

The doctrine of discovery:

Britain's 'divine right' to claim sovereignty over Australia

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Despite increasing secularisation in our society, the central role of Christianity in the evolution of European colonialism appears to have been either ignored or minimised in much of the historical literature in Australia, as has the role of Christianity in organically related matters such as exploration, conquest, massacres, slavery, exploitation and the destruction of other cultures. Awareness of the centrality of Christianity to colonialism, ironically, seems to have been more widespread during the colonial era when virtually all Europeans called themselves Christian and many invested in the Christian mission to 'civilise' the rest of the world. This awareness was evident not only in the case of those who believed that colonialism benefited mankind, but also in the case of those who were deeply critical of colonialism. In 1838, for example, English Quaker William Howitt wrote:

We have now followed the Europeans to every region of the globe, and seen them planting colonies, and peopling new lands, and everywhere we have found them the same—a lawless and domineering race, seizing on the earth as if they were the firstborn of creation, and having a presumptive right to murder and dispossess all other people. For more than three centuries we have glanced back at them in their course, and everywhere they have had the word of God in their mouth, and the deeds of darkness in their hands. In the first dawn of discovery, forth they went singing the Te Deum, and declaring that they went to plant the cross amongst the heathen. As we have already observed, however, it turned out to be the cross of one of the two thieves, and a bitter cross of crucifixion it has proved to the natives where they have received it. It has stood the perpetual sign of plunder and extermination.¹

European colonisation of the globe began in the wake of the Age of Discovery during the fourteenth century and continued for over five centuries until most of the world was divided among a dozen or so European imperial powers. It generally manifested as a tripartite, self-interested partnership between Church and State and private ventures. Claims of sovereignty over 'new' lands were made by explorers and sanctified by the Christian doctrine of first discovery. This doctrine, improbably perhaps, meant first discovery by Christians (i.e. European Christians) of lands not previously discovered by other European Christians. That these lands had been mostly occupied by non-Christians since time immemorial was not considered by those who framed the doctrine or made the claims. Moreover, discovery claims were often made without the knowledge or traditional owners, let alone their consent.² Because the colonisers were white and

¹ Howitt, pp499–500

² Miller, 2011, p5

because those who were colonised were people of colour, European colonisation was inherently connected to skin colour.³ The doctrine of discovery made it clear that Christians could legitimately claim whatever land they stumbled on, and thereby paved the way for the kind of violent upheaval that greatly benefited a small handful of people, but spelled disaster for most of mankind.

The assumption that the Chosen People could take the Promised Land by force is an integral part of a Judeo-Christian tradition that goes back thousands of years. We learn from the Old Testament, for instance, that Joshua and his army laid siege to the city of Jericho after the children of Israel arrived in Canaan. In accordance with God's command, seven priests blew seven trumpets for seven days as they compassed the city. On the seventh day, the Israelites all shouted at once as the trumpets blew, causing the walls of Jericho to tumble down. Then Joshua:

utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword... And they burnt the city with fire, and all that was therein: only the silver, and the gold, and the vessels of brass and of iron, they put into the treasury of the house of the LORD. (*Joshua* 6:21)

In a lifetime spanning 104 years, Joshua laid waste to many other cities in Canaan, smiting and burning as he went. (*Joshua* 11:11). Such apocryphal stories are likely to have fired the imagination of impressionable youth through the ages.

Early Christianity had parlous beginnings. It arose as little more than a messianic Jewish sect based in Greece. By 200AD Christians comprised only about a third of one per cent of the population of the Roman Empire.⁴ Yet despite a series of state persecutions, the Church continued to grow. In 313 Christianity was legalised, and in 380 it became the state religion of the Roman Empire, though its fortunes fluctuated for several more centuries. After the Western Roman Empire collapsed in 476 the Roman Church came to depend on the patronage first of the Christian Byzantine Empire and then of the Frankish king Charlemagne who was crowned Holy Roman Emperor in 800. Christianity spread into northern Europe, the Middle East and beyond. With the rise of Islam, Christian control over a significant part of Christendom — including Palestine — was relinquished. Finally, in 1095 Pope Urban II called the Christian world to arms to seize back Jerusalem from its Muslim rulers. In 1099 the Crusaders laid siege to the city, and after it fell, the carnage inflicted on its Muslim and Jewish defenders was so dreadful, even by medieval standards, that a legend arose of the Crusaders riding their horses through 'rivers of blood'.⁵ Again we see among the followers of the One True God a belligerent sense of entitlement to forcibly take possession of land they believed had been promised to them.

³ This is not to deny the fact that significant numbers of Indigenous people reached some kind of accommodation with colonialism in various ways to various degrees.

⁴ Stark, p7

⁵ Madden, pp25–37.

