

# WHERE LAWLESSNESS IS LAW: THE SETTLER-COLONIAL FRONTIER AS A LEGAL SPACE OF VIOLENCE

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## 1.0 INTRODUCTION

In understanding international law as a key legitimating discourse of colonialism, this paper argues the need to view settler-colonial frontiers within a conceptual field that directs as much attention to the legal and historical precedents to settlement as to the period that follows it. The discussion addresses some recent concerns of Australian frontier historiography by calling on critical legal-historical scholarship that theorises the mutual constitution of law and nation as a reiterative dynamic in which seemingly universal claims persistently champion particular interests. It identifies some constraints of the literature's nationalist preoccupations and seeks to articulate a way forward from stultifying debates about frontier violence that are inevitably drawn into divisive questions of national identity.

In extending the scope of inquiry to Europe's expansion to the Americas, the analysis considers both the notion and the actuality of the frontier to explain its pivotal role as a threshold space between international law and domestic law, two apparently distinct jurisdictions, which, both jointly and severally, had to secure the transfer and transformation of sovereignty as European nations sought to establish their interests abroad. This broader legal and historical framework acknowledges the fact that settler frontiers did not arise autochthonously within each colony, which is simply to say that frontiers did not originate where they were variously made. Rather, the notion of the frontier was produced as a potent residue of international law's responsiveness to colonialism, as a necessary complement to Europe's initial claims to sovereignty under the so-called doctrine of discovery. For in order to defend a first discoverer's claim to sovereignty against European rivals, the sovereignty of natives - already discursively denied in international law - had also to be transferred through their physical dispossession within the (emerging) field of domestic law. This task of completion - in acquiring the territorial dimension of sovereignty<sup>2</sup> - in turn produced the actuality of the frontier in the form of the lived experiences of its various inhabitants post settlement. Bringing the notion and the actuality of the settler-colonial frontier within the one analytical field therefore recognizes and makes manifest the legal, temporal, and spatial gap between a discursive claim to sovereignty and its full expression in territorial hegemony.

Produced in international law, and yet to be caught fully within the domestic law of the nation-to-come, frontiers hovered uncertainly between Europe's familiar legal orders. As Europe's law/ s met additionally with Indigenous law/s, frontiers emerged as highly unstable environments, both in practice and in law. Analytically, therefore, frontiers represent an enriched field of study, laying bare through their constitution of jurisdictional boundaries, the politics of law even as law protests its transcendence. Far from being fully formed in Europe and applied to the colonies as a pre-determinative force, the law on sovereignty had also to meet any number of global and local exigencies occasioned by deep-set imperial rivalries and the often-precarious circumstances arising from imperial rule. As these shifted over time and place, law's responsiveness to colonialism is evident not only in the normative precepts that sought to rationalise violence and discrimination against non-Europeans, but also in the

very notion of the frontier as the legitimate/lawful/ authorised time and space within which their sovereignty could be acquired on the ground.

Accordingly, for Indigenous peoples, the violence of the frontier was both notional and actual. Before the actuality of settlement, violence had already long inhaled in their characterisation through a developing international law as inferior to Europeans and therefore ineligible to join their exclusive community of sovereigns, a discourse that effectively delivered native lands available for expropriation. Moreover, through the notion of 'just war', Indigenous peoples were rendered susceptible to physical force if they presumed to contest Europe's self-evident claims on the ground. During this period of practical dispossession, settlers, too, could fear for their personal safety, while troubling questions of legitimacy further enhanced local anxieties, reiterating long-held uncertainties about law's self-referential authority.

In the interdisciplinary analysis to follow, I seek to pin down in historical time and place these more abstract explanations of the mutual constitution of law, sovereignty and nation in the violence of exclusion. The discussion begins by outlining the distinctiveness of the settler-colonial context and considering some pertinent issues arising from frontier historiography. I then bring to bear on the discussion the work of critical law-history scholars concerning the responsiveness of sovereignty discourse to Europe's expansionist ambitions from the late 15th century and the enduring implications for those it deemed to be non-sovereigns. Within this legal-historical framework the frontier can be understood as a strategic time and space whose ideological force licensed Europeans to seek to make good their sovereign claims in the lands of others. I suggest that in demonstrating the enmeshment of sovereignty discourse - in theory and in practice - in the history of colonialism, the insights of interdisciplinary scholarship can comprehensively expand the frame of reference of conventional frontier historiography.

The discussion then considers how during the extended process of acquiring settler sovereignty through the notional and actual dispossession of Indigenous peoples, the frontier has to shift from being a legal space of violence (in international law) to become a space of legal violence (in domestic law). This process of settling jurisdictional boundaries is characteristically a period of instability and ambivalence as Indigenous peoples begin to be moved beyond their imposed status as the abandoned subjects of international law (and, therefore, the objects of its force) and before they are brought more fully within the pale of the individual colony's domestic legal system in another, different, form of subjection to violence and discrimination otherwise condemned in law. The resulting indeterminacy about matters of jurisdiction heightened tensions further as colonial governments sought to regularise, if not routinely regulate, private violence through threats of prosecution and the equal application of the rule of law, while all the time reserving the right to impose martial law and summary justice on Indigenous peoples alone. I discuss examples of such anxiety about legitimacy in law and practice in relation to a number of Australian colonies to argue that far from being 'lawless', as commonly construed both then and now, settler-colonial frontiers simply make manifest the plenitude of law in what is, in fact, a legal space of violence: in the actuality of the frontier, where settlers were sovereigns and indigenes were not, the seeming absence of law is nevertheless law.

Finally, understanding the violence inherent in the notion of the frontier as the necessary complement of sovereignty enhances appreciation of its complex actuality, for while the notion of the frontier allows for further violence, it does not compel it. The constitutive dynamics of nation building are openly displayed in Europe's frontiers where the use of outright terror against Indigenous peoples could also coexist with efforts to conciliate or live more peacefully among them, even as their sovereignty was being transferred. Drawing more closely on the work of Peter Fitzpatrick here, I argue that this apparent contradiction reflects the conceptual force of the frontier as a discretionary space in law, wherein national sovereignty must be produced (and continually reproduced) in response to various conditions on the ground, conditions which might include that 'engaged intensity' with which non-sovereigns 'often confront the "global" domain and the accompanying juridical order of which they are a part.'<sup>3</sup>

## 2.0 CONTEXT AND HISTORIOGRAPHY

### 2.1 The Settler-Colonial Context

It is only relatively recently that the structural distinctiveness of the settler-colonial formation has begun to penetrate scholarly engagements, even postcolonial engagements, with colonialism. The work of historian Patrick Wolfe has been particularly influential in theorising settler colonialism as a land-based project.<sup>4</sup> Unlike franchise or slave formations, which support European interests through the application of (local or imported) labour to the natural resources of the colony, in settler colonies economic interest is in securing permanent control of the land through dispossessing native populations. Wolfe argues that this form of colonialism proceeds in identifiable stages according to a 'logic of elimination' that continually seeks to suppress the significance of prior and continuing Indigenous presence.<sup>5</sup> Accordingly, this defining logic is not confined to the past: settler colonialism is a structure whose characteristics persist in the present of settler nations, thereby limiting prospects for reform where matters of Indigenous sovereignty are concerned.<sup>6</sup>

Two distinguishing features of settler colonialism are pertinent to the current discussion of sovereignty doctrine: acquiring territory through dispossession and the permanent presence of the colonizers.

### 2.2 Conventional Frontier Historiography

Even where individual scholars engage with the significance of settler colonialism as a distinct formation, they usually abide by common practice in addressing the period that follows the initial settlement, rather than the period that precedes it. Accordingly, it is the actuality of the frontier (as lived experience) that has generally been the subject of analysis and interpretation, rather than the very notion of the frontier itself.

