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ABSTRACT

The antagonistic relationship between the Australian state and the Aborigines has deep and problematic roots. Beginning with the racist doctrine of *terra nullius*, I look at how more than two hundred years of legal policies have consistently constructed the Aborigine as a problem that required a state solution. I argue that these policies are predicated on a complete denial of native sovereignty and have increasingly alienated native communities. By refusing to engage with the source of these problems, the state has created significant barriers to native rehabilitation and has hijacked reconciliation efforts to strengthen its hegemony instead of native groups. Rather than solving the "Aboriginal problem", these state policies have *created* it by placing Aborigines in an ambiguous political space that functions as a medium for civilizing the native—a process through which the native is killed and reborn in a form that is unproblematic for the state.

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# The Changing Winds of Civilization

## The Aboriginal and Sovereignty Between the Desert and the State

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In 1770, Captain James Cook sailed up the eastern coast of what is now Australia, unfurled a "Union Jack", and claimed half of an inhabited continent under the authority of the British Crown. While it sounds farcical to imagine today, the power of such a grandiose claim still reverberates in and through the modern Australian state. The political dynamics established by this act of colonization are still manifest in the absolute inability of the Australian state to adequately recognize the separate-but-equal sovereignty of the Aboriginal.[1] In this paper, I will investigate the historical treatment of the Aborigines and the representation of the Aboriginal by the state, and will argue that the state, in its constitution, stands fundamentally opposed to the recognition of the native as having sovereignty beyond its jurisdiction. I will argue that this failure to recognize Aborigines as autonomous beings creates and justifies a political space in which the native is constituted as both within and without the juridical order, both subject to its limitations and beyond its protection. Finally, I will argue that the image of the native in the public imagination[2] serves as both a vector for state power and a means for civilizing the native, a process through which the native is killed and reborn in a form that ceases to be problematic for the state.

### Australian Sovereignty and *Terra Nullius*

In the late 18th Century, European legal theorists were tentatively formulating international law to mediate conflict in an increasingly globalized world. Entering into the "Age of Exploration", European nations needed a way of formally regulating the establishment of colonies. International law was therefore needed to legitimize the dispossession of territory held by non-European groups, yet also protect the property rights of European countries over these newly

[1] While indigenous Australians are generally referred to as either *Aborigines* or *Torres Strait Islanders* in recognition of their geographic specificity, I will refer to them together as either Aborigines or natives for the sake of space and clarity.

[2] By imaginary, I follow Charles Taylor's definition as "the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations." Charles Taylor, *Modern social imaginaries* (Durham: Duke University Press, 2004), 23.

established colonies. When the British Crown claimed legal control over what is now Eastern Australia, there were three legal justifications for the acquisition of territory: conquest, cession, or through the creation of settlements in a *terra nullius* – an uninhabited territory.[3] Due to the local conditions surrounding Captain James Cook's landing in 1770, British authorities chose to follow the latter justification when they established settlements in 1788.

Rather than being an empty territory, the land that would become New South Wales and eventually Australia was inhabited by a highly diverse indigenous population that was approximately 500,000 strong. They were grouped into about 500 small tribes and spoke several hundred different dialects.[4] Captain Cook, however, did not have the opportunity to experience this diversity as the natives bombarded his longboat with stones as he made shore in Botany Bay. Frightening the natives out of their nearby village with gunshots, Cook and his crew fruitlessly tried to reestablish more favorable contact by leaving beads and other material possessions in their abandoned shelters.[5] After this initial show of courage, Cook scared them away with several musket shots, wounding one of them. With the natives showing complete disinterest in the European gifts, Cook tellingly wrote, "We were never able to form any connections with them, they had not so much as touch'd the things we had left in their huts....All they seem'd to want was for us to be gone."[6] While he held official instructions to gain the consent of any natives he encountered to claim property rights to "Convenient Situations, in the King's name", Cook never established significant enough contact with native groups to receive such permission.[7] Though this prevented the colonial appropriation of native land through the legal mode of cession, his lack of interaction and observation of the complexity and nature of native social organization supported a view that the land was empty and unoccupied. Giving scientific credence to this view, Cook's botanist companion Joseph Banks described the land as mostly unpopulated and the few natives as timorous, primitive, and militarily inept. Not only were there few natives to be displaced, their lack of courage and sophisticated arms did not pose a threat to settlement.[8]

[3] Peter H. Russell, *Recognizing Aboriginal title: the Mabo case and indigenous resistance to English-settler colonialism* (Toronto: University of Toronto Press, 2005), 40. A military campaign to gain territory was considered as a last resource for obvious reasons.
[4] Robert Hughes, *The fatal shore* (New York: Knopf, 1987), 9. Estimates vary. This number is close to the middle of the spectrum. Cf. Damien Short, "Reconciliation, assimilation, and the indigenous peoples of Australia," *International Political Science Review* 24, no. 4 (2003), 492.
[5] Hughes, 54.
[6] Ibid.
[7] Russell, 69.
[8] Ibid.

Banks' description of the natives established the justification of *terra nullius* for three main reasons. First, the British did not show interest in creating a penal settlement until 1779,[9] the year of Cook's death, and Banks was relied upon instead as an expert. Distant from and ignorant of the territory they were claiming, the British had to rely upon the reports of the crew and therefore believed their analysis.[10] Second, the natives did not accord with Western ideas of national sovereignty, which meant having a unitary leader supported by a juridical order. Finally, as hunter-gatherers, the natives did not practice agriculture in the same way as Europeans. Since Europeans understood property ownership as being established and maintained through the Lockean idea of cultivating the land in an economically rational way, *natives were seen more as part of the landscape* rather than being in control of it.[11] The British understanding of political authority and economical land use established a hierarchical evolutionary schema whereby native practices were destined to be sublimated by the glories and fruits of civilization—civilization the Europeans would bring with violent precision.[12]

In comparison to other European settler societies, such as in North America, where the growth of settlements was slow and forced settlers into temporarily reciprocal relationships with native groups for survival, the British settlement in New South Wales progressed rapidly. Initially utilized as a prison outpost to ease their crowded prisons, the new colony quickly became home to thousands of inmates. Within less than fifty years of the first arrivals in 1788, over 37,600 inmates were sent from Britain to New South Wales[13] and by 1861 the European population swelled to over a million settlers.[14] As settlements grew, the aboriginal population decreased rapidly, falling to 180,400 during the same period.[15] Rather than developing mutual relations that might have contributed to limited recognition of Aboriginal sovereignty based on the necessities of trade and assistance, the European settlers immigrated *en masse* and quickly placed strain on relations with the native population by pushing them out of settlement areas. Soon after the first settlers arrived, Britain laid claim to the rest of the

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[9] Hughes, 57. The original motive for the creation of the colony was to have a place to send convicts who were sentenced to exile. Since the American colonies were breaking away, they needed a new place that could be habitable and self-sufficient.
[10] Ibid.
[11] Russell, 41. See also Lewis P. Hinchman and Sandra K. Hinchman, "Australia's Judicial Revolution: Aboriginal Land Rights and the Transformation of Liberalism," *Polity* 31, no. 1 (1998): 30-31.
[12] Hinchman and Hinchman, 30-31.
[13] Russell, 70-71.
[14] Ibid., 74-75. This population was not just inmates. Other settlements were quickly created that were unconnected to the penal outposts.
[15] Ibid., 75.

continent and all of the surrounding islands, solidifying their legally justified theft of an entire inhabited continent.

Using the doctrine of *terra nullius* as a legal justification and mass settlement as a vector, the British imposed exclusive sovereignty over their new territories. This notion of sovereignty, forming the foundation of the Australian state's legal and moral authority, however, was (and is) intimately linked to the absolute exclusion of the Aborigine from the juridical order. In fact, the identity of the state stood in direct opposition to the equality of the native because their exclusion was a necessary condition for the justified authority of the state. The doctrine of *terra nullius* exemplifies this: Crown authority is established over the territory because there is *no one inhabiting it*. The aborigines are merely *a part* of the greater territorial landscape to be disciplined and cultivated into economic productivity. The Europeans, on the other hand, are *apart* from the strictly natural order: they are the bearer's of civilization and are therefore justified in impressing an economically rational order on the discord of nature.

