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# ‘Legitimizing Fictions’: The Rule of Law, the Northern Territory Intervention and the War on Terror

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### **Abstract**

On 21 June 2007, the Australian Prime Minister John Howard declared war. In response to the latest in a line of reports about child sexual abuse, he declared a 'national emergency' and swiftly suspended the Racial Discrimination Act 1975 (RDA).<sup>1</sup> He deployed over 600 military personnel, Federal Australian Police and the Australian Crime Commission (ACC) Investigators into 73 targeted Aboriginal communities across Northern and Central Australia. As a result, these communities saw alcohol and pornography banned, mandatory income quarantining regimes introduced, community assets seized and the Government compulsorily reacquiring Aboriginal land on five-year leases.

# **‘Legitimizing Fictions’: The Rule of Law, the Northern Territory Intervention and the War on Terror**

**Jillian Kramer\***

On 21 June 2007, the Australian Prime Minister John Howard declared war. In response to the latest in a line of reports about child sexual abuse, he declared a ‘national emergency’ and swiftly suspended the Racial Discrimination Act 1975 (RDA).<sup>1</sup> He deployed over 600 military personnel, Federal Australian Police and the Australian Crime Commission (ACC) Investigators into 73 targeted Aboriginal communities across Northern and Central Australia.

As a result, these communities saw alcohol and pornography banned, mandatory income quarantining regimes introduced, community assets seized and the Government compulsorily reacquiring Aboriginal land on five-year leases.

As the Prime Minister explained:

Without urgent action to restore social order, the nightmare will go on ... Freedom and rights, especially for women and children are little more than cruel fictions without the *rule of law* and some semblance of social order imposed by a legitimate authority (emphasis added: Howard 2007a).

Howard’s appeal to the ‘rule of law’, here, introduces the colonial arsenal that I want to pursue in this paper. It resonates profoundly with a prescient call to action offered in Penny Pether’s (1999) work. Writing

eight years before the Intervention began, she offers an approach to critical analysis that is vested with political potential. She argues:

The rule of law is often invoked as the species of last refuge of the scoundrel. What this kind of practice leads me to is not despair, but the forensic impulse to work out what is going on when and where this happens, because it may reveal a node or pressure point where transformative work in law might be done. Equally, it may also demonstrate a viable technique for performing such work (1999: 225).

Over the course of this article, I work to do justice to Pether's (1999) call to action. I want to track how the 'rule of law' is not only inscribed in political rhetoric but also encoded in the law's textuality and materialised by the military, police and investigators deployed into targeted Aboriginal communities. To do this, I draw on Foucault's critique of the concept of the 'rule of law', specifically, his critique of the notion that a 'framework of the law' serves as a *rational* form of protection against sovereign tyranny and the police state (emphasis added; 2010: 168). Foucault argues that this concept effaces asymmetries of power, as it asserts that 'the coercive character of the public authorities is not the sovereign or his will ... in the space defined by the form of law, the public authorities may legitimately become coercive' (2010: 169). As he gestures toward the ways in which this concept is mobilised in order to justify state violence, Foucault's (2010) work intersects with another of Pether's (1998) insights into the 'rule of law'.

In an article entitled "Pursuing the Unspeakable: Towards a Critical Theory of Power, Ethics and the Interpreting Subject in Australian Constitutional Law" (1998), she exposes the 'unspeakable' legal discourses and institutions that shape the settler-colonial Australian state. At each stage, she challenges the 'neocolonial constitutional story' that renders the originary assertion *terra nullius* beyond legal scrutiny (Pether 1999: 21). She prefaces this analysis with a declaration that underscores the ingenuity of her interdisciplinary approach to the law, as she writes: 'It will be clear from what I write later, and indeed might be anticipated by readers of this essay, that for me the rule of law is a legitimating fiction' (1998: 22).

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As this statement reconceptualises the 'rule of law' as a powerful fabrication that can be used to justify the exercise of state power, it raises a critical question in the context of the Intervention; how do invocations of the 'rule of law' work in this context to not only justify Howard's policy but also legitimate white Australia's claims to sovereignty?