Over time, the Roman Church not only endured but became one of the most powerful organisations in the world. By the end of the thirteenth century, as Diarmaid MacCulloch states:

Throughout Europe ... Christians looked to the pope in Rome as their chief pastor. He looked further than that: newly aware of the possibilities of a wider world thanks to the crusades and the Western Church's thirteenth century missions into central and east Asia, the popes made large claims to be the focus of unity in all of Christendom... within its own world the Church was united by institutions whose ultimate appeal was to Rome: canon law, religious orders, indeed the whole network of parishes, dioceses and archdioceses which made a honeycomb of the map of Europe.⁶

Early in the fourteenth century the 'Black Death' arrived along the Silk Road, killing up to half the population of Europe and severely damaging economies. The demand for both gold reserves and cheap labour in the form of slaves prompted Portuguese caravels to explore new lands. In 1341 Portugal claimed the Canary Islands based on 'the priority of discovery and possession'.⁷ Soon enough they sailed down the west coast of Africa, building forts and fighting Saracens along the way. When Christian Constantinople fell to the Ottomans in 1453, the land route to Asia was cut, sparking a quest to find an alternative sea route. By the end of the fifteenth century, Vasco de Gama had reached India via the southern tip of Africa, and Columbus had 'discovered' what he believed was the East Indies. What followed was arguably the greatest upheaval in human history.

In 1521 Cortès and his Indigenous allies laid siege to the Aztec capital, Tenochtitlan. Despite small pox having already killed a third of the Aztec population, it took 93 days for the Spaniards to break through the city's defences. Once inside, in true Old Testament style, Cortès' forces went from door to door indiscriminately slaughtering the residents, burning down their houses and temples and looting everything that could be hauled away. This was how Cortès fulfilled his personal mission to bring Christianity to Mesoamerica.⁸ This pattern of conquest repeated itself around the world for centuries to come. In Latin America and on every other inhabited continent, non-believers were often confronted with a Melian dilemma: either surrender unconditionally or be annihilated. As African American theologian Katie Geneva Cannon wrote:

... if indigenous people refused to forsake the god of their religion and resisted entrusting their lives to the conqueror in the name of Christ, it was not only legal but also an act of faith, a religious duty sanctioned by God, for Christian imperialists to use whatever force was necessary—murder, starvation, rape, disease, physical exhaustion, and slavery in perpetuity—in order to rescue inferior beknighted brethren, identified as heathens, savages, infidels, pagans, and enemies of Christ. Such self-serving racist myths trapped millions of Africans and their descendants in a lifetime of chattel slavery and unmitigated poverty.⁹

This 'manifest destiny' of white Christians to assume sovereignty over land already occupied by 'heathens' can be traced to *Genesis*:

⁶ MacCulloch, p551

⁷ Miller, 2011, p12

⁸ Tutino, p16

⁹ Cannon, pp127-134

And the LORD said unto Abram, after that Lot was separated from him, Lift up now thine eyes, and look from the place where thou art northward, and southward, and eastward, and westward: For all the land which thou seest, to thee will I give it, and to thy seed for ever ... Arise, walk through the land in the length of it and in the breadth of it; for I will give it unto thee. (*Genesis*, 13:14–17)

Europeans colonised both the land and the minds of indigenous people, though not necessarily in that order. God's command to convert the rest of the world to Christianity was revealed in the New Testament:

18 And Jesus came and spake unto them, saying, All power is given unto me in heaven and in earth.

19 Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost:

20 Teaching them to observe all things whatsoever I have commanded you: and, lo, I am with you always, even unto the end of the world. Amen. (*Matthew* 28:18-20)

Each of many competing versions of the Bible is vague enough and internally inconsistent enough to loan support to a range of very different interpretations. Fundamentalists and humanists alike have been able to draw on biblical stories in order to support conflicting world views. Callous righteousness and love of one's fellow man have been the mixed messages of the Church since it was formed. While popes and bishops through the ages were likely to be as far removed from that lowly Galilean carpenter as any other living human, many parish priests and parishioners were forces of good in the world — taking their cue from the more inclusive verses of the Gospel of Jesus, carrying out charitable works and speaking out against injustice.

The ancient promise of dominion over every place that believers laid eyes on was reiterated in a slew of papal bulls in the 14th and 15th centuries as decisions were required about which European princes were entitled to claim which newly 'discovered' lands. This process resulted in the formulation of the doctrine of discovery. According to international law specialist Dieter Dörr:

At the forefront of the doctrine of discovery is the idea of the Christian European family of peoples. Thus, in the first Papal Bulls of 1344, 1436, and 1455, referring to overseas territories, any rights of indigenous populations or communities in those overseas territories are totally denied.¹⁰

In the 1454 bull *Romanus Pontifex* Pope Nicholas V states:

we had formerly by other letters of ours granted among other things free and ample faculty to the aforesaid King Alfonso [King of Portugal] – to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery ...¹¹

¹⁰ Dörr, p480

¹¹ 'Romanus Pontifex'