This is not to say, however, that there has been no prior theorization of the frontier. In the American case, Turner's 'frontier thesis', presented in 1893 as 'The significance of the frontier in American history'<sup>7</sup>, still

represents, perhaps, the most influential exposition of what the frontier might mean, including within the public sphere, even as scholars continue to contest his observations. Turner's context of the 'American West' was decidedly parochial. His frontier was a dynamic place of boundless opportunities for the resourceful pioneer, with plenty of land for the taking. Turner claimed that in taming the harsh environment and abandoning their civilized veneer, settlers were also liberated from the oppressive behaviours and beliefs of Europe, a process of loss and renewal that produced the exceptional character of American individualism and its unique form of democracy.<sup>8</sup> Turner's thesis promoted a vigorous historiography. Herbert Bolton, for example, was a student of Turner who, in directing attention to Spanish frontiers, signalled the importance of other imperial engagements in America. Bolton's early interventions informed what has now become identified as 'borderlands' history, which, over time, has variously sought to analyse the complexities of the frontier, focusing in particular on relations between Spanish colonisers and Indigenous peoples, but also including those not fitting neatly into either category.<sup>9</sup> In the 1950s, Walter Prescott Webb further broadened debate by emphasising the economic importance of the New World as a whole to the development of capitalism and democracy.<sup>10</sup> Following a range of comparative studies, a number of scholars came to reject previous 'line and process' models, and, from the 1960s, in the words of South African historian Leonard Thompson, began, rather, to conceptualise the frontier as 'an area of interpenetration between societies'.<sup>11</sup>

Turner's interpretation of the frontier experience nevertheless continued to have profound ideological resonance for American nationalism, and despite some vehement opposition, its mythic appeal has been difficult to dislodge outside the academy.<sup>12</sup> By the 1980s, however, practitioners of the so-called New Western History reinvigorated academic engagement with the American frontier by bringing to the fore 'the destruction of the environment, the massacres of indigenous populations, the ambiguities, difficulties and disappointments of settlers' lives.'<sup>13</sup> In common with developments in historiography more generally, this work emphasised the perspectives of a range of marginalised groups on frontiers, including not only those of Indigenous peoples, but also, for example, of women and immigrant populations. Historian Patricia Limerick, in particular, called for more complex conceptualisations that could produce appropriately differentiated accounts that placed the American experience of the so-called frontier within the broader context of European expansion and could help explain why 'the conquest of North America came to no clear point of completion'.<sup>14</sup>

Around the same time, similar shifts in frontier historiography were also evident in the scholarship of other settler societies.<sup>15</sup> In the Australian case, for example, these revisionist approaches revived some of the candour about the nature and extent of frontier violence that had characterized many mid nineteenth-century accounts.<sup>16</sup> Alongside growing Indigenous activism in the public sphere,<sup>17</sup> and certain land rights actions in the courts,<sup>18</sup> early interventions by Charles Rowley and Henry Reynolds, in particular, eschewed the 'great Australian silence' of the prevailing historiography, directing attention to the open brutality and coercion of early settlement and its profound consequences for the contemporary life opportunities of Indigenous peoples.<sup>19</sup> As elsewhere, a vigorous scholarship throughout the 1980s and '90s deeply enriched knowledge about the complex nature of colonial frontiers as formative stages of nationhood in settler societies,<sup>20</sup> while also coinciding with two major commissions of inquiry into the enduring effects of colonialism on Indigenous peoples,<sup>21</sup> and landmark judicial interventions in relation to native title.<sup>22</sup> Recently, colonial historiography more generally has turned its attention

to transnational understandings.<sup>23</sup>

Clearly, given the significance of founding narratives to national identity in settler societies, such revisionist histories are often controversial, and even more so through their association with judicial activism relating to Indigenous rights to land, with a range of commentators claiming particular works to be openly political rather than 'objectively historical' in their inquiry into the past.<sup>24</sup> In the Australian case, debate over the so-called 'History Wars' has preoccupied frontier historiography in recent years, frequently spilling over into the public realm as conservative observers seek to forge a link between the responsibility to redress discrimination in the present and the capacity to 'prove' empirically the nature and extent of frontier violence in the past.<sup>25</sup>

In the fallout, a number of prominent scholars and commentators have called for a reappraisal of frontier historiography in Australia and of the broader issues it raises. Aileen Moreton-Robinson's collection, for example, directs attention to the need to push Indigenous sovereignty to the foreground, bringing together a number of Indigenous thinkers around the issue. Among these, Tony Birch decries the 'politics of history and the destructive potential of empiricism' and seeks new ways to bring about 'a willingness to accede to the principles of Indigenous sovereignty'.<sup>26</sup> Birch has long considered this moral and strategic need to come to terms with colonial violence in a different way, and, in particular, to transfer the burden from Indigenous communities who 'have become the memory bank of white Australia's violence by proxy.' He suggests that Indigenous and non-Indigenous scholars and commentators should work collaboratively to 'put creative, political and ethical spaces into being in Australia; places where we can bypass these regressive debates and do something more productive'.<sup>27</sup> Non-Indigenous scholars such as Tim Rowse have observed, too, that controversy about 'the extent and causes of frontier violence ... is incidental to the really important story that indigenous people lost ownership and sovereignty without ever consenting to that loss.'<sup>28</sup> Deborah Bird Rose and Richard Davis emphasise the importance of moving beyond the divisive and simplistic ideological hold of the frontier as a place of 'violence, replacement and nation-building' in settler societies, to seek a new conceptualisation that is able to encompass the full range of past and continuing engagements (or disengagements<sup>29</sup>) and, in particular, to resist the prevailing tendency to reduce frontiers 'from a zone of encounter and interaction to a zone of conflict' wherein, too, 'body counts have become a measure of violence'.<sup>30</sup>

Two generalisations arise from this brief overview of the shifts in frontier historiography since the late nineteenth century. First, that despite the changes over time and place, it is the actuality (or lived experience) of the frontier that generally remains the main object of analysis. And second, in so doing, frontier historiography remains focused on and therefore inevitably caught within the politics of the settler-nationalist framework. The preoccupation with the postsettlement period, as it was variously but repetitively played at the local level, risks diluting the devastating effects of the globalised expansion of Europe by subsuming an overwhelming violence into just so many individualised national histories. Accordingly, such nationalist conceptualisations not only constrain the capacity to articulate for a broader audience how the full impact of colonialism far exceeds that represented in the empirical actuality of the frontier. It also inhibits understanding of the violence and discrimination inherent in the very concept of sovereignty, which has become so central to European thought and practice.

Turning away, for the moment, from the actuality of the frontier, the discussion now looks back towards Europe in order to examine the colonial history of sovereignty, within which the notion of the frontier arises.

### 3.0 THE COLONIAL HISTORY OF SOVEREIGNTY: THE NOTION OF THE FRONTIER

In its modern sense, state sovereignty relates both to a state's internal affairs, which are ordered by constitutional (or municipal/ domestic) law, and to relations between states, which are ordered by international law. Conventionally, histories of sovereignty regard the Peace of Westphalia (1648), which ended the Thirty Years war in Europe, as signalling the moment when modern notions of state sovereignty began.<sup>31</sup> Within this model, sovereignty has been regarded primarily as a European phenomenon with antecedents in classical and medieval law.<sup>32</sup>

In recent times, however, critical legal-history scholars such as Robert Williams<sup>33</sup>, Anthony Anghie<sup>34</sup>, Peter Fitzpatrick<sup>35</sup>, Patrick Wolfe<sup>36</sup>, and others, have challenged this orthodoxy, arguing that what we now know as positivist international law - and the sovereignty doctrine it represents - was not simply framed within Europe's attempts to solve its own internal political and religious conflicts. Rather, sovereignty was also influenced in fundamental ways by Europe's earlier encounters with native peoples abroad from the late 15th century. Within this model, sovereignty doctrine is implicitly and indelibly bound to colonialism. For in seeking to legitimate the domination of the New World, early writings by European jurists and theologians had already pronounced that Indians could not be sovereigns a century before Westphalia.

