able to 'recognize' 'the equality of independent, self-governing nation states and the equality of individual citizens' in Europe and later in white settler societies (such as Canada), while systematically denying recognition to the different cultural identities of Indigenous peoples.<sup>53</sup>

Invoking the image and the implicit message of Bill Reid's mysterious sculpture of Indigenous Haida motifs, known as *The Spirit of Haida Gwaii*, Tully powerfully argues that overcoming the entrenched injustices of Canada's imperial (and post-imperial) past requires a genuine (and mutual) constitutional recognition of Indigenous cultural identities.<sup>54</sup> Tully's phraseology here is significant:

Approaching *The Spirit of Haida Gwaii* in the right spirit does not consist in recognizing it as something already familiar to us and in terms drawn from our own traditions and forms of thought. This imperial attitude is to be abjured. Rather, recognition involves acknowledging it in its own terms and traditions, as it wants to be and as it speaks to us.<sup>55</sup>

Here Tully implies that there are at least two political senses of the word 'recognition', each of which must be distinguished, but which in modern constitutional language are often conflated. The first could be called 'recognition as familiarity', and Tully associates this with an 'imperial attitude'; the second, 'recognition as acceptance'. Recognition as familiarity is based on the common practice by which the apparently different is rendered familiar by translating it into the experience and language of the observer. In this kind of recognition, the new or different is acknowledged in so far as it conforms to what the observer regards as familiar to his or her own perspective. The more challenging 'recognition as acceptance', however, implies that differences are accepted on their own terms, and are not evaluated and acknowledged in terms of their familiarity with the observer's perspective. These two kinds of recognition play a vital part in Tully's argument, for his claim is that the cultural identities of Canada's Indigenous or First Nations peoples have long been subjected to the imperial recognition of familiarity, with disastrous results.

Part of the problem is that recent efforts of Indigenous people to win constitutional recognition (as acceptance) have been evaluated in a language of recognition as familiarity, that is, in terms of their status as 'sovereign' 'nations' seeking 'self-determination'.<sup>56</sup> In other words, the cultural identities of First Nations peoples have been 'recognized' only in so far as they have been deemed 'familiar', and the standard of familiarity is derived from the framework of con-

cepts and categories of Western political thought. This is what Tully means by speaking of the 'empire of uniformity'. The empire of uniformity is a rationalizing attitude that subjects and evaluates Indigenous cultural identity to a single standard of recognition. The empire of uniformity is an attitude hostile to cultural diversity, and is not limited simply to the era of imperial rule. Rather the empire of uniformity is an attitude that underlies and informs the languages of modern constitutionalism, and therefore shapes the attitude to Indigenous peoples adopted not only by the functionaries of empire, but by their post-imperial, liberal-democratic successors.

The chief problem that a contemporary constitutionalism must overcome, Tully contends, is the persistence of the 'empire of uniformity'. Helliwell and Hindess acknowledge Tully's success in highlighting the sources from which his more inclusive contemporary constitutionalism may be developed.<sup>57</sup> They have argued in contrast, however, that presenting the problem in terms of the empire of uniformity masks the ways in which imperial administration often did 'acknowledge cultural and other kinds of difference'. The problem, as Helliwell and Hindess see it, is not one of an imperial indifference to difference, but 'rather, how liberal constitutionalism *treats* such difference'. In most empires, for example, Indigenous peoples were not governed as 'citizens' but as some kind of 'subject' population, 'and this meant allowing and even encouraging cultural and religious difference between metropole and colony'.<sup>58</sup> This approach to the issue of difference emphasizes the need, explored in this book, to see the dual-sidedness of the language of Western political thought.<sup>59</sup>

At some 'moments' this language could support claims for an 'empire of uniformity' as in Lord Durham's call in 1835 for the Quebecois, whom he referred to as an inferior 'race', to be made to conform to the 'national character' of 'the British Empire', with 'English laws and language' and 'a decidedly English legislature'.<sup>60</sup> At other 'moments', the language of Western thought could sustain claims for an 'empire of difference'. This kind of view was invoked, for example, by Edmund Burke when he spoke of the '... extensive tribes, suffering nations, [and] infinite descriptions of men, different in language, in manners, and in rites ...' who were the victims of Warren Hastings's corrupt government of India, patiently awaiting a reformed and civilized British rule.<sup>61</sup> What I have called 'the empire of political thought' is intended to encompass these two moments in the deployment of Western political thought. My approach is to focus on the ways in which Indigenous Australian 'differences' could be 'recognized' and were assimilated within the Eurocentric language of political thought and policy formulation. The concern of this book will be to highlight the ways in which Indigenous identity was constructed not only as 'different' in a variety of ways, but also as 'inferior' or 'defective', requiring 'civilization', 'cultivation' or 'domestication'.<sup>62</sup>

As Tully and others have suggested, any discussion of empire and political thought in Britain and its former settler societies will require confronting the problem of the relationship between imperialism and liberal political thought.<sup>63</sup> By the later nineteenth century, liberalism became the dominant discourse of British politics and political argument, and variants of liberal political thought remained dominant in her former settler dominions. Bhikhu Parekh has analysed the ‘universalist’ pretensions (and strident Eurocentrism) of nineteenth-century liberalism, which acknowledged diversity but ‘defined its nature and permissible range in narrow terms’, effectively ruling out ‘several forms of diversity’ including ‘traditional and customary ways of life.’<sup>64</sup> While correctly disdaining any simplistic characterization of liberalism as an ‘ideological justification of colonialism’, Uday Singh Mehta goes much further in arguing that through the study of the writings of John Stuart Mill and others on India ‘one gets a vivid sense of thought that has found a *project*.’<sup>65</sup> Mehta speaks of the English liberal perception of, and at times confusion over, what James Mill called the ‘exceeding difference’ of India.<sup>66</sup> Nonetheless, Mehta also contends that the liberal ‘imperial gaze’ is ‘never really surprised by the stranger’, whose difference is ‘recognized as ... familiar’ by being reduced to the category of the child or deviant.<sup>67</sup>

More recently, Sankar Muthu and Jennifer Pitts have each argued for a more benign interpretation of liberal attitudes to empire. For Muthu, the origins of liberalism lie in the European Enlightenment (c. 1650–1800), which was itself characterized by a keen interest in and acceptance of human cultural and political diversity. Indeed, Muthu claims that, ‘In eighteenth-century debates about human diversity, no single category, classificatory scheme or set of explanations of cultural difference was hegemonic in the manner that racial typologies of non-European peoples ...’ came to dominate nineteenth-century ‘... anthropological and political thought.’<sup>68</sup> Pitts similarly argues that the great eighteenth-century thinkers who have been considered proto-liberals – Adam Smith, Edmund Burke and Jeremy Bentham – were all largely hostile to empire, ‘tolerant’ of and ‘broad-minded’ in their attitude towards non-European peoples.<sup>69</sup> Only in the nineteenth century did liberal theorists such as James and John Stuart Mill and Alexis de Tocqueville adopt a more consistently pro-imperialist position, dismissive of non-European difference as ‘defect.’<sup>70</sup>

This transition has been explained by the legal scholar Paul McHugh in terms of the colonial application of legal regimes premised in the eighteenth century on the concern to secure colonial stability by placating Indigenous hostility or winning Indigenous alliance. In the more stable imperial system of the nineteenth century, however, colonial legal regimes focused on access to and control of land over which colonial sovereignty was asserted. McHugh used Tully’s concept of an ‘empire of uniformity’ to describe how this ‘overweening’ pretension reduced former ‘allies’ to ‘subjects’, ‘transform[ing] aboriginal society through



de-tribalization and reconstruction of aboriginal being into a version of the white, enfranchised, and self-regarding individual.<sup>71</sup> The ‘unilateral’ assumption of sovereignty implicit in the empire of uniformity is contrasted with eighteenth-century colonial practice (especially in North America), where ‘treaty-relations’ between Indigenous ‘nations’ and the colonies settled jurisdiction ‘bilaterally’.<sup>72</sup> By contrast, Pagden argues that eighteenth-century European empires were based on claims to indivisible sovereignty asserted by conquest in which an internal sharing of sovereign power was not possible.<sup>73</sup> Later nineteenth-century empires, however, recognized the inevitability of eventual colonial self-government, and even incorporated a degree of ‘indirect rule’ of Indigenous populations through their own institutions. Paradoxically, however, this limited recognition of settler-colonial and Indigenous sovereignty aimed – under the rubric of civilization – to create a new standard of uniformity in which all self-governing peoples organized themselves after the European fashion in nation states.

From the perspective of political thought, however, the recognition of difference and the aspiration to uniformity appear as twin poles in a recurrent tension. As one commentator has described it, Western thought has always incorporated the will to ‘demarcate the world of civil (urban) civic humanity from the barbarians, provincials, *pagani*, and outsiders’ while also aiming at their ultimate ‘inclusion.’<sup>74</sup> Grasping the nature of the connection between political thought and empire requires an effort. Liberal imperialism often incorporated a ‘recognition’ of Indigenous differences in negative terms as ‘primitiveness’ or ‘backwardness,’ in contrast to the progressive and modern features of liberalism.<sup>75</sup> Just as often, however, liberal imperialism rested on the *construction* and governmental manipulation of cultural, social and political differences.<sup>76</sup> *The Empire of Political Thought* will not attempt a comprehensive historiographic study of the practices and policies of Indigenous administration in Australia.<sup>77</sup> Rather, the book will explore the ways in which European perceptions of Indigenous peoples were couched within the language of political thought, the key terms of which framed the ‘problems’ they were thought to present to colonial government.

The book will begin with a discussion (Chapter 1) of the concept of civilization and the related term ‘savagery’ in European and British political thought in the seventeenth and eighteenth centuries. The representation of Indigenous government derived from this literature, much of it focused on the North American imperial context, will be related (in Chapter 2) to later eighteenth-century theories of civilization, and to colonial discourse on trade or traffic in North America and the Pacific. The aim here is not to show that European observers applied a single or uniform standard of civilization, but that they thought in terms of a gradation between more or less civilized peoples on the basis of perceptions of the relationship between their economic, social, political and moral condition.

Attention will then shift (in chapters 3 and 4) to European efforts to construe their colonization of Australia as peaceful by considering the vexed issue of the colonial legal status of Indigenous Australians. Subsequent chapters (5 and 6) will relate how the development of concepts of 'savagery and civilization' in Australia and elsewhere in the nineteenth century were related to changing perceptions of Indigenous social structure and the development of colonial liberalism. Stuart Macintyre has argued that 'Aborigines' were 'the absent centre of colonial liberalism' in Australia, a presence glided over in silence, original occupiers whose 'peaceful' dispossession provided the blank slate for colonial projects of improvement and development.<sup>78</sup> I will conclude by arguing that the discursive construction of Aboriginal identity was not an 'absent centre' but a very real and present centre of Australian colonial discourse down to the present day.



## 1 SAVAGERY, CIVILIZATION AND POLITICAL THOUGHT

The famous ‘Additional Instructions’ given to Captain Cook, marked ‘secret’ by the Admiralty, outlined a second objective for his *Endeavour* voyage into the Pacific Ocean in 1768.<sup>1</sup> His first and publicized task was to observe the transit of Venus from Tahiti. The second was to proceed through the South Seas in order properly to chart the presumed vast southern continent, *Terra Australis Incognita*, colloquially known as New Holland.<sup>2</sup> In relation to this second objective in particular, Cook was required to ‘observe the Genius, Temper, Disposition and Number of the Natives, if there be any, and endeavour by all proper means to cultivate a Friendship and Alliance with them.’ This aim was to be pursued by presenting ‘the natives’ with ‘such Trifles as they may Value’, thereby inviting them to ‘Traffick’ while showing them ‘every kind of Civility and Regard’. Finally, in a phrase that seemed almost a throw-away line, but the import of which would resurface throughout Australian colonial history, Cook was instructed, ‘with the Consent of the Natives’, to ‘take possession of Convenient Situations in the Country in the Name of the King’ or, if uninhabited, to ‘take Possession for His Majesty by setting up Proper Marks and Inscriptions.’<sup>3</sup> Doubt hangs over what the instruction to obtain the ‘consent of the natives’ would have meant to a naval officer like Cook.<sup>4</sup> What we can say is that Cook does not appear to have obtained or even to have asked for any ‘consent’ before taking possession of the eastern coast of New Holland in August 1770.

In this chapter and the following, I want to place this decision in the context of my analysis of ‘savagery and civilization’ in Western thought. I begin in this chapter with an exploration of the development of European notions of ‘savagery and civilization’ before examining their application in colonial contexts in Chapter 2. My approach differs from those who attribute Cook’s and his successor’s failure to obtain Indigenous consent to possession to the influence of the legal doctrine of *terra nullius*.<sup>5</sup> On this view, *terra nullius* was the foundational assumption of Australian colonization; a fabrication that allowed the colonizers to view the land as occupied but ‘unowned’ and therefore ‘vacant’. Henry Reynolds has argued that *terra nullius* was based on a rich vein of ideas

and arguments tendentiously culled from the traditions of Western political thought in order to dismiss arguments more critical of empire.<sup>6</sup> My interpretation also differs from those who argue that colonists neither self-interestedly nor disingenuously marshalled political concepts and ideas to justify their endeavours. Rather, they were self-consciously acting in the interest of civilization by making the new land in their 'own eyes, and in truth, a domain of civilization.'<sup>7</sup>

This argument assumes that when the colonizers themselves used the terms 'civilized' (in relation to themselves) and 'savage' (in relation to the Indigenous peoples), they did so in a transparent way. This assumption fails to explore how the 'fog' of preconceptions and assumptions that actors carried with them into the colonial encounter prevented transparent, mutual understanding.<sup>8</sup> More importantly, it fails to acknowledge how the language of civilization and savagery was used by colonists in an effort to make Indigenous peoples 'fit' into a conceptual scheme reflecting their own experience and interests. Terms like 'civilization', 'uncivilized' or 'savage' were used by colonists not simply to describe what they saw, but to sustain their appropriation of what they saw and encountered within their own language of political thought.

Aware of this possibility, Dixon argued that early Australian colonization was informed by notions of 'ignoble' savagery, representing the Aboriginal peoples as exemplifying 'the lowest level in the scale of human development', held to be 'fit objects for Christian charity'.<sup>9</sup> In European thought, however, invoking the term 'savage' or 'savagery' set in train a number of other concepts such as property, government or sovereignty, the deployment of which was central to what I have called the 'empire of political thought'. The empire of political thought is a term of art that tries to capture the way in which colonial perceptions of Indigenous Australians were articulated through (and their schemes for colonial government framed by) a set of concepts drawn from Western political thought. The empire of political thought was thus an important means by which European colonists pushed the 'headlong expansion of European forms of government ...'<sup>10</sup> A crucial conceptual prop for this expansion was the projection of notions of 'savagery and civilization' in which the concept of government played a pivotal role.

### Civilizing Political Thought

According to David Cannadine, early British colonists in North America perceived the Indigenous peoples not in terms of '... a relationship of (English) superiority and (North American) inferiority, but in a relationship of equivalence and similarity ...'<sup>11</sup> Dismissive notions of '... the intrinsic inferiority of dark-skinned peoples ...', he argues, only developed during the eighteenth cen-

ture.<sup>12</sup> Cannadine's view, however, pays scant regard to the emergence of much more complex Europe-wide discourses of civility that were later exported to a variety of colonial settings. Colonial applications of concepts of civility and civilization drew on previous applications of these concepts in European contexts in what has been described as a process of 'internal colonialism'. This internal colonialism is reflected in the projection of notions of civility or its lack onto supposedly uncivil populations (such as the Celts, the 'wild' Irish, the poor), who were identified as problems requiring more rigorous government.<sup>13</sup>

By the time that 'civilization' entered the English language in the late eighteenth century, the term (and cognates such as civility and civil society) denoted a range of personal, social, moral and political qualities that Europeans increasingly associated with the idea of their own historical development from ancient 'savagery' and 'barbarism' to an ever more refined condition of 'civilization'.<sup>14</sup> 'Civilization' served, Starobinski suggests, as a 'unifying concept' or shorthand way of referring to both a process of individual and collective refinement and the end result of that process, namely the condition of civilization.<sup>15</sup> By means of this term, 'civilized' Europeans could portray themselves as different from and superior to other peoples both inside Europe and beyond who were deemed less 'civilized'.<sup>16</sup> While this superiority could be seen in terms of the accomplishments of urbanized societies, commercial economies, Christianity, systems of written law, arts, sciences and letters, it also invariably denoted life under sovereign states with regular government. As various observers have noted, civilization came to be seen as the process by which a people acquired 'polished' manners, largely due to the salutary effects of 'police', that is good laws and effective public order.<sup>17</sup> In colonial contexts, such conceptions of civilization provided the means by which Indigenous peoples could be represented as 'inferior' to the European agents of a 'superior' civilization.<sup>18</sup> Informing such views was a historicized account of the development of civil life (civility, politeness and an urban society based on regular government with written laws) as an accomplishment of more advanced societies.<sup>19</sup>

This historicized scheme of social development owed much to the influence of European natural law thought. Natural law thought developed around the central principle that human beings, as rational creatures, had an obligation to make proper use of nature to sustain life. For some natural lawyers this basic principle provided a foundation for broad conceptions of the natural rights of individuals to make use of natural resources through the accumulation of private property, and through travel to and trade with foreign countries.<sup>20</sup> A central feature of natural law thinking, then, was a conception of the individual as a rational self whose agency was tied to property ownership and accumulation. The individual and the individual's property, however, both required protection. Europe's experience of civil strife and religious war in the sixteenth century

meant that later natural lawyers placed a premium on the provision of protection by sovereign states.<sup>21</sup> In seeking to show how that protection could be secured and sovereign states legitimated, natural lawyers developed theories of historical development based on the harnessing of productive labour (in manufacture and agricultural cultivation), and engagement in economic exchange or trade (typically involving money), as concomitants in the development of sovereign states as protective institutions.<sup>22</sup> The rights of particular members of these societies were held to be secure precisely because they lived within societies based on private property and protected by systems of written law enforced by sovereign states.<sup>23</sup> During the period of European empire-building in the seventeenth and eighteenth centuries, this historicized account of the connection between individual rationality, rights and political sovereignty was also sustained by casting the peoples of the New World (America) as exhibiting less advanced forms of society (in which their rationality, rights and sovereignty were similarly thought less developed).<sup>24</sup> This is particularly evident in the range of British promoters of colonization and political thinkers who, from the sixteenth century, portrayed Indigenous peoples in the New World as being in want of effective, good or indeed any government.<sup>25</sup>

The English focus on 'civility' and 'government' in the New World was reflected in the Letters Patent issued to Sir Thomas Gates and others in 1606, which spoke of the need to preach the word of God to the 'infidels and salvages' in order to bring them to 'human civilitie and to a settled and quiet government.'<sup>26</sup> The following 'Instructions of Government' was more explicit in its references to the 'saluages and heathen people' and the need to bring them to 'good and sociable traffique', if need be by 'such seure paines and punishments' as may be deemed appropriate.<sup>27</sup> As the English saw it, they were the bearers of good government to peoples, whether in Ireland, America or elsewhere, who were perceived to be living in a state of no, or at best defective, government. Promoters of colonization thought the task of 'bringing' Indigenous people to 'civility' required the development of a system of regular government capable of instilling individual good conduct and collective subjection. As Samuel Purchas expressed it, the Indians lived without laws and 'were a Law unto themselves'. By neglecting the obligations of natural law in their failure to make proper use of the soil and by resisting the English who would, the Indians had 'lost their owne Naturall, and given us another Nationall right' to subdue them and take possession of new land.<sup>28</sup> Purchas further claimed that there had been a 'voluntary subjection of the Natives' to the 'Crown of England' through their various 'Kings', such as 'Powhatan ... chiefe Lord of all the Savages.'<sup>29</sup> This claim, however, which implied the existence of a 'recognizable' Indigenous political structure, existed alongside his other claim that the Indians possessed 'little of Humanitie but shape', were 'ignorant of Civilitie' and 'more brutish than the beasts' who hunted in the wild

lands through which 'they range rather than inhabite'.<sup>30</sup> As a consequence, Purchas thought a chief aim of English policy should be to 'recover' the Indians 'by humanity and civility from barbarisme and Savagenesse to good manners and humane polity'.<sup>31</sup>

As late sixteenth-century writers defined it, civility referred to various forms of mental discipline capable of shaping outward conduct. One contemporary writer described the practice of 'civil conversation' for instance, as '... the art of applying appropriate behaviour, or as the art of making behaviour conform to propriety and right reason'.<sup>32</sup> In seventeenth-century English political thought in particular, the word 'propriety' had a double meaning. While 'propriety' referred to what was considered proper or acceptable conduct, it also denoted a realm of conduct over which the individual was sovereign, exercising a 'property' over their own person.<sup>33</sup> Notions of civility emerged in Renaissance Europe alongside the growth of urban centres driven by the economics of commerce and trade. Civility denoted forms of conduct adapted to and supporting a well-regulated polity, encompassing laws protecting private property to which all citizens were subjected. Most importantly, it encompassed an absolute need for the careful management of human conduct. Civility was opposed to the rudeness of the uncultivated, the unlearned, and especially to those people 'wythout city or towne, law or relygyon, [who] wanyred abrode in the wyld feldys & wodys' as 'brute bestys' without 'ordur & cyvlyte'.<sup>34</sup>

Above all, civility was a learned quality consisting in the unspectacular virtues necessary for social, urban or city life: politeness, non-violence, respect for law, probity and thrift, self-discipline, good comportment, appropriate dress and speech.<sup>35</sup> By the seventeenth century, this opposition had been entrenched within what John Hale has called the '... "us" and "them" strand in European self-awareness'.<sup>36</sup> In other words, the ascription of civility to themselves, and occasionally to non-Europeans, was one of the standards Europeans employed to signify their sense of 'superiority', a superiority of 'civilized' as opposed to 'uncivilized' life at home and abroad.<sup>37</sup> Civility and civil society were also conceived to be fragile constructions, forever threatened by rampant corruption within or by unrestrained savagery and barbarity without. The need to guard civil society from both moral corruption and from uncivil barbarism and savageness became a distinctive feature of modern European political thought. It is significant then that for some early observers, American Indians were depicted as exemplars of robust virtues lost in more refined but morally enervated European societies. This image could be used to critique European social life and schemes for colonization.<sup>38</sup> It could also be used as a justification for conquest and colonization.<sup>39</sup> In part, this is revealed by the insistence in early colonial texts that American Indians be 'reduced' to civility, by which it was meant that their primitive virtues be replaced by learned conduct similar to European codes of civil conduct.



For the English to ‘reduce’ the Indigenous Americans to ‘civility’ was no easy task. Although some British promoters of colonization called for conquest, this was not always practicable in the parlous initial colonies. It also smacked of the opprobrium of the violence and wastefulness of the Spanish empire. For this reason, some sought to ‘civilize’ the Indians in the New World by making Indigenous authorities (‘chiefs’ or ‘sachems’) ‘tributaries’ of the English, and through them ensure their people’s subjection.<sup>40</sup> Others recommended religious conversion of the Indians as the key to their good government, just as it had been in European societies.<sup>41</sup> In colonial New England, for instance, the missionary John Eliot established a number of ‘praying towns’ in which converted tribes would live apart from the English, elect their own magistrates and hold their own courts under the superintendence of missionaries.<sup>42</sup> Violent confrontations with Indigenous communities, such as at Jamestown in 1622, and in the Pequot War of 1636–8, and especially King Phillip’s War in 1675, led to a greater willingness on the part of colonists to dismiss Indigenous peoples and their conversion on the grounds that they were irredeemably ‘savage.’<sup>43</sup> Although not concerned exclusively with colonial matters, John Locke’s *The Two Treatises of Government* reflects that sentiment. The text was a powerful statement of English attitudes towards America and its Indigenous inhabitants from a writer who had been involved in England’s colonial ventures since the late 1660s.<sup>44</sup> Above all, *The Two Treatises* gives an early example of the subordination of Indian claims (to land and property) to English claims on the basis of a historicized account of the origins and development of ‘civiliz’d’ government and property.

### The Savagery of Political Thought

John Locke is often considered a key thinker in the development of the British ‘ideology’ of empire.<sup>45</sup> In his association with the Earl of Shaftesbury’s schemes for colonization in the Carolinas, and his later involvement with the Board of Trade, Locke’s influence as an ideologist of colonization is certainly significant. Understood as the effort to transplant ‘European’ communities of settlers onto foreign lands, colonization required (and Locke certainly provided) an ideological justification.<sup>46</sup> In his treatment of Indigenous government, however, Locke can also be seen as an ‘ideologist’ of empire, that is the governmental project of administering ‘subject peoples’. His contribution was not to deny the existence of Indigenous government, but to ‘recognize’ it as ‘deficient.’<sup>47</sup> In doing so, Locke gave voice to an influential interpretation of Indigenous life that should not be seen as simple reportage or disinterested description. Rather, by building on earlier sources, Locke gave voice to and helped to develop an influential view of Indigenous life within the traditions of Western political thought by historicizing Indigenous differences as ‘primitive.’<sup>48</sup>

Locke's image of savagery must be seen as a further development of earlier Spanish attempts to restrict Indigenous rights by marshalling arguments from the natural law tradition to substantiate Indigenous irrationality, inferiority or barbarity.<sup>49</sup> Significantly, Spanish Dominicans such as Francisco de Vitoria and Bartolome de Las Casas used natural law arguments to establish that Indigenous Americans did possess rights.<sup>50</sup> In Vitoria's case, however, he was still prepared to justify Spanish conquest if Indians caused harm to the Spaniards by refusing their invitation to engage in trade.<sup>51</sup> In making this claim, Vitoria tied the Spanish right to wage war to the natural law principle that humans must make the most efficient use of nature to sustain life. By refusing to engage in trade, the Indians abrogated this prime injunction of natural law. Justifications of English colonization rested on claims that the Indigenous inhabitants did not make proper use of the land. The English began to justify their imperial designs on claims that the Indians had no laws but 'custom' and a defective government. This view had been articulated in the seventeenth century by the Jesuit Father Joseph Acosta, for whom the 'savagery' of Indians consisted in their lack of historical development, as demonstrated by their relative absence of good, effective or indeed any government at all.<sup>52</sup> It was this discourse on which Locke drew in his writing, but in doing so he tied his account of American 'savagery' to an implicit history of European civil life.<sup>53</sup>

Locke's thought was founded on the natural law principle that human beings had an obligation to preserve life by making the best use of natural resources. His explicit aim in the *Two Treatises*, however, was to demonstrate by means of an account of the 'state of nature', how political authority could be legitimately based upon the unforced consent of the members of civil society to renounce their own right of self-defence to an impartial, public authority. Locke's image of the state of nature was constructed from a range of colonial sources on Indigenous peoples, depicting a condition without settled private property and legislative authority. Emerging from this literature was an ethno-historical scheme that universal patterns of social development could be discerned, and that European societies were most developed. Though differently drawn by individual thinkers, this basic conviction remained a central feature of Western thought.<sup>54</sup>

Locke's ethno-historical scheme became most apparent in his account of how the agreements needed to establish legislative authority emanated from the 'common consent' of the more advanced peoples of the Earth to the use of money as a means of exchange thus allowing the accumulation of property. Such agreements were double-sided, one set of agreements setting the bounds of each person's property *within civil society*, the other setting the bounds of territories between the 'several States and Kingdoms' of the Earth. The implication that Locke did not hesitate to draw, was that where peoples had not consented to the use of money, no property beyond the immediate possessions necessary for

self-preservation could be accumulated, and thus 'great Tracts of Ground' in America were unclaimed, and so 'still lie in common'.<sup>55</sup>

The thrust of this argument was that in not consenting to the use of money such peoples could have only a very circumscribed and limited property, and that similarly they could have only a tenuous political identity. The implications of this view were spelled out in the chapter 'Of the Beginning of Political Societies', in which Locke argued that civil societies had their origin in the union of the family ruled by the patriarch.<sup>56</sup> He supposed that if more than one family united, the members would use 'their own natural freedom' and appoint someone who seemed best suited to rule, and 'Conformable hereunto', Locke suggested, 'we find the People of *America*, who ... set up the stoutest and bravest man for their Ruler'. This passage is crucial in two senses, first in that it characterizes Indian rulership as limited by the 'natural freedom' of all members of the tribe, and second in raising the possibility that rulership could be based on election or the choice of the members. Locke here develops an ethno-historical account of Indian 'government':

Thus we see, that the *Kings of the Indians in America*, which is still a Pattern of the first Ages in *Asia* and *Europe* ... are little more than *Generals of their Armies*; and though they command absolutely in War, yet at home and in time of Peace they exercise very little Dominion, and have but a very moderate Sovereignty, the Resolutions of Peace and War, being ordinarily either in the People, or in a Council ...<sup>57</sup>

In making this argument Locke echoed other writers such as James Tyrell, who clearly did recognize a real but qualitatively inferior Indigenous government.<sup>58</sup> This government was described in terms of a familiar trope in seventeenth- and eighteenth-century British thought of 'Lacedaemonian kings', or the kings of ancient Sparta. The power of an Indian chief, then, was described as analogous to that of a, '... *Lacedaemonian King* ... And so are those *Caciques* [chiefs] that the *Indians* in the *Caribbee* Islands and *Brasile* chuse to be their Leaders in War, but in Peace have little or no power.'<sup>59</sup>

Tyrell's (and Locke's) source on the 'Caribbees' was probably Charles Cesar de Rochefort, who claimed that although the 'poor Barbarian' Caribbees 'cannot be imagin'd to study much Policy', they did nonetheless have their own elected 'petty Kings and Captains'.<sup>60</sup> None of these leaders 'hath any command over the whole Nation nor any superiority over other Captains', except in times of war, and 'when the expedition is over, he hath no authority ...'<sup>61</sup> The election of leaders he described as contingent upon withstanding 'strange and savage' rituals which conferred respect, from which he made the not insignificant deduction that '... this Worlds Honour, whatever it may be, Virtue excepted, consists only in Opinion and Custom, which differ, and sometimes clash, according to the diversity of Mens humours'.<sup>62</sup>

In bowing to the power of custom and opinion, Rochefort was suggesting, as Locke was to suggest in his *Essay Concerning Human Understanding*, that there were more kinds of government than that which involved holding and exercising the powers of public office.<sup>63</sup> The presence of government could also be indicated by the degree to which a human community regulated its affairs by the operation of social sanctions – the need to show courage and fortitude (or, for Locke, rectitude and public credit). Government may also consist in the effective regulation of families, the control of children and women. It was with these latter kinds of government in mind that Tyrell refuted Hobbes's account of the state of nature, and the latter's particular claim that the Indigenous inhabitants of America exemplified it. Tyrell contended that even though there was 'no Civil Power to keep them in awe ...' and that they had no 'Government in time of Peace', Indigenous Americans nonetheless possessed 'Concord' by maintaining familial bonds, and 'having no riches.'<sup>64</sup> In the account of his wanderings among the peoples of the Isthmus of Panama, Lionel Wafer – the sometime privateer and shipmate of William Dampier – similarly extolled the familial virtue, order and regularity of the Indigenous peoples he observed.<sup>65</sup>

The idea that Locke and Tyrell employed was that 'civil' (as opposed to familial) government should be understood as a function of different arrangements of property, and correspondingly different kinds of political and social life. Tyrell's reference to the 'absence of riches' signified the view that where a subsistence economy prevailed, there could be few distinctions of wealth and property, thus the desire for private gain would be limited, few crimes were possible, and thus few (if any) laws were needed. 'Civil' government was seen here as a function of a more advanced stage of economic, social and political development than that exhibited in America. In other words, 'civil' government was premised on an unequal division of property requiring the regulation of conduct by laws, government and the norms of 'civility'. Indigenous government, as these Europeans saw it, was, like that of the Lacedaemonians, premised on rough equality and the inculcation of a rude, martial virtue.

In late seventeenth-century British thought, Lacedaemonian kingship could mean different things. For an absolutist like Sir Robert Filmer, limited or mixed monarchy was a dangerous concession, and the limited powers of Lacedaemonian kingship represented a defective kind of sovereignty.<sup>66</sup> For James Harrington and Walter Moyle, however, Lacedaemonian kingship could be invoked approvingly in reference to the equality, tranquility and martial vigour of the Spartans.<sup>67</sup> The Lacedaemonian system, as Harrington and Moyle understood it, represented a type of government in which a more suitable balance was struck between a limited monarchy, aristocratic privilege and popular delegates. Pocock also reminds us that it represented a system of government based on popular involvement with the means of national defence, thus identifying it with a martial virtue that

'republicans' claimed was being extinguished in contemporary England.<sup>68</sup> In describing Indian government as 'Lacedaemonian' or 'Spartan', European writers could be advancing a claim that those Indians possessed a kind of martial virtue, but could also be highlighting the absence of any settled system of law and legislation. This was the sense in which Locke may be said to have invoked the imagery of Lacedaemonian kings. As a critic of absolute sovereignty (and Filmer's defence of it in particular), Locke was aware of the anti-absolutist implications of the Lacedaemonian system. However Locke's invocation of this imagery was not a recommendation, but a way of highlighting the alternatives that hedged his own recommendation of limited power.

Locke in fact was reticent to speak of sovereignty precisely because the term had absolutist connotations, and he preferred using the term 'Supream Power'.<sup>69</sup> Locke's favoured style of government, expounded at length in the second *Treatise*, was based on the idea that political power derived from the 'consent' of property owners who together formed a civil society. This 'consent' was fully revocable on condition that the government to which they had consented had breached the trust bestowed upon it by those who had given their consent. To a late seventeenth- and early eighteenth-century English audience, this would have seemed a dangerous, if not revolutionary doctrine.<sup>70</sup> For this reason, Locke was careful to distinguish his favoured system of government not only from Filmer's absolutism, but from the more dangerously anarchic systems of government he seemed close to recommending. Hence Locke's repeated claim that his delegated 'supream power' was completely different from the simple assumption of power by undisciplined groups such as bands of 'Robbers and Pyrates'.<sup>71</sup>

Such distinctions reinforced Locke's view that these dangerously unregulated associations were based on the uninhibited (and dangerous) 'natural' freedom of their members. His favoured system of government, however, rested on the freedom of those in civil society and was thus regulated not only by laws, but by a refined 'law of opinion' quite different to that which dominated the savage mind. Locke was thus insistent that his system was qualitatively superior to the superficially similar power of Indian chiefs. Although the description of the power of Indian chiefs in *The Two Treatises* made it sound democratic and even delegated, it consisted solely in command in war, and as Locke also put it, 'in time of Peace' those chiefs exercised 'very little Dominion ...'.<sup>72</sup> In phrasing his description in this way, Locke was advancing the claim that, first, those chiefs possessed no power (or dominion) in times of peace as of right, and hence did not constitute a government based on the right to legislate. The second claim was that Indian chiefs did not possess or own (as their dominion) the lands upon which they and their tribes resided, and thus could legitimately be dispossessed by Europeans, who alone were capable of establishing a 'dominion'.

The idea that Indigenous peoples in America lived under the rule of chiefs whose powers could be described as roughly analogous to that of 'Lacedaemonian kings' was invoked by a variety of eighteenth-century 'authorities' such as Father Joseph Lafitau and Cadwalader Colden.<sup>73</sup> The superintendent of northern Indian affairs in the thirteen colonies in the 1750s, Sir William Johnson, also spoke of the 'chief magistrate, or Sachem' of the Iroquois as possessing some limited authority over the 'nation', but that his 'authority is scarcely discernible ...' and rested on the 'tacit consent' of the tribe.<sup>74</sup> Indeed, the 'political maxim' of the Indians, Johnson claimed, was 'Spartan-like', commending the pursuit of war and martial virtues, to which they had tailored their 'government' and its 'small degree' of 'sovereign' authority.<sup>75</sup> The consequence of this 'small degree of sovereignty' was that subjecting Indigenous Americans to British rule was a similarly minor moral concern.

### Histories of Civilization

The rationale that Locke and others provided for the subordination of Indigenous people to European imperial government rested on the 'recognition' of Indigenous difference. That recognition accepted the existence of Indigenous virtue and government but, by recognizing a limited, even temporary Indigenous form of government, British political thinkers and colonial administrators constructed the problem of imperial administration around an ordering of government. The task of imperial administration thus required the subjection of Indigenous peoples who possessed their own forms of government. This could be accomplished through the conquest of Indigenous peoples, but in most cases the problems of waging a war of conquest on the frontiers, not to mention polite scruples at home about conquest abroad, prevented this option.<sup>76</sup> The alternative was to engage in forms of negotiation, often by treaty, in which the British could attempt to subject and control Indigenous peoples through their own 'government'.

In India the British established an empire over peoples who were generally thought to have sophisticated and viable, though ancient and much decayed, structures of government. When the East India Company received the *diwani* of Bengal after the battle of Plassey (1757), the Company became a de facto government with powers of raising and administering taxes. Bowen has described East India Company rule, however, as a 'dual system of government' in which local government administration and tax collection were carried out by Indian officials under the supervision of East India Company functionaries.<sup>77</sup> In North America also, British colonists attempted to employ Indigenous sources of authority. Here, the wording of treaties with Indigenous peoples often construed the 'consent' of tribal chiefs and sachems in Canada and North America as

pledges 'on behalf' of their 'tribes', tying them by bonds of submission in return for limited recognition of rights and the payment of gifts or presents. In doing so, the recognition given to Indigenous peoples was framed within a historical scheme that tied the limited recognition of Indigenous government to a similarly limited recognition of Indigenous property (the ubiquitous 'hunting and fishing grounds' mentioned in many treaties).<sup>78</sup>

During the eighteenth century, this scheme was given powerful expression by a range of political thinkers who were more systematic than Locke in tying what they supposed to be the superiority of civilized life (such as good government, politeness or self-control, and the protection of person and property) to complex accounts of historical development or progress. Such schemes of civilization purported to show that various parts of Europe (especially England, but also large parts of Europe's north Atlantic seaboard) were simply more advanced along a scale of civilization that rendered less advanced people in need of guidance, tutelage or control.<sup>79</sup> European thinkers spoke of a gradation of more or less 'civilized' peoples, and thus differentiated peoples they deemed least civilized (the so-called 'savages') from others considered slightly more civilized (so-called 'barbarians').<sup>80</sup>

The French philosopher Montesquieu was among the most insistent on the purported distinction between 'savage' and 'barbarian' peoples.<sup>81</sup> Savages, he claimed, existed in 'small scattered nations', whereas 'barbarians' formed 'small nations that can unite together'. Savages he described as 'hunting peoples', barbarians as 'pastoral people', and significantly he claimed that because they wander about the forests, savages form no permanent social bonds and have loose if any family structures. Barbaric pastoralists by contrast were described as being tied to certain regions by their herds, as living in communities with settled laws and strict familial relations. Montesquieu said little about any further progression, but he did accord the use of money an importance that implied that its invention constituted a pivotal stage in human social and political evolution. 'If you are alone', Montesquieu wrote, and happen to come upon an 'unknown people and if you see a coin, reckon that you have arrived in a nation with police'. Here, 'police' referred to the governmental activities by which society was shaped by pervasive mechanisms of surveillance and regulation. The use of money thus implied a much more settled form of social existence, probably based on an agricultural economy, in which private property was mediated by a means of exchange, protected by laws and government.

As Richard Sher has argued, the thinkers most closely associated with the Scottish Enlightenment had read and appreciated Montesquieu's work.<sup>82</sup> They articulated a variety of 'historical' explanations of the motor forces and effects of social advance.<sup>83</sup> According to the stadial theory, often ascribed to Adam Smith, peoples pass through four distinct stages of development based on the

sophistication of their means of subsistence or economy. The means of subsistence was held to shape 'manners', conduct and the 'moral' progress of a people as they passed from primitive savagery (hunting and gathering), to barbarism (pastoralism), agriculture, and finally to civilized commerce and foreign trade.<sup>84</sup> Although he thought it beneficial, Adam Ferguson also thought commerce was a source of moral enervation, weakening the dedication to virtue. As Pocock has suggested, Ferguson's fear on this score was a 'moralistic' exposition of 'the dangers inherent' in civilized societies.<sup>85</sup> He underlined these dangers by focusing on the distinction between 'savages' and 'barbarians' in order to argue that the great benefits of civilization were won at considerable moral costs.<sup>86</sup>

For Ferguson, the image of 'the savage' embodied all the exotic, untutored qualities that the forces of civil society strove so hard to control. For him, the savage was 'inured to fatigue', possessed a 'robust ... unalterable constitution', was the subject of passions that rendered him (or her) indolent when unmotivated, but 'bold, impetuous, artful and rapacious' when driven by the hunt or conquest.<sup>87</sup> He used this image of the savage to highlight what he thought to be the peculiar advantages and special dangers of civilization. Although the French philosopher Jean-Jacques Rousseau also used the image of 'savagery' to critique civilized life, Ferguson's criticism of civilization can be separated from Rousseau's (in large part) on the basis of his construction of 'savage' life. The savage envisaged by Rousseau was a rather bloodless and pathetic creature more inclined to flight than fight.<sup>88</sup> Ferguson's savage, however, showed a robust appreciation for the boundless possibilities that savage life afforded for exercising a warrior's virtues.<sup>89</sup> For Rousseau, 'the savage' was a stranger to anything resembling a 'society', having 'neither houses, nor huts, nor any kind of property whatever', they were only brought together by passing need or sudden inclination, and separated as easily, 'with the same indifference'.<sup>90</sup>

Ferguson's savages were strangers to society because 'society' itself was seen as an artefact of a process of civilization.<sup>91</sup> Consequently, 'society' was an accomplishment only of pastoral 'barbarians' and more civilized peoples.<sup>92</sup> A similar sentiment was expressed by the great Scottish Enlightenment historian William Robertson, who claimed that Indigenous Americans occupied 'the rudest state of collective life, far inferior to the Germanic tribes described by Tacitus, in which '[w]e behold communities just beginning to unite ...' in which human beings 'feel but imperfectly the force of its [society's] ties ...'.<sup>93</sup> John Millar argued that the treatment of women was one of the key indexes of civilization, contending that female slavery was a characteristic of 'savagery', the 'rudest period of society'.<sup>94</sup> The distinction Ferguson made between 'savages' and 'barbarians' was in part based, as was Smith's, on their means of subsistence.<sup>95</sup> Such changes led to moral and psychological changes. Thus, having 'possessed themselves of herds', barbarians put an end to the rough equality of savage hunters, accomplishing



thereby 'a material difference of character', and laying the foundations for despotic forms of 'barbaric' government.

Ferguson claimed that his depiction of savage life was drawn from accounts of First Nations people in North America, citing European 'authorities' such as Charlevoix, Wafer, Colden and Lafitau.<sup>96</sup> From such sources, Ferguson outlined what he took to be the social and political condition of savagery, noting that among Indigenous North Americans each individual was 'independent', but belonged to family groups 'subject to no inspection or government from abroad' but loosely linked with other family groups 'to constitute a national council' organized as a 'confederacy'.<sup>97</sup> The Iroquois, he conceded, maintained a kind of 'balance of power' and pursued 'alliances and ... treaties, which, like the nations of Europe, they maintained, or they broke, upon reasons of state ...'. Ferguson's apparent recognition of Indigenous government here also drew on classical sources, notably Tacitus's identification of the 'order' of 'savage' communities resting not on laws, government or the manners of civil life, but 'instinct' and communal attachment.<sup>98</sup> Though Ferguson could admire the order of 'savage' communities, achieved without recourse to 'police or compulsory laws'; it was only when divisions of property among 'barbaric' pastoral peoples gave rise to 'distinction of ranks' that the terms '*jurisdiction* and *government*' become known. Among savages, the chief is not 'sufficiently distinguished from his tribe' and is still regarded with 'veneration' rather than 'envy', as the 'common bond' of their union, 'not as their common master'. Ferguson cited the 'frequent practice of war' as the motor force in 'strengthening' the 'bands of society' and 'mutual attachment', but also in establishing the 'despotism' and 'political slavery' imposed by barbaric 'sovereigns'. For Ferguson, then, the condition of savage virtue was contrasted to that of barbaric tyranny and corruption.<sup>99</sup>

The 'civilized' person by contrast was an autonomous agent, capable of resisting the whims of passion through the 'study of justice ... and good order' in civil society, entailing the inculcation of habits of civility, 'industry, sobriety, and frugality' enabling them to act 'with a view to futurity'. These qualities could only exist in a society in which private property provided the necessary foundation for 'relations of patron and client, of servant and master', and for the legal and political arrangements that protected them. Property ownership provided, Ferguson maintained, 'the ground' upon which 'a permanent and palpable subordination is laid'. The development of civil society was thereby associated with the simultaneous development of political institutions, in particular government and the state. By 'government' he meant the careful management and regulation of 'society' to ensure the flourishing of commerce, the increase of wealth, and the extension of the disciplines of labour throughout society. Ferguson's legacy is thus ambiguous, encompassing both a denigration of savagery, and an appreciation of what savagery could teach the civilized about combining their 'civility'

with 'martial virtue'. Nonetheless, Ferguson's thought reflected the development of ideas of civilization in British thought, in which concepts of 'society' and 'government' acted as measures of superiority, providing a rationale for subjecting the 'uncivilized'.<sup>100</sup>

This rationale for 'subjection' of Indigenous people to imperial rule was based on the representation of Indigenous differences from Europeans as backwardness or primitiveness. In other words, Indigenous differences were historicized in a conceptual scheme that purported to demonstrate European sophistication and civilization. Crucially, this conceptual scheme was thought to be based on universal processes of human social development that only Europeans could comprehend.<sup>101</sup> Within this scheme, 'savagery and civilization' conveyed meaning on the basis of the deployment of a series of other concepts – such as 'government', 'property' or 'society'. This scheme was firmly entrenched in British political thought by the time of Britain's engagement in Pacific exploration and colonization from 1767. This does not mean that the progress of colonization was initiated or driven by ideas of 'savagery and civilization'. Nor does it mean that all European political thinkers were unanimous in their praise of empire.

What I have referred to as the empire of political thought implies that the terms and concepts that constituted the language of Western political thought did not exist in a vacuum, isolated from or somehow immune from imperial expansion and colonization. While this is hardly a controversial or novel claim to make, it remains to explore how this language was employed in the Australian and other colonial contexts. In the following chapter I will argue that Captain Cook's 1767–72 voyage into the Pacific and his acts of possession there should be interpreted in light of the scheme of 'savagery and civilization' and of understandings of property and government that scholars have hitherto tended to overlook. The following chapters will then turn to an exploration of how colonists in Australia were able to use a range of concepts in Western political thought not only to justify their activities, but to frame the relationships they wished to forge with the Indigenous inhabitants of the country.



## 2 ‘TRAFFICKING’ FOR EMPIRE: COMMERCE, CONSENT AND COLONIZATION

Fifteen years after his death at Kealahou Bay on Hawai’i in 1779, the figure of Captain Cook was immortalized in a print designed by P. J. de L’Outhbourg entitled *The Apotheosis of Captain Cook*.<sup>1</sup> The *Apotheosis* is an artistic rendering of the moment of Cook’s supposed elevation to the heavens, immediately following his violent death at the hands of a crowd of enraged Hawai’ian islanders. None of the many contemporary images of this already legendary figure, nor any that were to follow, captures more completely his status as hero of empire. As he is whisked heavenward, the island of Hawai’i and the encircling Pacific Ocean he had done so much to expose to European vision recede beneath and behind him. The viewer is invited to see the Pacific, its lands and its peoples as a backdrop to his greatness, but also to see it in perspective – like the detailed maps he had meticulously prepared for the Admiralty. The viewer sees the previously unknown (to Europeans) Pacific from the vantage point of elevation. This is what the *Apotheosis* invites us to see as Cook’s accomplishment. Cook is immortalized because he was the one to have reduced the unknown and unseen to the scrutiny of European vision, European charts and European navigation.

The viewer of course cannot be unaware that Cook’s accomplishments have been won at the cost of his life at the hands of people he had made known to Europe. Much ink was later to be spilled over the question of whether Cook’s death was caused by his misjudgements and violence on the beach, or by the islanders’ belief that he was the personification of their god of peace and productivity, Lono, who had outstayed his ritually-prescribed welcome.<sup>2</sup> Cook’s European divinity, however, was assured by his apotheosis. If the viewer harboured any doubts as to the viciousness of the ‘savages’, the iconography of the *Apotheosis* removed them. Cook is shown floating upward on a cloud flanked by two allegorical female figures. On one side ‘Fame’ blows her trumpet, heralding to the ages Cook’s claims to greatness, while on the other side ‘Britannia’, the symbolic embodiment of Britain and its Empire, extends her arm and holds him aloft. Cook, the *Apotheosis* suggests, is the justly famed explorer, navigator and discoverer whose death is to be revered as a sacrifice for Empire.

There can be little doubt that Cook's heroic, even god-like status served an important purpose within the context of Britain's Empire. The Empire could have no more useful figure than Cook, the great navigator, the man of science, the intrepid explorer whose very 'discoveries' brought about his death.<sup>3</sup> More recent work on Cook has emphasized the degree to which he became enmeshed in complex 'spaces of contact' between Indigenous peoples and Europeans that were well beyond his control.<sup>4</sup> Indeed, Salmond portrays Cook as a kind of tragic figure, caught between two worlds – Europe and Polynesia – unable to live in either.<sup>5</sup> For Thomas, the 'act of looking' for and at the new, the unknown, the strange or exotic was the 'chief purpose of Cook's voyage'.<sup>6</sup> His 'expedition was not just a rational plan to fill spaces on a map, but also a symptom of a state of enchantment'. Elsewhere he describes Cook (and Joseph Banks) as 'embodiments of Enlightenment inquiry'.<sup>7</sup> These interpretations emphasize Cook's position as an intermediary between radically different cultures, seeking an understanding among the tentative exchange of goods and ideas between them. I will argue in this chapter that the activity of exchange – or 'traffick' – was central to the expansion of Britain's Empire, and that Cook's own 'trafficking' needs to be understood in the context of the longer history of European thought and colonial practice linking trade and empire.

Salmond reminds us that Cook's status as 'man of science' and as 'hero of empire' are inseparable,

... Captain Cook has become an icon of imperial history. His voyages epitomise the European conquest of nature, fixing the location of coastlines by the use on instruments and mathematical calculation, classifying and collecting plants, animals, insects and people. As the edges of the known world were pushed out, wild nature – including the 'savages' and 'barbarians' at the margins of humanity – was brought under the calm, controlling gaze of Enlightenment science, long before colonial domination was attempted.<sup>8</sup>

Salmond here alerts us to two important features of the Cook voyages that I will focus on in the last section of this chapter. The first is the intimate connection between what Cook did and the ferment of ideas associated with the European Enlightenment. The second is that Cook's voyages (and I will discuss only his first aboard HMS *Endeavour* in 1768–72) occupy an early phase in the development of Britain's Empire in the Pacific in which imperial claims had to be balanced alongside the abject inability to effect and sustain them. In this chapter I want to explore how these two elements of Cook's voyages can be interpreted together. First, I want to examine the importance of ideas of commerce and trade in Britain's eighteenth-century Empire. Then I want to turn to the application of ideas of commerce and trade in the American colonial context. In the final section, I will argue that Cook's employment of Enlightenment understandings

of 'traffick', trade, property and consent had a significant bearing on his acts of imperial possession.

### Empire of Trade, Empire of Liberty

Cook and his contemporaries carried with them a rich conceptual language they employed in their observations and interpretations of the Indigenous peoples of the Pacific.<sup>9</sup> In few studies, however, have the complexities and subtleties of that language and its employment been closely examined. Bernard Smith has made one attempt to do so by arguing that alongside explicit motivations to do with navigation and science, Cook's voyages into the Pacific had an 'implicit message'. This message was that Cook represented the values of European 'civilization and the values of an exchange economy' in a region evidently in need of such 'gifts'. Indeed, Smith argues, Cook became the 'first and perhaps the greatest global agent' of British commercial civilization in the Pacific. Smith's insight draws attention to a too often neglected aspect of Cook's voyages. Not only did Cook concern himself with the 'explicit' purposes of the voyage – adding to European scientific, geographic or ethnographic knowledge – he also conveyed its 'implicit' message by creating markets wherever he went. Unable to rely on Adam Smith's 'invisible hand', Cook himself had to try to determine the terms of trade and enforce rules of exchange with a god-like authority, 'Adam Smith's god' made manifest in the Pacific.<sup>10</sup>

More recently, Anna Neill has argued that Cook occupied a position analogous to Adam Smith's 'impartial spectator', able to internalize and accurately to perceive the web of sympathetic connections that underpinned society. Cook thus came to exemplify the pretensions of eighteenth-century British thought. His actions embodied the strictures of civilized society based on commercial engagement, yet he was also able to perceive and manage the dynamics of contact with less civilized societies.<sup>11</sup> These interpretations rightly draw our attention to the connection between Cook's (and by implication other colonists') actions and the broader framework of European concepts and assumptions. Nonetheless, they portray a relationship that is too dogmatic. I will argue here that Cook's activities were not based on Adam Smith's or any other contemporary economic theories. Nonetheless, Cook's *Endeavour* voyage was a pivotal moment in the articulation and extension of Britain's 'empire of trade' in the Pacific, which was to have profound implications for Australia's subsequent colonization.

Historians of the British Empire have long argued that after the Seven Years War (1756–63) the nature of the Empire began to shift away from territorial expansion by conquest, towards a focus on inter- and intra-colonial trade fueling the commercial supremacy of Britain.<sup>12</sup> This so-called 'second empire', as distinct from the 'first empire' (roughly 1580–1763), came to be seen more as a

network of commercial advantage to Britain and its colonies based on the supposedly peaceful pursuit of profit, opposed to the 'Black Legend' of Spanish cruelty, conquest and corruption.<sup>13</sup> This image of the British 'empire of trade' as a benign alternative to more violent empires was vital to contemporary British justifications of their Empire as an 'empire of liberty'. Significantly, this imagery is alive and well today among conservative historians. For Niall Ferguson, '... no organization in history has done more to promote the free movement of goods, capital and labour' or to plant '... Western norms of law, order and governance around the world' than the British Empire.<sup>14</sup> There is no doubt that Britain's eighteenth-century 'empire of commerce' was perceived by many Britons as an 'empire of liberty', but, like all such terms and images, their import hinges as much on what they reveal as it does on what they conceal. Trade and commercial advantage certainly played a key role in British (and other) imperial schemes before the eighteenth century, and throughout the history of the British Empire, commerce and imperial expansion and control were closely entwined.<sup>15</sup>

According to C. A. Bayly, the 'second' British Empire was an 'expression of a revived [British] nation-state' responding as much to concerns over its international position and the domestic security of Britain's aristocratic elites as to genuinely commercial interests.<sup>16</sup> Bayly argues that the real distinctiveness of the 'second empire' lies in the emergence of notions of British 'racial superiority' that began to emerge and receive institutional expression during the late eighteenth century. A range of evangelical, anti-slavery and missionary organizations, as well as a range of leading intellectuals, he suggests, came to see the qualities of personal independence ('self command') associated with the social and political thought of the Scottish Enlightenment as distinctly British qualities and as gifts bestowed on others through their benevolent Empire.<sup>17</sup> A key to the emergence of these ideas, as both Bayly and others have noted, lay in widespread concerns in Britain that 'corruption', due to the cronyism of patronage and the entrenched privileges of the governing elite, would lead to national weakness.

According to Wilson, in British popular discourse in the late eighteenth century one of the main dangers of corruption was that it caused 'effeminacy', a loss of the manly, martial virtues such as courage, fortitude and strength that Britons associated with themselves and their nation.<sup>18</sup> In the recurrent debates between 'Court' and 'Country' ideologies throughout the eighteenth century, however, the rhetoric of corruption covered a multitude of sins. These ranged from threats to civic virtue from speculative capital, to the encroachment of Court patronage onto parliamentary independence, or to simple electoral maladministration.<sup>19</sup> As Brewer has also noted, the rhetorical appeal of corruption lay in its service as an indictment of the current administration, rather than in any genuine determination to achieve wholesale moral reform.<sup>20</sup> What lay behind much of the rhetoric, however, was a growing perception that the development of Britain's

market economy was transforming the nature of government, calling forth new conceptions of the polity premised on the extension of commerce and trade. In these 'new' conceptions, the stability of the polity came to be seen as an artefact of governmental design. The stability and strength of the British state and its Empire came to be defined in terms of meeting the requirements for a flourishing market, a solvent state staffed with a more efficiently disciplined civil service, and an Empire that amplified British virtues and British trade globally.<sup>21</sup> Fears that the growth of British trade would be funnelled into greater corruption among the governing elite were partially allayed, Wilson argues, by the ability of Pitt the Elder's ministry and associated intellectuals to cast the Seven Years War and the rapid expansion of Britain's Empire as a reviver of national spirit, not a source of its corruption. The subsequent American War of Independence (1776–83) and the loss of the thirteen colonies from the Empire, however, intensified concerns that corruption had ruined the British state and weakened its Empire.<sup>22</sup> Similar concerns about the unprecedented rise to power and wealth of the British East India Company in India were expressed in terms of a corruption that threatened the British constitution, and from which the Empire had to be protected.<sup>23</sup> In these ways, Britain's Empire became a touchstone for different groups within British society who saw it as in need of defence from, and as a potential defence against, corruption. The Empire could thus be portrayed variously as a fitting object of national pride, as a test of loyalty to crown and country, as a device to project Protestant values, as an outlet for manly virtues, and crucially as an embodiment of English liberty through the pursuit of peaceful commercial interests.<sup>24</sup>

Commerce was thus closely entwined in British perceptions of its Empire and justifications for its expansion. P. J. Marshall has persuasively argued for the need to delineate 'empire' conceived as the political processes of control and administration of foreign lands, from 'expansion', the essentially unregulated activities of migration, private trade and cultural diffusion.<sup>25</sup> Nonetheless, as he also makes clear, British perceptions that theirs was the most sophisticated and advanced of all nations, whose civilization rested on the liberty of free trade and international commerce, played a crucial role in justifying both their empire and its expansion.<sup>26</sup> British conceptions of empire in the eighteenth century thus rested on a strong sense that Britain embodied supposedly peaceful values of civilized trade and commerce, and could exert a benevolent and civilizing influence over other peoples.<sup>27</sup> Not only were such self-images used to contrast the peacefulness of the British Empire to the violence of the Spanish, but also to sustain the perception that the British Empire was uniquely concerned to protect the interests of the Indigenous peoples who came under its 'benevolent' care and protection.<sup>28</sup>

This self-perception, Marshall argues, began to emerge in the 1760s and was reflected, for example, in the legal reasoning of Lord Mansfield that 'infidel'



peoples whose lands came under British imperial control were still entitled to practice their own laws and religion.<sup>29</sup> By the 1780s, this 'benevolent' reasoning was central to Edmund Burke's calls for the reform of British rule in India.<sup>30</sup> The different situation of India, Burke argued, required a form of government adapted to Indian 'principles and maxims', preserving Indian laws and institutions.<sup>31</sup> This language of imperial benevolence, however, had strict limitations. Burke's compelling case for Britons to show greater respect for the ancient laws and religion of the Carnatic or Bengal was premised on his capacity to show that these peoples and societies were neither 'abject and barbarous' nor 'savages', but 'a people for ages civilized and cultivated', possessing their own governments, cities, economies and industries, agriculture and religion.<sup>32</sup>

According to this self-image then, the 'benevolent' British possession of relatively 'civilized' lands and peoples assured to the 'subject' population the practice of certain laws, religion and customs within the Empire. For peoples deemed less civilized, the so-called 'barbarians' and 'savages', British imperial expansion was thought to be just as 'benevolent', but extended to them much less recognition of their own laws, religion or customs. We risk misunderstanding this process if we continue to portray it as taking place *either* by commerce *or* conquest. British imperial expansion was effected, I will argue, by means of 'traffick' or trade. In this process, understandings of the relationship between trade, property and polity played a key role, and we can see this not only in Cook's voyage into the Pacific, but in previous British colonial practice in North America.

### The Property of Empire

That Britons in the eighteenth century were able to see their Empire as an empire of liberty rested on the fact that they also saw it as an empire of trade. This view rested on a long history of British justifications of imperial expansion based on evaluations of whether the Indigenous inhabitants owned or merely resided on newly acquired lands. Evidence of ownership consisted in their cultivation of it, or by other evidence of private property and commercial exchange practised on the basis of land ownership. If such lands were inhabited by peoples who cultivated the soil or engaged in commerce, it followed that they must possess some form of legal system (even if rudimentary) promulgated by some kind of government ensuring the existence (even if tenuous) of civil society. By the eighteenth century, legal authorities proclaimed that such peoples could only be subdued by conquest, or their land 'ceded ... by treaties'.<sup>33</sup> If the land was inhabited by peoples who did not cultivate the soil, and lived by 'the fruits of the chase', that is, by nomadic hunting and gathering, then conquest was not possible, because such peoples were regarded as having no 'society' or 'polity' to conquer. Such peoples, moreover, clearly could not 'own' or 'occupy' the land, but merely

roamed over it. As both William Blackstone and Emmerich Vattel averred, the laws of the mother-country immediately went into effect across the whole of any European colonies claimed by Europeans on the grounds that they were 'desart and uncultivated'.<sup>34</sup> Did such lands include those obviously inhabited, but not by European-style cultivators? In 'conquered or ceded' territories, Blackstone explained, the prior inhabitants evidently possessed a polity with some kind of laws of their own and, what is more, those laws continued to apply *unless and until* the new imperial authorities changed them.<sup>35</sup> Indeed, in the celebrated case of *Campbell v. Hall* of 1774, Lord Mansfield had stated that 'The laws of [even a] conquered country continue in force until they are altered by the conqueror. The justice and antiquity of this maxim are incontrovertible ....'<sup>36</sup> It was in this latter category of imperial possessions, according to Blackstone, that the English colonies in North America lay, as conquests – into the justice of which Blackstone conveniently declined 'at present [to] enquire' – or as territories ceded by treaty.<sup>37</sup>

Lands inhabited by peoples who did not cultivate the soil or engage in commerce and trade in European style could be held to belong to no particular person. They were, in the European legal terminology of the period, a *res nullius*.<sup>38</sup> *Res nullius* applied to 'unowned things', the property of no particular person. Applied to land, *res nullius* was vacant space, 'nobody's land'; unlike land that had been made into some person's property by means of their having occupied it by cultivation and labour.<sup>39</sup> Lying behind this distinction was a set of arguments with an ancient pedigree in European thought.<sup>40</sup> At issue in these arguments was the notion that human beings possessed a common natural right to the bounties of nature (food, water, shelter and land) in order to sustain life. This natural right, however, was not a title to ownership. Ownership rested on occupation, by which was meant cultivation (clearing, tilling and manuring the soil, or erecting fences and permanent settlements), and it followed that where no cultivation in this European style could be observed, then the land was held to be wasteland, unowned and therefore open to the first person who could use it to sustain life.

It was this kind of argument that John Locke developed in his *Two Treatises*. Property, as Locke famously defined it, existed in those things (including land) that a person '... hath mixed his *Labour* with, and joynd to it something that is his own ...'<sup>41</sup> Just as Locke believed that at 'the beginning' of time, 'all the world was America' – unowned, vacant and waste – so '... *Labour*, in the Beginning, gave a *Right to Property* ...'<sup>42</sup> The native inhabitants of North America had no title of ownership to their land, he argued, because they had not cultivated it efficiently. Locke was well informed about North America and owned and read several first-hand accounts of European colonization.<sup>43</sup> He was therefore aware that there was abundant evidence of Native American agriculture, and

that more than once native maize, beans and marrows saved the parlous European colonies from extinction. For this reason, Locke stipulated that while the native Americans no doubt engaged in some agriculture, it was sporadic, was not accompanied by wide-scale clearing or systematic pasturage. In other words, native agriculture did not meet Locke's Eurocentric standard of 'Industrious and Rational' use and 'improvement', leaving the Indians with nothing more than a limited title of possession to the produce and game they consumed.<sup>44</sup>

Locke went on to argue, as I have explained in the previous chapter, that legitimate political authority could be thought of as emanating from the 'common consent' of the more 'civiliz'd' peoples of the Earth to the use of money as the universal means of trade.<sup>45</sup> Use of money, he argued, allowed the accumulation of property without wastage, and thus symbolized the proper use of resources. Agreement to use money determined both the bounds of each person's individual property, and the bounds of territories between the 'several States and Kingdoms' of the Earth. The obvious implication was that where peoples had not consented to the use of money, neither property nor polity could have any sure footing, and therefore could present no serious bar to European colonization and imperial expansion.<sup>46</sup> In this way, 'the Invention of Money, and the *tacit Agreement* of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to them ...'<sup>47</sup>

In arguing so, Locke was appealing to already established principles of natural law. Later in the eighteenth century William Blackstone defined the right of *possession* within English law as 'a kind of transient property' lasting only so long as its use lasted 'and no longer'.<sup>48</sup> *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, with their 'inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties'.<sup>49</sup> These arguments point to the significance of the concept of property in British political and legal thought, but they do not of themselves explain how or why they could have been deployed in the colonization of Australia in the late eighteenth century. As Atkinson has pointed out, there was considerable debate within Britain in the 1770s and 1780s over the ethics of conquest, with several writers contending that the only just means of acquiring new territory was by peaceful purchase and treaties.<sup>50</sup> Purchase was favoured precisely because commerce and trade were synonymous with peace, freedom and consent, the essential qualities of Britain's 'empire of trade'.<sup>51</sup> The conceptual and practical connections implied by such views were already well entrenched in Britain's colonial experience of trade and 'traffick' as a mechanism of diplomacy and negotiation in North America.

## 'Trafficking' in North America

In 1632 the Dutch West India Company (WIC) lodged a complaint with the English government to the effect that King Charles I had no right to prevent Dutch traders trading with native Americans. The WIC claimed that it was 'contrary to all right and reason' for the English king to prevent Dutch subjects trading with the 'free' inhabitants of America. Moreover, English claims could have no basis because they had 'not taken, nor obtained actual possession from the right owners, either by contract or purchase.'<sup>52</sup> The English responded that the Native Americans were not considered the '*possessors bonae fidei*' of land in America because their 'residences' were 'unsettled and uncertain, and only being in common ...'<sup>53</sup> Similarly, in New England, the early colonial leader John Winthrop justified the dispossession of Indigenous Americans on the grounds that 'that w<sup>ch</sup> lies in common & hath never been replenished or subdued is free to any that will possesse and improve it ...,' and that because the Native Americans '... inclose noe land ...,' have no 'settled habitation nor any tame cattle to improve the land by' they 'have noe other but a naturall right to' the land.<sup>54</sup> Land on which the Indians roamed was 'vacuum domicilium', literally, land enclosed by no one and belonging to no one.

The problem the British colonists confronted in America was that, notwithstanding such sweeping dismissals of the Indigenous inhabitants, they relied upon their supply of food for survival. The colonists also found that they were often unable to control the trade exchange with the Indigenous inhabitants. The British aimed to impose their authority by a number of means, including religious conversion and by making Indigenous authorities ('chiefs' or 'sachems') 'tributaries' of the colonies by means of 'traffick' or trade. Purchas indeed claimed that there had been a 'voluntary subjection of the Natives' of Virginia to the 'Crown of England' through their various 'Kings', such as 'Powhatan ... chiefe Lord of all the Savages.'<sup>55</sup> Purchas's claim here appears to rest on the dubious story recounted by Captain John Smith in his record of the Jamestown colony in 1607–8. According to Smith, after their first season in the hungry colony, the colonists' poor provisions were used up and (considering that few if any colonists were prepared to engage in agriculture) Smith endeavoured to trade with the surrounding Indigenous communities, who belonged to a powerful federation known by the name of its leader, Powhatan. The problem was that the colonists had little to offer for the maize and other produce they desperately needed. Powhatan drove a hard bargain and pushed his advantage cleverly. Trading for British 'trifles' in a 'pedling manner', Powhatan declared, was not 'agreeable with my greatnes.'<sup>56</sup> Instead he assigned his own value to British goods, and Smith laconically commented that the result was that Indian maize was made so expensive that it would have been cheaper for the colonists to buy it in Spain!<sup>57</sup>

In an attempt to wrest some degree of control from Powhatan, the colonists decided to invite him to come to Jamestown in exchange for some more valuable goods in a ceremony of coronation. The idea may have been to capture Powhatan, or at least to try to over-awe him with English wealth and splendour, and by crowning him to claim his 'subjection' to the English. Powhatan was too quick to fall for this, and responded that he would not 'bite at such a bait'.<sup>58</sup> As a king, he would not go to Jamestown; rather their leaders must come to him. So they did, and Powhatan was given a basin and ewer, a bed and furniture, a scarlet cloak and a crown. Of the latter Smith remarked,

... a fowle trouble there was to make him kneele to receaue his crowne, he neither knowing the maiestie nor meaning of a Crowne, nor bending of the knee, indured so many perswasions, examples, and instructions, as tired them all. At last by leaning hard on his shoulders, he a little stooped ... [to receive it]<sup>59</sup>

European reliance on 'traffick' or trade is underscored in this story, as is the effort of Indigenous people to wrest the trade relation to their own advantage.<sup>60</sup> What is also underscored is the dissonance between Indigenous and European understandings of what was at stake in the trade exchange.