Here we see a litany of crimes against non-Christians elevated to a religious duty. Characterisation of non-Christians as 'enemies of Christ' both demonised them and paved the way for cruelty on a horrific scale, including the 'perpetual slavery' of the Atlantic slave trade. The 1493 papal bull *Inter Caetera* is regarded as an important early articulation of the doctrine of discovery. In it Pope Alexander VI states:

Among other works well pleasing to the Divine Majesty and cherished of our heart, conquest of the New World assuredly ranks highest, that in our times especially the Catholic faith and the Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself... We have indeed learned that you [Spaniards], who for a long time had intended to seek out and discover certain islands and mainlands remote and unknown and not hitherto discovered by others, to the end that you might bring to the worship of our Redeemer and the profession of the Catholic faith their residents and inhabitants.¹²

Inter Caetera was designed to regulate the way in which the Spanish and Portuguese divided the Americas between themselves but its principles were soon extended to cover the whole globe.¹³ When Spanish explorer Vasco Núñez de Balboa, for example, crossed the Panama Isthmus and 'discovered' the Pacific Ocean in 1513, he claimed the whole ocean for Spain.

While such papal bulls automatically became canon law, in the view of American native title expert Robert Miller, the doctrine of discovery was also 'one of the earliest examples of international law'.¹⁴ This doctrine, though evolving in certain ways, was a constant during centuries of frequent warfare and changing political landscapes. Before the Reformation English legal scholars developed the theory that the papal bulls would not be violated if English explorers only claimed lands that had not yet been discovered by any other Christian prince.¹⁵ After the Reformation, Protestant monarchs, no longer feared ex-communication,¹⁶ and arrogated to themselves the divine right to grant charters to new lands, repudiating papal supremacy by employing the 'language of the reformation'.¹⁷ English royal charters granted private ventures the authority to explore, claim and occupy 'undiscovered' territory. A comparison of such charters granted before and after the 1534 Act of Supremacy — which recognised the English monarch the Supreme Head of the Church of England — shows that they used a similar template. In 1498 the Catholic king Henry VII granted a royal charter of discovery and conquest to John Cabot, declaring:

Be it knowen that we ... do giue and grant for vs and our heires to our welbeloued Iohn Cabot ... to seeke out, discouer, and finde whatsoever isles, countreys, regions or prouinces of the heathen and infidels whatsoever they be, and in what part of the world soeuer they be, which before this time haue bene vnknown to all Christians: we haue granted to them ... licence to set vp our banners and ensignes in euery village, towns, castle, isle, or maine land of them newly found. And that the aforesayd Iohn and his sonnes, or their heires and assignee may subdue, occupy and possesse all such townes, cities, castles and isles of them found ...¹⁸

¹² 'Inter Caetera'

¹³ William Howitt speaks of Alexander VI 'giving away a world in a breath' (Howitt, p23)

¹⁴ Miller, p9

¹⁵ Miller, p19

¹⁶ Miller, p20

¹⁷ McSloy, p43

¹⁸ 'Letters Patents of King Henry the Seventh Granted unto Iohn Cabot and his Three Sonnes, Lewis, Sebastian and Sancius for the the Discouerie of New and Unknowen Lands'

And in 1584 Protestant queen Elizabeth I granted a royal charter to Sir Walter Raleigh, but added a new element to the doctrine of discovery, namely that non-Christian land had to be inhabited (i.e. settled) by Christians in order to 'perfect' their Prince's discovery claim:

... we giue and graunt to our trustie and welbeloued seruant *Walter Raleigh*, Esquire, and to his heires assignee for euer, free libertie and licence from time to time, and at all times for ever hereafter, to discover, search, finde out, and view such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People, as to him, his heires and assignee, and to every or any of them shall seeme good, and the same to haue, horde, occupie and enjoy to him, his heires and assignee for euer...¹⁹

The notion of consummation by occupation within a reasonable time would become a potential test of the continued legitimacy of discovery claims and was applied by the British to western Australia some decades after Cook claimed the eastern part of the continent. In any case, from the very beginning of the voyages of discovery, discovery claims required proof in the form of rituals that signified symbolic possession. In 1606, when Portuguese-Spanish explorer Pedro de Quiros claimed for Spain what he believed was the Great Unknown Southland, he built a makeshift church on the Pacific island of Espiritu Santo, raised both a cross and the Spanish royal ensign, discharged muskets and arquebuses, and celebrated mass.²⁰ He proclaimed:

Let the heavens, the earth, the waters with all their creatures and all those here present witness that I, Captain Pedro Fernandez de Quiros... in the name of Jesus Christ... hoist this emblem of the Holy Cross on which His (Jesus Christ's) person was crucified and whereon He gave His life for the ransom and remedy of all the human race... On this day of Pentecost, 14 May 1606...I, take possession of all this part of the South as far as the pole in the name of Jesus... which from now on shall be called the Southern land of the Holy Ghost ...and this always and forever ...and to the end that to all natives, in all the said lands, the holy and sacred evangel may be preached zealously and openly.²¹

