



Debtscape

Australia's Constitutional Nomopoly

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Abstract

This article reveals the central role played by the Australian constitution in producing the Australian debtscape through the establishment and maintenance of a colonial nomopoly. Australia's colonial law is foundationally premised upon violent acts of invasion of Indigenous land and water, and because this continues without consent, the colonial state uses its monopoly of violence to manufacture consent through law for two main reasons: the first is to generate retrospective exculpation for historical wrongs and economic theft (the debtscape) and the second is to establish consent frameworks to provide cover for future exploitation and theft (the colonial nomopoly).

Keywords: colonialism, Australian constitution, nomopoly, debtscape, deathscapes

Colonial Nomopoly and Sovereign Debtscape

This article is concerned with the Australian constitution (the Constitution) and in revealing the structure it provides for exploitative coloniality to persist in the present. While the Constitution has been critiqued on racial grounds and Constitutional recognition for Indigenous people has been on the political agenda formally since 2012,¹ insufficient attention has been paid to its structural meaning/function in relation to the 'racial' problem the Recognise campaign has sought to redress. Here, critical attention to the structural role of the Constitution reveals its status as colonial *nomopoly*. This term is coined to make visible the way that the Constitution occupies the position of singular legal authority by effacing its foundationally violent origins and by imposing a framework that seeks to eliminate competition for law.

A *nomopoly* denotes a monopoly in the creation of *nomos*/law (Macdonald & Sandomierski 2006) but in a colonial context it has the added feature of structurally foreclosing the operations of the first laws of Aboriginal peoples by subjecting all to its rule. The absence of a legitimate basis for this subjectification or 'throwing under' (Macdonald & Sandomierski 2006) is what gives rise to the need for continual policy moves seeking to absolve the colonial legal apparatus for lacking consent to rule. The Australian Constitution as a key exemplar of the colonial *nomopoly* plays a critical role in retrospective exculpation for historical and ongoing state violence and economic theft. It also works to produce the legal borders against which targeted populations experience state violence. The *nomopoly* then is a critical component of the *debtscape*, the zone where Australia's sovereign debt (Giannacopoulos 2017)

is disavowed through consent frameworks (colonial laws), which provide license for the colonial state to obfuscate existing evidence of its violent practices and to continue with exploitation and theft.

A Note on Language

This article critiques colonial Australian law by introducing new theoretical concepts necessary for the critical unpacking of law and its colonial function. Because *nomophilia*, the inability to see law as anything other than the remedy for social issues (Giannacopoulos 2011; Giannacopoulos 2020) pervades so much legal and academic thinking there is an urgent need for a new lexicon to resist and challenge the exploitative coloniality of Australian law. Critical approaches to the Constitution reveal the racial and economic ordering functions that it performs. This is increasingly important for two main reasons. The first relates to the fact that constitutional 'reformist' positions continue to dominate the Australian national debate, academic legal commentary and legal pedagogy, despite the fact that it is structurally illogical that colonial law could ever deliver decolonial justice. And the second is that a critical legal lexicon reveals the link between constitutional boundaries and state violence occurring at the so-called national/geographic borders of the colonial state. The *Deathscapes* project provides an evidentiary ground for showing how settler colonial states systematically violate targeted populations, Indigenous, refugee and economically disenfranchised peoples, at and *with* the borders generated through the work of the colonial *nomopoly*.

State Violence Archive: Deathscapes²

Deathscapes is an international project with the aim of mapping race and violence in the colonial settler states of Australia, the US, Canada and the UK. The evidentiary aspect of the *Deathscapes* project is found in the meticulously researched case studies providing concrete proof of state violence as the lived effect of colonial governance in settler colonial contexts. The project which generates a single site in which otherwise silenced voices, artworks and testimonies relating to the lives of people targeted by state violence are collected and interconnected, has the simply stated yet ambitious objective of ending deaths in custody. It is an analytical archive, organised around key case