In order to answer this question, I want to examine one of the five pieces of legislation that make up the Intervention: *The Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response Other Measures) Act 2007 (Other Measures Act)*. Once situated within the genealogies of racial warfare instantiated with white invasion, this *Act* exposes the ways in which Howard's appeals to 'the rule of law' work as a 'legitimizing fiction' across seemingly disparate histories and geographies (Pether 1998: 22). I argue that this *Act* reproduces specifically post-9/11 biopolitical discourses that implicate targeted Aboriginal communities within Western frameworks of the War on Terror. In particular, the *Other Measures Act* exposes the transnational settler-colonial formations that fuel the still-unfolding wars in Afghanistan, Pakistan, Yemen and Iraq.

The Intervention and the missions it inaugurated, such as Operation Themis (AFP), Operation Outreach (Defence) and the Indigenous Violence or Child Abuse Special Operation (ACC), are entwined with Operation Enduring Freedom, Operation New Dawn and its predecessor Operation Iraqi Freedom. These operations build a system of relays that relies on biopolitical constructions of colonial law and 'Indigenous violence and child abuse'. As internal and international battlefields are enlaced and superimposed, I argue that the Intervention can be reconceptualised as constitutive of what Denise Ferreira da Silva (2009) identifies as the settler-colonial state's self-preserving force. The *Other Measures Act* demonstrates how race always already scripts this policy as a means to eliminate 'threats' to white Australia's 'authority'. In this context, race works as an *a priori* through the 'rule of law' in order to (re)instantiate *terra nullius* and, in doing so, reproduce post-9/11 regimes of securitisation that attempt to legitimate white Australia's claims to sovereignty.

## **1 Law and ‘the Government’s wishes’**

My point of entry into this process lies in Schedule Two of the *Other Measures Act*. Under the heading ‘Law Enforcement’, Howard’s government amended legislation that was passed through parliament in the midst of the War on Terror, specifically, the *Australian Crime Commission Act 2002 (ACC Act)*. These amendments ensured that special coercive powers could be deployed in targeted Aboriginal communities.

The Act was originally developed following 9/11 and the Tampa event in order to honour Howard’s re-election commitment to establish ‘a new national framework for dealing with transnational crime and terrorism’ (Howard 2001a: 2). It amalgamated the National Crime Authority, the Australian Bureau of Criminal Intelligence and the Office Of Strategic Crime Assessments. It rendered them a singular Commission equipped with the authority to mobilise a range of coercive powers including the ability to secretly summon subjects to ‘examinations’, forcibly attain documents, prohibit access to lawyers and impose prison terms and fines for subjects who do not answer required questions.

Under the original *ACC Act*, the use of these powers was limited. They could only be deployed to address specific crimes that were categorised as ‘relevant criminal activity’, a type of ‘activity’ that was classified as: ‘any circumstances implying, or any allegations, that a *serious and organised crime* may have been, may be being, or may in the future be, committed against a law of the Commonwealth, of a State or of a Territory’ (emphasis added; *ACC Act* section 5). The use of the term ‘serious and organised crime’ is particularly important here. It attempts to prescribe the characteristics of crimes that warrant coercive powers. For example, as the law sets out, such crimes must involve ‘two or more offenders and substantial planning and organisation’, ‘sophisticated methods and techniques’ and be ‘punishable by imprisonment for a period of three years or more or a serious offence within the meaning of the *Proceeds of Crimes Act 2002*’ (*ACC Act* sections 5-6). As a result, the ACC conducted five investigations into ‘federally relevant crime’

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throughout the 2003-2004 financial year. In its annual report, for instance, the Commission outlines their Firearms Trafficking Special Investigation; an investigation that sought to investigate and dismantle international firearms trafficking groups active in Australia (Australian Federal Police 2003-2004).

The original *ACC Act*, however, comes into conflict with Howard and Brough's Intervention. As the *Other Measures Act* Explanatory Memorandum states:

[T]hese definitions operate in a way that would preclude the ACC Board from authorising an operation/investigation into Indigenous violence or child abuse where the relevant criminal activity could not be characterised as serious and organised crime ... The government wishes to ensure that the existing special coercive powers of the ACC should be available (Brough 2007a: 16).