Explorers were instructed to perform a range of 'solemnities and acts' which signified symbolic possession.²² In 1616 the Dutchman Dirk Hartog nailed a pewter plate to a post on the western Australian coast. In 1642 Abel Tasman's ship's carpenter swam through rough surf to plant a Dutch flag on *terra firma* in order to formally claim 'Van Diemens Land' for the Dutch Republic. Portuguese explorers presented their king with a handful of dirt.²³ In 1768 Cook's instructions from the Admiralty, in the event of him finding the Great South Land, read:

You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by **setting up Proper Marks and inscriptions, as first discoverers and possessors.**²⁴ (My emphasis)

¹⁹ 'Charter to Sir Walter Raleigh: 1584'. See also R Miller et al., pp104-05

²⁰ de Quiros, p249

²¹ 'Australia South Land of the Holy Spirit 14 May 1606 Pedro Fernandez de Quiros'

²² Collecting natural specimens and cultural artefacts, making charts and keeping journals were other 'proofs of discovery'.

²³ Miller, pp35-6.

²⁴ 'Secret Instructions to Captain Cook, 30 June 1768'. The 'consent of the natives' appears to have been either too optimistic or tokenistic.

On the day that Cook claimed the eastern half of Australia for Britain (22 August 1770), he wrote in his journal:

on the Western side I can make no new discovery the honour of which belongs to the Dutch Navigators and as such they may lay claim to it as their property but *the Eastern Coast* from the Latitude of 38° South down to this place I am confident was **never seen or viseted by any European before us and therefore by the same Rule belongs to great Brittan** Notwithstand I had in the Name of his Majesty taken possession of several places upon this coast I now once more hoisted English Coulers and in the Name of His Majesty King George the Third took possession of the whole Eastern Coast ...²⁵ [My emphasis]

Any considered reading of this extract ought to render Cook's meaning is unmistakable: he claimed the eastern coast of Australia because he believed his was the first (European) to 'discover' it. He did not claim the whole of Australia because he knew the Dutch had already 'discovered' the western part. This alone is sufficient evidence that British claims of sovereignty over the eastern coast of Australia were made on the basis 'first discovery'. On that fateful day in August, hoisting the Union Jack and firing a volley of shots were acts of symbolic possession, giving formal expression to Cook's claim. This wasn't Cook's only claim in the Pacific during this first voyage, however. As a loyal servant of his monarch, he had made a series of other discovery claims in the same centuries-old tradition of all those explorers who had sailed before him. In July 1769 he claimed the Society Islands near Tahiti. On 19 July, he wrote:

To the Chief was given a small plate on which was Stamp'd the following inscription—viz., His Britannick Majesty's Ship, Endeavour, Lieutenant Cook, Commander, 16th July, 1769, "Huaheine." [which] the Chief promised never to part with. ***This we thought would prove as lasting a Testimony of our having first discover'd this Island*** [Ulitea] as any we could leave behind.²⁶

This testimony was the kind of proof required of such discovery claims. Later, on 15 November, Cook claimed possession of Mercury Bay and on 31 January 1770 he claimed possession of Queen Charlotte Sound – both in New Zealand. In all cases, he 'hoisted the English jack'. Cook regarded the east coast of Australia as being sparsely inhabited by nomadic hunters and gatherers, but he knew that the Polynesians were gardeners who lived in (often) fortified settlements ruled by chieftains. After all, they had presented him with hogs and tropical produce. The question arises, therefore, if these islands were *not* claimed on the basis of 'first' discovery, on what basis were they claimed, given that there are no clues to any other rationalisation in Cook's journal? If they were claimed on the basis of first discovery, why would Cook need a different rationalisation to claim the east coast of Australia?

As Miller states:

When England and English colonists set out to explore, exploit and settle new lands outside of Europe in the fifteenth through the nineteenth centuries, they justified their claims to sovereignty and governmental and property rights over

²⁵ *Cook's Journal, August, 1770*. Note that the Gutenberg version has deleted the struck-out words.

²⁶ Cook, 19 July 1769

these territories and the Indigenous inhabitants with the Discovery Doctrine. This international law had been created and justified by religious and ethnocentric ideas of European superiority over the other cultures, religions, and races of the world.²⁷

Cook's claim was 'consummated' by settlement just 18 years later. Like Cook, Governor Arthur Phillip hoisted the English Jack to symbolise British sovereignty in New South Wales. Phillip's orders appear to reveal little or nothing about the legal basis of Britain's claim to NSW, though they did empower him to grant land to colonists. Historian of European Law Jan Rudnicki argues (correctly) that there is no sign of any legal reasoning in Governor Phillip's Instructions of 25 April 1787 and (unconvincingly) that neither Phillip nor the British government at that particular moment had any legal doctrine in mind.²⁸ Of course, the Colonial Office and colonial administration alike must have been preoccupied with the practical matter of establishing a viable penal colony on the other side of the world, the legitimacy of which was not subject to any legal challenge by other European nations. Yet there can be little doubt that Phillip was well-versed in the doctrine of discovery and its applicability to the new colony.