studies which foreground the culpability of the state in countless deaths and where global imperial forces are revealed. The focus of this article is not to discuss the content of *Deathscapes* at length but to suggest that the significance of the existing case studies lies in their ability to provide analytical frameworks to understand unfolding violence. The recent fatal killing by police of Warlpiri man Kumanjayi Walker while at home and on his own country at Yuendumu in the Northern Territory³ can be read against at least two of the *Deathscapes* case studies. Through case study titled *The Road: Passage through the Deathscape*⁴ we learn of the life and death of Mr Ward a senior Ngaanyatjarra lore man and artist, aged 46, who died in the back of a prison van while being transported across the Western Desert on 27 January 2008 following his arrest for drink driving. Following his death, the Coroner said that Mr Ward had not only suffered a terrible death but that it was avoidable. The fact that the state official found Mr Ward's death to be avoidable speaks directly to the profound absence of a duty of care towards him.

Read in isolation, this police killing may seem exceptional, but *Deathscapes* does not allow for this simplistic reading. *At a Lethal Intersection: The Killing of Ms Dhu*⁵ tells the story of Ms Dhu, a 22-year-old woman of the Yamatji-Nanda Nation and the Banjima People, who was taken into custody at the South Hedland police lock-up under a warrant of commitment for unpaid fines. She died within 44 hours of entering the custody of Western Australian police. Because the project connects crucial dots around the workings of colonial power, it offers a holistic way of understanding contemporary violence, in this case police violence, while also building a body of evidence of that violence through artwork, testimony, film and poetry. As Jordy Silverstein has observed, *Deathscapes* affirms that 'deaths in custody of racialised people ... are not an accident. They are by design. They are a feature, not a bug, of the system' (2019). All three deaths of Mr Ward, Ms Dhu and that of Kumanjayi Walker might be seen as avoidable, to borrow the words of the Coroner but they are also the logical outcome of a system constitutionally built to eliminate Indigenous peoples and their laws.

With other digital archive projects identifying that state harm or crime are on the rise, I suggest that *Deathscapes* stands apart in its global and scholarly activist vision. *The Border Crossing Observatory* (BOB)⁶ produces high quality,

innovative academic research to transform understandings of irregular migration and border control. *The Killing Times* project is an updatable, interactive map showing evidence of mass killings from 1788 until 1928, which is described as a sustained and systematic process of conflict and expansion.⁷ The *Deaths Inside* Project, from 2019 tracks all Indigenous deaths in custody in Australia and monitors systemic issues like the provision of appropriate medical care.⁸ While the above projects have an exclusive focus on single issues such as irregular migration, historical killings of Indigenous peoples or on the counting of deaths, the *Deathscapes* project is conceptually expansive and politically daring: the unifying purpose and analytical approach is about social agitation and action to end state violence. Because *Deathscapes* does not have a single focus or limiting borders around the state actions and violations that come under its purview and critique, it pioneers an original borderless approach to the study of state violence. It does this by deliberately moving 'away from the nation as the primary analytical unit to consider forms of governance and social relations that are transnationally linked'. In taking a 'cross-disciplinary approach to racialized state violence' the site maps 'racialized deaths in custody in all their visual, analytical and geographical dimensions'.⁹ Methodologically, intellectually and politically, the approach taken by *Deathscapes* is one of open borders. Unlike its peers, the project does not carefully delineate boundaries beyond which critique, and analysis of state violence cannot extend. *Deathscapes* works against the silencing practices that accompany state violence and it does this by adopting and modelling a powerful genealogical method that is attentive to local detail within a global context where intellectual and political solidarity is urgently needed.

A History of the Present and Borderless Methodologies and Pedagogies

Chief Investigators of the *Deathscapes* project, Suvendrini Perera and Joseph Pugliese, have for nearly three decades produced a body of critical intellectual work on race that uniquely positions them to direct this groundbreaking project that is engendering profound new forms of scholarly activism. The project funded primarily by the Australian Research Council is built inclusively to effect social change on the most pressing questions of injustice. It constitutes a racial