Even though the natives were defined by exclusion from the state, they were simultaneously, and paradoxically, incorporated within it. As part of the landscape, they were integrated into the British Empire and were subject(ed) to its sovereignty. While natives resisted this integration by making violent stands in opposition to settler encroachment and the disruption of their ways of life,[16] the rapidly growing settler population pushed the natives back through persecution, disease, and environmental disruption. Within 100 years of settlement as many as 20,000 natives were killed in conflict.[17] By the 1830's, certain British authorities were growing concerned about settler abuse of the natives and began establishing administrative positions that would see to the protection and wellbeing of the native population.[18] These administrative offices, however, merely complicated and furthered the dangerously ambiguous and paradoxical position in which the Aboriginal was placed.

[16] Ibid., 77-78.
[17] Ibid., 78. See also Robert Tickner, *Taking a stand: land rights to reconciliation* (Crows Nest: Allen and Unwin, 2001), 2. Gordon Briscoe challenges this view of frontier violence, claiming instead that there is little textual evidence for such a claim. The evidence that Briscoe offers indicates that the violence against the natives was the same as the violence against the settlers. Briscoe's analysis is overly positivistic and relies solely upon the textual record of the perpetrators. He does have a point, however, in that it is difficult to establish a number with certainty because of the lack of sources. Gordon Briscoe, "Aboriginal Australian Identity: the historiography of relations between indigenous ethnic groups and other Australians, 1788 to 1988," *History Workshop*, no. 36 (1993): 142.
[18] Tickner, 4; Moses, 7; Russell, 79.

### The Space in Between Assimilation and Segregation

> It seemed to me that in the Northern Territory of Australia there exists Kafka's Metamorphosis in reverse, an elaborate if unwitting pretence that already present difference, that is, Aboriginal culture, is not there, or not real, or at the very most, some kind of temporary aberration which can be erased or overcome with a little help.[19]

### The Humanism of Imperialism

The ambiguity of the position in which Aboriginals were placed can be captured by the paradoxical maxim, "in order to be saved, you must be destroyed". Embodying a religious ethos of conversion and rebirth, "civilization" involves an irrevocable rupture from the natural order.[20] Rather than following a Hegelian logic where higher concepts sublimate and preserve their antecedents, "civilization" requires the destruction of its predecessor in order to grant redemption.[21] Through the establishment and maintenance of the juridical order, the imperial state, as the bearer of civilization, attempts to destroy and prevent the reemergence of the primitive. This is the function of the legal order and the police state: to establish and maintain a rational order that is compelled by necessity and not subject to whim, possibility, or nomadism.[22]

The paternal office of the Protector of Aborigines exemplifies this antagonistic position of the state toward the native. In charge of defending natives from settlers, but also settlements from natives, Protectors were placed in an uneasy position between respect for and violation of Aboriginal customs and territories. While the position was able to prevent certain egregious violations from being perpetrated against the natives, the office was also responsible for facilitating significant atrocities.[23] Colonial governors were often inflexible with their political ambitions and Protectors were therefore used to accomplish colonial aims through "humanitarian" means (i.e. without large-scale military intervention). Aboriginal historian Henry Reynolds recounts a meeting between

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[19] Gillian Cowlishaw, *Rednecks, eggheads, and blackfellas: a study of racial power and intimacy in Australia* (Ann Arbor: University of Michigan Press, 1999), xvii.

[20] Similar to Christianity where there is an original sin that must be renounced in order to be reborn and "saved". This rebirth, however, is never fully complete, and must be guarded against the resurgence of the primal, sinful desires. The legal order and the police serve this function.

[21] I am not advocating viewing this in evolutionary terms whereby higher means better. While the settlers definitely saw things from this perspective, we should see the violence and imperialism of this position.

[22] See Gilles Deleuze and Félix Guattari, *A thousand plateaus: capitalism and schizophrenia* (Minneapolis: University of Minnesota Press, 1987), 351-423; 424-473. This also reflects the position of Karena Shaw, *Indigeneity and political theory: sovereignty and the limits of the political* (London: Routledge, 2008), Chapter 8.

[23] Russell, 111.

Chief Protector George Augustus Robinson and Governor George Gibson after a failed, though devastating military effort to sequester natives from Van Dieman's Land (now Tasmania) on a small reservation in which "The Governor assured [Robinson] that his government was sympathetic with the Aborigines and favoured humanitarian measures, but *nothing was to hinder the improvement of the colony*" (emphasis added).[24] In his position as Protector, Robinson then worked for the next four years to convince the few indigenous survivors to temporarily comply with the government resettlement so that they would remain safe from colonial violence.[25] Even though they were promised regular passage to their traditional lands, the survivors were eventually transferred to a distant penal station where they were kept until their population was decimated by disease and despair.[26]

While Protectors saw to many resettlement programs in the "best interests" of the Aboriginal population, they also worked to establish a pastoral lease program through which traditional native areas would be protected from settler squatters and the growing sheep and cattle industry.[27] Due to the thin layer of topsoil that covers much of the Australian outback, large tracts of land were needed to sustain the animals that drove the colonial economy.[28] In order to protect the interests of native groups, legislation was passed to allow the colonies to lease pastoral areas to support the economy while also formally allowing some native groups use of their traditional lands. Forcing settlers to lease the land kept squatters from claiming exclusive rights over native areas and established a system of "dual-occupation" that still exists today.[29] While the pastoral system intended to reserve the rights of some native groups to continue using their traditional lands, strategic settler violence ultimately drove many Aboriginal groups onto established reserves.[30] Natives that chose to remain were eventually killed or integrated into the pastoral industry as cheap labor.[31] Because humanitarian measures, like the pastoral system, were always subject to the growth imperative of civilization (—"the improvement of the colony"), they ended up justifying the invasion and disruption of native lands through the process of trying to save them.

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[24] Henry Reynolds, "Land and customary law: 1993 perspective," in *Aboriginal self-determination in Australia*, ed. Christine Fletcher (Canberra: Aboriginal Studies Press, 1994), 20.
[25] Russell, 80.
[26] Ibid., 80-81.
[27] Ibid., 88.
[28] Ibid., 86.
[29] Ibid., 87-88.
[30] Short, 492-493. Short writes: "Massacres, poisoning of flour and waterholes, and the banishment of Aboriginal people from traditional sources of food and water were used by pastoralists and others as 'dispersal' measures".
[31] Ibid., 493.

## The Mission and Morality of Civilization

As natives moved increasingly onto reserves set aside for them by the state, they were also drawn further into the clutch of civilizing forces that attempted to destroy their way of life. Aboriginal reserves were generally located in close proximity to Christian missions where they were taught Western agriculture and pressured to assimilate to Western culture. Teaching them farming integrated them into the economy and some natives became acculturated to the collection of material goods.[32] Both of these practices tied them to the land and discouraged their traditionally nomadic lifestyle. Missionaries simultaneously told them about the evils of their ways and encouraged them to convert. These civilizational strategies, however, were not successful on many natives. Aboriginal families often attended sermons merely to collect the food that was served, leading one frustrated minister to claim that the natives were an "apathetic, insusceptible, defiant and lazy" people because they were thwarting the mission's civilizing purpose.[33] Native populations also fluctuated greatly as families continued their hunting and ceremonial traditions, motivating the same minister to inform them that their "nomadic habits" were "morally wrong" and not practical.[34]

As Christian missions were trying to cultivate assimilated native subjects, the colonial legal system was trying to incorporate them into the administration of the state. The natives were already the object of paternalistic legislation, but it was unclear whether the natives should be held accountable to the same body of law as the settlers. Their exclusion from the legal order would make them legally foreign enemies and subject to unregulated settler reprisal, while inclusion would judge them according to foreign standards but would help to protect them from extra-legal killing.[35] In 1836 in the case of *R v Murrell*, the High Court decided that English common law extended to the natives because, even though they had laws and customs of their own, they were not organized as a sovereign state at first-settlement. Since native sovereignty was not recognized, it would be inconvenient and unacceptable for the colonial "Community" if the court were not able to prosecute crimes that took place within its jurisdiction.[36]