John Locke's political thought, and in particular his use of the historical tale of the invention and use of money, provides an example of the ways in which 'traffick' and trade could be linked in European thought to consent to government. Locke employed the theoretical device of a mutual contract to argue that legitimate government should be thought of *as if* established by a contract between the government and the property-owning, rights-bearing sectors of society who established it, and whose material interests it served. Locke neither thought it desirable nor practical that all or even most of the governed should provide their actual or '*express Declaration*' of consent to government in any contractual sense.<sup>61</sup> For these others, the '*tacit Consent*' of living quietly and enjoying the benefits of property and trade protected by the laws of the government under which one lived necessitated obligation. Locke was quite clear that this kind of consent provided a limited obligation to government:

*The Obligation* any one is under, by Virtue of such Enjoyment [of property protected by law], *to submit to the Government, begins and ends with the Enjoyment*; so that whenever the Owner, who has given nothing but such a *tacit Consent* to the Government, will, by Donation, Sale, or otherwise, quit the said Possession, he is at liberty to go and incorporate himself into any other Commonwealth, or to agree with others to begin a new one, *in vacuis locis*, in any part of the World, they can find free and unpossessed ...<sup>62</sup>

Locke's discussion of consent here is interesting in two respects. First, Locke argues that living peaceably under the laws of 'a Commonwealth' (including a duly established colony in America) created a bond of obligation by tacit consent

unless and until one renounced all one's privileges under that Commonwealth and went to live under (or establish) another. Second, this consent presupposes the liberty of the subject to decide (if they wish) to move themselves to another 'Commonwealth' or start a new one in any 'unpossessed' location. Tacit consent could thus be read as placing (European) colonists and (Indigenous) Indians under a voluntary obligation to colonial government, while also leaving the door open to further settlement and colonization.<sup>63</sup>

Locke's political thought gives us some clues for thinking about the way in which trade and 'traffick' operated in eighteenth-century British colonization. As is well known, Locke had a long engagement with colonial affairs through his involvement with the Earl of Shaftesbury's colonizing schemes in the Carolinas (for which Locke designed the original Constitutions), and later through the Board of Trade. Part of the functions of that Board was to regulate colonial trade, including trade with Indigenous peoples. This trade developed throughout the seventeenth and eighteenth centuries as both a means of profit and of diplomacy along sparsely populated and often far distant frontiers. Profit was to be found in access to the supply of such items as beaver pelts and deer hides that traders exchanged for manufactured goods (often the products of early European industrialization: iron tools, glass beads, woven fabrics and linen). Both the British and French (and increasingly the Spanish also) sought to use trade networks to extend European influence among Indigenous peoples living far beyond the limits of the colonies. Their aim was to create among the Indigenous peoples a sense of personal interest that could be mobilized to maintain peace on the frontier, and to oppose the incursion of other colonizing powers. Their efforts to do so were often haphazard. Indigenous peoples regularly sought trade for their own purposes, and were also often able to resist or subvert European control.<sup>64</sup>

Nonetheless, trade or 'traffick' was one of the most important mechanisms by which colonies sought to tie Indigenous people to colonial authority in a way that seemed consensual.<sup>65</sup> Many Indian nations welcomed the trade and were able to exert considerable control over the supply of pelts from the far west through the Ohio and Mississippi valleys, and to the north around the Great Lakes area and beyond. To these areas the French had better access than the British, who had to try to make their own trade more attractive to the Indians.<sup>66</sup> Throughout the early eighteenth century, however, the French managed the 'Indian trade' more effectively.<sup>67</sup> The French trade was managed centrally. Goods were distributed to chiefs that they then redistributed to maintain their kinship connections and thus buttress their tribal standing. Many Indigenous peoples looked on this trade as a ritual reinforcement of 'the fictive kinship' they shared with Europeans, a kinship entailing mutual obligations between 'giver and recipient'.<sup>68</sup> For the British, however, trade was 'market driven' in that independent traders pursued their own commercial interests. They did not always trade exclusively with chiefs, and often

used alcohol in their negotiations to destabilize the Indigenous trading position.<sup>69</sup> Repeated calls were therefore made to British colonial authorities for the better regulation of Indian trade by salaried superintendents.<sup>70</sup> The appointment of such superintendents, such as Sir William Johnson, brought greater central control over diplomatic negotiations and trade relations with some Indian nations. This proved instrumental in British victory over the French in the Seven Years War, culminating in the cession of New France (Canada) to the English. As Johnson and others discovered, however, the defeat of the French contained the seeds of further strife, especially with the Iroquois.

As Johnson saw it, trade and 'traffick' provided an effective and subtle way of winning Iroquoian compliance with British sovereignty. This was because, he argued, Indians did not appreciate the layers of meaning that Europeans inscribed in 'traffick'. Indians, he said, 'judge only from Exterior Action, and Appearances', and were not able to appreciate the broader political significance that trade and 'traffick' had for Europeans.<sup>71</sup> Thomas Pownall, the former Governor of Massachusetts, spelled out the implication when he wrote that Indians:

... were not land-workers, but hunters; not settlers, but wanderers. They would therefore, consequently, never have, as in fact they never had, any idea of property in land, of that property which arises from a man's mixing his labour with it. They would consequently never have ... any one communion of rights and actions as extended to society; any one civil union; and consequently they would not ever have any government.<sup>72</sup>

For the British colonies in North America trade was the means of securing peace along the vulnerable northern and western frontiers, allowing greater colonial settlement and the gradual extension of British colonial government. Johnson nonetheless castigated colonists and policymakers alike for their short-sightedness, who 'from the confidence in our scattered numbers and the Parsimony of our People, who from an Error in Politicks would not spend to save ...'.<sup>73</sup> The advantages of the former French system of trade were well recognized in the colonies, if not in England.<sup>74</sup> As General Gage put it, '... the whole business of Indian Commerce was transacted greatly to the benefit of the [French] Crown, to the general satisfaction of the Savages, without Trouble or Expense to Government, and the Trade flourished exceedingly'.<sup>75</sup> Johnson also knew that the northern British colonies depended on the good will of the Iroquois. Pressing claims to British dominion too far in the absence of actual military power to enforce them was futile and counterproductive. Johnson was blunt:

I know that many mistakes arise here from erroneous accounts formerly made of Indians; they have been represented as calling themselves Subjects, although the very word would have startled them, had it ever been pronounced by any interpreter. They

desire to be considered as Allies and Friends and such we may make them at a reasonable expence ...

The great lesson of the frontier, Johnson concluded, was that '... Interest is the Grand tye which will bind them [the Indians] to us ... [but] their desire of plunder will induce them to commit Hostilities whenever we neglect them.'<sup>76</sup>

Johnson thus suggested a 'Distribution of some little Favours to' the Iroquois in order to maintain a 'quiet Possession of our distant Posts' while the 'settled Frontier' was steadily built up to the point that they could be overwhelmed.<sup>77</sup> Here trade was a mechanism to placate the Iroquois, thereby obviating British military weakness on the frontier, while enabling the consolidation of settlement.<sup>78</sup> The English also resorted to the legal subterfuge that in defeating the French, the Iroquois, and other Indigenous nations the Iroquois claimed to have conquered in the late war with the French, had been placed under the sovereignty of His Britannick Majesty. This approach, however, did not always wash on the frontier, and Indigenous peoples reminded the colonists that the French '... never Conquered us ...', nor had the Indians given any consent to subjection.<sup>79</sup> Indigenous sachems for their part knew what the British were trying to achieve, and tried to use their control over the supply of goods or their military position to extract as much independence as they could. In doing so, they also sought to bring the treaty negotiation process more closely in line with their own Indigenous traditions of oratory, protocol and negotiation.<sup>80</sup>

British negotiators attempted to circumvent this by relying on their capacity to manipulate trade and 'traffick' by threatening to withdraw 'all our Traders and Smiths from amongst you', or by claiming a power based on the regulation of trade, 'to prevent your [the Indians] being imposed upon by the Traders.'<sup>81</sup> Another strategy, with later implications for Australia, employed by Indian agents was to distribute symbols of office (gorgets or medals) along with other gifts as a means of appointing Indigenous leaders. These intermediaries would be responsible to colonial authorities, and answerable for their people's conduct.<sup>82</sup> The French had also tried the same tactic with the Christian Iroquois, who rebuffed the effort by curtly reminding their French allies, 'It is only we who can give ourselves chiefs.'<sup>83</sup>

The emphasis on trade as a mechanism of colonial diplomacy with Indigenous peoples in America must therefore be seen as part of the established practice of British imperial administration. Trade was not only a mechanism by which lines of communication could be opened with Indigenous peoples. Europeans also saw it as the means by which to obtain a tacit or express Indigenous consent to imperial administration. It was for this reason that when Captain Cook was sent on his first voyage into the Pacific Ocean he was instructed to obtain Indigenous consent to any acts of possession he was authorized to under-



take. What is more important for our purposes, however, is how he was urged to obtain that consent.<sup>84</sup>

### ‘With the Consent of the Natives’

As is now well known, Captain Cook was instructed in 1768 to observe, chart and report on the advantages Britain might acquire from the presumed southern continent *Terra Australis Incognita*. Most importantly, he was required to ‘observe the Genius, Temper, Disposition and Number of the Natives, if there be any, and endeavour by all proper means to cultivate a Friendship and Alliance with them.’ This was to be accomplished by presenting ‘the natives’ with ‘presents of such Trifles as they may Value’, inviting them to ‘Traffick’ and taking care to show them ‘every kind of Civility and Regard’. Finally, the ‘secret instructions’ authorized Cook, ‘with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King’, or, if uninhabited, to ‘take Possession for His Majesty by setting up Proper Marks and Inscriptions.’<sup>85</sup>

There has been much debate on the meaning of this instruction, or to be more precise on the relative importance the Admiralty and Cook could or should have placed upon it.<sup>86</sup> Lying behind the ‘Instructions’ was a framework of ideas Europeans used in the effort to translate Indigenous difference to European familiarity, rendering them ‘knowable.’<sup>87</sup> This framework allowed the English to translate what was ‘strange’, ‘new’ or ‘exotic’, into categories that were ‘understandable’ to them and hence able to be judged and evaluated as ‘inferior’ in comparison with their civilized ‘superiority.’<sup>88</sup> The key to this effort of translation was the ubiquity of ‘traffick’ or trade as both a mechanism of interpretation as well as communication and consent.

Cook’s ‘Instructions’ linked the ‘obtaining’ of ‘consent’ to the exchange of trifles. These instructions generally conformed to earlier instructions issued to captains Wallis and Byron but, significantly, Cook was also given an additional list of ‘Hints’ from James Douglas, fourteenth Earl of Morton and President of the Royal Society. Lord Morton’s ‘Hints’ implored Cook to avoid bloodshed, to recognize that the Indigenous inhabitants were ‘the work of the same omnipotent Author, equally under his care with the most polished European’; to consider that they ‘are the natural ... legal possessors of the several Regions they inhabit’, and that possession would only be justified by ‘their voluntary consent.’<sup>89</sup>

Morton’s ‘Hints’ are an important study in the articulation of European thought for a colonial context. In recent work on Cook, however, the ‘Hints’ barely raise a mention, and where they do they are characterized blandly as an example of naive though sincere Enlightenment humanitarianism or of ‘mannerly imperialism.’<sup>90</sup> This characterization misses the import of the ‘Hints’. Morton’s sentiments were a direct expression of a long tradition of Royal Society instruc-

tions to travellers and correspondents on how to observe and what to report on the lives of Indigenous peoples throughout Britain's fast growing Empire.<sup>91</sup> Cook was to open a 'traffick' allowing careful observations of the natives' currency (if any existed), their religion, morals, order, government, 'Distinctions of Power' and 'Police'. The crux of these observations was to open communication by means of 'traffick'. This 'traffick', however, was not 'gifting', an exchange of tokens of good will. Nor was the purpose of 'traffick' simply to open a line of communication. 'Traffick' here was an interpretive device.<sup>92</sup>

Many of those who have written on Cook's voyages have devoted attention to the practice of 'traffick'. For some, the instances of 'trafficking' on the beach or from the side of the ship represent little more than forms of exchange.<sup>93</sup> For others, the 'trafficking' between Europeans and islanders represented points of cultural contact charged with potentially devastating mutual misunderstandings and incomprehension.<sup>94</sup> Much effort has gone into trying to interpret Indigenous understandings of 'traffick' through the reconstruction of their moral and spiritual outlooks. In few cases are any efforts made to do the same for European understandings, for theirs no less than the Islanders were framed by deeply entrenched assumptions that require careful reconstruction.

In European thought, few connections were more fundamental than that between property and politics. Put simply, relations of private property signified established rules or laws that differentiated one person's property from another's. The existence of such laws themselves entailed the existence of a system of government able to proclaim and enforce such laws. Consequently, Indigenous participation in 'traffick' was used by Europeans to judge Indigenous political, legal and social structures. In making these judgements Europeans were not seeking only to *interpret* Indigenous peoples, they were also trying to find a way to control them.

The wording of Cook's 'Instructions' and 'Hints' both linked the obtaining of 'consent' to the exchange of trifles, the establishment of 'traffick'. This is precisely what Cook did in Tahiti and New Zealand. Almost the first thing he did on Tahiti was to draw up 'Rules' for 'the better establishing' of a 'regular and uniform Trade'.<sup>95</sup> In recent literature on Cook, his trade 'Rules' and their enforcement receive patchy attention. Thomas ignores them almost completely, but makes special note of Cook's harsh disciplining of sailors who attempted to circumvent the 'Rules', and of his stern determination to punish islander 'thefts'.<sup>96</sup> Salmond on the contrary devotes special attention to Cook's 'Rules' and sees them as an effort to put the benign intentions of Lord Morton's 'Hints' into practice.<sup>97</sup> In neither case do we see how the 'Rules' helped set the tone for European efforts to control potentially subversive 'traffick' with the islanders and, in doing so, to entrench European notions of property and its value.

Cook's 'Rules' consisted of five points. The first set the tone by requiring 'fair means to cultivate a friendship with the Natives'. The second stipulated the appointment of a 'proper person' to conduct all trade for provisions with the islanders, and forbade private trade. The third point held the sailors liable for the costs of any equipment stolen by the islanders, and the fourth also threatened punishment to any sailor found to 'imbezzle, trade or offer to trade' items of the ship's stores. Finally, trade in cloth or iron tools and implements was forbidden except for procuring provisions.<sup>98</sup>

These 'Rules' were partly a response to the difficulties encountered by Captain Wallis whose previous journey to Tahiti in HMS *Dolphin* had been endangered by the unregulated trade in iron nails for sex with Tahitian women.<sup>99</sup> For Europeans, this form of trade represented prostitution, a 'monetary' exchange for sexual service. They were only dimly aware of the ritual, spiritual and kinship significance that the exchange signified for the Tahitians. Nor were they fully aware of how possession of previously unknown iron tools exacerbated and fuelled island factionalism. None of these layers of significance, however, were as important for Wallis as the economic regulation of this particular kind of 'traffick'. So vigorous did this 'traffick' become that nails and hooks were pulled from the hull, and the English rapidly discovered that this 'illicit' trade devalued their currency and hampered their ability to buy desperately needed provisions for the return voyage (absolutely vital to a crew already suffering from scurvy).

Cook's 'Rules' were also an effort to assert control over the trade exchange with islanders who, Europeans believed, did recognize some form of private property.<sup>100</sup> Cook was quick to find that the islanders were able to exert considerable control over exchange rates, demanding high payment for the island's small but highly prized hogs. On one occasion, Cook lamented, '... thus we see those very People who but two years ago prefer'd a spike Nail to an Axe ... have now so far learnt the use of them that they will not part with a Pig of 10 or 12 pounds weight for any thing under a Hatchet ... and small Nails ... are of no Value at all ...'<sup>101</sup> Just as importantly, however, the 'Rules' also served to identify Cook as a source of authority on the island. Not only were sailors to be punished for embezzling the ships stores, but for cheating or stealing from the islanders.<sup>102</sup>

A particular problem that Cook sought to resolve were the many incidents of islander appropriation of European goods (including such items as the ship's quadrant, Doctor Monkhouse's opera glasses, a musket and rake, Joseph Banks's waistcoat and even Cook's own stockings, stolen from beneath his head while sleeping). Europeans saw these as cases of theft that had to be punished and redressed.<sup>103</sup> The shooting dead of one islander (who took a musket) was used by Cook 'to convenue them [the islanders]' by 'every means' that 'the man was kill'd for taking away the Musquet and that we still would be friends with them'.<sup>104</sup> When the extremely valuable quadrant was taken, Cook 'resolved' to 'detain all

the large Canoes that were in the Bay' and to 'seize' the noble Tutaha 'untill the Quad<sup>t</sup> was produce'd'.<sup>105</sup> On this and other occasions, the chieftain Te Pau was instrumental in negotiating the return of items to the Europeans, and for this reason Banks gave him the name 'Lycurgus'. More than just a classical allusion, Lycurgus was the famed law-giver of ancient Sparta, and the invocation of his name on Tahiti once again linked the European imagery of 'savages' as analogous to ancient Lacedaemonians.<sup>106</sup> Lycurgus was famed not only because his laws founded the Spartan Empire, but because those laws and the greatness of Sparta were held to be synonymous in European thought with a notion of civic virtue based on austerity, simplicity, equality and common ownership. Ancient Sparta, of course, was held to exhibit a kind of pre-legal and pre-governmental virtue long extinguished from more civilized communities that relied on less virtuous but more effective governmental systems of law and punishment.

In the absence of such civilized mechanisms of government on Tahiti, Cook's trade 'Rules' served the purpose.<sup>107</sup> The same kind of governmental assertion took place on colonial frontiers in North America where Europeans used trade as both a form of communication and an effort to control Indigenous populations. For Indigenous people, the exchange of goods could underscore good will, clear a path to agreement in negotiations or cement alliances. For Europeans, the exchange of goods evoked images of generosity on their part, and submission to and dependence on Europeans on the Indigenous peoples' part. The regular trade negotiations between Indigenous and European traders testify to the importance that Europeans attached to maintaining as much control as possible over the exchange rate.<sup>108</sup> For Europeans, Indigenous control of exchange – by withholding supply of pelts or by demanding higher payment, or by theft – had to be resisted because it represented a weakening of the European's bargaining position and hence of their imperial power. Similarly, the assertion of imperial authority through trade linked the legitimacy of that authority to its capacity to provide justice. Wanton frauds committed by traders threatened to destroy Indigenous goodwill, and for this reason, colonial governors recommended more effective regulation of the terms of trade.<sup>109</sup> On Tahiti, Cook was also conscious of the need to control the terms of trade. Reflecting on his stay in Tahiti, Cook took obvious pride in proclaiming that, 'Our traffick with this people was carried on with as much order as in the best regulated market in Europe ...'<sup>110</sup>

In his subsequent stops in New Zealand and New Holland (Australia), Cook attempted to establish similar relationships between 'traffick' and taking 'possession'. Throughout New Zealand, Cook's crew were able to engage in a variety of trade exchanges with Maori, aided by the linguistic skills of the Ra'iatean islander who accompanied them, Tupia. Maori were regarded by the Europeans as exhibiting obvious signs of civilization, as evidenced by European admiration for Maori fortress-building, agriculture and canoe manufacture.<sup>111</sup> In taking pos-

session of Totara-nui (or Queen Charlotte's Sound as he called it), Cook records an unusual form of exchange in return for Indigenous 'consent'. The resident Maori, he wrote, gave their 'free consent' to set up two posts with inscriptions claiming priority of European discovery and possession. In return he then 'gave to every one present one thing or a nother, to the old men I gave silver three-penny pieces dated 1763 and spike nails with the Kings broad Arrow ... things that I thought were most likely to remain long among them'. After taking formal possession of the Sound and 'adjacent lands', he recorded that the officers toasted the king's 'hilt in a Bottle of wine' and gave the empty bottle to 'the old man' (Topaa) 'with which he was highly pleased'.<sup>112</sup>

The unstated political and moral significance attached to such exchanges by Maori and Europeans alike were very different. For Maori, exchange of goods was governed by the principle of *utu* (or balance) which required 'reciprocal exchanges', gift for gift, insult for insult.<sup>113</sup> As Salmond argues, according to 'this philosophy of *utu*, impositions of superiority (or *whakahihihi*) were vigorously resented', and ritual cannibalism might occur as restitution for the insult of a lack of reciprocity.<sup>114</sup> European notions of commerce, however, were inextricably entwined with a range of other concepts such as civilization, savagery and sovereignty which enabled them to employ trade and 'traffick' in colonial contexts in order to obtain what they took to be Indigenous 'consent' to subjection. European understanding of their 'consent' was tied to European assumptions about Maori (and others') savagery. Consequently, Maori cannibalism was interpreted by Cook and his crew as a startling reminder that despite Maori willingness to trade, or their engagement in agriculture, or sophisticated building and intricate canoe manufacture, the Maori remained dangerous 'savages'. As Salmond described it, the disjunction between Maori and European understandings was underlined by the fact that Maori 'were neither mercantilists nor free-traders, nor did they subscribe to European ideas of private property – especially when they gave Europeans the right to take other peoples territory and resources'.<sup>115</sup>

For Cook and his companions, this disjunction did not preclude the effort to establish a relationship between 'traffick' and Indigenous consent in Tahiti and New Zealand. In New Holland Cook found a markedly different situation.<sup>116</sup> While Cook and his companions construed the Tahitians and Maori as 'uncivilized', they thought them more 'civilized' than the inhabitants of New Holland, who were far less eager to 'traffick' with the English, and far less interested in the goods the English had to offer (a point that Dampier had noticed less than one hundred years earlier on the Western shores). As Cook concluded, 'In short they seem'd to set no Value upon any thing we gave them, nor would they ever part with any thing of their own for any one article we could offer them ...'<sup>117</sup> Cook's 'Official Log' and journals make hardly any mention of an attempt to gain the natives' 'consent', and the reason may lie in the 'Private Log', which does make a

passing mention of an attempt to obtain 'consent'. The entry in Cook's 'Private Log' for Sunday, 29 April 1770 records the following encounter:

We saw several of the natives on both sides of the harbour ... As we approached the shore the natives all made off, except two men, who at first seem'd resolved to oppose our landing. We endeavour'd to gain their consent to land by throwing them some nails, beads, &c, ashore, but this had not the desir'd effect; for, as [we] put into the shore, one of them threw a large stone at us, and as soon as we landed they threw two darts at us, but the firing of two or three musquets, load with small shott, they took to the woods, and we saw them no more.<sup>118</sup>

The entry then goes on to say that they inspected the 'few poor huts' by the shore in which they found some terrified children, and they 'left some strings of beads, &c'. In the slightly more detailed journals, which incidentally do not employ the term 'consent', Cook noted that the beads they had left remained in the hut the next day, surmising that 'probably the natives were afraid to take them away'.<sup>119</sup>

When Cook did take possession of the east coast of New Holland, no mention was made of any consent from or consultation with Indigenous stakeholders in the transaction. Having ascertained that no European nations already claimed possession of the coast of New Holland, Cook saw no obstacle to taking possession for King George III. On 22 August 1770, Cook's 'Official Log' contains the following entry: 'At 6 possession was taken of this country in his Majesty's name and under his colours; fired several volleys of small arms on the occasion, and cheer'd three times, which was answered from the ship'. Part of the reason for the absence of Indigenous people is that Cook and his contemporaries dismissed any notion of Indigenous polity, such as the 'kings' or even 'chiefs' they had encountered elsewhere.<sup>120</sup> Throughout their imperial enterprise, Europeans and especially the British came to rely upon understandings of 'government' and sovereignty as concomitants of relations of private property. The ubiquity of 'traffick' in Cook's peregrinations across the Pacific thus echoes the framework of ideas linking sovereignty (and treaty) to property via engagement in 'traffick' or trade.

In January 1788, the first permanent British colony was planted in New Holland/Australia at Sydney Cove under the governorship of Captain Arthur Phillip. Ostensibly designed as a penal colony, the plan for a colony had also been formed in response to Britain's geo-political rivalry with France for control in the Pacific. Another reason for choosing Australia for the site of the colony was that Cook and Banks had noted very few Indigenous inhabitants who did not appear to constitute a recognizable sovereign authority. Consequently, Britain's new colony was to be established without contest from other European sovereigns, and (it appears to have been assumed) without resistance from any Indigenous sovereigns. This situation contrasted markedly with the complexi-

ties of colonization in North America, where British claims to sovereignty had to contend with Indigenous, Spanish, French and later United States claims to the same. This contestation, coupled with the limits and barriers to European colonial settlement, gave Indigenous Americans a bargaining power they were able to use in skilfully playing off one claimant against another.

When Captain Cook took possession of the east coast of Australia, he made no mention of trying to obtain any Indigenous 'consent'. What he did mention, however, was that he had first ascertained that, so far as he could tell, no other European power had already taken possession of the coast. This mention is significant in two respects. First, it underscores the central assumption of Australia's colonization, that the Indigenous inhabitants possessed no sovereignty over the land. Second, it emphasizes the fact that Australia's colonization, unlike the colonization of the Americas, would not be contested by any other European power. What this meant in the years to come was that the British authorities did not have to appeal to the Indigenous inhabitants for alliance against, intelligence about, or other assistance in war with any other non-British colony. Similarly, for the Indigenous peoples, the consequences were far reaching. They would not be able to turn to any other colonial power for aid against the British. They would not be able to play a double game with hostile colonies as the Iroquois had so successfully done for over 200 years. Instead, they would confront a single colonial presence who believed that they had asserted their own sovereignty over the land, and assumed control over an Indigenous population they regarded as 'savages'.<sup>121</sup> Some of the implications of that assertion will be explored in the following chapters.

### 3 DIFFICULT SUBJECTS

Everything we know about the 'Instructions' given to Captain Arthur Phillip, the naval officer selected as Governor of the first British colony in the land Cook had named New South Wales, shows them to have been the product of careful deliberation.<sup>1</sup> Dated 25 April 1787, the 'Instructions' had been drawn up under the auspices of the Secretary of State, Lord Sydney, and they authorized Phillip to direct a fleet (eventually consisting of 11 ships) carrying about 250 marines and 750 convicts to Botany Bay in New South Wales. In addition to the instruction given him to order and secure the settlement, Phillip was enjoined to use 'every possible means' to 'open an intercourse' with the Indigenous inhabitants, to 'conciliate their affections', commending 'all our subjects ... to live in amity and kindness with them.'<sup>2</sup> Significantly, the 'Instructions' also required Phillip to punish any European offences against the Indigenous people, and to determine 'in what manner our intercourse with these people may be turned to the advantage of this colony'.<sup>3</sup>

According to Frost, Phillip's 'Instructions' reflected the recently developed norms of imperial acquisition fostered by British imperial administration. According to those norms, New South Wales was declared to be a *terra nullius*, a land inhabited (but not owned) by supposedly 'uncivilized' peoples. It was the European 'discovery' and timely occupation and cultivation of the land that justified the act of imperial possession.<sup>4</sup> In the view of the British authorities, the Indigenous inhabitants were not considered to be owners of the soil, but neither were they to be driven to extermination, for this act of colonization was not to be a conquest. As Frost sees it then, Phillip's 'Instructions' were a product of the earnest desire of the Pitt the Younger's ministry to extend Britain's Empire in the South Pacific according to the just standards of international law then in operation. Colonization was not only effected by laws and institutions, but by a series of assumptions, concepts and arguments drawn from Western political thought.<sup>5</sup>

In this chapter (and those following), I will argue that applications of concepts of 'savagery' in the early Australian colonial context were already implied by Governor Phillip's instruction to 'conciliate' the 'affections' of the Indig-



enous inhabitants. The projection of Indigenous ‘savagery’ in Australia placed the Indigenous inhabitants in the position of being subject to British law and theoretically entitled to its protection. Official discourse of the period, discussed in the first section of this chapter, implies that the Indigenous people were not regarded as having the same status or rights as white, European ‘British subjects’. This is because the very concept of the ‘British subject’, discussed in the second section of the chapter, entailed a particular view of the subject as a rights-bearing individual (and sometimes as a member of the English nation) in a mutual relationship of rights and obligations with the British sovereign. This conception of the subject raised questions about the appropriate status of other subjects, especially those who were subject to imperial rule but not themselves ‘Britons’. One response to these questions prompted by the exigencies of colonial warfare will be discussed in the final section of this chapter. This was to negotiate their status by means of treaties. For all the deficiencies of these treaties, they did at least recognize the possibility of a negotiated relationship between Indigenous peoples and the imperial sovereign. Such treaties were conspicuously absent from Australia’s colonization, and in the following chapter I will suggest that the ambiguity of Indigenous legal status as well as presumptions about their ‘savagery’ were both unsettled and strengthened by the patterns of Australian frontier violence.

### Conciliating their Affections

The origins of the idea that the British pursued ‘conciliation’ by peaceful trade and justice rather than practising violent conquest originated in England’s early imperial endeavours in the sixteenth century. Here pro-imperial propagandists painted a picture of virtuous English, Protestant and gentlemanly colonization in opposition to Catholic, Spanish vice and violence. In 1596, for example, Sir Walter Raleigh’s account of the *Bewtiful Empire of Guiana* drew the distinction most clearly:

Nothing got us more loue among them [the Indians of Guiana] than this vsage, for I suffred not anie man to take from anie of the nations so much as a *Pina*, or a *Potato* roote, without giuing them contentment, nor any man so much as to offer to touch any of their wives or daughters: which course, so contrarie to the Spaniards (who tyrannize over them in all things) drew them to admire his Majestie, whose commandment I told them it was, and also wonderfully to honour our nation.<sup>6</sup>

Historians of Australian colonization have interpreted Phillip as an exponent of a similar kind of conciliatory policy. Indeed, Frost sees Phillip as the embodiment of ‘enlightenment and evangelical precepts’ that were broadly humane, tolerant and committed to ensuring the Indigenous people’s material and spiritual welfare.<sup>7</sup> Clendinnen identifies in Phillip a ‘rare’ determination (‘possibly

unique in the gruff annals of imperialism') to achieve and sustain the 'friendship' of the local Indigenous population.<sup>8</sup> As she describes it, Phillip began his Governorship by seeking to extend to the Indigenous population the benefit of protection under British law.<sup>9</sup> Through the trials and tribulations of the early colony, and in the face of tenuous communication (not to mention plentiful cases of mutual incomprehension), Phillip's achievement was to come to see the need for 'conciliation' between the structures and practices of Indigenous and British law.<sup>10</sup> In these accounts of Australia's early colonization, Phillip emerges as the agent of a peculiarly British colonial policy, which from 1788 centred on the extension to Aboriginal peoples of the legal status of British subjects.<sup>11</sup>

In fact, however, among the various original proposals for a colony in New Holland considered by the Pitt Ministry in the 1780s little if any mention was made of the Indigenous inhabitants, who seem to have been assumed to be too few to rate a mention.<sup>12</sup> That said, Phillip's 'Instructions' clearly reflected a knowledge of the difficulties that Cook and Banks had experienced in using trade or 'traffick' in New Holland. One clause makes reference to having sufficient supplies of livestock, weapons and 'other Articles of Merchandise' to 'barter' with the Indigenous peoples. But, in a phrase crossed out from the handwritten copy, the Indigenous inhabitants are described as having an 'ignorance of the value ... for such Articles'. References to the Indigenous inhabitants, however, are rare.<sup>13</sup>

The main part of the 'Instructions' conferred sovereign powers on the Governor. Consonant with this, the Governor was authorized to establish a court, make regulations for the governance of the colony, and to punish all crimes committed in the colony by the colonists. Given the overwhelming majority of colonists were in fact convicts (of whom Phillip held a conventionally low opinion), the emphasis on the punishment of crimes is hardly surprising, but at least one of the 'first fleters' thought the Governor's powers were 'more unlimited' than 'was ever before granted to any Governor under the British Crown'.<sup>14</sup> The ambit of this authority also included the punishment of any crimes committed by the colonists against the Indigenous people. What is significant about these powers and the 'Instructions' themselves is that they make no mention at all of the Indigenous people being regarded as 'British subjects'. What they do say is that by the judicious use of powers authorized by the official 'Instructions', the Governor was to use 'every possible means' to ensure that '*all our subjects*' live 'in amity and kindness with *them*'.<sup>15</sup>

This wording means that British policy in 1788 accepted a firm distinction between the 'King's subjects' and the Indigenous inhabitants.<sup>16</sup> From 1788 Indigenous Australians found themselves in fact to be anomalous subjects, neither voluntarily conciliated nor involuntarily subjugated by conquest.<sup>17</sup> All empires categorize those whom they hold subject to its power. Samson argues

that in the Spanish Empire racial administration categories were central. Specific terms designated one's 'breed' and the term Indian was a specific 'administrative designation'.<sup>18</sup> In the British Empire too administrative categorization operated, but in the late eighteenth century it rested less on racial than linguistic forms.<sup>19</sup> Here the wording of Phillip's 'Instructions' gives pause for more thought. The language used was not chosen at random. Rather, words conveyed meaning in terms of description (which for the users was never value-neutral, but morally loaded) and in terms of circumscribing the limits of possibility. 'Indian', the term Cook had used in speaking of the Indigenous Australians, was familiar from the North American context. There, Indians could be spoken of as trading partners, allies, warriors, enemies, treaty negotiators and possibly as fellow 'subjects'. Some early colonists, such as Watkin Tench, spoke of Australian Aborigines as 'Indians'. Officially, however, the term 'natives' was preferred. In legal discourse, the term 'native' could refer to children born of parents who were citizens in a particular state. Used in reference to those regarded as 'savages', the term 'natives' implied other significant deficiencies – such as a lack of political organization or interest in trade – contrasting with prevailing perceptions of American Indian warrior virtue and active interest in trade.<sup>20</sup>

In order to 'conciliate the affections' of the 'natives', Phillip was specifically instructed to use his powers to punish offences by the colonists against them. This exercise of power was intended to ensure that the 'King's subjects' would 'live in amity' with the Indigenous inhabitants.<sup>21</sup> Indeed, what is interesting about this instruction is not any apparent imputation of British subject status to the Indigenous peoples, but the frank assertion of British sovereignty, and the sweeping denial of any Indigenous sovereignty. Here, the full significance of the phrase 'conciliate their affections' becomes more ominous. Had the drafters of the 'Instructions' wanted, Governor Phillip could have been required, as generations of colonial governors in North America had been, to negotiate treaties with the Indigenous peoples. That he was not reveals that the decision had already been made in England that the Indigenous inhabitants were unable or unwilling to negotiate any such treaties.<sup>22</sup>

The Indigenous inhabitants of Australia were almost uniformly portrayed by the colonists as 'savages' whose status in the new colony was at best uncertain. Colonial observers in Australia noted that the Indigenous peoples of New Holland appeared to fit perfectly the European image of 'the savage': 'revengeful, jealous, courageous, and cunning', just as ready to avenge any perceived wrong as to lie about 'in the sun' with no thought of 'provision for the morrow'.<sup>23</sup> In his initial dispatches to Westminster, Governor Phillip spoke of the Indigenous peoples as living in a 'state of nature', and having no conception of private ownership.<sup>24</sup> The problem, then, was that the Indigenous peoples appeared to exhibit a condition of dangerous egalitarianism in terms of property ownership

and political rank. Colonists made regular mention of the Indigenous people's lack of interest in trade or 'traffick', and that they had apparently little regard for items of personal property. Elizabeth Macarthur, for example, noted that the Indigenous inhabitants accepted 'presents' from the colonists as 'children do playthings; just to amuse them for a moment and then throw them away disregarded'.<sup>25</sup> What the colonists often did not see was how those items might have been given and exchanged between Indigenous people according to their own rules of reciprocity. The impression formed by the colonists, however, was that the Indigenous people lived without 'any civil regulations' or 'any degrees of subordination among them'.<sup>26</sup> Collins's *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>27</sup>

The early observers and administrators struggled to 'understand' the kind of 'savage' order within and between the tribes.<sup>28</sup> As Phillip observed in his dispatch to Lord Sydney in 1790, 'There is every reason to believe that the women are treated as inferiors by the men, who employ them constantly fishing in the canoes. The men seldom fish with the line ... their chief employment is the chase'.<sup>29</sup> The observation on the 'inferiority' of women is a constant theme in early European accounts, and was regarded as a key index of civilization.<sup>30</sup> The other important criterion in early colonial accounts was the reference to living by 'the chase' or hunt. Here we can fully appreciate the way in which the European 'understanding' of Aboriginal people was framed by European notions of savagery. As Alexandro Malaspina put it in 1793,

This wandering Nation, without agriculture and industry and without any product which would attest their rationality, frugal by necessity and timid by character, received the first Europeans without surprise ... but neither the strangeness of colour, nor clothes, nor arms, nor whatever means devised by Captain Cook to arouse their cupidity, nor the efforts of European Artfulness, excited their imagination or covetousness, and at the end of many days, he saw with surprise, that they abandoned the same articles which they had been made gift of ...<sup>31</sup>

Consequently, Indigenous people were regarded as 'savages'; too uncivilized for a treaty to be made. Indeed, Governor Phillip tacitly admitted that the Indigenous people of Australia had been involuntarily subjected to British rule when he expressed his determination 'if possible' to bring the 'native inhabitants' to 'a voluntary subjection'.<sup>32</sup>

European notions of savagery applied in Australia were well established in eighteenth-century political and economic thought. In what has come to be called the 'stadial theory' of social development, Adam Smith and his contemporaries claimed that all societies pass through particular stages of moral and social

progress from savagery to civilization. A key to this process was the development of civilized manners which emerged from the development of more advanced agricultural and commercial economies.<sup>33</sup> Dugald Stewart thought this ‘conjectural history’ was a significant contribution to modern thought.<sup>34</sup> In developing it, however, Stewart argued that Smith ‘followed the plan ... suggested by Montesquieu; endeavouring to trace the gradual progress of jurisprudence ... from the rudest to the most refined ages ...’<sup>35</sup>

In *The Spirit of the Laws* Montesquieu had characterized ‘savages’ as ‘hunting peoples’ existing in ‘small scattered nations,’ with no permanent social bonds and loose family structures.<sup>36</sup> In a tone that almost exactly prefigured Morton’s ‘Hints’ and echoed John Locke’s link between money and civilization, Montesquieu identified coins as the vital ethnographic signifier.<sup>37</sup> For Montesquieu, money implied a system of exchange underwritten by institutions of government and law. This further entailed a settled social structure based on agriculture or commerce. It was with something very like this understanding of the relationship between property and polity that the British could take Indigenous people’s willingness to engage in ‘traffick’ as a way of interpreting their moral, social and political development.

At least part of the reason, then, that the British felt so sure that they did not need to sign treaties with the Indigenous inhabitants of Australia can be found in European notions of ‘savagery’ and their application in Australia. Such notions clearly carried weight in the early colony. At one point in his invaluable account of the early settlement, the Judge Advocate of the colony, David Collins, recorded a conversation with the explorer Captain Matthew Flinders. According to Collins, Flinders reflected on the possible implications of the use among some Indigenous people of large fishing nets and traps,

Mr. Flinders was of opinion, that this mode of procuring their food would cause a characteristic difference between the manners, and perhaps the dispositions, of these people, and of those who mostly depend upon the spear ... for a supply. In the one case, there must necessarily be the co-operation of two or more individuals; who therefore, from mutual necessity, would associate together. It is fair to suppose, that this association would, in the course of a few generations, if not much sooner, produce a favourable change in the manners and dispositions even of a savage. In the other case, the native who depends upon his ... spear for his support depends upon his single arm, and, requiring not the aid of society, is indifferent about it, but prowls along, a gloomy, unsettled, and unsocial being.<sup>38</sup>

The implications of Flinders’s comments were wide-ranging. In European thought, the ‘savage’ was held to be a pre-social being. Society, the mass of interactions and inter-relations between formally autonomous, rights-bearing and law-governed individuals (best exemplified in the societies of England and Western Europe), was held to be a product of higher and later stages of civiliza-

tion. Consequently, European colonists who saw themselves as the beneficiaries of this higher level of 'civilization' regarded the Indigenous people they saw as 'savages' as constituting a major problem for colonial government. The baffling indifference of Australia's Indigenous peoples to European notions of profit and property indicated a potential barrier to their absorption into 'civilized' colonial society.

Thus, while official policy towards Indigenous people in Australia remained focused on offering them the 'protection' of British law, the failure of conciliation rendered that protection uncertain at best. Much stress has been laid on Phillip's unusually strong commitment to the apparently humane tenor of his 'Instructions'. This commitment was shown by his handwritten gloss on the document,

I shall think it a great point gained if I can proceed in this business without having any dispute with the natives, a few of which I shall endeavour to persuade to settle near us, and who I mean to furnish with everything that can tend to civilize them, and to give them a high opinion of the new guests, for which purpose it will be necessary to prevent the transport's crews from having any intercourse with the natives, if possible. The convicts must have none, for if they have, the arms of the natives will be very formidable in their hands, the women abused, and the natives disgusted.<sup>39</sup>

For Phillip, as for other colonists, the understanding of 'conciliation' was informed by the strong sense of British superiority. As Lieutenant William Bradley put it, the policy of 'conciliation' meant trying to 'cultivate an acquaintance' with the Indigenous people which was made all the more difficult because they were easily over-awed by 'our great superiority over them'.<sup>40</sup> Phillip, however, seemed to assume that British superiority was not equally shared, and could be weakened by the unrestrained behaviour of the unruly convicts.

However this superiority was conceived, concepts of Indigenous 'savagery' and colonial 'civilization' informed it. In concluding his *Complete Account of the Settlement at Port Jackson*, the marine officer Watkin Tench surmised that the Indigenous people of Australia exemplified the 'state of nature' – an image of 'primitive' human life prior to the development of government, law or society. While some European philosophers, such as Jean-Jacques Rousseau, thought that life in the 'state of nature' would be nobler than civilized life, Tench took the more conventional view that it would be much more miserable,

A thousand times ... have I wished that those European philosophers whose closest speculations exalt a state of nature above a state of civilisation, could survey the phantom which their heated imaginations have raised. Possibly they might then learn that a state of nature is, of all others, least adapted to promote [human] ... happiness ... That a savage roaming for prey amidst his native deserts is a creature deformed by all those passions which afflict and degrade our nature, unsoftened by the influence of

religion, philosophy and legal restriction: and that the more men unite their talents, the more closely the bands of society are drawn and civilisation advanced ...<sup>41</sup>

Though Tench could not deny an essential similarity between the Indigenous peoples and his fellow European colonists – all were prey to the same ‘passions’ – Europeans had the advantage that their own passions had been ‘civilized’, unlike the ‘savage’ Indigenous peoples.

Elizabeth Macarthur wrote that Governor Philip ‘left no means untried to effect an intimacy’ with the Aborigines, but that all proved ‘ineffectual’ because the Aborigines ‘could not be brought to a parley.’<sup>42</sup> Other colonists, such as Thomas Watling, felt that the policy of conciliation was both unfair and tyrannically imposed:

... our governors ... have carried philosophy, I do not say religion, to such a pitch of refinement as is surprising. Many of these savages are allowed, what is termed, a free-man’s ration of provisions for their idleness. They are bedecked at times, with dress which they make away with the first opportunity, preferring the originality of naked nature; and they are treated with the most singular tenderness.<sup>43</sup>

Watling’s primary objection, however, was that this ‘kindness’ contrasted with the lack of ‘charity’ given to the convicts who were ‘at least denominated Christians.’<sup>44</sup> For Watling, Christianity not only crossed the internal divide between convicts and free colonists, but separated the colonists from Indigenous savagery. Watling’s invocation of religion as the marker between colonists and colonized is a reminder of the exclusivity inherent in the understanding of what it meant to be a ‘British subject’. In so reminding us, Watling’s view invites us to consider the concept of the British subject more closely before exploring its translation to colonial contexts.

### The Subject of British Political Thought

‘The subject’ is an ambiguous concept in British political thought. At its simplest, the term referred to all those persons who owed allegiance to the sovereign.<sup>45</sup> Its invocation in sixteenth-century British political thought, however, has been linked to the contest between what has been called ‘patriotic’ and ‘patriarchal’ ‘paradigms.’<sup>46</sup> Patriots, it has been argued, conceptualized an ‘active’ subject as one whose commitment to the common good rested on their virtue, Protestantism and Englishness. Patriarchalists on the other hand argued for obedience of all subjects to godly monarchical power.<sup>47</sup> But who exactly were these subjects? I want to suggest here that references to the ‘subject’ in English and British political thought have usually been framed by a number of crucial signifiers. The first of these signifiers was the identification of ‘the subject’ as a ‘private’ person, as opposed to the ‘public’ persona of the sovereign.<sup>48</sup> In the early 1530s, for

example, Thomas Starkey referred to the social disorder caused by rampant self-interest which prevented rulers from effectively protecting the interests of 'their subjectys'.<sup>49</sup> The key distinction between the ruler and the subject was that the ruler, as sovereign, represented the public life and body of the commonwealth, whereas the 'subjecte' was purely a 'private man' whose well-being was tied to the 'gud ordur', 'cyvyle ordur' and 'pollytyke rule' of the commonwealth.<sup>50</sup> In his *De Republica Anglorum* of 1583, Thomas Smith referred to 'subjects and citizes of the commonwealth' as 'freemen' in contrast to slaves or 'bondmen who can beare no rule nor jurisdiction over freemen'.<sup>51</sup> Subjects, then, were those whose private liberties were secured by the sovereign and included all adult males from great lords to yeoman farmers. Minors, women and bondmen, the latter category including villeins and apprentices, were excluded from being considered subjects. Smith maintained that subjects owed allegiance and obedience to the monarch, who 'hath absolutelie in his power the authoritie of warre and peace' as well as the power to punish transgressions of the law.<sup>52</sup>

Alongside this signifier of the subject as an individual whose status was defined by a particular legal relation between the private 'subject' and the 'public' sovereign was another signifier, that the subject was a 'true born Englishman'. On this view, the subject could be defined not solely in terms of a purely domestic relation to the sovereign. The subject could also be identified in contrast to the status of peoples outside that legal relationship, peoples perhaps living under English sovereignty but without the rights of English subject-hood. In English colonization in Ireland, for example, a firm distinction could be made between English subjects (including Anglo-Irish colonists), who acknowledged English law, and native populations (the Gaelic Irish), who continued to abide by traditional (*Brehon*) law.<sup>53</sup> The Attorney General of Ireland under James I, Sir John Davies, considered it an 'error' in English policy not to have made the 'Irishry' into good subjects which would have been the 'principal mark and effect of a perfect conquest'.<sup>54</sup>

If the status of the Irish under English rule prompted concern, so too did the status of Scots under the united crowns of England and Scotland under James I (from 1607).<sup>55</sup> The union of the crowns posed the problem of how a single sovereignty could be asserted over multiple legal systems (English and Scots), while also raising concerns that in James's 'Britain' the customary legal rights of 'true born' English subjects might be weakened. These problems were addressed in *Calvin's Case* (1608), in which it was determined that the monarch alone could decide whether one were an enemy alien (the subject of a monarch at war with England), an alien friend (the subject of a monarch at peace with England), a denizen (a person made a subject by royal charter) or a natural born subject (born of parents who were themselves subjects of the English monarch).<sup>56</sup> Sir Edward Coke argued in *Calvin's Case* that English law (and hence subject status)



automatically extended across lands conquered by the English monarch. Francis Bacon, whose arguments as counsel for the plaintiff were eventually successful, was of the opinion that the English monarch must first expressly declare 'conquered' peoples to be British subjects.<sup>57</sup> Despite the difference, *Calvin's Case* appeared to extend the status of 'British subject' to all people born within the territory (and colonies) of the British sovereign.<sup>58</sup>

Karatani argues that *Calvin's Case* established the rule that British subjecthood was granted to 'all men born within the king's dominions', as well as offered to all peoples in British colonies, 'whether acquired by conquest, settlement or treaty ... regardless of their ethno-cultural and linguistic differences'.<sup>59</sup> British political thinkers in the seventeenth century, however, came to think of the subject in a contractual relationship with the sovereign which was not easily transportable to the colonies.<sup>60</sup> The Civil War (1642–9) and the subsequent trial and execution of King Charles I led defenders of the Protectorate Commonwealth, such as John Milton, to defend the execution of the King on the grounds that Charles was a tyrant who had exceeded the trust reposed in him by his people. Following Grotius, Milton defined the essence of sovereign power as consisting in the natural right of self-defence naturally possessed by each person and entrusted to the sovereign to use to defend the commonwealth, punish crime and maintain social order.<sup>61</sup> Unlike Grotius, however, Milton argued that this entrusted right could be resumed by the subject whenever the sovereign broke their trust by ruling violently, serving their own interests or enslaving their subjects, especially by invading their property.<sup>62</sup> The subject, unlike a slave, was an active agent whose liberties and rights provided the rationale for sovereign power, and whose right of judging the sovereign and of rebellion marked the limit of sovereign power.<sup>63</sup>

Milton's radical defence of the rights of the subject was opposed to Thomas Hobbes's account of the subject as a person whose freedom ('corporall Liberty') consisted in whatever his or her sovereign permitted, or did not expressly forbid. It was in this latter sense that Hobbes famously defined the liberty of the subject as consisting in the 'silence of the Law', allowing the subject freedom 'to do, or forebears, according to his own discretion' and such freedoms as the law permits, such as freedom of contract, freedom to choose a trade, place of residence, or diet.<sup>64</sup> In so defining subjects, Hobbes argued that their liberty was tied to the effectiveness of the state's sovereignty, the purpose of which was to ensure the 'Peace of the Subjects within themselves, and their Defence against a common Enemy'.<sup>65</sup> The subject retained no liberty to contest or oppose the sovereign, except in those cases that involved purely personal self-defence (it being contrary to the laws of nature that a subject could be understood to voluntarily concede their right to existence). Hobbes's express purpose of course was to construe the relationship between sovereign and subject in such a way that the purpose of

political association hinged on protection (of life and property). Consequently, the subject must obey the sovereign only so long as the sovereign is able to provide effective protection, and when that protection ceases, the subject returns to a 'state of nature'. In this condition, which he famously equated to the condition of 'the savage people' in America, individuals must provide for their own protection, or seek it under some other sovereign power.<sup>66</sup>

While the purpose of sovereignty was to provide protection, the mode or operation of sovereignty consisted in the twelve 'rights' Hobbes specified in chapter 18 of *Leviathan*, all of which framed sovereignty as a power over (though exercised for the benefit of) subjects. Of these twelve, Hobbes insisted that the ninth right, 'of making Warre, and Peace with other Nations', was crucial because command of the armies 'without other Institution, maketh him that hath it Sovereign'.<sup>67</sup> Sovereignty, then, might be thought of as 'instituted' by subjects for their own benefit, surrendering to the sovereign the right to make laws, adjudicate punishments and rewards. In the absence of such deliberate 'institution', however, the command of armed force alone constituted the essence of sovereign power.

It was Filmer's idea of sovereignty (rather than Hobbes's) as instituted by god and unchallengeable by subjects that helped galvanize theoretical reflections on sovereignty during the Interregnum (1649–59) and the Restoration of the monarchy (1660).<sup>68</sup> The central claims of Filmer's opponents were that the individual's use of reason, and hence the ownership and use of property, should be seen as god-given. Sovereignty was instituted not by god, but by human beings for the protection of their property. The radical purport of these arguments was still thought too extreme by most, and a premium was placed on limiting rather than enhancing any supposed right to rebellion. Nonetheless, political wrangles over the exclusion of James II from inheriting the throne, and his eventual replacement (by William III) in the 'Glorious Revolution' of 1688–9, created a receptive environment for more strident notions of the contractual relationship between subject and sovereign.<sup>69</sup> While the right to rebellion was still considered too radical an assertion, the subject's allegiance was described as conditional on the effective fulfilment of the duties of sovereignty, namely, the protection of the rights and liberties of free subjects.<sup>70</sup> In this formulation, the subject's relationship with the sovereign emerges as one based on self-interested calculation but also, as the essential foundation for the pursuit of collective well-being by ensuring national defence, the execution of laws, and the preservation of trade.<sup>71</sup>

One of the most radical statements of the rights of the subject in relation to sovereignty in this period was John Locke's argument that the liberty of the subject itself constituted sovereign power. The power of Locke's 'political society' derived from the consent of the 'subjects' who constituted it, and was provisional on the grounds that their 'rights' (life, liberty and estate) were protected

and secured from infringement by having an independent means of adjudicating disputes.<sup>72</sup> In fact, Locke was reticent to use the language favoured by more absolutist writers such as Hobbes, preferring instead to speak of ‘men’, ‘individuals’ or ‘persons’ rather than ‘subjects’; and ‘supream power’ rather than ‘sovereignty’. Indeed, Locke insisted that seeing the ‘making of War and Peace’ as the defining feature of ‘sovereignty’ would allow any band of pirates who grouped together on oath to become ‘sovereigns’. Locke argued that the making of war and peace was the prerogative of the ‘Supream Power’ or government of ‘Politick Societies’, namely those political associations established by consent for the mutual preservation of individual rights.<sup>73</sup> Crucially, Locke tied this understanding of the provisional and delegated nature of ‘Supream Power’ to a historicized account of the emergence of such societies in Europe, far in advance of supposedly inferior types of association in North America.<sup>74</sup> Though far from representative of all British political thought, Locke’s historicized account of ‘more advanced’ political societies or states as those able to protect the individual rights of their members (especially their property rights) by adjudicating disputes (through law), and to protect the whole (by means of wielding the power of war and peace) was not uncommon.<sup>75</sup>

By the early eighteenth century, then, British political discourse had come to be characterized by a notion of the subject as a rights-bearer whose legal status could be conceptualized in terms of a contractual relation binding the sovereign and the people. Nonetheless, the *national* identity of the subject never entirely disappeared, hence the continuing appeal of the image of *English* liberty as ‘one of our first Principles connatural to an English Heart, to be tender and jealous of ... [liberty’s] loss and Abridgement!’<sup>76</sup> On this view, the relationship of subjects to sovereign was conceived in terms of the protection of the rights of ‘Englishmen’ or ‘true Britains.’<sup>77</sup> The political settlement forged by the Glorious Revolution reinforced an image of the inter-relationship between the rights of the English subject and the English monarch.<sup>78</sup> As Shower put it, ‘... Englishmen generally speaking are fond of a king, not only for his but their own sakes, and consequently such Fondness can be but of an equal Duration with their Ease and Liberty and a Suretyship of its Permanency; for the Loss or Fear of the Loss of either will quickly produce Aversion ...’<sup>79</sup> National tensions between English and Scots over the possibility of Union between them (enacted in 1707) meant that the exclusive rights of ‘the English subject’ and limitations on the English sovereign would be claimed for all the subjects and the sovereign of the new ‘Great Britain.’<sup>80</sup>

Emerging from this contestation over the rights of the subject and of the rights of sovereignty was an understanding that the subject was an agent who stood in a well-defined relationship to the sovereign state. The sovereignty of the state consisted in its capacity both to secure peace at home, and to wage war

abroad. In both activities, the *ne plus ultra* of state sovereignty was the power of 'life and death' over 'the subject'. Subjects were those who lived in the domestic peace that states were supposed to secure through the exercise of their sovereignty, to which they owed allegiance.<sup>81</sup> The payoff, at least in the now familiar terms of contractarian political thought, was that 'the subject' obtained from their subjection the possession of certain rights (such as Locke's famous triumvirate, 'Life, Liberty and Estate'). Conflicts between subjects over their respective rights were thus removed from the realm of war by being 'subjected' to the adjudication of sovereign states (through the processes of law). The question that remained was how far these rights were to be extended in the colonies beyond Britain's shores.<sup>82</sup>

### The Subject of Empire

Although *Calvin's Case* determined that British colonists took British law with them to the colonies as a 'birthright', the British Crown claimed the sole right to legislate on matters of Habeas Corpus.<sup>83</sup> Colonists, however, asserted their entitlement to the rights and privileges enjoyed as British subjects.<sup>84</sup> As New York's colonists framed it in 1691, their rights as 'English subjects' were threatened as much by the encroachments of executive power as by the hostility of non-subjects, the French and Indians.<sup>85</sup> In 1722, the Privy Council itself had declared that British law was the 'birthright of every subject' and was carried with them wherever they settled and thus immediately went into effect when they settled in an 'uninhabited country'.<sup>86</sup> The problem was that such calls were made by colonists who saw themselves as subjects with the same rights as those subjects at home, but whose rights were asserted against non-English European settlers (such as the French in Acadia) and non-European Indigenous peoples (such as the original inhabitants in North America or India).<sup>87</sup> The question was, did these other peoples have the same rights as British subjects?

In 1710 colonial North American forces captured the French colony of Acadia (subsequently Nova Scotia), and the conquest was confirmed by the Treaty of Utrecht in 1713. In order to secure peace in the new colony, which was dominated by pro-French, Catholic settlers and Indians more sympathetic to the French than the British, Queen Anne's government proposed to extend the rights and legal protection (of person and property) as British subjects to the French settlers in return for an oath of allegiance.<sup>88</sup> This offer was widely rejected by the colonists, but subsequent governors were nevertheless instructed to maintain the offer to any of the French colonists to 'be protected in all their Civill and Religious Rights and Liberties so long as they shall behave themselves as becomes good Subjects ...'<sup>89</sup> At least part of their refusal to take the oath of allegiance lay in the paucity of protection that the British could offer from the

Indians. By mid-century the hope that all the French colonists might become 'good subjects' had been watered down. In 1745, Lieutenant-Governor Mascarene wrote,

I have look't upon them [the French colonists] as grafted in the Body of the British Nation as an unsound limb indeed and therefore to be nurtur'd and by time and good care to be brought ... first to become Subjects and after that good Subjects which ... might be effected in some generations ...<sup>90</sup>

The conversion of French Catholic settlers into 'good' British subjects thus presented very real difficulties. The legal status of the original Indigenous inhabitants of North America, on the other hand, was a source of long established confusion.

Outside of the European context, Indigenous populations were regularly excluded from being considered as British subjects, at least partly because British colonists were jealous to maintain their monopoly over the legal rights this status bestowed upon them. Thus in relation to Africa and the regulation of the slave trade there, writers distinguished between British subjects and the 'naked Natives' with whom they sought to live 'peaceably and quietly' by means of trade and 'traffick'.<sup>91</sup> In regard to India too, a distinction between British subjects and Indian 'natives' was maintained.<sup>92</sup> An early proponent of the extension of British law to India, Sir Edward Hyde East, spoke of the need for equal laws 'in all matters of common concern between British and native subjects'. Hindu and Muslim Indians, he argued, were to be considered British subjects 'in an enlarged sense' rather than being denominated as heretofore 'native inhabitants'.<sup>93</sup> Those who opposed this plan spoke of 'the Natives' and the need to adopt laws and government suited to their 'character and customs'.<sup>94</sup>

In North America and Canada the British gained perhaps their longest continual experience of negotiated subjection to British imperial sovereignty. Here, colonists negotiated with a variety of Indigenous populations who were sometimes at war with their colonies, at other times living peacefully beside them, often supplying them with the goods they needed to survive, and sometimes integrated within colonial society.<sup>95</sup> There was no coherent single colonial policy framework governing what were complex encounters not only across obvious linguistic divides, but between very different cultures. In particular, Europeans and Indigenous Americans had very different understandings of sovereignty, treaty and subjection. Many First Nations or American Indian treaty protocols developed in a highly mobile context in which negotiations were conceptualized as forms of ritualized kinship ceremonies involving mutual obligation.<sup>96</sup> They presented chances to air grievances and condole for losses incurred in previous conflicts. They were an opportunity to restate claims, to exchange gifts of good will and to invoke previous agreements as a way of leveraging their Indigenous or

European partners to perform their part of the agreement. They were also to be conducted by skilled orators whose task was to recount the history of previous agreements and to articulate the claims of their people, but not to make binding decisions on behalf of them. On this view, as Richter has argued, Indian negotiators came to view themselves as partners with European colonists in agreements that were mutually binding. By the terms of treaties they did not so much 'subject' themselves to European sovereignty as seek to mobilize it to their best advantage.<sup>97</sup> For Europeans, however, treaty negotiations were conducted as part of the process of empire-building in which imperial sovereignty and territorial extension were key aims. In this sense, Indigenous 'partners' were conceptualized as 'nations' with distinct 'territories' inhabited by peoples who could be 'subjected' to empire.<sup>98</sup>

But these treaty negotiations were not entirely controlled by the colonists. Although they sought to impose their own understandings of Indigenous subjection, they often amounted to vacuous claims. In the early years of colonization, for example, the Virginia Company urged its colonists to seek the Christian conversion of the Indigenous inhabitants, but also advised them to make Powhatan, the leading Indigenous chief of the most numerous Tidewater nation on the Chesapeake, into a 'tributary' ruler who, along with his subordinate chiefs, 'acknowledge no other Lord but King James.'<sup>99</sup> By this policy they hoped to provide a regular income to the colony from Indian tribute, thereby 'reducing them to labour and trade' to produce the 'rent' for English 'protection', by which they may 'enjoye their howses ... and many other commodities and blessings of which they are yet insensible'. According to Fitzmaurice, the company's 'Ciceronian' policy of moderation towards the Indians contrasted with the 'Machiavellian' orientation of Captain Smith and the colonists who favoured the more overt use of violence and fear as weapons of control.<sup>100</sup> Other colonists in America regarded the Indians as savages enslaved to their own customs, and their chiefs as at best tributaries owing their position to the forbearance of the English monarch.<sup>101</sup> Significantly, however, even this condescending attitude tied the colonists to a recognition of a degree of Indigenous sovereignty. Whether colonists liked it or not, negotiations did provide some avenues for Indigenous people to articulate their claims and seek recognition of them from colonial authorities.

In many cases, the recognition afforded to Indigenous claims was couched in Eurocentric terms, as in the assumption that Indigenous treaty partners 'subjected' themselves, on behalf of their tribes, to colonial authority. In one such example from 1664, a Narraganset 'sachem' was said to declare '... of my own Voluntary mind without anyone moving me thereunto ...' that he and his fellow sachems,

... in behalf of the rest of the Indians under us ... that we do all approve of ye English Government and Manners of the English ... that we Voluntarily and of our own accord do desire to be governed by ye English Laws and Governors and desire to be no longer under the Indian Government – but to conform ourselves to ye English Laws and manners ...<sup>102</sup>

In this way, treaties could be used as linguistic devices framed for Europeans as a way of asserting sovereignty over Indian nations based on their willing subjection to colonial law. This subjection was represented, as it was here, as a ‘voluntary’ act, but rarely did the treaties give an accurate reflection of the plight of the Indians, who often found themselves reduced by the warfare, diseases and alcohol introduced by the colonists, and uncomfortably wedged between colonists taking up more land and other hostile Indian nations protecting their lands. Noteworthy also in these treaty documents is the claim that Indian sachems who negotiated the treaties did so ‘on behalf of their tribes’. This suggested a degree of authority as representatives of their people that was often alien to Indigenous understandings of the role of sachems as orators and spokespeople.

Nonetheless, British colonists continued to claim that Indigenous chiefs could even be appointed by colonial governors ‘from time to time’ and that they held their titles ‘from the King’s Majestie of England’.<sup>103</sup> Such claims were often unfounded, but they could also establish a claim on the colonial government for better protection from the aggression of colonists. By the latter half of the seventeenth century, tensions between the aristocratic elite of the Virginia colony and the poorer colonists resulted in the latter using open violence against neighbouring Indigenous nations (many of them living peaceably on lands secured to them by previous treaties) in order to take their land for themselves. This tension flared into the short-lived ‘Bacon’s Rebellion’ in 1675 in which land-hungry colonists under the tutelary leadership of a disaffected member of the colonial elite, Nathaniel Bacon, used ‘indiscriminate’ slaughter of Indians to gain the land they wanted.<sup>104</sup> In a scenario that played itself out in innumerable colonial situations, Governor Berkeley struggled in vain to control the violence. Subsequent governors, such as Alexander Spotswood in 1720, came to see, however, that the choice on offer between colonists and neighbouring Indians was a stark one, ‘... either an Indian or a civil war’.<sup>105</sup>

The prospect of an Indian war haunted many colonial American governors. The reality was that colonial frontiers were largely dependent on Indigenous trade (both for markets for European goods, and as suppliers of valued pelts and hides), while also being vulnerable to attack from Indigenous warriors. The mechanisms of colonial defence were often clumsy and inefficient, and unpopular with colonists because they were expensive to maintain. In this context, treaties of peace between the colonial government and Indigenous nations sought to secure peace on the frontier as cheaply as possible by granting neighbouring Indian nations

lands in the vicinity of colonial settlement. In exchange for this concession, the treaties also made extensive claims to colonial sovereignty over those nations. This exchange, however, was often framed in terms of an Indian 'subjection' to British law and colonial sovereignty, as for example in treaties made in the wake of Bacon's Rebellion with aggrieved Indigenous nations such as the Pamunkey Indians: '... the respective Indian Kings and Queens do henceforth acknowledge to have their immediate Dependency on, and own all Subjection to the Great King of England, our now Dread Sovereign ....'<sup>106</sup>

Colonists construed this 'subjection' in terms of the supremacy of their colonial law in all cases of disagreement or dispute between Indians and colonists. Indians were to seek redress under English, not Indian law.<sup>107</sup> Governor Spotswood's treaties with the Tuscarora, Nottoway, Saponi and other nations in the early eighteenth century echoed this formula, whereby,

The said Indians shall be faithful to her Majestys Government of Virginia and maintain a Strict Peace, friendship and amity with all her Majesty's Subjects of the said Colony: and on the other hand if any Controversys shall arise between the Inhabitants of the said Colony and the said Indians, Justice shall be done to both partyes according to the Laws of the said Colony neither shall it be Lawful for either party to seek redress by any other means.<sup>108</sup>

Although treaty formulas gave limited recognition to Indian chiefs and their people as political entities (nations), 'pre-emptive sovereignty' was granted to the British colonists whose law was held to be the supreme arbiter of dispute, including over land claims.<sup>109</sup>

In the Quaker colony of Pennsylvania, colonists sought to obtain the 'consent' of the Indigenous inhabitants to colonization on 'friendly termes' by means of 'traffick' or trade.<sup>110</sup> The pacifist Quakers were of course especially concerned to see their form of colonization as separate from the violent conquest they associated with other colonies.<sup>111</sup> It was perhaps for this reason that one of William Penn's treaties with the Indians stipulated that those who lived 'near or amongst the Christian' colonists and lived 'Regularly and soberly' should 'have the full and free privileges and Immunities ... as any other Inhabitant ... duely Owning and Acknowledging the Authority of the Crown of England ....'<sup>112</sup> As the colony grew, however, the Indigenous inhabitants found that more and more of their own land was being taken up, often by treaties that were plainly fraudulent and secured by the illegal supply of quantities of alcohol. Indigenous nations therefore moved further west to outpace the spread of settlement, thus making colonial control of the frontier less secure. In these circumstances, colonial authorities used treaties as a way of inducing Indigenous people to return to the colony by claiming that 'we treat you exactly as do our own People; we punish those that hurt an Indian, as if they had hurt ourselves.'<sup>113</sup> In this way, and



without always being specified, the Indigenous people were invited to think of themselves as British subjects, acknowledging His Majesty's sovereignty and entitled to the full protection of British law. As Indigenous negotiators like Tawenna of the Conestogoe nation realized, however, there was often a yawning gulf between the promise and the reality of treaty agreements. Although previous agreements with William Penn and the Conestogoe had been based on colonists and Indians constituting 'one Body ... that cannot be divided,' Tawenna decried the sale of rum in direct contravention of those agreements, which continued to debauch and impoverish his people.<sup>114</sup>

In New York, colonial policy regarding Indigenous people was shaped by the overwhelming concern to maintain the allegiance (first won by the Dutch) of the Five (later Six) Nations of the Iroquois confederation whose lands lay between the British and French colonies in North America. New York's governors also sought to use the claims the Iroquois made over other Indigenous nations to the south and west (in the Ohio Valley) and to the north and west (around the Great Lakes), as part of their colonial claim over those nations and over the other British colonies whose own resident Indigenous nations were represented as tributaries to the Iroquois.<sup>115</sup> For these kinds of reasons, New York's governors were willing to concede a more explicit recognition of the status of the Iroquois. In 1687, for example, Governor Dongan spoke of the Iroquois having 'submitted themselves' to 'our Sovereignty' and thereby 'are become our Subjects.'<sup>116</sup> This recognition of the Iroquois as 'Obedient Subjects' entitled to protection because of their allegiance with the colony was reiterated by Governor Fletcher in 1694.<sup>117</sup> Throughout this period, however, the Iroquois found that promises of British protection usually amounted to nothing, and despite the consistent Anglocentrism of the Mohawk (the easternmost Iroquois nation), the hostility of the Ojibway and other nations inclined the more westerly Iroquois nations, notably the Senecas, towards sympathy with the French.<sup>118</sup> Throughout the period of British colonization, the Iroquois sought to use both their location – between the British and French colonies – and their claims to control over other Indigenous nations as levers to wrest advantage from their colonial neighbours. This they often managed very skilfully by threatening to switch allegiance, or by playing a double game with both colonial powers – seeking the best advantages they could.

Iroquois social and political structure, and their complex rituals of treaty negotiation, favoured much more egalitarian relationships than the colonists were familiar with in Europe.<sup>119</sup> Within the Iroquois confederacy the Mohawk, Onondaga and Seneca nations were 'elder brothers,' while the Onieda and Cayuga (and later the Tuscarora) were the 'younger brothers.' Elder brothers held the prestige of seniority, but had no command over younger brothers. In their negotiations with the English, Iroquois negotiators spoke to the colonists as their

'brethren,' and expected the English to speak so to them.<sup>120</sup> As a consequence, New York treaty negotiators found it difficult to impose a European notion of subjection on the Iroquois. The colonists were also concerned to use treaty negotiations to try to maintain the fluctuating British interest among the Iroquois, or at least to secure their neutrality in times of conflict with the French colony in Canada, perilously close to their northern frontier. The result was that treaty agreements tended to be couched in terms of legal equality between Iroquois and colonists to an arguably greater degree than in other colonies. At the Treaty of Lancaster in 1744, possibly the high point of Iroquois independence, New York's negotiators were willing to concede that '[w]e are all Subjects, as well as you, of the Great King beyond the Water ...'<sup>121</sup> Throughout the period leading up to the Seven Years War (1756–63), however, there was a persistent failure to extend to the Iroquois not only the military protection they sought, but the fairness of legal redress to which, as British subjects, they should have been entitled.<sup>122</sup>

In the wake of Britain's triumph over the French in the Seven Years War, colonial authorities in London sought to impose some order on their vast and newly won territories in North America and Canada. In this context, the control of Indian affairs became important because it was one mechanism by which central government authority, based on the Crown's 'protection' of Indian interests, could be asserted over the increasingly independent colonies and their ambiguous westward frontiers. The subject status of Indigenous nations thus assumed a central importance.<sup>123</sup> Colonial policies were phrased in terms of securing 'the ancient inhabitants in all the Titles, Rights and Privileges granted to them by Treaty ...,' using the military to ensure 'good Treatment of the Indians' and to uphold 'regular' administration and the sovereignty of his majesty's government on the frontiers of colonial settlement.<sup>124</sup> These aims were officially pronounced in the Royal Proclamation of 1763, which, although only an expedient, did offer recognition of some rights and a limited sovereignty of Indigenous 'subjects.'<sup>125</sup> As Pocock suggests, the history of European treaty-making with Indigenous peoples should be viewed not simply as political and legal, but also conceptual and linguistic history. In these histories European 'fictions' about sovereignty and rights were projected onto Indigenous peoples who 'did not always understand them, but had their own ways of understanding themselves and what they were doing when they entered into what the Europeans called treaties.'<sup>126</sup> Nonetheless, for all their obvious shortcomings, colonial treaties were at least 'symbolic commitments' embodying possibilities for future recognition (albeit limited) of Indigenous rights to land, local administration, and even to better protection.<sup>127</sup> Nowhere can the significance of these 'symbolic commitments' be more clearly appreciated than in a consideration of those colonial contexts where they were absent.