This statement graphically elucidates the ways in which raciality and sovereign power sanction the biopolitical 'rule of law'. These forces interlock to render the definitions inscribed in the original *ACC Act* both insufficient and contrary to the 'Government's wishes'. After finding that the reported instances of child sexual abuse within targeted Aboriginal communities do not comply with the definition of 'serious and organised crime', the Government performs two manoeuvres to ensure that the state's coercive technologies of surveillance, management and punishment can be *lawfully* retrained on the bodies of targeted Aboriginal people. In the first instance, the Government inserts a new term in to the *ACC Act*: 'relevant crime'. Suitably similar to the term 'relevant criminal activity', this term is then defined as 'serious and organised crime *or* Indigenous violence or child abuse' (emphasis added; *ACC Act* section 16).

In the second instance, the Government then proceeds to perform a series of substitutions. It locates every subsequent reference to 'serious and organised' crime within the *Act* and deletes it. This term is 'repealed' and, in its place, 'relevant crime' is 'inserted'. In sum, this process ensures that the 'relevant criminal activity' that warrants the use of special coercive powers is now defined as 'relevant crime,' that

is, it is now defined as: 'serious and organised crime or Indigenous violence or child abuse'.

These significant textual changes ensure that investigators on the ACC's National Indigenous Intelligence Task Force, first stationed in the Northern Territory in late 2006 after earlier reports of child sexual abuse, can mobilise coercive powers to forcibly demand that Indigenous subjects and organisations provide them with the information they desire. Such demands are made in secret; due to gagging powers, those who receive demands from the ACC cannot acknowledge them without facing fines or prison sentences.

Performed over 25 times, this substitution invokes histories of frontier warfare that are permeated by duplicitous legal definitions and biopolitical constructions of 'Indigenous violence and child abuse'. It explicates the ways in which the analytics of raciality always already work within colonial law to ensure Indigenous people can be lawfully targeted by the settler-colonial state's self-preserving force. For instance, the addition of Indigenous targets to the *ACC Act* represents a continuation of the actions of British Governors throughout the nineteenth century. These Governors used definitions inscribed within the law in order to justify their use of paramilitary force (Cunneen 2001; Watson 2002). When it suited their interests, on the one hand, they would classify Indigenous people as 'British subjects' and thus charge them with crimes committed against white invaders. On the other hand, however, many Indigenous people were classified as 'foreign enemy combatants' and killed without recourse (Watson 2002). As Irene Watson argues, in the 1840s, Governor Gawler classified the Milmendjeri people as 'a savage enemy from lands within' in order to authorise their death by hanging (2002: 262).

It is precisely this operation of the law that continues here. Manifest in Howard and Brough's power to define 'nationally relevant crimes', technologies of hegemonic knowledge production continue the colonial project. They conflate those people originally targeted by the *ACC Act* and Aboriginal people. Both are classified as 'enemies' who emanate 'from' from an undefined and undesignated 'foreign' space, a space

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defined by Suvendrini Perera as not-Australia: a place 'populated by 'unlawful non-citizens. They are Not-Australian and unAustralian; the stuff of contraband: traffic, illegals, human cargo. Non-People' (2002: par 6). As I will explore further in the work that follows, this conflation continues to elide Indigenous sovereignty over country. Compounded by the reacquisition of Aboriginal land under the Intervention, it demonstrates how the law-as-text attempts to render the state intelligible by (re)situating Indigenous people outside the 'state's' borders. Targeted Aboriginal people are, once again, represented as a 'threat' to the white state's safety that can be targeted with impunity.

Against this backdrop, the insertion of 'Indigenous violence or child abuse' into the *ACC Act* (re)instantiates the biopolitical rubric that always already criminalises Indigenous bodies in advance of committing any offence. Scripted onto Indigenous people's bodies since white invasion, this rubric works to lawfully classify 'them' as criminal, 'savage' and unable to care for their children. Throughout the nineteenth and early twentieth centuries, for example, racist pseudo-scientific regimes such as phrenology posited that:

The skull [sic] of the Australian aborigine [sic] is the nearest approach to the orang type of that of any human being. It is truly an animal head ... The Australian is crafty, cunning, brutal and bloodthirsty, placing little or no value on human life ('Crania and Crime' 1892: 7).

While the connections I am drawing between this representation of Aboriginal people as immoral non-human animals and Howard's amendments to the *ACC Act* may appear tenuous at first, they are brought into sharp relief by the contemporaneous laws implemented by state-based Aboriginal Protection Boards. These laws expose the ways in which biopolitical hierarchies not only classify Aboriginal people as necessarily immoral and thus criminal; they also reveal the way in which this representation is – in turn – used to classify Aboriginal children as 'imperilled' and in need of 'protection'.