Accordingly, the constitution of sovereignty discourse within the relations of colonialism ensures that while evidence of its more blatant cultural and political judgments - and the violence that informed and succeeded them - may have been suppressed over time, its exclusionary principles not only continue to inform the operation of the positivist international law that has prevailed since the late 19th century.<sup>37</sup> They also remain available for both the international order and individual nation-states to recuperate at will, and particularly in times of (perceived) crisis.<sup>38</sup>

#### 3.1 Sovereignty and Colonialism

'[P]ower rarely presents itself simply as brute force, as shock and awe. Rather, it presents its violence in terms of an overarching narrative, and there are few more compelling stories that power can relate about itself when expanding than the great imperial narrative in which 'we' are civilized, peace-loving, democratic, humanitarian, virtuous, benevolent, and 'they' are uncivilized, violent, irrational, backward, dangerous, oppressed, and must therefore be sanctioned, rescued and transformed by a violence that is simultaneously, defensive, overwhelming, humanitarian and benevolent.'<sup>39</sup>

The colonial history of sovereignty was signalled by a powerful congruence between the domestic and international political activities of the resurgent Spanish crown in 1492. On the first of January of that landmark

year, the long reign of the Moors in the southern Iberian peninsular was finally brought to a close. Following the re-conquest by the Catholic monarchs Ferdinand and Isabella, both Moors and Jews were soon forced either to convert to Christianity or be expelled from the formerly cosmopolitan Al Andalus region and surrender their personal wealth. Mere months later, in August of that year, Columbus left for what he thought was Quinsay (modern-day Japan) only to encounter the Indigenous peoples of the Americas, whose lands would not only deliver unimaginable wealth but whose radical cultural difference would also serve to bolster Europe's self-fashioning as white, civilised and Christian. By the early to mid sixteenth century, European identity - and what we now know as international law - would be increasingly forged not only in response to the expulsion of Europe's internal others, but also to the others it would encounter abroad.<sup>40</sup> As Anghie explains the colonial history of sovereignty, 'the structure of sovereignty, the identity of sovereignty, no less than the identity of an individual or a people, is formed by its history, its origins in and engagement with the colonial encounter.'<sup>41</sup>

Leading up to this period of expansion, three domains of law had characterised the complex interdependencies of European feudalism: divine law, natural law and human law. In the medieval period, divine law (regarded as the law of God that was administered through his earthly representative the Pope) was generally regarded as supreme. Williams observes that, while within the overall thrall of papal authority, the monarchs of individual kingdoms nevertheless asserted control over their secular activities with the sanction of either natural law or human law, although these were seen, too, as varying manifestations of God's law on earth. Popes claimed that the jurisdiction of divine law was universal, that all of the world's heathens were susceptible to conversion to Christianity. The biblical basis of papal supremacy was of course complicated by the enmeshment of the Catholic Church in the political affairs of the day. Pope Hadrian IV had authorised England's conquest of Ireland in 1155, for example, while divine law had long been called upon to legitimise Europe's internal crusades against the Saracens. In 1493, given the intense imperial rivalry between Portugal and Spain, Pope Alexander VI divided the world between these two great colonising powers, with Spain being granted access to lands to the west of the Cape Verde islands and Portugal the lands to the east.<sup>42</sup> Divine law was therefore called upon to bring the people and the wealth of foreign lands within the ambit of Christian rulers and to authorise conversion to Christianity - by force if necessary - according to the medieval doctrine of 'just war'.<sup>43</sup>

According to this doctrine, which forms part of what Williams terms 'the discourses of conquest'<sup>44</sup>, if the Indigenous peoples of the New World resisted conversion they would be subject to all the force that Spanish landing parties could muster. So concerned were they to legitimise this violence, that first encounters were accompanied by the reading of the *Requerimiento*, duly witnessed by a notary, to inform the natives of what would happen if they failed to comply.<sup>45</sup> But by the mid sixteenth century, when reports of the violence arising from the Spanish New World expeditions became more widespread, theologians and jurists became increasingly anxious about the appalling consequences of expansion and doubtful of the capacity of divine law to legitimate war on religious grounds alone.

Drawing on ancient and medieval precedents, the natural law theorists of the sixteenth and early-seventeenth centuries, from Vitoria to Grotius<sup>46</sup>, responded to the violence of the early Spanish conquests in the Americas by proposing that all men, even kings and popes, were subject to the higher moral authority of God or, in an

increasingly secular order, the law of nature. Discernible through the use of reason, and insofar as it concerned European expansion, natural law posited a universal humanity within which the freedom of Indians might be acknowledged, alongside the rights of Europeans (as with all peoples) to trade and travel, and to preach the Christian faith, within their lands.

But despite the rhetoric of universal humanity, Indigenous peoples would fare no better under its oversight than they had under divine law. With the use of reason (rather than belief in a Christian god) as the threshold to equality, the commercial interests of civilized Europe could still be advanced at the expense of the savages of the wildernesses, wherever they might be. For according to the legal discourse of the doctrine of discovery<sup>47</sup> that these jurists helped articulate, the failure of natives to exercise their reason, evident not only in their radical cultural difference but also in their very resistance to European encroachment, cancelled out their membership of human society and subjected them instead to the outright force of just war.<sup>48</sup> As Wolfe characterises Vitoria's deft universalist calculation:

On the one hand, therefore, the inhabitants of the Indies were possessed of reason, and thus equivalent to everyone else - which is to say, equivalent to the Spanish - while, on the other hand, their sociocultural demeanour was at variance with the *jus gentium* (which was also, of course, equivalent to the Spanish). Thus they required Spanish intervention, an occurrence that was rendered likely by the fact that Vitoria held the Spanish entitled to enforce their right to travel, trade and proselytise in the Indians' country.<sup>49</sup>

Richard Waswo's rather more rollicking account of natural law theory further specifies the absurdity of the self-serving, self-referential Europeaness of its precepts and the overwhelming concern to anchor them in a bewildering array of authoritative sources, whether drawn from classical antiquity, medieval scholasticism or secular humanism. Like others, Waswo highlights the 'extreme utility of universalism' in legitimating the violence of colonialism, as natural law principles of a common human society based, nevertheless, on avowedly European norms, came to accommodate the massive exclusions that facilitated European expansion throughout the New World.<sup>50</sup>

Just as natural law had succeeded divine law, so too, did the universal principles of natural law eventually give way to the inter-national order of sovereign states, for which Indigenous peoples were, by now so seemingly naturally, unqualified. From the late-seventeenth century, in the post-Westphalia environment, legal theorists had begun to distinguish between the rights of nations and those of individuals.<sup>51</sup> In supplanting the 'supra-sovereign normative order' of natural law, and influenced by the liberal philosophies of Hobbes and Locke, their so-called 'law of nations' claimed no higher authority than that which nations agreed between themselves.<sup>52</sup> This positivist framework paved the way for modern international law, which oversaw the rampant colonialism of the 19th century, and whose sovereign-statist notions of international community still serve to block the political aspirations of Indigenous peoples and other national minorities to autonomy today.<sup>53</sup>