Exemplifying their ambiguous political position, however, natives were subject to the authority of the law, but were rarely protected by it. Extra-legal killings

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[32] Russell, 89.
[33] Quoted in Rosalind Kidd, *The way we civilise: Aboriginal affairs-the untold story* (Queensland: University of Queensland Press, 1997), 38.
[34] Ibid.
[35] David Ritter, "The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis," *Sydney Law Review* 15, no. 5 (1996): 10-11.
[36] Russell, 82-83.

continued unabated and the few legal supporters they had were drowned in the political current.[37] For instance, five years after *Murrell*, Justice Willis refused to prosecute an Aborigine for killing another Aborigine, claiming that they had rights to self-governance through their own customary laws—rights that could only be extinguished by legislation or treaty. This judgment, however, was too radical and Willis, with no support locally or in Britain, was removed from office.[38] Without the support of legal advocacy, natives were subjected to an institutionally mediated and regulated moral code that judged them according to concepts that were radically foreign to Aboriginal ways.[39] Through their integration into the coercive side of the legal system, and simultaneous exclusion from all protection of the law, state and police control reached deeply into traditional native affairs and disrupted their customary law.

### The "Stolen Generations"

While the institutional forces of the legal system were trying to eliminate traditional native subjectivity and replace it with settler morality, native populations were being genetically assimilated through the widespread rape of Aboriginal women. The semi-nomadic lives of pastoralists and the scarcity of white women disrupted family life in the outback and white men often used Aboriginal women as a sexual outlet.[40] In their position beyond the protections and guarantees of the foreign legal system to which they were subject, abused women had no recourse. Under their customary law, natives would seek reprisal by attacking the violator "with a spear or knife, intending to draw blood",[41] but this was no longer acceptable because it would provoke settler revenge or legal prosecution. Rape was therefore beyond the reach of justice.

It was not, however, beyond the compounding of injustice, as racially mixed children became the target of state assimilation policies as early as 1865. Falling into the emerging discourse of scientific racism and social Darwinism, many administrators saw Aborigines as racially inferior to Europeans and believed they were biologically disposed toward indecency, immorality, violence, laziness, and

[37] Ritter, 11.
[38] Russell, 83.
[39] Ritter, 11-12. Particularly problematic were different understandings of what constitutes truth, justice, and property rights.
[40] Cowlishaw, 64.
[41] Bruce Debelle, "Aboriginal customary law and the common law," in *Indigenous Australians and the law, second edition*, ed. Elliot Johnston, Martin Hinton and Daryle Rigney (Sydney: Cavendish, 2007), 90-91.

stupidity.[42] While they believed children of mixed blood had many of these characteristics as well, it was thought that they could be educated beyond them.[43] For this reason, administrators felt it was unconscionable to allow half-European children to be raised in an Aboriginal atmosphere and policies were developed to disrupt native claims to motherhood.[44] Under the Aboriginal Act of 1865, having an Aboriginal mother was the only evidence necessary for Queensland police to bring any Aboriginal child, full or half-blood, before the court on charges of neglect.[45] Protectors were eventually established as the legal guardians of all full and half-blood Aboriginals until the age of sixteen—a paternalistic right that overrode the claims of any Aboriginal mother.[46] Under the guise of protecting the interests of the child, thousands of so called "half-caste" children were kidnapped from their mothers and isolated in state and religious boarding schools with the intention that they would become culturally and racially assimilated within a few generations.[47]

Political support for this state policy of kidnapping was also driven by a fear of European racial degradation. Since the population of half-castes was growing faster than the European population, Protectors like Dr. Cecil Cook were concerned that the half-castes would grow to be the dominant population.[48] Many believed that the Aborigine was racially similar, though clearly inferior, to the Caucasian, and that the half-castes could be racially assimilated so long as the blood of the Aborigine was diluted each generation.[49] The boarding schools helped to facilitate this assimilation effort. Subject to horrific conditions, the children were sexually segregated, given basic education, taught English, and were often converted.[50] After completion, girls, having been raised to "white standards", were encouraged to marry European men so that their racial characteristics would be bred out, while boys were pushed to find practical employment.[51] Such discourses contributed significantly to the idea that the

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[42] Robert Manne, "Aboriginal Child Removal and the Question of Genocide, 1900-1940," in *Genocide and settler society: frontier violence and stolen indigenous children in Australian History*, ed. A. Dirk Moses (New York: Berghahn Books, 2004), 220-223, 227, 233-234.
[43] Ibid., 227.
[44] Ibid., 225.
[45] Ibid., 221.
[46] Ibid., 222. This happened in different places at different times, but the first was in Western Australia in 1904.
[47] Ibid., 217-239.
[48] Ibid., 228.
[49] Ibid., 231-232.
[50] Manne writes that: "It is difficult to believe, but nonetheless true, that by 1928 seventy-six half-caste children were housed in the small three-bedroom cottage in Darwin at Myilly Point. Moreover, almost everyone who visited the Bungalow at Alice Springs was appalled by the primitive and unhygienic conditions, the overcrowding and unbearable heat" (Ibid., 225).
[51] Ibid., 229-230. While there was definitely regional variation in the facilities and curriculum, concern with racial characteristics and fecundity was a general concern.

Aborigine was inevitably a "dying race" and that nothing could, or should, be done to save them.[52]

### The Imperative of Civilization

Despite these apocalyptic predictions and every effort of the state to force their assimilation, Aborigines survived against all odds. The civilizational imperative of the empire called upon the colonists to bring the savage into modernity—meaning, tying them to an acceptable territory, teaching them Christian morals, and integrating them into the economy; essentially, making them *unproblematic for the continuing hegemony of the state*. At the bottom of all of these historical atrocities is the redemptive message of the state that cries "let me help you become civilized, it is for your own good". But the guard at the gates of civilization has decreed that the Aborigine must remain forever outside, until such time as their scales are shed and they emerge reborn and transformed into someone fully human. This rebirth—"Kafka's Metamorphosis in reverse"[53]—is the demand of assimilation and forms the essence of the state: the production of subjects that emulate the "White Man himself, with his broad white cheeks and the black hole of his eyes. The face is Christ. The face is the typical European".[54]

Seen through the state projects of racial assimilation, the Christian boarding schools, and the British Common Law, this Christian European face could only emerge in the radical destruction of the Aborigine. Only through the abandonment of their nomadic lifestyle, the traditions and customs that animated their cultural existence, their languages, and even their families did the native cease to be a threat to the state. Rather than successfully assimilating the native, these policies produced a contradictory political space in which the Aboriginal was both inside and outside the juridical order, pushed to inhabit a space of cultural and material alienation.[55] Constituted as purely other, the Aboriginal was never integrated into the state, even though they remained subject to it. Recognizing the power of their otherness and hoping for the recognition of their separate-but-equal claims to self-determination, self-government, and sovereignty, the natives politically organized in the 1920's and began legally fighting for their collective rights.

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[52] Ibid., 237.
[53] Cowlishaw, xvii.
[54] Deleuze and Guattari, 176.
[55] This analysis closely parallels the theoretical work of Giorgio Agamben, *Homo sacer: sovereign power and bare life* (Stanford, CA: Stanford University Press, 1998).