'history of the present' and as such provides resources and a model for scholarly and political activism. As David Garland has observed, a history of the present 'sounds paradoxical at first' (2014, p. 367). But this Foucauldian methodology that 'explicitly and self-consciously begins with a diagnosis of the current situation' and has an 'unabashed contemporary orientation' (Garland 2014, p. 367) is precisely the genealogical approach of *Deathscapes*. The site reveals through the voices and artefacts of those targeted by violent power 'a series of troublesome associations and lineages' in order to trace how contemporary practices of state violence emerged out of 'specific struggles, conflicts, alliances, and exercises of power, many of which are nowadays forgotten' (Garland 2014, p. 372). This method offers a way of writing critical race history by using historical materials to assess and understand the modern day and indeed to 'problematize the present' (Garland 2014, p. 372). *Deathscapes* is genealogical because it allows otherwise silenced voices to speak to power struggles and attempts at domination to show how colonial power has taken its contemporary form. There can be no question that the burden assumed by *Deathscapes* in generating a body of evidence of global state violence is a form of writing history in the present by engaging boldly with 'forces active in the present' within 'a field of power relations and political struggle' (Garland 2014, p. 373). Because of this approach, *Deathscapes* has a profound pedagogical function.

As an academic working with and between the disciplines of law, sociolegal studies and criminology and with undergraduate training in English literature, law and with a PhD in Cultural Studies, I have experienced the gatekeeping function of academic and pedagogical borders throughout my career. While universities ostensibly welcome interdisciplinarity, in reality this happens alongside the powerful policing of disciplinary boundaries. I teach criminology without being a criminologist, but this is not unusual in the neoliberal university. I teach courses that are conducted from within the auspices of the colonial discipline of criminology (Agozino 2004; Cunneen and Tauri 2019, p. 359) and which examine the ways in which some populations are targeted for punishment in the absence of having committed any crime. Or, where crime has been committed, crime is defined and policed in a way that embeds a colonial order. The courses deliberately depart from understandings of crime

that posit an individual as the perpetrator of crime against another individual and/or symbolically against society. The idea that crime or wrongdoing against populations can also be perpetrated by those in power charged with the responsibility for the protection of peoples is disruptive to the core ideas holding the discipline together. In this approach to crime, the concepts of colonialism, race, sovereignty, austerity and illegitimate state power are crucial. There is a focus on the punishment of Indigenous populations, the punishment of those seeking asylum yet unable to cross state borders and on populations subjected to economic austerity regimes. This course requires an evidentiary body to draw on as well as a critical vocabulary in order to reveal how the punishment of populations is represented as legitimate. Within this context I deploy *Deathscapes* to offer a decolonial approach to the teaching of crime. Chatterjee and Maira have identified that 'imperialism and racial statecraft has three fronts: military, cultural and academic' (2014, p. 7). Their 'conceptualization of the imperial university links these fronts of war, for the academic battleground is part of the culture wars that emerge in a militarized nation, one that is always presumably under threat, externally or internally' (2014, p. 7).

Deathscapes has been a crucial resource with which to teach effectively against the criminological grain into a discipline deeply embedded within practices of imperialism. Criminology students are predominantly taught about the various arms of the criminal justice system (courts, policing, victimology) and crime is portrayed as being the act of an individual against society. When those directly and disproportionately impacted by the criminal justice system speak about it, their voices are deemed 'subjective, unscientific, and/or, at best, folk epistemology' by the imperial discipline (Cunneen & Tauri 2019, p. 364). This 'ideologically driven dismissal of Indigenous' and/or embodied knowledge is 'a key colonial project within the academy ... especially within criminology' (Cunneen & Tauri 2019, p. 364). *Deathscapes* gives value to otherwise discredited knowledge and gives it additional power by placing it within a knowledge community. *Deathscapes* provides a decolonising evidentiary ground for revealing the artificial and colonial line that holds between objective and subjective knowledge while showing the bloody impact of the colonial state's so called rational and objective legal order. *Deathscapes* is both archive

and methodology with pedagogical and social action applications. In the section of the article that follows I move to the law's role in producing but then also attempting to nullify the violence that *Deathscapes* so comprehensively brings to light.