Insofar as these developments in international law relate to the terms of Indigenous peoples' disqualification as sovereigns, their long-held socio-cultural inferiority had become increasingly associated with the inadequacy of their land use, a judgement whose legal dimensions were made particularly evident in the work of Vattel. As

Fitzpatrick explains the expansion of the doctrine of discovery since the early voyages of Columbus, growing imperial rivalry over the riches of the New World had forced individual discoverers to 'consummate' their 'inchoate' title, by demonstrating their actual territorial possession. While abstract assertions were considered sufficient against the natives, (and upheld through the sanctions outlined above), more grounded claims to sovereignty were needed to fend off other European claimants who were potentially more than able to force the issue. Accordingly, over time (and space), a conditional title to sovereignty would need additionally to be demonstrated through 'adequate possession'.<sup>54</sup>

This extended process of acquiring the territorial dimension of sovereignty played out in different ways according to different circumstances on the ground - evident in the granting or denial of treaties, for example - but while the European discoverer would always exercise dominion over the land, natives would never be accorded more than the right to its occupancy. Williams and Wolfe elaborate this process of realization in the North American context with Wolfe signalling, in particular, the significance of the strategic operation of the principle of preemption in facilitating the realisation of sovereignty through dispossession, a process whereby a sovereign not only 'gathered together the totality of rights attaching to the territory concerned' but also, in contrast to natives, 'settlers became the sort of people who could own rather than merely occupy [their land].'<sup>55</sup>

#### 4.0 THE COLONIAL HISTORY OF SOVEREIGNTY: THE ACTUALITY OF THE FRONTIER

Within this interdisciplinary framework, the notion of the frontier thereby recognises that in order for first discoverers to uphold a claim to sovereignty, the sovereignty of natives, while already discursively denied in international law, had also to be materially transformed and transferred through their dispossession within the (emerging) field of domestic law. It is this task of completion - in acquiring the territorial dimension of sovereignty in the actuality of the settlercolonial frontier - that framed the lived experiences of its various inhabitants. Produced through the insufficiency of international law as a legitimating discourse on sovereignty, the actuality of the settler-colonial frontier would therefore display for all to see sovereignty's ultimate dependence on force. Viewed in broader perspective, the frontier of conventional frontier historiography can best be understood as that liminal time and space between the external and internal modes of sovereignty, where the seeming absence of law is nevertheless law.

##### 4.1 Anxiety and Legitimacy in a Legal Space of Violence

The fact that the actuality of the frontier played out in different ways in different colonies was simply a further manifestation of sovereignty discourse. While the European sovereign gained ultimate title to the land and Indigenous peoples were accorded no more than the right to its practical use,<sup>56</sup> exactly what form such native entitlement would take, and how it would be enforced, would be the responsibility of the individual sovereign.<sup>57</sup> Colonial governments therefore gained considerable latitude in meeting local circumstances: Wolfe claims that the use of treaties with indigenes, for example, 'reflected their capacity to defend their borders'.<sup>58</sup> This element of discretion, usually highly controlled in law, informs the characteristic instability of the frontier, producing

heightened anxieties about questions of legitimacy in law and in practice.

In elevating the responsiveness of law and subordinating its determinacy,<sup>59</sup> this enhanced discretion created a highly volatile environment in which the need for legitimacy became even more compelling. Given the spurious legalities that produced the settler-colonial frontier, it is barely surprising that there, too, in the actuality of daily life for Indigenous peoples and settlers, the quest for legitimacy was similarly urgent and relentless, and no less absurd, than it had been for centuries beforehand.

#### 4.2 The Australian Case

As settlement expanded beyond the initial footholds, Indigenous peoples began to be moved beyond their constitution as (the abandoned) subjects of international law but were yet to be brought more fully within the pale of the individual colony's domestic legal system. During this time and space, colonial governments resorted to further exceptional measures as they were called upon to regularise, if not regulate, the open violence of dispossession.

In September 1840, the South Australian Advocate General Smillie called on international law to justify his government's exemplary execution of two Aborigines accused of murdering shipwreck survivors from the brig *Maria* who had wandered back to Adelaide along the remote Coorong coast. Smillie explained that 'the doctrine that they [aboriginal 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 our law, cannot be received without modification'. While it was just and fair that Aborigines who submitted to colonial authority were being given reserves of land for cultivation, and other means of raising themselves in the scale of civilisation, those 'who have never acknowledged subjection to any power, and who, indeed, seem incapable of being subjected to authority or deterred from atrocious crimes, except by military force' - and here Smillie calls on Vattel - ' . . . deserve to be extirpated as savage and pernicious beasts' Theirs was not the 'offence of an individual against the Municipal law' but, as evidence of the 'character of the tribe', became, rather, the 'crime of the nation'. Putting aside the contradiction this presents to the common reception of the notion of *terra nullius* in the Australian colonies<sup>60</sup>, Smillie's claims about the Milmenrura people, and the actions of his government, are a particularly blatant manifestation of colonial anxieties surrounding the exception of Indigenous peoples from 'the ordinary operations of domestic law'. To put this somewhat benign formulation another way, as many officials, including Smillie, openly did, Aborigines would be subjected to 'measures summary and severe . . . adopted to terrify the whole tribe by a sense of our power and determination to punish'.<sup>61</sup>

Keen to demonstrate the 'necessity' of their extraordinary actions (necessity being the conveniently indeterminate grounds required for such measures), colonial officials sought to legitimise the violence of dispossession through a range of legalised forms. In themselves, of course, these forms openly demonstrated the responsiveness of law to circumstances on the ground and, in so doing, risked both unsettling and reassuring local communities and distant authorities in London. The examples of extraordinary measures surveyed here demonstrate just some of the ways in which the notional frontier as a legal space of violence produced in international law had to be seen to become a space of legal violence within the actuality of the

frontier as governments called variously on their fledgling domestic legal systems to legitimise the enforcement of dispossession.

In the case of the executions of the Milmenrura people, following advice from Chief Justice Cooper, the principles of martial law were invoked (for fear that a formal proclamation would deter investment in the colony) and a trial in the field was held to authorise further the executions that had already been approved by Governor Gawler in advance of the event.<sup>62</sup> In preparing for the trial, the Commissioner of Police O'Halloran rode out from Adelaide to seek the testimony of a neighbouring tribe to identify the alleged murderers. Two Aborigines were shot and killed when attempting to escape custody during this stage of the investigation. O'Halloran would later interrupt the trial to demonstrate afresh the power of his guns as he sought to deter the assembled Aborigines from dispersing, showing them just how far his weapons could reach. The record of the trial shows that following a cursory examination of witnesses, O'Halloran declared through an interpreter:

Bob, tell these men that in consequence of their having given up a murderer, I will not hurt them; that the Great Governor sent me here that I might apprehend and punish the Black men who had killed the White; that the next time that they commit a murder on a White man the Great Governor will send me here again with a greater number of White men than I have now with me, and I will then kill them all . . .

After promising to reward the men who had identified the accused, O'Halloran declared to all the people in the 'court':

I will take these two men (pointing to each of the murderers) to the grave of the White men and will hang them Tomorrow ... these men (pointing to the Tribe) I will keep till Tomorrow confined, I will not hurt them for I wish them to see me hang these two men Tomorrow and if they attempt to go, the Sentries will shoot them, but they need not be afraid I will not hurt them.