While government policies prior to World War II were largely defined by the segregation of full blood Aboriginals onto reserves where they were targeted by strategic modes of assimilation, policies in the post-war state grew more explicitly assimilationist. Amid rising international concern for human rights and the realization that the "dying race" was not actually dying, the Australian state then focused on raising the standard of living, political status, and image of the Aborigine. Paul Hasluck, Minister of Territories from 1951-1966, described these familiar goals as:

> All Aborigines and part Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs, and influenced by the same beliefs, hopes, and loyalties....the advantages of civilization in Australia should be shared by all who live here.[56]

Addressing political, legal, and humanitarian concerns, these assimilationist objectives aimed at raising Aborigines to an undifferentiated position within the middle class through the removal of discriminatory policies of segregation. The state passed legislation forbidding racial discrimination by the state, guaranteed equal-pay for all, and increased social welfare programs for the needy. Aborigines were granted voting rights in federal elections in 1962 and were given full citizenship rights in 1967, effectively integrating them into the juridical order.[57]

This integration, however, remained on a purely formal level because it did not address the question of reconciliation. Many indigenous groups did not want to be forced into the state; they wanted to be free from it. They wanted their lands back and rights to self-determination that would allow them to regain what had been lost of their traditional ways. They wanted recognition of their sovereignty and reparations for the imperialistic policies that were thrust upon them.[58] The equality that was the focus of these assimilation policies did little to meet the *actual* needs and claims of the natives themselves. Once again, what seemed to be

[56] Hinchman and Hinchman, 33-34.
[57] Ibid., 34; Russell, 146-150. The 1967 referendum, passed with overwhelming public support, symbolically included the indigenous population in the national census. While many Australians see this as the extension of full citizenship to the Aborigines, most natives see justice for the past as a necessary condition for full citizenship.
[58] Russell, 150-152.

a mission driven by humanitarian concerns for the sake of the Aborigine was more about improving the position of the Australian state than the position of the native.[59]

Illustrating the vacuity of the formal equality that they were pledged, instead of giving Aborigines sovereign authority over the lands that they had inhabited for thousands of years, the court opened traditional native territories to the exploitation and environmental devastation of large-scale mining. Judging the Aborigines according to their formally equal status, the court claimed that the natives did not hold European-style proprietary rights to their land and were therefore unable to challenge state-sponsored use of the land.[60] Further outrage was sparked by Prime Minister McMahon's declaration on "Australia Day" 1972—*the anniversary of the British claim to sovereignty*—that native land rights could be established through leases, not by right, and that they would be given not according to traditional attachment to the land but rather based on rational standards of economic and social utility.[61] It was under these conditions that Aboriginal people repeatedly took to the streets of the capital to loudly proclaim their grievances. In 1972 a group of Aboriginal activists protesting the government denial of native sovereignty built a "tent embassy" on the lawn in front of the Parliament House in Canberra to remind legislators that they were sovereign peoples and that the Aboriginal problem was not going away.[62]

As the native was formally integrated into the juridical order, and as Aboriginal identity and solidarity arose to address the problems that collectively disenfranchised them,[63] the romantic image of the pre-contact Aborigine began to creep into the national imaginary, changing the national identity. In response to the national financial instability of the 1970's and increasing international concern over indigenous rights, the Australian state had to refashion itself as a "multicultural" state, one in which difference, including Aboriginal difference, was respected. After losing England as their major trading partner in the early 1970's, and faced with decreasing commodity prices, increasing debt, and

[59] This is similar to the claim of Elizabeth Povinelli, *The cunning of recognition: indigenous alterities and the making of Australian multiculturalism* (Durham: Duke University Press, 2002), 56: "The goal of understanding the necessary failure of indigenous identity is to understand how national and state recognition of that identity supports and strengthens the nation and capital, not indigenous peoples, or not primarily indigenous peoples." While Povinelli is writing about the state recognition of the difference of indigenous identity, which I will get to shortly, this also seems applicable for the recognition of similarity or equality.

[60] This was the notorious *Milirrpum* decision by Justice Blackburn. It explicitly upheld the doctrine of *terra nullius* as a mean for denying native land title claims. Russell, 158.

[61] Russell, 159.

[62] Tickner, 11.

[63] Ibid., 12.

uncompetitive industries, the Australian economy was becoming increasingly reliant upon trading partnerships and capital investment from the booming Asia-Pacific markets.[64] These transitions necessarily called into question the strict Eurocentrism of Australian identity and brought out a desire to shape a unique national image that adequately reflected their historical specificity.[65] This, however, required finding a solution to the Aboriginal problem.

It was in this atmosphere that the image of the pre-contact Aborigine entered into the public imagination. Breaking from the view that natives were savages and stood in fundamental opposition to the civilization of the state, the image and history of the unspoiled Aborigine paradoxically became incorporated into the Australian national identity as a sign of its multiculturalism. Drawn into mass culture under the romantic guise of the noble savage, indigeneity became commodified and glorified for the vibrant cultural difference it represented rather than the actual social struggles and colonial oppressions that shaped its genesis.[66] As the idea of indigeneity became detached from its referent, it ceased to function as a mode of resistance to the state and instead worked to purify and redeem the national image.[67] While the state was being forced to confront the image of its colonial past and the ghosts of the frontier, mourning this past *in its abstraction* allowed the country to emerge from the shroud of settler society in the eyes of the international community and their regional trading partners. This redemption took place through the romantic abstraction of the native, but provided little justice to the actual people scarred by this historical terrain. Through the strategic (mis)recognition of certain symbolic dimensions of native existence, the state was able to create the appearance of multiculturalism, while simultaneously continuing the colonial domination of those through which it gained greater legitimacy. The most famous and important example of this was the recognition of rights to native title in the Supreme Court case *Mabo v Queensland*.

## Native Title

In 1992, the Supreme Court handed down a decision, *Mabo v Queensland*,[68] which formed the basis for establishing native title claims to traditional lands under customary native law. Sparking a wide range of contradictory responses, *Mabo*

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[64] Povinelli, 19-20.
[65] Ibid., 20-21.
[66] Ibid., 24. The main idea here is that the identity of "indigenous" is only applicable in a colonial setting because it emerges only in opposition to what is non-native.
[67] Ibid., 26, 42.
[68] There were actually two different cases under this heading. I am referring here to the most recent case.

was seen as both unifying and dividing for the country, both a victory and a loss for the native population, and as both essential and detrimental for the national economy.[69] These contradictions came from the complicated position of the Aboriginal within Australian society and the ambiguous place that the native was forced to inhabit in both the juridical order and the social imaginary.

The decision in *Mabo* established two crucial points that significantly altered the legal understanding of the relationship between the native and the state. First, the court struck the notion of *terra nullius* from the common law, claiming that, "Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted".[70] The racist foundation of the doctrine that ruled out indigenous rights to land because they were characterized "as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land" was rebuked as a system that was out of sync with international law and perpetuated colonial injustice.[71]

Second, since the court could no longer use *terra nullius* as a legal justification for the extinguishment of native customary law, the establishment of Crown sovereignty could not alone "be taken to confer an absolute beneficial title to the occupied land."[72] While Crown sovereignty established "radical title" (power over the land, with the power to take a proprietary right to the land if the sovereign wished), it did not automatically extinguish rights to their traditional

[69] For an analysis of some of these contradictions and the implications for the postmodern state, see Paul Patton, "Mabo and Australia: Toward a Postmodern Republic," *The Australian Journal of Anthropology* 6, no. 1-2 (1995): 83.

[70] High Court of Australia, *Mabo v Queensland (No 2) (1992), 175 C.L.R. 1*, June 3, 1992, §42 http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html (accessed March 10, 2009). The passage continues:

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights…brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

[71] Ibid., §63, 42.

[72] Ibid., §51.

lands.[73] Since these rights were not automatically removed, certain elements of native customary law were protected under the common law through which natives could make land claims.[74]

While this ruling seems like it changes the relationship between the state and the native significantly, it is not nearly as radical as it seems. The court claimed that the invalidation of the concept of *terra nullius* could not call into question the legitimacy of the state as the sovereign power: "recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system."[75] As we have seen above, the sovereignty of the state depends upon this fundamental exclusion of the natives from their own sovereignty. Because of the legal limitations of the conditions present during the establishment of Crown sovereignty, the court could not fully banish the concept of *terra nullius* from the common law because *the concept animates the legitimacy of the state*. A judgment of this sort would amount to the delegitimation of the state through the power of the state. Such a paradox constitutes a limit beyond which the court cannot and will not proceed.