Colonial Nomopoly or Constitutional Borders

The recent police killing of Kumanjayi Walker while in his home and on his own country continues to bear out the *Deathscapes* contention: that Indigenous peoples continue to die at the hands of the colonial state machinery. Regardless of whether the most recent killing in custody is proven to be murder, or found to be justified, neither outcome will be sufficient to address the deeper issue at the heart of the Australian nation. The violent death of Kumanjayi Walker must be understood in relation to *other* evidence—evidence that the law might deem circumstantial, but that is available on the public record tracking lethal policing of Indigenous peoples on their own lands. Historically, policing has played and continues to play a critical role in dispossession in a way that works to displace self-determination as a real option for Aboriginal peoples on their own countries. Chris Cunneen has shown how unlike any other group, Indigenous peoples were subjected to military-style policing, akin to a state of war by paramilitary policing units such as the Mounted Police and Native Police forces. This form of policing, according to Cunneen was integral to the expansion of the British jurisdiction in Australia and it was influenced in its intensity by the degree of Indigenous resistance to the colonial will.

While dominant criminology would tell us that policing is said to operate by consent and through the impartial application of the rule of law, this cannot be said to hold true in Australia. Not only were Indigenous people resisting colonial governance and not policed by consent but the rule of law itself was ritually suspended from operation in the early colonial period. This meant that the murder of Indigenous people by specialist police forces or by settlers could be and was overlooked (Cunneen 2017, p. 3). So not only is it a feature of *nomopoly* to deny Indigenous law and sovereignty, but also for the coloniser to disallow the operation of the colonial where it might bring some measure of justice to Indigenous peoples. As Australia awaits the trial of the police officer who killed Kumanjayi Walker, the law will begin to do its work in transmuting

witness reports, forensic data and all other information into evidence. Evidence is crucial to establish facts, ascribe guilt or absolve a defendant. But *other* evidence, as captured by *Deathscapes* for example, already exists and relates to the culpability of a colonial system that has resulted in systematic Aboriginal death, and not just to the actions of an individual officer. At this juncture it is important to reveal in more detail the relevance of the Constitution, as *nomopoly*, to the carcerality and related harm revealed by the *Deathscapes* project.

Australia, as it is currently legally, politically and economically constituted came into being in 1901 following the passing of a British Act of Parliament, the *Commonwealth of Australia Constitution Act 1900*. This is 'whiteman's law' to use the words of Senior Lawman Murray George who said that 'Aboriginal law must sit on top of whiteman's law, because our law is the law of the land' (Sovereign Union 2013). Alongside this critique sits the position of eminent constitutional lawyer George Williams declaring that the Constitution has 'withstood political crises and the passage of time to produce a stable democracy responsive to and representative of the people. This has been a crucial factor in the economic and other successes of the Australian nation' (2000, p. 644). While the Constitution has been critiqued on racial grounds, the dominating voices in this space advocate for reform (Williams 2000; Davis 2017). This leaves decolonial critical scholarship of the Constitution produced by Indigenous and non-Indigenous scholars (Watson 2012; Watson 2018; Giannacopoulos 2015; Giannacopoulos 2018) marginalised. And while it is logical that constitutional law as a key area of legal inquiry would not give primacy to critical knowledge that may undermine it, this is what gives such knowledge a colonising character. The critical insights that seek to name the coloniality of law, in this instance the naming of the Constitution as *colonial nomopoly* are also where possibilities for decolonial justice reside.

Writing in 2000 Williams acknowledged that while the Constitution has 'produced stable democratic government' it 'has failed Indigenous peoples' (2000, p. 647). Williams is explicit about race and human rights being the reason for the 'critical weakness of the Australian constitutional and legal system' (2000, p. 646). About the drafting, he said:

The Australian Constitution was drafted at two conventions held in the 1890s. Neither convention included any women, nor representatives of Australia's Indigenous peoples and ethnic communities. In most cases, Aboriginal people were not qualified to vote for the delegates to the Convention and appear to have played no meaningful role in the drafting process itself. It is not surprising, then, that the Australian Constitution as drafted did not reflect their interests or aspirations. The preamble makes no mention of the prior occupation of Australia by its Indigenous peoples. In fact, the operative provisions of the Australian Constitution were premised upon their exclusion, and even discrimination against them. This, then, was the legal foundation upon which Aboriginal people were made part of the Commonwealth of Australia on 1 January 1901 (Williams 2000, p. 648).