O'Halloran twice grounded the proceedings by referring to the authority vested in him by the governor, appealing to the other Europeans present to confirm with their signatures that the verdict had indeed been correct and that the 'ceremony' had been conducted 'in an impressive and proper manner'. The executions took place the following day. O'Halloran reported later that he then rode throughout the country leaving the local people in little doubt of his capacity to make good his word.<sup>63</sup>

It is impossible to know exactly what happened in those last days of winter in 1840 in the lives of the Milmenrura peoples or to the luckless travellers who were sailing to Van Diemen's Land where Indigenous peoples had been subjected to martial law more than a decade earlier. But the record of the trial in the field could hardly be more telling in its candid juxtaposition of law and violence, while the additional quest for legitimacy in recording the legality of proceedings matches the patent absurdity of the trial seeking to demonstrate that state-sanctioned criminal punishment could not be read as outright murder. Given the subsequent disapproval of the Colonial Office - whose law officers indeed advised that murder charges might well be laid and some vehement domestic criticism, the attempt to legitimise proceedings failed, but the terrifying violence it oversaw had been no less real

for that. And in essence the event was not, of course, unique.

In 1828, the colonial government in Van Dieman's Land had informed the Colonial Office in London that following the failure of earlier, perhaps unlawful, attempts at removal, the authority of martial law was necessary to force Aborigines to leave the settled districts. It was clear that there was no threat to constituted authority or institutions: 'the Blacks, however large their number, have never yet ventured to attack a party consisting of even 3 armed men.'<sup>64</sup> Such measures 'of treating them as open enemies'<sup>65</sup> were due, however, to 'the great difficulty in apprehending them, or identifying the perpetrators of a felony, or murder, [which] added to the increased cunning of the Natives, occasioned impediments to the ordinary modes of enforcing the Law, which the Magistrates and Peace officers were unable to counteract, even with the assistance afforded by the Military in aid of the Civil Power.'<sup>66</sup>

The Executive Council felt a proclamation of martial law 'would be necessary for the justification of many acts which must necessarily be done in furtherance of the measure of forcibly expelling them' and regretted their earlier neglect of this formality. While keen to signal the limit of its application (to settled districts alone, while 'even within those districts it would not operate to stop, or suspend, the ordinary course of law, or Justice, further than would be absolutely necessary to the employment of an armed force against the Natives'), the Council warned of the danger in settlers feeling unprotected by the law and therefore 'driven to take the remedy into their own hands.' Accordingly, 'To inspire them [the Aborigines] with terror, the Council fears will be found the only effectual means of security for the future.'<sup>67</sup>

Four years earlier in New South Wales, Governor Brisbane had found it necessary to place the country beyond the Blue Mountains under martial law 'in consequence of the aggressions, committed by the Native Blacks, upon the habitations, Persons and property of the European Settlers, in the neighbourhood of Bathurst'.<sup>68</sup> The terms of the proclamation bear quoting at some length:

"Whereas, the Aboriginal Natives of the Districts near Bathurst, have, for many weeks past, carried on a Series of indiscriminate Attacks on the Stock Stations there, putting some of the Keepers to cruel Deaths; wounding others; and dispersing and plundering the Flocks and Herds - themselves not escaping sanguinary Retaliation; And Whereas the ordinary Powers of the Civil Magistrates (although most anxiously exerted) have failed to protect the Lives of His Majesty's Subjects; and every conciliatory Measure has been pursued in vain; and the Slaughter of Black Women and Children, and unoffending White Men, as well as of the lawless Objects of Terror, continue to threaten the before-mentioned Districts.

And Whereas by Experience, it hath been found, that mutual Bloodshed may be stopped by the Use of Arms against the Natives, beyond the ordinary Rule of Law in Time of Peace; and for this End, Resort to summary Justice has become necessary:

Now Therefore, by Virtue of the Authority in me vested by His Majesty's Royal Commission, I do declare, in Order to restore Tranquillity, MARTIAL LAW TO BE IN FORCE IN ALL THE COUNTRY WESTWARD OF

## MOUNT YORK:

And all Soldiers are hereby ordered to assist and obey their lawful Superiors in suppressing the Violences aforesaid; and all His Majesty's Subjects are also hereby called upon to assist the Magistrates in executing such Measures as any one or more of the said Magistrates shall direct to be taken for the same purpose by such Ways and Means as are expethent so long as Martial Law shall last; being always mindful, that, the Shedding of Blood is only just where all other Means of Defence, or of Peace, are exhausted; that Cruelty is never lawful; and that, when personal Attacks become necessary, the helpless Women and Children are to be spared . . ." 69

Brisbane wrote to the Colonial Office three weeks after the proclamation of martial law, which, he was pleased to note, was having 'the desired effect, as by the latest accounts, the hostile Natives, were hourly coming in to tender their submission, and sue for peace and protection.' However, when forwarding the formal repeal on the last day of December that year, the governor seemed at pains to convey the necessity of his actions, which arose 'more from the want of legal intermediate powers to repress the aggressions of the Aborigines, than that of having recourse to all the powers conveyed by so strong a measure which was sanctioned by the Attorney General, and strongly recommended by all the Proprietors in that District of Country.'<sup>70</sup>

Within a decade, and far to the west of the continent, the Acting Governor of Western Australia informed the Colonial Office that he had issued a formal proclamation to outlaw three Aborigines Yagan, Midgegooroo, and Munday who were viewed as implicated in events surrounding the theft of flour from stores in Fremantle.<sup>71</sup> One Aborigine had been shot and another killed during the theft while, the following day, two cart drivers had been killed in apparent retaliation. With the support of his Executive Council Irwin wrote that it had been absolutely necessary to adopt such exemplary measures, as should be calculated to strike terror into the minds of these savages ... I therefore proceeded to take such steps for a prompt and summary retaliation, as the means at my disposal admitted. A Proclamation was issued declaring the three most conspicuous offenders to be outlaws, and offering a reward of £30 for the apprehension of Yagan, and £20 each for Midgegooroo, and Munday dead or alive.<sup>72</sup>

Volunteers 'headed by a Magistrate or a Constable' joined with the military, which was 'in constant movement through the bush'. Governor Irwin was pleased to report that the 'whole of the hostile tribe have been harassed by the constant succession of parties sent against them, and in some instances have been hody pursued to a considerable distance in different directions.' Midgegooroo was captured, and following 'a patient investigation, and the examination of several credible witnesses' by the Governor and his Council, Irwin authorised an exemplary execution: 'He was accordingly shot, in front of the jail at Perth.'<sup>73</sup> Yagan was killed in the field while the order against Munday was eventually removed. The Colonial Office considered the use of outlawry 'exceedingly proper' but regretted the execution, given it was likely to foster rather than relieve local tensions.<sup>74</sup>

Like the 'Requerimiento' of 16th century Spain, whereby colonizers were obliged to read out to their uncomprehending victims the conditions under which their freedom would be forfeited, such suspensions of the rule of law, and the urge to record them, are archetypal frontier events. They bring to the fore the violence that is normally suppressed in law, a relationship clearly evident in the term martial law, which can be understood not so

much as a contradiction in terms as a simple display of law's suppressed violence. Accordingly, the use of martial law in domestic jurisdictions throughout the British empire was prompted by similarly urgent attempts to legalise violence in so-called times of crisis, once again through recourse to law's self-referential authority.

In the Australian colonies throughout the nineteenth century and beyond, although Aborigines certainly appeared before the courts on some occasions (in a different form of legal subjection<sup>75</sup>), colonial governments resorted to the (racialised and racialising)<sup>76</sup> application of exceptional procedures such as outlawry, martial law, summary justice legislation, the banning of testimony, and exemplary executions to name just some of their arsenal of legalised violence and discrimination. In such an environment, it is hardly surprising that colonial governments were so anxious to demonstrate that these practices were firmly anchored in law.