For instance, in New South Wales, the *Aborigines Protection Amending Act 1915* gave the Board the authority to abduct and enslave Aboriginal children within 'training institutions' for their own

‘protection’ (HREOC 1997). It states that the Board can lawfully ‘assume full control and custody of the child of any aborigine [sic], if after due inquiry it is satisfied that such a course is in the interest of the moral or physical welfare of such child’ (1915: 122). Like the Chief Protector of the Northern Territory, Cecil Cook, who suggested that Aboriginal children should be ‘removed from the evil influence of the aboriginal [sic] camp and its lack of moral training’, this law evidences the way race pre-comprehends Aboriginal bodies (cited by Markus 1990: 98). Working in tandem with a politico-scientific arsenal, it always already represents them as ‘evil’ in order to immediately and pre-emptively justify what Foucault terms ‘colonising genocide’ (Foucault 2004: 257). As Foucault argues, ‘themes of evolutionism’ and ‘appeal[s] to racism’ justify modes of governance that are woven into the disciplinary and juridical practices of everyday life to determine which subjects can live and those who can be left to die (2004: 257, 247).

## **2 Geopolitical Coordinates**

The points of connection invoked by the *Other Measures Act*, however, are not only temporal; the insertion of ‘Indigenous violence and child abuse’ into the *ACC Act* cannot be solely conceptualised as the re-animation of racist laws and discourses that have ramified, chronologically, from the past into the present. As Howard and Brough mobilise laws designed in the midst of what the West calls the ‘War on Terror’, they simultaneously reproduce a system of relays that spans national, regional and international borders. Pether (2010) identifies these points of connection in her incisive critique of the strategies deployed by the settler-colonial state to legitimate the Intervention. She argues:

[W]e find in the spectacle of the NTER something more disturbing ... we find an emergent biopolitical technology of rights discourse in the hands of distinctively post-9/11 governments whose strategically narrowed and foreshortened reconstruction of a national historical imaginary registers the seductions of rendering invisible, say, a national history of racialised colonial violence that undermines the legitimacy of the nation itself (2010: 33).

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In this analysis, Pether charts the geopolitical coordinates that orient the work that follows. She demonstrates that my work so far is not only incomplete; it is also, to borrow her words, 'entirely too polite' (1999: 231). As I have marked the consistent (re)instantiation of historically situated discourses, I have effaced the extent to which it responds to violent *international* events that produce 'emergent biopolitical technolog[ies]' and, in turn, recalibrate rights discourses and national identities. Invocations of 'the rule of law', Pether argues, resonate beyond the settler-colonial state's asserted boundaries (2010). They are implicated within transnational networks of state violence that attempt to 'render invisible' the illegitimate foundations of colonial law that extend across seemingly disparate geographies such as the United States, Afghanistan and Indonesia.

In this context, Howard and Brough's recalibration of the *ACC Act* stands as an incitement. Once situated within the post-9/11 narratives of terror that are inscribed in the *Act* itself, it opens up the space to flesh out the economies of racial warfare that are operative here. It begins to materialise the 'temporal' and 'geographic relationalities' that are at once contemporised and re-mapped by the Intervention (Pugliese 2013; Paglen 2010). I have taken the twin-concepts of temporal and geographic relationalities from Joseph Pugliese (2013) and Trevor Paglen's (2010) work, respectively. As Pugliese argues, the 'conjoining' of these concepts provides a productive lens through which to explore the 'diachronic relations that establish critical connections across historical time and diverse geographies' (2013: 48).

I mark these concepts in order to briefly foreground the work that follows; coupled with Pether's (2012) scholarship, they demonstrate that to insert my analysis into a neat chronological framework and prescribed set of geographic boundaries would undermine my project. In the work that follows, then, I not only hope to do justice to Pether's appeal to forensically examine invocations of the 'rule of law' across seemingly divergent landscapes; I also draw on her methodology in order to shape my approach. The phrase 'Indigenous violence and child abuse' is vested with meaning; the words 'Indigenous' and 'violence'

– and their relationships to one another – expose interlocking lines of transnational and historical connections that demonstrate how the ‘rule of law’ operates as ‘a legitimating fiction’ (Pether 1998: 22).