If we tease out and continue the court's logic in the statement above, the remnants of their prejudice become obvious: 1) the common law is built upon justice; 2) the dispossession of the natives was based on an unjust and prejudicial bias; 3) (hidden premise: the state itself was built upon this same prejudicial order); 4) the common law cannot contradict itself or invalidate itself, it can only build upon itself and become more just; 5) justice for the native is therefore relegated to the gaps in the sovereign order, the injustice of which must be protected to retain the validity of the common law; 6) the purity of the common law drives itself into contradiction because it perpetrates a fundamental injustice. The common law therefore is both contradictory and unjust for the native because it is unable to critically analyze the foundation of the juridical order.

This inability to bring about actual justice is further evidenced by the asymmetry that is established between native customary law and the common law. While *Mabo* has the appearance of establishing a pluralistic legal system whereby native claims to land are justified according to native standards and traditions rather than those of their colonial oppressors, this customary law is only recognized in and through the common law, reinforcing the hegemonic power of the state.

[73] Ibid., §53.
[74] Ibid., §65.
[75] Ibid., §43.

This is clear in the court's claim that "Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law."[76] Native law, however, cannot contradict the common law—it is qualified by its necessary compatibility with the authority of the state: "the only title dependent on custom which the common law will recognize is one which is consistent with the common law."[77] Native customs are once again constrained by their subordination to settler morality.

The land rights protected under this customary law are also extremely limited. Since the court was unable to raise the question of national sovereignty, the power of the sovereign still, in every case, overrules the customary law of the native. Sounding startlingly similar to the *Murrell* case, where it was declared that it would be inconvenient for the settler "community" if the natives were not subject to the common law, *Mabo* declares that it would be inconvenient for the state if it did not have the ultimate right to dispossess the territory of those it deems necessary. It would be highly undesirable if the lands upon which the state is founded were illegitimate and its absolute power called into question. The native land rights that are given in *Mabo* are therefore only valid *in the absence of an explicitly legislated state interest in the land*. The power of the state to extinguish native claims to land is justified under the absolute power of the Crown—it just has to do so explicitly through: 1) claiming that the indigenous people no longer have rights to the land; 2) selling the land to private owners; or 3) by setting it aside for some other kind of public project that contradicts the interests and uses of the natives.[78] In effect, the *Mabo* ruling left little valuable land for natives to claim rights to.

In the wake of the *Mabo* judgment, the Commonwealth government codified the ruling in legislation through the *Native Title Act of 1993* (NTA). While the NTA established a tribunal through which future claims to land could be made and established the guidelines according to which native title would be granted, it also justified the dispossession of many indigenous claims prior to when the act came into force (New Years Day, 1994), made significant concessions to the mining and pastoral industry, and granted the state the right to judge the authenticity of native claimants and the validity of their customs and practices.[79] In order to qualify, groups had to prove a genealogical connection with the original inhabitants of the land, a customary law that justified their land claim,

[76] Ibid., §65.
[77] Ibid.
[78] Ibid., §53.
[79] Russell, 305-310.

their continued practice of that law, and current occupation of the land.[80] While this was necessary from the state perspective,[81] the romantic image of the Aborigine in the public imaginary forced natives into a paradoxical position that drew attention away from the contemporary problems confronting them.

By framing the justification of native title in a romantic past, in order to make land claims, natives had to be reconstituted as "authentic" indigenous subjects that were unspoiled and untouched by the horrors of the colonial past—a reality that was and still is empirically false. To receive the benefits of the NTA, indigenous groups had to paradoxically *change to become authentic* in a way that validated the multicultural identity of their oppressors. Rather than shedding light on how Aborigines have the lowest standard of living in the nation because of colonial exploitation and exclusion, natives were pushed to renounce their radical opposition and incompatibility with the state in order to gain rights to their traditional lands. Since the state occupied the positions of both judge and jury, successful native title claims required adopting a system of cultural values that validated the legitimacy of the state and nullified their incompatibility with it. While the *Mabo* court recognized that native culture was necessarily changed by contact, they assumed, along with the rest of the Australian public, that a distinctive native-ness remained beneath all of the suffering and social dysfunction.[82] This distinctive essence—primarily their customs and spirituality—was what established their authenticity and held the potential to justify land claims. However, if "authentic" native practices were not readily observable, claims to native title were no longer valid.[83] In the words of the *Mabo* court:

> The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[84]

[80] Povinelli, 157.
[81] It is necessary for the state because of the way that native title is justified, i.e., by the existence of a pre-settlement customary law that establishes and maintains a claim to land that has not been explicitly extinguished by the Crown.
[82] Povinelli, 48-49, 180-181.
[83] As Povinelli writes, "At some 'to be announced' boundary, the 'less' becomes 'too little' and the special rights granted to indigenous persons give way to the equal rights granted to all groups in the multicultural nation" (Ibid., 57).
[84] *Mabo*, §66.

What the court gives with one hand, it takes away with the other. While there is an acknowledgement of native customary law that is based on non-European traditions, the state is still positioned to be the judge of both the form and validity of such claims.[85] What the native finds meaningful about their connection to the land and their customary law is irrelevant. Rather, what becomes important is what the judge or the public believes the native to be at heart, and whether that essence is different enough from, but not repugnant to, the juridical order to be celebrated and affirmed in its difference.[86]

While the development of native title was seen by many as a huge step for the establishment of a multicultural society and its corollary indigenous rights, the limitations of the legal order clearly presented themselves when they were moved beyond the purely symbolic realm. While the few claims that were successfully established under the NTA have given certain groups more of a say about what happens on their lands and limited compensation from the government, the act strengthened Australia's national and international image as a multicultural nation instead of significantly improving the position of most Aborigines.[87] Since this multiculturalism took place largely in the public imagination through the production of a romanticized representation of indigeneity that was different from, but still compatible with, the social organization of the Australian state, it served to efface the real struggles of indigenous groups who saw themselves as fundamentally excluded from this societal order.

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[85] It is on this point that Aboriginal lawyer Noel Pearson also sees the means of escaping the state:

> Colonial law determines and controls our ability to exercise our own law, enjoy our rights and maintain our identities. With the focus on Mabo, the colonial legal system is saying to us: 'Yes, we do recognize Aboriginal law in certain confined circumstances relating to land, but our law also says that there has been potential extinguishment of title in many regions'. And what of the balance of Aboriginal law? According to the colonial law it has limited reality – insofar as colonial law is prepared to act. Despite the illegitimacy of the imposition of colonial law and no matter how revisionist and how artificial and calculating the High Court has been, recognition of indigenous law in the Murray Island case is nevertheless a prevailing reality. They have outlined their position to us and we have to act.

Noel Pearson, "Aboriginal law and colonial law since Mabo," in *Aboriginal self-determination in Australia*, ed. Christine Fletcher (Canberra: Aboriginal Studies Press, 1994), 155-156.

[86] Povinelli writes that there is "a demand that cultural beliefs be intelligible…but not too believable; that lie within a set of preexisting legal frameworks but not be oriented to them.… In other words, the local must speak the truth of itself for itself even though speakers know other laws and agencies are sitting not far away ready to discipline any enunciation that strays 'too much' toward or against the nonlocal" (253). For a good empirical analysis of this see Ch. 6.

[87] Ibid., 42.

## Reconciliation

> We have got to get the balance right…The pendulum has swung too far in the direction of Aborigines.
>
> John Howard

> On someone else's terms, reconciliation can not be progressed.
>
> Patrick Dodson

Many commentators on the *Mabo* case and the subsequent title decision in *Wik Peoples v Queensland*[88] (1996) saw native title as one of the first steps toward reconciliation with the Aborigines for their past dispossession, even though, as we have seen, native title was a largely symbolic endeavor through which the Australian nation tried to resolve its Eurocentric and colonial past. While the "left" Keating government (1991-1996) was committed to pursuing the process of reconciliation, the "center-right" Howard government (1996-2007) was largely uncooperative and detrimental to the process. Both governments, however, show the limitations of the legal order and the problems presented by the disjunction between the romantic Aborigine of the public imagination and the actual conditions in which they live.