## 5.0 CONCLUSION

That which makes the nation ever unmakes it. The resulting unsettlement has, in an occidental modernity, been compensated for in two great and combined strategies - the sovereignty of law and the adumbration of the excluded. Neither of these produce settled results but are, rather, constant engagements with the ambivalence of nation and of that which would ever seek to surpass it.<sup>77</sup>

This analysis suggests that neither violence, nor the frontier, begins, or ends, with settlement. Rather, both inhere - and thereby persist - in the very concept of sovereignty. Moreover, in so openly reversing the normal order of things wherein law is seen to determine rather than respond to social situations (which is to say, to appear neutral rather than political), the settler-colonial frontier also offers a peculiar opportunity to test empirically the theoretical contention that law is only ever its own authority, that there is no legitimacy outside law, other than that which law accords itself. Such frontiers openly display their production through international law as a legal space of violence where European sovereignty was in the process of constitution, and other laws and other sovereignties were in the process of suppression, and where exceptions to the rule of law were unfolding to reveal a common template of dispossession across Europe's jurisdictional orders in the never-ending process of the mutual constitution of law and nation.<sup>78</sup>

Finally, understanding the violence inherent in the notion of the frontier as the necessary complement of sovereignty enhances appreciation of its complex actuality, for while the notion of the frontier allows for further violence, it does not compel it. As the conventional historiography shows, in the lived actuality of the frontier, state-sanctioned violence - as well as that which settlers and natives took into their own hands - co-existed not only with comprehensive regimes of management and control, but also with more flexible practices and peaceful interactions. This apparent contradiction reflects the notion of the frontier as a discretionary space wherein national sovereignty must be produced, but always in response to various conditions on the ground. Accordingly, frontiers would also witness colonial governments countenancing varying degrees of legal pluralism,<sup>79</sup> or different levels of entitlement to land, for example, while certain groups and individuals always found ways to pursue their interests and live their lives through different sorts of interactions or strategic disengagements.<sup>80</sup>

Appreciating the relationship between law and nation as a 'dynamic of formation' rather than as 'a peremptory

resolution', directs attention to law's capacity to respond in new ways to the continuing disruptions to nation occasioned by the persistence of founding inequalities.<sup>81</sup> Fitzpatrick and Mostert draw on Bernasconi and Derrida to explain this potential,

The initial constitution of the democratic polity cannot be considered to be enduringly closed and exclusive or excluding of others . . .

A truly authentic democratic dispensation must not seek only to conserve and reproduce. It must employ also those "resources that lie outside the West's definition of itself, resources the West has ignored", respecting the logic of that which it has inherited enough to realise when the inheritance must turn upon its own protective mechanisms, and to "give birth . . . to what had never seen the light of day".<sup>82</sup>

Through demonstrating how sovereignty has had to be cobbled together through the repeated violence of international and domestic law it becomes possible to pick away at its transcendent power and restore its socio-historical moorings. In thereby 'demystifying' sovereignty, new forms of constitutional thinking can emerge that are better adapted to the contemporary world 'in which the old triad of nation, territory and sovereignty can no longer be taken for granted.'<sup>83</sup>

1 Fitzpatrick Peter 'Terminal Legality: Imperialism and the (De) Composition of Law' in Kirkby Diane & Coleborne Catharine (eds) *Law, History, Colonialism: The Reach of Empire* Manchester University Press London 2001 p9 at 12.

2 As Peter Fitzpatrick explains it, 'territory remains the ground of sovereign completeness'. As above at 15.

3 Fitzpatrick Peter and Tuitt Patricia (eds) *Critical Beings: Law, Nation and the Global Subject* Ashgate London 2004 at xii.

4 Patrick Wolfe outlines the distinguishing features of settler colonialism, and its staged historical development in the Australia case, in 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis* 93. As explained below, Wolfe later elaborates the North American context in 'Corpus nullius: the exception of Indians and other aliens in US constitutional discourse' (2007) 10 *Postcolonial Studies* 127. For other early engagements with settler colonialism see Denoon Donald *Settler Capitalism: The Dynamics of Dependent Development in the Southern Hemisphere* Clarendon Press Oxford 1983; Stasiulis Daiva and Yuval-Davis Nira (eds) *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* Sage Publications London 1995.

5 Wolfe Patrick 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social*

Analysis 93.

6 Wolfe sought to demonstrate through his analysis of the Australian case that appreciating the significance of the logic of elimination helped explain continuing discrimination against Indigenous peoples in settler societies in ways that conventional approaches to contact history did not. (See Wolfe above note 5 at 93-98.) In Australia, the difficulties in delivering Indigenous land rights following the overturning of the notion of terra nullius in *Mabo ? Queensland (No 2)* (1992) 175 CLR 1 has prompted a vibrant scholarship on the limits to reform in settler states. In addition to Wolfe above, see, for example, Simpson Gerry 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 Melbourne University Law Review 195; and Motha Stewart 'The Failure of "Postcolonial" Sovereignty in Australia' (2005) 22 The Australian Feminist Law Journal 107.

7 Turner Frederick Jackson 'The significance of the Frontier in American History' (essay delivered in 1893 before the American Historical Association, Chicago) published as *The Frontier in American History* Holt New York 1920.

8 Hofstadter Richard and Lipset Seymour M (eds) *Turner and the Sociology of the Frontier* Basic Books New York & London 1968; Limerick Patricia Nelson *Something in the Soil: Legacies and Reckoning in the New West* WW Norton New York & London 2000.

9 Gerona Carla 'Is Borderlands History Ethnocentric?' H-Net Review (December 2008) <http://www.hnet.org/reviews/showrev.php?id=22897>. Gerona's review includes specific discussion of Weber David *Barbaros: Spaniards and Their Savages in the Age of Enlightenment* Yale University Press New Haven & London 2005; Hackel Steven *Children of Coyote, Missionaries of Saint Francis: Indian-Spanish Relations in Colonial California, 1769-1850* University of North Carolina Press Chapel Hill 2005 and Barr Juliana *Peace Came in the Form of a Woman: Indians and Spaniards in the Texas Borderlands* University of North Carolina Press Chapel Hill 2007.

10 Wolfskill George and Palmer Stanley H (eds) *Essays on Frontiers in World History* Texas A & M University Press Arlington 1983 at 3-5.

11 Cited in Wolfskill & Palmer above note 10 at 10.

12 Limerick above note 8 especially at 76, 92, 142-4.

13 Furniss Elizabeth 'Imagining the Frontier: Comparative Perspectives from Canada and Australia' in Rose Deborah Bird and Davis Richard (eds) *Dislocating the Frontier: Essaying the Mystique of the Outback* ANU E-Press Canberra 2005 p23 at 27.

14 Limerick above note 8 at 20, 25. Limerick employs the term conquest advisedly, in recognition of the scale and reach of European expansion.

15 For an overview in the cases of Canada, Australia, New Zealand, see Backhouse Constance, Curthoys Ann, Duncanson Ian and Parsonson Ann "'Race", Gender and Nation in History and Law' in Kirkby D and Coleborne C (eds) *Law, History, Colonialism: The Reach of Empire* Manchester University Press 2001 pp 277-300.

16 See, for example, West John *The History of Tasmania* (2 vols) H Dowling Launceston 1852.

17 See Backhouse Constance, Curthoys Ann, Duncanson Ian and Parsonson Ann above note 15.

18 See Curthoys Anne, Genovese Ann and Reilly Alexander *Rights and Redemption: History, Law and Indigenous People* University of New South Wales Press Sydney 2008.

19 The influential publications of these scholars began with Rowley Charles *The Destruction of Aboriginal Society* Australian National University Press Canberra 1970 and Reynolds Henry *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* Penguin Ringwood 1981.