In so far as there was an ideology of empire in mid-eighteenth-century Britain, it was premised on the Empire as a support for British commerce and trade, and as an embodiment of the rights and liberties of British subjects at home and abroad.<sup>128</sup> Although the Royal Proclamation provided some form of recognition of Indigenous peoples as British subjects, the colonists themselves were reluctant to extend to the Indians the rights they believed they possessed as British subjects. In the years leading up to the American War of Independence (1776–83), colonial discourse in the North American colonies revolved around the assertion of the colonists' rights as 'Free born Englishmen', usually asserted to the detriment of the Indians.<sup>129</sup> Such assertions could be based on explicitly Lockean notions of property and of the rights of property owners.<sup>130</sup> The Indians were often seen simply as disturbers of the peace on the fringes of the colonies who had no serious claim to their land on the grounds of natural law.<sup>131</sup> Alternatively, the growth and assertion of colonial rights might be seen to manifest the 'wonderful providence' of god, who 'swept off' by pestilence and disease the original 'savage' inhabitants.<sup>132</sup>

In Britain, however, many were coming to see their Empire as a benevolent institution, protecting and promoting the interests of the peoples subjected to it. In 1774, for example, Chief Justice Mansfield argued in *Campbell v. Hall* that once a people had been conquered by Great Britain, they received the 'conqueror's protection [and] become his subjects; and are universally to be considered in that light not as enemies or aliens.'<sup>133</sup> Although Mansfield confirmed the finding in *Calvin's Case* that the original laws of the conquered continue until changed by the conqueror, he explicitly rejected Coke's 'absurd exception' of 'infidels' or 'pagans' as the 'mad enthusiasm' of a less tolerant age.<sup>134</sup> The implication of such a view was that,

Those who lived in the kings dominions were his subjects; they owed allegiance to him and by the eighteenth century were deemed to be 'subordinate unto and dependant upon' the British Parliament. By common usage, the king's subjects were British subjects.<sup>135</sup>

What made one a 'subject' under British statutes was being born within the territories of the British sovereign (*jus soli*) and being born of parents who were themselves free 'British subjects' (*jus sanguinis*).<sup>136</sup> At the same time, however, many Britons believed that their laws and the rights they defined were products of 'an advanced, sophisticated, commercial society' which could not be applied to what were considered less developed peoples within the Empire for whom 'laws appropriate to what was assumed to be their less advanced condition should remain in force'.<sup>137</sup> The eighteenth-century British Empire incorporated a variety of peoples with diverse identities and varying status. This variety of status could be related to the method of imperial extension. In North America, the exigen-

cies of war and trade meant that Indigenous peoples were sometimes able to win a kind of negotiated subject status. In Australia, however, colonial attitudes to Indigenous people were heavily shaped not only by their reluctance to engage in trade, but by the fact that they were not 'subjects' with whom any war could be fought. They were in effect to be thought of as 'held in subjugation' not through warfare, but in the denial that any such war did or could ever take place in Australia because there was no Indigenous polity with (and against) whom such a war could be fought.



## 4 THE SUBJECT OF WAR

When Captain Arthur Phillip had his official instructions read to the assembled officers, marines, convicts and assorted other colonists at Sydney Cove on 7 February 1788, the sovereignty of His Majesty's government was asserted 'over all those Territories, belonging to his Britannic Majesty', investing 'full power and authority' in the office of his Governor of the colony.<sup>1</sup> This was not, as the British saw it, a dispossession of Indigenous people, because they did not regard the Indigenous peoples to be exclusive owners of the entire surface of the continent. Above all, however, this taking of possession and the blank assertion of British sovereignty was not considered to be a conquest. There had been and would be no war and no peace negotiation over the presumptive right the British assumed they had to take possession. Consequently, there would be and indeed in the eyes of British officials there could be no treaty with the Indigenous inhabitants of Australia.

Some have argued that this decision was based on the 'lie' of *terra nullius* and the consequent failure to extend citizenship status to Indigenous Australians contrary to 'the British rules of citizenship'.<sup>2</sup> This argument, however, overlooks the complexity of contemporary British discourse, especially in regard to citizenship:

So diverse was the [British] empire assumed to be that the peoples of the British Isles seem rarely to have envisaged themselves as citizens of a greater Britain that incorporated the peoples of the empire in a common Britishness with them ... In the absence of any concept of common citizenship, the peoples of the empire tended to be ordered in public debate in Britain according to whatever hierarchical system was in vogue, be it progress towards civility or innate racial characteristics. Britain's supremacy in this ranking was rarely questioned.<sup>3</sup>

Indeed, the very assumption that the British had uniform 'rules' of citizenship in 1788 is as problematic as the assertion that the notion of citizenship could be extended to the Indigenous peoples of Australia. As Claeys has masterfully demonstrated, there was no single or uncontested public discourse in Britain at this time, much less one that stipulated full adult male suffrage or citizenship.<sup>4</sup> Indeed, Philp and others have suggested that the impact of the American and

French Revolutions on British political discourse meant that the very notion of citizenship smacked of the odium of radical republicanism, if not outright Jacobinism.<sup>5</sup> At the level of discourse on empire, Armitage notes that the British Empire became after 1789 a counter-revolutionary empire 'that was increasingly authoritarian and more conspicuously territorial, than earlier manifestations of Imperial discourse'.<sup>6</sup>

Significantly, British colonization of Australia was never militarily contested by any other colonial power. This facilitated the uncompromising projection of 'savagery' onto the Indigenous inhabitants leading to a sweeping denial of any (even limited) Indigenous sovereignty. Consequently, no serious effort seems to have been made to consider what kind of difficulties might be raised if 'conciliation' proved inconclusive, and if Indigenous resistance proved more troublesome than expected.<sup>7</sup> In the first section of this chapter, I will argue that pervasive assumptions to the effect that the civilization of Europe had manifested itself in the 'honour' and 'civilities' of European war and diplomacy were unsettled by the realities of colonial warfare. In Australia in particular, there was to be no 'war' because the Indigenous inhabitants were not considered to be 'subjects' (of their own or another sovereign) with whom a war could in fact be fought. The evident problem confronting that view, however, was how to interpret and what to do about the all too obvious violence that accompanied the spread of colonization. What disturbed colonial authorities, as I will show in the second section of this chapter, was that much of the Indigenous people's violence did not conform to neat European presumptions about savagery. As I will discuss in the third section, the vexed question of the legal status of Indigenous Australians in the early years of colonization was therefore framed by the endemic problem of Indigenous violence. When 'British subject' status was extended to Indigenous people in the 1830s, as discussed in the final section of this chapter, it was hopelessly compromised by the presumption of Indigenous 'savagery' which exacerbated further colonial anxieties (explored in Chapter 5) about the appropriate policies for governing Indigenous people.<sup>8</sup>

### Civil Wars?

In the previous chapter it was argued that European political thinkers in the seventeenth century conceptualized warfare as an activity of states claiming sovereignty over their own subjects and defined territory. In the eighteenth century, however, warfare also came to be seen as an index of social and historical development or civilization.<sup>9</sup> As others have noted, European pretensions to civilization were often challenged by the exigencies of colonial conflict. Here, apparently 'civilized' warfare could be invoked as a stark alternative to the brutality of 'savage' wars, but could also be appealed to in the effort to 'exterminate' the 'savages',

thereby revealing the 'savagery' of the colonist's own 'civilized' values.<sup>10</sup> Colonial anxieties over the question of war and the status of the Indigenous peoples were shaped by presumptions about the inter-relationship between European civilization and diplomatic practice. The avid and erratic English Advocate General James Marriott expressed this sentiment in characterizing his as an age in which European diplomatic practice had been 'civilized'.<sup>11</sup> The corollary of this position was that determinations of issues according to the law of nations should have reference to the historical condition of the nations themselves. In suggesting this approach, Marriott gave voice to the characteristic assumption of European Enlightenment thought that the universal laws of social development governing the historical development of all nations could be discerned.

These laws were expressed in terms of theories of civilization which sought to place the emergence of commercial economies with pacified, law-governed civil societies in Britain and Western Europe within long historical trajectories of development, as in David Hume's *History of England*.<sup>12</sup> A key to unravelling the direction of historical development was the transformation of the rude virtues of savage life (based on simplicity, hardiness and a warrior ethos) into the more flexible and rational manners of civilized societies.<sup>13</sup> Manners consisted in the widely accepted standards of conduct and self-regulation that made civil life possible by circumscribing violence and entrenching social virtues such as courtesy, probity and industry. Civilized societies were those characterized by the interdependent development of both flourishing commercial economies and effective state sovereignty. These 'civilized' states, such as Britain, France and Holland, confronted one another in a new international order of sovereign states in Europe. In this way, the domestic development of civilization was tied to the civilization of international relations by the influence that civilized manners had on the mechanisms of international conduct – war, peace and treaties. As Marriott put it, 'The System of Nations concerning their reciprocal Rights, whether by Usage or Treaty depends upon their Manners'.

Marriott's contention thus amounted to the claim that Enlightenment historical analysis could be applied beyond the bounds of historiography. In effect, he suggested that not only was contemporary Europe more 'civilized' than in previous eras, but that its superior civilization showed in the prevailing patterns of international conduct:

When I speak of the present Age, I mean an interval of Time from the Treaty of Westphalia down to the last definitive Treaty of Versailles, which may be called the Age of Negotiation, of which kind of Intercourse and Connections the Greeks and Romans contending always with barbarous Nations, had very partial Notions, drawn however from and adapted to the Condition of their Rivals, and the rest of Mankind in those Ages.



Here the logic of Marriott's argument turned on the fundamental assumption then becoming a shibboleth of European Enlightenment thought that European nations had succeeded in civilizing war:

In the present Age as War is commenced on different Principles from the Wars of Antiquity, so it ends with different Principles, in both more to the Honour of Humanity. The public law of Europe abhors the sanguinary Object of antient Wars, universal Slavery, or Extirpation – Every War in these Times is considered but as an Appeal to the rest of the powers of Europe, and is but a temporary Exertion of Force to decide a Point of Interest which no human Tribunal can determine ...<sup>14</sup>

The central message of Marriott's argument was that in the period from 1648 down to his own day, European international relations – and the practice of warfare – had been civilized thanks to the historical development of the 'manners' of European nations.<sup>15</sup> Now that Europe had developed more sophisticated and 'humane' manners, Europeans could conduct their international disputes in a manner that befitted their civilized status. Wars could be waged solely in the rational pursuit of national interest rather than the irrational desire to enslave or exterminate all enemies.<sup>16</sup> This war-making was conceived to be so dispassionate that belligerents agreed merely to 'suspend' the mutual recognition of one another's rights during the period of hostility, while in times of peace this mutual recognition was automatically reinstated.

Perhaps nowhere were these sentiments more forcefully expressed than in Scottish Enlightenment histories of civilization in which war and diplomacy were treated as crucial indexes of social progress. In Hume's *History*, for example, even the invention of devastatingly lethal artillery showed the influence of civilization. This 'furious engine,' Hume wrote,

Though it seemed contrived for the destruction of mankind, and the overthrow of empires, has in the issue rendered battles less bloody, and has given greater stability to civil societies. Nations by its means have been brought more to a level: Conquests have become less frequent and rapid: Success in war has been reduced nearly to be a matter of calculation: And any nation overmatched by its enemies, either yields to their demands, or secures itself by alliances against their violence and invasion.<sup>17</sup>

The extension of Hume's argument was that the practice of war in Europe showed not only the effect of civilization, but even drove it forward.<sup>18</sup> In this way, civilized war was associated in the European imagination with the development of civilized conventions of war based on a heightened sense of honour.

For a variety of Enlightenment thinkers, honour denoted a quality of conduct central to civil life. To act from a sense of honour was to engage in self-regulated conduct in which one's aim was to win the esteem of peers by avoiding disgrace.<sup>19</sup> For Montesquieu, the principle of personal honour was among the chief 'springs' of republican constitutions, opposed to the cruelty and terror of

despotic regimes.<sup>20</sup> It was for this reason, he argued, that punishments under republican governments were less severe than under monarchical or despotic governments. Despots in particular governed by force and fear and thus sought to corrupt and debase their citizens. In monarchies, and especially republics, however, there was comparatively greater equality among citizens because the law sought to enshrine a respect for the honour and security of each person.<sup>21</sup> Lack of honour and of equality under despotisms, Montesquieu argued, led to the greater likelihood of vengeance in punishment and in war. His classic examples of both were from non-European cases, the people of Turkey under their Sultan, or the 'barbarous' Tartars of China.<sup>22</sup>

The opposition of revenge to honour (in punishment and war) echoed a much older conviction that the desire for vengeance was merely a 'kind of wild justice'.<sup>23</sup> The spirit of revenge was thus an unpredictable and potentially unlimited quality likely to sustain grievance and rancour. By the eighteenth century, however, thinkers such as Adam Ferguson interpreted the 'savage' desire for revenge as a cause of incessant wars leading to the consolidation of tribes, and eventually to the rise of 'barbarous' rulers.<sup>24</sup> In these earlier stages of social development, exemplars of which included the 'barbarous' ancient Greeks and the 'savage' American Indians, revenge was a constant source of conflict and a drain on population.<sup>25</sup> The ungovernable desire for revenge and extermination of one's enemies was opposed, in Ferguson's view, to considerations of clemency, gallantry and, above all, the principle of honour among combatants. These virtues, he suggested, first emerged in the age of 'chivalry' but had since become a hallmark of European 'civilization'.<sup>26</sup> In the practice of 'civilized' war in particular, 'honourable' conventions (such as sparing the lives of prisoners and wounded) were thought to limit the extent of violence on the battlefield, and to direct war solely to the dispassionate pursuit of national interests. As Hume put it, 'where honour and interest steel men against compassion as well as fear ... combatants divest themselves of the brute, and resume the man'.<sup>27</sup>

This kind of claim to European civilization could be used as a foundation for claims to European superiority, and even empire over supposedly uncivilized peoples.<sup>28</sup> Others took a more subtle view. Adam Ferguson, for example, could not deny that civilized militaries exhibited superior discipline and control, but these were accomplished by subordinating the individual soldier's warrior virtues to the commands of drill.<sup>29</sup> The loss of warrior virtue in civilized armies, he argued, was exposed by imperial conflicts in which 'civilized' soldiers fighting for empire across the globe had to 'contend with the savage' and thereby to 'imitate' the savage warrior's skills.<sup>30</sup>

In the European imagination, then, the subject of war was couched in terms of conflict between sovereign states. Although these states held a power of command over their subjects, civilized conventions of war were thought to protect

and enhance the rights of those same subjects to security of person and property. While the realities of battle in Europe often belied the shallowness of this image, the exigencies of colonial conflicts did so more starkly. Colonial war in North America, for example, necessitated the incorporation of 'irregular' units of Indigenous warriors whose skills, ferocity and intelligence were essential to the outcome.<sup>31</sup> European reliance on Indigenous ways of war was a constant source of colonial anxiety, because it was felt that 'savages' fought in a pitiless way more akin to revenge, while colonists considered their own way of war to embody 'honourable' European practice.<sup>32</sup>

Another source of anxiety was the question of how to wage war against those engaged in rebellion against their own sovereigns. The thought of Adam Ferguson is instructive here. For him, the conventions of war that were designed to mollify its terrible effects simply did not apply in cases of civil war. The issue was not one of hypocrisy or inconsistency. For him, the development of modern military discipline and tactics was an index of civilization.<sup>33</sup> The process of civilization culminated in and its polished accomplishments were secured by the creation of sovereign states. The sovereignty of these states rested on their control and use of supreme military force. Civil war or rebellion, by challenging the very institution that embodied and protected the processes of civilization (the sovereign state), was thus seen as an assault on those processes and the forms of self-control that made life in civil society possible.<sup>34</sup>

Thus Ferguson opposed the American colonies in their War of Independence (1776–83) because he believed the colonists had no right to contest British sovereignty, or to 'withdraw their allegiance because their settlements were made in America, any more than if they had been on Hounslow-Heath or on Finchley-Common'.<sup>35</sup> Indeed, Ferguson was later to be criticized when, as secretary to the ill-fated Carlisle Commission, sent to Philadelphia to negotiate a return of the American colonies to the imperial fold, he appeared to sanction a manifesto threatening severe military penalties against the Americans.<sup>36</sup> Whatever his precise role in this fiasco, he clearly believed that the 'rules' of engagement for a civil as opposed to a foreign war could be construed differently.<sup>37</sup> Such 'Rules of War' were designed to protect 'Innocent Subjects' and to limit warfare to the 'just measure of Hostilities' needed to 'force an Enemy to Justice', and thus not to cause harm 'wantonly'.<sup>38</sup> As he made clear in his *Institutes of Moral Philosophy*, however, the 'laws of war' limiting the use of indiscriminate violence pertained to conflicts between sovereign nations.<sup>39</sup> For Europeans, then, the concept of war was tied to ideas of civilization by its association with the sovereign state. The subject of war was thus bound to the idea of the subject in war, that is, the individual whose status was held to depend on the sovereign state which guaranteed his or her rights, to which he or she owed allegiance, and through which

he or she gained some measure of protection through 'civilized' conventions of war.

### The Subject of War in Australia

Early colonists in Australia were troubled by the patterns of intra-Indigenous violence. Some described this violence a series of 'outrages' illustrating a 'malignant' attachment to 'vengeance', a lack of order and profligate waste indicative to Europeans of the condition of 'savagery'.<sup>40</sup> Others, however, suggested that such violence was more rule-bound, describing it as 'wars and desperate battles', but also conceding that it was often ritualized warfare sparked by individual disputes rather than a desire for conquest or territory.<sup>41</sup> Thus, an early reviewer of David Collins's *Account* of the first years of Australian settlement noted that the Indigenous people did seem to have definite rules relating to conflict (or 'duelling') that signified 'some tendency to civilization'.<sup>42</sup> Some colonists even went so far as to describe Indigenous practices of war as an expression of their political status as nations.<sup>43</sup> Such observations suggested that the Indigenous inhabitants obeyed their own sophisticated rules governing the use of violence, and this implied the existence of Indigenous laws and of some kind of government. As we shall see in the next section, intra-Indigenous violence (violence committed *inter se*) raised obvious questions about the legal status of Indigenous people. Other concerns were raised by the violence between colonists and Indigenous peoples.

The earliest accounts of the colonization of Australia testify to the rapidity with which efforts to 'conciliate' the 'affections' of the Indigenous peoples degenerated into outright violence. Although there were many instances of peaceful contact between Indigenous and non-Indigenous peoples, violence was often provoked by the colonists' uninvited use of food resources upon which the Indigenous peoples relied. An early instance of this kind of violence was reported by Arthur Bowes Smyth on 4 February 1788 – only two weeks after the landing of the first fleet – who recorded that a party of sailors were 'pelted' with stones as they hauled in their fishing net.<sup>44</sup>

Many of the early colonists surmised that conflict over resources lay at the heart of the ill feeling between the Indigenous peoples and the colonists. Other sources of conflict were soon recognized, such as the theft of Indigenous artefacts (for sale to the marines and officers), the abuse of Indigenous women, and wanton violence committed against Indigenous people. Governor Phillip in particular considered the colonists, and especially the convicts, to be uniformly the 'aggressors' in cases of conflict, but that the Indigenous people were actuated by a strong desire to 'revenge' any insult.<sup>45</sup> Others were less accommodating. Lieutenant Bradley, for instance, interpreted Governor Phillip's spearing as an affront to the efforts to establish friendly discourse and a sign that Indigenous people

could not be trusted.<sup>46</sup> Inevitably, the policy of conciliation soon became a policy to 'reconcile' the Indigenous people to living with the colony. This is how Phillip himself expressed it, claiming that he wanted to prevent abuses against the Indigenous people and to 'reconcile' them to 'live amongst us' so that they may be taught 'the advantages they will reap from cultivating the land', enabling them to 'support themselves'.<sup>47</sup>

Many Indigenous people did forge peaceful and productive relationships with settlers, but some colonists such as William Bradley thought that the Indigenous people were only friendly when powerless and only held in awe by muskets.<sup>48</sup> The problem for colonial authorities, however, was that the assertion of British sovereignty on the basis that the Indigenous people were savages without their own forms of government or sovereignty precluded their being considered foreign subjects against whom a legitimate war could be waged. Consequently, prolonged campaigns of violent Indigenous resistance to colonization exacerbated the dubious legal status of Indigenous peoples.<sup>49</sup>

One of the most spectacular campaigns of Indigenous resistance was waged in the Hawkesbury River region north of Sydney by the Darug people.<sup>50</sup> On 22 February 1796, Governor John Hunter issued an order that colonists in the Hawkesbury River region organize themselves for mutual protection against the 'attacks', 'depredations', 'frequent murders and robberies' of 'the natives'.<sup>51</sup> Significantly he warned those colonists possessing firearms that they must not 'wantonly fire at or take the lives of any of the natives, as such an act would be considered a deliberate murder ...' punishable by law. What is noticeable about these orders is not only the presumption that 'the natives' were the aggressors against 'the settlers', but such was the effectiveness of this campaign of resistance that it could only be explained by the fact that 'the natives' were being assisted by renegade colonists and convicts.<sup>52</sup>

References to the spectre of 'irritated and hostile natives' in official dispatches reflected a widening gap between the 'humane' intentions of His Majesty's government and the colonists themselves who were more interested in 'wantonly destroying' them.<sup>53</sup> Despite warnings not to 'murder' the 'natives', at no time was any mention made of them being protected as 'British subjects'. Indeed, considerable confusion on this very subject was revealed by the case of the summary murder of two Aboriginal boys by several Hawkesbury settlers in 1799. Hunter had those responsible for the murder put on trial, and wrote to his superiors of the 'wanton and barbarous' treatment of the Indigenous peoples by the settlers.<sup>54</sup> Nonetheless, his communication was still couched in terms of the familiar distinction between the colonists – variously described as 'settlers', 'white people' or 'subjects' of His Majesty's government – and 'the natives'.<sup>55</sup> The accused, however, attempted to justify themselves to the court by claiming that they had received instructions from the Governor to use summary justice against Indig-

enous aggressors. One claimed that he was instructed by the commanding officer on the Hawkesbury, Lieutenant Hobby, to escort one captured Aboriginal boy to the Governor who, he maintained, was said to have complained,

'Well what am I to do with him why did not your own Commanding Officer at Hawkesbury [Hobby] do something with him' – ... the Witness answered he supposed it was from a wish to make a more Public Example of this Native ... His Excellency remarked it was not in his power to give Orders for the hanging or shooting of such Ignorant Creatures who could not be treated according to our Laws that the Witness then requested to know what was to be done ... the Governor told the Witness that immediate Retaliation should be made on the spot or words to that effect ... upon that some bystander observed that was impossible as the Natives always took advantage of the time and place – 'Then' replied His Excellency 'so soon as they can be caught'

The case reveals the extent to which a gulf was widening between the 'official' policy of 'protecting' Indigenous people and encouraging them to live peaceably in and among the settlers, and the settlers' own perception that showing them 'indulgencies' encouraged greater confidence and made them 'so knowing' as to be able to make their attacks.<sup>56</sup>

The application of any official policy regarding Indigenous people in the colony thus confronted the problem of how to enforce the legal protection of Indigenous people without further alienating settlers who believed themselves to be insufficiently protected.<sup>57</sup> This problem was compounded by the continuing confusion over the legal status of Indigenous peoples – some of whom lived peaceably alongside or among the colonists, others of whom maintained a state of active hostility to colonists taking up more and more land and resources. Governor King attempted to resolve the problem by proclaiming that 'any act of Injustice or wanton Cruelty towards the Natives' would be '... dealt with in the same manner as if such act of Injustice or wanton Cruelty should be committed against the Persons and Estates of any of His Majesty's Subjects ...'. Although seeming to recognize Indigenous peoples as 'British subjects', the term 'as if' carried an important proviso. The proclamation continued that no 'settler' was to 'suffer his property to be invaded, or his existence endangered' and so they were authorized to 'use effectual' (but hopefully 'humane') means in 'resisting' any 'attacks' by 'the Natives'.<sup>58</sup> In short, King's proclamation held out the prospect of Indigenous people being treated 'as if' they were British subjects, while also justifying the use of force by British subjects against 'the natives'. At the same time, King attempted to remove the cause of continuing hostility on the Hawkesbury by reserving land on the riverbanks for the Darug peoples.<sup>59</sup> He made use of the practice of 'victualling' or supplying Indigenous people with food and clothes as a means of winning their approval and ensuring their dependence on colonial largesse.<sup>60</sup> Though King was one of the first to adopt these latter two strategies,

both reservation and victualling or rationing were to become mainstays of later colonial policy. The questions of colonial war and the legal status of the Indigenous people, however, remained intractable problems.

Lurking behind European responses to Indigenous resistance was a restive uneasiness that not all forms of Indigenous violence sustained the image of Indigenous 'savagery'. In the European imagination, warfare was an activity by which sovereign nations contested with one another by means of their armed forces. War was the ultimate means of pursuing national interests, whether defined as territorial expansion, the inviolability of national borders, or access to trade routes or colonies. Throughout European history, warfare had long been seen as a means to defeat one's opponents by the use of overwhelming armed force.<sup>61</sup> By the eighteenth century though, some European observers were coming to see the European way of war as a carefully structured and tightly controlled activity under the auspices of sovereign states in which decisive military advantage was sought by a complex war of manoeuvre in which battlefield violence was restricted to the combatants and of relatively short duration. The celebration of this European way of war emphasized its industrial and technological sophistication, its complex organization, its moderation of violence (for example, in sparing prisoners of war) and its rationality. Above all, European war was identified with the considered pursuit of national interest, while the 'savage' way of war was characterized by festering rancour fuelling an incessant cycle of revenge culminating in the desire to annihilate one's enemies.<sup>62</sup> As one contemporary source described 'savage' war in America, the 'want of government' among the tribes consigned the Indians to perpetual 'war with each other' in which 'their revenge [could] ... only [be] ... completed, in the entire destruction of their enemies.'<sup>63</sup>

Some colonial officials on the far distant shores of Australia, most notably the Lieutenant-Governor in Van Dieman's Land, George Arthur (a Peninsular War veteran), would come to regard their conflicts with Indigenous peoples as a form of guerilla war.<sup>64</sup> Authorizations of martial law to protect the lives of 'defenceless Settlers' ('His Majesty's Subjects') were made from time to time, but they did not constitute official declarations of war.<sup>65</sup> Part of the reason for this was that the Indigenous people were not regarded as a national force fighting under the command of their own sovereign.<sup>66</sup> Only grudgingly did early colonists concede that Indigenous people used violence in a 'somewhat systematic' strategy that had 'the appearance of a pre-concerted plan.'<sup>67</sup> Using British military for the defence of towns and homesteads, and colonial references to the Indigenous people as 'enemies' or 'uncivilized Insurgents', fell short of a declaration of warfare.<sup>68</sup> Colonial anxieties were engendered by the fact that much of the violence that occurred on the frontier was not simply Aboriginal defence of strategic or territorial interests. In fact, it did not seem to aim at obliterating the colonists.<sup>69</sup> Indeed, many Indigenous people lived peacefully and cooperatively

alongside the settlers, and at least some of the latter viewed them as 'harmless and inoffensive'.<sup>70</sup> Where violence did occur, it seemed often to have a quality of 'payback' for colonists' infractions of Indigenous laws.<sup>71</sup>

From the early days of the first settlement, colonists realized that what actuated much of the frontier violence was a desire by the Indigenous peoples to exact justice according to their own laws and customs. This becomes clear in the repeated reference to the Indigenous propensity for 'vengeance' or 'revenge'.<sup>72</sup> In European thought, revenge was treated with disdain because it implied an ungoverned and uncivil urge.<sup>73</sup> 'There is no passion', Adam Smith asserted, 'of which the human mind is capable, concerning whose justness we ought to be so doubtful ...'<sup>74</sup> By reflecting on how an 'impartial spectator' would view indulgence in revenge, Smith argued that we would be led to see magnanimity as the preferable response. Nonetheless, he still allowed that to revenge an insult is better than to suffer it, 'if we yield to the dictates of revenge, it [must be] ... with reluctance, from necessity, and in consequence of great and repeated provocations.'<sup>75</sup> This admission meant that revenge could still be seen as just under some circumstances. The implications of revenge in European thought were thus ambivalent.<sup>76</sup> Revenge was indicative of both 'savagery' and 'barbarism' and thus of a defective or even complete absence of government. Nonetheless, revenge could also be redolent of a desperate desire for redress and thus of an attachment to a 'primitive' notion of justice.

Governor King hinted at the Europeans' concern over the Indigenous desire for revenge when he described it as 'a practice strictly observed' among them that 'murder should be atoned by the life of the murderer or someone belonging to him ...'.<sup>77</sup> Elsewhere he described the difficulty of trying Indigenous people by British laws when they regarded themselves entitled to take their own 'revenge' for any 'ill treatment' they supposed a 'Crime'.<sup>78</sup> In short, Governor King here voiced the concern that haunted the early years of Australian colonization, that, British presumptions to sovereignty notwithstanding, the Indigenous inhabitants almost invariably observed their own laws and pursued their own forms of justice, to which the colonists themselves were exposed. As Baron Hügel put it some years later:

One circumstance which clearly demonstrates the good nature of these poor people is the fact that even during the time when they lived in a state of hostility with the English, they did nothing to injure those who had been kind to them. It would have been easy for them to burn down all of the Englishmen's houses ... and likewise to set fire to all their ripe crops. But up to the present they have not done this anywhere, and all the misfortunes of this kind that have occurred can be blamed on the imprudence of the English themselves.<sup>79</sup>



The Indigenous desire for revenge troubled the colonial imagination precisely because it did not confirm colonial suppositions about Indigenous 'savagery'. Rather, the Indigenous desire for revenge implied an 'uncivilized' and unsocial form of conduct, but, as one observer condescendingly put it, they 'have a concept of justice and can distinguish it from injustice.'<sup>80</sup> This in turn implied the possibility of Indigenous laws which the blank assertion of British sovereignty denied.

Claiming sovereignty and exercising it, however, are two different things. The incidence of Indigenous revenge suggested that the Indigenous people had evidently not been subjected to British law, and that no means had been found to make or persuade them to subject themselves to it. This recognition lies behind the legal opinion elicited in 1805 by Governor King from his Judge-Advocate, Richard Atkins. Atkins clearly did not recognize the Indigenous people to be British subjects, but accepted that they were in the anomalous position of being 'within the Pale of H.M. protection' and yet clearly ignorant of British law and unable to give any testimony before colonial courts because they were '... Persons not bound by any moral or religious Tye ...'. Consequently, he concluded, the Indigenous people were simply 'incapable of being brought before a Criminal Court, either as Criminals or as Evidences [witnesses] ... and that the only mode [for dealing with them] at present, when they deserve it, is to pursue and inflict such punishment as they may merit.'<sup>81</sup> Atkins's advice thus conforms to the view purportedly held by Governor Hunter in 1799. The anomalous position of the Indigenous people of Australia was that they were not British subjects, but were entitled to legal protection, even though they were thought to deserve summary punishment wherever it was deemed necessary.

Successive governors were to grapple unsuccessfully with this problem of legal status that was so closely entwined with the practical difficulties of establishing peace on the frontiers of colonial settlement. For Governor Macquarie, Indigenous revenge was the chief difficulty to be overcome, and the problem was posed not in terms of frontier war, but as a barrier to 'civilizing' the Indigenous population.<sup>82</sup> In effect, Macquarie sought to engender 'civilized' habits in the Indigenous people residing within or near the colony (which meant inculcating a regard for private property and a motivation to provide labour) and thereby to transform them from 'savages' into colonial 'subjects.'<sup>83</sup> In doing so, Macquarie made a clear linguistic distinction between Indigenous and non-Indigenous peoples. In his May 1816 Proclamation, he spoke of the 'Ab-origines, or Black Natives' on the one hand and the 'British Inhabitants' and 'His Majesty's British Subjects' on the other. Macquarie's Proclamation thus sought to circumvent the notion of Indigenous revenge by portraying it as a merely 'barbarous Custom repugnant to the British Laws, and ... militating against the Civilization of the Natives ...'<sup>84</sup>

Macquarie's Proclamation reflected his earlier authorization of a military expedition against a variety of Indigenous tribes to the south and west of Sydney. His orders to the officers in command stipulated that only those Indigenous peoples guilty of violence were to be pursued, while the innocent were to be left alone. While this could not be construed as the policy of summary justice authorized by Judge Advocate Atkins in 1805, Macquarie commanded his officers to call on Indigenous peoples to 'surrender themselves to you as Prisoners of War'.<sup>85</sup> This seemingly innocuous concession – that British military officers could be authorized to fire upon and take 'prisoners of war' – in fact amounted to an admission that the Indigenous people living beyond the limits of the colony were very far from being British subjects.

The problem of a distinction between Indigenous people living within the pale of the colony and those without was further exacerbated by Governor Brisbane's Proclamation of August 1824.<sup>86</sup> Brisbane was goaded into issuing the Proclamation following a series of violent conflicts between settlers and the Wiradjuri people west of the Blue Mountains. Following the acquittal of five stockmen for killing three Wiradjuri women, Brisbane attempted to impose order on the Western frontier by proclaiming martial law. Far from recognizing the Wiradjuri or any other Indigenous peoples as British subjects, however, the Proclamation authorized a return to the policy of 'summary Justice' to 'restore Tranquillity'. To this end soldiers were ordered to the area and 'all His Majesty's Subjects' were told to 'assist the MAGISTRATES' in the lawful 'Shedding of Blood' (excluding of course 'helpless Women and Children') should all other peaceful means of restoring order prove unavailing.<sup>87</sup> It was clear that there was still much confusion among officials as to the legal status question given the instructions issued in 1825 by Earl Bathurst to Brisbane's successor, Governor Darling, that he must 'oppose force by force' and 'repel' the violence of Indigenous peoples against the colonists 'as if they proceeded from subjects of any accredited State'.<sup>88</sup> His official instructions, however, commanded him to provide legal protection of 'their persons' and 'possessions', omitting any mention of Indigenous people being considered 'British subjects'.<sup>89</sup>

Read in conjunction with Macquarie's orders to take 'prisoners of war', Bathurst's instructions provide tangible evidence that some colonial authorities in Britain and in Australia were concerned that they were in fact engaged in a war in Australia against an enemy who self-evidently did not recognize British sovereignty. Governor Darling found himself in a difficult situation, commanded on the one hand to protect the Indigenous people and to end the unregulated murders of Indigenous people on the frontier, while urged by his superiors to 'oppose force by force'. At the same time, he was petitioned by colonists demanding more effective protection against the 'depredation of these infuriated and savage people'.<sup>90</sup> To many colonists, however, Indigenous violence was far from

being considered with the legitimacy of war. Rather, Indigenous violence was described as 'depredations', 'treachery', 'outrages' and 'barbarity' committed by 'banditti' – terms intended to strip such acts of the legitimacy of war.<sup>91</sup> The appropriate response to such attacks was not war, but policing. In doing so, Darling had turned to the mounted police. Established by his predecessor to police the frontier, Darling was to find that the greater mobility of these soldiers on horseback did not bestow any greater capability for achieving peace.<sup>92</sup>

### British Subjects?

Despite the regular incidents of violence on the colonial frontiers, Governor Darling held 'no apprehension ... of the Natives as a body' in large part because he construed the Indigenous peoples as not being capable of war. Rather, he wrote, the Indigenous peoples were 'strict observers of the Law of retaliation ...', motivated by the desire to 'exact blood for blood'. In this sense, Darling took the view that Indigenous violence, though troublesome, was in fact of a different order to that of warfare. While he did foreshadow 'decisive measures' to 'check' this violence, he derided Saxe Bannister, his Attorney General, for 'repeatedly' calling for martial law to be proclaimed on the frontier. Bannister's position seemed to be that the expedient of martial law was to provide a more solid legal foundation for distinguishing legitimate policing from illegitimate violence. In this way, those colonists guilty of violence unauthorized by a declaration of martial law could be tried and found guilty. As Darling saw it, declaring martial law because of a 'few naked savages' was an overreaction and possibly a tacit admission that the colony was engaged in a frontier war.<sup>93</sup> Matters came to a head in July 1826 when an Aboriginal man named 'Jackey Jackey' was executed by Mounted Police constables at Wallis' Plains in the upper Hunter Valley under the orders of their commanding officer, Lieutenant Lowe.

Darling ordered investigations into the matter which were conducted in the face of considerable obstruction from local settlers who approved of Lowe's actions. The circumstances of this particular murder excited the attention of Governor Darling because it was committed against a man in police custody.<sup>94</sup> It was an act of murder that directly contradicted the official line that the Indigenous people were entitled to the protection of British law. When a case was finally brought against Lowe it hinged on the testimony of a convict who was dismissed as 'not being entitled to credit'.<sup>95</sup> The case was heard by the Chief Justice of the New South Wales Supreme Court, Francis Forbes, who took the view that Indigenous Australians were 'British subjects' and within the protection of British law.<sup>96</sup> Lowe's attorneys, Wardell and Wentworth, began their defence by contesting the jurisdiction of the Court over the Indigenous people, who, they maintained, had not been subjected by conquest or treaty. The Indigenous

people, they argued, were ignorant of British law, and hence (citing Pufendorf, Barbeyrac and Vattel in support) had not been 'incorporated into civil societies' and could thus be punished summarily according to the law of nations and divine law.<sup>97</sup>

While Forbes rejected this argument, there was an inherent ambiguity in the status of Aboriginal 'British subjects.' This ambiguity was reinforced in 1829 when both Forbes and Justice Dowling (a future Chief Justice) determined that Aboriginal people were not amenable to British law for offences committed *inter se*.<sup>98</sup> Here again, the existence of Indigenous laws authorizing 'revenge' or 'retaliation' lay at the heart of colonial anxieties. 'It is known,' Forbes contended, that 'the savages' of Australia had 'a mode of dressing wrongs committed amongst themselves' which was, he thought, 'productive, amongst themselves, of as much good, as any novel or strange institution which might be imparted to them.'<sup>99</sup> 'In point of practice,' Forbes asked, 'how could the laws of England be applied to this state of society?'<sup>100</sup> In other words, Forbes argued that while the Indigenous inhabitants might be savages, they nonetheless obeyed their own 'savage' laws, and that the immediate application of 'civilized' British laws would be unwise and disruptive. The lynchpin of Forbes's argument was that, as civilized subjects, British colonists could be understood to have surrendered their natural rights (of self-protection) to the British state, whereas the 'uncivilized' Aboriginal subjects had given up 'no natural rights' and thus retained their right to redress wrongs among themselves.<sup>101</sup>

The confusion surrounding the legal status of Indigenous people remained a problem for colonial authorities who sought to exercise some control over the ever-expanding colonial frontiers, and to portray the military as a source of justice and order.<sup>102</sup> Another way in which the authorities sought to control the frontier was to deny the validity of any treaties negotiated between settlers and Indigenous peoples on the grounds that they would be prejudicial to the sovereignty of the Crown.<sup>103</sup> In doing so, colonial authorities based the assertion of British sovereignty on the presumption of Indigenous savagery. This becomes apparent in the finding of Justice Burton in the New South Wales Supreme Court in *R. v. Murrell and Bummaree* in 1836. Justice Burton found in this case that at the time of British settlement, the Indigenous inhabitants '... had not attained ... a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognised as so many *sovereign states governed by laws of their own*.'<sup>104</sup>

The *Murrell* finding thus removed the lingering anomaly that His Majesty's Aboriginal subjects were amenable to British law only in so far as they committed offences against His Majesty's white subjects. Nonetheless, His Majesty's Aboriginal subjects remained in the ambiguous position of being declared fully

amenable to British law, but unable to give testimony in courts of law, and thus unable to claim the protection of law to which they were entitled as subjects.<sup>105</sup>

British colonial authorities were in fact caught by the logic of their discourses of colonial subjection. If Indigenous Australians were British subjects, they were entitled to legal protection of their rights, among which, as many colonists noted, were proprietary rights to the land evidenced in the variety of Indigenous rules or laws pertaining to its use. As subjects, however, their own native rules, laws or customs could not be recognized (especially after *Murrell*), despite the self-evident fact (as the Court recognized pre-*Murrell*) that such laws existed. This left the colonial authorities in the situation of having to regard the Indigenous people as subjects, but only in a tenuous sense. It meant that their own laws could be acknowledged, but not when they led Indigenous people into the defence of their own interests in the land; it meant that they were entitled to legal protection, but unable to claim it as defendants or as witnesses. As one resident magistrate put it, making Indigenous people amenable to British law put them 'in the anomalous position of being made amenable to laws of which they are quite ignorant' and which did 'not afford them the slightest redress for any injuries' inflicted by Europeans because 'Native evidence' was not admissible before the courts.<sup>106</sup> Possessing neither a full claim on the tenuous advantages of British law, nor on any status as sovereigns over the land that was steadily being taken from them, Indigenous Australians had no resort for protection and redress other than violence.

Significantly, the extension of British subject status to Indigenous people reflected the efforts of colonial authorities to assert control over frontier violence. Among the first unambiguous official policy statements that the Indigenous inhabitants of Australia were to be regarded as British subjects came in response to yet another violent encounter between Indigenous people and the British military. This time the incident took place when Major Mitchell, a commissioned officer in Her Majesty's armed forces, and men under his command fired on and killed members of the Barkindji tribe.<sup>107</sup> Mitchell's party had dispersed a large gathering of the Barkindji on the banks of the river Murray by firing upon them indiscriminately. An unknown number of the Barkindji were killed, though Mitchell reported seven deaths. When the new Colonial Secretary, Lord Glenelg, was informed of the encounter, Mitchell's conduct prompted him to stipulate that Bourke's Commission as Governor asserted 'H.M.'s Sovereignty over every part of the Continent of New Holland ...' outside of Western and Southern Australia,

Hence I conceive it follows that all the natives inhabiting those Territories must be considered as Subjects of the Queen, and as within H.M.'s Allegiance. To regard them as Aliens with whom a War can exist, and against whom H.M.'s Troops may exercise

belligerent right, is to deny that protection ... [they were entitled to] claim from the Sovereignty which has been assumed over the whole of their Ancient Possessions.<sup>108</sup>

Glenelg's position here was a significant departure from previous policy, which consigned the Indigenous people to a shadowy status, neither enemies at war, nor yet British subjects. This new departure was a product of a number of forces. These included official interests in stabilizing colonial frontiers, colonial claims to the virtue of British settlers, and Evangelical aims (shared by Glenelg and his Under Secretary, James Stephen) to portray the Empire as benevolent towards Indigenous populations.<sup>109</sup> What remained unclear was the means by which such protection was to be provided, and how the persistent problem of frontier conflict could be resolved without resort to the violence of war.<sup>110</sup>

### The Subject of Protection

Despite the official pronouncement that Indigenous people in Australia were to be considered 'British subjects' entitled to full rights and protection under British law, sporadic violence and massacres, such as that at Waterloo Creek (January 1838), continued to take place along the fringes of the expanding settlements. This prompted Governor Gipps to release a public notice in April 1838 which stated that,

As human beings ... and as subjects of the Queen, whose sovereignty extends over every part of New Holland, the natives of the whole territory have an acknowledged right to the protection of the government ...

Nonetheless, the notice continued, '[i]n disputes among themselves they may be governed by their own ancient usages, wherever these do not interfere with the rights or safety of their more civilized fellow subjects'. Both Europeans and Indigenous people, Gipps's notice claimed, were entitled to claim the protection of British law,

To allow either to injure or oppress the other, and still more to permit the stronger to regard the weaker party as aliens, with whom a war can exist, and against whom they may exercise belligerent rights, is not less inconsistent with the spirit of the law, than it is at variance with the dictates of justice and humanity.<sup>111</sup>

The high-sounding words, however, were no more than an expression of powerlessness as Gipps himself knew and tried to explain in a subsequent despatch to Glenelg. In terms which starkly revived the image that Judge Advocate Atkins had foreseen in 1805, Gipps warned that he was powerless to prevent the settlers from taking matters into their own hands,

If proprietors, for the sake of obtaining better pasturage ... will venture ... to such a distance from protection, they must be considered to run the same risk as men would do who were to drive their sheep into a country infested with wolves, the Government would encourage the shepherds to combine and destroy them, whilst all we can now do is, to raise, in the name of justice and humanity, a voice in favour of our poor savage fellow-creatures, too feeble to be heard at such a distance.<sup>112</sup>

While petitioners demanded more effective 'protection' from the Indigenous inhabitants, Gipps and the Colonial Secretary Edward Thomson could only repeat that as British subjects the Indigenous inhabitants were also entitled to protection, and that it was impossible to 'authorise the levying of war against them.'<sup>113</sup> Some colonists went to great lengths to persuade themselves this was no war. One missionary, for example, deplored the 'distressing and lamentable' 'slaughtering of blacks by the whites' in 1842, but noted that most such incidents were 'accidental' and that it was 'difficult to convince' the 'savages' that they were so.<sup>114</sup>

High hopes were held that in South Australia, established as a new colony of free settlers in 1836, that the rights of the Indigenous inhabitants would be respected. Indeed, in one of their letters of instruction to the resident commissioner in the colony, the Colonization Commissioners for South Australia enjoined him to 'furnish the protector of the aborigines with evidence of the faithful fulfilment of the bargains or treaties which you may effect with the aborigines for the cession of lands ...'<sup>115</sup> Moreover, he was instructed that the Indigenous people 'are not disturbed in the enjoyment of the lands over which they may possess proprietary rights, and of which they are not disposed to make a voluntary transfer.' Such good intentions however, counted for little in the colony where colonists' hunger for arable land and the Governor's concern to maintain the parlous financial viability of the colony were in conflict with the intention to protect the 'proprietary rights' of the Indigenous inhabitants.<sup>116</sup>

As in other colonies, much of the violence that inevitably ensued was attributed to disreputable or unregulated colonists, such as the parties of drovers and stockmen travelling overland between New South Wales and South Australia, and the groups of sealers who came ashore along the south coast.<sup>117</sup> In 1840, the Colonization Commissioners for South Australia had warned that it was 'indefensible' to 'subject savage tribes to the penalties of laws with which they are unacquainted, for offences which they may possibly regard as acts of justifiable retaliation for invaded rights ...'<sup>118</sup> They felt that subjecting the Indigenous people to different laws would give rise to greater enmity between the Indigenous inhabitants and settlers, and unless both were equally subject to British laws an 'exterminating war' would ensue. The question as ever was how to effect an Indigenous subjection.

When twenty-six survivors of the *Maria* shipwreck on South Australia's south coast were killed by Indigenous people (belonging to the Milmenrura clan of the Ngarrindjerri people) in July 1840, Governor Gawler dispatched a party of men under the command of the Police Commissioner, Major O'Halloran, to the scene.<sup>119</sup> According to Indigenous tradition, the killings were prompted by some of the survivors abrogating Indigenous laws, possibly by assaulting Indigenous women.<sup>120</sup> So far as the colonial authorities were concerned, however, this was a case of violence that had to be punished. Gawler's instructions authorized O'Halloran to apprehend the guilty parties of the so-called 'Big Murray tribe', and to explain to them that 'your warfare' is not with the whole tribe but only with those guilty of the murders, and that he and his men would 'not be held blameable' if he had to use 'extreme force' in the 'deliberate execution' of 'strictest justice'.<sup>121</sup> O'Halloran's account makes mention of his party entering 'the country of the hostile 'Big Murray tribe', of firing on and wounding (and it would appear killing) two men, and thus capturing a number of other people attempting to flee from them.<sup>122</sup> Having apprehended two Indigenous men and convened a cursory 'court', O'Halloran found that '... neither of the culprits denied, though they would not actually confess their guilt ...', and he therefore sentenced them to death '... by virtue of the authority and instructions ...' from the Governor.<sup>123</sup> The two Milmenrura men were hung on 25 August in front of the captive tribe, over the graves of some of the murdered *Maria* survivors. O'Halloran then warned the tribe that such was '... how the white man punished those who murdered any of his tribe'.<sup>124</sup>

In the face of public criticism in the colony of both the Governor's authorization and O'Halloran's actions, Gawler attempted to justify himself on the grounds that the Indigenous people in that part of the colony were 'beyond the reach of the ordinary British law' because no trial could be conducted.<sup>125</sup> Gawler's reasoning was that 'The natives, being practical atheists, unacquainted with the obligation of an oath or solemn declaration, are not in British law valid witnesses'. As a consequence, Gawler proceeded on the basis that the area where the murders took place should be considered as if under martial law, but no official proclamation of it had been made in case it reflected badly on the colony, and because it would have been an 'empty form' as far as the Indigenous inhabitants themselves were concerned. Gawler's reasoning was supported by the Advocate General, Charles Cooper, whose long remarks on the case declared that,

The doctrine that they [the hostile Indigenous people] are to be held and dealt with as British subjects, and, under no circumstances, to be tried or punished, except according to the ordinary forms of law, cannot be received without modification. It may be true in its full extent, as regards those tribes with whom we have constant and peaceable intercourse ... [but those] who have never acknowledged subjection to any power ... however insignificant their numbers, or however savage and barbarous their



manners [must be viewed] as a separate state or nation, not acknowledging, but acting independently of, and in opposition to, British interests and authority.<sup>126</sup>

Damen Ward has argued that the *Maria* incident illustrates how concerns of ‘policy and politics’ dominated jurisprudential or theoretical arguments.<sup>127</sup> Julie Evans has used the same material to argue that the problem was a product of the imperial extension of European sovereignty over other people’s lands.<sup>128</sup> Another layer of analysis requires examination of how the very definition of the problems of ‘policy and politics’ in the colony depended on the use of a conceptual language in which ‘savagery and civilization’ were central. By Judge Advocate Cooper, Indigenous ‘savagery’ was invoked to place the Indigenous inhabitants in the position of hostile enemies against whom military violence could legitimately be used. This position, however, was untenable for imperial administrators who by this time had accepted that Australian ‘savages’ had no Indigenous sovereignty. To admit that the Indigenous people were subjects of their own state or nation would be to undercut the British claim to sovereignty in Australia.

The South Australian ‘Protector of Aborigines,’ Matthew Moorhouse, concluded that the Indigenous tribes of the area could not be considered as British subjects because Indigenous people were barred from giving evidence in courts.<sup>129</sup> Drawing on evidence from New Zealand, he claimed that Indigenous people were unable to hold their own alongside European settlers and would inevitably become extinct. He therefore called for ‘exceptional laws’ for Indigenous Australians separate from the British laws that applied to the settlers. Moorhouse’s superior, Governor Gawler, however, saw Indigenous savagery and British civilization as opposed moral conditions. The ‘savagery’ of Indigenous people discounted them from being accorded any significant rights at all, as subjects of their own state or nation, but especially as subjects of the British Crown:

The British constitution is the growth of a thousand years, it cannot be imposed on a nation in a day. It is adapted for Britain – the country which stands highest in the world in the scale of religion, civilization and improvement; it cannot be fully received or properly appreciated even by civilized nations of an inferior class, much less by the savages of Australia, who stand in the lowest degree in all the earth in religion, government, arts and civilization. In all these respects they are morally, as in material things they are physically, the antipodes of Britain – and it is not an easy thing to make antipodes meet.<sup>130</sup>

The response of officials in London also showed that the concept of savagery framed the issue of legal status. The Colonial Secretary James Stephen condemned Gawler’s actions:

The aborigines, whether subjects of the Queen or not, are persons living on British territory, and within the jurisdiction of British Courts. That they are savages cannot entitle them to impunity, still less expose them to be punished without a trial.<sup>131</sup>

Lord John Russell was more circumspect, arguing that the 'indiscriminate application of British law' to Indigenous people living 'without the limits of the particular colonies' was not possible.<sup>132</sup> James Stephen's response to Lord Russell, however, was that 'there is not within the whole of New Holland a single spot of ground which is not included in some British Colony'.<sup>133</sup> Here then was the rub of the issue. British sovereignty had been asserted over the whole of Australia on the basis that its Indigenous inhabitants were 'savages' possessing no sovereignty of their own, but lacking any secure claim to protection under British sovereignty.

Captain George Grey succeeded Gawler as Governor of South Australia in May 1841, and he too quickly became embroiled in the same difficulties his predecessor experienced. This time the flashpoint was a series of successful attacks made by Indigenous warriors on overland parties north-east of Adelaide. Grey reported his position to London as being based on the desire to rigorously apply British law. O'Halloran's reports indicate a certain level of frustration at the restraint he appeared to be under.<sup>134</sup> Grey's dispatches prompted the new Secretary of State for the Colonies, Lord Stanley, to reflect on the problem of the legal status of the Indigenous inhabitants. The problem as he saw it was that if killings by Indigenous warriors were not punished with death, white settler opinion would swing in favour of taking 'law into their own hands' and seeking 'vengeance':

Although it may be very true that the Government is bound to protect the Natives within its territory from violence on the part of the settlers, and to visit with severity upon the latter any proceedings which may outstep the legitimate bounds of self-defence, it is very difficult to define what are those legitimate bounds; and if the Government, while they protect the Aborigines, do not also protect the Colonists, by the infliction of what public opinion may fix upon as adequate punishment for actions which civilized man considers as crimes of the deepest dye, that same public opinion will lean more and more towards effacing the limits which ought to separate self-defence and retaliation.<sup>135</sup>

The problem, then, was that as subjects, war could not be levied against Indigenous Australians, but their armed defence of their territory and rights also could not be tolerated and had to be punished. Beyond the effective limits of colonial government, however, along the overland tracks, armed parties of drovers were 'virtually making war upon [the Aborigines on] their own account ...'<sup>136</sup>

The problem returned in August of 1841 when an armed expedition under the command of Moorhouse was sent to the aid of another beleaguered overland

party. At Mount Rufus on the River Murray, Moorhouse's party killed about thirty and wounded approximately ten more Aboriginal people.<sup>137</sup> Though Moorhouse was exonerated, the colonial government appears to have adopted the position that what was said in official correspondence was one thing, what was said in private was another. The contrasting positions can be seen in official correspondence where O'Halloran was commanded to apprehend Aboriginal offenders while '... being careful that no belligerent rights are exercised against the natives; and that no proceedings are adopted but such as the laws of England would authorize against Europeans who had been guilty of similar atrocities.'<sup>138</sup> On another occasion, however, O'Halloran was careful to record a private meeting with Governor Grey and the Colonial Secretary relating to a proposed expedition to Lake Albert. O'Halloran's memo states that he was to 'quell the blacks if they continued riotous and threatening', whereupon,

I asked the Governor what would be the extent of my powers and instructions if sent on such a service? Upon which he replied that I must treat the blacks if ... likely to resist as I would any other hostile party who were resisting the law, and that I should be fully justified in becoming the aggressors in such a case, or if I thought that the life of a single individual of my own party was threatened or endangered, in which case I should act with vigour until all resistance ceased. The Governor further added that tho the law might have to decide upon the legality of such proceedings, I might rest assured ... that the Government would give me every support and protection in their power.<sup>139</sup>

In effect, O'Halloran was being empowered to exact summary justice.

By the early 1840s it was clear that the legal status of Australia's Indigenous inhabitants was still prey to much confusion. The problem was that the assertion of British sovereignty, premised on projections of Indigenous 'savagery', meant that they automatically became subject to British law even though many of them were engaged either in active resistance to colonial expansion or in observing their own laws. The formal acknowledgement of Indigenous peoples' status as 'British subjects' after 1836 made these two facts increasingly difficult to resolve. Colonial authorities could acknowledge neither the existence of Indigenous laws (such as those governing the use of violence), nor the legitimacy of Indigenous resistance as a form of war. The result, as Edward Parker, one of the 'Assistant Protectors of Aborigines' in the infant colony of Port Phillip (later Victoria), saw was that 'a decided and speedy change' in policy was needed to 'prevent the increase of predatory attacks on colonial property' by Indigenous people, and 'the continuance of a system of illegal punishment and indiscriminate slaughter' of Indigenous inhabitants by the settlers and pastoralists.<sup>140</sup> The authorities' inability to prevent either the settlers' armed incursions upon the Indigenous people, and their armed retaliation, in effect rendered their subject status a tragic farce.

The policy options this presented to colonial administrators were roughly two-fold. One option was to maintain the pretence that the declaration of British sovereignty made all the Indigenous inhabitants of Australia into British subjects who could only be governed by British law.<sup>141</sup> As a proponent of the latter position, George Grey characterized all Aboriginal laws as merely 'barbarous customs' and proclaimed that only British law applied in Australia.<sup>142</sup> Lord Russell recommended Grey's proposals to colonial governors.<sup>143</sup> Governor Gipps in New South Wales rejected them as unworkable, while Governor Hutt in Western Australia claimed that it was unwise to regard all Aborigines 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 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>144</sup>

Hutt's response thus invoked the idea the Indigenous subjects of Her Majesty in Australia be governed under a different set of laws to those which applied to Her Majesty's white subjects in Australia.

The second policy option was to regard Indigenous communities as 'nations' or 'dependent allies', which required some form of agreement or treaty.<sup>145</sup> This suggestion had famously been made in 1841 by the irascible Justice of the district court at Port Phillip, J. W. Willis.<sup>146</sup> Willis's finding in the *Bonjon* case was that the defendant, an Aboriginal man named Bonjon accused of the murder of another Aboriginal man, could not be tried by the court because the act was carried out in accordance with Indigenous – not British – laws. Willis concluded therefore that the existence of such laws indicated that the Indigenous inhabitants of Australia had not been voluntarily subjected to British sovereignty and that 'treaties' should be signed with them. They were, he maintained, the original 'sovereigns and proprietors of the soil'. Willis thought it '... sufficiently manifest that the aboriginal tribes are neither a conquered people, nor have tacitly acquiesced in the supremacy of the settlers.'<sup>147</sup> This finding was swiftly opposed by Governor Gipps, who was later able to have Willis dismissed from the bench.

The kind of recognition that Justice Willis proposed threatened the very foundation of British sovereignty in Australia.<sup>148</sup> Gipps suggested introducing legislation to settle the matter, and instructed the Colonial Secretary Edward Deas Thomson to compile a brief precis 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>149</sup> Thomson's reasoning encapsulated the intellectual framework that informed British colonization in Australia. He argued in effect that no treaty could be negotiated because the 'Sovereigns of Great Britain' exercise 'unqualified dominion' in Australia on the grounds that,

the Aborigines never have been in possession of any Code of Laws intelligible to a Civilized People, and ... 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.<sup>150</sup>

Thomson's reasoning thus exposes the pivotal role that European representations of Indigenous 'savagery' played in Australia's colonization. The image of 'savagery' was neither a convenient fiction that washed away colonial guilt, nor was it merely a term of description. Operating in the language of policy formulation alongside the concept of civilization, 'savagery' was the essential foundation for all British claims to sovereignty in Australia. They were also, as I will argue in the following chapter, the essential foundation for all schemes of colonial government of Indigenous populations in Australia.

## 5 FIT FOR SOCIETY

The British government took the opportunity to present their case to the British public for establishing a penal colony in New South Wales by the publication in 1787 of an anonymous *History of New Holland*.<sup>1</sup> Included in the publication was a discourse on the transportation of convicted felons written by Sir William Eden, an influential jurist, penal reformer, MP and member of the Committee for Trade and Plantations which oversaw the management of Britain's Empire. Transportation of convicted felons to the distant colony, he argued, could be justified as the means 'to convert the Indians', quite aside from its remedial effects on the felons themselves.<sup>2</sup> Alexander Dalrymple had ridiculed this argument in his *Serious Admonition* of the previous year, arguing that convicts were the least likely candidates for effecting a conversion and were more likely to become a nuisance to British trade.<sup>3</sup> Eden, however, persisted with the argument, noting that, while it seemed incongruous,

To carry amongst the rude inhabitants of New Wales [*sic*] a picture of society, which, though its features may be harsh to the ideas of an European, will appear even for the present a degree more perfect than any subsisting among them, would of itself be an act suitable to the beneficence of a civilized power; how much more will the conversion, if practicable, of the natives, still lost in pitiable ignorance, be an endeavour worthy of a polished age ...<sup>4</sup>

Two features of the phrasing of this argument are worthy of note, the first being the recognition that Eden saw transportation not only as a means of exporting felons for punishment, but of exporting society itself. The second feature is that while the society of felons may have been thought harsh by polished and refined standards among the educated elite who consumed the *History of New Holland*, it was nonetheless far superior to the rudeness and ignorance in which the 'savages' lived.

Here Eden combined what would become recurrent themes in the ideology of British imperial expansion in the nineteenth century, civilization and benevolence. For Eden, as for many of his British contemporaries, British civilization meant British superiority, a superiority based on the possession of the benefits of civilized life, property, rights, ordered government, settled laws and a civil

society. For the British to export these benefits, to plant them in the wild and untamed 'wastes' previously inhabited only by 'wandering savages' was not only a mark of British superiority, but of civilized benevolence.<sup>5</sup> Above all, British imperial benevolence towards Indigenous Australians was phrased in terms of 'fitting' them to take their place in (invariably the lowest orders of) colonial society.<sup>6</sup> Understandings of 'society' in European thought were crucial to the formulation of early policies for the 'civilization' of Indigenous people in Australia.<sup>7</sup> The concept of 'society' was itself decisively shaped by British experiments in social reform of the lower classes (at home) and colonial government of Indigenous peoples (abroad). Exploring how colonial authorities in the early nineteenth century communicated the task of 'fitting' Indigenous Australians for society will illustrate how notions of 'civilization and savagery' and related understandings of society underpinned the articulation of schemes for the colonial government of Indigenous Australians.

As a goal of colonization, civilization involved the effort to reconstruct Indigenous peoples in line with European expectations, norms and behaviours. The often baffling difference that colonists felt separated themselves from Indigenous Australians constituted 'problems' requiring governmental solutions. Among the chief of the 'problems' Europeans considered Indigenous people to exemplify was the social difficulty of how to 'fit' a people without 'society' for taking their place in the lower orders of colonial society. Enquiring into the history of the concept of 'society' in colonial discourse reveals that it was not simply construed as an independent domain that 'civilization' acted upon, as if Europeans aimed at 'civilizing' a pre-existing 'Indigenous society'. Rather, society was understood to be an artefact of a process of civilization, and therefore was used as a key criterion to differentiate the 'civilized' European colonists from the 'uncivilized' Indigenous inhabitants.<sup>8</sup>

### Concepts of Society

Although the concept of society emerged in Western European thought in the seventeenth and eighteenth centuries, there was no necessarily consistent method of usage by the late eighteenth century. 'Society' could be used to refer to the attainment of a certain stage of historical progress or civilization, but it could also be used to refer to more restrictive types of association. The first sense of the term 'society' may be labelled 'general' in that it refers to something like Dr Johnson's definition of society as the '[u]nion of many in one general interest.'<sup>9</sup> The second sense may be termed 'particular' in that it implies different and mutually exclusive 'societies' within the one (general) society. In other words, society in the particular sense refers to 'polite society' or the society of one's

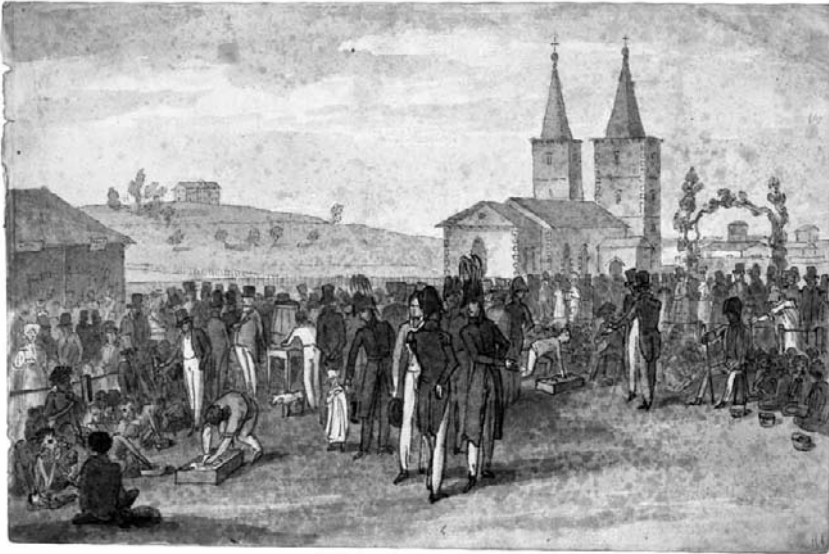


Figure 2. Augustus Earle (1793–1838), 'The Annual Meeting at Parramatta', hand coloured lithograph (n.d.), Rex Nan Kivell Collection; NK 2652, National Library of Australia.

friends, the society of literati, and, of course, the bad or low society of the poor, the idle and the dissolute that so haunted early social reformers.

According to Otto von Gierke, the term society emerged from the concept of *societas* which had been used by natural law theorists in seventeenth-century Europe to define their conception of 'the people', and the political claims they made as individuals against the majesty of rulers.<sup>10</sup> *Societas* thus came to denote a purely collective association in which each separate individual was understood to be the bearer of rights, whose union was founded on consent, agreement or contract. The concept of *societas* was opposed to other collective entities, notably *universitas*, a term that denoted 'the people' as a corporate bearer of rights. Baker argues that 'society' entered French discourse in the seventeenth century, but by the eighteenth was coming to be used to describe particular forms of association distinct from and in opposition to those of the 'Old Regime'.<sup>11</sup> Most importantly, the term came to refer to forms of association conceived in terms of 'common action and mutual support' in the supply of basic needs, as an 'instituted' or purposively created form of association, but one that was constantly 'endangered', requiring the delicate maintenance of 'peace and stability'.<sup>12</sup> Baker contends that from the late seventeenth century the 'particular' sense of the term society (understood as 'voluntaristic associations') 'disappear[s]', and is replaced by the 'general' understanding of society as 'the basic form of collective human existence'.<sup>13</sup>



Significantly, this 'new' understanding of society (in the 'general' sense as referring to the 'basic form of collective human existence') could only be constituted by the assemblage of autonomous individuals.<sup>14</sup> Mary Poovey has suggested that although both the 'general' and 'particular' senses of the term can be found throughout eighteenth-century British thought, it was the general view, that spoke of a society as a complex assemblage of different 'objectified domains' governed by their own internal dynamics, that became dominant.<sup>15</sup> This shift she attributes to the emergence of separate 'domains', none more central than that of the market economy, which regulated the interaction between individuals in new ways, requiring them to adopt a new orientation towards others whose combined actions constituted the 'society' in which they lived.<sup>16</sup> As John Brewer has pointed out, however, conceptual delineations of separate social spheres, such as those of public and private, were notoriously fluid throughout the eighteenth century.<sup>17</sup> Importantly, however, by means of conceptions of civilization Europeans in the eighteenth and nineteenth centuries distinguished themselves from supposedly 'uncivilized' peoples in terms of the forms of sociality they had accomplished among themselves.<sup>18</sup> By the late eighteenth century, British and French writers, for example, could speak (differences in usage notwithstanding), of their own 'civilized' societies (literally, civil societies) as networks of interaction quite different from and far superior to the associations, 'tribes', clans or 'nations' of barbaric and savage peoples.<sup>19</sup> Montesquieu, for example, referred to the solidity of savage 'tribes' and barbaric 'nations', but spoke of 'society' as a realm of quite different interaction.<sup>20</sup> Society referred to the space in which individuals 'conform' their own thought to the 'thoughts and impressions of others'; society (in the generalized sense) is thus a sphere of activity premised on the achievement of individual autonomy conceptualized as a rational internalization of self-government according to accepted norms. Of course, this accomplishment was usually regarded as the preserve of those with the leisure and independence to cultivate autonomy, in other words, those with property and means. Consequently, 'society' in the generalized sense denoted a hierarchical realm of interaction in which those at its higher levels were thought of as autonomous, rights-bearing, property-owning individuals who combined for mutual support and protection of their rights, and mixed in the (particular) society of one another. Europeans were able to represent 'civilization' as a quest to impart their own form of sociality to others, and thereby to 'fit' them for entering, usually at its lower levels, a transplanted form of European society. In this sense, the project of civilization encompassed the regulation of problematic forms of society (in the particular sense) within Europe (the poor, the disorderly, the idle), and in the extension of their own society (in the general sense) to other parts of the globe.<sup>21</sup>

## Society, Civilization, Government: Britain and Australia

Throughout the early colonial period, various efforts to conceptualize the civilization of Indigenous Australians revolved around their formation as 'social' subjects. These efforts involved a host of reforming techniques focused on reshaping their collective or social life through the inculcation of new family relations, forms of dress and deportment, and routines of labour. One of the earliest examples of this approach in Australia was proposed by Governor Macquarie in 1814. Macquarie's despatch to Earl Bathurst of 8 October 1814 is a remarkable example of the translation of Enlightenment ideas of civilization into colonial policy. Macquarie's starting point was the then firmly established view that the Indigenous people of Australia were an 'Uncultivated Race ... [s]carcely Emerged from the remotest State of rude and Uncivilized Nature ...'. Macquarie traced the 'rudeness' of the Indigenous people to their nomadic existence, which he described as 'Wild wandering and Unsettled Habits ... [suited to their continual] Quest of the immediate Means of Subsistence.'<sup>22</sup>

Elbourne argues that nomadic peoples were a particular focus for nineteenth-century British missionaries, for whom 'The nomad ... was believed to have an empty life and consequently an empty mind.'<sup>23</sup> In Australia, however, this assumption does not appear to have been made. The problem of Australian 'savagery' was construed not as an emptiness, but as a disturbing prevalence and tenacity of 'savage' habits. This was the problem that colonial government of Indigenous people in Australia aimed to resolve. It is significant that some of the first detailed articulations of this problem of colonial government should display a strongly Scottish Enlightenment flavour. It has been argued that referring to '*the* Enlightenment' is a misleading anachronism, obscuring the diversity of intellectual movements and indeed rival or different national Enlightenments across Europe. Speaking of a distinctly '*Scottish* Enlightenment' is also potentially misleading. Nonetheless, I want to draw attention to the characteristic focus of eighteenth-century Scots thought on the dynamics of social development from less to more civilized conditions and from 'simple' to 'sophisticated' manners.<sup>24</sup> Macquarie's foundational assumption was that a people's means of subsistence shaped their manners and allowed the observer to determine their level of social and historical progress.<sup>25</sup> This approach can be contrasted to more rigidly deterministic analysis based on climate and geography.<sup>26</sup> Macquarie's aim was thus to turn the 'rude' Indigenous people into productive agricultural 'Labourers' or into a 'lower Class of Mechanics'. In reaching this aim, he noted the failure of the previous introduction of European farming methods to Indigenous people, which he firmly believed were far superior to Indigenous techniques of food procurement. The solution therefore lay elsewhere, and in particular in the ideal realm of social norms or, in contemporary parlance, manners.

For the intellectuals of the Scottish Enlightenment, the concept of manners was loaded with moral, historical and political significance. For them, social progress was driven by the connection between changes in a people's means of subsistence and their 'manners'. In his *Wealth of Nations*, for instance, Adam Smith attributed the development towards 'universal opulence' in Britain to the division of labour which subjected each individual worker to a precise regimen of disciplined labour, eliminating rustic inefficiencies.<sup>27</sup> For Smith, however, the process of civilization did not only involve economic changes, but incorporated a whole host of changes in moral outlook, individual behaviour and social values. The relationship between the two forms of change – economic and ideational – is notoriously difficult to pin down and lies at the heart of controversy over the (in)famous 'four stages' or 'stadial' theory of development.<sup>28</sup>

Such ideas of social progress were becoming widely accepted in Britain by the end of the eighteenth century.<sup>29</sup> Their influence in the colonies, however, did not only lie in assumptions about Indigenous 'primitiveness' and limited rights to property, but in perceptions of the problem of Indigenous 'sociality'.<sup>30</sup> A key to the development from 'savagery' to 'civilization' was the transformation of the rude virtues of savage life (based on simplicity, hardiness and a warrior ethos) into the more flexible and rational manners of civilized societies. Manners consisted in the widely accepted standards of conduct and self-regulation that made civil life possible by circumscribing violence and entrenching social virtues such as courtesy, probity and industry. Their emergence hinged on the development of commercial economies which brought people into greater contact and mutual dependence while also fostering a strong self-interest in changing one's conduct.