In 1991, the Keating government established the Council for Aboriginal Reconciliation, a committee that would progressively address the social and political disadvantages for Aboriginal groups caused by the history of colonialism. The group was charged with resolving issues relating to Aboriginal "aspirations to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and any other relevant matters" within ten years.[89] But rather than being made up of all, or mostly, Aboriginal people, the council was composed of 25 people associated with business, the government, academia, and some "high-profile Aboriginal people", most of whom were involved with churches.[90] The symbolic diversity of the council closely paralleled their message of forgiveness and national unity, with competing interests all joining together in a common goal of correcting the wrongs of the settler past.

This idea of national unity, however, was strictly at odds with many Aboriginal groups' demands for separation from the nation. Aboriginal groups had long

[88] This case was the second major native title victory. It ruled that the granting of a pastoral lease did not remove native title, therefore establishing larger areas for natives to claim as traditional lands.
[89] "Council for Aboriginal Reconciliation Act 1991: Preamble", quoted in Short, 495.
[90] Short, 496.

been asking for treaties that would justify a space for native self-determination and, with the acknowledgement of native customary law in the *Mabo* case, were interested in having their pre-colonial sovereignty recognized.[91] While the reconciliation council's rhetoric fell into the language of "social justice"—specified by citizenship rights, specific indigenous rights, and constitutional recognition—indigenous groups wanted the self-determination rights and land rights as specified under the UN Draft Declaration on the Rights of Indigenous Peoples (DDRIP).[92] They saw separation as a necessary condition for the realization of reconciliation.

The division between the reconciliation council and native groups was directly related to the disjunction between the position that the native held within the national imagination and the political space they were forced to inhabit. The abstract idea of indigeneity associated with the public was something *pacified* and able to coexist within the state; it was the native that was different, yet also united in civilization. This was the Aboriginal whose claims and customs complemented the common law rather than challenged it. The state-sponsored reconciliation effort was based upon this romantic idea, as the council's rhetoric of national unity implies. The reconciliatory position was not based upon "multicultural" respect for difference; it was based and judged according to the degrees of integration of the native into the apparatus of the state. Since the fundamental assumptions and prejudices of the state were not called into question, the injustices that pervaded the structures of the state from the conditions of its genesis were merely being continued.

As the public image and discourse of the Aborigine came closer to the actual desires and conditions of Aboriginal life, public opinion soured and support was lost for the reconciliatory project. Gradually realizing the implications of actually meeting Aboriginal needs, the public began to see the native as once again inhabiting an antagonistic social space. In the aftermath of the *Wik* (1996) ruling that claims to native title were not extinguished by pastoral or mining leases, various commercial interests initiated a smear campaign against Aboriginal land rights and the "uncertainty" they introduced into the traditional understanding of land ownership. Citing the "horrifying" prospect of having to negotiate with native titleholders, the mining industry claimed that the *Wik* decision placed many government issued mining and pastoral permits in question and threatened

[91] Michael Dodson and Robin McNamee, "Recognition of the Indigenous people of Australia and their rights," in *Indigenous Australians and the law, second edition*, ed. Elliot Johnston, Martin Hinton and Daryle Rigney (Sydney: Cavendish, 2007), 238-244.
[92] Short, 500.

the stability of the national economy.[93] Inciting fear through blatant falsification, mining companies also started publicizing that native title was compromising the private property of "other Australians", not just commercial interests. With people ignorantly worrying that their backyards would be subject to native title claims, fear shaped a political discourse in which support for Aboriginal rights was a political liability.[94]

Rather than seeing native title as a right guaranteed to Aborigines under the common law, many ordinary Australians began to see it as an assault on *their* rights.[95] No longer holding a place within the public imaginary, the rights and claims of the native were reinscribed as violations of it. Prime Minister Howard agreed with this view when he claimed, "We have got to get the balance right…The pendulum has swung too far in the direction of Aborigines."[96] The Howard government followed this assertion months later with the Native Title Amendment Act 1998, which had the explicit intent of making title claims harder and less beneficial, and promised "bucketloads of extinguishment".[97] As Peter Russell writes, "Whereas…Keating pledged to use the recognition of native title to establish a new relationship with Indigenous peoples, Howard seemed determined to return Australia as quickly as possible to denying recognition of Aborigines…as distinct and enduring peoples."[98]

Howard's position on other elements of the reconciliation process followed similar trends. When confronted with *Bringing Them Home*, the government report that brought to light the "stolen generations" of the state kidnapping policies, Howard was unable to even offer an official apology to Aborigines because he believed that "Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control." He also feared that an apology would establish further grounds for Aboriginal litigation and claims for compensation.[99] Instead of apologizing, Howard reaffirmed his plans for restricting native title and claimed that reconciliation needed to be practical, meaning primarily "a shared commitment

[93] Russell, 322.
[94] Short, 498-499.
[95] Russell, 323.
[96] Ibid., 326.
[97] This claim was made by Tim Fischer, Deputy Prime Minister and Minister for Trade. Quoted in Fred Tanner, "Land rights, Native Title and Indigenous land use agreements," in *Indigenous Australians and the law, second edition*, ed. Elliot Johnston, Martin Hinton and Daryle Rigney (Sydney: Cavendish, 2007), 154.
[98] Russell, 325.
[99] Ibid., 328.

to raise living standards and broaden the opportunities available to the most disadvantaged group in Australian society".[100]

Howard's refusal to bring shame upon the Australian nation was driven by a fear of national division. While only a few years before, the Aboriginal was the sign of an emerging national multicultural identity, the native, under Howard, stood transfigured once again into an imminent threat to the integrity of the state. Howard's government was marked by a radical inability to say either of the words that meant most to Aborigines: "sorry" or "treaty". He believed in a unified vision of the future of Australia and nothing could dissuade him from it.[101] Admitting guilt or giving natives special rights only reinforced the belief that natives had a claim to sovereignty that made them separate from the Australian state. And, again coming full circle, this claim to sovereignty—and therefore true reconciliation—was something that Howard and all his predecessors were unable to entertain.

### Humanitarian Discrimination, "Sorry Day", and Indigenous Rights

> Blackfellas will get the words, the whitefellas keep the money.
> Noel Pearson

In June of 2007, a government study entitled *Little Children are Sacred* was published that claimed Aboriginal communities in the Northern Territory had significantly higher rates of child sexual abuse and neglect than the rest of the Australian population. Linking the problems to alcoholism, pornography, substance abuse, rampant poverty and the lack of community organization, the report made 97 suggestions for addressing the issue, mostly focusing on community empowerment, education, and the allocation of funds to help combat poverty. In response, the Howard government passed the Northern Territory National Emergency Response package (known as "the intervention"). Ignoring nearly all of the reports' suggestions and suspending the Racial Discrimination Act of 1975 (RDA) that protects against racially biased legislation, the Howard government imposed paternalistic restrictions on Northern Territory Aboriginal communities. Particularly, they enacted a wholesale ban on alcohol and pornography, and coercively tied welfare payments to the school attendance of children and regulated how and where funds could be spent. The "intervention" also disrupted native claims to land by reestablishing exclusive government

[100] Ibid., 328-329.
[101] Ibid., 360-361.

control over the 73 native communities in question by removing the permit system[102] and suspending native title. Under the name of protecting the rights of Aboriginal children, the "intervention" authorized the military and police to take over Aboriginal camps and townships and required compulsory medical examinations for Aboriginal children. It also, however, allocated greater funds for addressing native economic and social problems than has historically been the case.