20 For an overview of the Australian historiography see Attwood Bain *Telling the Truth About Aboriginal History* Allen & Unwin Sydney 2005.

21 Royal Commission Into Aboriginal Deaths In Custody (1992); Human Rights and Equal Opportunity Commission *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

22 For interdisciplinary analysis of the limitations of judicial reform, see Curthoys Anne, Genovese Ann and Reilly Alexander above note 18, which considers why law and history understand the past in different ways and how they might work together to advance Indigenous rights.

23 For a comprehensive overview see Smandych Russell 'Mapping Imperial Legal Connections: Toward a Historical Sociology of Colonial Law' (forthcoming 2009) *Adelaide Law Review*, see also Lake Marilyn and Reynolds Henry *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* Melbourne University Press Melbourne 2008

24 See, for example, Windschuttle Keith *The Fabrication of Aboriginal History: Van Diemen's Land 1803-1947* Macleay Press Sydney 2002; Attwood Bain 'The Law of the Land or the Law of the Land?: History, Law and Narrative in a Settler Society' (2004) 2 *History Compass* 1.

25 The key players included: Windschuttle above note 24; Manne Robert (ed) *Whitewash: On Keith Windschuttle's Fabrication of Australian History* Black Inc. Agenda Melbourne 2003; and Macintyre Stuart and Clark Anna *The History Wars* Melbourne University Press Melbourne 2003.

26 Birch Tony "'The Invisible Fire': Indigenous Sovereignty, History and Responsibility' in Moreton-Robinson Aileen (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* Allen and Unwin Crows Nest 2007 p 105 at 112, 114. Other recent publications include Rose Deborah Bird and Davis Richard (eds) *Dislocating the Frontier: Essaying the Mystique of the Outback* ANU E-Press Canberra 2005; Attwood Bain and Foster Stephen G (eds) *Frontier Conflict: The Australian Experience* National Museum of Australia Canberra 2003; Attwood above note 19.

27 Birch Tony "'I Could Feel It in My Body": War on a History War' (2006)1 *Transforming Cultures eJournal* 19 at 24, 19. In his wide-ranging discussion, Birch highlights the common failure of intellectuals on both sides of the debate to engage with Aboriginal people. For discussion about the need to radically re-evaluate western research practices per se see Tuhiwai-Smith Linda *Decolonizing Methodologies: Research and Indigenous Peoples* Zed Books London 1999.

28 Cited in Attwood and Foster above note 26 at 23.

29 The most immediate problem with enjoining the complexity of encounter to the goal of creating a distinctive settler nation is the difficulty of acknowledging or accounting for the spaces of encounter beyond the encompassing rubric of frontier. It is precisely at this point that the authors here announce their intention to dislocate frontier historiography, and at the same time to probe the symbolic energy of the frontier in its refusal to relinquish its territorial hold over the terms within which settler Australia conceives an Australian social order.' Davis Richard 'Introduction: Transforming the Frontier in Contemporary Australia' in Rose and Davis (eds) *Dislocating the Frontier* p 7 at 13

30 See Rose and Davis above note 26 at iv and Introduction.

31 Recent critiques of this understanding include Beaulac Stéphane *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* Brill Leiden 2004; Oslander Andreas 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55:2 *International Organisation* 251.

32 For a more expansive view, however, see Nussbaum Arthur A *Concise History of the Law of Nations* Macmillan New York 1954 (revised edition from 1947).

33 Williams Robert A Jr *The American Indian in Western Legal Thought: The Discourses of Conquest* Oxford University Press New York 1992 (orig. 1990).

34 Anghie Anthony *Imperialism, Sovereignty and the Making of International Law* Cambridge University Press Cambridge 2005; 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 10:1 *Harvard International Law Journal* 1 ; and 'Francisco de Vitoria and the Colonial Origins of International Law' in Fitzpatrick Peter and Darian-Smith Eve (eds) *Laws of the Postcolonial University of Michigan Press Ann Arbor 1999* p 89.

35 Fitzpatrick above note 1 at 19-25; Fitzpatrick Peter *Modernism and the Grounds of Law* Cambridge University Press Cambridge 2001.

36 Wolfe Patrick 'Corpus nullius: The Exception of Indians and Other Aliens in US Constitutional Discourse' (2007) 10:2 *Postcolonial Studies* 127.

37 For a convenient summary, see Anaya James S *Indigenous Peoples in International Law* 2nd edition Oxford University Press Oxford 2004 Chapter One. Anaya argues that despite its history, contemporary international law holds out possibilities for redress for Indigenous peoples through the discourse of human rights (rather than through state-centred sovereignty discourse). It is important to note, however, that the only four states to reject the United Nations Declaration on the Rights of Indigenous Peoples (2007) were the settler states of Australia, New Zealand, Canada and United States (with eleven abstentions). Australian Prime Minister Kevin Rudd recently reversed the former Howard government's decision and ratified the Declaration (April 2009).

38 'International law is in a permanent state of emergency; it could not be otherwise, over the centuries, given that international law has endlessly reached out towards universality, expanding, confronting, including and suppressing the different societies and peoples it encountered.' Anghie above note 34 at 314.

39 As above at 317

40 See Pagden Anthony *Lords of All the World: Ideologies of Empire in Spain Britain and France* Yale University Press New Haven 1995 and Greenblatt Stephen *Marvelous Possessions: The Wonder of the New World* Garendon Press Oxford 1991.

41 Anghie above note 34 at 312.

42 Williams RA Jr above note 33.

43 See Nussbaum above note 32 at Chapter Two and Tuck Richard *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* Oxford University Press Oxford 2001 . For the classical antecedents of 'just war' see Nussbaum above note 32 at 35-38.

44 Williams RA Jr. above note 33.

45 For commentary see Williams RA Jr., as above at 88-93. Such sanctions included: 'We shall forcibly enter your country and shall make war against you in all ways and manners that we can ... we shall take your wives and your children, and shall make slaves of them. . . and we shall take away your goods and do all the harm and danger that we can. . .and we protest that all the deaths and losses which shall accrue from this are your fault, and not of their Highnesses, or ours, nor of the gentlemen who come with us.' (Extract from 'The Requirement' (1513) in Lunenfeld Marvin 1492 *Discovery, Invasion, Encounter: Sources and Interpretations* Heath and Co. Lexington DC 1991 p 190.

46 De Victoria Franciscus *De Indis* ['On the American Indians'] (lecture delivered in 1532) published in *Relectiones Theologicae XII* (1557), Gentili Albericus *De Jure Belli Commentano Prima* [First Commentary on the Law of War] (1588), Grotius Hugo *De Jure Belli ac Pacis* [On the Law of War and Peace] (1625).

47 Wolfe notes that despite its common usage the singular form is misleading, 'since it glosses a range of positions within the disputatious arena that would come to be known as the law of nations, or later, international law. Nonetheless, certain themes are constant, in particular the unequivocal distinction between dominion, which inhered in European sovereigns alone, and natives' right to occupancy (also expressed in terms of possession or usufruct).' Wolfe above note 36 at 131.

48 See Anghie above note 34 at Chapter One; and Anghie Anthony 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 10:1 *Harvard International Law Journal*!

49 Wolfe above note 36 at 135.

50 Waswo Richard 'The Formation of Natural Law to Justify Colonialism 1539-1689' (1996) 27:4 *New Literary History* 743 at 745. See also Docker John *The Origins of Violence: Religion, History and Genocide* Pluto Press London 2008.

51 Von Pufendorf Samuel *De Jure Naturae et Gentium* [Of the Law and Nature of Nations] (1672) and Von Wolff Christian *Jus Gentium* [The Law of Nations] (1749); and later, De Vattel Emmerich *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758).