Significantly, when Macquarie came to put his finger on just how the social customs of the Indigenous people were to be transformed into the 'manners' of civilized society his terminology reflected a subtle, but profound distinction. 'Those Natives' who lived in and around Sydney, he wrote,

... live in a State of perfect Peace, Friendliness, and Sociality With the Settlers ... [but] the fostering Hand of Time, gentle Means, and Conciliatory Manners ... [could] bring these poor Un-enlightened People into an important Degree of Civilization, and to Instil into their Minds, as they Gradually open to Reason and Reflection, A Sense of the Duties they owe their fellow Kindred and Society in general (to Which they Will then become United), and taught to reckon upon that Sense of Duty as the first and happiest Advance to a State of Comfort and Security.

Here Macquarie distinguished the 'sociality' of natives who persisted in living alongside (rather than within) colonial life, and the civilized, European, colonial 'society' of which they had to become a part. The ability of the Indigenous people to become a part of 'society' would rest on the inculcation of the values and norms, or, as he put it, the 'manners' and 'duties' on which he believed European

society rested. The means Macquarie felt were able to accomplish this social transformation were provided by William Shelley, of the Church Missionary Society, who was given land and financial support to establish a 'native institution'. The purpose of Macquarie's and Shelley's 'Experiment towards the Civilization of these Natives' was to inculcate 'Habits of Industry and Decency' in Indigenous children, while also trying to lead Indigenous adults to become settlers, to 'Cultivate Lands' and thereby come to prefer 'the productive Effects of their own Labor and Industry to the Wild and precarious Pursuits of the Woods'.<sup>31</sup>

This kind of programme of civilization reflected established ideas and practices of social reform in late eighteenth-century Britain. The construction of highly regulated communities had been advocated for the poor in Britain by social reformers such as the police magistrate Patrick Colquhoun. Colquhoun spoke to the Select Committee on Finance and Police in 1798 of the need for a 'Village of Industry' model of reformatory to 'prevent' the 'shocking Corruption of Morals' among the lower orders of society.<sup>32</sup> The concept of society that informed such schemes was one in which various orders had their place within an overall structure. In this scheme, those in the lower orders may be said to be 'of society', but not necessarily 'in society' with those in the more elevated levels.<sup>33</sup>

Enlightenment concepts of civilization, understood as a programme of reform of conduct, tended to focus on reshaping the attitudes, opinions and thereby the outward behaviour of *individuals*. Civilization was therefore seen as a process of reform that could be shaped by governmental intervention. The most common problems that were thought to beset life 'in society' were those emanating from the 'bad habits', unrestrained passions or want of appropriate conduct of particular categories of people, especially the so-called 'idle poor'. Colquhoun defined the problem of 'the poor' not in terms of their poverty (which, by compelling them to work made them 'the actual pillars of the State'), but of their 'indigence'.<sup>34</sup> Such views implied that social order (and/or its absence) was determined by individual manners and morals. Good conduct and regular behaviour (or want of it) was an object of governmental activity aimed at shaping opinions and attitudes, instilling patterns of self-restraint and productive habits. Sir Frederic Morton Eden expressed this view succinctly in his massive three-volume study of 1797 entitled *The State of the Poor*,

... the aim and object of every institution, in which the Public is concerned, is to render mankind good, in order that they may be happy. Neither of these ends is it possible to attain ... otherwise than in society; for this, then, the social state is formed, and governments instituted: and for this, seminaries of learning ... are instituted, to direct the nascent passions, and mould the infant reason into such habits of thinking and acting, as may best promote, not only the weal of each individual, but the general welfare ... Government, (that is, Society in its state of perfection,) is founded

on opinion: inasmuch as no skill nor force can render any government efficient and durable, when the opinions of those who are to be governed are generally adverse to it ... Men are not, all at once, but gradually, to be trained to political, as well as to moral, rectitude ...<sup>35</sup>

It was with something very like this view that a number of social reformers in Britain showed their concern at the state of 'society' among the 'lower orders'. As the authors of the Report from the Select Committee on the Laws Relating to Penitentiary Houses of 1811 put it, they were concerned by the 'promiscuous association' that took place within prisons; reformed prisoners should be 'separated from the society of ... more indigent fellow prisoners' in order to effect complete rehabilitation.<sup>36</sup> The Second Report from the Committee on the State of the Police of the Metropolis in 1817, for example, defined the objective of a reinvigorated police as the 'reform ...' of the 'morals and manners' of the 'people' in order that penal law could be made more effective.<sup>37</sup> What lay behind such views of social reform was an aspiration central to the European Enlightenment to create more orderly and more self-regulated conduct. This self-regulation was conceived as rational self-control under the influence of self-interest. Malthus expressed it most succinctly in describing the foundation of society being 'an inequality of conditions' which,

offers the natural awards of good conduct, and inspires widely and generally the hopes of rising and the fears of falling in society and is unquestionably the best calculated [means] to develop the energies and faculties of man, and the best suited to the exercise and improvement of human virtue.<sup>38</sup>

European understandings of society were thus shaped by the extension of schemes of the better regulation and government of those (in Europe) who belonged to the lower orders of society, and whose presence and conduct represented a threat to those who occupied its higher levels. Campaigns to reform the conduct of the poor, to inculcate new habits of industry and to educate were conceived as projects of benevolence and 'civilization'. This framework established at home set the pattern for British colonization abroad. But whereas in other colonial contexts the British administered peoples they regarded as having their own society (as in India), or who displayed patterns of communal solidarity (as in North America), in Australia they found peoples they regarded as entirely 'savage' and hence as exhibiting only the most rudimentary form of collective life.

One of the key deficiencies that early schemes for the 'civilization' of the Indigenous people in Australia were supposed to overcome was the supposed lack of any Indigenous 'society', and perhaps of any 'social' structures that could be used to facilitate their civilization. Consequently, colonial perceptions of society were characterized by an absence of Indigenous people from the realm of

'society'. When the House of Commons Select Committee on Transportation of 1812 wanted to get a sense of the state of society in the colony, they interviewed former Governor William Bligh. Bligh responded by describing the 'orders' of society in the new colony,

Generally we consider that the first class is the Military; the second, the Civil; the third, the Settlers, in that class I include not only those from England, but those which were settled, and had grants after having received free pardons; the fourth class are called Landholders, they are made up of persons renting land, and, I believe, including some ticket of leave men and convicts.<sup>39</sup>

What is significant here is that Bligh excluded any mention of the Indigenous people as a class that helped to constitute 'society' in New South Wales.<sup>40</sup> Indeed, the Committee was not interested in hearing about Indigenous people, but about the convicts and former convicts and their place within the colony's 'society'.<sup>41</sup>

Bligh was therefore asked whether any former convicts were 'received in society', to which he responded that they were not received in 'superior society', but only 'mixed in society together'.<sup>42</sup> Here, Bligh invoked the two senses of society in referring to the (particular) society of the upper or 'superior' echelons, and of the 'mixing' of all classes in the (general) 'society' of the colony. As Bligh's comments implied, the discourse of society in the colony was shaped by the question of what to do about its 'lower' orders, especially the convicts and former convicts.<sup>43</sup> Such hierarchical notions of society were far from uncommon among the upper classes of Australian colonial society. Elizabeth Macarthur, the wife of one of the most prominent pastoralists, invoked both the general and particular notions of 'society' in bemoaning the imminent loss of some members of 'our small society' in the colony and in complaining that the clergyman's wife was 'a person in whose society I could reap neither profit nor pleasure'.<sup>44</sup> Indigenous people were clearly present in society, as servants and as labourers wandering in and out of the colony, but they were not necessarily seen as part of society. For Barron Field, judge of the New South Wales Supreme Court (1817–24), the Indigenous people were a picturesque distraction from colonial monotony. They could never become part of society because they were contemptuous of the 'comforts, of civilization', because they failed to appreciate their subordination and felt equal to 'us masters', and had no patience for labour. 'They will never become builders, or cultivators, or mechanics, or mariners like the New Zealanders or the South Sea Islanders', Field maintained, 'nor indeed till they cease to be at all, will they ever be other than what they are'.<sup>45</sup>

### Problems of Society and Government in Colonial Australia

It has been suggested that early colonial programmes of civilization in Australia were 'assimilationist' in aspiration.<sup>46</sup> Such a view implies that a form of equal membership of colonial society was offered to Indigenous Australians who assimilated 'European' attitudes and behaviours. The hierarchical nature of European concepts of society, however, suggests that what was envisaged was not the uniformity of equal membership, but 'an Indigenous similitude to European values and society'.<sup>47</sup> This meant a form of integration of Indigenous people in colonial society invariably viewed in terms of fitting Indigenous people for assuming their place in the 'lower orders' of society, among the labouring classes, or perhaps as members of a rural 'peasantry'.<sup>48</sup> Colonial observers and administrators, however, noted that although the Indigenous people lived in 'tribes' or extended family groups, they could not really be described as 'societies.' Among the early colonists, the forms of Indigenous sociality were regarded as highly problematic, partly because their guiding principles seemed utterly mysterious to Europeans.<sup>49</sup> More importantly, however, Europeans were concerned by the apparent egalitarianism of the 'tribes' they observed, frequently noting that the tribes had no obvious rulers, be they kings or chiefs, other than a vague council of elders.<sup>50</sup> Some administrators held to the hope that they could resolve this problem by appointing Indigenous chiefs as had been attempted in America. It was rarely that simple, however, because, as Europeans also noticed, Indigenous people had no notion of private property and hence did not rely on rulers either for the protection of their property or for the distribution of largesse.<sup>51</sup>

Europeans attempted to resolve this problem by distributing goods (such as blankets, clothing and foodstuffs) to the tribes to induce a sense of obligation at the receipt of gifts, and a desire to conduct themselves appropriately in the expectation of more.<sup>52</sup> As many of the more perceptive observers noted, however, such distributions apparently failed to have that effect, as goods distributed to one member of the tribe were frequently passed immediately to others, and the Indigenous people treated the distribution as no more than a supplement to their own means of subsistence.<sup>53</sup> European observers persisted in seeing this absence of European property relations or government as an 'erratic' way of life characterized by continual and undisciplined 'wandering about the bush'.<sup>54</sup> Having been raised in such 'erratic' communities, in which Europeans felt that all forms of conduct had to be subordinated to the need to keep moving and find food, colonial observers also felt that individual Indigenous people were trained from early childhood in 'erratic' habits. This was the foundation of the 'problem' of Indigenous sociality, the persistence of a framework of ideas and attitudes in the minds of Indigenous people that Europeans attributed to their means of subsistence. Solving that problem would require strategies of intervention

aimed not simply at making Indigenous people live in society, but at 'fitting' Indigenous people for a life in society. As Alexandro Malaspina, a Spanish visitor to the early colony, put it, it seemed an open question 'whether or not' the Indigenous inhabitants 'are able to combine with the sociable Instinct of Man' or surrender to their desire to return to the bush, 'divested it would appear of all sociable attraction.'<sup>55</sup>

In order to civilize the Indigenous people, Europeans felt that it was necessary to prevent them from living in their 'erratic' or traditional ways, to 'settle' them in one place, to subject them to regular routines of discipline, and thereby to induce them to accept a more 'settled' way of life based on the inculcation of 'settled' habits.<sup>56</sup> In doing so, Indigenous 'civilization' was seen in terms of their social (re)formation. As envisaged by the missionary William Shelley, the key problem was the tenacity of Indigenous 'habits'. He referred, for example, to Indigenous people who had lived for a time in 'civilized Society', but had 'relapsed into their former habits and Society'.<sup>57</sup> The problem Shelley set out to resolve was how to ensure that the Indigenous people were properly trained so their attachment to their 'new Society' would endure, and eradicate the 'habitual' attachment to the society' of their fellow tribesmen and women.<sup>58</sup>

Shelley's reference to society thus encompassed the two senses of the term current in British discourse at the time, the first referring to the generalized sense of society as the whole network of interaction among those in 'civilized colonial society', the second to the restrictive sense of the society of one's peers. Shelley's plan was that the particular 'society of' (or associations between) Indigenous people had to be broken, in order that they could then begin to take their place in civilized 'society'. By the early 1820s, however, Shelley's plan was regarded as a failure, and hopes that other missions may 'civilize' their inmates similarly began to fade. This growing pessimism was to characterize future policies aimed at governing the Indigenous people of Australia. It was partly in response to such pessimism that perceptions of the Indigenous 'problem' were informed by new understandings of society.

For many colonists, Indigenous individuals were not the real problem. Individual Indigenous people were often praised by colonists for their useful labour, their personal qualities of justice, honesty, politeness, generosity, sagacity or tenderness.<sup>59</sup> In this way, the 'Indigenous problem' came to be posed not so much in personal or individual terms, but in terms of reshaping Indigenous 'sociality'. At one level, this was a policy aimed at removing the unruly 'camps' on the fringes of white settlement.<sup>60</sup> The deeper problem, however, lay in the suspicion that Indigenous people had no capacity for society, or, as George Angas described it, '... their perfect social degradation, with no combination, no government, no home'.<sup>61</sup> In accomplishing this, it was felt, the task of civilization meant finding some way to break what were considered the 'age-old traditions' of the Indig-



enous people, who, despite all efforts, seemed ‘firmly anchored in their tribal customs.’<sup>62</sup> This shift in thinking is indicative of broader changes in the European understanding of society and its translation to colonial contexts. In the next section I want to turn to a discussion of how new understandings of society informed the findings of the 1837 Select Committee on Aborigines and found their way into Indigenous policy formulation in Australia.

### The Subject of Society

The 1837 Select Committee was in large part a product of the evangelical shift in British public and political discourse in the late eighteenth and early nineteenth centuries. Though the term ‘evangelism’ covers a very broad range of thinkers and organizations, British evangelicals tended to share a scepticism of Enlightenment emphases on individual rationality and the socially beneficial influence of self-interest. The evangelical imperative was one of atonement for human sin, of the need to face the ‘moral trial’ of life by and through faith in the face of ‘public and private calamities.’<sup>63</sup> Evangelicals thus renounced eighteenth-century ‘natural theology’ (associated in Britain with William Paley), in which God’s universal design could be deduced from the felicitous providence of nature. The horrors of war, famine and economic dislocation during the French Revolutionary and Napoleonic wars (1789–1815) led a variety of Christian thinkers to see these tribulations as important ‘moral tests.’<sup>64</sup> One such test was the duty to provide charity to the deserving poor. By doing so, the rich were supposed to atone for their riches. They were also to create a ‘desirable gift relationship’ between giver and receiver based on feelings of ‘condescension’ through face-to-face transactions allowing them to determine who the ‘deserving poor’ were.<sup>65</sup> The endurance of tribulation and the struggle to alleviate suffering thus led to a focus on the plight of the poor, the downtrodden, and the dispossessed at home and abroad. In all evangelical campaigns, the conversion to a revived Christianity by means of education and the gospels was thought the pathway to both civilization and spiritual redemption.<sup>66</sup>

Boyd Hilton argues that the evangelical revival in Britain coalesced around critiques of slavery from the 1780s as the ‘foul inequity’ blighting the nation – an offence in the eyes of God requiring a national atonement.<sup>67</sup> The foundation of missionary societies in the 1790s helped to encourage a British national identity already based on Protestantism, but now encompassing an evangelical critique of slavery and the slave trade, and a commitment to using imperial power for ‘benevolent’ ends. Evangelical campaigns and missions were publicized as sowing the seeds of liberty, civilization and Christianity and thereby shaping British national identity into the nineteenth century.<sup>68</sup> The growth of evangelism in Britain also mirrored the development of a pervasive antipathy to the French

Revolution, and the perceived need to manage economic and social reforms to stave off the danger of revolution at home.<sup>69</sup> Thus, the growth of evangelism and British national identity mutually reinforced perceptions of the need for Protestantism as the foundation of social order that could espouse liberty while remaining deeply sceptical of (if not completely hostile to) political radicalism.<sup>70</sup> In this way, evangelicals who had long been suspected by ruling elites in Britain as dangerous ‘enthusiasts’ were able to articulate their own role as conveyers of social order and civilization, offering a ‘fostering arm’ to lead uncivilized peoples to the ‘protection of British law’.<sup>71</sup> Although political power in Britain remained firmly in elite hands, the popularity of formal institutions, such as the missionary organizations and the meetings in Exeter Hall, and the relatively informal gatherings of evangelically-minded reformers, such as the so-called ‘Clapham Sect’, provided new avenues for political influence. Their influence on the Empire reached a high-point with the elevation of James Stephen to Permanent Under-Secretary for Colonies in 1836 (until 1847), and Charles Grant, Lord Glenelg, as Secretary of State for Colonies (1835–9).<sup>72</sup>

The influential London Missionary Society missionary in South Africa, John Philip, expressed the link between evangelism and Empire in such a way as to counter elite scepticism in Britain towards the need for evangelical missions,

While our missionaries, beyond the borders of the Cape of Good Hope, are everywhere scattering the seeds of civilization, social order, and happiness, they are, by the most unexceptionable means, extending British interests, British influence, and the British Empire. Wherever the missionary places his standard among a savage tribe, their prejudices against the colonial government give way; their dependence upon the colony is increased by the creation of artificial wants; confidence is restored; intercourse with the colony is established; industry, trade, and agriculture spring up ... Triumphs gained by such weapons occasion no tears, and present no disgusting details: they are the triumphs of reason over ignorance, of civilization over barbarism, and of benevolence over cruelty and oppression.<sup>73</sup>

Philip was well connected with prominent evangelicals in England, notably the MP Thomas Fowell Buxton, who had been chosen by William Wilberforce to lead the Parliamentary campaign for the abolition of slavery, and went on to spearhead the 1837 Select Committee Enquiry on Aborigines.<sup>74</sup> Buxton’s campaign for a Select Committee on the treatment of Indigenous peoples mirrored Philip’s account of the benefits of missionaries. ‘[H]umanity’ and ‘kindness’ to Indigenous peoples, Buxton claimed, were not simply moral imperatives, but would be ‘safer, far cheaper, and far more profitable than coercion.’<sup>75</sup>

The Committee provided a platform for the articulation of some new ways of thinking about society and the challenges of colonial policy. In the Minutes of Evidence to the Enquiry, the representatives of the London Missionary Society presented their case for the colonial application of evangelism. ‘No sooner does

the Gospel begin to operate upon the mind of the heathen' the Society reverends proposed, 'than it leads to the first step in civilization', from 'indecorous and improper ... filthiness' to 'a settled course of life' with all the 'moral virtues, truth, honesty, fidelity, chastity'.<sup>76</sup> These missionaries knew that in preaching the Gospel to non-Christian Indigenous peoples in Australia and elsewhere they were participating in the process of colonial government. 'Christianity', they averred, 'furnishes a complete moral machinery for carrying forward all the great processes which lie at the root of civilization.'<sup>77</sup> 'Moral machinery' is a revealing term. What it signalled was a growing sense that the task of colonial government of Indigenous peoples was one that involved imparting to them a framework of ideas and values that made society possible.<sup>78</sup> In contrast to Enlightenment understandings of society as the realm of autonomous individuals whose conduct was shaped by the operation of self-interest, this newer understanding emphasized that a capacity for society hinged on the collective inculcation of a set of attitudes, values, obligations and expectations.

This view of society is revealed by the final Report of the Select Committee Enquiry. The evidence gathered by the Committee led them to conclude that previous colonial governments throughout the Empire had disastrously mishandled contact between colonizers and Indigenous populations.<sup>79</sup> The crucial point was that they represented this failure in social terms, by leading to the erroneous 'supposition' that Indigenous people were 'not capable of being reclaimed or elevated into a civilized or well ordered community'.<sup>80</sup> The Committee accepted the fundamental axiom of Enlightenment and post-Enlightenment notions of civilization, that Indigenous peoples exhibited a 'less advanced state of society'.<sup>81</sup> The Committee also accepted that apparently 'primitive' social forms were especially fragile, unable to stand up to the pressure of contact with the supposedly 'superior' society of civilized Europeans. In taking this view, the Committee reinforced what was then becoming a central assumption in colonial literature: that the process of colonization led to the degradation and extinction of Indigenous people.<sup>82</sup> This observation was a commonplace in accounts of colonial society in Australia.<sup>83</sup>

Crucially, the Committee seems to have accepted that the presumed 'degradation' of Indigenous people represented a problem of social order.<sup>84</sup> In other words, Indigenous people living according to their own customs were thought to be subjects of an order that although 'savage' and 'primitive' was nonetheless effective in maintaining a customary structure. The problem as the Committee saw it was that the loss of customs due to colonial violence, exploitation or the influence of alcohol meant that Indigenous people also lost any semblance of customary structure, and were simultaneously thought to be unable to integrate into civilized society. In taking this view, the Committee made a decisive step towards a more sociological account of society, defined not solely in terms of

Enlightenment notions of progress from pre-social 'savagery' to 'civilized' society. Rather, this new understanding implied a more complex gradation of social structures, each more or less 'civilized', but each held together by their own mental, moral or spiritual values sustaining an encompassing social order.

The Report described Australia's Indigenous people in particular as 'the least instructed portion of the human race in all the arts of social life ... and so entirely destitute ... of civil polity'.<sup>85</sup> For this reason, the Committee's suggestions for amending colonial policy centred on 'protecting' Indigenous people from unregulated contact with settlers; even to the extent of recommending that treaties with Indigenous peoples should not be made.<sup>86</sup> Their specific suggestions for Australia were that 'Protectors' of Indigenous people be appointed to superintend the segregation of Indigenous communities – as far as possible – from contact with European settlers. This separation could then be used to facilitate further evangelization of the Indigenous people, to foster further experiments in industry, and especially to protect them from the settlers' pursuit of 'belligerent rights' against them.<sup>87</sup>

### Protection and Society

It has often been assumed that a chief aim of the Report and the colonial policies it inspired was to provide a more comprehensive protection of British law to the Indigenous people from obvious threats, namely the violence and alcohol of white settlers.<sup>88</sup> Considerable doubt persisted, however, over exactly what 'protection' meant. Behind this confusion lay an increasing scepticism about 'civilization' as a programme of social development. In other words, the perception that Indigenous people did possess some kind of archaic and delicate social structure seemed to reinforce a notion that they were incapable of 'civilization' in the short term. For some, therefore, protection meant sheltering Indigenous people from unregulated and degrading contact with settlers. Missionaries often saw this separation as a chance to strike at what they saw as the basis of Indigenous social order by imposing Western ideas of marriage and family life, or in separating Indigenous children from their families.<sup>89</sup> Curtin argues that the concept of protection in British discourse was itself undergoing a transition from the evangelical emphasis on Christian conversion towards notions of 'trusteeship' of so-called 'lower races' which became dominant in the late nineteenth century.<sup>90</sup>

The Select Committee Enquiry's chief promoter, Thomas Fowell Buxton, was certainly moved by the rapid decline of Indigenous populations immediately following colonization, and he spoke of those populations' entitlement to '... protection in the possession of their lands'.<sup>91</sup> The final Report, however, spoke of protection in two rather different senses. First and most obviously it adverted

to the need for effective protection or 'defence' of Indigenous people by 'British law' whenever Indigenous 'life or property may be attacked'. Following that, however, the Report recommended the appointment of 'Protectors' whose task was defined in terms of the preservation of Indigenous communities by providing them with 'lands' suitable for their 'support', on which they may have 'the means of pursuing the chase [hunting] without molestation', and where they may be introduced to 'industry' and 'employment' that was 'least foreign' to their 'habits and dispositions'.<sup>92</sup> Informing this view was not so much a commitment to preserve Indigenous communities as an effort to stabilize colonial frontiers. This stabilization would allow the deployment of missionaries beyond it to evangelize and to mobilize colonial governments to provide more effective peace-keeping.<sup>93</sup> In the meantime, missionaries would be able to consolidate their influence over Indigenous populations residing on reserves.

Following the Report the Colonial Secretary Lord Glenelg expressed the aims of 'protection' to Governor Gipps in New South Wales as the 'protection and civilization of the Natives', making it clear that legal protection was to be paired with '*moral* and *religious* improvement', especially through education of Indigenous children.<sup>94</sup> The Report led to the creation in Australia of what came to be called the Port Phillip Protectorate under the Chief Protector, George Augustus Robinson, and his Assistant Protectors. Once appointed, the Protectors were given few directions by Gipps on how or what kind of protection they were to offer to the Indigenous people.<sup>95</sup> One of their key instructions was to 'itinerate' with the tribes under their care, a term that implied an expectation that the Protectors would follow the Aborigines' nomadic lifestyle. It was also redolent of the roots of the evangelical revival in Britain, where missionaries literally itinerated or walked their message from village to village.<sup>96</sup>

Lord Glenelg instructed Gipps that the duties of the Protectors he was to appoint were, *inter alia*, to 'teach and encourage' the Indigenous people under their care 'to engage in ... cultivation ... [the] building [of] suitable Habitations ... and in whatever else may conduce to their civilization and social improvement'.<sup>97</sup> In framing the task of Indigenous civilization in this way, colonial administrators represented their work as one of social advancement on a grand scale. The supposedly benevolent task of administering these 'uncivilized' peoples was an undertaking that the civilized British, with their 'superior' knowledge of the condition of 'savagery', with all its inherent limitations, considered themselves particularly suited to achieve. As Glenelg's successor, Lord Russell, observed to Gipps 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 Indigenous people the various races of people, some half-civilized, 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>98</sup>

The apparent 'inaptitude' of the Indigenous peoples in Australia 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>99</sup> Consequently, he recommended that the 'best chance of preserving the unfortunate race of New Holland lies in the means employed for training their children', and he thus recommended that the Governor be made guardian of the 'more promising' children, thereby facilitating their removal and institutionalization.<sup>100</sup>

As far as Chief Protector Robinson and his Assistant Protectors were concerned, the policy of protection meant concentrating Indigenous tribes on stations or reservations from which goods (such as foodstuffs, clothing and blankets) were to be distributed, and efforts made to 'improve' their 'social condition' through Christian evangelism, education, and the provision of agricultural labour.<sup>101</sup> Education of the young was intended to prepare boys for manual labour, and girls for domestic service. Such a policy framework was in step with similar developments in the United States in which Commissioners of Indian Affairs spoke of the need to obtain more effective labour, and even to 'colonize' the Indians in their own separate communities with their own 'labour schools.'<sup>102</sup> In Canada also administrators had recommended a policy of settlement on agricultural reserves as a more cost-effective alternative to the annual distribution of 'presents' long enshrined in treaty agreements.<sup>103</sup>

In Australia, however, the Port Phillip Protectorate seemed doomed from the start. Governor Gipps in New South Wales and his Superintendent at Port Phillip, C. J. La Trobe, looked upon the Protectors as a drain on scarce resources and as meddlers whose supporters in Britain could make trouble for the colonial government.<sup>104</sup> As far as they were concerned, the Protectors fuelled the suspicion among the settlers that colonial administration was hamstrung by exposing the colonists to violence and theft committed by the Indigenous people while 'protecting' Indigenous people from the penalty of the law.<sup>105</sup> 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 no advance in their 'social condition' could be evinced.<sup>106</sup> While methods of rationing were employed to encourage a sense of obligation and private own-

ership in the minds of Indigenous recipients, most observers noted that such methods failed to induce them to live 'in society'.<sup>107</sup>

By 1840 there was real confusion over what protection meant, and part of this confusion grew from an increasing pessimism about the possibility that Indigenous peoples could take their place in colonial society. In the wake of massacres of unknown numbers of Indigenous people at Waterloo Creek (January 1838), Glenelg's successor, Lord John Russell, was moved to speak of 'securing to the Indigenous Race of New Holland protection against injustice, and the enjoyment of every social advantage which our superior wealth and knowledge at once confer on us the power and impose on us the duty of imparting to them'.<sup>108</sup> As he was to express it to the Governor of New Zealand, William Hobson, protection of Indigenous populations consisted in securing their 'permanent welfare' rather than securing 'their supposed claim to the maintenance of their own laws and customs'. In doing so, he argued, the Maori of New Zealand were to be regarded as a special category of population under the superintendence of Protectors armed with 'every power of prompt and decisive interference' in Maori life, quite distinct from the operation of law 'as administered amongst Englishmen'.<sup>109</sup> According to one of the leading British liberal theorists of the period, Herbert Spencer, this form of 'protection' was a nonsense. He proposed leaving relations with Indigenous people to the settlers, unaided by a 'powerful government'. This would incline the settlers to 'stand on their good behaviour' and 'deal justly' with the Indigenous people. Government 'protection', however, presupposed 'forcible possession' of Indigenous lands under the pretence of a spurious 'lawful right' which amounted to a licence for Indigenous 'extermination'.<sup>110</sup>

When Lord Russell was lobbied by members of the Church Missionary Society about the fate of their mission at Wellington Valley (in New South Wales), he wondered what 'measures' he might adopt 'for the security of the Indigenous people'.<sup>111</sup> For the Reverend Dandeson Coates of the Society, the purpose of protection was to effect the 'religious, moral and social improvement of the Indigenous people', and this required missions where 'any intrusion of the Colonists' could be prevented.<sup>112</sup> The Colonization Commissioners for their part derided policies of separation as practised in Canada and Van Diemen's Land. The aim of policy as they saw it must be to provide 'moderate' reserves on which the inmates were not to be allowed to hunt as they had been accustomed to, but instructed on how to 'pass from the hunting to the agricultural and pastoral life'.<sup>113</sup> Russell hopefully recommended a policy framework of settling Indigenous people on missions, educating Indigenous children into productive labour, and appointing police 'for the protection of the Missionaries and Natives'.<sup>114</sup> As far as many colonists were concerned, however, the policy of Indigenous protection amounted to impunity for Indigenous 'depredations', against which the colonists had no recourse because the Indigenous people were protected both

by the official Protectors and by their vocal, evangelical supporters in the British parliament.<sup>115</sup>

By 1842 Lord Stanley at the Colonial Office gave voice to an increasing mood of pessimism about the prospect that Indigenous peoples could be enabled to take their place in colonial societies by conceding that all efforts to civilize the Indigenous people 'have been unavailing', and that 'no real progress has yet been effected'.<sup>116</sup> Respondents to the New South Wales Report from the Select Committee on the Condition of the Indigenous People (1845) noted that there was no willingness of the 'white labouring population to amalgamate with the Indigenous people', and that the Indigenous people would not or could not provide effective labour.<sup>117</sup> The evidence given by the evangelical Chief Protector George Robinson was more optimistic, but his Assistant Protectors, Parker and Thomas, seem not to have been so sanguine.<sup>118</sup> In his report on the New South Wales Select Committee on Indigenous People, William Westgarth noted that all attempts to 'enrol' the Indigenous people in the 'labouring community of the country' had, 'generally speaking, proved a failure', while both the missions and the Protectorate had 'entirely failed' to achieve the objectives for which they were 'benevolently intended'.<sup>119</sup>

The authors of these reports continually referred to the failure of the Indigenous people to submit to civil or political arrangements, because they remained forever hostile to the lessons of 'morality', and that therefore no advance in their 'social condition' could be discerned. By linking 'social' to 'moral' improvement, however, the reports also indicated a growing sense of the division between 'society' as an attainment of European people, and the various (inferior) forms of association among Indigenous peoples. The distinction between European society and Indigenous tribes thus rested on the norms appropriate to the autonomy and inter-subjective interactions of the inhabitants of society. The inhabitants of tribes were subject to an entirely different set of norms premised on the corporate character of the collective entity. The 'benevolence' of early colonial administration of Indigenous people was to consist in breaking these norms, and 'civilizing' Indigenous people by inducing them to internalize a willingness to live in permanent and orderly settlement, an obedience to white instruction and the command of law officers, and, above all, the willingness to conform to a market economy and to provide effective and productive labour.<sup>120</sup>

The 'society' that colonial administrators aimed to impart to the Indigenous people was an artefact of governmental activity held together by a framework of internalized norms. This conception of society lay behind the desire among advocates of colonization and colonial self-government that the most 'fitting' colonists be sent to the colonies.<sup>121</sup> Those deemed most 'fit' for colonial society were those free settlers who were thought to embody solid middle-class values of thrift, industry, sobriety and prudence. The 'society' of these sober selves was



considered a foundation for the future self-government of the colonies. As the colonies moved towards self-government after mid-century, however, there was an increasing sense that Indigenous peoples could not be 'fitted' for colonial (white) 'society', and that colonial (white) 'society' itself was in need of better moral regulation. This is revealed for example in the findings of the New South Wales Legislative Council Select Committee Report on Indigenous People and Protectorate. This short and bleak document expressed a sense of failure in the Port Phillip Protectorate, recommended its abolition, and claimed that its resources would be better spent on the instruction of the colony's white population.<sup>122</sup>

The Appendix to the Report included a long submission from the Superintendent of the Port Phillip Colony, La Trobe, who concluded that the Protectorate had been an 'impracticable' scheme from the start, and that the only possible replacement for it was to subject the Indigenous people to a more 'vigorous coercion' and 'Military discipline' on reserves directly administered by the government. He remarked in particular that 'nothing short of an actual and total separation, from their parents ... natural associates' and the lands and influence of their tribes would aid the civilization of the Indigenous people of the colony. La Trobe had been an assiduous opponent of the Protectorate from its early days. In his capacity as chairman of the 'Societies for Promoting Christian Knowledge' in the district, he had warned of the severe moral dangers to Europeans in the bush, removed from the 'restraints and checks which Society imposes' and surrounded by 'degraded and untutored Savages'.<sup>123</sup> The direction of La Trobe's thought thus pointed towards an Indigenous policy of more rigorous segregation and discipline. Significantly, La Trobe implied that society and its restraints were fragile constructs. In the bush, Europeans were in danger of losing their capacity for life in society. His comments thus prefigured the future development of more rigorous and interventionist policies for the government of Indigenous people. Informing these policies was a growing sense of pessimism about schemes for Indigenous 'civilization' based on the view that Indigenous people were the subjects of an archaic, invariable, 'customary' social order. In the following chapter, I want to examine the development of this view more closely and relate it to the emergence nineteenth-century liberalism.

## 6 LIBERALISM, SELF-GOVERNMENT AND THE ETHNOGRAPHY OF 'PRIMITIVE SOCIETY'

Captain George Grey and Edward John Eyre shot to prominence in the 1840s on the back of their separate journeys of 'discovery', each made possible by their reliance on the knowledge of Aboriginal guides and trackers.<sup>1</sup> Both publicized their successes very effectively in time-honoured imperial fashion, Grey in his *Journals of Two Expeditions of Discovery* (1841) and Eyre in his *Journals of Expeditions of Discovery* (1845). Both journals provided the platform for their elevation to the ranks of colonial administration – Eyre as a (highly esteemed) resident magistrate at Moorundi (in South Australia) and subsequently as (highly controversial) Governor of Jamaica; Grey as Governor of South Australia, and subsequently Governor of New Zealand (reappointed for a second term), and of the Cape Colony. Perhaps part of the reason for the success of both journals was that while they apparently confirmed the general pessimism about the prospects of 'civilizing' Australia's Indigenous peoples, they sought to provide an analysis of why. In doing so, they both gave voice to a sense that Australia's Indigenous people lacked the capacity for society.

Grey was willing to concede that the Indigenous tribes possessed some 'social habits', engaged in 'social intercourse and conversation', and even had 'institutions.'<sup>2</sup> But both Grey's and Eyre's journals confirm that whatever 'social habits' the Indigenous people 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 present inability of a supposedly 'savage' people for making 'social ties and connections' because the power of the elders drives them back 'among the savage hordes.'<sup>3</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>4</sup> This 'general opinion', unlike the civilized influences of 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>5</sup> The way in which the Indigenous people

lived prior to or beyond white contact was emphatically *not* society, because they were 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>6</sup>

The relevant distinction between savage 'hordes' and civilized 'society' was the predominant view of Indigenous Australians (and their tribes) until well into the twentieth century.

In this chapter, I will argue that the increasing pessimism about colonial schemes for the 'civilization' of Australia's Indigenous people in the nineteenth century was reinforced by the emergence of liberal political discourse. Liberal political thought has long been characterized by a series of conditions attached to the application of liberal values such as freedom and rights. This was neither an 'evasion' nor a 'betrayal' of liberal values. Rather, I argue in the first section of this chapter that it was constitutive of a distinction that was central to liberal thought in the nineteenth century between those deemed capable of self-government, and those deemed incapable.<sup>7</sup> In the second section, I go on to examine the articulation of this delineation and its relationship to concepts of 'civilization and savagery' in the political thought of John Stuart Mill. While Mill remained wedded to the view that supposedly 'uncivilized' people could be 'civilized', the hardening of notions of racial inferiority in Britain and its colonies, discussed in the third section of this chapter, reinforced the view that Indigenous peoples were supposedly ill-adapted to survive contact with more 'civilized' people. The emergence of racist doctrines after the mid-nineteenth century is only a partial explanation for the gradual decline of faith in schemes of civilization. Another explanation lies in the emergence, discussed in the final section, of a broadly 'liberal' ethnographic account of 'primitive society'.<sup>8</sup> This ethnography drew heavily on theories about Australian Indigenous social structure, as well as reflecting both liberal understandings of individualism and freedom as well as racist notions of Indigenous inferiority. In the process, it appeared to provide a 'scientific' basis for the exclusion of Aboriginal people from the realm of white society, and their subjection to ever more invasive techniques of colonial government.

## Liberalism and the Limits of Self-Government

In so far as there was any coherent ideology of empire in Britain in the mid to late nineteenth century, it could be said to have centred on the extension of civilization through the transportation of the presumed benefits of supposedly superior British values and institutions to portions of the earth deemed 'uncivilized'.<sup>9</sup> While civilization remained an integral feature of the British self-image of its Empire, the values and institutions that Britons felt they were transporting throughout their Empire were increasingly defined in terms of 'liberty' and 'liberalism'.<sup>10</sup> Liberalism is an evasive term that conveys a very broad spectrum of political thought and practice. Within this spectrum were such diverse trends as classical liberal commitments to natural rights, the utilitarian focus on maximizing social goods, and the later nineteenth-century social liberal interest in correcting systematic economic disadvantage. Liberalism originated, however, in a series of early nineteenth-century political campaigns in Britain over reform of the highly inequitable eighteenth-century political establishment. Liberals thereby articulated new claims about the appropriate relationship between individual merit, government action and the market.<sup>11</sup>

For the so-called 'classical liberals' of the early nineteenth century in particular, freedom was construed as a sacrosanct sphere of thought and action not to be unduly infringed by other individuals, groups or institutions. As David Ricardo expressed it in the House of Commons, 'no person ought to be controlled in his own arrangements, unless such control was rendered necessary by paramount political circumstances'.<sup>12</sup> The primacy of the individual was also an important theme of early evangelical thought in which conversion was conceptualized as the essential step towards a life of autonomous self-government in a godly and commercial society.<sup>13</sup> As this view implies, individual self-government was conceptualized as a disciplined individuality associated with the supposed virtues of Britain's middle classes (such as, probity, thrift, industry, piety and deference), which was explicitly contrasted to the disorderly conduct of the poor.<sup>14</sup> In this way, evangelism reinforced the liberal focus on the self, while also echoing a mistrust of the poorer classes and an attachment to classical political economy.<sup>15</sup>

Classical liberals, utilitarians and many evangelicals also shared a critique of the old social, economic and political order in Britain in which the privileges of aristocratic elites were maintained by arcane systems of patronage generally described as 'Old Corruption'.<sup>16</sup> Beyond this critique of power and patronage, liberals remained divided on economic, religious and social issues.<sup>17</sup> Classical liberals and utilitarian liberals both anticipated a new order in which privilege was open to merit. They did not want a levelling of wealth or status, but the removal of forms of discrimination and preferential treatment that restricted access to advancement to a very select few.<sup>18</sup> Showing their indebtedness to

Scottish Enlightenment theories of social development, classical liberals and utilitarians saw self-interest as a positive motivation. The desire for personal gain was not only a spur to individual industry and thrift, its effects flowed throughout society, generating spontaneous social order based on the progressive development of individual and collective productivity. As a consequence, liberalism developed as an ideology wedded to the progressive role of commerce and trade as a solvent of the old order based on patronage and place, and as a spur to individual action.<sup>19</sup> Above all, liberals and evangelicals aimed at a 'free market' unhindered by the distortions of non-commercial interference (regularly styled as 'corruption').<sup>20</sup> As Elbourne points out, however, evangelical acceptance of *laissez faire* systems depended on the assumption that commercial engagement and productive labour wrought a moral transformation in individuals, while also dissolving the practices and institutions that upheld slavery and blighted Britain's Empire.<sup>21</sup>

While the prevalence of *laissez faire* economics in early nineteenth-century British political thought has regularly been attributed to classical liberal enthusiasts and to Benthamite reformers, it had a much wider appeal. By the 1830s a growing 'fatalism' about abolishing poverty was shared by committed Christians and conservatives alike, allowing them to concur with liberals that government interference in the operation of the market was to be deprecated.<sup>22</sup> *Laissez faire* became an article of faith – the essential foundation for a society that allowed merit to rise. It was also thought to be the foundation of social development and international peace.<sup>23</sup> As William Huskisson, one of the leading proponents of free trade in British politics, put it, 'liberal principles' of free trade were essential to show that 'commerce was not the end, but the means of diffusing comfort and enjoyment among the nations embarked in its pursuit.'<sup>24</sup> Underscoring this commitment to free trade was the conviction that state power had to be limited in its reach. This was, however, much more than a classical liberal scepticism of state interference in the economy. It was above all a moral commitment to individualism. In other words, markets should be free and state power limited in order to facilitate the development of individual character by fostering self-reliance.<sup>25</sup>

Conceived in this broad sense, early nineteenth-century British liberalism was a doctrine that incorporated a developmental view of self and society. In line with received notions of civilization, liberals expressed their faith in positive social progress that enhanced productivity, efficiency and freedom. This faith in progress seemed confirmed by the development of Britain's industrial economy and its genuinely global reach. The global reach of Britain's economy was closely connected to the global reach of Britain's Empire, but liberals had long been divided on the moral basis for empire and on its economic merits.<sup>26</sup> Indeed, early utilitarians and liberals were reformers who sought to cut the costs of empire and trim the power of colonial governments.<sup>27</sup> Pro-imperial British opinion coa-

lesced around the notion that the Empire offered unparalleled opportunities for benevolence, culminating in the eventually successful Abolitionist campaign. For a time it was thought that liberal freedom and equality might be extended to former slaves; an anticipation that began to dissipate from mid-century (see the third section of this chapter). Liberalism, however, has always been characterized by division on just how far liberal values were supposed to extend (both domestically and abroad).<sup>28</sup> Above all it was felt that only civilized Britons (and some others) were capable of the kind of self-government liberalism envisaged, and that the populations of Indigenous people throughout the Empire were not. It is to this latter claim that I turn in the next section.

### Empire and Self-Government

Although Britain only extended colonial self-government to a range of former colonies in the 1850s and 1860s, opinion in favour of self-government had been growing for some time.<sup>29</sup> In the 1770s and 1780s arguments in favour of American self-government had been articulated by the radical Richard Price as well as the conservative Edmund Burke.<sup>30</sup> In 1793 the utilitarian philosopher Jeremy Bentham enthusiastically mounted his own argument for colonial self-government addressed to the French National Convention. Under the title, 'Emancipate Your Colonies!', Bentham suggested that the French should divest themselves of their colonies, and even thought that the commercially-minded British East India Company might not make the worst colonial 'masters' and might be interested in buying Pondicherry if the French were willing to sell.<sup>31</sup> In the West Indies, he argued, the population was largely European, and so he concluded that 'they are ripe for self-government ...'. In the East, however, the matter was somewhat different, and he pondered, 'Would the tree of liberty grow there, if planted? Would the declaration of rights translate into Shanscrit? ... If not, you may find some difficulty in giving them to themselves.' Bentham's advice was not finally published until 1829, and in a postscript he reiterated his conviction that self-government was achievable only for Europeans, and claimed that the Australian colonies might before too long attain it.

At the Colonial Office, James Stephen took an ungenerous – if pragmatic – approach to Australian self-government, acknowledging its inevitability not 'on the principles of political philosophy' but through compromise between the British parliament's caution and colonial impetuosity. Stephen would have preferred a more gradual transition, separating 'the actual depositaries of popular rights and powers, from the mess of the community' which he described as 'so strange and anomalous' carrying the 'hereditary taint' of convicts and in want of 'a more virtuous character' but whose growth in population and wealth demanded a concession of self-government sooner rather than later.<sup>32</sup> Debate in

Britain over whether to grant self-government to colonies centred on the virtue – or lack of it – of the free population and the problem (in Australia in particular) of a large convict population.<sup>33</sup>

In his later years Bentham achieved some influence over a variety of intellectuals and administrators who took up the call for colonial self-government. Among these was the proponent of ‘systematic colonization’ Edward Gibbon Wakefield, whose ideas were to help shape the colonization of South Australia and New Zealand. Wakefield’s scheme was to invite the settlement of free British subjects on the basis that their purchase of small land holdings at a fixed price would fund colonization while also stimulating the development of a virtuous society of industrious citizens.<sup>34</sup> In this way, he argued, personal utility would be served by offering new opportunities for virtuous wealth creation by colonists, while the utility of the colony and the Empire itself would be served by a self-financing system of colonization that simultaneously extended European society, agriculture and trade. Wakefield regularly spoke of the availability of ‘waste lands’ in the new colony of South Australia and studiously avoided saying much at all about the Indigenous inhabitants. The Colonization Commissioners for South Australia, however, originally advertised their intention that the Aboriginal people receive free ‘shelter’ in ‘weather-proof sheds’, and thereby be invited to provide ‘labour’ in exchange for ‘food and clothing’. This plan was proposed in strongly utilitarian terms as a way of serving multiple interests at little or no cost:

By this arrangement the Aborigines will be secured against the destitution and want to which they are now so frequently exposed; they will be reconciled to labour for the sake of its reward; the value of the moderate quantity of work they will be required to perform will exceed the value of the rations and clothing they will receive; and thus the asylums for the Aborigines, while they are a source of revenue rather than expense, will accelerate the prosperity of the Colony, by training the Aborigines to habits of useful industry, and by bringing a supply of native labour to aid the efforts of the settlers.<sup>35</sup>

At no point was it seriously considered that Indigenous people in the new colony might govern themselves.

The exclusivity of liberal views of self-government received decisive expression in the Report of the Durham Commission (in which Wakefield was involved) into tensions between French and British Canadians in the 1830s. Durham’s Report of 1839 recommended the establishment of self-government in Upper and Lower Canada, but he recommended that the French-speaking Quebecois, whom he referred to as an inferior ‘race’, be governed by British standards:

I entertain no doubts as to the national character which must be given to Lower Canada; it must be that of the British Empire ... it must henceforth be the first and

steady purpose of the British Government to establish an English population, with English laws and language, in this Province, and to trust its government to none but a decidedly English legislature.<sup>36</sup>

The Durham Report was a watershed in the movement for colonial self-government and, while it cemented calls for extending self-government to other colonies, it excluded any mention of their Indigenous populations.<sup>37</sup>

For many thinkers of the nineteenth century the assumed 'backwardness' or 'primitiveness' of Indigenous populations, and the failure of previous policies of civilization, excluded them from the realm of liberal self-government.<sup>38</sup> The key distinction between European populations (deemed capable of self-government) and Indigenous populations (deemed in need of 'protection' and 'improvement') was made most clearly by another former disciple of Bentham, John Stuart Mill. For most of his career, Mill worked in London as an administrator of the British East India Company between 1823 and its dissolution in 1857–8. While his interest in the Empire was focused largely on India, this interest was firmly embedded in his wider intellectual concerns about the development of civilization.<sup>39</sup>

For Mill, civilization consisted in the diffusion of cooperative relations between individuals and groups in the industrialized societies of Western Europe (and especially England) that were daily, in his view, demonstrating an unparalleled power to control nature. The cooperation that made civilization possible consisted in the diffusion throughout society of disciplined self-government. This self-government consisted in the 'subordination' of 'individual caprice to a preconceived determination', facilitating individuals 'performing severally the parts allotted to them in a combined undertaking'.<sup>40</sup> According to Mill this form of self-government, disciplined by education, by labour and by the leadership of 'better minds', made possible the freedom of individuals to act in their own interest.<sup>41</sup> The focus on education especially, however, belied a fear that Alexis de Tocqueville and Mill shared of the 'tyranny of the majority', or, as the Australian liberal W. A. Duncan put it, of 'the unenlightened exercise of the popular will'.<sup>42</sup> While liberals such as Mill could argue that self-governing individuals were the best judges of their own interests, they could also argue that the capacity for self-government and enlightened use of reason was not universally and equally shared. In particular, the freedom Mill recommended was reserved for civilized European societies, and not for non-European peoples he considered in their 'nonage'.<sup>43</sup>

Some have argued that this exclusion of non-European, Indigenous peoples amounts to a contradiction of, or at least as being in tension with, Mill's liberalism.<sup>44</sup> Mill was neither the first nor the last liberal thinker to have made his recommendation of liberal values conditional upon his conception of civi-



lization. Indeed, as a senior East India Company administrator, it is hardly surprising that Mill should have taken this view. In his *Considerations on Representative Government*, Mill argued that the great problem of the British Empire was not how to justify British rule over other peoples, but how 'to organise' it 'so as to make it a good' for the governed, 'providing them with the best attainable present government, and with the conditions most favourable to future permanent improvement.'<sup>45</sup>

Granting self-government to dominions populated by white colonists of European descent, Mill argued, would be the most obvious way of resolving that problem. Other peoples, especially those of non-European descent, were deemed to be 'still at a great distance' from self-government because they had yet 'to learn the first lesson of civilization, that of obedience.'<sup>46</sup> Mill consigned such 'uncivilized' peoples to a subject position. For them it would be better if they were 'conquered and held in subjection' by more 'civilized' peoples and thus led to civilization, by force if need be.<sup>47</sup> Supposedly uncivilized peoples, Mill argued, were not capable of collective self-government because they had not learned the techniques, or appreciated the benefits of disciplined self-government. Mill was far from blind to the violence and cruelty of European empires, but he was firmly convinced that the violence of savagery and barbarism was far worse than an enlightened 'vigorous despotism' of civilized rulers interested in 'training the people ... to render them capable of a higher civilization.'<sup>48</sup> For other liberals, 'the best educated, the most powerful, the happiest [of people is] ... the white man, the European, the epitome of man', against whom neither Africans nor Indigenous Americans could compete.<sup>49</sup>

Mill's support for empire however, did not rest on any simple notion of racial inferiority or superiority.<sup>50</sup> Mill's position was that the British Empire was well founded in its supposed commitment to the 'benefit' of subject populations, held in subjection not simply because they were 'uncivilized' but because they were incapable of self-government. He made this clear in his *Memorandum of the Improvements in the Administration of India during the Last Thirty Years*, in which Mill celebrated East India Company government in India for 'improving the internal government of the country, and the physical and mental condition of its inhabitants ...'<sup>51</sup> Indeed, Mill concluded that

... few governments, even under far more favourable circumstances, have attempted so much for the good of their subjects ... A Government of foreigners, over a people most difficult to be understood, and still more difficult to be improved ... has a right to take pride to itself for having accomplished so much ...<sup>52</sup>

Mill's liberal imperialism reflected a much wider sentiment. The early Australian liberal William Wentworth, for example, argued that the 'amelioration' of the 'condition' of less civilized subject populations was the true foundation of the

British Empire.<sup>53</sup> Wentworth and Mill shared the conviction that the Empire was a civilizing and thus a progressive and modernizing force.<sup>54</sup> Unlike Mill, however, Wentworth made no concession that Indigenous populations were ever remotely capable of self-government.

### Civilization and Race

Although Mill's faith in the civilizing influence of British rule in India illustrates the continuing relevance of ideas of civilization at that time, some have argued that the 'encounter' with Australia's Indigenous people played a decisive role in shifting British public and intellectual discourse at mid-century away from civilization and toward more rigid racial hierarchies.<sup>55</sup> Paradoxically, the articulation of more strongly defined racial categories in European thought amplified much older concerns in discourses of 'civilization and savagery', while also destabilizing the central assumption in those discourses – that there was a universal process of human development of civilization. From the late 1850s the development of European sciences appeared to unravel many of the mysteries of the immutable laws of nature. Above all, the publication of Charles Darwin's *Evolution of the Species* in 1859 and his *Descent of Man* in 1871 seemed to offer a comprehensive explanation for the survival (and extinction) of particular species according to the theory of natural selection.<sup>56</sup> Above all, theories of evolution and natural selection 'steadily cut away at the foundations of faith in a beneficent historical process.'<sup>57</sup> In his earlier and brief sojourn in Australia, Darwin reflected on the rapid decrease in the Aboriginal population, noting that although the cause was 'mysterious' it appeared to illustrate how 'The varieties of Man may seem to act on each other; in the same way as different species of animals – the Stronger always exterminating the weaker.'<sup>58</sup> According to his later theory of natural selection, species less well adapted to their environment than others die out, and the resulting selection of species favours more complex creatures better able to adjust to changing environments.

One of the effects of Darwinian theories of natural selection and evolution was to help pave the way to obsolescence of older 'Lamarckian biocultural' accounts of human diversity. In these accounts, the development of human 'races' was to be explained by the interaction of biological characteristics with learned or 'cultural' qualities. After mid-century, however, 'an emerging racialism of a harsher, hereditarian sort' (partly inspired by Darwin's ideas) developed ascendancy.<sup>59</sup> Such ideas were conducive to the development of liberalism, which was itself based on the rejection of earlier notions of social order in favour of new ideas about the role of competition in social change, and the idea of 'life as a race'.<sup>60</sup> The conviction that the laws of human social progress, development, or evolution mirrored those in the natural world was thus eagerly adopted.<sup>61</sup>

Europeans such as August Comte came to see their own societies not only as products of a process of civilization, but as organic entities subject to their own natural laws of development. Comte sought to account for the rapid growth of urbanized mass societies with industrialized economies by speaking of society as a 'system' of differentiated but interconnected 'organs'. Modern social systems, he argued, were characterized by a high degree of impersonality which required the inculcation of disciplined self-government while also facilitating the unprecedented development of individuality among its members. Such systems were contrasted to supposedly more simple societies based on intimate, face-to-face connections. Comte spoke of the process by which individuals and the social system developed as one of 'culture', a process of cultivation by which individuals were fitted for society.<sup>62</sup>

Arguably, few European thinkers did more to extend the ideas of evolution and natural selection to the social world than the widely-read English liberal Herbert Spencer.<sup>63</sup> Spencer referred to societies as 'organisms' that, through a process of evolution, developed in size, interdependence and complexity of structure.<sup>64</sup> Despite his criticism of colonization, for Spencer 'our large civilized nations ... much exceed primitive savage tribes ...'<sup>65</sup> Spencer conceived this distinction in biological terms, speaking of the most primitive societies among the 'lowest races' as 'undifferentiated group[s] of individuals' like the mere aggregations of cells at the 'initial stage of animal and vegetal organization.'<sup>66</sup> Among those 'savages not quite so low' on the evolutionary scale, 'traces of social structure', such as chieftainship and some class distinctions, can be found.<sup>67</sup> In this way, societies were thought to develop in the same way as species evolve in the direction of greater internal differentiation, interdependence of structure and complexity of internal function, culminating in the societies of Western Europe marked by sophisticated and separate institutions of government and commerce, and a complex division of labour.<sup>68</sup> This organic view of society went hand in hand with assertions that social evolution required a physical and moral fitness displayed by the vigorous middle classes in Britain that the poor and working classes were thought to lack.<sup>69</sup> Such ideas also supported the assumption that participation in the British political system required a 'political fitness' consisting in the display of 'manly' independence, of rationality and property ownership, and of the necessary virtues of bourgeois life, 'industry, sobriety, thrift, self-help'.<sup>70</sup>

This view seemed to confirm earlier ideas that supposedly 'primitive' Indigenous peoples were weaker, less vigorous and less intelligent than Europeans, and that the former were destined to die out following contact with the more vigorous latter.<sup>71</sup> This racial pessimism about the plight of Indigenous peoples marked a significant shift in European discourse. Enlightenment concepts of civilization might be premised on a division of humankind into a number of different 'races', among whom Europeans were considered the most active and

intelligent 'race'.<sup>72</sup> Nonetheless, explanations of this 'superiority' did not rest on supposed biological advantages alone. They also rested on a range of other factors including climatic and geographical advantages, and the prior development of allegedly superior moral and political ideas and institutions.<sup>73</sup> Importantly, Enlightenment thinkers recognized the possibility not only of dominance, but of decay and decline. Civilization was a sliding scale on which a people's level may rise or fall.<sup>74</sup> As a consequence, though notions of racial inferiority or superiority were not uncommon in eighteenth-century thought, the preference was to speak of different 'nations' exhibiting different levels of social, historical, economic advance.<sup>75</sup> Curtin notes that even as late as the 1840s English writers widely asserted European racial superiority but 'also left room for the operation of 'moral causes', which might drastically modify or even eliminate the 'barbarity' of African culture.'<sup>76</sup>

Nonetheless, the shift in discourse from 'civilizational' to 'racial' accounts of Indigenous 'inferiority' was well underway. In 1827 for instance, Cunningham could attempt to explain what he thought was the puzzle that Indigenous Australians were, as he put it, 'at the very zero of civilization' even though they showed all the intellectual qualities necessary to rise much higher.<sup>77</sup> The answer, he felt, lay in the particular combination of factors in Australia that determined Indigenous 'savagery', namely the circumstances of scarce resources, a hard climate and geography, the absence of Indigenous government, and the prevalence of Indigenous violence.<sup>78</sup> By 1847 however, George French Angas could report that Australia's Indigenous people constituted an inferior race – judged inferior not only to Europeans, but also to the Maori of New Zealand. The position of Indigenous Australians was to be explained by their skin colour and skull shape rather than their language and social practices.<sup>79</sup> As Turnbull has suggested, the colonial 'construction' of the idea of a 'degraded' 'Aboriginal race' in Australia played a key role in the development of British racial hierarchies.<sup>80</sup>

The shift towards a racially pessimistic view was also consolidated by a series of violent encounters between Europeans and their 'subject' populations in the 1850s and 1860s which appeared to some to confirm European notions of their inherent biological superiority.<sup>81</sup> Elbourne locates the emergence of a more strident racist discourse at the Cape in the wake of the Xhosa rebellion (1850–3) which was put down by British troops with bloody ferocity.<sup>82</sup> According to Bolt, it was the revolt of former slaves in Jamaica in 1865 that proved a 'turning point' in white British racial attitudes. This incident, Bolt argued, discredited the evangelical and abolitionist campaigns premised on 'the essential equality of all men before God', while seemingly demonstrating the 'innate savagery of the Negro' and justifying the 'savage counter-measures ... of the superior white race'.<sup>83</sup> Belich comes to a similar conclusion in relation to the Waikato War in New Zealand in 1863, but argues that this 'evidence' merely confirmed already firmly entrenched

racial stereotypes.<sup>84</sup> Dismissive attitudes towards Aboriginal peoples and suppositions that they were racially unfit certainly predated any mid-century 'turning point'. Their gradual predominance after mid-century was closely connected to the territorial expansion of colonies, and the growth of immigration and related campaigns for colonial self-government (from which Aboriginal populations were excluded).<sup>85</sup> Colonial liberal arguments for self-government were thus phrased in terms of a shared Britishness and a sense of entitlement to *British* liberty from which Indigenous Australians were excluded. Colonial self government was thus underwritten by the recognition, as the Australian liberal John West put it, that 'in her colonies ... [Britain] recognizes the reproduction of herself ...'<sup>86</sup> For Ballantyne, the 'stark racial language' that became characteristic of British and colonial discourse after the 1850s was 'not minted in the crucible' of native rebellions. When such rebellions did occur, however, they provided 'greater confidence in race as a marker of difference'.<sup>87</sup>

This racial pessimism was certainly reflected in the development of Australian colonial liberalism. Significantly, however, colonial liberal arguments for self-government were premised not simply on race, but on the moral qualities long associated with 'civilization'; discipline, individuality, self reliance, forethought and industry – qualities that Aboriginal people were thought to lack.<sup>88</sup> So pervasive was this assumption that overt discussion of Indigenous peoples was, in McIntyre's view, conspicuously absent from Australian liberal writings in general. The exclusion of Indigenous people lay in the liberals' unwillingness to see themselves as anything other than 'settlers' founding a new nation, rather than as 'invaders' who 'confined' Aboriginal peoples to reserves where they could be 'forgotten'.<sup>89</sup> Such a dismissal was aided by the growing conviction that the Aborigines were destined for extinction.<sup>90</sup>

European colonists had long observed the decline of Indigenous populations in the colonies. This concern was one motivation behind the 1837 Select Committee on Aborigines which tapped domestic concerns about the honour of the British government, its colonists and its military.<sup>91</sup> Some colonial administrators seemed caught between seeing Indigenous people as a 'feeble race' while worrying about their 'formidable' attacks against the colony.<sup>92</sup> Almost invariably, however, Indigenous Australians were thought to be susceptible to the vices introduced to them by unscrupulous whites, whether it be disease, alcohol or European weapons. As John Dunmore Lang put it,

It seems, indeed, to be a general appointment of Divine Providence, that the Indian wigwam of North America, and the miserable bark-hut of the aborigines of New Holland, should be utterly swept away by the flood-tide of European colonisation; or in other words, that races of uncivilized men should gradually disappear before the progress of civilization, in those countries that have been taken possession of by Europeans. Humanity may interpose, for a season, for the preservation of the savage

man ... but European vice and demoralisation will ... ere long infallibly produce a rich harvest of misery and death ... [and] the miserable remnant of a once hopeful race will at length gradually disappear from the land ... like the snow from the summits of the mountains on the approach of spring!<sup>93</sup>

Angas put it more succinctly, 'As British civilization is daily spreading over the Australian continent, so the degraded natives of the soil are fast disappearing; and, in New South Wales especially, they will, ere long, have totally disappeared.'<sup>94</sup> This conviction seemed to reinforce a Lockean justification for possession and property. According to the prominent colonial barrister Richard Windeyer, 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.'<sup>95</sup> The colonial appropriation of land and property was justified by the fact that the settlers had 'bestow[ed] ... their *labour* upon particular portions of ground', whereas Indigenous Australians failed to make 'the land produce by labour what it would not produce spontaneously.'<sup>96</sup> Windeyer's views were reinforced by the 'colonial magistrate' William Hull, who maintained 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.<sup>97</sup>

This broadly Lockean account became an axiom of colonial liberalism in Australia. As the free trader Bruce Smith put it later:

Land must be enclosed and cultivated and drained to give it value. The man or men who did this first, sold their improvements or gave them to his or her successors ... The land, thus improved passed from one to another ... what was once a rock became a garden; what was once a swamp or forest became a site of a factory or palace. The magic of ownership turns sand into gold, and the camping place of savage warriors becomes the scene of industry's peaceful triumphs.<sup>98</sup>

By the late nineteenth century, this view had hardened into a settled conviction that Aboriginal populations were racially unfit to compete physically or intellectually with Europeans.<sup>99</sup> On these grounds, Indigenous Australians were consigned to an inevitable fate, '[a]s settlement spreads the black will give place to the white man ... their complete disappearance from the continent is only a question of time.'<sup>100</sup> As McGregor has argued, however, the development of Indigenous policy in the late nineteenth century was premised on regimes of 'protection' in which Indigenous people were supposed to be insulated on reserves from 'contaminating' and 'degrading' contact with other 'races'.<sup>101</sup> They were deemed the subjects of special protective measures rather than being seen as citizens entitled to the same rights, levels of equality or freedom that white

citizens were entitled to. This was not simply a policy of ‘smoothing the dying pillow’ of a ‘race’ deemed unable to survive. It was, more importantly, a policy shaped by what I will describe in the next section as a liberal ethnography of ‘primitive society’.<sup>102</sup>

### The Liberal Ethnography of ‘Primitive Society’

In the development of colonial liberalism in Australia the plight of Aboriginal peoples attracted scant attention. According to Melleuish, liberalism developed in Australia from the enthusiasm of the Victorian gold rush in the 1850s. The gold rush fuelled further free immigration to the colonies, exacerbating tensions between rising commercial and financial interests and the more conservative, land-owning elite.<sup>103</sup> Australian colonial liberalism thus remained preoccupied by debates between the proponents of free trade and the supporters of economic protection who envisaged a more paternalistic role for the state as the manager of tensions created by the market.<sup>104</sup> In this context, the Indigenous people and their plight were simply thought to be irrelevant.