The year after the British settled in New South Wales, a widely-anticipated 'official Phillip publication'²⁹ was printed in Britain, namely, *The Voyage of Governor Phillip to Botany Bay*, published by John Stockdale. In its 2003 digital version of the book, the University of Sydney Library (erroneously, I believe) attributes Arthur Phillip as the author, although the book presents itself as a reconstruction of Phillip's perceptions. The 'anecdotes' of Phillip are drawn from a variety of sources, including his own papers and the journals of various officers who had sailed out with the First Fleet, some of whom had returned to England by March 1789. In a section of the book described in its list of contents as 'Reasons for fixing our settlement there', we read the following extract:

To New South Wales England has the claim which a tacit consent has generally made decisive among the European States, that of prior discovery. The whole of that Eastern coast, except the very Southern point, having been untouched by any navigator, till it was explored by Captain Cook. This consideration, added to the more favourable accounts given of this side of the continent than of the other, was sufficient to decide the choice of the British government, in appointing a place for the banishment of a certain class of criminals.³⁰ [My emphasis]

So all the European states agreed that prior discovery is what really matters. Aboriginal people are not discussed; there are no references to Indigenous population density, economy or governance in this section of the book. Those factors certainly affected the way occupation unfolded, but they were not even remotely considered when it came to determining the legitimacy of the settlement.

²⁷ Miller et al., p37

²⁸ Rudnicki, Section 3, para 1

²⁹ Dobrez, p39

³⁰ Stockdale, Ch 1

Employing the principle of 'prior' discovery as the key, self-evident justification for claiming new lands was not just something adopted by Cook or fairly attributed to Phillip, but it was most probably widely supported by many within the British ruling circles at the time. The aristocratic complexion of the included list 'subscribers' to Stockdale's book— among them something in the order of 6 dukes, 37 other members of the peerage and 29 knights of the realm (including Banks) — makes it reasonable to infer that there would have been broad acceptance of 'prior' discovery amongst those in power.

Another insight into British and indeed European thinking around that time comes, curiously, from a Frenchman: the explorer Nicholas Baudin. After he had sheltered at Port Jackson in 1802 as Governor King's guest, Baudin wrote the governor a private letter challenging Britain's

ill-founded claims to Van Diemen's Land ... that Tasman and his heirs did not bequeath to you [i.e. the British], so you should expect that sooner or later they will say to you *Sic vos non vobis nificatus*, etc. [So you don't build your nest]. To my way of thinking, I have never been able to conceive that there was any justice or even fairness on the part of ***Europeans in seizing, in the name of their government, a land they have seen for the first time*** when it is inhabited by men who did not always deserve the titles of "savages" and "cannibals" that have been lavished on them, whereas they were still only nature's children and no more uncivilised than your Scottish Highlanders of today or our peasants of Lower Brittany ... [My emphasis]³¹

The British considered that earlier European claims to other parts of New Holland had lapsed because they had not been followed by settlement within a reasonable time. The British did not trust the French, suspecting them of planning to establish settlements along our southern coast. So they strategically established new settlements of their own and in the process extended their claim to sovereignty over the whole continent, without in their view breaching the principle of discovery.

In 1792 US Secretary of State Thomas Jefferson claimed that the Doctrine of Discovery was international law that applied to the new US government.³² The discovery principle seems to have been sufficiently embedded American popular consciousness to encourage the writer and sometime diplomat Washington Irving, in his 1809 satire 'The History of New York', to mockingly justify European colonisation of North America on the basis of the rights of discovery, cultivation, civilisation, extermination (by gunpowder), authority (the papal bull) and lunacy.³³ In the 1823 US Supreme Court case *Johnson v McIntosh*, long-serving Chief Justice John Marshall summarised the history of discovery claims in North America, asserting that after the War of Independence 'the powers of government, and the right to soil' passed from Great Britain to the United States'.³⁴ The following extracts from his summary give the flavour of Marshall's summary:

³¹ Baudin, 24 December 1802

³² Dunbar-Ortiz, Section: The whip of colonialism, para 2

³³ Knickerbocker, pp45-57

³⁴ Marshall, p584

... discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves ... The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.³⁵

Spain [rested her title] on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France, also, founded her title to the vast territories she claimed in America on discovery.³⁶

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe.³⁷

No one of the powers of Europe gave its full assent to this principle [discovery], more unequivocally than England. The documents upon this subject are ample and complete.³⁸

Applying the same reasoning that was evident in NSW Governor Bourke's 1835 Proclamation, Marshall adds:

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.³⁹

In 1835 John Catron — later, another long-serving justice of the US Supreme Court — delivered the opinion in the Tennessee Supreme Court case *State v Foreman*. Catron was more jugular than Marshall. The settlers' rights in North America, he argued, not only owed their origins to discovery,⁴⁰ but the Christian powers had the right to 'coerce the obedience' of Native Americans:

We maintain, that the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to assume sovereignty over, and to govern the unconverted natives of' Africa, Asia, and North and South America, has been recognized as a part of the national law, for nearly four centuries, and that it is now so recognized by every Christian power, in its political department, and its judicial ... That, from Cape Horn to Hudson Bay, it is acted upon as the only known rule of sovereign power, by which the native Indian is coerced; for conquest is unknown in reference to him in the international sense. Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution, this continent never could have been inhabited by our ancestors. To abandon the principle now, is to assert that they were unjust usurpers; and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in honesty abandon it, return to Europe, and let the subdued parts again become a wilderness and hunting ground.⁴¹

A few years later William Howitt would argue that Pope Alexander VI granting to Ferdinand and Isabella all the countries inhabited by infidels which they had discovered or would discover was the genesis

³⁵ Marshall, p574

³⁶ Ibid.

³⁷ Marshall, p575

³⁸ Marshall, p576

³⁹ Marshall, p596

⁴⁰ Catron, p258

⁴¹ Catron, p277. This ruling was reaffirmed seven years later by the US Supreme Court case: '*Martin v. Waddell*', 41 U.S., 1842, p367, <https://supreme.justia.com/cases/federal/us/41/367/>

of that grand delusion which led the first discoverers of new lands, to imagine themselves entitled to seize on them as their own, and to violate every sacred right of humanity without the slightest perception of wrong, and even in many instances, in the fond belief that they were extending the kingdom of Christ.⁴²

In 1892, employing the language of the fifteenth century papal bulls, Pope Leo XIII defended the Christian conquest of the Americas. Christopher Columbus, he said, saw Native Americans:

in spirit a mighty multitude, cloaked in miserable darkness, given over to evil rites, and the superstitious worship of vain gods. Miserable it is to live in a barbarous state and with savage manners: but more miserable to lack the knowledge of that which is highest, and to dwell in ignorance of the one true God. Considering these things, therefore, in his mind, he sought first of all to extend the Christian name and the benefits of Christian charity to the West.⁴³

Scholarly opposition from within the Church to both the brutality of the conquistadors and the doctrine of discovery came soon after reports of that brutality reached Spain. Most notable among the oppositional scholars was Francisco de Vitoria (1483-1546) who belonged to the Spanish Late Scholastic School. In the words of Dörr, Vitoria:

acknowledged that the recently discovered Indians ... had rights of sovereignty and possession. In his view, they were the legal owners and occupiers of the land. Spain could neither derive title to Indian land through the Emperor nor the Pope. The Emperor was not lord of the world, and the Pope's authority extended only over Christendom, so accordingly he could not rule over any territories of heathens. Even the right of discovery did not give Spain any legitimate title over the existing Indian empires.⁴⁴

Such faith-based recognition of the rights of 'all men' was not unique. In 1700, while criticising slavery in his essay 'The selling of Joseph', Massachusetts jurist Samuel Sawell wrote:

It is most certain that all Men, as they are the Sons of Adam, are Coheirs; and have equal Right unto Liberty, and all other outward Comforts of Life. GOD hath given the Earth [with all its Commodities] unto the Sons of Adam, Psal 115. 16. And hath made of One Blood, all Nations of Men, for to dwell on all the face of the Earth, and hath determined the Times before appointed, and the bounds of their habitation ...⁴⁵

While such humanist ideas challenged the legitimacy of colonialism, the degree to which they lightened the colonial burden before the abolition of slavery through most of the British Empire in 1833 is not obvious. For one thing, they were in competition with the views of other influential 'champions of the rights of man' like John Locke (1632-1704) and Emer de Vattel (1714-1767). According to Andrew Fitzmaurice:

There were ... two traditions of employing natural law in discussions of empire. The first, following Vitoria, was a defence of Indigenous rights; the second used natural law to justify dispossession. Throughout the eighteenth and nineteenth centuries both of these traditions were vibrant, and often both were evident in any one discussion of the problems of empire.⁴⁶

⁴² Howitt, p22

⁴³ 'How popes have addressed the conquest of the Americas,'

⁴⁴ Dörr, p480. See also Francisco de Vitoria, 'De Indis et de Ivre Belle Reflectiones'.