While there was significant outcry from Aboriginal representatives at the politically motivated and harsh nature of the intervention, the unprecedented allocation of funds complicated this response. At the forefront were concerns that the Howard government was using Aboriginal child abuse and the "national emergency" as a lightening rod to spark middle-class support for his election campaign. Howard had information about Aboriginal child abuse for all eleven years of his leadership, yet, after many years of waiting, he chose to address it as if it were a "natural disaster" in need of an emergency response right when he was gearing up for reelection.[103] Many natives saw Howard's response as political opportunism and, in the context of his other decisions on Aboriginal policy, as merely another assault on native rights to self-determination. Aboriginal leader Patrick Dodson agreed with this position, saying it was an "urgent [and] immediate priority…to protect children…. But this priority is undermined by the Government's heavy-handed authoritarian intervention and its ideological and deceptive land reform agenda." However, he also saw the intervention as an "historical opportunity" to address the plight of Aboriginal communities *if* it could be conducted in a manner than was not merely coercive but also sought community involvement and a "partnership" between local, state, and federal levels.[104] Pat Anderson and Rex Wild QC, authors of the *Little Children are Sacred* report, also challenged the government response, testifying before the Senate's "legal and constitutional affairs committee" that the intervention would be a step backward in Aboriginal policy, was discriminatory, and failed to recognize the recommendations of the report that they were responding to. Anderson further mirrored Dodson's position, claiming "there's a real opportunity here to once

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[102] The permit system required non-natives to acquire a permit from the Aboriginal community before being allowed access to their land. This gave native communities a level of autonomy from the surrounding territories, though police were still allowed unfettered access.

[103] Emily Sherlock, "NT intervention seen as stunt by protesters; Aboriginal march likens child abuse issue to children overboard," *Canberra Times*, July 15, 2007, http://www.lexisnexis.com, (accessed March 10, 2009); See also Simon Kearney, "Police unite against NT permit plan," *The Australian*, August 13, 2007, http://www.lexisnexis.com, (accessed March 10, 2009).

[104] Patrick Dodson, "An entire culture is at stake; comment & debate," *The Age*, July 14, 2007, http://www.lexisnexis.com, (accessed March 10, 2009).

and for all do something… We need extraordinary interventions but not at the risk of infringing our fundamental human rights".[105]

While these statements are only a few of a vast public debate, they represent another instance of a struggling discourse about the position of Aborigines within the state. In response to the intervention, Aboriginal leaders were generally split into two camps: one supporting the government program of "practical reconciliation" and the other opposing it by advocating rights to self-determination.[106] This response elucidates the complex nature of the problems facing Aboriginal communities. Acknowledging the clear connections between the historical suppression of native sovereignty and the dysfunction native communities face today directly calls into question state solutions that involve further violation of native rights to self-determination. From this perspective, contemporary problems must be addressed by the withdrawal of state coercion from Aboriginal affairs and by providing native communities with resources to collectively solve their own problems. Reconciliation would then mean agreeing to a treaty that would recognize the sovereign status of Aborigines. This, on the other hand, is seriously complicated by reports like *Little Children are Sacred* that imply Aboriginal groups are too dysfunctional to have self-determination work in the interest of their communities. More freedom, it is feared, will only create further human rights abuses *within* their groups rather than providing space for the emergence of a responsible collectivity. Reconciliation then is a necessary evil that should aim to practically improve the position of Aborigines within the greater community of the state by coercively promoting social institutions to raise the Aboriginal standard of living. In its attempt to respond to these different perspectives, the state adopted an uneasy position that privileged the latter while symbolically placating the former.

For example, at the end of 2007, Howard was voted out of office and replaced by Labor candidate Kevin Rudd. On February 13, 2008, Rudd offered the first formal apology to the Aborigines in front of Parliament for the "stolen generations" and "past mistreatment".[107] Rudd passionately broke with the policies of his predecessor, claiming:

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[105] Patricia Karvelas, "Tactic a backward step, say authors," *Weekend Australian*, August 11, 2007, http://www.lexisnexis.com, (accessed March 10, 2009).
[106] Joel Gibson, "One policy, two camps - the takeover rift," *Sydney Morning Herald*, October 27, 2007, http://www.lexisnexis.com, (accessed March 10, 2009).
[107] Kevin Rudd, "Apology to Australia's Indigenous Peoples," *Parliament of Australia*, February 13, 2008, http://www.aph.gov.au/house/rudd_speech.pdf (accessed March 12, 2009), 1.

> To the stolen generations, I say the following: as Prime Minister of Australia, I am sorry. On behalf of the government of Australia, I am sorry. On behalf of the parliament of Australia, I am sorry. I offer you this apology without qualification. We apologise for the hurt, the pain and suffering that we, the parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied. We offer this apology to the mothers, the fathers, the brothers, the sisters, the families and the communities whose lives were ripped apart by the actions of successive governments under successive parliaments.[108]

Acknowledging that a purely symbolic apology was insufficient, Rudd also signaled a commitment to shrinking the life-expectancy gap between natives and non-natives and to addressing the significant social problems facing Aboriginal communities.[109] He wanted to make sure that his apology was not merely an empty symbol. Rather, it was the beginning of a bridge being built between disparate worlds, founded on "real respect" instead of "a thinly veiled contempt".[110]

Certainly the long overdue apology was an emotional event that was warmly welcomed by Aborigines. Many have also wondered, however, whether it was really more than another symbolic token. While acknowledging that much Aboriginal suffering was related to discriminatory state policies, the apology simultaneously set the state up as the new solution. Despite his revolutionary proclamations about breaking with the policies of the past, nothing was mentioned about Aboriginal sovereignty or rights to self-determination. Rudd's commitment was also undermined by his firm conviction that victims of the "stolen generations" should not receive state compensation for their suffering. Some Aboriginal leaders, such as Noel Pearson, took this as a clear signal that Rudd remained entrenched within the paradigm of his predecessors and reduced the apology to the formulaic proposition, "Blackfellas will get the words, the whitefellas keep the money".[111] Further problematizing the apology was Rudd's continuing support of Howard's paternalistic intervention policies as a way of addressing "*practical* reconciliation". While some Aborigines continued to support the intervention as a necessary—practical—evil for dealing with child

[108] Ibid., 3.
[109] Ibid.
[110] Ibid.
[111] Quoted in Misha Schubert, Sarah Smiles, Bridie Smith, Dewi Cooke and Ari Sharp, "'We'll never let it happen again'; Historic gesture to Aborigines," *The Age*, February 13, 2008, http://www.lexisnexis.com, (accessed March 10, 2009).

abuse, substance abuse, and welfare dependency, others renewed their criticism in light of these new promises.

In late October of 2008, an independent review of the "practical reconciliation" taking place through the Northern Territory intervention found that it was racist, dogmatic, and humiliating.[112] Criticizing the state for turning a blind eye and not seeking input or advice from the groups that it was trying to assist, the review board recommended that the government "reset their relationship with Aboriginal people" to be "based on genuine consultation, engagement and partnership".[113] The report also called for the reinstatement of the permit system that controls entrance to Aboriginal lands and revision of the discriminatory regulation of welfare payments.[114] Others challenged intervention policies on functional grounds, claiming that the "expensive, untried, top-down, heavy-handed policy approaches" created greater barriers to Aboriginal health because they ignored and disrupted local knowledge and practices.[115] Instead of improving health, a year and a half of paternalistic policies saw rates of children with anemia nearly triple and underweight childbirths double.[116] The United Nations committee on racial discrimination also joined this chorus in response to sustained complaints from Aboriginal communities, formally warning the Rudd government that it needed to make progress toward reinstating the Racial Discrimination Act and remove intervention policies that were at odds with it.[117]

It was in this controversial context that the state created another symbolic discontinuity with the Howard administration by pledging its support for the UN Declaration on the Rights of Indigenous Peoples (DRIPs). Having been closely involved in the drafting process, the Howard government ended up rejecting the final product along with the United States, Canada, and New Zealand. No longer able to become a signatory, the Rudd administration officially endorsed the declaration as a *nonbinding resolution* on April 3, 2009.[118] Many saw this step, along with the apology, as an important piece in the larger puzzle of