By mid-century it had become apparent that previous Indigenous policies aimed in part at inducing Indigenous populations to take their place in the lower orders of colonial society in Australia had largely failed.<sup>105</sup> Despite the demand for Aboriginal labour following the shortage of white labourers in the wake of the gold rush of the 1850s, many colonial observers remained convinced that Indigenous peoples, especially in those areas relatively untouched by white settlement, were unable to adjust to colonial society. Florence Nightingale seemed to express the general sentiment in referring to what she supposed was the Indigenous Australian’s ‘instinctive dread’ of permanent settlement, surmising that it was ‘founded on some physiological law of their organisation’.<sup>106</sup> Her proposed solution to the ‘problem’ was to recommend the activities of missionaries, like Bishop Salvado of New Norcia in Western Australia, who attempted to inculcate bourgeois values among the Indigenous people through the cultivation of land and the development of inter-relationships mediated by financial transactions.<sup>107</sup> Nightingale indeed approvingly quoted Salvado’s dictum that, when ‘dealing with uncivilized races,’ ‘Ceres comes before Minerva’.<sup>108</sup> Other missions, such as Poonindie in South Australia, aimed to fulfil the ‘grand desideratum’ of forming Indigenous people into regulated communities on the principles of ‘isolation, industrial education ... schooling; marriage, separate dwellings, hiring and service for wages; gradual and progressive improvement based on Christian education, Christian worship, and Christian superintendence’.<sup>109</sup>

As influential as the biological or racial explanations for the supposed inability of Indigenous people to adjust to white colonial society were, however, the late nineteenth century witnessed the development of more complex sociologi-

cal explanations. This was reflected in the development of theories of so-called 'primitive' or 'ancient' society. While these theories and their influence have been subjected to penetrating critique, their relationship to nineteenth-century liberalism has excited little attention.<sup>110</sup> This is all the more curious given that theories of primitive society expressly condemned Indigenous people for their 'illiberal' qualities, namely, the supposed corporate nature of Indigenous communities, the supposed lack of individuality, and the supposed tenacity of traditional customs. Theories of primitive society rendered the task of imperial and colonial administration as one of seeking to understand the long-forgotten mysteries of archaic social order enabling its inhabitants to be governed appropriately. Almost invariably this meant preserving or 'protecting' 'primitive' societies from unregulated contact with 'superior' (European) societies. It was in this vein that John Stuart Mill praised Sir Henry Maine's *Village Communities in the East and West* for directing a 'flood of light ... upon the ideas of an early state of society' that, he admitted, the British had largely mismanaged in India.<sup>111</sup> According to Mill, Maine's great insight was to have shown how English ideas of individual property ownership had been recklessly applied in India, where property ownership resided in less developed village communities, thus causing considerable social and economic dislocation.<sup>112</sup> Maine of course was a leading figure in the emergence of comparative and historical jurisprudence, but in the 1860s he had participated in the administration of the Raj. In developing his theory of ancient society, Maine articulated the view that what set modern societies apart from ancient societies was their institutional development, and in particular their legislative or law-making capacity.<sup>113</sup>

Maine is today most remembered for his dictum that modern 'progressive' society had originated in the transition 'from Status to Contract'.<sup>114</sup> To nineteenth-century readers, 'contract' denoted the personal freedom and independence of selves in commercial society, a freedom in which engagements between individuals were conceptualized in contractual terms. The cry for 'freedom of contract' thus conveyed the classical liberal aspiration for a society in which position, wealth and class were open to individual merit based on their voluntary participation in contractual relations. According to Maine, however, development towards more modern, civilized, contractual societies was only made possible by '... the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account.'<sup>115</sup> In other words, the 'ancient' condition of society was characterized by the solidity of 'status' underpinned by relations within the family unit. Each individual was born into a certain set of family relationships which bestowed a certain status that predetermined their social role, duties and life expectations. The corporate unit was thus the basis of archaic social order, an order characterized by its conservatism,



its inability to progress and develop through the free action of its members.<sup>116</sup> Progressive societies by contrast were those in which relations between individuals were organized not on the basis of 'status', but 'contract', the free agreements between autonomous individuals.<sup>117</sup> 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 civilized West.<sup>118</sup>

What is important here is the association of 'status' with the family, 'contract' with autonomy. Only this latter quality, 'contract-autonomy', was compatible with the existence of political sovereignty, whereas status and the family were incapable of grounding true sovereignty. Maine illustrated this distinction with examples drawn from Indian and European history in distinguishing his own conception of sovereignty from an Austinian account of the origins of sovereignty in the 'authority of the Patriarch or Paterfamilias over his family'.<sup>119</sup> 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. Such examples, he asserted,

... may be taken as a type of all Oriental communities in their native state ... They have ever been despotisms, and the commands of the despots at their head, harsh and cruel as they might be, have always been implicitly obeyed.<sup>120</sup>

In this sense, Maine thought that Indian rather than European history was a far more accurate view of the conditions that prevailed throughout human history. 'The States of modern Europe', Maine attested, must be regarded 'as having been formed in a manner different from the great empires of antiquity ... and from the modern empires and kingdoms of the East ...'<sup>121</sup> In Western Europe only did the 'Aryan race' develop 'political communities' through processes of amalgamation, federation and confederation of smaller communities eventually creating 'legislative' authority.<sup>122</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>123</sup>

For Maine then, the distinction between so-called 'ancient' and modern societies was primarily an institutional difference in so far as it was the capacity to legislate that explained social order in advanced or modern societies. Nonetheless, racial distinctions were never far from the surface. Maine's analysis was imbued with the notion of Aryan racial ancestry in Europe and India. Maine believed that Aryan racial development had been 'arrested' in India, whereas in Europe Aryans had developed free institutions.<sup>124</sup> Australian colonial liberals

also ran racial hierarchy together with institutional critique of the slavishness of Eastern 'races' and the free institutions of Europe.<sup>125</sup> Maine was clearly animated by the governmental concern this racial and institutional analysis raised. For him, the institutional complexity of European societies was as much a mystery to so-called 'primitive' peoples, as many supposedly 'primitive' customs were to so-called 'superior' Europeans. For many nineteenth-century ethnographers and colonial administrators, this contrast was nowhere more sharply drawn than in Australia where Indigenous Australians were seen as the most archaic peoples known, 'the ultimate in living savagery'.<sup>126</sup>

This view informed the development of more invasive techniques of Aboriginal administration in the years following the granting of self-government. Victoria was the first colony/state to develop a centrally-administered Aboriginal policy through the Central Board for the Protection of Aborigines (1863) (CBPA) and the Aborigines Protection Act (1869). The aim of the CBPA's policy was to administer a series of Aboriginal stations designed to impart the physical and psychological features of an ordered village society.<sup>127</sup> The other states eventually followed with their own Aboriginal Acts, 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. The substance of these legislative frameworks of 'protection' consisted in the more effective white control of the intimate details of the lives of the inmates on reserves and missions.<sup>128</sup> None of these policies of control were more ominous than the practice of removing Aboriginal children from their families.<sup>129</sup>

Perceptions of Australia's Indigenous peoples were coloured by the view that they exemplified a kind of 'primitive' condition illustrative of the origins of humankind that could be 'scientifically' explicated and used to illustrate the evolution of modern 'society'.<sup>130</sup> This analysis rested on the 'scientific' analysis of the basic unit of 'primitive society', the tribe. Two of the early pioneers of Aboriginal ethnography, Alfred Howitt and Lorimer Fison, exemplified this approach, and in doing so helped to disseminate the view that Indigenous Australians were 'locked in an evolutionary past'.<sup>131</sup> For Howitt and Fison, the basic unit of Aboriginal society was the tribe. The tribe no longer appeared as a series of distinct groups standing in some form of familial relationship to one another, but as a corporate body incorporating distinct familial and local organizations. Howitt and Fison used the 'word tribe ... as synonymous with community', by which they appeared to mean no more than an aggregate association, but one that was internally divided into more significant groups or 'exogamous intermarrying classes'.<sup>132</sup> Howitt and Fison were criticized for the slipperiness of their terminology, and in a later work Howitt offered a rather different definition of the tribe:

I use the word 'tribe' as meaning a number of people who occupy a definite tract of country, who recognise a common relationship and have a common speech, or dialects of the same. The tribes-people recognise some common bond which distinguishes them from other tribes ...<sup>133</sup>

Here, Howitt was clearly speaking of something closer to a 'society', an association of people held together by a (presumably mysterious) 'common bond'. Within the tribe, however, he believed there were divisions based on 'locality' and 'marriage', organizations termed the 'local' and the 'social'. The distinction was explained in the following terms:

An entire community, tribe, nation, or whatever it may be termed, is divided socially into two exogamous intermarrying moieties [or classes] ... having the names of material objects, even of natural phenomena, for which the term 'totem' is appropriate ... It is this systematic division of the tribe which was called by Dr. Lorimer Fison and myself 'the social organisation' ... the tribe is also divided into a number of lesser groups ... [which] are local, and therefore differ essentially from the classes or totems, which are groups of the social organisation.<sup>134</sup>

Of these lesser 'local' groups Howitt distinguished the 'clan' – a subdivision with descent in the male line – from the 'horde' – a subdivision with descent in the female line. Somewhat later, Howitt did in fact use the term 'aboriginal society' when speaking of the role of class divisions in 'social development'.<sup>135</sup> Howitt and Fison's analysis accorded with the generally pessimistic view of the aptitude of so-called 'full-blooded' Indigenous people – a so called 'vagrant race' – for life in anything other than their tribes, or in the highly regulated environment on reserves and missions.<sup>136</sup> A chief focus of Aboriginal policy in this period, then, was the growing fear of miscegenation. Racial segregation was informed by the conviction that contact between supposedly 'stronger' and 'weaker' races would be fatal to the latter.<sup>137</sup>

Nonetheless, in articulating their case for more tightly controlled Indigenous reserves under the legislated authority of 'protectors', administrators invoked a 'liberal' understanding of the objectives of policy. The Northern Protector of Aborigines in Queensland, W. E. Roth, made this clear in his outline of the rationale for segregating Aboriginal people on reservations,

... the isolation of, and restricted intercourse between, the weaker race and the stronger, so long as the preservation of the former continues to be the goal to which, as humanitarians, we are striving – is one that was accepted by the late Herbert Spencer after long study of ethnical and historical problems. 'It seems to me' says the philosopher, 'that the only forms of intercourse which you may with advantage permit, are those which are indispensable for the exchange of commodities – importation and exportation of physical and mental products. No further privileges should be allowed to people of other races, and especially to people of the more powerful races, than is absolutely needful for the achievement of these ends.'<sup>138</sup>

Roth saw the invasive provisions of Queensland's Aboriginal Act of 1897 as the chief means of regulating the supposed 'gap' between Indigenous tribes and white society. This perception of a gap rested on a broadly 'liberal' ethnography which represented individualism as a quality of 'civilized' societies totally absent from the dangerously egalitarian Indigenous communities.<sup>139</sup> Howitt gave substance to this view in clearly delineating (white or European) 'society' from Aboriginal tribes, noting that in these tribes each 'individual' was entirely subject to a structure of invariable 'corporate' membership. In white or European society by contrast, '... civilized 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>140</sup> Referring to Maine as his authority, Howitt claimed that Aboriginal 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 this structure was superseded by the 'individual family' – as it had long ago among 'Aryan' peoples – with 'descent through the father' was the solidity of the communal family weakened and the conditions created for the emergence of 'individuals'.<sup>141</sup> To illustrate the difference, Howitt used the example of the understanding of 'crime' or the nature of offence. Within Aboriginal tribes, offence was not suffered individually, he maintained, but was suffered by all as members of a 'body corporate'; and similarly, redress may be sought not only against the particular perpetrator, but against any members of the perpetrator's tribe.<sup>142</sup> Here, Maine once again was the authority, whose reflections on India led him to the conclusion that there was no 'right or duty in an Indian village community; a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society'.<sup>143</sup>

The liberal assumptions on which this critique of 'primitive society' rested were amplified by one of Howitt and Fison's celebrated correspondents, the early American ethnologist Lewis Henry Morgan. For Morgan, Howitt and Fison had provided evidence of an original and extremely primitive form of social organization, namely, an 'organisation on the basis of kin, with descent in the female line'.<sup>144</sup> Morgan's claim was that this structure was the universal social condition of human beings at the most primitive of stages, and had been superseded elsewhere by social organizations based on descent in the male line, before development into 'political society' among the 'Aryan' peoples, and especially in the period preceding the Roman Republic.<sup>145</sup> According to Morgan, the 'idea of government' evolved through three relatively discrete stages, the first characterized by the power of a council of elected chiefs of the tribe, the second of the council and a 'military commander', and the third and highest stage, of 'a people

or nation by a council of chiefs, an assembly of the people, and a general military commander'.<sup>146</sup>

Only in this latter stage, Morgan argued, was it proper to speak of the beginning of the differentiation of distinct political institutions, and he was clear that what drove this evolution was 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 which were capable of establishing and maintaining distinctions on the basis of property (through laws and regulations). It was here that the Greeks ('the first' among the 'Aryan family') made the transition from the 'gens' to the 'deme' or township as the basis of organization and thus began to develop sovereign political institutions which were separate from and began to act upon the 'social' relations of the tribe, thus initiating the distinction between 'state' and 'society'.<sup>147</sup>

Howitt and Fison applied Morgan's framework to the Indigenous peoples of Australia, describing that section of a matrilineal Aboriginal tribe occupying a certain territory as a 'horde', a very primitive version of the ancient Greek 'deme'.<sup>148</sup> What was significant about the 'horde', they argued, was that it represented the very first glimmerings of the emergence of father-right and patrilineal descent, and thereby the development of the state. The assumption on which this view was based was that all matrilineal 'social' organization was entirely bound by custom, it was an invariant whole in which the status of one's mother determined one's membership of the tribe. Where the association of members of the tribe begins to be organized on the basis of territory or locality, however, separate individuals or kin groups can begin to be distinguished from the vast consanguine family. Thus all local or territorial organization (the horde) has within it a tendency to 'modify and contract the range of social organization, to usurp its authority, to bring about descent through males, to arrange society on its own basis, and finally to make itself paramount'.<sup>149</sup>

Thus the 'hordes' that Howitt and Fison thought they had identified in Aboriginal tribes were a starting point for the development of the much more sophisticated 'demes' or territorial organizations of patrilineal families in which law, political authority and sovereignty began to develop.<sup>150</sup> As they represented it, the 'horde' eventually developed into some form of 'deme' through which laws began to supplant the sway of custom, and individuals started to interact with one another on the basis of contract. In this way, the germ of the modern state (the incarnation of father-right) separated from 'society' (the realm of mother-right), and in fact subordinated the latter, eventually giving rise to mod-

ern 'society' as a realm of individual interaction regulated by laws and political authority emanating from the sovereign state. 'In our own day', they concluded,

... modern notions and institutions exist side by side with old beliefs and regulations – the one in civilization, 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>151</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 Howitt and Fison saw it, was that the 'inferior' Indigenous tribes did not yet possess sufficiently evolved institutions (such as chieftainship) which could be used by 'superior' European administrators in the task of governing them.<sup>152</sup> They were, as Fison observed in his Presidential address to the Australasian Association for the Advancement of Science in 1892, entirely trapped within the confines of custom which have 'all the force of divine law, the breach of which will certainly be followed by terrible consequences ...'.<sup>153</sup> This innate conservatism, it was surmised, rendered the Indigenous inhabitants of Australia ill adapted to meet the challenges of confrontation with the supposed 'vigour' and 'dynamism' of 'superior' races, hence explaining their 'inevitable demise'.

While the aspiration of the various Australian 'Aboriginal Acts' was to control Indigenous populations, the reality was that they were often difficult to enforce. As one pastoralist remembered of the late nineteenth century, '[w]hat to do about the blacks was a question that everyone solved as best he could ...'.<sup>154</sup> Missionaries were often the chief agents of any kind of systematic Aboriginal policy, centring on daily calendars of work and prayer as the best means of inculcating settled and ordered social habits.<sup>155</sup> Many of the Indigenous inhabitants of the missions and reserves actively sought to assert their rights to land and freedom.<sup>156</sup> So far as most colonists were concerned, however, the aim of policy should be to better organize Aboriginal labour or settle them on reserves, if only to get them out of the way.<sup>157</sup> Many others concurred with Frank Gillen, then a 'Sub-protector of Aborigines', who stated that '[t]here is only one thing to be done with our Australian blacks ... [y]ou cannot do more than make their path to extinction as pleasant as possible'.<sup>158</sup>

Two elements in the nineteenth-century discourse on Aboriginal people – the ethnographic account of 'primitive society' and the assertion of 'racial inferiority' – thus appeared to undermine the older language of 'savagery' and 'civilization' and eighteenth-century convictions in 'human psychic unity'.<sup>159</sup> The concepts of 'savagery' and 'civilization' did not disappear from Western discourse. They continued to be invoked both in academic anthropological and government policy literature. Over time, however, the concepts of 'civilization' and 'savagery' were increasingly submerged within a newer discourse focused on

the development of supposedly 'scientific' knowledge of Indigenous 'cultures'. In this sense, the older conviction that Indigenous peoples lived in a pre-social state of 'savagery' was replaced by the 'anthropological' view that Indigenous people did have 'societies' with distinct 'cultures'. Nonetheless, those 'societies' were thought to be of a particularly archaic kind. The understanding of these societies was also thought to depend on the anthropological analysis of Indigenous 'culture' – the system of norms and beliefs whose lineage was also held to be archaic. Even as the terms 'civilization' and 'savagery' were beginning to lose their predominance they continued to echo in the perception that the particular problem of Indigenous culture and society was its archaic nature. As Elsie Masson, the future Mrs Bronislaw Malinowski, put it, if policies for governing Australia's Indigenous people aimed to build 'a bridge for the black man' between their 'tribes' and white 'society', it also had to enable them to cross the 'chasm of ages' between their primordial condition and white society.<sup>160</sup>

## CONCLUSION: AFTER THE TIDE OF HISTORY, RECONCILIATION?

I have argued in this book that concepts of ‘civilization and savagery’ provided an intellectual foundation for the colonial government of Australia’s Indigenous peoples. It was this foundation that enabled colonists and colonial administrators in Britain and Australia to perceive Indigenous people as ‘problems’ for colonial government to ‘resolve’. It also provided a framework of concepts with which the various policies and techniques of government devised to ‘resolve’ those ‘problems’ could be articulated and justified. As previous chapters have shown, the application of these concepts did not entail any uniformity in the precise definitions of the ‘problems’ of Indigenous government. Nonetheless, the influence and continuity of that discourse was an important, if not the central intellectual framework for Australia’s early colonization.

By the time of Australia’s Federation and political independence in 1901, however, the predominance of this discourse was already beginning to fade. In its place arose a more anthropological language in which older assumptions about civilization and historical development were gradually replaced by sociological analyses of Indigenous culture and social structure. Of course, this was not an ‘overnight’ replacement, and some of the anthropologists who came to influence early twentieth-century Indigenous policy in Australia – such as Baldwin Spencer and A. P. Elkin – continued to make use of the concept of civilization. As the influential anthropologist and Indigenous policy mandarin Elkin expressed it, the problem of Indigenous policy in the early twentieth century was that it amounted to a haphazard ‘drift to civilization’, whereas it should aim for an orderly ‘advance towards and in civilization’ through the adaptation of Indigenous culture (informed by white/European anthropological expertise) to ‘civilized’ white/European culture.<sup>1</sup>

Today, the very concepts of ‘savagery’ and ‘civilization’ seem as alien to Australian political and public discourse as it is possible to be. And yet, the implications and long influence of those terms continue to reverberate in contemporary Australia. One of the most profound legacies of the terms is the continuous denial of Indigenous sovereignty in Australia. As I have argued in previous chapters,



the colonial assertion of sovereignty was made on the basis that the Indigenous inhabitants of Australia were 'savages'. The image of Indigenous people as too 'uncivilized' to constitute their own sovereignty, and hence unable to negotiate over the terms of colonial sovereignty through a treaty or treaties, eventually led to the view that Indigenous people were characterized by their inability to adapt to civilized society because of the tenacity of their 'traditional customs'. It is precisely this issue, of the tenacity of the customary, that lies at the core of Native Title determinations in Australia today.

### Native Title and the 'Tide of History'

In the landmark *Mabo* case (1992), the High Court of Australia found that Native Title rights to some lands and waters did exist within the common law, and that their previous denial in Australia's colonial history was unjust. In making this finding, however, the Court specified that the test of Native Title hinged on the continuity of traditional connections to the land in question, a connection that had not been swept away by the 'tide of history'.<sup>2</sup> The 'tide of history' is a powerful metaphor. It bespeaks neutrality, inexorability, an indifference to the human subjects it sweeps over. Invoked by then Chief Justice Brennan in *Mabo* this metaphor served as a shorthand for the manifold forces and pressures exerted on Indigenous peoples throughout the colonial period. The 'tide of history' was a way of representing the effects of colonization – the separation from country, the pressure to renounce beliefs and customs, the inculcation of new ways of life, the active resistance to those pressures, as well as the effort to adapt to them – as an irrevocable disruption. Indigenous peoples know, however, that those pressures, that 'tide' of history, is neither inexorable nor neutral, nor is it indifferent to the subjects it effects. Indigenous people know that they were subjected to these manifold pressures to change because of who they were. The 'tide of history' is a persuasive metaphor that both obscures and explains away the effects of colonization.

*Mabo no. 2* and the subsequent Native Title Act (1993) reversed over one hundred years of legal reasoning based on the idea that at the time of settlement the Indigenous people did not own but merely resided on or wandered over the land. Although finally recognizing the existence and survival of distinct Indigenous societies with their own native title (in some circumstances), the High Court in *Mabo no. 2* did not rule on the question of Indigenous sovereignty. The Court was solely concerned with the rights of those Indigenous individuals and their societies to particular lands at the time that sovereignty was asserted by the British Crown. The Court expressly avoided the question of whether those societies possessed or exercised a sovereignty of their own, and whether that sov-

ereignty was wrongfully denied, or voluntarily subjected to the Crown or later Australian governments.

Some Indigenous writers have raised doubts as to whether the Western concept of sovereignty is an appropriate concept for Indigenous communities seeking their own path to self-determination.<sup>3</sup> The concept of sovereignty developed in the context of European imperial and colonial expansion, and it was one of the key concepts used by Europeans in the dispossession and subjection of Indigenous peoples to European rule. Its invocation in campaigns for Indigenous self-determination means that many Indigenous people may only give it an equivocal support.

Nonetheless, even a partial recognition of Indigenous sovereignty raises the prospect of negotiating political settlements between Indigenous communities and non-Indigenous governments. In Australia, a nation founded on the consistent denial of any Indigenous sovereignty, this recognition is long overdue. To claim Indigenous sovereignty is not simply to claim an independent political existence (though it could mean that), rather it is to claim a sovereignty that encompasses the claims of Indigenous people to a substantive recognition of their collective identities. The understanding of Indigenous sovereignty must be founded on the recognition that Indigenous collective identities have survived contact and colonization, and that their future development should lie in Indigenous people's hands.<sup>4</sup> Acknowledging Indigenous sovereignty thus means recognizing more than the political motivation of Indigenous people for greater control over their own affairs. It means that an acceptance needs to be made by the 'sovereign' authorities that the collective *identities* of Indigenous people represent an essential part of this nation's constitutional foundation.<sup>5</sup>

The denial of that recognition constitutes the key feature of what I have called in this book the 'empire of political thought'. The empire of political thought in Australia amounted to the assimilation of Indigenous peoples within a disrespectful and demeaning language of political and policy communication. While the empire of political thought in Australia consisted in a particular kind of recognition of Indigenous peoples within the Eurocentric terms of 'savagery and civilization', other forms of recognition have been possible. This is the aspiration I referred to in the Introduction to this book in shifting political discourse from colonial representations of Indigenous people (recognition as familiarity), towards recognizing Indigenous representations of themselves (recognition as acceptance). In Chapter 3, for instance, I examined the possibilities for Indigenous self-representations to be articulated in the process of treaty negotiations in colonial North America. I argued here that these possibilities were strictly limited, and were undermined by the persistence of colonial representations of Indigenous 'subjection'. Nonetheless, these treaty negotiations provided a platform to contest those colonial representations, and to negotiate some kind of

partnership in sovereignty. Most importantly, they established a tradition of some kind of recognition (as acceptance) by the colonists of Indigenous aims and aspirations. Often belittled, maligned and obviated by colonists and colonial authorities at the time, they served nonetheless as a promise to the future, when a comparatively greater acceptance has allowed a greater delivery on some of those promises.

In Australia, even this partial recognition of Indigenous aims and aspirations was absent, and throughout the early colonial period the dominant representation of Indigenous peoples was framed by the familiar terms of European 'savagery'. Today, the echoes of this old colonial representation may not yet have faded from Australian public discourse. One of the most striking echoes came in the 1998 *Yorta Yorta* Native Title case. Although this was a case about determining a land claim, the Federal Court's finding (confirmed by the High Court in 2002)<sup>6</sup> hinged on a view of Indigenous people as entirely subject to the sovereignty of the Australian state, and wholly unable to claim their own sovereignty. Following the Native Title Act, the Court decided that the validity of the *Yorta Yorta* Native Title claim rested on the degree to which they manifested a continued observance of 'traditional' and 'customary' practices on the land, that is, practices that predated extensive white colonization in the area in the early nineteenth century.<sup>7</sup> In determining what the 'traditional' and 'customary' Indigenous practices were, the Court chose to privilege written colonial sources over the oral testimony of the *Yorta Yorta* themselves. In doing so, the Court effectively accepted the reliability of the objectifying knowledge of Indigenous peoples developed from the standpoint of colonial authority by white pastoralists such as E. M. Curr.

Curr was an amateur ethnographer whose views of the *Yorta Yorta*'s predecessors (a people he called the *Bangerang*) were shaped both by his belief in their 'savagery', and by his own material interests in obviating genuine recognition of Indigenous rights to the land.<sup>8</sup> He wrote of a people he regarded as 'interesting' but fast disappearing, affording him the pleasure of 'rambles in unoccupied country.'<sup>9</sup> He also wrote on what he thought to be an absence of government among the *Bangerang*. Curr's views on this issue were accorded considerable prominence by the Federal Court, for the simple reason that they were taken as proof of the centrality of customary and traditional observances. As Curr put it,

Among the *Bangerang* there was not, as far as could be observed, anything resembling government; nor was any authority, outside of the family circle, existent. Within the family the father was absolute ... The adult male of the *Bangerang* recognised no authority in anyone, under any circumstances, though he was thoroughly submissive to custom.<sup>10</sup>

In his later *The Australian Race*, Curr wrote expressly to correct (quite emphatically) what he took to be the errors of other European authorities on Indigenous Australians. Here he provided more detail to the image of Indigenous life wrapped in the obscurity of immemorial custom in contrast to the freedom of European life,

The idea is a common one, that savage life is an existence akin in its unrestraint to that of the wild beast of the forest ... The Englishman, noting in the savage the absence of the manacles which civilization imposes, fancies that none other exist, and that the savage is a free man. Persons who have looked below the surface, however, are aware that the Australian savage, though absolutely untrammelled in some respects, is nevertheless, on the whole, much less free ... than the Englishman or Frenchman.<sup>11</sup>

Moreover, there was no such thing as a 'national life' among Indigenous Australians, '... failing even to reach the earlier stage of clan life ... [they] existed to the end in tribes ... destitute of any formal governing principle'.<sup>12</sup> The tribes of Indigenous people, he claimed, held 'together in a way quite distinct from European society' by being maintained not through the rational deliberations of government, but the 'impersonal', 'hidden' and 'constraining' power of 'education' in the rigid customs and traditions of the tribe, to which the individual tribal member totally submitted.<sup>13</sup>

Sentiments such as these have played a prominent part in the European, colonial discourse on Indigenous people in Australia. The crucial assumption made by the Court, however, was that colonization represented an irreparable alteration of 'traditional' and 'customary' Indigenous observances. This colonial attitude towards the interruption of Indigenous tradition meant that Indigenous people were effectively denied agency in shaping and adapting their communities and cultures to new circumstances. Indigenous communities and culture were perceived as forever locked into unalterable archaic custom, and any changes to those customs were the necessary effect of 'superior civilization' and therefore exogenous to those communities. Change was perceived as the preserve of 'civilized' societies engaged in the rational pursuit of progress. Colonial attitudes towards Indigenous peoples, cultures and customs were reflected in assumptions that their existence throughout time could be captured at the moment of colonial observation. The assumption was that Indigenous communities and customs must always have been as they appeared when first 'seen', their persistence over time merely due to having been left alone, rather than acknowledging their own processes of social, political and cultural development.<sup>14</sup> As far as the Court was concerned, the claimants had no other way of demonstrating their 'acknowledgement' or 'observance' of tradition than by living exactly as Curr had depicted them. Having had their lifestyles changed by living on missions and reserves in the meantime, a process that the Court blankly referred to

as happening by 'force of circumstances', the Yorta Yorta were told that they had renounced forever their once valid title.<sup>15</sup>

### Reconciliation and Indigenous Sovereignty

The image of Indigenous Australians that emerged from the *Yorta Yorta* case is emblematic of the salience of the legacies of colonial representations of Indigenous subjection. In these representations, Indigenous people were thought 'subject' to the supposed immemorial despotism of custom, 'subject' to the intervention of colonization to which they were deemed unable to respond in their own terms, and 'subject' also to superior colonial knowledge and government. This image also echoed in the policies of the former Federal (Liberal-National) Government under Prime Minister John Howard. In the last months of the Howard Government in 2007, a startling initiative was launched, apparently in response to horrific stories of women and children in Indigenous communities being subjected to domestic violence, sexual and child abuse.<sup>16</sup> Many of these communities have become dysfunctional, due to the inter-generational demoralization of unemployment, alcoholism, welfare dependence and drug abuse. The solution favoured by the Howard Government was to launch a 'neocolonialist' police intervention (backed by military personnel) in these communities in the Northern Territory under the title of a 'National Emergency'.<sup>17</sup> The intervention was carried out with the aim of 'stabilizing' and 'normalizing' social conditions in these communities.<sup>18</sup> The scope of the intervention, however, involved bypassing local community decision-making bodies, and even included suspending the collective ownership of community lands, and encouraging greater levels of individual land and home ownership by community members (though there is no link between child abuse and collective land ownership). The intervention was the boldest in a long line of 'top-down' programmes imposed on Indigenous communities which effectively penalized them for poverty, dysfunction, persistent disadvantage and demoralization that were themselves the inevitable products of over two hundred years of colonial government. 'Normalizing' and 'mainstreaming' means enforcing another standard of 'normal' derived from non-Indigenous society, often with little or none of the funding, planning and support required even to bring the delivery of health, housing and educational service delivery up to any 'normal' standard.<sup>19</sup> The burden of these initiatives is that they simply reimpose the old 'trajectory of civilization', by which Indigenous people are represented as needing to conform more closely to Western notions of property ownership, orderliness and good government.<sup>20</sup>

As I write these lines, on the eve of the new Federal (Labor) Government's apology to the 'Stolen Generations' of Indigenous people removed (many by force) from their families as children, the future of the intervention seems

unclear. Significantly, the new Federal Government has pledged itself to revive the national campaign for reconciliation between Indigenous and non-Indigenous Australians. In seeking to revive reconciliation, however, the new Federal Government must confront the legacies of colonial discourse implied in the very term 'reconciliation' itself.<sup>21</sup> Originally, the campaign for reconciliation aimed to improve the relationship between Indigenous and non-Indigenous Australians by seeking greater 'national unity', achieving social justice for Indigenous people, and overcoming Indigenous disadvantage.<sup>22</sup> In framing this task as one of national 'reconciliation' the assumption was made that the national unity had been disturbed, and that both parties had to be brought back into a better agreement.<sup>23</sup> The call for reconciliation is above all a call for a political settlement. As the Indigenous leader Patrick Dodson defined it,

The reconciliation process gave Australia a doorway to a political settlement approach on how the modern Australian state could recognize the traditional ownership status of Indigenous people and unravel the historical layers of colonial legacy that continue to determine contemporary relationships between Indigenous communities and Australian governments and other institutions.<sup>24</sup>

The 'moral force' of the reconciliation movement rests on the 'acknowledgement' by non-Indigenous peoples that they bear a 'collective responsibility' to correct the 'wrongs committed by their political ancestors.'<sup>25</sup>

The former Howard Government always insisted that current generations of Australians should not feel responsible for or bound by the 'wrongs of the past'. Their position went hand in hand with a tragic affirmation of a euphemistic view of history. The euphemism the former Prime Minister invoked was that the so-called 'black arm-band' history of colonial violence against and degradation of Indigenous people should be replaced by a more 'balanced' history that properly celebrated Australian achievements. Yet, if Australia's colonization after 1788 is to be construed as an achievement, it can only be seen as having been founded on a very great wrong yet to be corrected. That wrong is the denial of any Indigenous sovereignty and the refusal to negotiate a treaty or treaties with Indigenous Australians. Mary Heath and I have argued elsewhere that this national failure was expressed by another euphemism employed by the Federal Court in the 1998 *Yorta Yorta* case, that 'force of circumstances' had irrevocably changed Indigenous society, culture and lifestyles.<sup>26</sup> The phrase, 'force of circumstances' mirrors the use made elsewhere in the finding of Justice Brennan's reference in the *Mabo* case to the 'tide of history' washing away native title. By referring to 'force of circumstances', the Federal Court in *Yorta Yorta* signalled its intention to avoid any kind of enquiry oriented towards 'righting the wrongs of the past'. This, however, is precisely the aim of the movement for reconciliation, and indeed the expressed intention of Prime Minister Rudd's apology given

to the Stolen Generations and other Indigenous Australians at the momentous opening of Australia's 42nd Parliament.

The national apology dramatically affirmed to all Australians that addressing contemporary Indigenous disadvantage, demoralization and social disintegration is invariably connected to 'righting the wrongs of the past'. It is simply impossible to understand the problems that Indigenous communities face today in isolation from their experience of our colonial past. Whatever policy initiatives may be proposed for dealing with those problems, they must be based on an understanding of Australia's colonial past and its many legacies in the present. This, however, is the challenge that lies before the reconciliation movement. Rowse argues that the rhetoric of reconciliation is caught between the aspirations of 'colonial liberalism', which envisages equal citizenship premised on Indigenous assimilation to 'mainstream' (white) society, and an emergent 'post-colonial liberalism' based on affirmations of Indigenous difference, special rights and a frank acknowledgement of Australia's history of invasion.<sup>27</sup> If this understanding of the past is to inform the drive to reconciliation, it invites us to look again and reconsider the language of 1788.

Governor Phillip's 'Instructions' enjoined him to pursue a policy of 'conciliation' in 1788. As I have argued in previous chapters, this policy never entailed the negotiation of a political compact, treaty or series of treaties. Rather, conciliation appears to have involved the effort to secure acquiescence to settlement and colonization through the provision of a vacuous legal protection. At least initially, this provision does not seem to have been intended as any more than a desire to circumvent Indigenous hostility. Phillip's admission of the failure of conciliation merely made it the first in a long line of colonial policy failures which was to include policies of victualling, child removal and reservation; protection, welfare and assimilation. The problems raised by its failure, however, were correctly identified by Governor Phillip himself when he noted that he had been unable to find any means to effect the Indigenous peoples' 'voluntary subjection' to colonial rule. In saying so, he made it quite clear that the Indigenous peoples had not 'voluntarily' consented to be governed by colonial authorities. The implication of his words was that if voluntary subjection were unattainable, then an involuntary subjection would have to be sought. As subsequent developments illustrated, colonial government of Indigenous people was premised on this involuntary subjection.

It could well be argued that the 1967 Referendum, which has been interpreted as the overdue formal recognition of equal Indigenous Australian citizenship, constituted an end to this 'involuntary subjection'. Yet, the denial of Indigenous sovereignty remains, and despite the hard-fought advance won by the 1967 Referendum, Indigenous communities lack any national representative body. It might also be argued that notwithstanding that, there is a *de facto* rec-

ognition by the Australian Commonwealth of an 'Indigenous jurisdiction'. That jurisdiction could be said to rest on the recognition enshrined in the census of the self-identification of Indigeneity, the recognition of the survival of customary law, the recognition of Native Title, and the recognition of the capacity for self-government supported by government funding.<sup>28</sup> As real as these forms of recognition are, however, they do not constitute recognition of Indigenous sovereignty.<sup>29</sup> Indeed, the key question to actors within an Indigenous jurisdiction without Indigenous sovereignty is the degree to which they are able to set the parameters for policy formulation, implementation and evaluation within that jurisdiction.

Denials of Indigenous sovereignty in Australia were accomplished by means of what I have called in this book, the 'empire of political thought'. The pervasive representation of Indigenous peoples in Australia was that they were 'savages', and hence were ungoverned, unsocial and property-less. This was made possible by the deployment in political and policy discourse of deeply entrenched concepts in Western political thought. Recognizing Indigenous sovereignty in contemporary Australia is one way of challenging the history and periodic recurrence of this kind of representation of Indigenous Australians. Resisting this recurrence and developing and articulating alternatives to it gives the call for Indigenous sovereignty a real significance. At the same time, calls for Indigenous sovereignty need to be based on an awareness of the colonial legacies of the concept of sovereignty. Although many of the central concepts in Western political thought have been deployed in sustaining colonial representations of Indigenous people, they have also been used to articulate critiques of them. Continuing debates over Indigenous sovereignty thus exemplify what I have called the 'dual-sidedness' of the language of Western political thought.

All claims for Indigenous sovereignty rest on the acceptance of the irreversibility of the colonial encounter. Indigenous sovereignty is not a pathway to a reversal of the legacies of colonization. Rather, Indigenous sovereignty is a concept that speaks of the need for an accommodation between Indigenous aspirations and the language of Western political thought. The unitary and indivisible notion of sovereignty, asserted in 1788, is founded on the denial of any such accommodation. It thereby sustains the assumption of an Indigenous 'subjection' effected in part by means of central concepts in Western political thought. Challenging that 'subjection' by seeking a new accommodation will mean fracturing that unitary sovereignty and encouraging the multiple Indigenous identities, voices and visions of Indigenous sovereignty to be recognized and accepted.<sup>30</sup> This is the possibility entailed in the process of reconciliation in Australia. It is a possibility that Indigenous and non-Indigenous Australians may forge a new understanding of one another based on a negotiated political accommodation between them. It is a possibility that our language of politi-



cal debate and communication may be divorced from the persistent colonial representation of Indigenous people. It is above all a possibility that Australia's citizens, Indigenous and non-Indigenous, may find new ways to conceptualize the nation and its future. Working to achieve this possibility will require a realistic appraisal of what is needed in the present and for the future. It will also require an awareness of the origins, limitations and potential of our language of public and political discourse. Only when this awareness is brought to bear on the question of reconciliation and Indigenous sovereignty might Australians pull themselves out of the 'tide of history'.

## NOTES

### Introduction

1. H. Merivale, 'Senior on *Political Economy*', *Edinburgh Review*, 66:133 (1837), pp. 73–102, on p. 87. On Merivale and his later influence on Indigenous administration, see D. McNab, 'Herman Merivale and Colonial Office Indian Policy in the Mid-Nineteenth Century', *Native Studies*, 1:2 (1981), pp. 277–302.
2. Merivale's argument here essentially mirrored the earlier use of 'savagery' by Malthus. See T. R. Malthus, *An Essay on the Principle of Population; or A View of its Past and Present Effects on Human Happiness; with an Inquiry into our Prospects respecting the Future Removal or Mitigation of the Evils which it Occasions* (1803), ed. P. James, 2nd edn, 2 vols (Cambridge: Cambridge University Press, 1989), vol. 1, pp. 25–9.
3. As a non-Indigenous person I do not claim here to speak for or on behalf of Indigenous peoples, nor do I seek to present a picture of the Indigenous reality behind the Eurocentric language. My aim is simply to trace the ways that Europeans assimilated Indigenous peoples and cultures into the structure of their own political thought. Throughout the book I refer to the original inhabitants of Australia as 'Indigenous peoples' or 'Indigenous Australians'. I retain the terms 'Aborigine' or 'Aboriginal' in quotes from or titles of other sources. Kuper argues that the term 'Indigenous' is merely a blind that sustains the 'return' of the idea of the 'primitive'. My decision to employ the term, however, follows the employment of that term by Indigenous Australians who articulate their own visions of 'Indigenous' sovereignty or 'Indigenous' identities. See the works listed in note 7, below. In speaking of 'Indigenous Australians', I follow the admirable convention established by the early colonial explorer Matthew Flinders, who considered the Indigenous inhabitants to be 'Australians'; indeed, the *first* Australians. A. Kuper, *The Reinvention of Primitive Society* (Abingdon: Taylor and Francis, 2005), pp. 205–17.
4. See for instance, D. Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); A. Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (New Haven, CT: Yale University Press, 1995).
5. J. G. A. Pocock, *The Discovery of Islands: Essays in British History* (Cambridge: Cambridge University Press, 2005), p. 233.
6. See, for example, A. Pagden, *Peoples and Empires: Europeans and the Rest of the World, from Antiquity to the Present* (London: Weidenfeld and Nicolson, 2001), p. 170. Here Pagden discusses the *Mabo* case and the legacy of *terra nullius* in Australia, erroneously

- declaring that the High Court overturned Australia's sovereignty over the Murray Islands and potentially the rest of the land mass also.
7. Part of the inspiration for this project lies in the efforts made by Indigenous scholars and activists to articulate their vision in ways that do not reduce their claims to European concepts and categories of thought. See, for example, R. A. Williams, *Linking Arms Together, American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997); P. Monture-Angus, *Journeying Forward: Dreaming Aboriginal People's Independence* (Annandale: Pluto Press, 2000); T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999); and L. Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003).
  8. There is a rich literature on the influence of ideas of 'savagery and civilization' in America. Among the earlier studies are R. H. Pearce, *Savagism and Civilization. A Study of the Indian and the American Mind* (1953; Berkeley, CA: University of California Press, 1988); R. F. Berkhofer, *The White Man's Indian. Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1978).
  9. *Mabo v. State of Queensland* (No 2) (1992) 175, Commonwealth Law Reports 1.
  10. This limitation was built into the later Native Title Act (1993) and its 1998 amendments.
  11. H. Reynolds, *The Law of the Land*, 2nd edn (Ringwood: Penguin, 1992). It is worth noting that, despite the assertion of Reynolds's influence, his *The Law of the Land* (originally published in 1987) was cited only 4 times in the over 92,000-word *Mabo* judgement. This included two citations by Justices Dean and Gaudron in their joint finding, and one citation each by Justice Toohey and Justice Dawson. Recent critiques of Reynolds include the revisionist Michael Connor's *The Invention of Terra Nullius* (Sydney: Macleay Press, 2005); and Bain Attwood's, 'The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society', *History Compass*, 2 (2004), pp. 1–30.
  12. Here I take issue with Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia', *Law and History Review*, 23:1 (2005), pp. 95–131.
  13. See, for example, H. Liebersohn, *Aristocratic Encounters. European Travellers and North American Indians* (Cambridge: Cambridge University Press, 1998), pp. 26–38; T. Ellingson, *The Myth of the Noble Savage* (Berkeley, CA: University of California Press, 2001).
  14. On the difficulties of using Western concepts to express Indigenous visions, see I. Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius', *Borderlands eJournal*, 1:2 (2002), <[http://www.borderlandsejournal.adelaide.edu.au/vol1no2\\_2002/watson\\_laws.html](http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html)> [accessed 9 March 2003]; L. Behrendt, 'Power from the People: A Community-Based Approach to Indigenous Self-Determination', *Flinders Journal of Law Reform*, 6 (2003), pp. 135–50; M. Heath, 'The Feral State: A Feminist Critique of the Gendered and Colonialist Theoretical Premises of "the State"' (PhD dissertation, Flinders University, 2003). See also A. Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, 2nd edn (Auckland: Oxford University Press, 1997), pp. 57–8.
  15. K. Windschuttle, *The Fabrication of Aboriginal History, Volume 1, Van Diemen's Land 1803–1847* (Sydney: McLeay Press, 2002), p. 32, also p 186.
  16. *Ibid.*, pp. 186. As Finnane has argued, Windschuttle's invocation of this understanding of civilization is motivated by his desire to paint British colonization of Australia as relatively 'peaceful' rather than a violent conquest. Finnane further explores Windschuttle's

- questionable use of mortality figures. M. Finnane, 'Counting the Cost of the "Nun's Picnic"', in R. Manne (ed.), *White Wash: On Keith Windschuttle's Fabrication of Aboriginal History* (Melbourne: Black Inc, 2003), pp. 299–310.
17. M. Krygier and R. van Krieken, 'The Character of the Nation', in Manne (ed.), *White Wash*, pp. 92–3.
  18. Elbourne, for example, traces the ambivalence in the public discourse over the vices and virtues of the settlers during the Select Committee on Aborigines in 1837. E. Elbourne, 'The Sin of the Settler: The 1835–6 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire', *Journal of Colonialism and Colonial History*, 4:3 (2003), <[http://muse.jhu.edu/journals/journal\\_of\\_colonialism\\_and\\_colonial\\_history/v004/4.3elbourne.html](http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v004/4.3elbourne.html)> [accessed 15 April 2004]. Others have emphasized part of this dual-sidedness in tracing the ways that the language of civilization was employed in the effort to construct the image of 'savagery' but also of 'Britishness'. See, for example, C. Hall, *Civilising Subjects: Colony and Metropole in the English Imagination, 1830–1867* (Chicago, IL: University of Chicago Press, 2002); M. Lake, 'History and the Nation', in Manne (ed.), *White Wash*, pp. 160–73, on pp. 170–1.
  19. C. Rawson, *God, Gulliver and Genocide. Barbarism and the European Imagination, 1492–1945* (Oxford: Oxford University Press, 2001). Some revisionists have argued that 'Eurocentrism' is an anachronistic charge that does not actually explain what Europeans were doing or how they thought. Stephen Buckle, for instance, has argued that John Locke's work should be read in terms of the projection of 'an ideal' he used to 'measure' both European and Amerindian political institutions'. S. Buckle, 'Tully, Locke and America', *British Journal for the History of Philosophy*, 9:2 (2001), pp. 245–81, on p. 255. This claim completely fails to grasp the way in which Locke articulates his claims in *The Two Treatises* and elsewhere in terms of an account of historical (social, political and economic) progress or development which he explicitly derived from European experience. This issue will be discussed further in the following chapter.
  20. H. Reynolds, 'Terra Nullius Reborn', in Manne (ed.), *White Wash*, pp. 109–38.
  21. S. Lindqvist, *Terra Nullius. A Journey through No One's Land*, trans. S. Death (New York: New Press, 2007); Banner, 'Why Terra Nullius?'; P. Havemann, 'Denial, Modernity and Exclusion: Indigenous Placelessness in Australia', *Macquarie Law Journal*, 5 (2005), pp. 57–80; A. Pagden, 'Fellow Citizens and Imperial Subjects: Conquest and Sovereignty in Europe's Overseas Empires', *History and Theory*, 44 (2005), pp. 28–46, on p. 42; J. Samson, 'British Voices and Indigenous Rights: Debating Aboriginal Legal Status in Nineteenth-Century Australia and Canada', *Cultures of the Commonwealth*, 2 (1996–7), pp. 5–16, on p. 8; J. Mulvaney and J. Kamminga, *Prehistory of Australia* (St Leonard's: Allen and Unwin, 1999), p. 79. The view that *terra nullius* somehow set Australia apart from other colonial contexts can be found as far back as Ernest Scott's pioneering essay 'Taking Possession of Australia – The Doctrine of 'Terra Nullius' (No Man's Land)', *Royal Australian Historical Society Journal and Proceedings*, 26:1 (1940), pp. 1–19.
  22. A. Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995), pp. 16, 14; A. G. L. Shaw, 'British Policy towards the Australian Aborigines, 1830–1850', *Australian Historical Studies*, 25:99 (1992), pp. 265–85, on p. 266; P. Karsten, *Between Law and Custom. 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600–1900* (Cambridge: Cambridge University Press, 2002), pp. 61–3.

23. King refers to the early colonial overlooking of Indigenous rights in Australia, compared to the limited recognition accorded by the Royal Proclamation in Canada in 1763, as a 'blind spot' in British thinking. R. J. King, 'Terra Australis: Terra Nullius aut Terra Aboriginum', *Royal Australian Historical Society Journal*, 72:2 (1987), pp. 75–91, on p. 89.
24. The doctrine of *terra nullius* was formally applied in Australian law only in the nineteenth century. See, for example, Bruce Kercher's *Unruly Child: A History of Law in Australia* (St Leonard's: Allen and Unwin, 1995), pp. 4–5, 18–20; M. Borch, 'Rethinking the Origins of *Terra Nullius*', *Australian Historical Studies*, 32:117 (2001), pp. 222–39.
25. A. Davidson, *From Subject to Citizen* (Cambridge: Cambridge University Press, 1997), p. 189. The issue of the legal status of Australia's Indigenous people seems to be a matter of some doubt. According to Andrew Armitage, the Aborigines were 'not British subjects and, hence, were excluded from citizenship rights'. Armitage, *Comparing the Policy of Aboriginal Assimilation*, p. 22. It is certainly the case that Australian Aborigines were long excluded from 'citizenship rights', but it is not because they were or were not regarded as 'British subjects'. B. Kercher, 'Native Title in the Shadows: The Origins of the Myth of *Terra Nullius* in Early New South Wales Courts', in G. Blue, M. Bunton and R. Crozier (eds), *Colonialism and the Modern World: Selected Studies* (Armonk: M. E. Sharpe, 2002), pp. 100–17. Kercher in fact argues that the application of *terra nullius* in Australia should be traced to *R. v. Murrell* in 1836.
26. P. J. Marshall argues in contrast that citizenship status in Britain and the Empire remained largely unclear until the mid-twentieth century. P. J. Marshall, *'A Free Though Conquering People': Eighteenth-Century Britain and its Empire* (Aldershot: Ashgate, 2003), p. 14. See also, M. Philp, 'English Republicanism in the 1790s', *Journal of Political Philosophy*, 6:3 (1998), pp. 235–62; G. Claeys, 'The Origins of the Rights of Labor: Republicanism, Commerce, and the Construction of Modern Social Theory in Britain, 1796–1805', *Journal of Modern History*, 66:2 (1994), pp. 249–90. Chapters 3 and 4 will explore the question of the legal status of Australia's Indigenous people.
27. A. Frost, "Far More Happier than we Europeans": Reactions to the Australian Aborigines on Cook's Voyage', *Historical Studies*, 19:74–7 (1980–1), pp. 513–23, on p. 522. Jonathan Lamb has also argued that the British saw Indigenous Australians as 'propertyless innocents living in a state of nature' and thus were able to 'declare the land *terra nullius*'. J. Lamb, 'Coming to Terms with What Isn't There: Early Narratives of New Holland', *Eighteenth-Century Life*, 26:1 (2002), pp. 147–55, on p. 149.
28. P. D. Curtin, *The Image of Africa: British Ideas and Action, 1780–1850* (Madison, WI: University of Wisconsin Press, 1964), pp. vii–viii.
29. E. W. Said, *Culture and Imperialism* (London: Vintage, 1993), p. 8.
30. *Ibid.*, p. 40.
31. Two of the more significant recent studies include J. Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ: Princeton University Press, 2005); and S. Muthu, *Enlightenment against Empire* (Princeton, NJ: Princeton University Press, 2003).
32. Millar, for instance, tried to condense the literature of what may be called 'New World ethnography' into a conceptual scheme of social and political development, while Ferguson was concerned by the ethical problems brought about by processes of civilization and by contact between 'civilized' and 'less civilized' peoples.
33. R. A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), p. 50.

34. Armitage, *The Ideological Origins of the British Empire*, p. 5. See also A. Fitzmaurice, *Humanism and America: An Intellectual History of English Colonization, 1500–1625* (Cambridge: Cambridge University Press, 2003).
35. Pagden, *Lords of all the World*, p. 5.
36. *Ibid.*, pp. 9–10. See also Kiernan's discussion of the range of opinion on the 'civilizing' mission as a justification for conquest and rule. V. G. Kiernan, *Imperialism and its Contradictions*, ed. H. J. Kaye (New York: Routledge, 1995), pp. 101–6.
37. P. J. Marshall, and G. Williams, *The Great Map of Mankind: British Perceptions of the World in the Age of Enlightenment* (London: Dent, 1982), p. 303.
38. The 'practical' and utilitarian rather than 'theoretical' interpretation of Australian history was emphasized in W. K. Hancock's *Australia* (1930; Brisbane: Jacaranda Press, 1961). Subsequent writers have also tended to emphasize the 'practical' and 'utilitarian' aspects of Australian history. See, H. Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society', in S. Graubard (ed.), *Australia: The Daedalus Symposium* (Sydney: Angus and Robertson, 1985), pp. 147–69. For an alternative view, see M. Sawer, *The Ethical State: Social Liberalism in Australia* (Melbourne: Melbourne University Press, 2003).
39. Sawer, *The Ethical State*, pp. 31–3.
40. Some Australian scholars have sought to trace the impact of European thought in the Australian colonial experience, notably Russell McGregor in *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne: Melbourne University Press, 1997); and Alan Atkinson in *The Europeans in Australia: A History, Volume I* (Melbourne: Oxford University Press, 1997). Neither, however, is explicitly addressed to European political thought. For examples of recent Canadian and New Zealand legal or political theorists addressing this issue, see J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), pp. 137–76; B. Arneil, *John Locke and America* (Oxford: Clarendon Press, 1996), pp. 115–17; D. Ivison, 'Locke, Liberalism and Empire', in P. R. Anstey (ed.), *The Philosophy of John Locke: New Perspectives* (London: Routledge, 2003), pp. 86–105; J. G. A. Pocock, 'Nature and History, Self and Other: European Perceptions of World History in the Age of Encounter', in A. Calder, J. Lamb and B. Orr (eds), *Voyages and Beaches: Pacific Encounters, 1769–1840* (Honolulu: University of Hawai'i Press, 1999), pp. 25–44; P. G. McHugh, 'A Tribal Encounter: The Presence and Properties of Common-Law Language in the Discourse of Colonization in the Early Modern Period', in Calder et al. (eds), *Voyages and Beaches*, pp. 114–31; 114–31; M. Hickford, "Decidedly the Most Interesting Savages on the Globe": An Approach to the Intellectual History of Maori Property Rights, 1837–53', *History of Political Thought*, 27:1 (2006), pp. 122–67.
41. According to C. A. Bayly, the primacy of commitments to private property in Western liberal political thought offered a powerful rationale for the 'exclusion' of Indigenous, nomadic peoples from the sphere of constitutional rights. C. A. Bayly, *The Birth of the Modern World, 1780–1914; Global Connections and Comparisons* (Oxford: Blackwell, 2004), p. 299.
42. I. M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990). This and the following quotations are taken from pp. 99–101. See also A. Phillips, *Democracy and Difference* (University Park, PA: Pennsylvania State University Press, 1993), p. 62.
43. The typical example of this kind of liberalism was provided by John Rawls's *A Theory of Justice* (Oxford: Oxford University Press, 1977). The 'politics of difference' Young

- endorsed was based on the vision of a participatory democratic polity in which differences are recognized as an ontological reality, and equal recognition of all groups is celebrated as an ongoing political aspiration. Young, *Justice, and the Politics of Difference*, p. 228; I. M. Young *Inclusion and Democracy* (Oxford: Oxford University Press, 2002), pp. 103–4.
44. John Gray in particular was edging his way towards an ‘agonistic liberalism’ inspired by the work of Berlin. Gray’s arguments are redolent of the fears of incessant conflict which shaped the development of liberalism in the wake of the religious wars in early modern Europe. See J. Gray, *Two Faces of Liberalism* (Cambridge: Polity, 2002). Solutions to endemic conflict in early modern thought revolved around the need for a wider confessional toleration based, as Grotius argued, on an agreed doctrinal minimum, or, as Althusius and later Hobbes argued, on the need to establish a secular, state control of religious matters. H. Grotius, *Meletius, Sive, de iis Quae Inter Christianos Conveniunt Epistola* (1611), trans. G. H. M Posthumus Meyjes (Leiden: E. J. Brill, 1988); J. Althusius, *The Politics of Johannes Althusius* (1614), trans. F. S. Carney (Boston, MA: Beacon Press, 1964); and T. Hobbes, *Leviathan* (1651; Harmondsworth: Penguin, 1968). On liberalism and fear, see B. Buchan, ‘Liberalism and Fear of Violence’, *Critical Review of International Social and Political Philosophy*, 4:3 (2001), pp. 27–48.
  45. C. Kukathas, ‘Liberalism, Multiculturalism and Oppression’, in A. Vincent (ed.), *Political Theory: Tradition and Diversity* (Cambridge: Cambridge University Press, 1997), pp. 132–53, on p. 135.
  46. W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), pp. 50, 75, 75–6, 82.
  47. *Ibid.*, pp. 116–20, 152, 167, 188, 191–2.
  48. Young in particular criticized Kymlicka’s distinction between the recognition due to ‘societal cultures’ as nations, and the expectation that smaller, less diverse and less institutionally differentiated ‘ethnic minorities’ ‘integrate into the larger nation’. I. M. Young, ‘A Multicultural Continuum: A Critique of Will Kymlicka’s Ethnic-Nation Dichotomy’, *Constellations*, 4:1 (1997), pp. 48–53, on p. 51.
  49. Kymlicka, *Multicultural Citizenship*, pp. 54–5.
  50. A. Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1982), pp. 12, 10–14; A. Pagden, ‘Ius et Factum: Test and Experience in the Writings of Bartolome de Las Casas’, *Representations*, 33 (1991), pp. 147–62.
  51. D. Carey, *Locke, Shaftesbury, and Hutcheson: Contesting Diversity in the Enlightenment and Beyond* (Cambridge: Cambridge University Press, 2006), pp. 95, 193–9.
  52. J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), p. 37. Although originally defined in opposition to the claims of empire in Europe, these languages of modern constitutionalism were nonetheless employed in the legitimation of empire beyond Europe. On the basis of his critique, Tully articulated an alternative language of ‘contemporary constitutionalism’ that was ‘neither exclusively imperial nor exclusively European’. Tully’s ‘contemporary constitutionalism’ provides a compelling account of the possibilities for achieving a genuine and viable accommodation of cultural diversity based on mutual recognition and respect.
  53. *Ibid.*, pp. 15–16.
  54. Haida Gwaii is the name given by the Haida people of Queen Charlotte Islands off the west coast of Canada to their island home. *The Spirit of Haida Gwaii* is a massive 6 metre long and 4 metre high bronze cast sculpture by the late Bill Reid, a renowned Haida artist.

The sculpture itself consists of a canoe in which a central human chief figure, traditionally attired in Haida costume, is surrounded by a host of animal spirits and mythological figures who link past and present, animal and human worlds, and the two sides of Haida society, but who tussle and bicker with one another, threatening to overturn the canoe. The sculpture represents the fate of human communities on Haida Gwaii and elsewhere. Our future depends on acknowledging and living with our past, but it also depends on accommodating all those with whom we share this life. The ‘Spirit’ of *The Spirit of Haida Gwaii* is not necessarily one of tolerance, but one of acceptance of difference, and a willingness to flourish in and from difference.

55. Tully, *Strange Multiplicity*, p. 23.
56. Some have argued that the politics of recognition (of Indigenous cultural distinctiveness) merely reproduces the colonial subordination of Indigenous populations. G. S. Coulthard, ‘Subjects of Empire: Indigenous Peoples and the “Politics of Recognition” in Canada’, *Contemporary Political Theory*, 6:4 (2007), pp. 437–60.
57. C. Helliwell and B. Hindess, ‘The ‘Empire of Uniformity’ and the Government of Subject Peoples’, *Cultural Values*, 6:1–2 (2002), pp. 139–52.
58. T. D. Dubois, ‘Hegemony, Imperialism and the Construction of Religion in East and Southeast Asia’, *History and Theory*, 44 (2005), pp. 113–31, on p. 118.
59. Cooper has spoken of the need to see how Western political thought and colonial discourse developed around a recurrent tension between universality and difference, rather than a spurious either/or dichotomization. F. Cooper, *Colonialism in Question: Theory, Knowledge, History* (Berkeley, CA: University of California Press, 2005), pp. 20–31.
60. J. G. L. Lambton, Lord Durham, *Lord Durham’s Report on the Affairs of British North America*, ed. Sir C. P. Lucas (Oxford: Clarendon Press, 1912), pp. 288–9.
61. E. Burke, ‘Speech on Opening of Impeachment, 15, 16, 18, 19 February, 1788’, in *The Writings and Speeches of Edmund Burke, Volume VI, India: The Launching of the Hastings Impeachment 1786–1788*, ed. P. J. Marshall (Oxford: Clarendon Press, 1991), pp. 264–459, on p. 277.
62. The theme of ‘domesticating difference’ is explored by Penny Edwards in ‘On Home Ground: Settling Land and Domesticating Difference in the “Non-Settler” Colonies of Burma and Cambodia’, *Journal of Colonialism and Colonial History*, 4:3 (2003) <[http://muse.jhu.edu/journals/journal\\_of\\_colonialism\\_and\\_colonial\\_history/v004/4.3edwards.html](http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v004/4.3edwards.html)> [accessed 14 March 2004].
63. Ivison, ‘Locke, Liberalism and Empire’, pp. 91–3; B. Semmel, *The Liberal Ideal and the Demons of Empire: Theories of Imperialism from Adam Smith to Lenin* (Baltimore, MD: Johns Hopkins University Press, 1993).
64. This and the quotations below from B. Parekh, ‘Democracy and Cultural Pluralism, or How to Decolonize Liberalism’, Paper prepared for the European Consortium for Political Research Workshop on ‘Indices of Democratisation’, Leiden, 1993, pp. 20–33; B. Parekh, ‘Liberalism and Colonialism: A Critique of Locke and Mill’, in J. N. Pieterse and B. Parekh (eds), *The Decolonization of Imagination: Culture, Knowledge and Power* (London: Zed Books, 1995), pp. 81–98, on p. 89; M. L. Pratt, *Imperial Eyes: Travel Writing and Transculturation* (London: Routledge, 1992), p. 53.
65. B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, MA: Harvard University Press, 2000), p. 34; U. S. Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago, IL: University of Chi-



- cago Press, 1999), p. 12; E. P. Sullivan, 'Liberalism and Imperialism: J. S. Mill's Defence of the British Empire', *Journal of the History of Ideas*, 44:4 (1983), pp. 610–11.
66. James Mill, quoted in Mehta, *Liberalism and Empire*, p. 67.
  67. Mehta, *Liberalism and Empire*, p. 33.
  68. Muthu, *Enlightenment against Empire*, p. 279.
  69. Pitts, *A Turn to Empire*, p. 26.
  70. *Ibid.*, p. 127. Kohn and O'Neill persuasively argue that neither Burke nor Mill can so easily be cast as representatives of anti-imperial or pro-imperial positions. See M. Kohn and D. I. O'Neill, 'A Tale of Two Indias: Burke and Mill on Empire and Slavery in the West Indies and America', *Political Theory*, 34:2 (2006), pp. 192–228.
  71. P. G. McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), p. 49.
  72. See, for example, *ibid.*, pp. 102–3.
  73. Pagden, 'Fellow Citizens and Imperial Subjects', pp. 42–6.
  74. J. M. Headley, 'Geography and Empire in the Late Renaissance: Botero's Assignment, Western Universalism, and the Civilizing Process', *Renaissance Quarterly*, 53 (2000), pp. 1119–55, on p. 1121.
  75. Mehta, *Liberalism and Empire*, p. 25.
  76. Dubois, 'Hegemony, Imperialism and the Construction of Religion', p. 121; M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996), pp. 51, 82, 111–12; M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001).
  77. See, for example, A. Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle: Fremantle Arts Centre Press, 2000); T. Rowse, *White Flour, White Power: From Rations to Citizenship in Central Australia* (Cambridge: Cambridge University Press, 1998); R. Kidd, *The Way We Civilize: Aboriginal Affairs – The Untold Story* (St Lucia: University of Queensland Press, 1997); and B. Attwood *The Making of the Aborigines* (Sydney: Allen and Unwin, 1989).
  78. S. Macintyre, *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (Oxford: Oxford University Press, 1991), p. 211.

## 1 Savagery, Civilization and Political Thought

1. This chapter draws on an earlier paper, B. Buchan, 'The Empire of Political Thought: Civilization, Savagery and Perceptions of Indigenous Government', *History of the Human Sciences*, 18:2 (2005), pp. 1–22.
2. J. C. Beaglehole, 'Introduction', in J. Cook, *The Journals of Captain James Cook on His Voyages of Discovery*, ed. J. C. Beaglehole, 2 vols (Cambridge: Cambridge University Press, 1955), vol. 1: Voyage of the Endeavour 1768–1771, p. cclxxxiii.
3. 'Secret. Additional Instructions for Lt James Cook, Appointed to Command His Majesty's Bark the Endeavour', in Beaglehole, 'Introduction', p. cclxxxii.
4. P. H. Russell, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005), pp. 28, 55–6; G. Denning, 'Possessing Tahiti', in R. Borofsky (ed.), *Rememberance of Pacific Pasts* (Honolulu, HI: University of Hawai'i Press, 2000), pp. 112–32; G. Nettheim, "'The Consent of the Natives': Mabo and Indigenous Political Rights', *Sydney Law Review*, 15 (1993), pp. 223–46; Reynolds, *The Law of the Land*, pp. 51–4; N. L. Wallace-Bruce, 'Two Hundred

- Years On: A Reexamination of the Acquisition of Australia', *Georgia Journal of International and Comparative Law*, 19:1 (1989), pp. 87–116, on p. 102.
5. The term *terra nullius* is a vague piece of legal terminology derived originally from Roman law but not extensively used until the development of international law in the nineteenth century. The term itself could be applied in a number of different ways to refer to uninhabited territory, sparsely inhabited but ungoverned territory, territory inhabited by peoples with only 'rude and primitive' systems of polity, territory once inhabited by an owning and sovereign people but abandoned by them, or territory claimed by but only partially held by a sovereign power. See J. MacDonell, 'Occupation and 'Res Nullius', *Journal of the Society of Comparative Legislation*, 1:2 (1899), pp. 276–86, on p. 284.
  6. H. Reynolds, 'Sovereignty', in N. Peterson and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge: Cambridge University Press, 1998), pp. 208–15. See also D. Ivison, P. Patton and W. Saunders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).
  7. Windschuttle, *The Fabrication of Aboriginal History*, p. 186.
  8. I. Clendinnen, *Dancing with Strangers* (Melbourne: Text Publishing, 2003), p. 286.
  9. R. Dixon, *The Course of Empire: Neo-Classical Culture in New South Wales 1788–1860* (Melbourne: Oxford University Press, 1986), p. 24. Other historians have noted the use of concepts of civilization in Australia's early colonization, but have not focused exclusively on 'civilization and savagery'. J. Melleuish, 'Justifying Commerce: The Scottish Enlightenment Tradition in Colonial New South Wales', *Journal of the Royal Australian Historical Society*, 75:2 (1989), pp. 122–31; and L. Coltheart and P. Bridges, 'The Elephant's Bed? Scottish Enlightenment Ideas and the Foundations of New South Wales', *Journal of Australian Studies*, 68 (2001), pp. 19–33, 220–3; J. Gascoigne, *The Enlightenment and the Origins of European Australia* (Cambridge: Cambridge University Press, 2002), pp. 157–68.
  10. Bayly, *The Birth of the Modern World*, p. 434.
  11. D. Cannadine, *Ornamentalism: How the British saw their Empire* (London: Allen Lane, 2001), p. 8.
  12. *Ibid.*, p. 5.
  13. M. Metzloff, *England's Internal Colonies: Class, Capital and the Literature of Early Modern English Colonialism* (New York: Palgrave MacMillan, 2003), pp. 5–10; Rawson, *God, Gulliver and Genocide*, pp. 80–1; J. H. Ohlmeyer, "'Civilizing' of Those Rude Partes": Colonization Within Britain and Ireland, 1580's–1640's, and N. Canny, 'England's New World and the Old, 1480's–1630's', both in N. Canny (ed.), *The Oxford History of the British Empire: Volume I, The Origins of Empire* (Oxford: Oxford University Press, 1998), pp. 124–47, 148–69. See also *The Statutes of Iona 1609*, in W. C. Dickinson and G. Donaldson (eds), *A Sourcebook of Scottish History, Volume III, 1567–1707* (London: Thomas Nelson, 1954), pp. 265–70; 'A Deputy's Instructions, 1530', in E. Curtis and R. B. McDowell (eds), *Irish Historical Documents 1172–1922* (London: Methuen, 1943), pp. 78–80. E. Spencer, *A View of the State of Ireland* (1633), ed. A. Hadfield and W. Maley (Oxford: Blackwell, 1997), pp. 20–1; Sir J. Davies, *Historical Relations: or, A Discovery of the True Causes why Ireland was Never Entirely Subdued nor Brought Under Obedience of the Crown of England* (Dublin, 1664); A. MacInnes, 'Crown, Clans and the Fine: the "Civilizing" of Scottish Gaeldom, 1587–1638', *Northern Scotland*, 13 (1993), pp. 31–55; N. Canny, *The Elizabethan Conquest of Ireland: A Pattern Established 1565–76* (Hassocks: Harvester Press, 1976), pp. 125–8. Williamson perceptively explores the

- tensions and themes in Scottish efforts to conceptualize their own civilization in the sixteenth century, A. H. Williamson, 'Scots, Indians and Empire: The Scottish Politics of Civilization 1519–1609', *Past and Present*, 150 (1996), pp. 46–83.
14. E. Benveniste, *Problems in General Linguistics*, trans. M. E. Meek (Coral Gables, FL: University of Miami Press, 1971), pp. 293–6; A. Pagden, *European Encounters with the New World: From Renaissance to Romanticism* (New Haven, CT: Yale University Press, 1993), pp. 117, 153–5, 160–5.
  15. J. Starobinski, *Blessings in Disguise: or, The Morality of Evil*, trans. A. Goldhammer (Cambridge, MA: Harvard University Press, 1993), p. 3.
  16. A. Pagden, 'The "Defence of Civilization" in Eighteenth-Century Social Theory', *History of the Human Sciences*, 1:1 (1998), pp. 33–45; C. A. Bayly, 'The British and Indigenous Peoples, 1760–1860: Power, Perception and Identity', in M. Daunton and R. Halpern (eds), *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (Philadelphia, PA: University of Pennsylvania Press, 1999), pp. 19–41, on pp. 20, 25, 27–9.
  17. L. Febvre, 'Civilization: Evolution of a Word and Group of Ideas', in P. Burke (ed.), *A New Kind of History from the Writings of Febvre*, trans. K. Folca (London: Routledge and Kegan Paul, 1973), pp. 223–5; Starobinski, *Blessings in Disguise*, pp. 14–15.
  18. N. Thomas, *Colonialism's Culture: Anthropology, Travel and Government* (Princeton, NJ: Princeton University Press, 1994), p. 14. Starobinski errs in arguing that Enlightenment writers used the word civilization to distinguish between themselves and a merely 'hypothetical primordial state' of human existence. As this volume contends, British and other political thinkers believed this condition to be anything but 'hypothetical'. Starobinski, *Blessings in Disguise*, p. 5.
  19. Armitage argues that the incorporation of America into British historical consciousness was crucial in sustaining this view. D. Armitage, 'The New World and British Historical Thought, from Richard Hakluyt to William Robertson', in K. O. Kupperman (ed.), *America in European Consciousness, 1493–1750* (Chapel Hill, NC: University of North Carolina Press, 1995), pp. 52–75, on p. 60.
  20. A. Pagden, 'Stoicism, Cosmopolitanism, and the Legacy of European Imperialism', *Constellations*, 7:1 (2000), pp. 3–22, on pp. 8–10; F. Vitoria, 'On the American Indians' (1539), in *Francisco de Vitoria, Political Writings*, ed. A. Pagden and J. Lawrence (Cambridge: Cambridge University Press, 1991), pp. 231–92, see q1, a2, pp. 240–3, also, pp. 278–80.
  21. See for example, H. Grotius, *The Law of War and Peace* (1625), trans. F. W. Kelsey (Indianapolis, IN: Bobbs-Merrill, 1925), book I, ch. 1, pp. 39, 43, ch. 2, p. 53; S. Pufendorf, *The Whole Duty of Man According to the Law of Nature*, trans. A. Tooke (1691), ed. I. Hunter and D. Saunders (Indianapolis, IN: Liberty Fund, 2003), pp. 55–6. R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), pp. 78–108; Pagden, *Lords of all the World*, pp. 66, 73–86; Pagden, 'Stoicism, Cosmopolitanism and the Legacy of European Imperialism', pp. 11–12.
  22. Grotius, *The Law of War and Peace*, book II, pp. 186–90. See also Pufendorf, *The Whole Duty of Man*, p. 129. J. Salter, 'Hugo Grotius: Property and Consent', *Political Theory*, 29:4 (2001), pp. 537–55, on pp. 544–5. According to Pagden, the crucial innovation of Grotius and later natural lawyers was to see human sociability (and hence the historical narrative about the development of civil societies) as originating in an 'act of will', whereas earlier natural lawyers saw human sociability as a natural attribute. A. Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', *Political Theory*, 31:2 (2003), pp.