### **3 ‘Hobbesian Nightmares’ and ‘Dark Corners’**

The insertion of ‘Indigenous violence’ into the *ACC Act*, then, provides a point of departure. Continuing the historical process of criminalisation, it works to script the Intervention as an incursion into violent, lawless and ungoverned territory. This operation unfolds in Howard’s address to the Sydney Institute. Speaking just four days after the Intervention was announced, he says: ‘tonight, in our rich and beautiful country, there are children living out a Hobbesian nightmare of violence, abuse and neglect ... To recognise this is not racist. It is a simple, empirical fact’ (2007a). With this statement, Howard builds a powerful dichotomy. As I unpack this dichotomy, I want to follow Watson’s (2009) approach to analysing the Intervention. I do not want to dismiss the chronic poverty and structural disadvantage that faces Aboriginal people living in the Northern Territory. Nor do I want to overlook the rate of violence and child abuse identified by the report that sparked Howard’s Intervention: the *Ampe Akelyernemane Meke Mekarle: ‘Little Children are Sacred’ Report* (Wild and Anderson 2007). Instead, I want to follow Watson’s argument that we must ‘critically evaluate the intervention processes’ by placing these processes in their historical and geopolitical context (2009: 55).

Once situated within histories of white colonial violence, Howard’s statement reveals the ways in which representations of the Intervention reassert white sovereignty. ‘Our [white] country’ is not only depicted as ‘rich’ and ‘beautiful’; it is also represented as a site governed by ‘Reason’ and vested with the knowledge/power needed to make ‘empirical’ and ‘factual’ observations about the ‘Other’. Howard’s appeal to ‘empiricism’ is particularly telling in this respect. As da Silva (2005, 2001, 2007) articulates, the very notion of ‘empirical fact’ is reliant upon signifying strategies that have been cultivated since the seventeenth century within the natural sciences and, later, fields such as sociology

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and anthropology. It is these very fields, she argues, that represent race – and race difference – as a substantive signifier: a signifier that 'writes' white people in transparency and, in doing so, ensures 'race difference, now substantive (prescientific and prehistoric) difference, would constitute the 'empirical' basis for ... distinguishing between the 'vanishing native' and the anthropologists' fellow Europeans' (da Silva 2007: 140-141). In this context, Howard's claim to 'empiricism' can be conceptualised as an assertion of white supremacy; it exposes the signifying strategies that continue to reproduce 'racial difference' as a signifier of unoblittable distinction between racialised subalterns and white subjects.

Howard builds on this distinction. In a move that (re)instantiates *terra nullius*, he cites Hobbes in order to depict targeted Aboriginal communities as those existing in a pre-historic 'state of nature' untouched by the forces of 'civility' and 'modernity'. According to Hobbes's hypothesis, this state exists beyond white 'universality' and scientific reason. It is a state within which 'men' are propelled by their selfish and unrestrained impulse to stay alive and 'the life of man [is] solitary, poor, nasty, brutish and short' (Hobbes 1651: Chapter XIII). Within this schema, targeted Aboriginal people are represented as violent and archaic. Howard reproduces 'them' as *lacking* an 'understanding' of justice and ethics and their ostensibly attendant systems of law, property and authority. He compounds this representation in an interview on *Sunrise*, as he says: 'We have got to confront the fact that ... the basic elements of a civilised society don't exist. What civilised society would allow children from a tender age to become objects of sexual abuse?' (Howard 2007b).

Replete with rhetorical flourishes, this statement once again uses the pronoun 'we' to address white Australians and, in turn, represents 'us' – white Australians – as those 'enlightened' subjects who possess 'facts', the 'elements of a civilised society' and a right to 'sovereignty'. In contradistinction, Howard's repetitive use of the word 'civilised' and his emotive rhetorical question are used to reproduce targeted Aboriginal subjects as affectable bodies who live beyond the limits of the law.

This representation of Aboriginal communities resonates with the ways in which US President George W Bush characterises Afghanistan and Iraq in the wake of 9/11. As Jessica Wyndham argues, these attacks – which killed over 3,000 people – were ‘immediately labelled ‘terrorist’ and were soon attributed to the Al-Qaeda organisation, a sophisticated Afghanistan-based international network of ‘sleepers cells,’ training camps and affiliated organisations’ (2003: 1). Although these attacks pre-date the Intervention and occurred on the other side of the globe, they inform and shape Howard’s policy. On the one hand, for instance, Bush’s response to 9/11 marks a significant catalyst in the development of the *ACC Act* and, as such, provides critical insights into the laws that were deployed within targeted Aboriginal communities. On the other hand, Bush’s construction of Afghanistan and Iraq also reveals the ways in which invocations of the ‘rule of law’ work to script colonial law as universal, transparent and just.