⁴⁵ Sawell, p1

⁴⁶ Fitzmaurice, p8

Englishman John Locke is often described as the founder of modern liberalism. Yet, despite his colossal contributions to modernity, Locke's view that those who cultivated the soil had the right to displace those who lived 'in a natural state' (i.e. hunter-gatherers) vindicated dispossession. In his 1690 *Second Treatise of Civil Government* he wrote:

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And tho' all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion, exclusive of the rest of mankind, in any of them, as they are thus in their natural state: yet being given for the use of men, there must of necessity be a means to appropriate them some way or other, before they can be of any use, or at all beneficial to any particular man. The fruit, or venison, which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.⁴⁷

Locke recognised the right of hunters and gatherers to own the 'fruits of the earth', but not their right to own the earth which produced those fruits. Ownership of the earth derived from subduing it:

But the chief matter of property being now not the fruits of the earth, and the beasts that subsist on it, but the earth itself; as that which takes in and carries with it all the rest; I think it is plain, that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common. Nor will it invalidate his right, to say every body else has an equal title to it; and therefore he cannot appropriate, he cannot inclose, without the consent of all his fellow-commoners, all mankind. God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e. improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.⁴⁸

English publicists in the seventeenth century asserted that 'the North American Indians had failed to turn trees into chairs and that the English were therefore the first takers of that land'.⁴⁹ In a similar vein, Vattel argued that Europeans were justified in taking possession of territory in the New World because their land practices were better able to feed mankind than the 'erratic nations whose scanty population is incapable of occupying the whole'. In 1758, in *The Law of Nations*, he reasoned:

There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed ... in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savage stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had, from the beginning, resolved to appropriate to itself a vast country; that the people might live only by hunting, fishing, and

⁴⁷ Locke, Section 26

⁴⁸ Locke, Section 32

⁴⁹ Fitzmaurice, p8

wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not, therefore, deviate from the views of nature in confining the Indians within narrower limits.⁵⁰

Vattel included the caveat that Europeans had an obligation to occupy and cultivate whatever land they claimed. He questioned 'whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate.'⁵¹ Bringing into focus, as Locke and Vattel did, the 'backwardness' of Indigenous peoples represents a degree of secularisation of the justification for dispossession. This secularisation was accentuated by the growing popularity of pseudo-scientific Social Darwinism later in the nineteenth century. Vattel's influence is clearly visible in the disturbingly candid opinion that Catron delivered in *State v Foreman*:

That mere wandering tribes of savages, or such as have a stated place of residence, should claim a vast extent of forest, as hunting grounds, for the nurture of wild animals, and exclude the cultivation of the earth, is unreasonable and unjust. The earth belongs to all men in general, destined by the Creator to be their common habitation; and all derived from nature the right of drawing from it their subsistence and those things suitable to their wants. This it would be incapable of affording, was it uncultivated. Every nation is then obliged, by the law of nature, to cultivate the ground that has fallen to its share. Those people, like the ancient Germans and the modern Tartars, who, having fertile countries, disdain to cultivate the earth, and choose rather to live by rapine, are wanting to themselves, and deserve to be exterminated as savage and pernicious beasts. There are others, who avoid agriculture, and would live only by hunting and their flocks. This was allowable, in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its few inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations resolved to live in this manner.⁵²

The degree of recognition of indigenous land rights at least roughly corresponded to Vattel's 'ladder of civilisation'. In Fitzmaurice's view, there was a taxonomy 'in which peoples were placed on a developmental ladder. Their position on that ladder would determine the degree of colonial intervention that could be justified.'⁵³ So, if the original owners were relatively small mobile groups of hunters and gatherers who owned the land in common and had no obvious government, their property rights were less likely to be recognised and treaties were less likely to be negotiated. In 1833 the NSW Supreme Court described Aboriginal people as 'wandering tribes ... living without certain habitation and without laws.'⁵⁴ In 1837 the final report of the House of Commons Select Committee on Aborigines concluded that Australian

aboriginal tribes, [formed] probably the least instructed portion of the human race in all the arts and social life. Such, indeed, is the barbarous state of these people, and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded.^{55 56}

So when Bruce Pascoe tells us that Aboriginal Australians were not just 'wandering savages', the perception he is challenging is actually hundreds of years old. It is a perception that might explain why

⁵⁰ Vattel, p100

⁵¹ Vattel, p99

⁵² Catron, p266

⁵³ Fitzmaurice, p13

⁵⁴ Dorr, pp486-87

⁵⁵ Cannon, pp66-7

⁵⁶ As late as 1919, Sigmund Freud was using similar language to describe Aboriginal Australians: Freud, Ch 1, para 4

settlers seemed to have demonstrated little or no sense that they were stealing Aboriginal land. According to Meredith Lake, the European colonists who overran Australia cited Locke's idea that their labour 'transformed nature into property'.⁵⁷ She quotes Victorian pastoralist Robert von Steiglitz who 'spat out', 'I believe the general rule is that, if the people cultivate or graze the land they have claim to it. These creatures did neither.'⁵⁸

Arguably, the term that most accurately describes the views of Locke and Vattel is the 'doctrine of backward peoples'. Referring to a ruling by the 1971 NT Supreme Court, native title expert, David Lavery comments:

The terra nullius doctrine is commonly asserted to be the basis upon which Great Britain claimed territorial sovereignty over eastern New Holland in 1788 and, subsequently, the remainder of the Australian continent. However, in *Milirrpum v Nabalco* ... in which the only comprehensive account in the Anglo-Australian jurisprudence to examine this issue prior to the 1992 Mabo (No 2) decision, it was not terra nullius which was declared to be the foundation but the Doctrine of Backward Peoples, which posits that a territory inhabited by 'uncivilised inhabitants in a primitive state of society' can be dispossessed by 'more advanced peoples'.⁵⁹

The doctrine of backward peoples might have been a better choice of terminology than terra nullius in the 1990s when Henry Reynolds and his colleagues were seeking a 'convenient term' to accurately describe how Europeans justified their disregard of indigenous sovereignty and native title.⁶⁰ As Reynolds acknowledges, there is no historical record of the term being used until the mid to late nineteenth century,⁶¹ and it has no agreed single meaning.⁶²

There is no evidence that early explorers or settlers ever claimed that the inhabited parts of Australia they had seen were uninhabited.⁶³ There is evidence, though, that many believed they had a God-given right to claim and settle on land that was occupied by 'savages'. It is therefore puzzling why there has been so little recognition in Australia of either the Christian nature of colonialism or the fact that the Christian doctrine of discovery was our foundational myth in the sense that the British solely based their sovereignty claims on it. Rather than examining the degree to which the Church bears historical responsibility for the evils of colonialism, those outside the Church have tended to problematise the discussion by getting caught up in arguments about whether the British breached international law, or broke their own laws, or ignored the advice of their own jurists. Such arguments not only deflect from the bigger picture, but they indicate a failure to grasp the fundamental reality that *the law serves the state*. Christian imperial law paved the way for colonialism. The best jurisprudential arguments, in my view, are those that lay bare the ways in which

⁵⁷ Lake, p104

⁵⁸ Ibid.

⁵⁹ Lavery, p53

⁶⁰ 'A New Historical Landscape'

⁶¹ Ibid. See also Attwood, 'On Possession Island, Myth, History and Captain Cook'. The earliest date I can find that for the use of the term terra nullius in Australia is 1885 in an article about Bismarck's Realpolitik headed 'Germany' in the 28 February 1885 edition of the *South Australian Register*.

⁶² Terra nullius can mean uninhabited land, sparsely inhabited land, uncultivated land and/or unowned land.

⁶³ Parts of Australia were uninhabited in 1788, most notably off-shore islands like Kangaroo Island.

British and European law enabled the tearing apart of the indigenous world with the grave consequences that persist today. The following comment by American human rights lawyer David Waggoner is a fine example of such arguments:

In the 15th and 16th centuries, acting under color of law as decreed by various popes of the Catholic Church, Spanish and Portuguese conquistadors laid claim to vast lands of the Americas, declaring the New World and its human inhabitants to be under the divine authority and control of Jesus Christ and his church on earth. It is well settled what followed: five centuries of death, displacement and cultural erasure. While many contemporary scholars and opinion makers may uphold the practical legacy of those papal decrees in so far as they were the origin of title to real property in the Americas, and thus the foundation of the world's largest economy, few today would openly affirm the logic of horror by which they operated.⁶⁴

In the minds of the British, then, the legitimacy of their sovereignty claims over eastern Australia derived from their confidence that Cook was the first European to sail up the east coast and lay claim to it. This accorded with a time-honoured practice which was observed around the world by all European imperial powers since the beginning of the Age of Discovery, and which carried the *gravitas* of an internationally-recognised (initially, European) legal convention. It can be traced to the sense of entitlement inherent in seizing land promised by God in the earliest days of Judeo-Christian monotheism. Rights that derived from 'first discovery' were articulated in and sanctified by the doctrine of discovery which had issued from a series of medieval papal bulls. It was irrelevant to discovery claims that 'new' lands were already inhabited, and the sovereignty rights of 'heathens' were therefore largely disregarded. As European kingdoms extended their power and influence globally, Christendom expanded and the Word of God was spread, by force when necessary. Initially dispossession was rationalised by pointing out the perceived evils of the 'heathenism' of Indigenous peoples. Later, influenced by thinkers like Locke, the key rationalisation for dispossession subtly shifted to pointing out the benefits of 'civilising savages' and subduing the land they roamed over.

It is perhaps fitting if the last word here goes to Indigenous Australian musician Ziggy Ramo in the form of the lyrics of his 2021 song 'I am just giving my truth':

We start the story in 1493
With a piece of paper called the doctrine of discovery
Invoked by Pope Alexander VI.
Without this good Christian, our story don't exist.

Captain James Cook, he boarded a fleet,
And he was armed with the doctrine of discovery.
The same tactics were used by Columbus.
It's how today Australia claims terra nullius.

And on that paper the pope did write,
"You are only human if you've been saved by Christ".
And if there are no Christians in sight in sight
The land that you stumble on becomes your God-given right.⁶⁵

⁶⁴ Waggoner, p750

⁶⁵ Ramo: 'I am just giving my truth'

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