- 171–99, on p. 180. See also Pocock, *The Discovery of Islands*, p. 204. Monod has also argued that the ‘subject’ of sovereignty was an individual whose conduct was disciplined not simply by the application of external force, but by internal, self-command. The sovereign individual thus became a microcosm of the sovereign state, exercising control over the passions just as states controlled their subjects. P. K. Monod, *The Power of Kings: Monarchy and Religion in Europe, 1589–1715* (New Haven, CT: Yale University Press, 1999), pp. 72–80.
23. Pococke, *The Discovery of Islands*, pp. 211–12.
  24. As Alexandrowicz points out, Grotius and others did recognize ‘societies in Asia’ as being ‘endowed with statehood and sovereignty’. C. H. Alexandrowicz, ‘Freitas versus Grotius’, in D. Armitage (ed.), *Theories of Empire, 1450–1800* (Aldershot: Ashgate Variorum, 1998), pp. 239–59, on p. 243. Waswo argues that the model for the historicized dismissal of Indigenous peoples was established in ancient Roman thought through the poet Virgil’s ‘fictional’ account of the founding of Rome. R. Waswo, ‘The Formation of Natural Law to Justify Colonialism, 1539–1689’, *New Literary History*, 27:4 (1996), pp. 743–59.
  25. Kupperman argues that European observers did acknowledge Indigenous forms of society and government. As I argue below, however, such acknowledgements were made within a framework of other assumptions. K. O. Kupperman, *Indians and English: Facing Off in Early America* (New York: Cornell University Press, 2000), pp. 43, 64, 75–6. Chaplin argues for a decisive shift towards a more dismissive attitude towards Indigenous Americans after 1650, mirroring the development of European scientific discourse. J. E. Chaplin, *Subject Matter: Technology, the Body, and Science on the Anglo-American Frontier, 1500–1676* (Cambridge, MA: Harvard University Press, 2001), pp. 235–7, 316–22.
  26. P. L. Barbour (ed.), *The Jamestown Voyages under the First Charter 1606–1609*, 2 vols (Cambridge: Hakluyt Society, 1969), vol. 1, pp. 25–6.
  27. *Ibid.*, p. 43.
  28. S. Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes* (1625), 20 vols (Glasgow: James MacLehose and Sons, 1906), vol. 19, p. 224.
  29. *Ibid.*, vol. 19, p. 228. Purchas’s source here was probably Captain John Smith, whose farcical account of Powhatan’s ‘voluntary subjection’ and what it tells us about European notions of property is explored further in Chapter 2.
  30. *Ibid.*, vol. 19, p. 231. Captain John Smith certainly considered Powhatan a king with his own ‘sub-kings’, but, significantly, their power was said to reside in ‘custom’. Neither he ‘nor any of his people understand any letters whereby to write or read, only the lawes whereby he ruleth is custome. Yet when he listeth his will is a law and must be obeyed: not only as a king but as halfe a God they esteeme him. His inferior kings whom they cal werowances are tyed to rule by customes, and have power o life and death ... But this word Werowance which we call ... for a king, is a common worde whereby they call all commanders: for they have but fewe wordes in their language, and but fewe occasions to use anie officers more than one commander ...’ Captain John Smith, *A Map of Virginia* (1612), in Barbour (ed.), *The Jamestown Voyages*, vol. 2, pp. 321–482, on p. 371. See also P. Vincent, *A True Relation of the Late Battell fought in New England, between the English and the Salvages* (London: Nathanael Butter, 1637), pp. 4–11.
  31. Purchas, *Hakluytus Posthumus*, vol. 19, p. 238. On similar French dismissals of Indian ‘society’, see C. Jaenen, ‘French Attitudes towards Native Society’, in C. M. Judd and

- A. J. Ray (eds), *Old Trails and New Directions: Papers of the Third North American Fur Trade Conference* (Toronto: University of Toronto Press, 1980), pp. 59–72; J. Axtell, *The Invasion Within: The Contest of Cultures in Colonial North America* (New York: Oxford University Press, 1985), pp. 43–70.
32. Quoted in J. Hale, *The Civilization of Europe in the Renaissance* (London: Harper Collins, 1993), p. 366.
  33. J. Scott, *England's Troubles: Seventeenth Century English Political Instability in European Context* (Cambridge: Cambridge University Press, 2000), p. 288; N. Wood and E. M. Wood, *A Trumpet of Sedition: Political Theory and the Rise of Capitalism, 1509–1688* (London: Pluto, 1997), pp. 85, 123–6.
  34. T. Starkey, *A Dialogue Between Pole and Lupset (1529–32)*, ed. T. F. Mayer (London: Royal Historical Society, 1989), p. 35; also M. B. Becker, *Civility and Society in Western Europe, 1300–1600* (Bloomington, IN: Indiana University Press, 1988), pp. 12–21.
  35. See for example, F. Guicciardini, *Dialogue on the Government of Florence (1524)*, ed. A. Brown (Cambridge: Cambridge University Press, 1994), p. 57; T. Elyot, *The Boke Named the Governour (1531)*; London: J. M. Dent, n.d.); G. Botero, *The Greatness of Cities (1588)*, in G. Botero, *The Reason of State*, trans. P. J. and D. P. Waley (London: Routledge & Kegan Paul, 1956), pp. 226–80. This new language provided a potent means of distinguishing Europeans from so-called 'monstrous' peoples on the basis not simply of birth, but of cultivated conduct. P. Seed, '“Are These Not Also Men?” The Indians' Humanity and Capacity for Spanish Civilization', *Journal of Latin American Studies*, 25:3 (1993), pp. 629–52, on p. 633.
  36. Hale, *The Civilization of Europe*, p. 360. See for example, Botero, *The Greatness of Cities*, ch. 2; R. Hakluyt, 'Pamphlet for the Virginia Enterprise by Richard Hakluyt, Lawyer, 1585', in *The Original Writings and Correspondence of the Two Richard Hakluyts*, ed. E. G. R. Taylor, 2 vols (London: Hakluyt Society, 1935), vol. 2, pp. 327–38, on p. 330.
  37. M. J. Braddick, 'Civility and Authority', in D. Armitage and M. J. Braddick (eds), *The British Atlantic World, 1500–1800* (Houndmills: Palgrave Macmillan, 2002), pp. 95–7.
  38. Fitzmaurice, *Humanism and America*, pp. 159–64.
  39. The implication here was that 'barbarians' could be taught 'civility'. Thus Purchas's marginal note on Strachey's account of early Virginia, 'Can a Savage remaying a Savage be civill? Were not wee our selves made and not borne civill in our Progenitors dayes? And were not Caesar's Britaines as brutish as Virginians? The Roman swords were best teachers of civilitie to this & other Countries neere us.' W. Strachey, 'A True Reportorie of the Wrack, and Redemption of Sir Thomas Gates, Knight', in Purchas, *Hakluytus Posthumus*, vol. 19, pp. 5–67, on p. 62.
  40. Captain Smith's narrative of the Jamestown colony describes the effort to 'crown' Powhatan as a tributary king under James I. Powhatan replied, however, 'If your king have sent me presents, I also am king, and this my land ... your father is to come to me, not I to him ...' Smith, *A Map of Virginia*, p. 413.
  41. Axtell, *The Invasion Within*, pp. 131–270; D. K. Richter, "“Some of Them ... Would Always Have a Minister with Them”": Mohawk Protestantism, 1683–1719', *American Indian Quarterly*, 16:4 (1992), pp. 471–84. The use of religious reform as a tool for political consolidation was famously advanced in Otto Hintze's essay 'Calvinism and Raison d'Etat in Early Seventeenth Century Brandenburg' (1931), in *The Historical Essays of Otto Hintze*, ed. F. Gilbert (New York: Oxford University Press, 1975), pp. 88–154. Porter has also written of the connections between missionary work in North America

- and British missionary activities in Africa and the Pacific, A. Porter, 'North American Experience and British Missionary Encounters in Africa and the Pacific, c. 1800–50', in Daunton and Halpern (eds), *Empire and Others*, pp. 345–63.
42. On the 'praying towns', see N. Salisbury, 'Red Puritans: The "Praying Towns" of Massachusetts Bay and John Eliot', *William and Mary Quarterly*, 31:1 (1974), pp. 27–54; K. J. Bragdon, 'Crime and Punishment among the Indians of Massachusetts, 1675–1750', *Ethnohistory*, 28:1 (1981), pp. 23–32; and D. Mandell, "'To Live more like my Christian English Neighbours": Natick Indians in the Eighteenth Century', *William and Mary Quarterly*, 48:4 (1991), pp. 552–79.
  43. J. Lepore, *The Name of War: King Phillip's War and the Origins of American Identity* (New York: Alfred A. Knopf, 1998), p. 167. See also the proposal of Edmund Browne (c. 1677) to establish a system of strict segregation of Indians and English, confining the former to towns wherein they may 'employ their spare times in hand crafts ...' or provide labour during harvest time under 'English Guard'. The text of Browne's letter can be found in J. H. Pulsipher, "'Our Sages are Sageles": A Letter on Massachusetts Indian Policy after King Phillip's War', *William and Mary Quarterly*, 58:2 (2001), pp. 431–48, on p. 433. Increase Mather famously castigated the colonists for this attitude in I. Mather, *An Earnest Exhortation to the Inhabitants of New England* (Boston, MA: John Foster, 1676), pp. 19–20.
  44. J. Locke, *Two Treatises of Government* (1690), ed. P. Laslett (Cambridge: Cambridge University Press, 1960). In his Introduction, Peter Laslett argues that the bulk of the *Two Treatises* was composed in 1679–80 (p. 35). In 1669 Locke (perhaps in conjunction with his patron Shaftesbury) wrote the *Fundamental Constitutions of Carolina*, which made only passing references to allowing Indians freedom of belief, and authorizing the colony's governors to make treaties to prosecute war against them. See 'The Fundamental Constitutions of Carolina: March 1, 1669', Avalon Project, <[www.yale.edu/lawweb/avalon/states/nc05.htm](http://www.yale.edu/lawweb/avalon/states/nc05.htm)> [accessed 2 May 2002], sections 50, 97, 112.
  45. Armitage, *The Ideological Origins of the British Empire*, pp. 115–17; Ivison, 'Locke, Liberalism and Empire'; Tully, *An Approach to Political Philosophy*, pp. 137–76.
  46. Arneil, *John Locke and America*, pp. 115–17. In other contemporary justifications for colonization, the example of Rome was used to show what benefits derive from 'the excellent use of colonies'. C. Robbins, 'The "Excellent Use" of Colonies: A Note on Walter Moyle's Justification of Roman Colonies, ca. 1699', *William and Mary Quarterly*, 23:4 (1966), pp. 620–6.
  47. Buckle argues that Locke's *Two Treatises* were written primarily with English (rather than American) political issues in mind. Armitage, however, is surely correct to maintain that the colonial context of Locke's arguments served as much more than mere examples of 'his hypothesized natural state'. See Buckle, 'Tully, Locke and America', p. 274; and D. Armitage, 'John Locke, Carolina, and the *Two Treatises of Government*', *Political Theory*, 32:5 (2004), pp. 602–27, on pp. 604–5.
  48. B. Hindess, 'The Past is Another Culture', *International Political Sociology*, 1:4 (2007), pp. 325–38.
  49. Keal suggests that such claims lay at the heart of the exclusion of Indigenous peoples from 'international society'. As Tuck indicates, however, the very idea of an 'international society' of states was an artefact of European imperialism. See P. Keal, *European Conquest and the Rights of Indigenous People: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003), pp. 34–5; and Tuck, *The Rights of War and Peace*, pp. 42–5, 102–8.

50. B. Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta, GA: Scholars Press, 1997), pp. 265–87.
51. Vitoria, ‘On the American Indians’, q3 a1, pp. 278–83; Vitoria, ‘On the Law of War’ (1539), and ‘Vitoria to Miguel de Arcos, Salamanca, 8 Nov 1534’, both in *Political Writings*, pp. 293–327, 331–3, see q1 a2, p. 300, 331–3. A. Anghie, ‘Francisco de Vitoria and the Colonial Origins of International Law’, *Social and Legal Studies*, 5:3 (1996), pp. 321–36; L. C. Green and O. P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), pp. 42–7.
52. J. Acosta, *The Natural and Moral History of the Indies* (1604), trans. E. Grimston, 2 vols (London: Hakluyt Society, 1880), vol. 2, pp. 409–10. Acosta distinguished the lack of government among ‘savage’, wandering tribes, from the relatively settled government of amalgamated tribes under councils, and the highly structured government of Inca ‘monarchy’. According to Pagden, Acosta was among the first comparative ethnologists. That said, Acosta still considered all forms of Indian government deficient due to the lack of writing. See Pagden, *The Fall of Natural Man*, p. 198; J. Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (Philadelphia, PA: University of Pennsylvania Press, 1994), pp. 67–9.
53. Another of Locke’s sources identifying a supposed ‘misgovernment and ... want of police’ among the Indians was the French Récollet missionary Father Gabriel Sagard’s *The Long Journey to the Country of the Hurons* (1632), trans. H. H. Langton (Toronto: Champlain Society, 1939), p. 163.
54. For an example, compare Locke’s ethno-historical scheme and his identification of money as a crucial step in social progress with E. B. Tylor’s description of the development of language, religion and law. E. B. Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art and Custom* (1871), in *The Collected Works of Edward Burnett Tylor*, 8 vols (Bristol: Routledge, Thoemmes, 1994), vols 3–4, in vol. 3, pp. 9–10.
55. Locke, *Two Treatises*, § 45, p. 299.
56. *Ibid.*, § 105–9, pp. 336–40.
57. *Ibid.*, § 108, pp. 339–40.
58. J. Tyrell, *Patriarcha Non Monarcha: The Patriarch Unmonarch’d: Being Observations on a Late Treatise and Divers Other Miscellanies, Published Under the Name of Sir Robert Filmer Baronet* (London, 1681), p. 76.
59. *Ibid.*, p. 92.
60. C. C. de Rochefort, *The History of the Caribby-Islands* (London, 1606), book I, p. 116. In his *A Brief Disquisition of the Law of Nature* (London, 1701), Tyrell referred to ‘the French Author of the Natural History of the Caribe Islands, Part. 2d. Chap. 11 and §19’ (p. 330). In addition to Acosta (see note 52 above), another likely source for this view of Indigenous leaders was Sagard, *The Long Journey*, p. 151.
61. Rochefort, *The History of the Caribby-Islands*, p. 314.
62. *Ibid.*, p. 316. See also Baron de Lahontan’s comment about the role of ‘Temperament’ rather than law or government in Indian ‘society’. B. de Lahontan, *New Voyages to North America*, 2 vols (1703; New York: Burt Franklin, 1970), vol. 2, p. 424.
63. J. Locke, *An Essay Concerning Human Understanding* (1690), ed. J. Yolton (London: J. M. Dent, 1970), p. 175. Here Locke referred to the ‘law of opinion’ as a means of regulating conduct. See also J. Locke, ‘Credit, Disgrace’, in *Political Writings of John Locke*, ed. D. Wootton (New York: Mentor, 1993), pp. 236–7.
64. Tyrell, *A Brief Disquisition of the Law of Nature*, pp. 328–9.

65. L. Wafer, *A New Voyage and Description of the Isthmus of America* (1699), ed. L. E. E. Joyce (Oxford: Hakluyt Society, 1934), pp. 93–7.
66. R. Filmer, *The Anarchy of a Limited or Mixed Monarchy* (1648), in *Patriarcha and Other Writings*, ed. J. P. Sommerville (Cambridge: Cambridge University Press, 1991), pp. 131–71, on pp. 157–8.
67. J. Harrington, *The Commonwealth of Oceana* (1656), in *The Political Works of James Harrington*, ed. J. G. A. Pocock (Cambridge: Cambridge University Press, 1977), pp. 155–360, on p. 273; and W. Moyle, ‘An Essay on the Lacedaemonian Government’ (1698), in *The Whole Works of Walter Moyle, Esq; that were published by himself* (London, 1727), pp. 47–77, on pp. 51–2, 59–60.
68. J. G. A. Pocock, *The Machiavellian Moment; Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975), pp. 415–17. E. Rawson, *The Spartan Tradition in European Thought* (Oxford: Clarendon Press, 1969).
69. Locke, *Two Treatises*, § 107 p. 238. I am obliged to James Tully for making this point forcefully to me in private correspondence.
70. J. Tully, ‘Placing the *Two Treatises*’, in N. Phillipson and Q. Skinner (eds), *Political Discourse in Early-Modern Britain* (Cambridge: Cambridge University Press, 1993), pp. 253–80; and R. Ashcraft, *Revolutionary Politics and Locke’s Two Treatises of Government* (Princeton, NJ: Princeton University Press, 1986), p. 305.
71. Locke, *Two Treatises*, § 176, p. 385. According to Anna Neill, pirates were ‘the stuff of Lockean nightmare: self-created savages who prey on civilized men of commerce’. A. Neill, *British Discovery Literature and the Rise of Global Commerce* (Houndmills: Palgrave, 2002), p. 39.
72. Locke, *Two Treatises*, § 108, p. 340.
73. J. F. Lafitau, *Customs of the American Indians Compared With the Customs of Primitive Times* (1726), ed. W. N. Fenton and E. L. Moore, 2 vols (Toronto: Champlain Society, 1974–7), vol. 1, p. 283; and C. Colden, *The History of the Five Indian Nations of Canada* (1747; facsimile edition, Toronto: Coles Publishing, 1972), p. 13. Sagard, *The Long Journey*, pp. 150–1.
74. W. Johnson, ‘Extracts of Some Letters, from Sir William Johnson Bart., to Arthur Lee, M. D. F. R. S. on the Customs, Manners, and Language of the Northern Indians of America’, *Philosophical Transactions of the Royal Society*, 63 (1773), pp. 144–7, on pp. 144–5. <<http://www.bodley.ox.ac.uk/cgi-bin/ilej>> [accessed, 5 March 2002].
75. *Ibid.*, pp. 145, 147.
76. Pagden, *Lords of All the World*, pp. 84–5.
77. H. V. Bowen, *The Business of Empire: The EIC and Imperial Britain, 1756–1833* (Cambridge, Cambridge University Press, 2006), p. 195.
78. Some of these themes will be explored further in Chapter 3.
79. Curtin, *The Image of Africa*, pp. 63–7.
80. See, for example, G. T. F. Raynal, *A Philosophical and Political History of the Settlements and Trade of the Europeans in the East and West Indies*, 6 vols (Edinburgh: W. Gordon, 1782), vol. 5, pp. 170, 225; J. R. Forster, *Observations made during a Voyage Round the World* (1778), ed. N. Thomas, H. Guest and M. Dettelbach (Honolulu, HI: University of Hawai’i Press, 1996), pp. 191–216.
81. C. L. S. Montesquieu, *The Spirit of the Laws* (1748), trans. and ed. A. M. Cohler, B. C. Miller and H. S. Stone (Cambridge: Cambridge University Press, 1989), pp. 290–2.
82. R. B. Sher, ‘From Troglodytes to Americans: Montesquieu and the Scottish Enlightenment on Liberty, Virtue, and Commerce’, in D. Wootton (ed.), *Republicanism, Liberty*



- and Commercial Society, 1649–1776* (Stanford, CA: Stanford University Press, 1994), pp. 368–401. There is much debate over the reliability of the name ‘Scottish Enlightenment’, and whether it refers to a single phenomenon or encompasses a variety of rival Enlightenments. I discuss this issue further in B. Buchan, ‘Enlightened Histories: Civilization, War and the Scottish Enlightenment’, *European Legacy*, 10:2 (2005), pp. 177–92.
83. G. H. Murray, ‘Historiography’, in A. Broadie (ed.), *The Cambridge Companion to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 2003), pp. 258–79; and I. Hont, ‘The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the “Four-Stages Theory”’, in A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), pp. 253–6.
  84. W. Robertson, *An Historical Disquisition Concerning the Knowledge which the Ancients had of India* (London: A. Strahan et al., 1791), p. 263. Edmund Burke included ‘politics’ in the broad category of ‘manners’. ‘Every age’, he argued, ‘has its own manners, and its politics dependent upon them ...’ E. Burke, *Thoughts on the Cause of the Present Discontents* (1770), in *The Political Philosophy of Edmund Burke*, ed. I. Hampsher-Monk (London: Longman, 1987), pp. 78–108, on p. 83.
  85. J. G. A. Pocock, *Barbarism and Religion, Volume II, Narratives of Civil Government* (Cambridge: Cambridge University Press, 1999), p. 350.
  86. D. Forbes, ‘Introduction’, in A. Ferguson, *An Essay on the History of Civil Society* (1767; Edinburgh: Edinburgh University Press, 1966), pp. xiii–xli, on pp. xx, xxii.
  87. Ferguson, *An Essay*, p. 107.
  88. J.-J. Rousseau, ‘A Discourse on the Origin of Inequality’ (1755), in *The Social Contract and Discourses*, trans. G. D. H. Cole (London: J. M. Dent, 1973), pp. 31–126, on p. 65.
  89. Ferguson, *An Essay*, pp. 58, 73.
  90. Rousseau, ‘A Discourse on the Origin of Inequality’, p. 65.
  91. K. M. Baker, ‘Enlightenment and the Institution of Society: Notes for a Conceptual History’, in W. Melching and W. Velema (eds), *Main Trends in Cultural History, Ten Essays* (Amsterdam: Rodopi, 1994), pp. 94–120; and E. de Dampierre, ‘Note sur “Culture” et “Civilization”’, *Comparative Studies in Society and History*, 3 (1960), pp. 328–40.
  92. Ferguson, *An Essay*, p. 97; A. Ferguson, *Principles of Moral and Political Science*, 2 vols (1792; Hildesheim: Georg Olms Verlag, 1975), vol. 1, p. 254.
  93. W. Robertson, *The History of America*, 12th edn, 4 vols (London: Cadell and Davies, 1812), vol. 2, p. 51. Robertson’s *History of America* was originally published in 1777.
  94. J. Millar, *The Origin of the Distinction of Ranks* (1806; Bristol: Thoemmes, 1990), pp. 14, 28, 34. Millar’s *Origin* was originally published in 1771. See also Malthus, *An Essay on the Principle of Population*, vol. 1, pp. 28–9.
  95. Ferguson, *An Essay*, p. 81.
  96. Thanks to Peter McCarthy, who pointed out to me that Ferguson made the claim in a footnote to the 1768 edition that his account of ‘Rude Nations’, and specifically the ‘original North Americans’, was based ‘... on the concurring representations of living witnesses, who, in the course of trade, of war, and of treaties, have had ample occasion to observe the manners of that people.’ Ferguson, *An Essay*, p. 82.
  97. *Ibid.*, p. 85.
  98. In the *Germania*, Tacitus spoke of the various nations of the *Germani* as obeying either ‘kings’ (*rex*), ‘which they choose for their birth’ (*nobilitas*) and which have strictly limited powers, or ‘generals’ (*dux*), which ‘lead more by example’ (*virtus*) ‘than command’.

- Tacitus, *Germania* (98–9), trans. J. B. Rives (Oxford: Clarendon Press, 1999), pp. 77–8, 80. On eighteenth-century interpretations of the *Germania*, see M. Thom, *Republics, Nations and Tribes* (London: Verso, 1995).
99. Ferguson, *An Essay*, pp. 81–101, on pp. 86, 100–1.
100. *Ibid.*, pp. 81–101. A similar account of the origins of government was expressed by John Millar in his *The Origin of the Distinction of Ranks*, pp. 3–5.
101. See, for example, J.-M. Degérando, *The Observation of Savage Peoples* [1800], trans. F. C. T. Moore (London: Routledge and Kegan Paul, 1969), p. 62; Marshall and Williams, *The Great Map of Mankind*, pp. 274–6.

## 2 ‘Trafficking’ for Empire

1. This chapter draws on some of my earlier research, B. Buchan, ‘Traffick of Empire: Trade, Treaty and *Terra Nullius* in Australia and North America, 1750–1800’, *History Compass*, 5:2 (2007), pp. 386–405.
2. N. Thomas, *Discoveries: The Voyages of Captain Cook* (London: Penguin, 2003), pp. 382–401.
3. The great Cook scholar J. C. Beaglehole portrayed him as the embodiment of the European Enlightenment’s quest for knowledge, but also as a man who respected the Indigenous people he encountered. More recently, Hough has also portrayed Cook as an intrepid explorer who patiently seeks friendship from the ‘frustrating’ and ‘volatile’ natives. J. C. Beaglehole, *The Life of Captain James Cook* (London: Adam and Charles Black, 1974), p. 382; R. Hough, *Captain James Cook* (London: Hodder and Stoughton, 1994), pp. 142, 153.
4. D. Clayton, ‘Captain Cook’s Command of Knowledge and Space: Chronicles from Nootka Sound’, in G. Williams (ed.), *Captain Cook: Explorations and Reassessments* (Woodbridge: Boydell Press, 2004), pp. 110–33, on p. 114. As if to underline the point, Pauline Nawahineokala’i King argues that Cook was the unwitting agent of Indigenous Hawai’ian state formation on a scale that he never anticipated. P. N. King, ‘Some Thoughts on Native Hawaiian Attitudes towards Captain Cook’, in Williams (ed.), *Captain Cook*, pp. 94–109, on p. 99.
5. A. Salmond, ‘Tute: The Impact of Polynesia on Captain Cook’, in Williams (ed.), *Captain Cook*, pp. 77–93, on p. 91.
6. Thomas, *Discoveries*, p. 17.
7. *Ibid.*, p. 59.
8. A. Salmond, *The Trial of the Cannibal Dog: Captain Cook in the South Seas* (London: Penguin, 2003), p. xxi. Stuart Murray argues in contrast that the writing of Cook’s (and other Pacific explorer’s) journals exemplifies ‘a complexity that is characteristically modern’, encompassing both an aspiration to scientific certainty, and a self-awareness of the provisionality and limitations of this knowledge. S. Murray, “Notwithstanding our Signs to the Contrary”: Textuality and Authority at the Endeavour River, June to August 1771’, in Williams (ed.), *Captain Cook*, pp. 59–76, on p. 63.
9. D. Mackay, ‘Exploring the Pacific, Exploring James Cook’, in A. Frost and J. Samson (eds), *Pacific Empires* (Melbourne: Melbourne University Press, 1999), pp. 251–69, on pp. 262–3.
10. B. Smith, ‘Constructing “Pacific” Peoples’, in Borofsky (ed.), *Remembrance of Pacific Pasts*, pp. 152–68, on pp. 159, 164. See also A. Frost, *The Global Reach of Empire: Brit-*

- ain's Maritime Expansion in the Indian and Pacific Oceans 1764–1815* (Melbourne: Miegunyah Press, 2003).
11. Neill, *British Discovery Literature*, p. 156.
  12. F. McLynn, *1759: The Year Britain Became Master of the World* (New York: Atlantic Monthly Press, 2004), p. 388.
  13. David Armitage has explored the points of ideological articulation connecting the 'first' and 'second empires.' Armitage, *The Ideological Origins of the British Empire*. On conquest and 'glory' in early English imperial discourse, see Fitzmaurice, *Humanism and America*. On the manifestation and uses of the 'Black Legend', see C. Gibson (ed.), *The Black Legend: Anti-Spanish Attitudes in the Old World and the New* (New York: Alfred A. Knopf, 1971).
  14. N. Ferguson, *Empire: How Britain Made the Modern World* (London: Penguin, 2003), p. xxi. Ferguson is here talking primarily of the British Empire in the nineteenth and twentieth centuries. Significantly, of the criticisms he levels at the Empire, most pertain to the eighteenth century. Windschuttle, *The Fabrication of Aboriginal History*, pp. 30–1.
  15. K. R. Andrews, *Trade, Plunder and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480–1630* (Cambridge: Cambridge University Press, 1984), pp. 31–40, 251–2.
  16. C. A. Bayly, *Imperial Meridian: The British Empire and the World 1780–1830* (Harlow: Longman, 1989), p. 102.
  17. *Ibid.*, pp. 136, 150–2.
  18. K. Wilson, *The Sense of the People: Politics, Culture and Imperialism in England, 1715–1785* (Cambridge: Cambridge University Press, 1995), p. 186–7.
  19. H. T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (London: Methuen, 1977), pp. 102–18.
  20. J. Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (New York: Alfred A. Knopf, 1989), p. 74.
  21. Bayly, *Imperial Meridian*, pp. 117–19.
  22. Wilson, *The Sense of the People*, pp. 272–3. The danger of imperial corruption was one of the central themes in eighteenth-century British political thought. See B. Buchan and L. Hill, 'From Republican to Liberalism: Corruption and Empire in Enlightenment Political Thought', *Proceedings of the Australasian Political Studies Association Conference*, Monash University, 24–6 September 2007, <<http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/index.php>>. On America as a source of corruption, see H. S. Commager and E. Giordanetti (eds), *Was America a Mistake? An Eighteenth-Century Controversy* (New York: Harper Torchbooks, 1967).
  23. E. Burke, 'Speech on the Nabob of Arcot's Debts, 28 February 1785', in *The Writings and Speeches of Edmund Burke, Vol. V, India: Madras and Bengal 1774–1785*, ed. P. J. Marshall (Oxford: Clarendon Press, 1981), pp. 478–552, on p. 491; F. G. Whelan, *Edmund Burke and India: Political Morality and Empire* (Pittsburgh, PA: University of Pennsylvania Press, 1996), pp. 98–108.
  24. Wilson, *The Sense of the People*, pp. 193, 201. Some of these ways of portraying the Empire in the wake of the Jacobite rebellion in 1745 are explored in B. Buchan 'Adam Ferguson, the 43rd and the Fictions of Fontenoy', in E. Heath and V. Merolle (eds), *Adam Ferguson: Philosophy, Politics, and Society* (London: Pickering & Chatto, forthcoming 2008).
  25. P. J. Marshall, *The Making and Unmaking of Empires. Britain, India, and America c. 1750–1783* (Oxford: Oxford University Press, 2005), p. 45.

26. *Ibid.*, pp. 160, 183.
27. P. Langford, *A Polite and Commercial People: England 1727–1783* (Oxford: Clarendon Press, 1989), pp. 514–15; D. Armitage, *Greater Britain, 1516–1776, Essays in Atlantic History* (Aldershot: Ashgate Variorum, 2004), pp. 91–107; Neill, *British Discovery Literature*, pp. 99–100.
28. See Marshall, *A Free Though Conquering People*, pp. 8, 90–1. On the foundations of the view that the ‘Brytish Impire’ was a ‘Cosmopoliticall Government’ of all peoples, see John Dee’s *The Perfect Arte of Navigation* (1577; New York: Da Capo Press, 1968).
29. Marshall, *The Making and Unmaking of Empires*, p. 185.
30. E. Burke, ‘Speech on Almas Ali Khan, 30 July 1784’, in *The Writings and Speeches of Edmund Burke, Vol. V*, pp. 460–78, on p. 462.
31. Burke, ‘Speech on Opening of Impeachment’, p. 302.
32. E. Burke, Speech on Mr. Fox’s East India Bill, 1 December 1783’, in *The Writings and Speeches of Edmund Burke, Vol. V*, pp. 378–451, on pp. 389–90.
33. W. Blackstone, *Commentaries on the Laws of England*, 4 vols (1765–9; New York: Legal Classics Library, 1983), vol. 1, p. 104.
34. *Ibid.*, vol. 1, p. 105; E. Vattel, *The Law of Nations or the Principles of Natural Law*, 2 vols (1758), trans. C. G. Fenwick (Washington, DC: Carnegies Institution, 1916), vol. 1, p. 86; W. Prest, ‘Law for Historians: William Blackstone on Wives, Colonies and Slaves’, *Legal History*, 11 (2007), pp. 105–15, on pp. 109–11.
35. Blackstone, *Commentaries*, vol. 1, p. 105. The caveat Blackstone made to this principle was that any established laws cannot be held to apply if they contradict the ‘law of God’.
36. ‘*Campbell v. Hall*, 28 November 1774’, in F. Madden and D. Fieldhouse (eds), *Imperial Reconstruction, 1763–1840: The Evolution of Alternative System of Colonial Government*, Select Documents on the Constitutional History of the British Empire and Commonwealth, 3 (New York: Greenwood Press, 1987), pp. 475–80.
37. Blackstone, *Commentaries*, vol. 1, p. 105. Vattel argued that Spanish conquest of the ‘civilized Empires’ of Mexico and Peru was ‘a notorious usurpation’, while the establishment of French colonies in North America would be ‘entirely lawful’ owing to the fact that the Indians there merely ‘roamed over’ those lands rather than ‘inhabited them’. Vattel, *The Law of Nations*, vol. 1, p. 38.
38. Kercher, *Unruly Child*, pp. 4–5, 18–20.
39. See, for example, Francis Hutcheson’s *A Short Introduction to Moral Philosophy in Three Books* (Glasgow: Robert Foulis, 1747), p. 159. I am indebted to Paul Turnbull for his suggestions here.
40. On this pedigree, see Fitzmaurice, *Humanism and America*; R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1981).
41. Locke, *Two Treatises*, § 27, p. 288.
42. *Ibid.*, § 45, p. 299. In this Locke and others profoundly misunderstood the sophistication of Indigenous cultivation. See C. C. Mann, *1491: New Revelations of the Americas before Columbus* (New York: Alfred A Knopf, 2005).
43. Armitage, ‘John Locke, Carolina, and the *Two Treatises of Government*’; Tully, *An Approach to Political Philosophy*.
44. Locke, *Two Treatises*, § 34, p. 291.
45. *Ibid.*, § 45, p. 299.
46. *Ibid.*, § 45, p. 299.
47. *Ibid.*, § 36, p. 293.
48. Blackstone, *Commentaries*, vol. 2, p. 3.

49. *Ibid.*, vol. 2, p. 8. See also Vattel, *The Law of Nations*, pp. 37–8; Hutcheson, *A Short Introduction to Moral Philosophy*, pp. 172–3; A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776), ed. R. H. Campbell and A. S. Skinner (1976; Indianapolis, IN: Liberty Fund, 1981), vol. 2, p. 626.
50. A. Atkinson, ‘The Ethics of Conquest, 1786’, *Aboriginal History*, 6:2 (1986), pp. 86–91. At times, however, the British could employ the most nakedly cynical excuses for failing to negotiate treaties. George Robertson, for instance, described the Tahitian ‘Queen’ Puraea’s effort to make Captain Wallis ‘Signe a Treaty of Peace’. Being unwell, however, Wallis claimed to have ‘a little paralytick disorder in his hand [and] could not hold the pen, therefore [he] Excused him selfe untill another opportunity’. Captain Wallis’s indisposition was a convenient, though one suspects improvised, subterfuge. Puraea may well have been angling for her own advantage in island politics. G. Robertson, *The Discovery of Tabiti, A Journal of the Second Voyage of H. M. S. Dolphin Round the World, under the Command of Captain Wallis, R. N. in the Years 1766, 1767 and 1768*, ed. H. Carrington (London: Hakluyt Society, 1948), p. 211. The ‘Queen’ in question was called Puraea by Robertson, and later, by Cook, Oberea.
51. On these conceptual connections in European thought at the time, see Buchan, ‘Enlightened Histories’.
52. ‘West India Company to the States General ... May 5, 1632’, in *Early American Indian Documents: Treaties and Laws, 1607–1789*, ed. A. T. Vaughan, 20 vols (Washington, DC, and Frederick, MD: University Publications of America 1979–2004), vol. 7: New York and New Jersey Treaties, 1609–1682, pp. 30–1.
53. ‘English Answer to the Remonstrance of the Dutch Ambassadors, May 23, 1632’, in *Early American Indian Documents*, vol. 7, p. 31.
54. J. Winthrop, *Reasons to be Considered for Justifying the Undertakers of the Intended Plantation in New England ...* (1629), in *The Winthrop Papers*, 4 vols (Boston, MA: Massachusetts Historical Society, 1931), vol. 2, pp. 138–45. Contrary views were expressed by Roger Williams, see ‘Roger Williams to John Winthrop, 15 July and 31 July 1637’, in *Winthrop Papers*, vol. 3, pp. 450–52, 458–9.
55. Purchas, *Hakluytus Posthumus*, vol. 19, p. 228.
56. Smith, *A Map of Virginia*, p. 392. Indigenous and European notions of property in land were very different. New England Indian approaches to property were based on family ‘ownership’ of localities, allowing ‘ecological use’ through hunting, fishing and harvesting, continually shifting to avoid overuse. For Europeans, however, property meant exclusive rights and legally-defined boundaries integrated within a growing Atlantic market economy. J. O’Brien, “‘They are so Frequently Shifting their Place of Residence’”: Land and the Construction of Social Place of Indians in Colonial Massachusetts’, in Daunton and Halpern (eds), *Empire and Others*, pp. 204–16, on p. 207.
57. Smith, *A Map of Virginia*, p. 392.
58. *Ibid.*, p. 413.
59. *Ibid.*, p. 414.
60. On Indigenous control of trade in America, see Lahontan, *New Voyages to North America*, vol. 2, p. 397.
61. Locke, *Two Treatises*, § 121, p. 349.
62. *Ibid.*, § 121, p. 349. J. H. Franklin, ‘Allegiance and Jurisdiction in Locke’s Doctrine of Tacit Consent’, *Political Theory*, 24:3 (1996), pp. 407–22.
63. J. C. Klausen, ‘Room Enough: America, Natural Liberty, and Consent in Locke’s *Second Treatise*’, *Journal of Politics*, 69:3 (2007), pp. 760–9.

64. On American colonial trade, see E. Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673–1800* (Cambridge: Cambridge University Press, 1997); D. K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA: Harvard University Press, 2001); D. J. Weber, *Bárbaros: Spaniards and their Savages in the Age of Enlightenment* (New Haven, CT: Yale University Press, 2005), pp. 178–220; and J. Pritchard, *In Search of Empire: The French in the Americas, 1670–1730* (Cambridge: Cambridge University Press, 2004).
65. Andros's Instructions to John Collier, 23 September 1676, in *Early American Indian Documents*, vol. 7, p. 377.
66. Governor Dongan's Report to the Committee of Trade and Plantations on the State of the Province of New York, 22 February 1687, in *Early American Indian Documents*, vol. 8: New York and New Jersey Treaties, 1633–1713, p. 103; W. J. Eccles, 'The Fur Trade and Eighteenth-Century Imperialism', *William and Mary Quarterly*, 40:3 (1983), pp. 341–62, on pp. 344–5, 349–55.
67. Cadwallader Colden's Comments on the Indian Trade in New York, 1723, in *Early American Indian Documents*, vol. 9: New York and New Jersey Treaties, 1714–1753, p. 132; 'Sr Wm Johnson to Lords of Trade, on the state of the Department of Indian Affairs in North America, 18 November 1763', Office of the Superintendent of Indian Affairs 1755–1830, Library and Archives Canada, Ottawa (hereafter, LAC), R216-193-4-E; 'Gage to Lord Shelburne, 22 Feb 1767', Dartmouth Papers, vol. 1, LAC, R9370-0-5-E.
68. M. Witgen, 'The Rituals of Possession: Native Identity and the Invention of Empire in Seventeenth-Century Western North America', *Ethnohistory*, 54:4 (2007), pp. 639–68, on p. 658. Indigenous traders were prepared both to invoke and to side-step these obligations where possible. It was in this sense that the Hudson's Bay Company trader and traveller Samuel Hearne warned of the impostures used by the Indians to defraud unwary traders, S. Hearne, *A Journey from Prince of Wales's Fort in Hudson's Bay to the Northern Ocean ... in the Years 1769, 1770, 1771, and 1772* (facsimile, Edmonton: M. G. Hurtig, 1971), pp. 307–9.
69. The Southern Superintendent of Indian Affairs struggled in vain to regulate these trade exchanges, but faced opposition from colonists jealous of their own economic advantages. G. O'Brien, 'Protecting Trade through War: Choctaw Elites and British Occupation of the Floridas', in Daunton and Halpern (eds), *Empire and Others*, pp. 204–16, on pp. 150–1.
70. An unregulated trade, Colden argued, allowed too many frauds perpetrated on the Indians, and this undermined their 'subjection' to the sovereignty of English law. Indians, Colden pointed out, could obtain no redress for frauds because their 'evidence is not admitted in any of our Courts ...': 'Can these people', Colden asked, 'who are treated in this manner be supposed to be under the protection of the King of Great Britain ...?' Colden to Governor Clinton: Administration of Indian Affairs, 8 August 1751, in *Early American Indian Documents*, vol. 9, p. 597.
71. 'Sr Wm Johnson to the Lords of Trade, 20 August 1762', LAC, R216-193-4-E. The interest in 'traffick' was not limited to the British, but was also employed by the Spanish in their colonies. Weber, *Bárbaros*, pp. 178–91.
72. T. Pownall, *The Administration of the Colonies* (1768; New York: Scholar's Facsimiles & Reprints, 1993), pp. 256–7. The text was originally written in 1763–4.
73. Sr Wm Johnson to Lords of Trade, 'State of the Department of Indians Affairs in North America', 18 November 1763, LAC, R216-193-4-E.

74. As George Crogan put it, The French, 'always adopted the Indian's customs and Manners, and treated them civilly and supply'd their wants Generously', and secured thereby a 'very Advantageous Furr Trade'. 'Crogan to Sr Wm Johnson, n.d.', LAC, R216-193-4-E.
75. 'Gage to Lord Shelburne, 22 Feb 1767', Dartmouth Papers, vol. 1, LAC, R9370-0-5-E. Gage also looked to Spanish inexperience in Indian trade to deliver the English 'advantages' they should not hesitate to exploit.
76. 'Sr Wm Johnson to Lords of Trade, 25 September 1763', LAC, R216-193-4-E.
77. 'Sr Wm Johnson to the Lords of Trade, 20 August 1762', LAC, R216-193-4-E.
78. 'Proceedings with the Sachems and Great Warriors of the United Six nations ... 8 September 1762', LAC, R216-193-4-E.
79. 'A meeting with the Shawanese, Delawares, Senecas, and Sandusky Indians at Fort Pitt, 9 May 1765', LAC, R216-193-4-E. An unnamed Iroquois sachem tried to explain to Governor Dongan in 1686 that the Iroquois understanding of their relationship with the English did not encompass subjection to English sovereignty: 'We are one head, one body, and one heart'. Conference between Governor Thomas Dongan and the Iroquois, 20 May 1686, in *Early American Indian Documents*, vol. 7, p. 90.
80. Williams, *Linking Arms Together*.
81. 'Minutes of Proceedings Held by Sr Wm Johnson with the Onondagas, Senecas, Oniedas and Mohacks ..., 16 March 1763', LAC, R216-193-4-E.
82. 'The Superintendent's Speech of 27 March 1765 to the Chickasaw and Chactaw Nations', enclosed in 'Mr Stuart's Communication, 16<sup>th</sup> April, 1765', LAC, R216-193-4-E.
83. L. A. Bougainville, *Adventure in the Wilderness: The American Journals of Louis Antoine de Bougainville 1756–1760*, trans. and ed. E. P. Hamilton (Norman, OK: University of Oklahoma Press, 1964) p. 103.
84. My argument here should be contrasted with that of Michael Connor, who asserts that Cook received 'no direction' by word or 'implication' on how to 'evaluate' Indigenous land use. Connor, *The Invention of Terra Nullius*, p. 247.
85. 'Secret. Additional Instructions for Lt James Cook, Appointed to Command His Majesty's Bark the Endeavour', in Beaglehole, 'Introduction', p. cclxxxii. On Cook and his instructions, see pp. cix–cxv; on 'secrecy', see p. cxxxvii.
86. Glyndwr Williams simply argues that Cook's act of possession of the Eastern Coast of Australia 'without' Indigenous consent was a case of 'exceeding' his instructions. G. Williams, "'As Befits our Age, There are No More Heroes": Reassessing Captain Cook', in Williams, *Captain Cook*, pp. 230–45, on p. 244. On Indigenous people's perceptions, see Denning, 'Possessing Tahiti', p. 118. For an effort to reconstruct the layers of meaning in encounters between Europeans and Indigenous peoples, see J. Axtell, *Natives and Newcomers: The Cultural Origins of North America* (New York: Oxford University Press, 2001).
87. Bayly, 'The British and Indigenous Peoples', pp. 20, 25, 27–9; J. Axtell, 'Colonial America without the Indians: Counterfactual Reflections', *Journal of American History*, 73:4 (1987), pp. 981–96; M. Borch, *Conciliation – Compulsion – Conversion: British Attitudes toward Indigenous Peoples, 1763–1814* (Amsterdam: Rodopi, 2004).
88. Sometimes the image of Indigenous 'simplicity' or 'nobility' was used to critique civilized society. See, for example, *The Journals of Captain James Cook*, p. 399; and Cook's 'Letter to John Walker', in *The Journals of Captain James Cook*, pp. 508–9. Such views, however, did not imply any sense of Indigenous 'superiority' and often sustained the European language of 'savagery'. See, for example, S. Parkinson, *A Journal of a Voyage to the South Seas in HMS Endeavour* (1784; London: Caliban Books, 1984), p. 23; T. Ryan, "'Le

- Président de Terres Australes”: Charles de Brosses and the French Enlightenment Beginnings of Oceanic Anthropology’, in T. Ballantyne (ed.), *Science, Empire and the European Exploration of the Pacific* (Aldershot: Ashgate Variorum, 2004), pp. 247–76, on p. 263.
89. ‘Hints offered to the consideration of Captain Cooke, Mr Banks, Doctor Solander, and the other Gentlemen who go upon the Expedition on Board the *Endeavour*’, in *The Journals of Captain James Cook*, pp. 514–19.
  90. The phrase is from Clendinnen, *Dancing with Strangers*, p. 24. See also Thomas, *Discoveries*, p. 92; Salmond, *The Trial of the Cannibal Dog*, pp. 57, 117–18. Elsewhere Salmond writes that on his first voyage Cook had been ‘inspired’ by Morton’s ‘Hints’, but by the second he came to ‘epitomise’ them. Salmond, ‘Tute’, p. 83.
  91. See, for example, R. Boyle, *General Heads for the Natural History of a Country, Great or Small: Drawn Out for the Use of Travelers and Navigators* (London: John Taylor, 1692). This text is based on three essays published by Boyle in the *Philosophical Transactions of the Royal Society* in 1666. See also Carey, *Locke, Shaftesbury, and Hutcheson*, pp. 14–33; D. Carey, ‘Locke, Travel Literature, and the Natural History of Man’, *Seventeenth-Century*, 11 (1996), pp. 259–80; J.-P., Rubiés, ‘Instructions for Travelers: Teaching the Eye to See’, *History and Anthropology*, 9:2–3 (1996), pp. 139–90.
  92. At this stage, the idea of racial inferiority and superiority exerted little influence. Count Buffon, who is usually credited with originating ideas of racial hierarchy, in fact showed little consistency in his use of terms. At various points in his *Natural History* he refers to ‘nations’ whose unity is expressed in social terms (such as speaking the same language or having one chief). Elsewhere, he speaks of ‘races’ being identified by a uniformity originating ‘from their living all in the same manner’, having the same ‘mode of life’, or by their exhibiting the same ‘savage state’. In other words, there is little or no consistency in identifying any biological quality as determining one’s ‘race’. Count Buffon, *A Natural History General and Particular: Concerning the History and Theory of the Earth, a General History of Man ...*, trans. W. Smellie, 2 vols (1781; London: Thomas Kelly, 1866), vol. 1, pp. 278, 282. Johann Forster similarly used ‘race’ interchangeably with ‘tribe’, and focused most attention on differences between Pacific Islanders on the basis of ‘culture’. Forster, *Observations Made During a Voyage Round the World*, pp. 153, 159, 193, 250. Hume notoriously ‘suspected’ that ‘negroes’ were ‘naturally inferior’ to white Europeans, but measured that supposed inferiority by non-racial criteria (such as manufacturing, arts and science) as characteristics of civilization. D. Hume, ‘Of National Characters’, in *Essays Moral, Political and Literary* (1777), ed. E. F. Miller (Indianapolis, IN: Liberty Classics, 1985), pp. 197–215, on p. 208.
  93. Clendinnen, *Dancing with Strangers*, pp. 31–2.
  94. See, for example, Thomas, *Discoveries*, pp. 67–71.
  95. *The Journals of Captain James Cook*, pp. 75–6.
  96. Thomas, *Discoveries*, pp. 71–4.
  97. Salmond, *The Trial of the Cannibal Dog*, pp. 63–4. Later, on Ra’iatea, Salmond argues, Cook’s trade regulations were motivated by a strong desire to restore the discipline of his crew after their sojourn on Tahiti (pp. 100–1). Beaglehole similarly argues that Cook’s trading ‘Rules’ were a response to Morton’s ‘Hints’ as well as an effort to ‘... regularise trade, keep up the value of his trade goods, and obviate the confusion and quarrels that would arise from lack of direction’. Beaglehole, *The Life of Captain James Cook*, p. 177.
  98. *The Journals of Captain James Cook*, pp. 75–6.
  99. These exchanges were described in some detail by George Robertson, the *Dolphin*’s master. According to him, the ‘price of the old trade’ was initially fixed at ‘a thirty penny nail



- each time,' an item apparently highly sought after by islanders, who had no iron of their own. The problem was that the illicit 'old trade' undermined the exchange rate for the supply of meat, vegetables and fruit for the scurvy-ravaged crew, who had to resupply for the return voyage. Robertson soon discovered that 'the Young Girls ... now rose their price ... from a twenty or thirty penny nail, to a forty penny, and some was so Extravagant as to demand a Seven or nine Inch Spick, this was plain proof of the way the large nails went'. And indeed, as the ship's carpenter lamented, it was no time at all before '... every cleat in the Ship was drawn, and all the Nails carryed off', while the Boatswain observed that 'most of the hammock nails was drawn, and two thirds of the men obliged to lie on Deck for want of nails to hang their Hammocks ...'. Robertson, *The Discovery of Tahiti*, pp. 185, 208, 207.
100. *Ibid.*, p. 187.
101. *The Journals of Captain James Cook*, p. 82. Cook notes that 'cut glass Beeds' continued to be of great value to the islanders.
102. Examples of both kinds of punishment can be found in *The Journals of Captain James Cook*, pp. 98, 100.
103. For the islanders, taking European goods represented an appropriation of the sacred power they embodied, a power that could be earned as much by the possession of the goods as by the audacity of the taking, Salmond, *The Trial of the Cannibal Dog*, pp. 68, 72; *The Journals of Captain James Cook*, p. 96.
104. *The Journals of Captain James Cook*, p. 80.
105. *Ibid.*, p. 87.
106. Lycurgus's life and achievements were celebrated by Plutarch, see *Plutarch's Lives, abridged from the Original Greek* (London: J. Newbery, 1762), pp. 74–5. On the image of 'rude American tribes' as analogous to ancient Sparta, see J. Adams, *A View of Universal History, from the Creation to the Present Time* (London: G. Kearsley, 1795), pp. 68–72.
107. Some writers have missed the significance of the different trade encounters Cook had with peoples in the Pacific. Connor, *The Invention of Terra Nullius*, p. 250. Lamb argues that Cook's acts of possession 'were intended not as a sign of annexation, but of priority of claim with respect to the French, the Spanish, and later the Americans...'. J. Lamb, 'Samuel Wallis, The Discovery of Tahiti', in J. Lamb, V. Smith and N. Thomas (eds), *Exploration and Exchange; A South Seas Anthology – 1680–1900* (Chicago, IL: University of Chicago Press, 2000), pp. 57–8, on p. 58. An earlier connection between possession and 'traffick' was made by captain Wallis's lieutenant, Tobias Furneaux, who took 'possession' of Tahiti by erecting a pole and pennant, and then establishing a market on the beach. See Robertson, *The Discovery of Tahiti*, pp. 159–60. The Tahitians later took down the pole and incorporated the British pennant into the red feather girdle or *maro ura* of the Island's supreme 'chief'. William Bligh observed it in this context in 1792. G. Dening, *Mr Bligh's Bad Language: Passion, Power and Theatre on the Bounty* (Cambridge: Cambridge University Press, 1992), pp. 233–7. See also *The Journals of Captain James Cook*, pp. 242–3.
108. See, for example, 'Conference With the Five Nations at Albany, 7–20 August 1710', and 'Propositions Made by the Sachems of the Five Nations ... to Governor Hunter ...' ([1711?]), National Archives, London, Colonial Office Records (hereafter NA), CO 5/1050; and 'Treaty of Friendship and Commerce Concluded 18 July 1759 at Wauyahatchey in the Upper Creek nation, by the Honourable Edmond Atkin esq his Britannick Majesty's Agent for and Superintendent of the Affairs of his Allies the Several Nations of

- the Indians Inhabiting the Frontiers of Virginia, North and South Carolina and Georgia ...', NA, CO 5/64.
109. 'Governors Clinton (New York) and Shirley (Massachusetts Bay) to the Board of Trade, 18 August 1748', NA, CO 5/5, part 2.
  110. *The Journals of Captain James Cook*, p. 118.
  111. *Ibid.*, p. 197.
  112. *Ibid.*, pp. 242–3.
  113. A. Salmond, *Between Worlds: Early Exchanges between Maori and Europeans 1773–1815* (Honolulu, HI: University of Hawai'i Press, 1997), p. 33.
  114. *Ibid.*, p. 177.
  115. *Ibid.*, p. 237.
  116. Connor dogmatically asserts that Cook '... treated eastern Australia exactly as he treated other territory he took possession of in the Pacific'. Connor, *The Invention of Terra Nullius*, p. 250.
  117. *The Journals of Captain James Cook*, p. 399. His journal entry for 6 May 1770 records that the Indigenous people '... had not so much as touch'd the things we had left in their huts on purpose for them to take away'. Consequently, he goes on, European possession was signified not by obtaining Indigenous consent, but by causing '... the English Colours to be display'd ashore every day and an inscription to be cut out upon one of the trees ...' (*ibid.*, p. 312). Similarly, Sydney Parkinson noted that 'we could not prevail on them [the Aborigines] to come near us or to be social ...' Parkinson, *Journal of a Voyage to the South Seas*, p. 135.
  118. 'Lieutenant Cook's Private Log', in *Historical Records of New South Wales*, 7 vols (1893; facsimile, Mona Vale: Lansdown Slattery, 1978–9), vol. 1, part 1, p. 19. Though referred to as 'Cook's Log' or the 'Private Log', Beaglehole states that it was certainly not written in Cook's hand, while the 'Official Log' or 'Ship's Log' was the work of Cook's senior officers and was kept by Joseph Banks, who donated it to the British Museum. See Beaglehole, 'Introduction', pp. ccxxvi–ccxxxix.
  119. *The Journals of Captain James Cook*, p. 306.
  120. Cook for instance spoke of Tahitian chiefs, and of the power of the elder Maori over the younger, and even considered it possible that the Maori were 'united under one head or chief' (*ibid.*, pp. 85, 281).
  121. As an example of this uncompromising view of Australian 'savagery', see Robertson, *The History of America*, vol. 2, pp. 393–4, n. XXXIII.

### 3 Difficult Subjects

1. See, for example, A. Frost, *Arthur Phillip 1738–1814: His Voyaging* (Oxford: Oxford University Press, 1987), pp. 146–9.
2. 'Governor Phillip's Instructions', in *Historical Records of Australia*, ed. F. Watson, 33 vols (Sydney: Library Committee of the Commonwealth Parliament, 1914–25), vol. 1, p. 13 (hereafter *HRA*). Another copy of the 'Instructions' can be found at the National Archives of Australia website at <[http://www.findingdocs.gov.au/resources/transcripts/nsw2\\_doc\\_1787.pdf](http://www.findingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf)> [accessed 25 January 2007].
3. 'Instructions', in *HRA*, vol. 1, p. 14.
4. A. Frost, *Botany Bay Mirages: Illusions of Australia's Convict Beginnings* (Melbourne: Melbourne University Press, 1994), pp. 184–7.

5. These ideas and assumptions have received considerable attention in the Spanish and broader Atlantic colonial contexts. See, for example, L. Hanke *The Spanish Struggle for Justice in the Conquest of America* (Boston, MA: Little Brown, 1965), p. 33; A. Pagden, *Spanish Imperialism and the Political Imagination* (New Haven, CT: Yale University Press, 1990), pp. 15–29; Muldoon, *The Americas in the Spanish World Order*, pp. 134–9; P. Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge: Cambridge University Press, 1995), pp. 42–63.
6. W. Raleigh, *The Discoverie of the Large and Bewtiful Empire of Guiana* (1596), ed. V. T. Harlow (London: Argonaut Press, 1928), p. 44. Raleigh went on to mention that ‘... I confesse it was a very impatient worke to keepe the meaner sort [among his crew] from spoile and stealing ...’ Written in the vain attempt to curry favour with the England’s new king, James I, Raleigh of course had an interest in promoting his own virtue as well as the virtues of colonization. Though he failed in his immediate aims, with fatal consequences for himself, the image he promoted of a virtuous, peaceful, legal and Protestant British form of colonization in opposition to the Spanish Catholic form would long endure.
7. Frost, *Arthur Phillip*, p. 184.
8. Clendinnen, *Dancing with Strangers*, p. 25.
9. *Ibid.*, pp. 29, 36.
10. *Ibid.*, p. 217; Borch, *Conciliation – Compulsion – Conversion*, p. 113.
11. Frost, *Arthur Phillip*, p. 144. This formulation could be variously rendered as ‘subjects of the crown’, and ‘Her’ or ‘His majesty’s subjects’.
12. The various proposals concentrate on other matters such as the need to find a new home for American loyalists, to find sources of timber or flax, to find a place for the transportation of convicts, to find a base for trade to Asia, or a strategic base against Spain and Holland in the Pacific. See, for example, J. M. Matra, ‘A Proposal for Establishing a Settlement in NSW, 23 August 1783’, Sir George Young’s Plan’, [1785]; Lord Sydney’s final proposal ‘Heads of a Plan’, communicated to Lords Commission of the Treasury 18 August 1786, all in *Historical Records of New South Wales*, vol. 1, part 2, pp. 1–6, 11–13, 17–20.
13. The only existing copy of the ‘Instructions’ is a handwritten draft from which various passages, notably a detailed injunction to maintain public morality and references to freedom of conscience and religious worship in the colony, were crossed out. Among the crossings out are a few passing references made to the Indigenous inhabitants as ‘savages’, for which the word ‘natives’ was inserted.
14. A. Bowes Smith, *The Journal of Arthur Bowes Smith: Surgeon, Lady Penrhyn 1787–1789*, ed. P. G. Fidlon and R. J. Ryan (Sydney: Australian Documents Library, 1979), p. 68.
15. ‘Governor Phillip’s Instructions’, in *HRA*, vol. 1, p. 13 (my italics).
16. My interpretation here contradicts the view that in 1788 Indigenous Australians ‘suddenly became British subjects’. See, for example, B. J. Hocking, ‘Conclusion: A Change of Sovereignty – During the Age of Empire’, in B. A. Hocking (ed.), *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Canberra: Aboriginal Studies Press, 2005), pp. 277–9, on p. 277.
17. For Aboriginal people the appellation ‘subject’ may have served not only to signify their subjection to a foreign sovereign, but also to enable their claims on the crown for respect for their rights and land. This, I take it, is what Cooper means by his observation that ‘external categorizations’ imposed by colonial authorities ‘have both stigmatized and humiliated people and given them an enabling and empowering sense of collective selfhood ...’ Cooper, *Colonialism in Question*, p. 85.

18. J. Samson, *Race and Empire* (Harlow: Pearson Longman, 2005), pp. 15–16; R. Hill, ‘Towards an Eighteenth-Century Transatlantic Critical Race Theory’, *Literature Compass*, 3:2 (2006), pp. 53–64.
19. Part of the distinction may rest on the characteristically Spanish concern to establish authority over imperial ‘subjects’ (people), as opposed to the British concern to take possession of land. See P. Seed, ‘Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires’, in J. M. Williams and R. E. Lewis (eds), *Early Images of the Americas, Transfer and Invention* (Tucson, AZ: University of Arizona Press, 1993), pp. 111–47, on p. 127.
20. Indeed, it is hard to read Phillip’s ‘Instructions’, or his early despatches from the colony, and agree with Borch’s statement that there was no indication in government reports of the period that ‘indigenous people in general were perceived as having relative positions on any kind of cultural or racial scale or that official policy was influenced by considerations of that sort’. Borch, *Conciliation – Compulsion – Conversion*, p. 118.
21. Indeed, the ‘Instructions’ specifically enjoin Phillip to punish any of ‘Our Subjects’ who ‘wantonly destroy them [the Indigenous people], or give them any unnecessary Interruption in the exercise of their several occupations’. For Marshall, the application of legal terms such as ‘subject’ was closely related to significant but gradual and ‘piecemeal’ shifts in imperial policy following 1763. For him, British success in the Seven Years War brought extensive religiously, ethnically and linguistically diverse populations in India and French Canada under British rule. Whereas previously smaller diverse populations had been brought within the pale of British Law, after 1763 there was a more concerted effort to sustain the Indigenous or pre-existing legal structure. Marshall, *A Free Though Conquering People*, p. 10. As Warren Hastings, the English East India Company Governor of Bengal put it, the policy of conciliation involved ‘... social communication with people over whom we exercise a dominion ... it attracts and conciliates distant affections; it lessens the weight of the chain by which the natives are held in subjugation; and it imprints on the hearts of our own countrymen the sense and obligation of benevolence’. Warren Hastings, Minute to Chairman of East India Company Board, 1784, cited in O. P. Kejariwal, *The Asiatic Society of Bengal and the Discovery of India’s Past* (New Delhi: Oxford University Press, 1988), p. 24. My thanks to Malcolm Allbrook for this reference.
22. Many years later in Tasmania this dismissive rationale was articulated: ‘... all endeavours to conciliate the Natives have failed ... little can be hoped from attempts to negotiate with, or to conciliate, a people in so rude and savage a state as the Aboriginal Natives of this Island, who live in Tribes independent of each other, and who appear to be without Government of any kind ... [and] appear to be insensible to acts of kindness ...’. ‘Minutes of the Executive Council, Sept 1830’, in *Historical Records of Australia, Resumed Series III, Despatches and Papers Relating to the History of Tasmania*, ed. P. Chapman, 3 vols (vols 7–9) (Carlton: Melbourne University Publishing, 2003), vol. 9, p. 615 (hereafter *HRA, Series III*).
23. D. Collins, *An Account of the English Colony in New South Wales*, 2 vols (1798; facsimile, Adelaide: Libraries Board of SA, 1971), vol. 1, pp. 555, 599–601; J. Hunter, *An Historical Journal of the Transactions at Port Jackson* (1793; facsimile, Adelaide: Libraries Board of SA, 1971), pp. 59–60; E. Home, *A First Fleet Letter to a Gentleman in Edinburgh* (1789; Canberra: Mulini Press, 1999), p. 16.
24. ‘Phillip to Lord Sydney, 15 May 1788’, and ‘Phillip to Secretary Stephens, 10 July 1788’, both in *HRA*, vol. 1, pp. 26–30, 62.

25. 'E. Macarthur, March 7<sup>th</sup> 1791', in S Macarthur Onslow (ed.), *Some Early Records of the Macarthurs of Camden* (Adelaide: Rigby, 1914), p. 34.
26. W. Tench, *A Narrative of the Expedition to Botany Bay* (1789), in *1788: A Narrative of the Expedition to Botany Bay and 'A Complete Account of the Settlement at Port Jackson'*, ed. T. Flannery (Melbourne: Text Publishing, 1996), pp. 13–84, on p. 57.
27. Collins, *An Account of the English Colony*, vol. 1, p. 544.
28. *Ibid.*, vol. 1, pp. 544–5.
29. 'Phillip to Lord Sydney, 27 August 1789' in *HRA*, vol. 1, p. 160.
30. J. Millar, *The Origin of the Distinction of Ranks*, p. 34. 'E. Macarthur, March 7<sup>th</sup> 1791', p. 37.
31. A. Malaspina, 'Loose Notes on the English Colony of Port Jackson' (1800), in A. Malaspina, *The Secret History of the Convict Colony: Alejandro Malaspina's Report on the British Settlement of New South Wales*, trans. R. J. King (Sydney: Allen and Unwin, 1990), pp. 132–50, on pp. 144–5. See also A. J. Cavanilles, 'Observations on the Soil, Natives and Plants of Port Jackson and Botany Bay', in Malaspina, *The Secret History, of the Convict Colony*, pp. 159–61; see also D. Paine, *The Journal of Daniel Paine 1794–1797*, ed. R. J. B. Knight and A. Frost (Sydney: Library of Australian History, 1983), p. 39.
32. A. Phillip, *The Voyage of Governor Phillip to Botany Bay ...* (1789; facsimile, Adelaide: Libraries Board of SA, 1968), p. 68.
33. R. L. Meek, *Social Science and the Ignoble Savage* (Cambridge: Cambridge University Press, 1976), pp. 5–36, 131–76. For a statement of this view, see Robertson, *The History of America*, vol. 2, pp. 29–30.
34. D. Stewart, 'Account of the Life and Writings of Adam Smith LL. D' (1793), in A. Smith, *Essays on Philosophical Subjects*, ed. W. P. D. Wightman and J. C. Bryce (Oxford: Clarendon Press, 1980), pp. 269–351. See also D. Stewart, 'Account of the Life and Writings of William Robertson D. D' (1796), in *The Collected Works of Dugald Stewart*, ed. W. Hamilton, 11 vols (Edinburgh: Thomas Constable, 1854–60), vol. 10, pp. 99–242, on pp. 147–55.
35. Stewart, 'An Account of the Life and Writings of Adam Smith', p. 275.
36. Montesquieu, *The Spirit of the Laws*, pp. 290–1.
37. *Ibid.*, p. 292.
38. Collins, *An Account of the English Colony*, vol. 2, pp. 253–4.
39. 'Phillip's Suggestions', *Historical Records of New South Wales*, vol. 1, part 2, p. 52.
40. On assumption of British superiority, see G. Caley, *Reflections on the Colony of NSW* (1803–7), ed. J. E. B. Currey (Melbourne: Lansdowne Press, 1966), p. 177.
41. W. Tench, *A Complete Account of the Settlement at Port Jackson* (1793), in *1788*, pp. 264–5.
42. 'E. Macarthur, March 7<sup>th</sup> 1791', p. 35.
43. T. Watling, *Letters from an Exile at Botany-Bay to his Aunt in Dumfries*, ed. G. Mackaness (Sydney: D. S. Ford, 1945), p. 28. Letter not dated – probably 1792.
44. Like Tench, the encounter with Australian savagery and the policy of conciliation in particular led him to reflect on what he considered the errors of European philosophy: 'this may be philosophy, according to the calculation of our rigid dictators; but I think it is the falsest species of it that I have ever known or heard of'. Watling, *Letters from an Exile*, p. 28.
45. R. Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Abingdon: Frank Cass, 2002), p. 17. As far back as the thirteenth century, the subject

- was defined as one subject to the sovereign's power, but the sovereignty of the English monarch was itself characterized in terms of respect for the usages and customs of English law. S. van Duffel, 'Natural Rights and Individual Sovereignty', *Journal of Political Philosophy*, 12:2 (2004), pp. 147–62; C. J. Nederman, 'Bracton on Kingship Revisited', *History of Political Thought*, 5 (1984), pp. 61–77; E. H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 1957), pp. 147–9.
46. C. Cuttica, 'Kentish Cousins at Odds: Filmer's *Patriarcha* and Thomas Scott's *Defence of Freeborn Englishmen*', *History of Political Thought*, 28:4 (2007), pp. 599–616.
  47. G. J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (Oxford: Basil Blackwell, 1975).
  48. Kantorowicz, *The King's Two Bodies*, p. 369.
  49. Starkey, *A Dialogue Between Pole and Lupset*, pp. 57–8.
  50. *Ibid.*, p. 67.
  51. T. Smith, *De Republica Anglorum* (1583; Menston: Scholar Press, 1970), p. 19.
  52. *Ibid.*, pp. 43–5.
  53. 'Statutes of Kilkenny (40 Ed. III), 18 February 1366', and Fynes Moryson, *The Commonwealth of Ireland* (1610), both in F. Madden and D. Fieldhouse (eds), *The Empire of the Bretaignes, 1175–1688, The Foundations of a Colonial System of Government*, Select Documents on the Constitutional History of the British Empire and Commonwealth, 1 (Westport, CT: Greenwood Press, 1985), pp. 57, 64.
  54. 'Sir John Davies on the Application of English Law, 1612', in Madden and Fieldhouse (eds), *The Empire of the Bretaignes*, p. 66. This policy, Davies suggested, derived from the influence of the great magnates among the Anglo-Irish who feared that making all the Irish into British subjects would give them legal protection for the land and goods the magnates wished to take from them (see p. 68). The 'enemy' status of the Irish in English eyes was reinforced by Irish Catholic support for Charles I and his son James II. 'The Civil Articles of the Treaty of Limerick, 3 October 1691', in Madden and Fieldhouse (eds), *The Empire of the Bretaignes*, pp. 68–9.
  55. J. P. Sommerville, *Loyalists and Patriots. Politics and Ideology in England 1603–1640*, 2nd edn (London: Longman, 1999), p. 134.
  56. The status of the last category, natural subjects, did not just depend on birth. Rather, Bacon argued that their status was determined by the law which itself depended on the royal will. G. Loughton, 'Calvin's Case and the Origins of the Rule Governing "Conquest"', in *English Law, Australian Journal of Legal History*, 8 (2004), pp. 143–80.
  57. The one exception Bacon made was for the conquest of non-Christian 'infidels' who, 'if a Christian king should conquer' them 'there *ipso facto* the laws of the infidel are abrogated'. *Calvin's Case, Trinity Term, 1608*, in Madden and Fieldhouse (eds), *The Empire of the Bretaignes*, p. 36. Irving argues that Bacon's position here was a product of his 'anxieties' over the violence of colonization (exemplified by the Spanish in America) and its distortion of the knowledge that he saw as vital to regaining humanity's lost mastery ('empire') over nature. S. Irvine, 'In a Pure Soil': Colonial Anxieties in the Work of Francis Bacon, *History of European Ideas*, 32 (2006), pp. 249–62.
  58. P. J. Price, 'Natural Law and Birthright Citizenship in Calvin's Case (1608)', *Yale Journal of Law and Humanities*, 9 (1997), pp. 73–145.
  59. Karatani, *Defining British Citizenship*, p. 41.

60. A. Cromartie, *Sir Matthew Hale 1609–1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 46–7; J. G. A. Pocock and G. J. Schochet, 'Interregnum and Restoration', in J. G. A. Pocock (ed.), *The Varieties of British Political Thought, 1500–1800* (Cambridge: Cambridge University Press, 1993), pp. 146–79, on p. 151. See also H. Parker, 'Observations upon some of his Majesties Late Answers and Expresses' (1642), in H. Erskine-Hall and G. Storey (eds), *Revolutionary Prose of the English Civil War* (Cambridge: Cambridge University Press, 1983), pp. 36–63; G. Winstanley, *The Law of Freedom in a Platform, or, True Magistracy Restored* (1652), ed. R. W. Kenny (New York: Schocken Books, 1941), pp. 56–7.
61. J. Milton, *The Tenure of Kings and Magistrates* (1649), in *Political Writings*, ed. M. Dzelzainis (Cambridge: Cambridge University Press, 1991), pp. 3–48, on p. 9.
62. J. Milton, *A Defence of the People of England* (1651), in *Political Writings*, pp. 49–254, on p. 146.
63. Milton, *The Tenure of Kings and Magistrates*, p. 11. On Milton's anti-imperialism, see D. Armitage, 'John Milton: Poet Against Empire', in D. Armitage, A. Himy and Q. Skinner (eds), *Milton and Republicanism* (Cambridge: Cambridge University Press, 1995), pp. 206–25.
64. Hobbes, *Leviathan*, pp. 271, 264.
65. *Ibid.*, p. 268.
66. *Ibid.*, pp. 187, 272. For the German Hobbesian Samuel Pufendorf, the duty of subjects to obey their sovereign would even excuse the taint of unjust acts the sovereign commanded, such as participation in an unjust war. Pufendorf, *The Whole Duty of Man*, pp. 224–5.
67. Hobbes, *Leviathan*, pp. 234–5.
68. Scott, *England's Troubles*, pp. 286, 359–60, 384; R. Filmer, *Patriarcha* (1680), in *Patriarcha and Other Writings*, pp. 1–68, on pp. 7, 12.
69. S. Masters, 'The Case of Allegiance in our Present Circumstances Considered' (1688–9), in J. L. Malcolm (ed.), *The Struggle for Sovereignty: 17th Century English Political Tracts*, 2 vols (Indianapolis, IN: Liberty Fund, 1999), vol. 2, pp. 906–41, on p. 915.
70. Masters, 'The Case of Allegiance', p. 921; J. Harris, *The British Hero: or A Discourse Plainly Shewing that it is the Interest, as well as the Duty of Every Briton ...* (London: R. Tookey, 1715), pp. 32–7.
71. Anon. 'A Friendly Conference Concerning the New Oath of Allegiance to K William and Q Mary, Wherein the Objections against Taking the Oaths are Impartially Examined' (1689), in Malcolm (ed.), *The Struggle for Sovereignty*, vol. 2, pp. 946–88, on p. 959.
72. Locke, *Two Treatises*, § 88 pp. 324–5.
73. *Ibid.*, § 93 p. 238.
74. *Ibid.*, § 108 pp. 339–40.
75. H. Neville, *Plato Redivivus or, A Dialogue Concerning Government* (1681), in C. Robbins (ed.), *Two English Republican Tracts* (Cambridge: Cambridge University Press, 1969), pp. 90, 130–1.
76. Sir B. Shower, 'Reasons for a New Bill of Rights: Humbly Submitted to the Consideration of the Ensuing Session of Parl' (1692), in Malcolm (ed.), *The Struggle for Sovereignty*, pp. 1042–64, on p. 1051.
77. *Ibid.*, p. 1049.
78. Schwoerer argues that both Whigs and Tories were essentially united in their elitist identification of 'the people' with the representative body only, excluding the poor and

- labouring classes. L. G. Schworer, 'The Right to Resist: Whig Resistance Theory, 1688–1694', in Phillipson and Skinner (eds), *Political Discourse in Early Modern Britain*, pp. 232–52, on pp. 242–3.
79. Shower, 'Reasons for a New Bill of Rights', p. 1064.
  80. See, for example, A. Fletcher of Saltoun, 'Speeches by a Member of Parliament', May 1703, in *Political Writings*, ed. J. Robertson (Cambridge: Cambridge University Press, 1997), pp. 129–73.
  81. Allegiance could be conceived in a variety of ways, but a distinctive feature was that it was thought to override 'private' considerations, such as religious affiliation. Considerable doubt persisted in British public discourse throughout the eighteenth century on whether Catholics could be considered to have the full rights of British subjects. See Anon. *A Letter to George Saville, Bart. Upon the Allegiance of a British Subject* (London: J. Robson, 1778).
  82. In Locke's 'The Fundamental Constitutions of Carolina', the rights of the colonial subject – to trial by jury and to freedom of religion – were nonetheless tied to land ownership, each colonist owing allegiance to a landed proprietor. The Constitutions conceded far fewer rights to slaves and the Indigenous inhabitants of Carolina.
  83. See 'Act for the Better Securing the Liberty of the Subject, and for Preventing of Illegal Imprisonment, 14 December 1694', and 'Instructions to Sir Beville Granville, 18 August 1702', both in F. Madden and D. Fieldhouse (eds), *The Classical Period of the First British Empire, 1689–1783, The Foundations of a Colonial System of Government*, Select Documents on the Constitutional History of the British Empire and Commonwealth, 2 (Westport, CT: Greenwood Press, 1985), pp. 200–3, 215–16. The logic of *Calvin's Case* was applied to the colonization of Jamaica in *Blankard v. Galdy* in 1693. In this case it was asserted that Jamaica having been conquered from Spain, the laws and customs of Spain continued until replaced with new laws by the conquering power. '*Blankard v. Galdy*, Trinity Term 1693', in Madden and Fieldhouse (eds), *The Classical Period*, p. 204. The same logic was applied in relation to Barbados in *Dutton v. Howell et al.*, in 1694. Here it was asserted that Barbados was not conquered but was rather a 'Plantation or new Settlement ... in an uninhabited Country'. See '*Dutton v. Howell et al.*, 1694', in Madden and Fieldhouse (eds), *The Classical Period*, p. 207.
  84. In Virginia, such claims rested on the original Letters Patent of 1606, which stated that '... all and everie the parsons being our subiectes ... [dwelling in the colony] and everie of their children which shall happen to be borne within [the colony] ... shall haue and enjoy all liberties Franchises and Immunities within anie of our other dominions ... as yf they had been abiding and borne within this our Realme of Englande ...'. 'Letters Patent to Sir Thomas Gates and others, 10 April 1606', in Barbour (ed.), *The Jamestown Voyages*, vol. 1, p. 31.
  85. See 'Act Declaring the Rights and Privileges of English Subjects, 13 May 1691', in Madden and Fieldhouse (eds), *The Classical Period*, pp. 195–8. The background to this Act was the usurpation of New York's colonial government by Jacob Leisler and the refusal of other colonies to cooperate with New York in defensive measures against a feared French attack. See 'H. Sloughter to Governors of Virginia, Maryland, Pennsylvania, West Jersey, Connecticut, and Rhode Island, 11 July 1691' and 'Abstract of Proceedings in New York, 17 July 1691', NA, CO 5/1037.
  86. 'Privy Council Memorandum on English Law in Settled and Conquered Colonies, 9 August 1722', in Madden and Fieldhouse (eds), *The Classical Period*, p. 193.