52 Anaya above note 37 at 17; Hobbes Thomas, *Leviathan* JM Dent & Sons London 1914; Locke John *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* Basil Blackwood Oxford 1976.

53 See Anaya above note 37 at 291, 'International law has evolved, however modestly, to challenge the legacy of this history and the forces that would see it continue.'

54 Fitzpatrick above note 1 at 15-17.

55 Wolfe above note 36 at 1 33-1 34.

56 As above at 131.

57 Williams RA Jr. above note 33 at 312-317, especially discussion of US Chief Justice Marshall's notorious Supreme Court judgments, which were based on his interpretation of the doctrine of discovery. Wolfe above note 36 also considers these judgments. See Johnson and Graham's *Ussee v. M'Intosh* (1823); *The Cherokee Nation v. The State of Georgia* (1830); *Worchester v. The State of Georgia* (1831).

58 Wolfe above note 36 at 132, 137.

59 'For there to be a rule of law, for law to rule, it "itself must have a determinant force. Yet if it were merely or fixedly a determinant, if it were not responsive, it would cease being able to rule a situation which had inexorably changed around it' Fitzpatrick Peter *Modernism and the Grounds of Law* Cambridge University Press Cambridge 2001 at p6.

60 For a recent discussion of how Blackstone's pronouncements on the legal bases for colonisation were 'skewed' by colonial courts in the interests of legitimizing what was unfolding on the ground, see Anthony Thalia 'Blackstone's Commentaries on Colonialism: Australian Judicial Interpretations' in Prest Wilfrid (ed) *Blackstone and His Commentaries* Hart Publishing Oxford 2009 pl29. Historian Henry Reynolds has long engaged in these debates. See Reynolds Henry *The Law of the Land* (New Edition) Penguin Books Melbourne 1992 ? 7-35; *Aboriginal Sovereignty: Reflections on Race, State and Nation* Allen & Unwin Sydney 1996 Chapter 3; and *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* Penguin Melbourne 1982.

61 'Journal of the Proceedings of the Council' Adelaide, 15 September 1840 [Minute on the recent murder committed by the Aborigines on the Coorong in the month of August 1840] in *South Australian Government Gazette* (Adelaide) 1840-41 No. 139, 17 September 1840, State Record Office, South Australia. Emphasis in original. I thank Hannah Robert for this reference.

62 I discuss the circumstances in more detail in Evans Julie 'Colonialism and the Rule of Law: The Case of South Australia' in Godfrey Barry S and Dunstall Graeme (eds) *Crime and Empire 1840-1940: Criminal Justice in Local and Global Context* Willan Publishing Cullumpton 2005 p57. See also Lendrum SD "'The Coorong Massacre": Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26; and Foster Robert, Hosking Rick and Nettelbeck Amanda *Fatal Collisions: The South Australian Frontier and the Violence of Memory* Wakefield Press Adelaide 2001.

63 Gawler to Secretary of State, no. 13, 5 September 1840, end. O'Halloran to Gawler, 24 August 1840, Colonial Office 13/16, National Archives, London.

64 Murray to Secretary of State, 4 November 1828, Colonial Office 280/17, National Archives, London

65 As above.

66 'Minutes of Executive Council' 30 October 1828, end. in Murray to Secretary of State, 4 November 1828, CO 280/17, National Archives, London

67 As above.

68 Brisbane to Secretary of State, 3 November 1824, CO 201/150, National Archives, London

69 'Proclamation of Martial Law' by Sir Thomas Brisbane, 14 August 1824, end. in Brisbane to Secretary of State, 3 November 1824, CO 201/150, National Archives, London. As usual in such 'emergency' cases, the authority of distant Britain was meaningless - the proclamation was not even received in London until 29 April 1825. Emphasis in the original.

70 Brisbane to Secretary of State, 31 December 1824, CO 201/150, National Archives, London. Brisbane reported that 'during the four months that Martial Law prevailed, not one outrage was committed under it, neither was a life sacrificed, or even Blood spilt.' Later in the letter, however, Brisbane says he hopes soon to forward 'a pretty accurate return of all the Individuals who lost their lives during these disturbances, but hitherto I have not been able to ascertain it.'

71 The circumstances surrounding this outlawry are discussed in more detail in Hunter Ann ? Different Kind of "Subject": Aboriginal Legal Status and Colonial Law in Western Australia, 1829 to 1861' PhD Thesis (2007) Murdoch University, Western Australia.

72 Irwin to Secretary of State, 1 June, 1833, CO 18/12, National Archives, London.

73 While settlers in Western Australia were also liable to public execution, the practice was withdrawn under The Capital Punishment Amendment Act 1871; although, the Act was amended in 1875 to except Aborigines from its application.

74 Goderich to Stirling, 19 November 1833, CO 18/12, National Archives, London.

75 For related discussion of colonial courtroom practices extending well into the twentieth century, see Auty Kate, *Black Glass: Western Australian Courts of Native Affairs 1936-54* Fremantle Arts Centre Press Fremantle 2005.

76 While I do not consider racialisation explicitly here, I discuss examples of racialisation in relation to Australian

legislation in Evans Julie 'The Rule of Law in the Setder-Colonial Encounter: the case of Western Australia' in Brand Paul, Costello Kevin and Osborough W.N. (eds) *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference* Four Courts Press Dublin 2003 pi 61. See also Wolfe Patrick 'Race and Racialisation: Some Thoughts'(2002) 5:1 *Postcolonial Studies* 51.

77 Fitzpatrick and Tuitt (eds) above note 3 at xi-xii.

78 See Fitzpatrick : 'nation - the national society - resorts to law in the cause of its own cohering; and, in their mutual making, law and nation share certain dynamics of formation, such as the negating resort to savagery and its "barely reworked variants" (Balibar 1991:25).' Fitzpatrick Peter *Modernism and the Grounds of Law* Cambridge University Press Cambridge 2001 at 7. Fitzpatrick is referring to: Balibar Etienne "Racism and Nationalism' trans. Turner Chris, in Balibar Etienne and Wallerstein Immanuel eds. *Race, Nation, Class: Ambiguous Identities* Verso London 1991 pp 36-37.

79 For consideration of the Australian case, see Ward Damen *The Politics of Jurisdiction. 'British' Law, Indigenous Peoples and colonial government in South Australia and New Zealand, c. 1834-60* DPhil Thesis Oxford University 2003. For New Zealand see Ward Damen 'Civil Jurisdiction, Setder Politics, and the Colonial Constitution, Circa 1840-58' (2008)<sup>39</sup> *Victoria University of Wellington Law Review* 497.

80 See Rose and Davis above note 26.

81 Fitzpatrick and Tuitt above note 3 at xii.

82 Fitzpatrick Peter and Mostert Henri "'Living in the Margins of History on the Edge of the Country" Legal Foundation and the Richtersveld Community's Tide to Land' (2004)<sup>2</sup> & <sup>3</sup> *Journal of South African Law / Tydskrif vir die Suid-Afrikaans e Reg* 309; 498. Fitzpatrick and Mostert first cite Bernasconi Robert "Politics beyond Humanism: Mandela and the Struggle against Apartheid" in Madison Gary B (ed) *Working through Derrida* Northwestern University Press Evanston 1993 94 at 111; and then Derrida Jacques "The Laws of Reflection: Nelson Mandela, in Admiration" in Derrida Jacques & Tlili Mustapha (eds) *For Nelson Mandela Seaver* New York 1987 pl3 at 17, 25.

83 Keating Michael 'European Integration and the Nationalities Question' (2004)<sup>32</sup> *Politics and Society* 367 at 368, 381.

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