As important as the critiques that Williams makes are, they are situated as historical and are silent on the question of colonialism. His critique outlines the centrality of British whiteness in the establishment of the legal structure by identifying that the interests of Aboriginal people (and other ethnic peoples) were not considered, nor was 'prior' occupation mentioned. And while Williams' critiques are historically accurate, these exclusions and omissions are in fact logical if the Constitution is seen as a key colonial apparatus. Williams is of the view that the Constitution 'as drafted' did not reflect the interests of Indigenous peoples, even though he said they were affected more than any other group (2000, pp. 646-647). The fact that Indigenous peoples were affected more than any other group is logically consistent if the Constitution is not only placed in a historical context but also understood within the context of colonisation. By coming into being, the Constitution erased what came before; prior Indigenous occupation, laws and sovereignties. It assumed the position of *nomopoly*. This is downplayed by the trick played by the constitutional reformist position. While the critique is a strong one, the belief in the Constitution itself underwrites and informs the critique. Central to Williams' argument then is *nomophilia* (Giannacopoulos 2011; Giannacopoulos 2020). His critique exhibits an uncritical love for colonial law since he is confident that if the Constitution had been drafted differently with the interests of Indigenous peoples considered, the result would be less racist. He goes further to state that:

There is no constitutional reason why a treaty could not recognise a measure of sovereignty or self-government for Indigenous peoples. This could be developed

within the existing legal system. The Australian Federation already encompasses different laws co-existing at the federal, state, and local levels. The High Court in *Mabo (No 2)* has also given legal effect to the native title of Indigenous peoples and has found that the content of this title is defined by Indigenous legal and cultural traditions. This did not fracture Australia's existing system of law, but was accommodated within it (Williams 2000, p. 664).

This type of critique does not acknowledge the pivotal role played by law as part of a colonial structure. And so, it produces and is symptomatic of *nomophilia* and remains the prevailing form of the constitutional critique informing state approaches to questions of Indigenous justice.

While the colonial undertaking began well before 1900, the Constitution generated an artificial yet materially violent origin point that sought to *nomopolise* what could constitute law in the newly founded 'Australia' by replacing 'an entire system of ownership with another' (Wolfe 2016, p. 34). But this violence was not able to do away with Indigenous peoples, their resistance and their laws. This gave rise to the need to impose a structure that could continually act on the desire to eliminate. Wolfe asserted that 'settler societies seek to neutralise the extraneous sovereignties that conquered Natives continue to instantiate' (2016, pp. 35-36). The state deals with this structural tension in several ways, including by seeking 'consent to transfer of ownership' (2016, p. 36) even after they have *nomopolised* the land.

There should be no doubt that the Australian High Court ruling in *Mabo v Queensland (Mabo)*¹⁰ entrenched the colonial legal borders of Australian law and power. But this is not the prevailing view. The more popular meaning is that the ruling did what it said it did and that was to reject '*terra nullius* as a legitimate source of legal foundation' (Watson 2002). And while the decision has been widely celebrated as advancing the place of Indigenous peoples under Australian law, these are politically naïve conclusions about *Mabo* that are productive of *nomophilia*. The formal rejection of the doctrine of *terra nullius*, more than 200 years after colonisation has in fact entrenched its sovereignty according to Watson (2002). Although the High Court, a key institution in Australia's constitutional infrastructure, identified the foundational logic for Australian law as fictitious, the violence done in the name of that fiction was left untouched by ruling that the sovereignty upon which the law was based

was non-justiciable (Watson 2002). In other words, the colonial court produced by colonial sovereignty ruled that justice could not be done to the question of sovereignty (Giannacopoulos 2006, p. 45). The ruling was that the law could not trump sovereignty even if the location of the court was in that same moment being used to affirm colonial sovereignty and to create the conditions for its future. The *Mabo* decision as legal 'event' has operated to cement foundationally violent legal borders, structures of invasion, while acting as masquerade for justice for Indigenous peoples. This is *nomophilic* and fictitious.