87. In 1757, in the wake of the battle of Plassey that established the governing power of the British East India Company in Bengal, the Privy Council was advised that His Majesty's government had 'right of sovereignty' over settlements, 'as English settlements, and over the inhabitants, as English subjects, who carry with them your Majesty's laws, wherever they form colonies ...'. The original Indian inhabitants, however, although they were increasingly being subjected to East India Company taxation, and to the decisions of East India Company courts, were not regarded as British subjects. See 'Copies of Several Treaties from the Country Powers, to the East India Company ... 1756 to 1766', in (ed.), *House of Commons Sessional Papers of the Eighteenth Century*, ed. S. Lambert, 147 vols (Wilmington, DE: Scholarly Resources, 1975), vol. 26, pp. 10–111; and 'Sir Charles Pratt (Attorney General) and Charles Yorke (Solicitor General) on English Common Law in Settled and Ceded Colonies, 24 December 1757', in Madden and Fieldhouse (eds), *The Classical Period*, p. 194.
88. 'Queen Anne's Act of Grace, 23 June 1713', in Madden and Fieldhouse (eds), *The Classical Period*, pp. 162–3. According to Eccles, the French were prepared to acknowledge that Indigenous people 'were entitled to all the rights and privileges of French citizenship' if they converted to Christianity. W. J. Eccles, 'Sovereignty-Association, 1500–1783', in Armitage (ed.), *Theories of Empire*, pp. 203–38, on p. 209.
89. 'Instructions to Governor Richard Phillips, 19 June 1719', in Madden and Fieldhouse (eds), *The Classical Period*, p. 165.
90. 'Lieutenant-Governor Mascarene to Governor Shirley, 7 December 1745', in Madden and Fieldhouse (eds), *The Classical Period*, p. 178. The subsequent history of forced removal of many Acadians testifies to the limits of British intentions to allow them rights as British subjects.
91. See 'In Answer to the Separate Trader's Feigned Great Trade for 80 Thousand Negroes in 13 Years ...' (n.d.), in *A Collection of Papers Relating to the Trade to Africa* (London, [1712?]); and 'James Walker to Royal African Company, Annamaboe, 9 October 1686', in R. Law (ed.), *The English in West Africa 1685–88*, Local Correspondence of the Royal African Company of England 1681–99, Part 2 (Oxford: British Academy, 2001), p. 176.
92. See for example, Edmund Burke's 'Observations on the State of the C<sup>o</sup>'s Affairs in India from 9th Report of Select Committee on the Petitions ... against the Supreme Court' (1783), in Madden and Fieldhouse (eds), *Imperial Reconstruction, 1763–1840*, pp. 178–80, on p. 178.
93. Sir E. Hyde East, CJ, 'A Sketch of the State and Condition of the British Population within the Jurisdiction of the Supreme Court in Calcutta, in respect to Laws and Usages', [c. 1815], in Madden and Fieldhouse (eds), *Imperial Reconstruction*, p. 211. Hindu laws, he argued, were 'formed in rude times' and 'imperfectly adapted to the modern growth of arts, knowledge and civilisation around them' and therefore ought to be gradually replaced by British law.
94. See, Sir Charles Metcalfe, Memorandum, 12 December 1815, in Madden and Fieldhouse (eds), *Imperial Reconstruction*, pp. 212–13, on p. 213; Mountstuart Elphinstone, 'The Advantages of an Indigenous Legal System', in Madden and Fieldhouse (eds), *Imperial Reconstruction*, pp. 214–15.
95. J. Adelman and S. Aron, 'From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History', *American Historical Review*, 104:3 (1999), pp. 814–41.
96. Witgen, 'The Rituals of Possession'.
97. Richter, *Facing East from Indian Country*, p. 149.

98. Witgen, 'The Rituals of Possession', pp. 644–5.
99. 'Instructions from the Virginia Council in London Advocating Christian Conversion of the Indians, Tributary Status for Powhatan, and Agreements with his Enemies, May 1609', in *Early American Indian Documents*, vol. 4: Virginia Treaties, 1607–1722, p. 7.
100. Fitzmaurice, *Humanism and America*, pp. 178–81.
101. The colonists themselves could be made uneasy by this policy, as when the Virginian Colonial Council opposed the award of 'Coronets' to Indian chiefs because the Indians would deem such 'presents' to be 'the effect ... of fear, and not kindness.' 'Opposition to Gifts of Coronets to Tributary Leaders, 19 June 1680', in *Early American Indian Documents*, vol. 4, p. 88.
102. Submission, 'Placed on Record in ye Colony book of Rhode Island. Providence Plantations, 28 December 1664', CO 5, LAC, America and West Indies – Original Correspondence: Board of Trade, New England, vol. 864, microfilm B-6111.
103. 'Treaty of Peace with Necotowance, King of the Indians, 1646', in *Early American Indian Documents*, vol. 4, p. 68. See also 'Articles of Peace and Amity with several Maryland Tribes, 19 April 1666', in *Early American Indian Documents*, vol. 6: Maryland Treaties, 1632–1775, p. 58.
104. Richter, *Facing East from Indian Country*, pp. 106–8.
105. Spotswood, cited in *ibid.*, p. 108.
106. 'Treaty at Middle Plantation with Tributary Indians after Bacon's Rebellion, 29 May 1677', in *Early American Indian Documents*, vol. 4, p. 82.
107. *Ibid.*, p. 83. See also 'Articles of Peace and Amity with Delaware Bay Indians', in *Early American Indian Documents*, vol. 6, p. 48.
108. 'Spotswood's Treaty with the Nottoways, 27 February 1714', in *Early American Indian Documents*, vol. 4, p. 215. See also pp. 211–24.
109. Pocock argues that this linguistic strategy was central to the Treaty of Waitangi in New Zealand in 1840. Pocock, *The Discovery of Islands*, p. 236. This presented obvious difficulties for Indigenous litigants contesting colonial claims to their land, as revealed in the 69-year *Mohegan Indians v. Connecticut* case. See, for example, J. H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), pp. 422–42.
110. 'William Penn's Third Letter to the Indians', in *Early American Indian Documents*, vol. 1: Pennsylvania and Delaware Treaties, 1629–1737, p. 57, also pp. 55–6.
111. 'Report of a Conference between Colonel Talbot and William Penn', in *Early American Indian Documents*, vol. 1, p. 75.
112. 'Articles of Agreement between William Penn and the Susquehannah, Shawoneh and North Patomack Indians, 23 April 1701', in *Early American Indian Documents*, vol. 1, p. 102.
113. 'Provincial Council: Meeting with Allumpees and other Indians, 10–11 October 1728', in *Early American Indian Documents*, vol. 1, p. 317.
114. 'Provincial Council: Meeting with Conestogoes, Conoys, and Delawares, 26 May 1729', in *Early American Indian Documents*, vol. 1, p. 322. Further distinctions were implied by British demands that the Six Nations return 'captives' to the colony because they were our 'Flesh and Blood', see also S. Kalter (ed.), *Benjamin Franklin, Pennsylvania, and the First Nations. The Treaties of 1736–62* (Urbana, IL: University of Illinois Press, 2006), pp. 376–8.
115. F. Jennings, *The Ambiguous Iroquois Empire* (New York: W. W. Norton, 1984), pp. 10–17, 191–2.

116. 'Warrant Authorizing Governor Dongan to Protect the Five Nations, 10 November 1687', in *Early American Indian Documents*: vol. 8, p. 167.
117. 'Treaties between Governor Fletcher and the Indians of the Five Nations, the River Indians, and the Shawnees, 1694', in *Early American Indian Documents*, vol. 8, p. 321.
118. R. L. Haan, 'Covenant and Consensus: Iroquois and English, 1676–1760', in D. K. Richter and J. H. Merrell (eds), *Beyond the Covenant Chain. The Iroquois and their Neighbors in Indian North America, 1600–1800* (Syracuse, NY: Syracuse University Press, 1987), pp. 41–57.
119. Richter, *Facing East from Indian Country*, pp. 134–40.
120. Williams, *Linking Arms Together*, pp. 71–4; M. A. Druke, 'Iroquois Treaties: Common Forms, Varying Interpretations', in F. Jennings, W. Fenton, M. Druke and D. Miller (eds), *The History and Culture of Iroquois Diplomacy* (Syracuse, NY: Syracuse University Press, 1985), pp. 85–98.
121. 'Treaty with the Six Nations at Lancaster, 22 June–4 July 1744', in *Early American Indian Documents*, vol. 8, p. 422; F. Anderson, *Crucible of War: The Seven Years War and the Fate of Empire in British North America, 1754–1766* (London: Faber and Faber, 2000), p. 24.
122. 'Colden to Governor Clinton: Administration of Indian Affairs, 8 August 1751', in *Early American Indian Documents*, vol. 8, p. 600; S. Banner, *How the Indians Lost Their Land. Law and Power on the Frontier* (Cambridge, MA: Belknap Press, 2005), pp. 87–9.
123. Eccles, 'Sovereignty-Association', p. 234.
124. 'Lords of Trade to the Earl of Egremont, 8 June 1763', LAC, B-6111.
125. Anderson, *Crucible of War*, p. 566.
126. Pocock, *The Discovery of Islands*, p. 231.
127. R. de Costa, 'National Encounters between Indigenous and Settler Peoples: Some Canadian Lessons', in P. Read, G. Meyers and B. Reece (eds), *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986–2006* (Canberra: ANU E Press, 2006), pp. 15–30.
128. Armitage, *Greater Britain*, p. 99.
129. George Chalmers's historical survey of the colonization of America, for instance, trumpets the theme of the gradual triumph of the 'English liberties' of the colonists as 'Englishmen' asserted themselves against the encroachments of executive power and in the face of threats from the Indians. G. Chalmers, *Political Annals of the Present United Colonies from their Settlement to the Peace of 1763* (London, 1780), p. 14.
130. See, for instance, J. Otis, *A Vindication of the British Colonies* (London: J. Alman, 1769); and Anon., *Remarks on the Review of the Controversy between Great Britain and her Colonies* (London: T. Beckett and P. A. De Hondt, 1769).
131. Chalmers, *Political Annals*, p. 5. Although entitled to consideration from the colonists (in the form of treaties), Chalmers argued that America was a 'desert planted by English subjects', and the 'dawn of [English] liberty in the wilderness ...' was based firmly on natural law and the law of nations '... which sternly disregarded the possession of the aborigines, because they had not been admitted into the society of nations'. Chalmers, *Political Annals*, pp. 668, 669. On his approval of the terms of Indian treaties, see, for example, pp. 154, 207, 587.
132. A. Adams, *A Concise Historical View of Difficulties, Hardships and Perils which attended the Planting, and Progressive Improvements of New England* (London: E and C Dilly, 1770), pp. 8–9. Such assertions of the entitlements of British colonists to the rights and liberties of the British subject were not restricted to the American colonies. See, for

- instance, ‘Resolutions of the British Inhabitants of Calcutta, 25 July 1785’; in Madden and Fieldhouse (eds), *Imperial Reconstruction*, pp. 191–2.
133. ‘*Campbell v. Hall*, 28 November 1774’, in Madden and Fieldhouse (eds), *Imperial Reconstruction*, p. 476.
134. *Ibid.*, p. 476.
135. Marshall, *A Free Though Conquering People*, p. 3.
136. S. Sen, ‘Imperial Subjects on Trial: On the Legal Identity of Britons in Late Eighteenth-Century India’, *Journal of British Studies*, 45:3 (2006), pp. 532–55, on p. 540. Foreign Protestants who resorted to the American colony of Georgia were declared ‘Denizens’, in contrast to the Indigenous Indians. The ‘friendship’ of the latter was to be courted in order to obtain their land by ‘voluntary cession’, thereby adding further ‘Right and Title’ to the British ‘to that of first Discovery and Cultivation.’ ‘An Account Shewing the Progress of the Colony of Georgia in America from its First Establishment’ (1741), in *House of Commons Sessional Papers of the Eighteenth Century*, vol. 13, pp. 3, 14.
137. Marshall, *A Free Though Conquering People*, p. 7. Marshall argues that slaves, for example, had no legal protection and were not considered British subjects, and even Mansfield in his famous *Somerset* case (1722) did not challenge the existence of slavery in Britain. The indiscriminate extension of the rights and privileges of British subjects to non-Britons was in direct tension with the development of a discourse of racial superiority in late eighteenth-century Britain. Bayly, *The Birth of the Modern World*.

#### 4 The Subject of War

1. Bowes Smith, *The Journal of Arthur Bowes Smith*, p. 68.
2. Davidson, *From Subject to Citizen*, p. 189. According to one interpretation, the equal application of British law was defeated by local colonial populations and reinforced after 1850 by increasing racial pessimism. H. Goodall ‘Authority under Challenge: Pikampul Land and Queen Victoria’s Law during the British Invasion of Australia’, in Daunton and Halpern (eds), *Empire and Others*, pp. 260–79, on p. 269.
3. Marshall, *A Free Though Conquering People*, p. 14.
4. Claeys, ‘The Origins of the Rights of Labor’, pp. 252–5.
5. Philp, ‘English Republicanism in the 1790s’, pp. 242–3. See also M. Walzer, ‘Citizenship’, in T. Ball, J. Farr and R. L. Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), pp. 211–19.
6. Armitage, *Greater Britain*, p. 106. Marshall also notes the development of a more authoritarian British Empire in the late eighteenth century, sustained by regular and substantial troop deployments and incorporating diverse populations of non-British origin, to whom the Empire offered only ‘citizenship of a kind’, and Indians and black slaves, who were offered something far less. Marshall, *A Free Though Conquering People*, p. 116, see also pp. 5–6.
7. Joseph Banks in particular wrote that the Indigenous Australians were a ‘very pusillanimous people’ who simply gave up their land rather than fight for it. The land itself he described as ‘thinly inhabited even to admiration’. J. Banks, *The Endeavour Journal of Joseph Banks*, ed. J. C. Beaglehole, 2 vols (Sydney: Trustees of the Public Library of NSW, 1962), vol. 2, pp. 134, 122. In 1779 Banks recommended Botany Bay as the site for a proposed penal colony to a Select Committee of the House of Commons on the grounds (in part) that the Indigenous inhabitants were few and unlikely to oppose it. ‘Banks on Botany Bay 1779’, in C. M. H. Clark (ed.), *Select Documents in Australian History 1788–*

- 1850 (London: Angus and Robertson, 1950), pp. 26–8. On the historiography of ‘war’ in colonial Australia, see A. Atkinson, ‘Historians and Moral Disgust’, in B. Attwood and S. G. Foster (eds), *Frontier Conflict: The Australian Experience* (Canberra: National Museum of Australia, 2003), pp. 113–19, on pp. 118–19.
8. K. Willey, *When the Sky Fell Down: The Destruction of the Tribes of the Sydney Region 1788–1850’s* (Sydney: Collins, 1979), p. 158.
  9. B. Buchan, ‘Civilization, State Sovereignty and War: The Scottish Enlightenment and International Relations’, *International Relations*, 20:2 (2006), pp. 175–92; R. Weigley, *The Age of Battles: The Quest for Decisive Warfare from Breitenfeld to Waterloo* (London: Pimlico, 1993); and J. Black, *Warfare in the Eighteenth Century* (London: Cassell, 1999).
  10. H. Reynolds, *An Indelible Stain? The Question of Genocide in Australia’s History* (Ringwood: Viking, 2001), pp. 96–8, 103–4. See also Atkinson, ‘Historians and Moral Disgust’, p. 117. One is reminded here of Immanuel Kant’s ironic comment on the apparent cruelty of ‘savage’ cannibalism, ‘Europeans know how to make better use of those they have defeated than merely by making a meal of them [as savages do]. They would rather use them to increase the number of their own subjects, thereby augmenting their stock of instruments for conducting even more extensive wars.’ I. Kant, ‘Perpetual Peace: A Philosophical Sketch’ [1795], in H. Reiss (ed.), *Kant’s Political Writings* (Cambridge: Cambridge University Press, 1970), pp. 93–130, on p. 103.
  11. ‘James Marriott to Thomas Pownall, 15 February 1765’, LAC, R216-193-4-E.
  12. D. Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, new edn, 8 vols (London: Cadell and Davis et al., 1807), vol. 2, p. 106.
  13. The contrast between ‘savage’ and ‘civilized’ manners was most clearly drawn by Adam Smith, who argued that ‘the style of manners which takes place in any nation, may commonly upon the whole be said to be that which is most suitable to its situation’. In other words, the harshness of ‘savage’ nomadism and war gives rise to hardiness, while the security of civil life engenders greater ‘humanity’ but also more ‘softness’. A. Smith, *The Theory of the Moral Sentiments* (1759), ed. D. D. Raphael and A. L. Macfie (Oxford: Oxford University Press, 1976), pp. 205, 209.
  14. ‘James Marriott to Thomas Pownall, 15 February 1765’, LAC, R216-193-4-E.
  15. Ferguson, *An Essay*, pp. 190, 189. Ferguson, *Principles of Moral and Political Science*, vol. 2, p. 295. A central feature of Enlightenment conceptions of the ‘rules of war’ was that civilized Europeans were motivated by a heightened sense of honour. Honour was held to consist in the open conduct of battle in which the aim was to defeat the enemy by means which win the ‘approbation and esteem of mankind’. Waging war according to the ‘principles of humanity’ would lead to abstention from ‘slaughter as much as possible’ and the protection of non-combatants. J. J. Burlamaqui, *The Principles of Politic Law: Being a Sequel to the Principles of Natural Law* (Dublin: J. Sheppard and G. Nugent, 1776), pp. 38, 209, 214. Considerations of interest also played a role in leading to finer calculations of the benefits of securing a peace favouring future commercial prosperity rather than continual conquest. Accordingly, under considerations of honour and interest ‘the Effusion of Blood is spar’d, and indiscriminate reprisal is forbidden. S. Brewster, *Jus Feciale Anglicanum: or A Treatise on the Laws of England Relating to War and Rebellion....*, 2nd edn (London: T. Cooper et al., 1740), p. 7. See also Hutcheson, *A Short Introduction to Moral Philosophy*, pp. 232–4, 333; D. Hume, ‘Of Refinement in the Arts’, in *Essays Moral, Political and Literary*, pp. 268–80, on p. 274; C. Lofft, *Elements*

- of Universal Law, and Particularly of the Law of England* (London: His Majesty's Law Printers, 1779), p. 127.
16. Montesquieu, *The Spirit of the Laws*, pp. 461–2.
  17. Hume, *The History of England*, vol. 2, p. 432.
  18. Hume's argument that artillery unexpectedly led to further moderation of warfare by stimulating new calculations of interest can be placed alongside his analysis of how technological advances ('industry') stimulated the growth of 'knowledge, and humanity' by opening up more avenues for sociability, leading to greater knowledge and refinement of manners. Hume, 'Of Refinement in the Arts', p. 271. On the progressive features of the development of state sovereignty and national armies, see W. Robertson, *History of the Reign of Charles the Fifth*, 2 vols (1769; London: George Routledge, 1856), vol. 1, pp. 67, 86, 93.
  19. Smith, *The Theory of the Moral Sentiments*, pp. 144–5. R. Bourke, 'Edmund Burke and Enlightenment Sociability: Justice, Honour and the Principles of Government', *History of Political Thought*, 21:4 (2000), pp. 632–56.
  20. Montesquieu, *The Spirit of the Laws*, pp. 82, 87.
  21. *Ibid.*, pp. 74–6. For another statement of this view, see J. Adams, *A Defence of the Constitutions of Government of the United States of America* (London: C. Dilly, 1787–8), pp. 330–1. A similar distinction between kingly good government and tyrannous revenge was made earlier by J. Bodin, *The Six Bookes of the Commonweale* (1606), facsimile, ed. K. D. McRae (Cambridge, MA: Harvard University Press, 1962), chs iv–v.
  22. Montesquieu, *The Spirit of the Laws*, pp. 75, 295–6.
  23. F. Bacon, 'Of Revenge', in *The Essays or Counsels, Civill and Morall* (1625), ed. J. Picher (London: Penguin, 1985), pp. 72–3, on p. 72.
  24. Ferguson, *An Essay*, p. 98.
  25. This was Hume's view also. D. Hume, 'Of the Populousness of Ancient Nations', in *Essays Moral, Political and Literary*, pp. 377–464, on pp. 404, 406.
  26. Ferguson, *An Essay*, pp. 201–3. See also A. Gentili, *De Lure Belli Libri Tres* (trans. 1612), ed. J. C. Rolfe (Oxford: Clarendon Press, 1933), book I, pp. 122–7.
  27. Hume, 'Of Refinement in the Arts', p. 274. William Robertson's statement of this view is the most succinct: '... when nations are in a state similar to each other, and keep equal pace in their advances towards refinement, they are not exposed to the calamity of sudden conquests ... Other states interpose, and balance any temporary advantage which either party may have acquired. After the fiercest and most lengthened contests, all the rival nations are exhausted, none are conquered. At length they find it necessary to conclude a peace, which restores to each almost the same power and the same territories of which they were formerly in possession'. Robertson, *The History of America*, vol. 2, p. 413.
  28. *Ibid.*, vol. 2, pp. 413–14. The Abbé Raynal denounced European empire, but still saw European commerce as an agent of global civilization by creating a globalized 'mutual intercourse' between nations. Raynal, *A Philosophical and Political History*, vol. 1, pp. 1–2; vol. 5, pp. 223–36.
  29. A. Ferguson, *Reflections Previous to the Establishment of a Militia* (London, 1756), p. 18.
  30. Ferguson, *An Essay*, pp. 216–17.
  31. I. K. Steele, *Warpaths: Invasions of North America* (New York: Oxford University Press, 1994), pp. 134–6; Black, *Warfare in the Eighteenth Century*, pp. 87–91.

32. Lepore, *The Name of War*, pp. 113–21; R. M. Ketchum, *Saratoga: Turning Point in America's Revolutionary War* (London: Pimlico, 1997), pp. 268–75; Anderson, *Crucible of War*, pp. 99–107.
33. Brewster, *Jus Fecliale Anglicanum*, pp. 7, 30, 34, 51.
34. Ferguson, *An Essay*, p. 131; A. Ferguson, *Remarks on a Pamphlet lately Published by Dr. Price ...* (London: T. Cadell, 1776), p. 59.
35. More ominously, he warned that armed rebellion not only threatened the stability of Britain's Empire, but also incurred the likelihood of a violent armed response from Britain. See Ferguson, *Remarks on a Pamphlet*, pp. 21, 27, 35, 41. This manifesto (including the Carlisle Commission and Ferguson himself) was roundly condemned by Thomas Paine in letter 6 (20 October 1778) of *The Crisis* (New York: Dolphin Books, 1960), pp. 154–63.
36. The manifesto was censured by the British House of Lords for declaring that the 'extremes of war' would be unleashed on fellow British subjects in the colonies in direct contravention of 'the maxims which have been established among Christian and civilized communities ...' 'Protest of the Lords, Dec 7, 1778', *Annual Register, or a View of the History, Politics and Literature for the Year 1778* (London: J. Dodsley, 1781), pp. 300–3.
37. See, for example, A. Ferguson, 'Notes on the Enquiry into General Sir William Howe's Conduct in the American War, 10 May 1779', in V. Merolle (ed.), *Correspondence of Adam Ferguson*, 2 vols (London: Pickering & Chatto, 1995), vol. 2, p. 561.
38. *Ibid.*, pp. 562–4.
39. A. Ferguson, *Institutes of Moral Philosophy*, 3rd edn (Edinburgh: John Bell and William Creech, 1785), pp. 227–8.
40. For examples of this view, see *The Sydney Gazette and New South Wales Advertiser*, 3 vols (facsimile, Sydney: Trustees of the Public Library of NSW, 1963–6), vol. 1, 2 October 1803; *The Sydney Gazette*, vol. 2, 24 June and 23 December 1804; *The Sydney Gazette*, vol. 3, 31 March, 8 and 29 December 1805, 19 January 1806. Indeed, the *Sydney Gazette* reported with some interest the disdain expressed by a visiting Maori chief (Tip pa-hee) for Australian Indigenous warfare, see *The Sydney Gazette*, vol. 3, 22 December 1805.
41. See, for example, G. Thompson, 'Slavery and Famine Punishments for Sedition or an Account of the Miseries and Starvation at Botany Bay' (1794), ed. G. Mackaness (Sydney: D. S. Ford, 1947), p. 39; *The Journal of Daniel Paine*, p. 40. Although Paine called the Indigenous people 'uncivilized', he admitted that Indigenous 'punishments' were far less deadly than those among 'Nations who are stiled *Civilized* and *Christian* ...'. See also the observations of the missionary L. Threlkeld, *Australian Reminiscences and Papers*, ed. N. Gunson, 2 vols (Canberra: ANU Press, 1975), vol. 1, pp. 67–8, 70–1. Another missionary, John Wollaston, noted that Aboriginal women engaged in ordered violence against one another in Western Australia in 1842. Rev. J. R. Wollaston, *Wollaston's Picton Journal (1841–1844) Being Volume I of the Journals and Diaries (1841–1856)*, collected by Rev. C. A. Burton, Paterson (Perth, n.d.), p. 96. I would like to thank Malcolm Allbrook for this and subsequent references to this text. See also An Emigrant Mechanic, *Settlers and Convicts or Recollections of Sixteen Year's Labour in the Australian Backwoods* (1847; Melbourne: Melbourne University Press, 1953), p. 128.
42. Anon., 'Collins's Account of New South Wales, Volume II', *Edinburgh Review*, 2:3 (1803), pp. 30–42, on p. 35.
43. G. A. Robinson, *Friendly Mission: The Tasmanian Journals and Papers of George Augustus Robinson 1829–1834*, ed. N. J. B. Plomley (Hobart: Tasmanian Historical Research Association, 1966), p. 257; G. A. Robinson, *The Journals of George Augustus Robinson*,

- Chief Protector, Port Phillip Aboriginal Protectorate*, ed. I. D. Clark, 6 vols (Melbourne: Heritage Matters, 1998), vol. 1, p. 27, vol. 3, p. 101, vol. 1, p. 291; J. Dredge, *Brief Notices of the Aborigines of New South Wales* (Geelong: James Harrison, 1845), pp. 6–7, 26. Baron Hügel felt that violence between tribes was aimed solely ‘at maintaining political equilibrium between their states ...’ but this concession of political status was highly unusual among colonial observers. C. F. von Hügel, *New Holland Journal, November 1833–October 1834*, trans. and ed. D. Clark (Melbourne: Miegunyah Press, 1994), p. 27.
44. Bowes Smith, *The Journal of Arthur Bowes Smith*, p. 66. See also J. Finucane, *Distressed Settlement: New South Wales after Bligh, from the Journal of Lieutenant James Finucane 1808–10*, ed. A.-M. Whitaker (Melbourne: Miegunyah Press, 1998), p. 87.
  45. See, for example, ‘Phillip to Lord Sydney, 10 July 1788’, ‘Phillip to Lord Sydney, 28 September 1788’, and ‘Phillip to Secretary Stephens, 16 November 1788’, all in *HRA*, vol. 1, pp. 62, 68, 96 100; *The Journal of Daniel Paine*, p. 39; J. Connor, *The Australian Frontier Wars, 1788–1838* (Sydney: UNSW Press, 2002), p. 87. Blaming convicts was seen by Baron Hügel as a way of exonerating the British ‘upper classes’ of the responsibility for violence they certainly shared. Hügel, *New Holland Journal*, p. 145.
  46. See W. M. Bradley, *A Voyage to New South Wales, the Journal of Lieutenant William Bradley, R. N.* (Sydney: Trustees of the Public Library of New South Wales, 1969), pp. 225–30.
  47. ‘Phillip to Lord Sydney, 10 July 1788’, in *HRA*, vol. 1, p. 65. Later governors were also to express the desire to effect ‘reconciliation’. See, for example, *The Sydney Gazette*, vol. 3, 17 July 1805.
  48. Bradley, *A Voyage to New South Wales*, p. 126. This view was also taken by Malaspina, ‘Loose Notes on the English Colony of Port Jackson’, pp. 148–9. Interestingly, though there were cases in the early years of settlement of Indigenous people stealing muskets, there are no recorded cases of them using them against the colonists. See, for example, *The Sydney Gazette*, vol. 3, 21 April 1805; and *The Sydney Gazette*, vol. 2, 19 August and 18 November 1804.
  49. Note, for example, that in July 1788 Governor Phillip conducted an unsuccessful search for the Indigenous perpetrators of the killing of two convicts, who, he believed had probably provoked the attack upon them. In writing to his superiors, Phillip records his conviction that Indigenous people could ‘never be the first aggressors’, and his expedition was justified as an exercise in reassuring them of his ‘friendly’ intentions. In late 1790, however, Phillip authorized a punitive expedition to track down other Indigenous ‘murderers’, this time in response to what appeared a more concerted Indigenous attack. His instructions were to apprehend up to six of the offenders so that they may be ‘made severe example of’, or, failing that, to ‘put that number to death’ on the spot. See ‘Phillip to Lord Sydney, 9 July 1788’, ‘Phillip to Secretary Stephens, 10 July 1788’ and ‘General Orders 13 December 1790’, all in *HRA*, vol. 1, pp. 48–9, 62, 293. Clendinnen suggests that Phillip’s aim was less to terrorize, than to demonstrate – to colonists and Indigenous peoples alike – that he and his soldiers had the capacity to punish offences against the law, and that the wanton violence of unauthorized colonists against Indigenous Australians was not permissible. Clendinnen’s interpretation is plausible, but does not address the fact Phillip’s response could not have been deemed appropriate against British subjects. If Indigenous Australians were understood to be ‘under the protection of British law’, it was protection of a precarious kind. Clendinnen, *Dancing with Strangers*, pp. 172–81.
  50. Connor argues that the Darug successfully waged a war of resistance based on three tactics: the ‘corn raid’, in which whole tribes aimed to carry off or destroy the settlers’



crops; the ‘farmhouse raid’, carried out by small numbers based on detailed observation of farmhouse activity; and the use of fire against farms and crops. Connor, *The Australian Frontier Wars*, pp. 40–1. For accounts of these strategies, and of attempts to take boats at anchor, see *The Sydney Gazette*, vol. 2, 3, 17 and 24 June, 19 August 1804; and *The Sydney Gazette*, vol. 3, 3 March, 28 April, 5 May and 9 June 1805. As late as June 1790, however, Governor Phillip doubted that ‘the natives will ever attack any building’ or any ‘number of armed men’ because they are ‘sensible of the great superiority of our arms’. Although he expressed a fear that crops of corn may be set alight, he maintained that this had not yet been done. ‘Phillip to Grenville, 16 June 1790’, in *HRA*, vol. 1, p. 179. On the effectiveness of Indigenous corn raids, use of European firearms, and rapidity of movement through the bush, see ‘Governor King to Earl Camden, 30 April 1805’, in *HRA*, vol. 3, pp. 306–7.

51. ‘Governor Hunter’s Orders, 22 February 1796’, in *HRA*, vol. 1, pp. 688–9.
52. *Ibid.*, and ‘Hunter to the Duke of Portland, 20 June 1797’, in *HRA*, vol. 2, p. 24.
53. ‘Governor Hunter to Duke of Portland, 2 January 1800’ and enclosures including court transcript, in *HRA*, vol. 2, pp. 403, 402. The subsequent court records of a trial of several colonists for the murder of a number of local indigenous people reveal the extent of this widening gap; see pp. 403–21, especially the prisoner’s defence on pp. 406, 414, 416. Contrast to ‘Phillip to Secretary Stephens 10 July 1788’, in *HRA*, vol. 1, p. 65. References to ‘the natives’ in early records often designated conflict with a ‘fiery and violent’ people ‘without controul and principles, nay, capable of the most detestable outrages’, who commit ‘depredations’ and ‘outrages’, and act with ‘ungrateful and Treacherous Conduct’. ‘Governor Hunter’s Orders, 22 February 1796’, in *HRA*, vol. 1, p. 688; ‘Hunter to Lord Portland 20 June 1797’, in *HRA*, vol. 2, p. 24; ‘King to Lord Hobart, 30 October 1802’, in *HRA*, vol. 3, p. 582; ‘Governor King to Earl Camden 30 April 1805’, in *HRA*, vol. 5, p. 306.
54. ‘Hunter to Portland, 2 January 1800’, in *HRA*, vol. 2, p. 402. Hunter’s account is corroborated in the main by D. D. Mann, *The Present Picture of New South Wales* (1811; Sydney: John Ferguson, 1979), pp. 33, 46.
55. Indeed, Hunter justifies his actions by quoting from the Governor’s official instructions the passage previously discussed enjoining ‘conciliation’ and ‘amity’ between the King’s ‘subjects’ and ‘the natives’. ‘Governor Hunter to Duke of Portland, 2 January 1800’, in *HRA*, vol. 2, p. 402.
56. See the record of transcripts accompanying ‘Governor Hunter to Duke of Portland, 2 January 1800’, in *HRA*, vol. 2, pp. 403–22, quotes from pp. 404, 418, 421, 416.
57. Government attempts to ‘protect’ Indigenous people were represented by the *Sydney Gazette* as a policy of ‘lenity’ illustrating the ‘liberal clemency of our Government’. *The Sydney Gazette*, vol. 3, 21 April and 4 August 1805.
58. ‘Governor King’s Proclamation, 30 June 1802’, in *HRA*, vol. 2, pp. 592–3.
59. ‘Governor King to Lord Hobart, 20 December 1804’, in *HRA*, vol. 3, pp. 166–7.
60. ‘Governor King to Lieutenant Menzies, 24 May 1804’, in *HRA*, vol. 3, p. 413. King also realized that such ‘liberality’ failed to prevent Indigenous people destroying the corn harvests. See ‘Governor King to Earl Camden, 30 April 1805’, in *HRA*, vol. 3, pp. 306–7. For an earlier example of victualling Indigenous ‘chiefs’ to induce the pacification of their tribe, see *The Sydney Gazette*, vol. 2, 1 July 1804.
61. J. Black, *War and the World: Military Power and the Fate of Continents 1450–2000* (New Haven, CT: Yale University Press, 1998), pp. 4–17.

62. It must be emphasized again that this image of ‘savage’ as opposed to ‘civilized’ war obscured both the intensified lethality of European wars and the pursuit by Europeans of the annihilation of their ‘enemies’.
63. J. Filson, *The Discovery, Settlement, and Present State of Kentucke* (Wilmington, DE: James Adams, 1784), pp. 76, 80.
64. Lieutenant-Governor George Arthur in Van Diemen’s Land (present-day Tasmania) was faced with the task of overcoming a determined and vigorous campaign of indigenous resistance. So desperate did he become that he referred to ‘our unpleasant warfare with the aboriginal Natives’ under their own commanders or ‘Chieftains’ who showed ‘more cunning and ... degree of tact’ in this ‘species of warfare’ than European troops, who lacked sufficient mobility and bushcraft to pursue them. ‘Lieut-Gov Arthur to Sir George Murray, 12 Sept 1829’; and ‘Report of the Aborigines Committee, 19 March 1830’; both in *HRA, Series III*, vol. 7, January–February 1829, p. 607, January–December 1830, p. 212. Arthur’s use of military force to round up the island’s Indigenous people in the ‘Black Line’ operation was a bloody farce. His authorization of the missionary George Augustus Robinson to effect the removal of the Indigenous people from the island by peaceful means was to prove more effective, and gave more impetus to moves to separate Indigenous people from colonial society on missions and reservations. H. Melville, *The History of Van Diemen’s Land from the Year 1824 to 1835* (1836), ed. G. Mackaness (Sydney: Horwitz-Grahame, 1965), pp. 89–102, 105–6. For Hügel, this policy was such a hypocritical and massive violation of ‘human rights’ it compared unfavourably to the Spanish atrocities of Pizarro. Hügel, *New Holland Journal*, p. 146. See also Connor, *The Australian Frontier Wars*, pp. 92–101; B. Elder, *Blood on the Wattle: Massacres and Mal-treatment of Australian Aborigines since 1788* (Sydney: Child and Associates, 1988), pp. 38–45.
65. ‘Sir George Murray to Lieut-Gov Arthur, 25 August 1829’, in *HRA, Series III*, vol. 8, p. 587.
66. An exception to this view is Melville’s account of Indigenous resistance to settlement in Tasmania, Melville, *The History of Van Diemen’s Land*, pp. 30–1.
67. *The Sydney Gazette*, vol. 3, 28 April 1805.
68. *The Sydney Gazette*, 28 April and 12 May 1805.
69. N. Ogle, *The Colony of Western Australia: A Manual for Emigrants 1839* (Sydney: John Ferguson, 1977), p. 49; C. Pellion and A. Pellion, ‘Excursion to the Town of Bathurst, 1819’, in G. Mackaness (ed.), *Fourteen Journeys over the Blue Mountains of New South Wales 1813–1841* (Sydney: Horwitz-Grahame, 1965), pp. 91–100, on p. 95. As Baron Hügel saw it, the Aborigines had it ‘in their power to destroy hearth and home and every living thing’ on the colonial frontier for one generation before the numbers of colonists overwhelmed them. In that time, he surmised, the settlers were ‘entirely dependent on the goodwill of the Aborigines’ – a goodwill more often offered than not. Hügel, *New Holland Journal*, pp. 51, 67.
70. Finucane, *Distracted Settlement*, p. 103.
71. My argument here owes much to Mark Finnane’s excellent paper, ‘“Payback”, Customary Law and Criminal Law in Colonized Australia’, *International Journal of the Sociology of Law*, 29 (2001), pp. 293–310.
72. See, for example, ‘Phillip to Secretary Stephens, 10 July, 1788’, and ‘Phillip to Lord Sydney, 30 October, 1788’, both in *HRA*, vol. 1, pp. 62, 96; Bradley, *A Voyage to New South Wales*, p. 141; *The Sydney Gazette*, vol. 3, 31 March 1805; ‘King to Earl Camden, 20 July 1805’, in *HRA*, vol. 3, p. 497. Macquarie was among the first of the colonial governors

- to voice the concern that revenge would be sought for the mistreatment of Indigenous women, 'Macquarie to Earl Bathurst, 7 May 1814', in *HRA*, vol. 5, pp. 250–1. Much later in the nineteenth century this attachment to revenge was used to indicate Aboriginal primitiveness. Tylor, 'Primitive Society' (1874), in *The Collected Works*, vol. 6, pp. 50–71, on p. 59.
73. P. Saint-Amand, 'Original Vengeance: Politics, Anthropology, and the French Enlightenment', *Eighteenth-Century Studies*, 26:3 (1993), pp. 399–417.
  74. Smith, *The Theory of the Moral Sentiments*, p. 38.
  75. *Ibid.*, p. 38.
  76. Smith further defined revenge as 'the most detestable of all the passions', but in moderate and fully justified cases it was not altogether 'evil', and indeed could inspire 'spirited' defence against unprovoked attack. Smith, *The Theory of the Moral Sentiments*, pp. 75–6, n. 8.
  77. 'King to Lord Hobart, 30 October, 1802', in *HRA*, vol. 3, p. 582.
  78. 'King to Earl Camden, 20 July 1805', in *HRA*, vol. 3, p. 497.
  79. Hügel, *New Holland Journal*, p. 46. See also Melville, *The History of Van Diemen's Land*, pp. 55–9, 71–9. Colonial anxieties over Indigenous 'revenge' were exacerbated by concerns that convict stock-keepers beyond the limits of colonial authority would mistreat Aboriginal women and thus give rise to further violence against 'His Majesty's Subjects', the white settlers. See 'Lieut-Gov Arthur to Sir George Murray, 15 April 1830', in *HRA, Series III*, vol. 9, January–December 1830, pp. 164–8.
  80. Captain F. G. Bellingshausen, in G. Barratt (ed.), *The Russians at Port Jackson 1814–1822* (Canberra: Australian Institute of Aboriginal Studies, 1981), p. 43.
  81. 'Judge-Advocate Atkins' Opinion on the Treatment of Natives, 8 July 1805', in *HRA*, vol. 3, pp. 502–4.
  82. 'Macquarie to Earl Bathurst, 8 October 1814', in *HRA*, vol. 8, p. 369. It is clear that contemporaries also perceived the exclusion of Indigenous people from the status of British subjects. This is revealed by the exhortation Macquarie received from the Revd Robert Cartwright in 1819 to 'admit the sable proprietors of this Land to the rank of British Subjects ...'. 'Revd Robert Cartwright to Governor Macquarie, 6 December 1819', in *HRA*, vol. 9, p. 263. On Macquarie's 'civilizing' strategy, see Chapter 5, and also 'Macquarie to Earl Bathurst, 8 June 1816', in *HRA*, vol. 9, p. 140. See also 'Macquarie to Earl Bathurst, 27 July 1822', in *HRA*, vol. 10, p. 677. Macquarie to Earl Bathurst, 8 October 1814, and 'Mr William Shelley to Governor Macquarie, 8 April 1814, and 20 August 1814', both in *HRA*, vol. 8, pp. 367–73.
  83. 'Macquarie to Earl Bathurst, 8 June 1816', in *HRA*, vol. 9, pp. 144–5. Macquarie's successor, Governor Brisbane, continued the policy, 'Sir Thomas Brisbane to Earl Bathurst, 14 February 1824' and 'Earl Bathurst to Brisbane, 19 August 1824', both in *HRA*, vol. 11, pp. 226, 350.
  84. 'Proclamation, 4 May 1816', in *HRA*, vol. 9, pp. 141–5. On Macquarie's attitude, see also H. C. Antill, 'The Journal of an Excursion over the Blue or Western Mountains of NSW to Visit a Tract of New Discovered Country in Company with his Excellency Governor and Mrs Macquarie and a Party of Gentlemen, 1815', in Mackaness (ed.), *Fourteen Journeys over the Blue Mountains*, pp. 74–90, on p. 83.
  85. 'Macquarie to Lieutenant Schaw, 9 April 1816', quoted in Connor, *The Australian Frontier Wars*, p. 51.
  86. Connor, *The Australian Frontier Wars*, pp. 58, 112.
  87. 'Proclamation of Martial Law, 14 August 1824', in *HRA*, vol. 11, pp. 410–11.

88. 'Earl Bathurst to Governor Darling, 14 July 1825', in *HRA*, vol. 12, p. 21.
89. 'Instructions to Governor Darling', in *HRA*, vol. 12, p. 125.
90. 'Landholders to Governor Darling, 4 September 1826', in *HRA*, vol. 12, p. 576.
91. See, for example, *The Sydney Gazette*, vol. 3, 21 April, 26 May and 9 June 1805; 'John Macarthur, 7 June 1824', in Macarthur Onslow (ed.), *Some Early Records*, pp. 450–2. As Hügel saw it, British 'contempt' for the Australian Aborigines originated in 'their failure to offer due resistance to the English'. Such views are, however, contradicted by the many references in colonial records to the persistence and difficulty of Indigenous resistance. Hügel, *New Holland Journal*, p. 421.
92. 'Brisbane to Earl Bathurst', 8 November 1825', in *HRA*, vol. 11, p. 898. British use of light infantry and mounted troops largely developed in colonial warfare with Indigenous peoples in America. Connor, *The Australian Frontier Wars*, p. 13.
93. 'Darling to Earl Bathurst, 6 October, 1826', in *HRA*, vol. 12, p. 609. It is worth noting that some observers were characterizing Indigenous people not only by their desire to seek vengeance for any perceived wrongs, but by the fact that they were usually the aggressors in any conflict. Archdeacon Scott tried to maintain this view even while calling for better moral regulation of white stock-keepers to prevent them from abusing Aboriginal women. 'Archdeacon Scott to Governor Darling, 1 August 1827', in *HRA*, vol. 14, p. 59.
94. As far as Cunningham was concerned the violence in the Hunter Valley was remarkable for the 'cowardly wanton atrocity' committed by the Aboriginal people, not the settlers. Nonetheless, he did concede that 'convict stockmen' had probably been the cause of ill feeling in the area. P. Cunningham, *Two Years in New South Wales* (1827), ed. D. S. Macmillan (Sydney: Angus and Robertson, 1966), p. 197.
95. See 'Darling to Earl Bathurst, 6 October 1826', in *HRA*, vol. 12, p. 623, and the accompanying depositions from the enquiry, pp. 625–8; 'Governor Darling to Under Secretary Hay, 23 March 1827', and 'Darling to Lieutenant-General Sir H. Taylor, 22 May 1827', both in *HRA*, vol. 13, pp. 179, 317.
96. *R. v. Lowe*, Supreme Court of New South Wales, 18 May 1827, <[http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r\\_v\\_lowe\\_1827.htm](http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_lowe_1827.htm)> [accessed 9 March 2005]. Hügel described Forbes as a liberal with many enemies in the colony, and Wardell as a rather disreputable fop. Hügel, *New Holland Journal*, pp. 208, 240.
97. One of Wentworth's other aims in using this natural law argument was to establish the right of Indigenous peoples (especially the Maori) to sell their land directly to colonists. This right was denied by the Crown on the grounds that the assertion of sovereignty over Australia gave it the control of all land and a duty of protection over the Indigenous inhabitants. The position was stated by Governor Gipps on 9 July 1840, see J. D. Lang, *Reminiscences of my Life and Times* (1877–8), ed. D. W. A. Baker (Melbourne: Heinemann, 1972), pp. 179–82. Ian Hunter has perceptively studied the uses of European natural law by colonial lawyers seeking to contest the extent of Crown jurisdiction. I. Hunter, 'Natural Law, Historiography and Aboriginal Sovereignty', *Legal History*, forthcoming, 2008.
98. *R. v. Ballard or Barrett*, Supreme Court of New South Wales, 13 June 1829, <[http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r\\_v\\_ballard\\_or\\_barrett\\_1829.htm](http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_ballard_or_barrett_1829.htm)> [accessed 9 March 2005].
99. Cunningham also emphasized the propensity for revenge among Indigenous people. Cunningham, *Two Years in New South Wales*, p. 196.

100. *R. v. Ballard or Barrett*. Ann Hunter traces the application of this logic in Western Australia, and concludes that it represented a form of ‘legal pluralism’. Perhaps it was never more than a ‘legal loophole’, an escape clause to avoid placing the court in the invidious position of ruling (as it did in *Murrell*) on Indigenous ‘subjecthood’ while plainly failing to enforce it. A. Hunter, ‘The Boundaries of Criminal Law in Relation to Inter-Aboriginal Conflict (“*Inter Se Offences*”) in Western Australia in the 1830’s–1840’s’, *Australian Journal of Legal History*, 8 (2004), pp. 215–36. Captain Collett Barker was under no illusion that ‘[a]s we have not power to rule them we must ... be content with endeavouring to reform them by persuasion’. J. Mulvaney and N. Green, *Commandment of Solitude. The Journals of Captain Collett Barker 1828–1831* (Melbourne: Miegunyah Press, 1992), p. 282.
101. *R. v. Ballard or Barrett*. Two French visitors to the early colony, Louis de Freycinet (1818–19) and Dumont d’Urville (1826), expressed astonishment at the ‘liberty’ with which Indigenous combatants were able to practise their punishments so long as they did not break any English laws. C. Dyer, *The French Explorers as the Aboriginal Australians, 1772–1839* (St Lucia: University of Queensland Press, 2005), p. 195.
102. See, for example, ‘Sir George Murray to Governor Darling, 3 September 1829’, in *HRA*, vol. 15, pp. 153–4. The violence complained of here was the indiscriminate killing of Iwaidja people in Raffles Bay, in the present day Northern Territory. In the worst incident, Iwaidja were killed by soldiers and armed convicts acting under the orders of Captain Smyth to capture an Aboriginal person for a £5 reward. See also Connor, *The Australian Frontier Wars*, pp. 73–5. As Connor points out, a persistent concern of officials in Britain was to sustain the ‘honour’ of the British army as the source of order and protection on the frontier. Similar sentiments motivated policy in colonial America in the eighteenth century.
103. ‘Sir Richard Bourke to ‘Lord Glenelg, 10 October 1835’; and ‘Lord Glenelg to Sir Richard Bourke 13 April 1836’; both in *HRA*, vol. 18, pp. 153–4, 379. This correspondence relates to the treaty negotiated by John Batman and others with ‘chiefs’ of the Dutigalla tribe for the cession of lands. James Backhouse thought the dismissal of the treaty was owing to the fact that the ‘state of society among the Aborigines gave no power to the chiefs to sell, on behalf of their respective tribes ...’ J. Backhouse, *A Narrative of a Visit to the Australian Colonies* (London: Hamilton Adams, 1843), p. 503. The legal advice given to the Colonial Office on the treaty was that it was inconsistent with the Crown’s ‘preemptive’ sovereignty over the land mass, and over its Indigenous ‘subjects’. ‘William Burge, Lincoln’s Inn, 16 January 1836’, Case for Opinion for the Geelong and Dutigalla Association and Opinions Thereon, 1836, National Library of Australia, MS 1624.
104. *R. v. Murrell and Bummaree*, Supreme Court of New South Wales, 5 February 1836, <[http://www.law.mq.edu.au/scnsw/cases1835-36/html/r\\_v\\_murrell\\_and\\_bummaree\\_1836.htm](http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree_1836.htm)> [accessed 9 March 2005].
105. R. Smandych, ‘Contemplating the Testimony of “Others”’: James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839–1849’, *Australian Journal of Legal History*, 8 (2004), pp. 237–83. Hügel, in Sydney in February 1834, recorded that the British ‘have begun to punish the murder of one blackfellow by another’, but noted the difficulty of obtaining ‘valid evidence’ and that cases were few. Hügel, *New Holland Journal*, p. 270.
106. E. J. Eyre, *Reports and Letters to Governor Grey from E. J. Eyre at Moorunde* (Adelaide: Sullivan’s Cove, 1985), ‘Letter to Governor Grey, 1 Feb 1843’, pp. 48–9. On 5 June, Eyre wrote that more important than this difficulty was the problem of using British law to

- 'shield' young Indigenous people 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 (p. 61). Indigenous Australians at the time were not entitled to be tried before a jury of their peers: 'One New Hollander was brought before the Supreme Court on account of a crime – a murder – and was asked by which jury he wished to be judged (every other offender is allowed to choose either a military or a civil jury). He answered: "By blackfellows", which was of course not granted him'. Hügel, *New Holland Journal*, p. 423.
107. Baker, D. W. A., *The Civilised Surveyor: Thomas Mitchell and the Australian Aborigines* (Melbourne: Melbourne University Press, 1997), pp. 122–4.
  108. 'Lord Glenelg to Sir Richard Bourke 26 July 1837', in *HRA*, vol. 19, p. 48. Earlier statements of policy might refer to Indigenous people as being 'under' British law and hence entitled to the same protection as colonists, and yet still not refer to Indigenous people as His Majesty's subjects. See 'Proclamation by Colonel George Arthur, 23 June 1824', in *HRA, Series III*, vol. 9, January–December 1830, p. 173.
  109. Elbourne, 'The Sin of the Settler'.
  110. Emigrant Mechanic, *Settlers and Convicts*, p. 206.
  111. Enclosure in 'Gipps to Glenelg, 27 April 1838', Correspondence Relating to the Massacre of Various Aborigines and the Trial of their Murderers, 1839, in *Correspondence and Papers Relating to the Government and Affairs of the Australian Colonies 1837–40*, British Parliamentary Papers, Colonies, Australia, 5 (Shannon: Irish University Press, 1970), p. 26 (hereafter BPP, Australia, 5).
  112. 'Gipps to Glenelg 21 July 1838', in BPP, Australia, 5, p. 28. Gipps's comments here were also a response to the Myall Creek massacre (June 1838).
  113. See enclosures in BPP, Australia, 5, pp. 29–30, quote from p. 30.
  114. Wollaston, *Wollaston's Picton Journal*, pp. 59–60.
  115. 'Second Letter of Instructions by the Colonization Commissioners for South Australia to James Hurtle Fisher, Esq., Resident Commissioner in South Australia, 8 October 1836', in BPP, Australia, 5, p. 192. Despite these instructions, there is no record of any treaty being signed in the colony. See also *The First Annual Report of the Aborigines Protection Society, 16 May 1838*, p. 23, in Society of Friends, *Tracts Relative to the Aborigines, published by Direction of the Meeting for Sufferings from 1838–1842* (London: Edward Marsh, 1843).
  116. This tension is revealed in the exchanges between prominent landowners and the Assistant Commissioner of lands, Charles Sturt, in the *South Australian Gazette*, 23 July 1840 and 17 July 1840, NA, CO 16/1. See also 'Gawler to Lord John Russell, 1 August 1840', Papers Relating to South Australia, NA, CO 13/16. On the reverse of this letter James Stephen noted that Aboriginal people held 'proprietary rights in the Sod ... which were clearly defined or well understood before the occupation of their country'. As far as South Australia's first judge, Sir John Jephcott, was concerned, the Aboriginal inhabitants of the province 'were to be considered as British subjects ... entitled to the full protection of British law ...'. Cited in R. M. Hague, *Sir John Jephcott: Portrait of a Colonial Judge* (Melbourne: Melbourne University Press, 1963), p. 79.
  117. See, for example, Captain Sturt's reflections of the killing of Captain Collett Barker, C. Sturt, *Two Expeditions into the Interior of South Australia, during the Years 1828, 1829, 1830, and 1831*, 2 vols (London: Smith, Elder, 1833), vol. 2, pp. 243–4.
  118. 'Fourth Annual Report of the Colonization Commissioners for South Australia, 8 January 1840', in BPP, Australia, 5, p. 445.

119. Gawler informed London of this ‘very serious outrage’ and his determination to ‘execute summary justice, after deliberate and formal investigation’ on 15 August 1840, ‘Gawler to Lord John Russell, 15 August 1840’, NA, CO 13/16.
120. D. Bell, *Ngarrindjeri Wurruwarrin: A World that Is, Was and Will Be* (Melbourne: Spinifex, 1998), pp. 429–30. Two years previously members of the same clan had aided survivors from the *Fanny* shipwreck, who spoke of the Indigenous people’s aid and hospitality in glowing terms.
121. Gawler’s instructions to O’Halloran, dated 14 August 1840, are also enclosed in ‘Gawler to Lord John Russell, 5 September 1840’, NA, CO 13/16. The instructions authorized O’Halloran to convene a ‘court’ consisting of all the white men in his party in front of Aboriginal witnesses.
122. *South Australian Gazette*, 10 September 1840, p. 2, NA, CO 16/1.
123. The transcript of O’Halloran’s ‘court’ proceedings is terse, the Indigenous testimony is rendered into simple words and phrases and the testimony of the whole captive tribe is improbably reported as unanimous. The transcript is dated 24 August 1840 and is enclosed in ‘Gawler to Lord John Russell, 5 September 1840’, NA, CO 13/16.
124. George French Angas recorded that members of the same tribe were wary of contact with whites in 1846. G. F. Angas, *Savage Life and Scenes in Australia and New Zealand*, 2 vols (London: Smith, Elder and Co, 1847), vol. 1, p. 133.
125. *South Australian Gazette*, 17 September 1840, p. 1, NA, CO 16/1. The Aboriginal Protection Society complained of this incident in March 1841. ‘APS to J. Stephen, March 1841’, Miscellaneous Papers, vol. 4, 1841, NA, CO 13/23.
126. *South Australian Gazette*, 17 September 1840, p. 2, NA, CO 16/1.
127. D. Ward, ‘Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1840–60’, *Journal of Imperial and Commonwealth History*, 34:4 (2006), pp. 483–504, on p. 491.
128. J. Evans, ‘Colonialism and the Rule of Law: The Case of South Australia’, in B. S. Godfrey and G. Dunstall (eds), *Crime and Empire 1840–1940* (Uffculme: Willan Publishing, 2005), pp. 57–75.
129. ‘Moorhouse to Lord John Russell, 20 February 1841’, in *Papers Relating to Colonisation and Other Affairs in Australia, 1842–44*, British Parliamentary Papers, Colonies, Australia, 7 (Shannon: Irish University Press, 1969), pp. 356–8 (hereafter BPP, Australia, 7).
130. *South Australian Gazette*, 1 October 1840, p. 2, NA, CO 16/1.
131. James Stephen’s note, ‘Gawler to Lord John Russell, 15 August 1840’, NA, CO 13/16. Lord Russell wrote in response that the settler’s desire for ‘vengeance’ was to be expected and it was hard to see ‘what else Colonel Gawler could have done’. Officials in Australia, such as F. B. St John, Commissioner of Crown Lands at Melbourne, urged Governor Gipps to see armed ‘conquest’ of the Indigenous peoples as the ‘first step’ towards their ‘civilization’. Cited in S. Martin, *A New Land: European Perceptions of Australia 1788–1850* (St Leonards: Allen and Unwin, 1993), p. 61.
132. See Russell’s memoranda of 22 February and 10 March in response to ‘Gawler to Lord John Russell, 5 September 1840’, NA, CO 13/16.
133. See Stephen’s memorandum of 10 March in response to ‘Gawler to Lord John Russell, 5 September 1840’, NA, CO 13/16.
134. ‘Grey to Lord John Russell, 11 June 1841’, and ‘O’Halloran to Governor Grey, 27 June 1841’, in BPP, Australia, 7, pp. 305, 309. The Protector of Aborigines, Matthew Moorhouse, accompanied O’Halloran’s party and his own report indicated the widely shared

- fear among the Aborigines that they would be shot by the police. ‘Moorhouse to Colonial Secretary, 30 June 1840’, in BPP, Australia, 7, p. 311.
135. ‘Stanley to Grey January 19 1842’, Correspondence Between Governor Grey and Lord John Russell 1843, in BPP, Australia, 7, p. 283; see also ‘Grey to Russell, July 5 1841’ and enclosures, pp. 277–82. As J. W. Bull recounts, shortly after Grey’s arrival in the colony, the Commissioner of Police, Major O’Halloran, was dispatched to restore order on the overland trail, and was given specific instructions ‘not to levy war or to exercise *belligerent actions* against the aborigines of Australia.’ J. W. Bull, *Early Experiences of Life in South Australia* (1884; facsimile, Adelaide: Libraries Board of SA, 1972), p. 219.
136. ‘Grey to Lord John Russell, 3 August 1841’, in BPP, Australia, 7, p. 315.
137. See, for example, ‘Moorhouse to Colonial Secretary’, ‘Grey to Lord John Russell, 30 October 1841’, and the record of the court of enquiry, all in BPP, Australia, 7, pp. 324–30.
138. ‘Colonial Secretary to O’Halloran, 4 November 1842’, State Archives of South Australia (hereafter SASA), O’Halloran Papers, GRG 5/83.
139. ‘Memorandum 18 April 1842’, SASA, GRG 5/83.
140. E. S. Parker, *Early Days in the Loddon Valley: Memoirs of Edward Stone Parker 1802–1865* (Daylesford: Daylesford Historical Society, 1965), p. 13. The ‘Emigrant Mechanic’ believed that government protection of Aborigines merely led to further slaughter by less obvious means such as poison. *Settlers and Convicts*, p. 211.
141. This option had been recommended to Lord John Russell in 1840 by Captain George Grey, who was then angling for a colonial appointment (which he later received, becoming Governor of South Australia in 1841). Grey maintained that the Aborigines had to be entirely and totally subjected to British law, requiring the elimination of all native laws and customs. At the time he submitted his ‘Report’, Grey had recently 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 (twice) 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), pp. 18–20, 52–61. Grey’s journals were to provide the most detailed ‘ethnological’ account of Indigenous social structure since the early sketches of Collins and Tench, and informed the work of later anthropologists such as Lubbock, Tylor and Morgan. M. Spriggs, ‘Who Taught Marx, Engles and Morgan about Australian Aborigines’, *History and Anthropology*, 19:2–3 (1997), pp. 185–218, on p. 190.
142. ‘Captain Grey to Lord John Russell 4 June 1840’, in *HRA*, vol. 21, pp. 34–5. Herman Merivale approvingly cited Grey’s proposals in his *Lectures on Colonization* in order to buttress the view that ‘It will be necessary ... that the colonial authorities should act upon the assumption that they have the right in virtue of the relative position of civilized and Christian men to savages, to enforce abstinence from immoral and degrading practices, to compel outward conformity to the law of what we regard as better instructed reason’. H. Merivale, *Lectures on Colonization and Colonies* (1839–41, revised 1861; London: Oxford University Press, 1928), pp. 502–3.
143. See, for example, ‘Russell to Hutt 8 October 1840’, in *Papers Relating to Emigration, the Aboriginal Population, and Other Affairs in Australia, 1844*, British Parliamentary Papers, Colonies, Australia, 8 (Shannon: Irish University Press, 1969), p. 392 (hereafter BPP, Australia, 8).



144. 'Gipps to Lord John Russell 7 April 1841', in *HRA*, vol. 21, pp. 312–15, quote from p. 312; 'Hutt to Lord John Russell 10 July 1841', in *BPP*, Australia, 8, p. 392.
145. The negotiation of a treaty was supported by the Aboriginal Protection Society, see S. Motte, *Outline of a System of Legislation for Securing Protection to the Aboriginal Inhabitants of all Countries Colonized by Great Britain* (London: Aboriginal Protection Society, 1840), p. 14. James Stephen's eventual successor at the Colonial Office, Herman Merivale, took the time in his *Lectures on Colonization* to disparage such treaties (and the Treaty of Waitangi in particular) on the grounds that they cemented native rights to land which impeded colonization and settlement. Merivale, *Lectures on Colonization and Colonies*, p. 498, n.
146. *R. v. Bonjon*, Supreme Court of New South Wales, 16 September 1841, <<http://www.law.mq.edu.au/scnsw/cases1840-41/cases1841/R%20v%20Bonjon,%201841.htm>> [accessed 9 March 2005]. Willis considered a case brought before him of an Aboriginal man named Bonjon accused of the murder of another Aboriginal man. Willis was already making himself unpopular with certain sections of Port Phillip society. His political partisanship, his close financial connections to one colonial newspaper, and above all his argumentativeness and his repeated use of his position to denounce anything of which he disapproved, were also alienating the Lieutenant Governor of Port Phillip, C. J. La Trobe, and his superior in New South Wales, Governor George Gipps. See the transcripts and reports in *BPP*, Australia, 8, pp. 146–55.
147. *R. v. Bonjon*. Willis may have been influenced by the United States' Chief Justice, John Marshall, who found in the famous Cherokee cases of 1829, 1831 and 1832 that the Cherokee were a domestic 'dependent nation' within the Union. Willis, however, referred explicitly to the Treaty of Waitangi as a model, maintaining 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'. *R. v. Bonjon*.
148. Willis's previous decisions indicate he was no friend to Indigenous people, but this remarkable finding (delivered in almost three hours) indicated his clear perception of the many ambiguities around Indigenous people's legal status. S. Davies, 'Aborigines, Murder and the Criminal Law in Early Port Phillip, 1841–1851', *Historical Studies*, 22:88 (1987), pp. 313–34.
149. 'Colonial Secretary Thomson to Sir James Dowling 4 January 1842', in *HRA*, vol. 21, p. 655.
150. *Ibid.*

## 5 Fit for Society

1. This chapter draws upon some earlier work in B. Buchan, 'Subjects of Benevolence: Concepts of Society and Civilization in Early Colonial Indigenous Administration', *Journal of Australian Studies*, 86 (2006), pp. 37–48.
2. W. Eden, 'Introductory Discourse on Banishment', in *The History of New Holland, from its First Discovery in 1616, to the Present Time*, 2nd edn (London, 1787), p. xx. Some historians have argued that another, perhaps the important motive for the settlement was to establish a British naval base in the Pacific to weaken Spanish dominance of the Pacific. Marshall, *A Free though Conquering People*, p. 190.
3. A. Dalrymple, *A Serious Admonition to the Public on the Intended Thief Colony at Botany Bay* (1786; Sydney: D. S. Ford, 1943), pp. 24–7.
4. Eden, 'Introductory Discourse on Banishment', pp. xix–xx.