In the days following the attacks, for example, Bush set the scene for later military campaigns to ‘hunt down’ the ‘axis of evil’ in Afghanistan and Iraq; he says: ‘an enemy has emerged that rejects every limit of law, morality, and religion ... they dwell in the dark corners of the earth. And there, we will find them’ (2008: 80). In line with Pugliese’s analysis of the US Military’s language, this statement ‘pivot[s] on a series of predictable racialised oppositions – black/white, light/day, civilised/barbaric’ (2007: 3). Like Howard, Bush reiterates Hobbes’s theory; he too argues that target subjects live in a ‘state of nature’ within which ‘the notions of Right and Wrong, Justice and Injustice have no place’ (Hobbes 1651: Chapter XIII). He cultivates this opposition in order to represent the ‘dark corners of the earth’ as the antithesis of the US, as those that reject the ‘basic elements of a civilised society’, posited as the universalised (white) principles ‘law, morality and religion’.

Bush’s reference to ‘territory’ or, more specifically, the ‘corners of the earth’ is telling in this respect. It reproduces a powerful – yet unexceptional – political-symbolic arsenal that uses ‘race difference’ (re-signified here as difference from whiteness: ‘darkness’) to create a ‘*no mans land*, where universality finds its *spatial* limits’ (da Silva

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2001: 422). While this move does not explicitly invoke 'dark' subjects, it extends a genealogy that relies on the hypotheses of theorists such as Darwin and Franz Boas; more specifically, it sustains a strategy of power that reproduces 'race difference' as a signifier that engulfs the racialised subject's mind, body and territory and simultaneously suggests that they have 'failed to achieve the degree of development proper to modern conditions' (da Silva 2001: 436; for an analysis of Darwin and Boas's work see da Silva 2007). In line with Howard, then, Bush racialises and represents target subjects and spaces as inherently violent and void of 'the rule of law'.

This representation elucidates another critical point of connection. Although operating in vastly different contexts, both Howard and Bush build on such representations in order to reassert white sovereignty *within* their borders. Howard's announcement of the Intervention begins to reveal this operation. Epitomised by his use of the pronoun 'we', he attempts to naturalise white ownership of the continent. This pronoun is used repetitively to preface the description of each 'major measure' prescribed by the policy. For example, he says: 'we will provide the resources ... we will bear the cost ... we're going to introduce a series of welfare reforms ... we're going to enforce school attendance ... we'll require intensive on the ground clean up[s] ... we're going to ban the possession of X-rated pornography' (2007c: par 5-7). Here, he uses 'we' in order to directly address white Australians. Although Howard's policy targets specific Aboriginal communities, he does not speak to them. Instead, Howard reproduces white subjects as self-determined citizens who possess the wealth, power and legal framework necessary to incur into otherwise unchecked and ungoverned Aboriginal communities.

In the context of the US, official representations of 9/11 are also marked by strategic silences that reassert the settler-colonial state's sovereignty. The Federal Bureau of Investigation and 9/11 Memorial's account of the attacks are telling. They suggest that 9/11 constitutes the 'most lethal attacks in history' and the 'single largest loss of life from a foreign attack on American soil' respectively (*Federal Bureau*

*of Investigation: Famous Cases and Criminals* 2014; *National 9/11 Memorial: Interactive Timelines* 2014).

As Pugliese (2013) and Andrea Smith (2005) argue, however, these representations are untenable. On one level, Pugliese suggests, they occlude the United States' 'foundational history of state-sponsored terrorism against Native Americans' (2013: 48). They violently elide ongoing histories of conquest, genocide and racial violence carried out by the States across multiple continents (Pugliese 2013). Smith (2005) maps the ramifications of this elision. She argues: 'it is important to understand that the war against 'terror' is really an attack against Native sovereignty, and that consolidating US empire abroad is predicated on consolidating US empire *within* US borders' (Smith 2005: 9). On another – interconnected – level, then, the use of the terms 'American soil' and 'homeland' work to reassume white possession of Native American peoples' country. Moreover, in the wake of 9/11, this rhetoric has been deployed to leverage policies that reassert (white) control of the space seized by the US nation-state. For instance, Bush mobilised new and increasingly militaristic border control measures that seek to identify, capture and punish racialised subjects such as refugees who attempt to enter *his* country, or set foot on *his* 'soil'.