Despite the formal overturning of *terra nullius*, the Australian legal system is still 'imposed' and locked in place to 'deny pre-existing Aboriginal laws that have lived in this land from the beginning' (Watson 2002, p. 3). The effect of this imposition is that despite and perhaps because of moments of self-consciousness about its racial constitution, the legal system still operates to 'subjugate Nungas to the power of the colonial state. Australia is a place taken without the consent of the 'natives'—with no treaty or agreements ever signed—where *terra nullius* filled a lawless void, is now hungry to construe our consent to the theft of our lands and the genocide of our peoples' (Watson 2002, p. 3). Despite Watson's incisive and prolific critique of the *terra nullius* overturning being the trick of the *Mabo* decision, the official story became and remains that Australia's legal system has since 1992 been humanely redressing its racial history.

While the High Court of Australia 'did reject *terra nullius* it was also highly concerned with the legitimacy of 'Australia' as a settled colony' (Watson 2014, p. 510). Out of that strategic rejection, or one that I name an *exculpatory* event, colonial power entrenched itself further by 'having one's cake and eating it; that is the *Mabo* decision enjoyed a lime-lighted victory against the injustice of *terra nullius* while at the same time retaining the spoils of the unjust foundation by way of the continued and uncompensated occupation of First Nation peoples' unceded territories' (Watson 2014, p. 510). But this was a 'declarative' overturning and was just as fictitious as the original fiction because like its predecessor, its work was to operate to further conceal the foundational sovereign debts of colonialism underpinning Australia's successful economy (Giannacopoulos, 2017). The legal order does the work of making theft permanent and guarding territory because as Wolfe has observed 'territoriality

is settler colonialism's specific irreducible element' (2006, p. 388). The foregrounding of the landmark *Mabo* case here is to make a new claim about it. The act of revisiting colonial foundations triggered by the claims made by Eddie Mabo and his people, the landmark judgment has birthed and instituted another legal foundation, one that began in 1992 and one that further cements structures of invasion. As such it has *nomophilically* worked to conceal Australia's sovereign debt and has provided a fresh foundation for subsequent legal events designed to efface colonial violence and cement colonial power.

Where Watson's vast body of work asserts that the endurance of *terra nullius* has been genocidal, Patrick Wolfe's work makes a critical distinction between genocide and what he terms the 'logic of elimination' (Wolfe 2006, p. 387). Extending the work of Wolfe helps to elucidate the ways in which Australian law, in particular the Constitution offers a legal form for invasion to be made permanent and a vehicle for colonial power to operate invisibly. Even though it could be argued that the 'logic of elimination' has manifested as genocidal, Wolfe contends that the two should be distinguished because elimination performs two interrelated tasks. In its negative sense, it works to dissolve native societies since the principal motive for elimination is not race but access to territory. Having accessed this territory, 'positively, it erects a new colonial society on the expropriated land base' signifying the permanence of the coloniser's intentions (Wolfe 2006, p. 388). In the Australian context the positive/negative dimensions of elimination manifest where:

the erasure of indigeneity conflicts with the assertion of settler nationalism. On the one hand, settler society required the practical elimination of the natives in order to establish itself on their territory. On the symbolic level, however, settler society subsequently sought to recuperate indigeneity in order to express its difference—and accordingly, its independence—from the mother country (Wolfe 2006, p. 389).

In Wolfe's critical distinction between genocide and elimination as the logic of Australian settler colonialism is the insight that *inclusion* is an integral component of elimination. To be *included* in the colonial construct that is Australia, is the meaning and logic of elimination. This form of colonial power operates on the basis that Indigenous peoples have survived genocide. This survival then, presents opportunities for their *inclusion* within Australia without