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[112] Ben Doherty and Leo Shanahan, "Review finds intervention racist; government rejects planned changes," *The Age*, October 29, 2008, http://www.lexisnexis.com, (accessed March 10, 2009).
[113] Ibid.
[114] Ibid.
[115] Larissa Behrendt and Irene Fisher, "Intervention is hurting health," *Sydney Morning Herald*, March 31, 2009, http://www.lexisnexis.com (accessed May 5, 2009). Lindsay Murdoch, "Infant iron levels worse than in Zimbabwe," *Sydney Morning Herald*, April 7, 2009, http://www.lexisnexis.com (accessed May 5, 2009).
[116] Ibid.
[117] Rosslyn Beeby, "'Divided society' without treaty," *Canberra Times*, March 30, 2009, http://www.lexisnexis.com (accessed May 5, 2009).
[118] James Massola, "Aust backs black rights; UN declaration endorsed," *Canberra Times*, April 4, 2009, http://www.lexisnexis.com (accessed May 5, 2009).

reconciliation, but certainly not sufficient on its own.[119] Problematically, certain provisions in the declaration—primarily, indigenous rights to equality, self-determination, self-government, and land rights[120]—were fundamentally opposed to the invasive and discriminatory intervention that the government was openly sponsoring. Support for the declaration was therefore received by opponents of the intervention as "absolute hypocrisy" and as "nothing less than a tokenistic gesture like the apology was".[121] Illustrating the vacuity of the state's commitment to the principles of the declaration, in response to a warning from Senator George Brandis that at least five articles were in direct conflict with Australian law, Indigenous Affairs Minister Jenny Macklin assured him that the domestic law would remain unaffected because "Article 46 makes it clear that the declaration can not be used to impair Australia's territorial integrity or political unity".[122] Also, because of its nonbinding status, the declaration also cannot be used as a basis for legal challenges.[123] Here again it seems that the strategic recognition of symbolic elements of native life does far more for cultivating and rehabilitating the position of the state than those they claim to help.

While the Rudd government's efforts to distance themselves from the policies of previous administrations are certainly well intentioned, their continuities with the past are strong and unnerving. In 2008, Aboriginal leaders gathered to brainstorm goals that they would like met by 2020. Chief among them was the development of a treaty that would recognize their autonomy, secure their land rights, and create an overseeing body to mediate and regulate the relationship between Aborigines and the state.[124] Others like Australian of the Year Mick Dodson have continued this call for a revamp of the state's "horse and buggy era" constitution and for a treaty to preserve government recognition of customary law, land rights, and equality in positive law.[125] Native title laws have become so convoluted and strict that they are "nearly impossible" for Aborigines to win and

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[119] Beeby, "'Divided society' without treaty."

[120] United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," *United Nations permanent forum on Indigenous issues*, September 13, 2007, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed May 1, 2009), Articles 2, 3, 4, and 8.

[121] Massola, "Aust backs black rights." See also Margaret Wenham, "Match declaration with deeds," *The Courier Mail*, April 20, 2009, http://www.lexisnexis.com (accessed May 5, 2009); Stephanie Peatling, "Activists say intervention must be reviewed," *Sydney Morning Herald*, April 4, 2009, http://www.lexisnexis.com (accessed May 5, 2009).

[122] Massola, "Aust backs black rights."

[123] The Canberra Times, "'Divided' without fair treaty," *Canberra Times*, March 30, 2009, http://www.lexisnexis.com (accessed May 5, 2009).

[124] Greg Ansely, "Pressure grows for treaty talks with Aborigines," *The New Zealand Herald*, June 3, 2008, http://www.lexisnexis.com (accessed May 5, 2009); Sarah Smiles, "2020 The Ideas Summit - outcomes & flashpoints," *The Age*, April 21, 2008, http://www.lexisnexis.com (accessed May 5, 2009).

[125] Beeby, "'Divided society' without treaty."

a treaty is seen as the best way to provide positive results for addressing reconciliation in a way that is not merely for state benefit.[126] Instead of supporting such measures that would ensure Aboriginal sovereignty, Rudd has remained tied to the Howard administration's insistence on practical commitments to address Aboriginal problems. While Rudd has certainly brought the question of reconciliation back into open political discourse, he remains tied to the interventionist policies of his predecessor and has preferred solutions that confront Aboriginal claims in coercive and paternalistic ways rather than creating a space that allows natives to collectively provide their own solutions. Because he fails to clearly see the connections between the impositions of the state and the disillusion of native communities, and has failed to listen to the people that he is practically reconciling with, Rudd is led to believe that the problem is really the solution.

While Rudd has made no gestures toward embodying guarantees to natives in positive law, we must remain optimistic and hopeful that the tide of Aboriginal activism and international concern will inspire the state to commit to the project of seeking a true reconciliation that treats Aborigines as equals in the political sphere. High Court Chief Justice Robert French has recently opened up new possibilities for this pursuit by publically dismissing legal challenges to the creation of a treaty, claiming that the state could recognize native customary law and their status as prior occupants without contradicting the grounds for Australian sovereignty.[127] All that is lacking, then, is a healthy dose of political conviction to truly overturn more than two hundred years of policy that has relegated the Aborigines to an ambiguous position both inside and outside the paternal authority of the state.

## Conclusions

While it is important to not descend too far into pessimism and essentialize the antagonistic relationship between the Australian state and Aborigines, it is also important to recognize how deep the historical roots of this relationship go. Interactions between natives and the Australian state have certainly been dynamic, but are still fundamentally characterized by the radical exclusion of the native from the juridical order. Historically this can be seen in the establishment of Crown sovereignty based upon the doctrine of *terra nullius*, where the native was deemed so low on the civilizational scale that they were not privy to

[126] Ibid.; The Canberra Times, "'Divided' without fair treaty."
[127] Joel Gibson, "Chief Justice backs Aboriginal treaty," *Sydney Morning Herald*, March 28, 2009, http://www.lexisnexis.com (accessed May 5, 2009).

proprietary rights, and in the assimilation and segregation policies of the state that tried to establish the native as something unproblematic. In more recent times, however, the image of the Aborigine has functioned as a vector through which the problems and powers of the state could be addressed. While the native was used as a symbol for the emerging multiculturalism of the state in the early 90's, Aborigines were also used as a threat against which society needed to mobilize.

In all of these discourses there remains the common theme that the native, as presently situated, must always become something else in order to be included in the state. The earliest confrontations between the state and the native encouraged the Aborigine to forsake their lands and their traditions for the sake of safety within the new state. Under the guise of humanistic principles, natives were forced into state and religiously affiliated disciplinary institutions—schools, missions, and the court system—and were held subject to paternalistic legislation. Through their ethnocentric bias, these institutions functioned as processes of subjectivation that tried to destroy the native to make way for their entry into civilization. When the image of the Aborigine became a fashionable icon of the multicultural society, natives had to act like they were unspoiled by their colonial heritage in order to gain the modest benefits of native title. When these benefits disrupted public expectations, however, the native ceased to be a romantic symbol of diversity and became a threat to the unity of the nation. Seen then as a drain on public resources and as drunks and child abusers, Aborigines were reconstituted as a problem that justified paternalistic intervention and discrimination.

The contradictions of these discourses reach their culmination in the empty efforts of the state for reconciliation. While the apology and the recognition of the DRIPs are important steps, state sovereignty is never placed into question. Accordingly, the reconciliation effort is constrained to pursue policies that legitimate state control rather than affirm and recognize native rights to sovereignty and self-determination. As indigenous leader Pat Dodson claimed, "On someone else's terms, reconciliation can not be progressed."[128] Circumventing this trap necessitates recognition of how the problems facing native communities are a product of state policies that have violated native sovereignty. What is needed is an actual commitment to new policies and treaties that empower native groups to collectively pursue what they perceive to be in their interest rather than paternalism and coercion. Because the future

[128] Russell, 329.

remains unwritten, we must remain optimistic that this relationship can fundamentally change. For now, however, we must be content with the elucidation of the problem as a way of paving a path toward a new and more fruitful solution.

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