This move to legitimate the US's sovereignty can also be linked to the increasing appropriation and militarisation of Native American country in the form of 'black sites' (Pugliese 2013). Once such site, documented by Paglen (2010) and Pugliese (2013), is Nellis Range in Nevada, home to the Western Shoshone peoples who call their land Newe Sogobia. The site of numerous and sprawling military complexes and test ranges, the traditional owners of this land, Carrie and Mary Dann, have been evicted, charged with 'trespassing' and had their 504 horses and livelihoods seized by the government. As Carrie Dann says, 'if you think the Indian Wars are over, then think again' (Frontline Defenders 2015).

Dann's compelling call to 'think again' ramifies across international borders. It resonates with Howard and Brough's compulsory (re) acquisition of Aboriginal land under the Intervention. Like Bush,

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they too deploy the motif of 'control' in order to (re)instantiate frontier warfare. This comes to the fore as Brough introduces the Intervention's legislation to Parliament. Following Howard's (2007b) earlier assertion that 'we are moving in, we are going to take control', he makes two particularly relevant assertions. First, he says: 'we need to show [targeted Aboriginal] people that it is possible to own and control your own house' (2007b: 11). And second, he continues: 'when land tenure is settled, the Howard government will begin the process of improving housing and infrastructure' (2007b: 15).

Here, Brough continues to use the pronoun 'we' to refer to white Australians exclusively. White Australians are depicted those who *own and control* their homes. Further, in his use of the loaded term 'settled', Brough also depicts 'us' as possessing interminable and unquestioned land tenure. He suggests, then, that the settler-colonial state can seize the land *occupied* by targeted Aboriginal communities in order to ensure it is 'settled' and 'secure'. The media reproduce this assertion of white sovereignty. For instance, headlines such as 'I'm seizing control, says PM', 'Sex abuse crisis sparks takeover' and 'Aboriginal hit list drawn up as force prepares to move in' are telling (Peating & Murdoch 2007: 1; Karvelas 2007a: 1).

On one level, they continue to posit Aboriginal communities as *terra nullius*: as terrain that is void of people who possess civilised and lawful systems of property. On another level, they also suggest that the white state should necessarily 'take over' and assume the land by force. In this respect, *The Australian's* reference to an 'Aboriginal hit list' is particularly revealing. It resonates with another story on the front-page: 'Aussies seized in terror raids'. This story details the capture of 'seven Australians suspected of involvement with an al-Qai'da linked terror group' (Chuiov & Kerbaj 2007: 1). Underpinned by their references to the state's 'Aboriginal hit list', 'terror' and 'terrorists', these stories culminate to suggest the white Australian state is at war on two fronts: against targeted Aboriginal communities and 'terror' groups such as al-Qaeda.

#### 4 'But we will decide who comes to this country': Indigenous violence, Terrorists and Refugees

As the Intervention and the War on Terror interlock on this front-page, they not only expose the transnational racial arsenal that always already attempts to reassert white sovereignty; they also point to the ways invocations of 'the rule of law' represent racialised subjects as 'threats' to white authority. The representation of racialised subjects as 'criminals' can be tracked back to the earliest phase in the Commission's establishment. More specifically, it can be tracked back to Howard's 2001 pre-election promise to: 'develop a new national framework under which *transnational crime and terrorism* can be dealt with' (emphasis added Howard 2001a: 2). This promise laid the legislative and political groundwork for the *ACC Act*. Made in the weeks following 9/11, it was heralded in a policy booklet entitled 'A Safer More Secure Australia' (2001a). This booklet called for new measures to 'protect' the community from terrorism and 'safeguard our borders'.