the coloniser surrendering the seized territory. Such inclusion operates to severely restrict or to eliminate the possibilities for Indigenous peoples to access and control their own territory. As Wolfe contends 'settler colonialism destroys to replace' (2006, p. 388) and by attempting the destruction of Indigenous laws, a space is cleared for colonial law to impose itself as singular. Colonial law and society then can tolerate the survival of Aboriginal peoples but not of their laws and their status as sovereign peoples. In line with this, the quest for consent, through legal events that foundationally cement colonial legal borders are a major technology for elimination. The Constitutional Recognise Campaign (2012-2017) has been such an event. The Recognise Campaign was firmly implicated in the project of gaining consent for law's violence, but it had precedents in earlier legal events; events that are continually producing and reproducing the colonial structures of 'invasion' as Wolfe has named it. In other words, colonial law operates to eliminate through inclusion within the borders of colonial law. This is achieved via the law's key moments or events around race relations or around the question of the continued existence and status of Indigenous peoples in colonial society.

Up until 1967 Indigenous peoples in Australia were not deemed to be human at all and as a result of Aboriginal politicisation that was according to Gary Foley conservative in approach, the national referendum was held (2010). The result of this referendum was that from one extreme of being denied humanity, Indigenous peoples were now designated citizens of 'Australia'. By fact of inclusion, their exclusion could once again be ensured. But as Gary Foley has argued the Indigenous activism that resulted in the 1967 referendum was conservative and after the exodus of Indigenous peoples from rural areas to Redfern in the 1960s new forms of Indigenous activism were deemed necessary to redress questions of deep and foundational injustice of Indigenous people who survived but were expected to accept political and legal death. New forms of activism emerged, these were the founding of a 'black power movement', the founding of the Aboriginal tent embassy and calls for Indigenous sovereignty and self-determination (2010). In light of this, there is a fundamental error in turning to the Constitution seeking remedy for ongoing attempts at genocide and dispossession. The constitutional *nomopoly* cements unlawful foundations and further entrenches colonial permanence over stolen

territory. While Patrick Wolfe famously argued that invasion is 'a structure and not an event', I am building here on a lesser-known but related aspect of his work that invasion is 'constituted through events, through practices that colonisers repeatedly strive to maintain' (Wolfe 2016, p. 36). Here I emphasise constitutional legal events to show the centrality of structures of law in cementing invasion. These do not readily appear violent because the imposed *nomopoly* produces the fictitious knowledge that law in the Australian context is legitimate, singular and without rival. This is *nomophilia* and it runs through a series of legal events that are presented (and often understood) as an antidote to the coloniality of law. Stemming from this is a blind love and faith in the correctness of colonial law. This is both product and contemporary device of the *nomopoly*.

The Australian Debtscape

Australia's sovereign debt crisis is still not formally acknowledged, but proof of it can be found in the *Deathscapes* archives where the state is revealed to ritually enact violence sanctioned by law at the borders that law has produced. Law is deeply implicated in providing the conditions underwriting prosperity for mining interests for example even at a time when the country is in the grips of apocalyptic fires and environmental damage caused by the unwillingness of the colonial state to accept Indigenous law and knowledge (Odisha 2019). *The debtscape* is the place where foundational harms of colonialism are continued in the present day and are legitimised through legal apparatuses. Law is the location where the evidence of state violence is quashed lest it reveal the violence upon which its legal apparatuses are founded. *Debtscapes* are the border zones and practices emanating from Australia's hidden and unpaid sovereign debt to Aboriginal peoples where austerity has always been an aspect of colonial rule. To address the deaths resulting from these state practices, sovereign debt must become visible. The Australian *debtscape* is the place that has never owned up to its indebtedness and the place that still shows no sign of willingness to pay for the debts that all its social, political and legal systems and associated privileges are premised upon. There also does not seem to be any immediate plan to consider how this foundational debt, incurred through frontier violence, dispossessing land removals and the imposition of a

British legal and political order, can stop accruing. *Mabo*, the case celebrated for bringing Australia's legal system in line with human rights norms, in fact further buried the sovereign debt owed. When the High Court held that the nature of sovereignty held by the colonial state could not be questioned because it would fracture the skeletal principle upon which the law is premised, law was constructing the border around how law should be understood. And it seems to work. Many legal scholars and law advocates follow the lead of the state and work to support the closing of borders on the question of sovereign debt. This is despite the ample evidence of colonial violence in the public realm. It is also despite the existence of the well-established (colonial) legal tenet, that knowing of harm or violence and turning away from it is to give consent for it to continue.