5. J. Samson, *Imperial Benevolence: Making British Authority in the Pacific Islands* (Honolulu: University of Hawai'i Press, 1998), pp. 12–23. As Marshall notes, the commitment to benevolence did not preclude resort to coercion. Marshall, *'A Free though Conquering People'*, p. 119. Hilton argues that British notions of imperial trusteeship 'were at least based on an idea of the fundamental sameness and not otherness of all peoples, whatever their current condition'. B. Hilton *A Mad, Bad and Dangerous People? England 1783–1846* (Oxford: Clarendon Press, 2006), p. 246. As this chapter will demonstrate, however, this view requires important qualification.
6. On the governmental aspects of the concept of society, see C. Helliwell and B. Hindess, "Culture", "Society" and the Figure of Man', *History of the Human Sciences*, 12:4 (1999), pp. 1–20.
7. Merete Borch argues that a more cursory attitude to Indigenous peoples developed around the turn of the century (1800), influenced in part by the emergence of a colonial policy in New South Wales of 'eradicating' rather than 'negotiating' with Indigenous communities. Borch, *Conciliation – Compulsion – Conversion*, pp. 119, 283–5. My aim here is to trace how transitions in colonial policies and perceptions were framed by the continual development of the colonists' conceptual language.
8. Some scholars have tended to refer to 'Indigenous society' as if Europeans regarded Indigenous people as living in their own form of society, thus missing the connotations of exclusivity Europeans invested in the concept. See, for example, Gascoigne, *The Enlightenment and the Origins of European Australia*, p. 155; and Reynolds, *The Law of the Land*, p. 74.
9. S. Johnson, *A Dictionary of the English Language*, 2 vols (London: J. Knapton et al., 1756), vol. 2.
10. O. von Gierke, *Natural Law and the Theory of Society 1500–1800*, trans. E. Barker (Boston, MA: Beacon Press, 1957), pp. 44–6.
11. Baker, 'Enlightenment and the Institution of Society', p 101.
12. *Ibid.*, pp 99–100.
13. *Ibid.*, p 108.
14. E. J. Hundert, 'Sociability and Self-Love in the Theatre of Moral Sentiments: Bernard Mandeville and Adam Smith', in S. Collini, R. Whatmore and B. Young (eds), *Economy, Polity, and Society: British Intellectual History 1750–1950* (Cambridge: Cambridge University Press, 2000), pp. 31–47.
15. M. Poovey, 'The Liberal Civil Subject and the Social in Eighteenth-Century British Moral Philosophy', *Public Culture*, 14:1 (2002), pp. 125–45, on p. 130.
16. *Ibid.*, p 136.
17. J. Brewer, 'This, That and the Other: Public, Social and Private in the Seventeenth and Eighteenth Centuries', in D. Castiglione and L. Sharpe (eds), *Shifting the Boundaries: Transformation of the Languages of Public and Private in the Eighteenth Century* (Exeter: University of Exeter Press, 1995), pp 1–21; R. Emerson, 'The Enlightenment and Social Structures', in P. Fritz and D. Williams (eds), *City and Society in the 18th Century* (Toronto: Hakkert, 1973), pp. 99–124.
18. N. Phillipson, 'Language, Sociability and History: Some Reflections on the Foundations of Adam Smith's Science of Man', in Collini et al. (eds), *Economy, Polity, and Society*, pp. 70–84.
19. Pagden, 'The "Defence of Civilization"'; Dampierre, 'Note sur "Culture" et "Civilization"'. On French perceptions of Indigenous social forms, see Jaenen, 'French Attitudes towards Native Society'; T. C. Jacques, 'From Savages and Barbarians to Primitives:

- Africa, Social Typologies, and History in Eighteenth-Century French Philosophy', *History and Theory*, 36:2 (1997), pp. 190–215.
20. Montesquieu, *The Spirit of the Laws*, 'Preface' and pp. 290–2.
  21. B. Buchan, 'Zero Tolerance, Mandatory Sentencing and Early Liberal Arguments for Penal Reform', *International Journal of the Sociology of Law*, 30 (2002), pp. 201–18.
  22. 'Macquarie to Earl Bathurst 8 October 1814', in *HRA*, vol. 8, pp. 367–70. See also Bradley, *A Voyage to New South Wales*, p. 129.
  23. E. Elbourne, *Blood Ground, Colonialism, Missions, and the Contest for Christianity in the Cape Colony and Britain, 1799–1853* (Montreal: McGill-Queens University Press, 2002), p. 250.
  24. These issues are discussed at greater length in Buchan, 'Enlightened Histories'.
  25. Informing Scottish Enlightenment thought was a complex account of the (inter-)relationship between historical circumstances and human action. See N. Hargraves, 'Enterprise, Adventure and Industry: The Formation of "Commercial Character"', in William Robertson's *History of America, History of European Ideas*, 29 (2003), pp. 33–54.
  26. R. P. Lesson, 'Journey across the Blue Mountains, 1824', in Mackaness (ed.), *Fourteen Journeys over the Blue Mountains*, pp. 143–65, on p. 158.
  27. Smith, *Wealth of Nations*, vol. 2, I, p. 19.
  28. As Robertson expressed it in his *Historical Disquisition*, this development involved the uniting of families in 'independent tribes and communities', followed by the uniting of those tribes in alliances for mutual defence, and only later on to develop an economy to 'provide for the wants' of each and finally to 'conduct the affairs of a numerous society'. Robertson, *An Historical Disquisition*, p. 263. For some of the vast literature on this question, see A. Garrett, 'Anthropology: The 'Original' of Human Nature', in Broadie (ed.), *The Cambridge Companion to the Scottish Enlightenment*, pp. 79–93; H. M. Hopfl, 'From Savage to Scotsman: Conjectural History in the Scottish Enlightenment', *Journal of British Studies*, 17:2 (1978), pp. 19–40, on p. 36; Meek, *Social Science and the Ignoble Savage*.
  29. Bayly, *The Birth of the Modern World*. See also J. G. A. Pocock, 'Introduction', in E. Burke, *Reflections on the Revolution in France* (1790), ed. J. G. A. Pocock (Indianapolis, IN: Hackett Publishing, 1987), pp. xxxii–xxxiii. According to Bank, the social hierarchy of Scottish Enlightenment thought was at odds with humanitarian commitment to equality, but this view ignores the Scottish Enlightenment conviction that the laws of social development were held to be universal and thus underpinned a notion of the fundamental sameness of human beings, though exhibiting different stages of social development. See A. Bank, 'Losing Faith in the Civilising Mission: The Premature Decline of Humanitarian Liberalism at the Cape, 1840–60', in Daunton and Halpern (eds), *Empire and Others*, pp. 364–83, on p. 368.
  30. Here my approach is slightly different to that of Hickford. See Hickford, "Decidedly the Most Interesting Savages on the Globe".
  31. 'Mr William Shelley to Governor Macquarie 8 April 1814', in *HRA*, vol. 8, p. 367–73. Read notes that Shelley's Institution was the precursor of all later efforts to institutionalize Indigenous people down to the twentieth century. Like them, it was a failure. P. Read, 'Shelley's Mistake: The Parramatta Native Institution and the Stolen Generations', in M. Crotty and D. A. Roberts (eds), *The Great Mistakes of Australian History* (Sydney: UNSW Press, 2006), pp. 32–47.
  32. House of Commons Select Committee on Finance and Police, Including Convict Establishments (1798), Appendix D, in *Report from the Select Committee on Transportation*,

- etc, British Parliamentary Papers, Crime and Punishment, Transportation, 1 (Shannon: Irish University Press, 1969), p. 53 (hereafter BPP, Transportation, 1).
33. Minutes of Evidence to the Report of the Select Committee on Police of the Metropolis 1816, in *Reports from Select Committees on the Police of the Metropolis*, British Parliamentary Papers, Crime and Punishment, Police, 1 (Shannon: Irish University Press, 1969), p. 33.
  34. P. Colquhoun, *A Treatise on the Police of the Metropolis*, 7th edn (1806; Montclair: Patterson Smith, 1969), pp. 365–6. See also C. Hall, *The Effects of Civilization on the People in European States* (1805; New York: Augustus M. Kelley, 1965), p. 27; Malthus, *An Essay on the Principle of Population*, vol. 2, pp. 215–16.
  35. F. M. Eden, *The State of the Poor*, 3 vols (1797; New York: Augustus M. Kelley, 1965), vol. 1, p. 423.
  36. Report from the Select Committee on the Laws Relating to Penitentiary Houses, 1811, in BPP, Transportation, 1, pp. 6–7.
  37. Second Report from the Committee on the State of the Police of the Metropolis, 1817, in *First and Second Reports from the Select Committee Appointed to Inquire into the State of the Police of the Metropolis*, British Parliamentary Papers, Crime and Punishment, Police, 2 (Shannon: Irish University Press, 1968), p. 331. See also Minutes of Evidence, pp. 429, 507.
  38. Malthus, *An Essay on the Principle of Population*, vol. 1, p. 335.
  39. Report from the Select Committee on Transportation to New South Wales, 1812, Appendix, in BPP, Transportation, 1, p. 35.
  40. Much later an Austrian visitor to the colony, Baron Charles von Hügel, gave a far less sympathetic account of colonial society but similarly excluded any mention of Indigenous people. ‘Letter, 22 June 1834’, quoted in ‘Introduction’ to Hügel, *New Holland Journal*, p. 11. Elsewhere he described the plight of colonists constituting colonial society, but living in the ‘wilderness among savages’ who were not of their society. Hügel, *New Holland Journal*, p. 69. As far as the irascible James Mudie was concerned, the principles ‘applicable to the government of any other civilized community, are *not* applicable to the government of this colony’ because of the gulf between free settlers and convicts or former convicts – people he regarded as having been ‘lopped for their rottenness from the tree of British freedom’. J. Mudie, *The Felony of New South Wales* (1836), ed. W. Stone (Melbourne: Lansdowne Press, 1964), p. 3.
  41. A similar set of concerns was manifested in House of Commons Select Committee into the East India Company (1812–13), in which one issue was the relationship between East India Company traders (British subjects) and either poor Europeans, Indo-Europeans or Europeans in Indian service. Minutes of Evidence Taken before the Whole House and the Select Committee on the Affairs of the EIC, 24 Nov–22 July 1812–13, in *Reports &c. (East India Company) First Part*, British Parliamentary Papers, Colonies, East India, 4 (Shannon: Irish University Press, 1968). In 1839, Ogle argued that Britain’s convict colonization was faulty in failing to transplant all ‘the bonds that connect and hold together the fabric of society’. Ogle, *The Colony of Western Australia*, pp. 37, 82–7.
  42. Report from the Select Committee on Transportation to New South Wales, 1812, Appendix, in BPP, Transportation, 1, p. 36.
  43. Indeed as far as some were concerned there was precious little difference between the ‘savage’ Indigenous people and ‘the half savage stock keeper’ (convicts). B. Field, ‘Journal of an Excursion across the Blue Mountains of New South Wales, October 1822’, in

- Mackness (ed.), *Fourteen Journeys over the Blue Mountains*, pp. 131–53, on p. 135, n. 3. Emigrant Mechanic, *Settlers and Convicts*, p. 163.
44. 'Elizabeth Macarthur, 7 March 1791', in Macarthur Onslow (ed.), *Some Early Records*, pp. 29, 39. For another description of colonial society that excludes any mention of Indigenous people, see W. W. Burton, 'The State of Society and of Crime in New South Wales', *Colonial Magazine* (1840), pp. 434–6.
45. Field, 'Journal of an Excursion' p. 129.
46. See, for example, D. Ward, 'A Means and Measure of Civilization: Colonial Authorities and Indigenous Law in Australia', *History Compass*, 1 (2003), pp. 1–24; D. J. Mulvaney, *Encounters in Place: Outsiders and Indigenous Australians 1606–1985* (St Lucia: University of Queensland Press, 1989), p. 43; Shaw, 'British Policy towards the Australian Aborigines', pp. 268–71. Assimilation, however, implies the granting of full membership of a society in return for 'assimilating' the cultural norms and behaviours of that society. This is not quite what the early colonists envisaged, as their own understandings of society remained deeply hierarchical. See H. Reynolds, 'Indigenous People and European Social Hierarchy', *Indigenous History*, 7:2 (1983), pp. 124–33.
47. H. Babha, 'Of Mimicry and Man: the Ambivalence of Colonial Discourse', in F. Cooper and L. A. Stoler (eds), *Tensions of Empire, Colonial Cultures in a Bourgeois World* (Berkeley, CA: University of California Press, 1997), pp. 152–62, on p. 157.
48. 'Return to an Address by Mr Thomson ... on Indigenous People, 1843', *New South Wales Votes and Proceedings* (1843), pp. 1–47 (hereafter *NSWV&P*); Letter from the Chief Protector, to ... the Superintendent of Port Phillip, 11 Dec 1841; *NSWV&P* (1841), p. 19. This aspiration directly mirrored William Wilberforce's ambition that former slaves be instructed to become 'a free peasantry'. 'Wilberforce to Buxton, 24 May 1821', in C. Buxton, *Memoirs of Sir Thomas Fowell Buxton, Baronet, with Selections from his Correspondence* (London: John Murray, 1848), p. 118.
49. Atkinson, *The Europeans in Australia*, pp. 152–3. See for example Bradley, *A Voyage to New South Wales*, p. 231; Collins, *An Account of the English Colony*, p. 544; R. Dawson, *The Present State of Australia: A Description of the Country, its Advantages and Prospects, with Reference to Emigration: And a Particular Account of the Manners, Customs, and Condition of its Indigenous Inhabitants* (1830; Alburgh: Archival Facsimiles, 1987), pp. 63–4.
50. The corollary of this was that Europeans worried about the fact that Indigenous people did not show enough deference to colonial authority. Cunningham, *Two Years in New South Wales*, pp. 184–7. See also S. Nind, 'Description of the natives of King George's Sound', *Journal of the Royal Geographical Society*, 1 (1830–1), pp. 40–1.
51. Captain F. G. Bellingshausen, *The Voyage of Captain Bellingshausen to the Antarctic Seas 1819–1821*, trans. F. Debenham (London, Hakluyt Society, 1945), pp. 188–9. For Cunningham, the absence of 'chieftainship' among Australia's Indigenous people was the most obvious sign and continuing cause of their supposed 'savagery'. The development of chieftainship, he argued, would constitute the first step towards civilization by providing the means to 'protect' and 'accumulate' property. Cunningham, *Two Years in New South Wales*, p. 204.
52. Another practice was to appoint Indigenous chiefs whose elevation to office was often symbolized by cast off military uniforms and gorgets or neck-plates bearing an inscription. George French Angas gives one account of the distribution of such a neck plate, inscribed 'good native' to reward apparent good conduct. Afterwards, however, the man given the neck plate made off with a sheep's carcass, a range of food stuffs and the kitchen

- utensils belonging to South Australia's Governor. Angas, *Savage Life and Scenes*, vol. 1, p. 175. See also Cunningham, *Two Years in New South Wales*, p. 189.
53. Hügel noted failure of annual distribution policy – blankets given in summer were simply discarded or traded for alcohol. No 'conference' occurs, just a distribution of blankets and disorderly feast. Hügel, *New Holland Journal*, pp. 350, 418. Nonetheless, the practice of annual distributions continued to be used, Angas, *Savage Life and Scenes*, vol. 1, p. 219.
  54. R. J. Flanagan, *The Indigenous People of Australia* (1852–3; Sydney: George Robertson, 1888), p. 12.
  55. A. Malaspina, 'A Political Examination of the English Cols in the Pacific' ([1793?]), in Malaspina, *The Secret History of the Convict Colony*, pp. 92–125, on p. 106.
  56. See, for example, Haebich, *Broken Circles*, pp. 65–130; H. King, *Richard Bourke* (Melbourne: Oxford University Press, 1971), pp. 192–4. Backhouse appreciated the difficulties of this task by noting that 'Few white people seem to reflect upon the fact, that our notions of the value of things, depend upon our habits ...' and that Indigenous disinterest in property and labour was not an 'invincible peculiarity in them.' J. Backhouse, 'Account of a Journey from Parramatta across the Blue Mountains to Wellington, 1835', in Mackness (ed.), *Fourteen Journeys over the Blue Mountains*, pp. 196–225, on p. 199.
  57. 'Mr William Shelley to Governor Macquarie, 20 August 1814' in *HRA*, vol. 8, p. 370.
  58. The 'native institution' at Parramatta under William Shelley's superintendence was a failure, and Macquarie's 'experiment' was eventually abandoned. Backhouse, 'Account of a Journey', p. 200. Cunningham, *Two Years in New South Wales*, p. 185.
  59. For example, see Journal of William Thomas, 19 May 1839 and 18 July 1839, in *Historical Records of Victoria, Volume 2B: Indigenous People and Protectors 1838–1839* (Melbourne: Victorian Government Printing Office, 1983), pp. 525, 532–3; the evidence of Reverend Threlkeld in *R. v Boatman or Jackass and Bulleye*, Supreme Court of New South Wales, 10 February 1832, <[http://www.law.mq.edu.au/scensw/Cases1831-32/html/r\\_v\\_boatman\\_or\\_jackass\\_and\\_bul.htm/](http://www.law.mq.edu.au/scensw/Cases1831-32/html/r_v_boatman_or_jackass_and_bul.htm/)> [accessed 14 May 2006]; E. J. Eyre, *Journals of Expeditions of Discovery into Central Australia*, 2 vols (1845; facsimile, Adelaide: Libraries Board of South Australia, 1964), vol. 2, pp. 211–13.
  60. Assistant Protector William Thomas to Chief Protector Robinson, 28 November and 17 December 1839, in *Historical Records of Victoria*, pp. 608–10. See also 'E. Macarthur, 8 March 1817', in Macarthur Onslow (ed.), *Some Early Records*, p. 311; Hügel, *New Holland Journal*, p. 421.
  61. Evidence of G. F. Angas, 25 March, 1841, in *First and Second Reports from the Select Committee on South Australia*, British Parliamentary Papers, Colonies, Australia, 2 (Shannon: Irish University Press, 1968), p. 214. As Governor Hutt in Western Australia put it, 'We have to deal here with individuals, not communities of men. There is neither nation nor tribe collected together under one common head ... each is his own master ...' 'Hutt to Lord Russell, 15 May 1841', in BPP, Australia, 8, p. 380.
  62. W. C. Wentworth, *Statistical, Historical and Political Description of the Colony of New South Wales* (1819; facsimile, Adelaide: Griffen Press, 1979), pp. 4–5; H. de Bougainville, *The Governor's Noble Guest: Hyacinthe de Bougainville's Account of Port Jackson, 1825*, trans. M. S. Rivière (Melbourne: Miegunyah Press, 1999), p. 150.
  63. B. Hilton, *The Age of Atonement: The Influence of Evangelism on Social and Economic Thought, 1785–1865* (Oxford: Clarendon Press, 1988), pp. 8, 32.
  64. Hall, *Civilising Subjects*, pp. 87–8.
  65. Hilton, *A Mad, Bad and Dangerous People?*, p. 341.

66. Elbourne, *Blood Ground*, p. 30; K. Heasman, *Evangelicals in Action: An Appraisal of their Social Work in the Victorian Era* (London: Geoffrey Bles, 1962), p. 74.
67. Hilton, *A Mad, Bad and Dangerous People?*, pp. 187–8. Hudson argues that anti-slavery was also a popular theme among British conservatives, who imbibed the national myth of Britain as free from slavery. N. Hudson, “Britons Never will be Slaves”: National Myth, Conservatism, and the Beginnings of British Antislavery’, *Eighteenth-Century Studies*, 34:4 (2001), pp. 559–76.
68. Elbourne, *Blood Ground*, pp. 54–70; L. Colley, *Britons: Forging the Nation 1707–1837* (London: Pimlico, 1992), pp. 354–5.
69. Curtin, *The Image of Africa*, pp. 291–2.
70. J. C. D. Clark, *English Society 1660–1832* (Cambridge: Cambridge University Press, 2000), pp. 292–300.
71. See, for example, L. Threlkeld, ‘10th Report; The Annual Report of the Mission to the Indigenous people, Lake Maquaries Inlet, 1840’, in Threlkeld, *Australian Reminiscences*, vol. 1, p. 166. Threlkeld saw Christianity as the primary force for civilization in British history as well as in Britain’s Empire. ‘Second Half Yearly Report of the Indigenous Mission ... 21 June 1826’, in *Australian Reminiscences*, vol. 1, p. 205. Threlkeld was a member of the London Missionary Society. J. L. Comaroff, ‘Images of Empire, Contests of Conscience: Moulds of Colonial Domination in South Africa’, and S. Thorne, “The Conversion of Englishmen and the Conversion of the World Inseparable”, *Missionary Imperialism and the Language of Class in Early Industrial Britain*, in Cooper and Stoler (eds), *Tensions of Empire*, pp. 163–97, 238–62.
72. R. Ely, ‘From Sect to Church: Sir James Stephen’s Theology of Empire’, *Journal of Religious History*, 19:1 (1995), pp. 75–91; Curtin, *The Image of Africa*, p. 290.
73. J. Philip, *Researches in South Africa, Illustrating the Civil, Moral, and Religious Condition of the Native Tribes*, 2 vols (London: James Duncan, 1828), vol. 1, pp. ix–x. See also Elbourne, *Blood Ground*, pp. 246–7.
74. Z. Laidlaw, *Colonial Connection 1815–45: Patronage, the Information Revolution, and Colonial Government* (Manchester: Manchester University Press, 2005), pp. 146–54.
75. *Hansard’s Parliamentary Debates*, 356 vols (New York: Kraus Reprints, 1971), vol. 29, 29 June–3 August 1835, p. 549 (14 July). For Buxton, the evangelical aim of conversion went hand in hand with the liberal aim of integrating former slaves and Indigenous populations into Britain’s commerce. Buxton, *Memoirs of Sir Thomas Fowell Buxton*, p. 360.
76. *Report from the Select Committee on Aborigines. British Settlements*, British Parliamentary Papers, Anthropology, Aborigines, 1–3 (Shannon: Irish University Press, 1968), no. 1, pp. 538–9 (hereafter BPP, Aborigines).
77. Report from the Select Committee, p. 541. J. Woolmington, ‘The Civilization/Christianisation Debate and the Australian Indigenous People’, *Aboriginal History*, 10:2 (1986), pp. 90–8.
78. As others have noted, missionaries were not simply the agents of colonial domination. They were also able to provide resources, in the form of education in literacy and biblical example, that some Indigenous people’s used to resist colonial domination. T. Ballantyne, *Orientalism, Racial Theory and British Colonialism: Aryanism in the British Empire* (Basingstoke: Palgrave, 2001), pp. 150–2.
79. Jan Critchett argues that the Enquiry’s suggestions were either ignored or misapplied. Indeed, she contends that the lack of clear instructions given to the Protectors the Report called for and the failure to adequately supply and provision them indicated a

- lack of serious intent to apply the Report's suggestions properly. J. Critchett, *A Distant Field of Murder: Western District Frontiers 1834–1848* (Melbourne: Melbourne University Press, 1990), pp. 141–2.
80. BPP, *Aborigines*, 2, p. 46. The Committee here followed the influential testimony of the former New South Wales Attorney General and co-founder (with Fowell Buxton) of the Aborigines Protection Society, Saxe Bannister. See *ibid.*, p. 6.
  81. BPP, *Aborigines*, 2, p. 75.
  82. The Quaker physician and reformer Thomas Hodgkin testified to this effect before the Committee but represented the problem especially in terms of Indigenous peoples living close to colonial society losing 'much of their pristine noble character ...', while 'Indians upon the frontier ... retain much more of their native character ...'. BPP, *Aborigines*, 1, p. 459. Hodgkin was later the founder and driving force behind Indigenous People Protection Society. See also Curtin, *The Image of Africa*, p. 374.
  83. J. A. St John, 'The Aborigine Natives of Australia', *Westminster Review*, 12 (1830), in J. Johnson and M. Anderson (eds), *Australia Imagined: Views from the British Periodical Press 1800–1900* (Crowley: University of Western Australia Press, 2005), pp. 71–4.
  84. See, for example, Cunningham, *Two Years in New South Wales*, pp. 185, 188; Angas, *Savage Life and Scenes*, vol. 2, pp. 111, vol. 1, p. 318.
  85. BPP, *Aborigines*, 2, p. 82.
  86. BPP, *Aborigines*, 2, p. 80.
  87. BPP, *Aborigines*, 2, p. 83. Unrau argues that the authors of the Report were motivated by the desire to avoid the Jacksonian policy of Indian removal in the United States. W. E. Unrau, 'An International Perspective on American Indian Policy: The South Australian Protector and Indigenous People Protection Society', *Pacific Historical Review*, 45:4 (1976), pp. 519–38.
  88. Critchett, *A Distant Field of Murder*, pp. 5–18; A. G. L. Shaw, *A History of the Port Phillip District: Victoria Before Separation* (Melbourne: Miegunyah Press, 1996), p. 116.
  89. Wollaston, *Wollaston's Picton Journal*, pp. 82–3.
  90. Curtin, *The Image of Africa*, p. 415.
  91. *Hansard's Parliamentary Debates* (reprint 1971), vol. 29, p. 551 (14 July). This defence of Indigenous proprietary rights was not uncommon in Britain, see Anon. 'Australia', *North British Review*, 4 (1845–46), in Johnson and Anderson (eds), *Australia Imagined*, pp. 77–82.
  92. BPP, *Aborigines*, 2, p. 83.
  93. Porter, 'North American Experience', pp. 353–4.
  94. 'Glenelg to Gipps, 31 January 1838', in *HRA*, vol. 19, pp. 252–5.
  95. Shaw, *A History of the Port Phillip District*, pp. 119–20. Threlkeld gives an interesting account of the duties he performed as a missionary, including acting as evangelist to the Indigenous people, translator to the courts and a protector 'to which circumstances have called me'. L. Threlkeld, 'The Annual Report of the Mission to the Indigenous people, Lake Macquarie, for 1838', in *Australian Reminiscences*, vol. 1, p. 149.
  96. Elbourne, *Blood Ground*, p. 33.
  97. Glenelg to Gipps, 31 January, 1838', in *HRA*, vol. 19, p. 255. Glenelg's predecessor, Viscount Goderich, had argued in a dispatch of 1832 to Governor D'Urban in British Guiana that 'The first step towards the civilization of any nomadic tribe' was to 'induce them to fix themselves in settled abodes ... erecting habitations, supplying implements wherewith to till the soil, and communicating instruction and assistance in that and other fixed pursuits'. 'Goderich to D'Urban 17 February 1832', Correspondence and



- Other Papers Relating to Indigenous Tribes in British Possessions 1834, in BPP, *Aborigines*, 3, p. 198.
98. 'Lord Russell to Governor Gipps, 25 August, 1840', in BPP, *Australia*, 8, p. 73.
99. *Ibid.*, pp. 73–4.
100. *Ibid.*, p. 74.
101. See, for example, 'G. A. Robinson to Colonial Secretary, 22 March 1839', 'G. A. Robinson to C. J. La Trobe, 21 August 1839', and 'Colonial Secretary to C. J. La Trobe, 26 August 1839', all in *Historical Records of Victoria*, pp. 447, 463–5, 476–8.
102. See, for example, 'Indian Commissioner Crawford on Indian Policy, November 25, 1838', and 'Indian Commissioner Medill on Indian Colonies, November 30, 1848', both in F. P. Prucha (ed.), *Documents of United States Indian Policy*, 2nd edn (Lincoln: University of Nebraska Press, 1990), pp. 73–80. The international links between Australian and American Indigenous policy have been usefully explored in Unrau, 'An International Perspective on American Indian Policy'.
103. 'Sir J. Kempt to Sir G. Murray, 16 May, 1829', Correspondence and Other Papers Relating to Aboriginal Tribes in British Possessions 1834, in BPP, *Aborigines*, 3, pp. 38–9.
104. 'Gipps to La Trobe, 24 October 1840', in A. G. L. Shaw (ed.), *Gipps-La Trobe Correspondence 1839–1846* (Melbourne: Melbourne University Press, 1989), p. 48.
105. 'Gipps to La Trobe, 6 September 1842', in *ibid.*, p. 165.
106. On the duties of the commissioners, see 'Gipps to Glenelg, 6 April 1839', in *HRA*, vol. 20, pp. 90–2. The pastoralist E. M. Curr painted a typically unflattering portrayal of the Commissioners in the 1840s. They were usually late on the scene of any 'disturbance', and proceeded to mete out what passed for justice on whatever Indigenous inhabitants were most accessible with only the most cursory investigation of the facts. E. M. Curr, *Recollections of Squatting in Victoria from 1841 to 1851* (1883; facsimile, Adelaide: Libraries Board of SA, 1968), pp. 120–2.
107. See, for example, 'Gov. Hutt to Lord John Russell, 1 March 1842', Papers Relative to the Aborigines, Australian Colonies, in BPP, *Australia*, 8, pp. 402–3; Revd Threlkeld, 'Annual Report of the Mission, 1841', 'Allman to Colonial Secretary Thomson, 9 November, 1841', and 'Lambie to Colonial Secretary Thomson, 14 January 1842', all in *HRA*, vol. 21, pp. 735, 743, 744; 'Report by Mr. E. Mayne, 3 July 1842', 'Report by Mr. G. J. Macdonald, 1 July, 1842', 'Report of Transactions relative to the Indigenous people ... of Moreton Bay ... 1842', 'Mr J. Lambie to Colonial Secretary Thomson, 11 January 1843', 'Report on the Condition of the Aboriginal Natives of the Murrumbidgee District', and 'Mr. G. J. Macdonald to Colonial Secretary Thomson, 13 January 1843', all in *HRA*, vol. 22, pp. 170, 172, 648, 649, 650–1, 653–4. See also Report from the Committee on Immigration, with Appendix, Minutes of Evidence, and Replies to a Circular Letter on the Aborigines 1841, *NSW&P* (1841), pp. 35–49.
108. 'Russell to Gipps, 21 December 1839', in *HRA*, vol. 20, p. 441.
109. Lord John Russell to William Hobson, 9 December 1840, in Madden and Fieldhouse (eds), *Imperial Reconstruction*, p. 878.
110. H. Spencer, 'The Proper Sphere of Government' (1843), in *The Man Versus the State, with Six Essays on Government, Society, and Freedom* (Indianapolis, IN: Liberty Classics, 1981), pp. 181–263, on p. 224.
111. 'Russell to Gipps, 5 August 1840', in *HRA*, vol. 20, p. 734.
112. 'Coates to Russell, 14 February 1840', in *HRA*, vol. 20, pp. 736–7. Coates was especially concerned about the proximity of a police station to the mission and of police interfer-

- ence with the inhabitants of the mission. See 'Coates to Lord Glenelg, 31 October 1838', in *HRA*, vol. 19, pp. 660–5.
113. 'Land and Emigration Commissioners to Under Secretary, 17 July 1840', in *HRA*, vol. 20, pp. 738–40.
  114. 'Russell to Gipps, 25 August 1840', in *HRA*, vol. 20, pp. 775–6.
  115. See, for example, 'J. H. Wedge to Russell, 24 July 1840' and the sub-enclosure, in *HRA*, vol. 20, pp. 786–9; Emigrant Mechanic, *Settlers and Convicts*, pp. 212–22. The 'Mechanic' calls for an end to 'Protection' and its replacement by 'intimidation.'
  116. 'Stanley to Gipps, 20 December, 1842', in *HRA*, vol. 22, p. 436. Stanley's communication was warmly received by Gipps, who informed La Trobe that he had been given authority over the whole Protectorate system as well as all other missions to the Indigenous people in New South Wales and that he could now 'discontinue the Missions & the Protectorate should I think it proper to do so'. 'Gipps to La Trobe, 28 July 1843', in Shaw (ed.), *Gipps-La Trobe Correspondence*, pp. 222–3. This mood of pessimism was encouraged by other events, most notably the failure of the Niger expedition (1841–2) to resettle former slaves in Africa. P. Brantlinger, *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1800–1930* (Ithaca, NY: Cornell University Press, 2003), p. 89.
  117. Report from the Select Committee on the Condition of the Indigenous people, with Appendix, Minutes of Evidence, and Replies to a Circular Letter 1845, *NSWV&P* (1845), pp. 22–45.
  118. Report from the Select Committee, *NSWV&P* (1845), pp. 45–58; Parker, *Early Days in the Loddon Valley*, p. 73; Dredge, *Brief Notes on the Aborigines*, pp. 26, 31–45.
  119. W. Westgarth, *A Report on the Condition, Capabilities and Prospects of the Australian Aborigines* (Melbourne: William Clarke, 1846), pp. 23, 28; Shaw, *A History of the Port Phillip District*, p. 143.
  120. Some colonial observers held out hope that such norms could indeed be induced among Indigenous people through the introduction of monetary rewards and property. See 'Mr. W. H. Wright to Colonial Secretary Thomson 15 January 1844', in *HRA*, vol. 23, p. 588. Others thought all efforts would be pointless without thoroughgoing Christian conversion. See 'Rev. Threlkeld in the Annual Report of the Mission 1841', in *HRA*, vol. 21, p. 735.
  121. R. Grant, "'The Fit and Unfit': Suitable Settlers for Britain's Mid-Nineteenth-Century Colonial Possessions', *Victorian Literature and Culture*, 33 (2005), pp. 169–86, on p. 171.
  122. Report from the Select Committee on the Aborigines and Protectorate, *NSWV&P* (1849), vol. 2, pp. 419–20. See also L. Threlkeld, 'Final Report of the Mission to the Indigenous people, Lake Maquarie, 1841', in *Australian Reminiscences*, vol. 1, p. 168.
  123. Report of the Port Phillip District Committee of the Societies for Promoting Christian Knowledge and for the Propagation of the Gospel in Foreign parts ... of the Port Phillip District, July 29, 1843', in *HRA*, vol. 23, p. 65. The same concern was raised by Emigrant Mechanic, *Settlers and Convicts*, p. 189.

## 6 Liberalism, Self-Government and the Ethnography of ‘Primitive Society’

1. It is small wonder that Catherine Hall used Eyre as an exemplar of the formation and new possibilities enabled by his ‘imperial identity’. Hall, *Civilising Subjects*, p. 65. On Grey, see J. M. R. Cameron, ‘Agents and Agencies in Geography and Empire: The Case of George Grey’, in M. Bell, R. Butlin and M. Heffernan (eds), *Geography and Imperialism 1820–1940* (Manchester: Manchester University Press, 1995), pp. 13–35.
2. G. Grey, *Journals of Two Expeditions of Discovery ...* (1841; Adelaide: Libraries Board of SA, 1964), pp. 219–20, 251, 253.
3. Eyre, *Journals of Expeditions*, p. 430.
4. *Ibid.*, p. 315.
5. *Ibid.*, p. 384.
6. Grey, *Journals of Two Expeditions*, pp. 217–18.
7. C. B. Welch, ‘Colonial Violence and the Rhetoric of Evasion: Tocqueville on Algeria’, *Political Theory*, 31:2 (2003), pp. 235–64.
8. I use the term ‘ethnographic’ here to distinguish it from later ‘anthropological’ studies of Indigenous peoples, communities and cultures. In its earlier development, ethnography consisted of studies of supposedly ‘uncivilized’ peoples that reflected a strong commitment to the idea of human development as ‘civilization’ and to the development of ‘culture’ as a measure of ‘civilization’. This orientation informed the development of anthropology also, but its later development in the twentieth century was shaped by the gradual rejection of the idea of ‘civilization’ in favour of the study of the plurality of human ‘cultures’. G. W. Stocking, *Victorian Anthropology* (New York: Free Press, 1987), pp. 302–5. It is important to point out that I do not claim that such theories were ‘scientific’ (in the sense that they offered objective and testable hypotheses). On the contrary, these theories were accepted as scientific because they seemed to confirm long-held prejudices about Indigenous people.
9. J. M. Ward, *Colonial Self-Government: The British Experience 1759–1856* (London: Macmillan, 1976), p. 234.
10. Baron Hügel saw the British insistence on rights, liberty and civilization as no more than ‘hypocrisy’ belied by the devastation of Indigenous populations in North America, New Holland, the West Indies and especially Tasmania. Hügel, *New Holland Journal*, p. 138.
11. J. G. Merquior, *Liberalism Old and New* (Boston, MA: Twayne Publishers, 1991), pp. 32–4.
12. *The Parliamentary Debates, Vol. VIII, 4 February–13 April 1823* (London: T. C. Hansard, 1823), p. 663 (24 March 1823).
13. Comaroff, ‘Images of Empire’, pp. 169–70; Elbourne, *Blood Ground*, pp. 248–9.
14. M. Poovey, *Making a Social Body: British Cultural Formation, 1830–1864* (Chicago, IL: University of Chicago Press, 1995), p. 35.
15. Elbourne, *Blood Ground*, pp. 249–50; Hilton, *A Mad, Bad and Dangerous People?*, p. 205.
16. See, for example, J. Wade, *The Extraordinary Black Book: An Exposition of Abuses in Church and State* (1832; New York: Augustus M. Kelley, 1970). See also P. Harling, ‘Rethinking Old Corruption’, *Past and Present*, 147 (1995), pp. 127–58; Buchan and Hill, ‘From Republican to Liberalism’; Hilton, *A Mad, Bad and Dangerous People?*, pp. 233–4.
17. Hilton, *A Mad, Bad and Dangerous People?*, pp. 518–23.

18. B. Smith, *Liberty and Liberalism: A Protest against the Growing Tendency toward Undue Interference by the State, with Individual Liberty, Private Enterprise and the Rights of Property* (1887; St Leonards: Centre for Independent Studies, 2005), p. 131.
19. D. Read, *Cobden and Bright: A Victorian Political Partnership* (London: Edward Arnold, 1967), pp. 30–5.
20. Buchan and Hill, 'From Republican to Liberalism'.
21. Elbourne, *Blood Ground*, p. 252; C. Hall, 'William Knibb and the Constitution of the New Black Subject', in Daunton and Halpern (eds), *Empire and Others*, pp. 303–24, on p. 305. For Susan Thorne, evangelical abolitionist campaigns came to present the object of their endeavours to lead former slaves and Africans to 'alternative forms of trade' and thereby to civilization and God. Thorne, "'The Conversion of Englishmen'", p. 249. In at least one sense, however, tensions remained. One effect of the growing influence of *laissez faire* liberalism was an increasing scepticism of expensive state action called for by evangelicals, such as the maintenance of anti-slave trade squadrons, and the cost of Aboriginal protection. Curtin, *The Image of Africa*, p. 316; Elbourne, *Blood Ground*, p. 234.
22. A. Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984), p. 243; H. S. Jones, *Victorian Political Thought* (Houndmills: Macmillan, 2000), pp. 18–21.
23. Hilton, *A Mad, Bad and Dangerous People?*, p. 326.
24. *The Parliamentary Debates, Vol. IX, 1 May–19 July 1823* (London: T. C. Hansard, 1824), p. 797 (6 June 1823).
25. S. Collini, D. Winch and J. Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983), pp. 157–9; Jones, *Victorian Political Thought*, pp. 31–4; Arblaster, *The Rise and Decline of Western Liberalism*, p. 285.
26. Pitts, *A Turn to Empire*.
27. Laidlaw, *Colonial Connection*, pp. 43–9.
28. Brantlinger suggests that at least part of the enthusiasm for extending British liberty to former slaves abroad rested on its suitability as a strategy for criticizing slavery. Such calls could thus be seen as patriotic claims to extend British liberty through the Empire, even though some of its proponents resisted the extension of liberty at home as too radical or 'Jacobin'. Brantlinger, *Dark Vanishings*, p. 72.
29. J. W. Cell, *British Colonial Administration in the Mid-Nineteenth Century: The Policy-Making Process* (New Haven, CT: Yale University Press, 1970), p. 45.
30. See, for example, E. Burke, 'Speech on Conciliation with America' (1775), in *The Political Philosophy of Edmund Burke*, pp. 111–29; R. Price, 'Observations on the Importance of the American Revolution' (1785), in *Richard Price, Political Writings*, ed. D. O. Thomas (Cambridge: Cambridge University Press, 1991), pp. 116–51.
31. J. Bentham, 'Emancipate Your Colonies! Addressed to the National Convention of France, Anno 1793' (1830), in *The Works of Jeremy Bentham* (1843), ed. J. Bowring, 11 vols (Bristol: Thoemmes Press, 1995), vol. 4, pp. 407–18, on p. 417. Pitts argues that despite his aspirations towards reformed and all-embracing laws, Bentham was not a consistent supporter of European imperialism. J. Pitts, 'Legislator of the World? A Rereading of Bentham on Colonies', *Political Theory*, 31:2 (2003), pp. 200–34.
32. 'James Stephen to Lord Howick, 11 January 1836', in Madden and Fieldhouse (eds), *Imperial Reconstruction*, pp. 815–16.

33. See, *Hansard's Parliamentary Debates* (reprint 1971), vol. 88, 27 July–28 August 1846, pp. 714–17 (14 August 1846).
34. E. G. Wakefield, *The British Province of South Australia* (London: K. Knight, 1834).
35. 'First Report of the Colonisation Commissioners for South Australia, 24 June 1836,' in *Correspondence and Papers Relating to the Government and Affairs of the Australian Colonies, 1830–36*, British Parliamentary Papers, Colonies, Australia, 4 (Shannon: Irish University Press, 1968), p. 481.
36. *The Durham Report* (1839; Oxford: Clarendon Press, 1946), pp. 288–9.
37. Hilton, *A Mad, Bad and Dangerous People?*, p. 567.
38. Pagden, 'Fellow Citizens and Imperial Subjects', p. 45. Curtin, *The Image of Africa*, pp. 244–50. Curtin identifies two sources as crucial here, Hugh Murray's, *Enquiries Historical and Moral Respecting the Characters of Nations and the Progress of Society* (1808); and James Mill's, *History of British India* (1817).
39. U. S. Mehta, 'Liberal Strategies of Exclusion,' in Cooper and Stoler (eds), *Tensions of Empire*, pp. 59–86, on p. 77.
40. J. S. Mill, *Principles of Political Economy, Books IV and V* (1848), ed. D. Winch (London: Penguin, 1985), p. 58. See also J. S. Mill, 'Civilization' (1836), in *Essays on Politics and Culture*, ed. G. Himmelfarb (New York: Anchor Books, 1962), pp. 57–8.
41. Mill, *Principles of Political Economy*, p. 114.
42. W. A. Duncan, *Lecture on National Education, Brisbane, 20 June 1850* (Brisbane: James Swan, 1850), p. 22. On the 'tyranny of the majority,' see A. de Tocqueville, *Democracy in America* (1835–40; London: Penguin, 2003), pp. 296–306; P. Joyce, *Democratic Subjects: The Self and the Social in Nineteenth-Century England* (Cambridge: Cambridge University Press, 1994), pp. 166–76.
43. J. S. Mill, *On Liberty* (1859), ed. G. Himmelfarb (London: Penguin, 1974), p. 69. Similar views were expressed by evangelicals interested in colonial reform such as Wilberforce and members of the Clapham Sect, among whom was Sir Charles Grant, father of Lord Glenelg. Mehta, 'Liberal Strategies of Exclusion,' p. 78; Bhabha 'Of Mimicry and Man,' in *Tensions of Empire*, p. 154.
44. M. Levin, *Mill on Civilization and Barbarism* (London: Frank Cass, 2004), p. 56.
45. J. S. Mill, *Considerations on Representative Government* (1861; London: Dent, 1964), p. 382.
46. *Ibid.*, pp. 377, 220. Other calls for colonial self-government or imperial 'decentralization' simply failed to mention Indigenous peoples at all. See Anon., 'Our Colonial Policy,' *Colonial and Asiatic Review*, 1:1 (1852), pp. 1–10.
47. J. S. Mill, 'A Few Words on Non-Intervention' (1859), in *Essays on Politics and Culture*, pp. 368–84, on pp. 377–8; B. Jahn, 'Barbarian Thoughts: Imperialism in the Philosophy of John Stuart Mill,' *Review of International Studies*, 31 (2005), pp. 599–618.
48. Mill, *Considerations on Representative Government*, p. 382.
49. Tocqueville, *Democracy in America*, p. 371, also pp. 370–6.
50. Kohn and O'Neill, 'A Tale of Two Indias.' Mill was deeply critical of Thomas Carlyle's racist arguments for slavery in his 'Occasional Discourse ...' of 1849. Carlyle's essay and Mill's response can be found in J. S. Mill, *The Negro Question* (1850), ed. E. R. August (New York: Appleton, 1971), pp. 1–37, 38–50.
51. J. S. Mill, *Memorandum of the Improvements in the Administration of India during the Last Thirty Years* (1858), in *Writings on India by John Stuart Mill*, ed. J. Robson, M. Moir and Z. Moir (Toronto: University of Toronto Press, 1990), pp. 91–160, on p. 93.

- Mill compiled this memorandum while British troops were ferociously suppressing the Indian Mutiny of 1857. Mill had little to say about the Mutiny.
52. *Ibid.*, p. 142.
  53. Wentworth, *Statistical, Historical and Political Description*, pp. 163, 194–5.
  54. Mill, *Principles of Political Economy*, p. 336; Mill, 'A Few Words on Non-Intervention', p. 378; D. Bell, 'From Ancient to Modern in Victorian Imperial Thought', *Historical Journal*, 49:3 (2006), pp. 735–59.
  55. K. Anderson and C. Perrin, "'The Miserablest People in the World": Race, Humanism and the Australian Aborigine', *Australian Journal of Anthropology*, 18:1 (2007), pp. 18–39.
  56. Stocking, *Victorian Anthropology*, pp. 145–50.
  57. R. Shannon, *The Crisis of Imperialism, 1865–1915* (London: Hart-Davis, 1974), p. 271.
  58. C. R. Darwin, 'Journey across the Blue Mountains to Bathurst in January, 1836', in Mackaness (ed.), *Fourteen Journeys over the Blue Mountains*, pp. 226–36, on p. 230.
  59. Kuper, *The Reinvention of Primitive Society*, pp. 17–18, 34; Stocking, *Victorian Anthropology*, p. 107.
  60. I. Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca, NY: Cornell University Press, 1990), p. 291. An early contributor to this view was Robert Malthus, who recommended the removal of poor relief to eliminate the idle poor. See his *Essay on the Principle of Population*, vol. 1, pp. 539–40.
  61. Smith, *Liberty and Liberalism*, p. 291.
  62. A. Comte, cited in K. Thomson (ed.), *The Foundation of Sociology* (London: Nelson, 1976), p. 121.
  63. Brantlinger, *Dark Vanishings*, pp. 177–8.
  64. H. Spencer, 'The Social Organism' (1860), in *The Man Versus the State*, pp. 383–434, on p. 392.
  65. *Ibid.*, p. 393.
  66. *Ibid.*, p. 400.
  67. *Ibid.*, p. 401.
  68. H. Spencer, *The Evolution of Society: Selections from Herbert Spencer's Principles of Sociology* (1876–96), ed. R. L. Carniero (Chicago, IL: University of Chicago Press, 1967), p. 6.
  69. Poovey, *Making a Social Body*, pp. 56–65; S. Collini, *Public Moralists: Political Thought and Intellectual Life in Britain 1850–1930* (Oxford: Clarendon Press, 1991), pp. 61–85.
  70. J. Garrard, *Democratisation in Britain, Elites, Civil Society and Reform since 1800* (Houndmills: Palgrave, 2002), p. 89; S. Collini, *Liberalism and Sociology: L. T. Hobhouse and Political Argument in England 1880–1914* (Cambridge: Cambridge University Press, 1979), pp. 173–5.
  71. Brantlinger, *Dark Vanishings*, pp. 6–35. See also Elbourne, *Blood Ground*, p. 334.
  72. The concept of race was not universally applied. Most notably the German philosopher Johan Herder (drawing inspiration in part from Georg Forster's account of Captain Cook's second voyage into the Pacific) criticized his former teacher, Immanuel Kant, for his use of the term in his lectures on anthropology. D. Denby, 'Herder: Culture, Anthropology and the Enlightenment', *History of the Human Sciences*, 18:1 (2005), pp. 55–76.

73. See, for example, Curtin, *The Image of Africa*, pp. 38–9. Other significant factors shaped the eighteenth-century resistance to rigid racial hierarchies including Sir William Jones's identification of a 'close affinity between Sanskrit and European languages', and the dominance of analytical frameworks that privileged environmental, climatic or historical factors over biology. Ballantyne, *Orientalism*, p. 27; Marshall and Williams, *The Great Map of Mankind*, pp. 129–31.
74. Samson, *Race and Empire*, p. 29.
75. N. Hudson, 'From "Nation" to "Race": The Origin of Racial Classification in Eighteenth-Century Thought', *Eighteenth-Century Studies*, 29:3 (1996), pp. 247–64; K. Blackburn, 'Imagining Aboriginal Nations: Early Nineteenth-Century Evangelicals on the Australian Frontier and the "Nation" Concept', *Australian Journal of Politics and History*, 48:2 (2002), pp. 174–92.
76. Curtin, *The Image of Africa*, p. 236.
77. Cunningham, *Two Years in New South Wales*, p. 202.
78. *Ibid.*, p. 203.
79. Angas, *Savage Life and Scenes*, vol. 1, pp. 303–4; Stocking, *Victorian Anthropology*, pp. 64, 106–7.
80. P. Turnbull, 'British Anatomists, Phrenologists and the Construction of the Aboriginal Race, c. 1790–1830', *History Compass*, 4 (2006), pp. 1–25.
81. Samson, *Race and Empire*, pp. 56–63.
82. Elbourne, *Blood Ground*, pp. 352–7, 378.
83. C. Bolt, *Victorian Attitudes to Race* (London: Routledge and Kegan Paul, 1971), p. 92. See also D. A. Lorimer, *Colour, Class and the Victorians: English Attitudes to the Negro in the Mid-Nineteenth Century* (Leicester: Leicester University Press, 1978). James Belich has persuasively argued that the Waikato War of 1863 had the same effect on attitudes towards the Maori. J. Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1988), p. 328; Hilton locates the turning point in 1842 following the annihilation of the British Army of occupation in Afghanistan, while Curtin suggests it was the rapid dissipation of evangelical aspirations about 'improving' so-called 'lower races' after the failure of the Niger Expedition in 1841–2. Hilton, *A Mad, Bad and Dangerous People?*, p. 571; Curtin, *The Image of Africa*, pp. 302–3.
84. Belich, *The New Zealand Wars*, pp. 321–30.
85. See also Samson, *Race and Empire*, pp. 48–9; Bank, 'Losing Faith in the Civilising Mission'.
86. J. West, *Union of the Colonies: Essays on Federation* (1854), ed. P. F. Ratcliff (Launceston: Queen Victoria Museum, 2000), p. 81. The 'father' of Australian Federation, Sir Henry Parkes, similarly defined the freedom of Australian citizens as being underwritten by the 'British tie'. H. Parkes, *Fifty Years in the Making of Australian History* (London: Longmans, 1892), p. 637; P. Cochrane, *Colonial Ambition: Foundations of Australian Democracy* (Melbourne: Melbourne University Press, 2006), p. 11.
87. Ballantyne, *Orientalism*, p. 45. Ballantyne was here referring to the Indian Mutiny of 1857.
88. West, *Union of the Colonies*, p. 71.
89. MacIntyre, *A Colonial Liberalism*, pp. 211–12.
90. Nonetheless, colonial control of Indigenous communities and formation of Aboriginal policies played a key role in the granting of colonial self-government by Britain, especially to Western Australia. The transactions of this campaign can be read in Cor-

- responsidence Relating to the Proposed Abolition of the Aborigines Protection Board of Western Australia, in *Correspondence Relating to the Importation of Polynesian Islanders, to Native Affairs and to the Government of the Australian Colonies*, British Parliamentary Papers, Colonies, Australia, 34, (Shannon: Irish University Press, 1969) (hereafter BPP, Australia, 34). See especially ‘Memorandum for His Excellency the Administrator, April 20, 1892’, pp. 383–4; Forrest to Governor, November 22, 1892, p. 396; and ‘Governor Smith to Chamberlain, May 19, 1896’ (especially enclosure 1 in no. 42, Premier Forrest to Governor), pp. 503–9.
91. ‘Sir George Murray to Lieut-Gov Arthur, 5 November 1830’, in *HRA, Series III*, vol. 9, pp. 573–4.
  92. See, for instance, ‘Government Order No. 2, 25 February 1830’, in *HRA, Series III*, vol. 9, pp. 200–201.
  93. J. D. Lang, *An Historical and Statistical Account of New South Wales* (London: Cochrane and M’crane, 1834), pp. 38–9. The former missionary to the Aborigines, Lancelot Threlkeld, also apprehended the ‘passing away’ of the Aborigines and seemed at a loss to explain why they did not flock to the ‘Benevolent Asylum’ of the missions. ‘Threlkeld to Sir G. Grey, 10 April 1857’, in *Australian Reminiscences*, vol. 1, p. 301.
  94. Angas, *Savage Life and Scenes*, vol. 2, p. 210.
  95. R. Windeyer, ‘On the Rights of the Aborigines of Australia’, p. 32, Mitchell Library, Sydney, CY Reel 528, MSS A1400. I am grateful to Dr Mary Heath for references to this source.
  96. *Ibid.*, pp. 31, 32.
  97. W. Hull, *Remarks on the Probable Origin and Antiquity of the Aboriginal Natives of New South Wales* (Melbourne: William Clarke, 1846), p. 21.
  98. Smith, *Liberty and Liberalism*, p. 334.
  99. McGregor, *Imagined Destinies*, pp. 50–5.
  100. *The Centennial Supplement to the Sydney Morning Herald*, ‘The Origin and Progress of Australian Settlement’, 24 January 1888, p. 11.
  101. McGregor, *Imagined Destinies*, p. 86.
  102. Karsten argues that Indigenous ‘customary’ rights were originally respected by imperial authorities but later ignored by self-governing colonial legislatures. Karsten, *Between Law and Custom*, pp. 116–17.
  103. G. Melleuish, *A Short History of Australian Liberalism* (St Leonards: Centre for Independent Studies Occasional Paper 74, 2001), p. 1.
  104. *Ibid.*, pp. 5–12.
  105. The development of this pessimism can be traced, for example, in the letter books of Matthew Moorhouse, Protector of Aborigines in South Australia (1840–57). See SASA, Protector of Aborigines. Letter Books 1840–1857, GRG 52/7.
  106. F. Nightingale, ‘Note on the Aboriginal Races in Australia’, *Transactions of the National Association for the Promotion of Social Science* (1864), pp. 552–8, on p. 553.
  107. *Ibid.*, p. 554–5. Nightingale quotes extensively from Salvado’s own descriptions here. The inmates were to be paid for their labour on the mission and, once able to farm for themselves, would receive their own land, would be paid for clearing and fencing it, and expected to use the money obtained from the crops to buy agricultural equipment.
  108. *Ibid.*, p. 557.
  109. M. B. Hale, *The Aborigines of Australia, being an Account of the Institution for their Education as Poonindie in South Australia* (London: Society for Promoting Christian



- Knowledge, 1889), pp. 10, 52. This work was based on Bishop Hale's involvement with Poonindie from 1850.
110. Kuper, *The Reinvention of Primitive Society*, pp. 10, 35.
  111. J. S. Mill, 'Maine on Village Communities' (1871), in *Writings on India*, pp. 213–38, on p. 227.
  112. *Ibid.*, p. 222; Collini et al., *That Noble Science of Politics*, pp. 254–5.
  113. E. B. Tylor agreed with Maine that this was the distinguishing feature of primitive society, opposed to civilized society. Tylor, 'Primitive Society', p. 59.
  114. H. S. Maine, *Ancient Law* (1861; Bristol: Thoemmes Press, 1996), p. 170.
  115. *Ibid.*, p. 168.
  116. *Ibid.*, pp. 135–8.
  117. *Ibid.*, p. 169.
  118. H. S. Maine, *Village Communities in the East and West*, 3rd edn (London: John Murray, 1876), pp. 13–14.
  119. H. S. Maine, *Lectures on the Early History of Institutions* (1888; Buffalo, NY: William S. Hein, 1987), p. 379. See also J. L. Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, ed. R. Campbell, 2 vols (Bristol: Thoemmes Press, 1996), 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*'. *Ibid.*, 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). *Ibid.*, vol. 1, pp. 284–5.
  120. Maine, *Lectures*, p. 382.
  121. *Ibid.*, p. 385.
  122. *Ibid.*, pp. 388–9.
  123. *Ibid.*, p. 390.
  124. Ballantyne, *Orientalism*, p. 52.
  125. Smith, *Liberty and Liberalism*, p. 48.
  126. P. Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics of Poetics of an Ethnographic Event* (London: Cassell, 1999), p. 9; 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), pp. 1–19, on p. 5.
  127. See the annual reports of the CBPA, for example, '1st Report of the Central Board Appointed to Watch Over the Interests of the Aborigines of the Colony of Victoria, 1861', *Victorian Votes and Proceedings of the Legislative Assembly* (1861–2), vol. 3, pp. 10–26 (hereafter *VV&PLA*); '4th Report, CBPA, 1864', *VV&PLA* (1864); '5th Report, CBPA, 1866', *VV&PLA* (1866), vol. 2; '6th Report, CBPA, 1869', *VV&PLA* (1869), vol. 4; '24th Report, CBPA, 1888', *VV&PLA* (1888), vol. 3; Attwood, *The Making of the Aborigines*. See also Royal Commission on the Aborigines, 1877, *VV&PLA* (1877–8), vol. 3.
  128. B. Chesterman and B. Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge: Cambridge University Press, 1997).
  129. Haebich, *Broken Circles*, pp. 207–8. This particular policy had a long history, and though it did not become a settled strategy until well into the twentieth century, many had called for it 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 of 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 (hereafter *SAPP*). The rationale for child removal was made clear by Western Australia’s Chief Protector, Henry Prinsep. See ‘1902 Aborigines Department Report’, *Western Australia Votes and Proceedings* (1902), vol. 2, p. 3 (hereafter *WAV&P*).
130. As an example of the growth of this ‘scientific’ attitude in early Australian ethnography, see R. Brough Smyth, *Aborigines of Victoria* (1876; Melbourne: John Currie, O’Neil, 1972). This work was compiled when he was serving as Secretary to Victoria’s CBPA. 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 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’. Brough Smyth, *The Aborigines of Victoria*, p. xxv.
131. Brantlinger, *Dark Vanishings*, p. 139.
132. A. W. Howitt and L. Fison, *Kamilaroi and Kurnai* (Melbourne: George Robertson, 1880), p. 27.
133. A. W. Howitt, *The Native Tribes of South East Australia* (1904; facsimile, Canberra: Aboriginal Studies Press, 1996), p. 41.
134. *Ibid.*, pp. 42–3. Spencer and Gillen offered a different definition (that excluded any essential reference to totemism) in their *The Northern Tribes of Central Australia*: ‘In the great majority of Australian tribes, but not in all, there is a very definite social organisation, which term we use in connection only with the division of the tribe into two (or more) exogamous, intermarrying groups without reference to the presence or absence of a totemic system’. B. Spencer and F. J. Gillen, *The Northern Tribes of Central Australia* (London: Macmillan, 1904), p. 70. Radcliffe-Brown was critical of the inconsistency of Howitt’s terminology, favouring Spencer and Gillen’s definition of the tribe. Radcliffe-Brown defined the ‘Australian tribe’ as a group of people speaking the same language but as having ‘no political authority’. A. R. Radcliffe-Brown, ‘The Social Organisation of Australian Tribes, Part I’, *Oceania*, 1 (1930–1), pp. 34–63, on pp. 36–7.
135. Howitt, *The Native Tribes of South East Australia*, p. 90.
136. See, for example, ‘Report of a Commission of Enquiry into the Treatment of Aboriginal Native Prisoners and into the General Condition of the Aboriginal Natives, 1884’, *WAV&P* (1884), p. 32; ‘Report of the Select Committee of the Legislative Council upon “The Aborigines”, *SAPP* (1860), vol. 3, paper no. 165, pp. 3, 6; ‘Report of the Aborigines Commissioners, 1878’, *Queensland Votes and Proceedings* (1878), vol. 2, pp. 59–61 (hereafter *QV&P*); A. Meston, ‘Report on the Aborigines of Queensland, 1896’, *QV&P* (1896), vol. 4, pp. 723–34. See also A. Haebich, *For Their Own Good: Aborigines*

- and Government in the Southwest of Western Australia, 1900–1940* (Perth: University of Western Australia Press, 1988), pp. 54–5.
137. 'Report of the Government Resident ... 1907', *SAPP* (1908), vol. 3, paper no. 45, p. 18; and 'Report of the Government Resident ... 1909', *SAPP* (1910), vol. 3, paper no. 45, pp. 46–7; '1899 Aborigines Department Report', *WAV&P* (1899), vol. 2, paper no. 40, p. 3; and '1902 Aborigines Department Report', *WAV&P* (1902), vol. 2, paper no. 21, p. 3. '1903 Aborigines Department Report', *WAV&P* (1903), pp. 19, 21. See also T. Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911–1939* (Darwin: NTU Press, 1997), pp. 30–3.
138. 'Report of the Northern Protector ... 1905', *QV&P* (1905), vol. 1, p. 770. Part of the 'problem' was that Aboriginal people of mixed descent, derisively labelled 'half-castes', were thought to be more 'hardy' than those Aborigines of pure descent. See, for example, 'Governor Robinson to Marquis of Ripon, February 20, 1894', enclosure E, no. 4, 'Some Account of the Spanish Mission ... to New Norcia', in *BPP*, Australia, 34, p. 451; McGregor, *Imagined Destinies*.
139. F. A. Hagenauer, *Notes of a Missionary Journey to North Queensland* (Sale: Ross and Reece, 1885), p. 30.
140. Howitt and Fison, *Kamilaroi and Kurnai*, p. 332. The early reports of the Victorian CBPA recount the tragic story of their effort to instil in one Indigenous man, Thomas Bungelene, what they called '*amour propre*' or the sense of 'personal pride and desire to be thought well of', considered vital to 'mental progress'. 'First Report, CBPA, 1861', *VV&PLA* (1861–2), vol. 3, pp. 8–9; 'Second Report, CBPA, 1862', *VV&PLA* (1862–3), vol. 3, p. 14. Rusden asserted that there 'is no such towering elevation of an individual above the mass amongst savages as amongst civilized Caucasians'. G. W. Rusden, *History of Australia* (London: Chapman and Hall, 1883), p. 82. The first Premier of Western Australia, John Forrest, similarly asked in his Presidential address to the Australasian Academy for the Advancement of Science in 1890, 'Why has no superior genius' among Indigenous people 'arisen through the ages ... to instil into his people an ambition to rise from their servile and degraded condition?', J. Forrest, 'Presidential Address, Section G, Anthropology', *Report of the Australasian Association for the Advancement of Science* (1890), pp. 160–2, on pp. 161–2. See also G. Taplin (ed.), *The Folklore, Customs and Languages of the South Australian Aborigines, Gathered from Enquiries made by Authority of the South Australian Government* (Adelaide: Government Printer, 1879), p. 11.
141. Howitt and Fison, *Kamilaroi and Kurnai*, pp. 334, 340.
142. *Ibid.*, pp. 330–1.
143. 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 to 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 towards 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).

144. L. H. Morgan, 'Preliminary Note', in Howitt and Fison, *Kamilaroi and Kurnai*, pp. 1–20, on p. 6.
145. L. H. Morgan, *Ancient Society* (1877; Cambridge, MA: Belknap Press, 1964), pp. 62–3, 305.
146. *Ibid.*, p. 107.
147. *Ibid.*, 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 therefore cannot be the crucible of sovereignty. Austin, *Lectures*, vol. 1, p. 250. For Austin, see n. 119 above.
148. A. W. Howitt, and L. Fison, 'On the Deme and the Horde', *Journal of the Anthropological Institute of Great Britain and Ireland*, 14 (1885), pp. 141–69, on p. 143.
149. *Ibid.*, p. 144.
150. *Ibid.*, pp. 150–1.
151. *Ibid.*, p. 167.
152. In his later *The Native Tribes of South East Australia*, Howitt did in fact speak of '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 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 '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 Aborigines had not progressed beyond the stage of primitive 'equality'. Howitt, *Native Tribes of South East Australia*, pp. 295, 297, 320.
153. L. Fison, 'Address by the President, Section G, Anthropology', *Report of the Australasian Association for the Advancement of Science* (1892), pp. 144–53, on p. 148.
154. M. M. Bennett, *Christison of Lammermoor*, 2nd edn (London: Alston Rivers, 1928), pp. 81–2.
155. R. Salvado, *The Salvado Memoirs*, trans. and ed. E. J. Stormon (Perth: University of Western Australia Press, 1977). Further information is supplied in the enclosures in 'Bishop Gurney to Cardinal Vaughan, January 13, 1893', and 'Governor Robinson to Marquis of Ripon, February 20 1894', both in Correspondence Relating to the Proposed Abolition of the Aborigines Protection Board of Western Australia, in BPP, Australia, 34, pp. 397–404, 438–57.
156. See, for example, the various petitions collected in B. Attwood and A. Markus (eds), *The Struggle for Aboriginal Rights: A Documentary History* (Sydney: Allen and Unwin, 1999), pp. 30–58.
157. 'South Australian Government Resident's Report for the Northern Territory, 1889', *SAPP* (1890), vol. 2, paper no. 28, p. 9. See also G. Reid, *A Picnic with the Natives: Aboriginal-European Relations in the Northern Territory to 1910* (Melbourne: Melbourne University Press, 1990), p. 164.
158. 'Report of the Select Committee of the Legislative Council on the Aborigines Bill, 1899', *SAPP* (1899), vol. 2, paper no. 77A, appendix, pp. 96, 110.
159. G. W. Stocking, *Race, Culture and Evolution* (New York: Free Press, 1968), pp. 117–19.

160. E. R. Masson, *An Untamed Territory: The Northern Territory of Australia* (London: Macmillan, 1915), p. 151.

## Conclusion

1. A. P. Elkin, 'Native Education, with Special Reference to Australian Aborigines', *Oceania*, 7:4 (1937), pp. 459–500, on p. 469; A. P. Elkin, *Citizenship for the Aborigines: A National Aboriginal Policy* (Sydney: Australasian Publishing Co., 1944), p. 23. See also G. Gray, 'From Nomadism to Citizenship: A. P. Elkin and Aboriginal Advancement', in Peterson and Sanders (eds), *Citizenship and Indigenous Australians*, pp. 55–76.
2. B. Buchan and M. Heath, 'Savagery and Civilization: From Terra Nullius to the "Tide of History"', *Ethnicities*, 6:1 (2006), pp. 5–26; D. Ritter, 'No Title Without History', in M. Paul and G. Gray (eds), *Through a Smoky Mirror: History and Native Title* (Canberra: Aboriginal Studies Press, 2002), pp. 81–92.
3. Alfred, *Peace, Power, Righteousness*.
4. In this way, claims for Indigenous sovereignty build on but go beyond earlier campaigns, such as the 1967 Referendum which finally included Indigenous Australians in the national census. The Referendum itself grew out of earlier assimilation policies that aimed at equal citizenship for Indigenous peoples, and represented to many Australians a 'safe' form of recognition of Indigenous peoples short of the more radical recognition of special Indigenous rights to land or sovereignty. B. Attwood and A. Markus, 'Representation Matters: The 1967 Referendum and Citizenship', in Peterson and Sanders (eds), *Citizenship and Indigenous Australians*, pp. 118–40. Subsequent history has shown that neither the Referendum nor the various Anti-Discrimination Acts passed afterward were able fully to deliver equal citizenship. J. Chesterman, *Civil Rights: How Indigenous Australians won Formal Equality* (St Lucia: University of Queensland Press, 2005), pp. 180–93; Chesterman and Galligan, *Citizens without Rights*, pp. 197–222. See also T. Rowse, 'Indigenous Citizenship and Self-Determination: The Problem of Shared Responsibilities', in *Citizenship and Indigenous Australians*, pp. 79–100.
5. S. Curry, *Indigenous Sovereignty and the Democratic Project* (Aldershot: Ashgate, 2004), pp. 148–9.
6. *Members of the Yorta Yorta Aboriginal Community v. the State of Victoria and Ors* (1998), 1606 FCA; and *Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Ors* (2002) High Court of Australia 58.
7. In *Western Australia v. Ward* (2000), the continuity of Indigenous connection to land was located in their 'spiritual' beliefs, which were held to persist even when their physical presence on the land in question had 'ceased for reasons beyond the control of the people'. The 2002 High Court decision to uphold the 1998 *Yorta Yorta* finding, however, held that Indigenous connection resided in the continuity of laws and customs predating the assertion of British sovereignty. See R. French, 'The Evolving Law of Native Title', in S. Toussaint (ed.), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne: Melbourne University Press, 2004), pp. 86–96; *Yorta Yorta* (1998); *Western Australia v. Ward* (2000), 170 ALR 159.
8. Curr, *Recollections of Squatting in Victoria*, pp. 243–4.
9. *Ibid.*, p. 418.
10. *Ibid.*, p. 244.

11. E. M. Curr, *The Australian Race: Its Origin, Languages, Customs, Place of Landing in Australia, and the Routes by which it Spread Itself Over that Continent*, 3 vols (Melbourne: Government Printer, 1886), vol. 1, p. 51.
12. *Ibid.*, vol. 1, p. 192.
13. *Ibid.*, vol. 1, pp. 241, 52, 54.
14. The Federal Court, for example, simply referred to Yorta Yorta people having found themselves ‘by force of the circumstances’ dispossessed of their traditional lands, and relocated to various missions where their customary beliefs and practices were forever altered (*Yorta Yorta* (1998), § 121). The nature of these ‘circumstances’ were declared not to be the concern of the Court, only their purported effects. Such were their effects that the current Indigenous commitment to conservation, for example, was deemed by the Court to be non-traditional in so far as Curr, in particular, provided evidence of Indigenous profligacy and waste (*Yorta Yorta* (1998), § 123). Furthermore, to the extent that the current inhabitants engage in ‘traditional’ practices of gathering ‘bush tucker’, the Court considered this non-traditional in that it is today more of a ‘recreational activity’ than a ‘means of sustaining life’. In other words, if the Indigenous inhabitants still depended on bush tucker for their survival, this would be taken as evidence of their living a ‘traditional’ lifestyle.
15. As the subsequent history of Native Title determinations shows, some Indigenous communities have been successful in demonstrating the continuity of their ‘traditional’ title. Today over 8 per cent of the Australian land mass is owned under Native Title provisions, while over 10 per cent is subject to Indigenous Land Use Agreements. These agreements, recognized under the Native Title Act and negotiated between Indigenous communities and commercial interests, can be said to constitute an important recognition of Indigenous political status. M. Langton and L. Palmer, ‘Treaties, Agreement Making and the Recognition of Indigenous Customary Politics’, and L. Strelein, ‘Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government’, both in M. Langton, M. Tehan, L. Palmer and K. Shain (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne: Melbourne University Press, 2004), pp. 34–49, 189–202. See also J. Litchfield and L. Jackson, ‘History and the Native Title Act’, in Paul and Gray (eds), *Through a Smoky Mirror*, pp. 93–9.
16. Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akekyernemane Meke Mekarie ‘Little Children are Sacred’* (Darwin: Northern Territory Government, 2007).
17. J. C. Altman, ‘The Howard Government’s Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?’, *Centre for Aboriginal Economic Policy Research*, Topical Issue 16 (2007), pp. 1–19, <<http://www.anu.edu.au/caept/>> [accessed 30 January 2008]; R. Stringer, ‘A Nightmare of the Neo-Colonial Kind: Politics of Suffering in Howard’s Northern Territory Intervention’, *Borderlands EJournal*, 6:2 (2007), <<http://www.borderlands.net.au/issues/vol6no2.html>> [accessed 3 February 2008].
18. The aims of the intervention were also mirrored in the neo-liberal recommendations of the *Lands of Shame* report, which sought to discredit Indigenous leaders, portraying them as self-interested and as willing to use their community’s resources as a source of patronage to sustain their own positions. H. Hughes, *Lands of Shame: Aboriginal and Torres Strait Islander ‘Homelands’ in Transition* (St Leonards: Centre for Independent Studies, 2007).

19. One example of this were the Shared Responsibility Agreements (SARs) by which the Howard Government sought to enforce a quid pro quo with Indigenous communities. In their crudest form, the SARs echoed the outdated rhetoric of assimilation. In the ‘infamous’ case of the Mulan community in Western Australia, petrol pumps were to be provided on condition that community members wash their children’s faces regularly and adopt other hygiene measures. R. McCausland, ‘Shared Responsibility Agreements: Practical Reconciliation or Paternalistic Rhetoric?’, *Indigenous Law Bulletin*, 6:12 (2005), pp. 9–11; Altman, ‘The Howard Government’s Northern Territory Intervention’, p. 12.
20. R. Lawrence and C. Gibson, ‘Obliging Indigenous Citizens?’, *Cultural Studies*, 21:4 (2007), pp. 650–71, on p. 663.
21. The campaign for reconciliation was initially prompted in 1991 by the Royal Commission into Aboriginal deaths in custody. In the same year, the Federal government passed the Council for Aboriginal Reconciliation Act, with the support of other parties, to work towards achieving ‘reconciliation’ between Indigenous and non-Indigenous peoples based on the appreciation of the ‘unique’ position of Indigenous peoples in the Commonwealth. The process of reconciliation was never precisely defined. It was, at least initially, a government initiative with apparently broad popular support. Among its aims were overcoming the sources of Indigenous disadvantage, and establishing the basis for a new and more equitable political settlement between Indigenous and non-Indigenous Australians. Following the election of the Howard (Liberal-National coalition) Government in 1996, however, the process of reconciliation was stymied. The Report of the Council for Aboriginal Reconciliation (in 2000) was shelved, while the Federal Government chose to represent itself as seeking what was called ‘practical reconciliation’. Practical reconciliation was packaged as a policy initiative designed to achieve practical results. As such, it was contrasted to the previous reconciliation strategy, which was castigated for its emphasis on supposedly Pyrrhic symbolism involving what the Howard Government took to be an unjust denigration of the ‘achievements’ of Australian history. The Howard Government’s sidelining of reconciliation thus coincided with their effort to ‘rescue’ Australia’s national heritage from what it considered to be the ‘black arm-band’ historians with their lopsided emphasis on the injustices of colonization. This policy orientation was also contributed to by the refusal of the Howard Government to issue a formal apology to the ‘stolen generations’ in 1997. These were the survivors of the policy of forced Indigenous child-removal, institutionalization and fostering with white families, which had been a mainstay of assimilation policy until the 1970s. M. Gordon, *Reconciliation: A Journey* (Sydney: UNSW Press, 2001), pp. 123–7; *Bringing them Home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: Commonwealth of Australia, 1997).
22. Indigenous disadvantage is well documented. For example, life expectancy among Indigenous people is seventeen years lower than for the rest of the Australian population, while the death rate is up to six times greater than it is for the non-Indigenous population. Indigenous people are more likely than non-Indigenous people to suffer from long-term, debilitating chronic diseases such as diabetes, asthma and kidney disease. Indigenous peoples are thirteen times more likely to be incarcerated, while rates of suicide, self-harm and child abuse are higher among Indigenous communities than in non-Indigenous communities. The rate of unemployment in Indigenous communities (though falling in recent years) is still over three times as great as it is among the rest of the Australian population. Steering Committee for the Review of Government Service

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23. Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge – Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra: Council for Reconciliation, 2000).
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  25. R. Gaita, 'The Moral Force of Reconciliation', in Altman and Hinkson (eds), *Coercive Reconciliation*, pp. 295–306, on pp. 300–1.
  26. Buchan and Heath, 'Savagery and Civilization'. See *Yorta Yorta* (1998), § 126, 129.
  27. T. Rowse, 'From Enforceability to Feel-Good: Notes on the Pre-History of the Recent Treaty Debate', in Read et al. (eds), *What Good Condition?*, pp. 71–88, on p. 84.
  28. T. Rowse, 'The National Emergency and Indigenous Jurisdictions', in Altman and Hinkson (eds), *Coercive Reconciliation*, pp. 47–61.
  29. Previous efforts to enter a negotiation over the nature of Indigenous sovereignty in Australia, such as the Makaratta proposal in the 1980s, foundered (in part) for want of an appropriate and shared conceptual language in which Indigenous aspirations could be conveyed and non-Indigenous anxieties resolved. See also the essays in C. Fletcher (ed.), *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press, 1994); P. Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples', *Stanford Law Review*, 45 (1993), pp. 1311–67.
  30. In this regard, an excellent series of essays by Indigenous scholars and activists points the way, A. Moreton-Robinson (ed.), *Sovereign Subjects: Indigenous Sovereignty Matters* (Sydney: Allen and Unwin, 2008).





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