In Australia, as in many other settler colonial countries globally, it is law, or rather a particular type of legal system that imposes a colonial infrastructure over stolen territories. This imposition of law is a form of violence but does not appear as such because law is generally understood as the antithesis of violence. Across the body of my work I have argued that it is the machinery of the law that performs a foundational and violent role in dispossession and in ensuring the ongoing operations of colonial power. It is a colonial trick to see law as the innocent, impartial and objective regime that it attempts to represent itself as. To fall for this logic would mean being embroiled consciously or unconsciously in *nomophilia*.

This belief in, or insistence on, the correctness of colonial law prevents the seeing of that regime as a system predicated on mass theft and violence against peoples and lands. The immeasurable sovereign debt incurred as a consequence of the theft of land, natural resources and more from the First Peoples of the land continues to be actively effaced by governments, corporations, privileged populations as well as by many knowledge producers. Australia can be said to have a sovereign debt at several levels with austerity for Indigenous peoples being a key colonial technology. While the colonial state made itself and extended its reach off the back of dispossession, First Nations Peoples were made poor by being removed from their own bountiful lands from where life sustaining resources could be accessed and from where their laws sprang and could be practiced.

Across three interconnected moves, this article has argued that the Australian Constitution is a colonial *nomopoly* because it provides the structure for exploitative coloniality to persist in the present while erasing its foundationally violent origins, its dismissal of Indigenous law and its ongoing accrual of debt in the Australian *debtscape*. It has identified the archives where evidence of state violence exists and has argued that law apparatuses and its agents work to erase that violence. Finally, the place where that violence is obfuscated and the conditions for it to continue affirmed, is the *debtscape*. While the outcome of the current charges against Constable Zachary Rolfe, the police officer who shot and killed Kumanjayi Walker is yet unknown, the broader evidence on state violence is abundant and it is clear. When it comes to Indigenous peoples, Australian law and policing do not deal with crises—they both produce and are the crisis (Giannacopoulos 2019). I am aware that some will find this conclusion extreme and may seek solace in the comforting fiction that law is about peace and policing about safety. But the evidence of the bloodshed created by state violence and housed within the *Deathscapes* site, among other places, reveals exactly what is at stake and what will follow by continuing to turn to colonial law for resolutions to colonial violence.

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Notes

¹ The Recognise Campaign began in 2012 in response to recommendations of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Australian Constitution. Its focus was narrow as it was to raise awareness across the Australian community of the need to change the Constitution, in advance of a referendum. While the campaign raised the profile of the issue and many were in support of this change, it was silent on the broader colonial role of the Constitution.

² The reader is urged to enter and view the multi-layered *Deathscapes* site as a way of appreciating its visual, critical and analytical power as an archive of state violence: <https://www.deathscapes.org/>

³ On 9 November 9, 2019, 19 year old Indigenous man Kumanjayi Walker was shot dead by Northern Territory Police. Walker died after he was shot at Yuendumu, 300km from Alice Springs, on Saturday night when two police officers went there to arrest him for breaches of his suspended sentence.

⁴ *The road: passage through the deathscape*, viewed 20 January, 2020, <https://www.deathscapes.org/case-studies/the-road-passage-through-the-deathscape/>

⁵ *At a lethal intersection: the killing of Ms Dhu (Australia)*, viewed 20 January, 2020, <https://www.deathscapes.org/case-studies/ms-dhu/>

⁶ *The Border Crossing Observatory (BOB)*, viewed 20 January, 2020, <https://www.monash.edu/arts/border-crossing-observatory>

⁷ *The killing times, massacre map*, viewed 20 January, 2020, <https://www.theguardian.com/australia-news/ng-interactive/2019/mar/04/massacre-map-australia-the-killing-times-frontier-wars>

⁸ *Deaths inside: Indigenous Australian deaths in custody*, viewed 20 January, 2020, <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>

⁹ *About Deathscapes*, viewed 20 January, 2020, <https://www.deathscapes.org/about-project/>

¹⁰ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.