While Howard's pre-election promise may appear extraneous to the Intervention, I want to unpack it here as it not only marks the first step in the establishment of the ACC; it also marks the (re) emergence of 'national security' and 'border protection' as sites of contestation and, in turn, the emergence of post-9/11 biopolitical regimes of governmentality that shape the Intervention. Howard's call to 'safeguard our borders' can be rooted in events that began to unfold just two weeks prior to 9/11. In particular, they can be rooted in an event colloquially known as the 'Tampa affair' (Giannacopoulos 2005, 2007, 2009; Perera 2009a, 2009b; Howard 2001c). This event began when 439 Afghan refugees were rescued from their sinking vessel in waters off Australia by a Norwegian cargo ship called the *MV Tampa*. Howard and his government attempted to ensure that the Afghan refugees could not (lawfully) disembark on Australian soil using several methods, including a militaristic and legislative campaign known as the 'Pacific Solution' (Howard 2001c; Marr & Wilkinson 2003).<sup>2</sup> Their legislation systematically excised outlying Australian territories and water from its migration zone, increased military and customs surveillance and

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mandated the arbitrary imprisonment of refugees who attempt to reach the Australian shoreline by boat in countries throughout the region (Giannacopoulos 2005, 2007, 2009).

Maria Giannacopoulos's (2005, 2007, 2009) incisive work maps the way this legislation elides Indigenous sovereignty over country. As such, I will not focus on this legislative operation here. Instead, I want to unpack how Howard weaves the 9/11 and the Tampa event into a dualistic logic of racial warfare that not only racialises and attempts to conflate terrorists, refugees and Aboriginal people; it also constructs 'them' as 'threats'.

This regime of governmentality is reproduced most explicitly in Howard's re-election campaign speech. Delivered on 28 October 2001, it promotes his 'new framework for dealing with transnational crime and terrorism'. This speech, however, not only occurred against the backdrop of the Tampa 'affair' and 9/11. On 7 October, the day Howard issued the writs for the 2001 Federal Election, the US also launched its military incursion into Afghanistan called 'Operation Enduring Freedom'. On the same day, Australian Immigration Minister, Phillip Ruddock, fabricated a misleading story as he announced that another group of asylum seekers had thrown their children into the sea to avoid being repelled back to Indonesia (Marr & Wilkinson 2003: 81-91). Two weeks later, on 19 October, 353 refugees drowned after their boat sank in Australia's heavily militarised and surveilled waters (Perera 2006, 2009a). Against this backdrop, Howard's campaign speech is particularly telling. I want to reproduce a lengthy extract of it here. He argues:

We are as you all know in a new and dangerous part of the world's history. The tragic events of the 11th of September have changed our lives, they have caused us to take pause and think about the values we hold in common with the American people and free people around the world. That was an attack on Australia as much as it was an attack on the United States ... National security is therefore about a proper response to terrorism. It's also about having a far sighted, strong, well thought out defence policy. It is also about having an uncompromising view about the fundamental right of this country to protect its borders.

It's about this nation saying to the world we are a generous open hearted people ... But we will decide who comes to this country and the circumstances in which they come (Howard 2001b).

This statement performs a series of manoeuvres. The first lies in the opening line; as Howard presumes the ability to produce knowledge/power about the 'world', he reveals the genericity of racial warfare that hinges on totalising dualisms and oppositions (Foucault 2004). In the second move, Howard builds this dualism. Over the course of the following two lines, he renders white Australians 'victims' of 9/11. He not only suggests that 'we' – presumed to be white Australians – hold values in common with white allies in the US and 'free people around the world'; his declaration that 9/11 was an attack on Australia also goes so far as to directly link 'us' and 'our lives' with those subjects materially hurt in the US. This rhetorical move posits that 'we' must take extraordinary 'national security' measures in order to defend 'our' 'common' and 'decent' 'values' against terrorist 'threats'. It also opens up the space for Howard to link terrorists and refugees. In the following lines, 'national security', 'defence policy' and 'the fundamental right of this country to protect its borders' are aligned in order to conflate 'terrorists' and refugees.

Howard's final manoeuvre lies in the concluding line: 'but we will decide who comes into this country and the manner in which they come'. This line marks another critical point of conflation that inscribes the *ACC Act*. In line with Foucault's (2004) understanding of racial warfare, it posits white Australians – 'we' – as the sovereigns 'entitled' to manage the continent's borders. This move builds on the (re)instantiation of *terra nullius* in order to further efface Indigenous sovereignty over country. Yet, here, Aboriginal people are not only silenced and elided; they are also conflated alongside the racialised bodies of refugees and 'terrorists' as those who undermine white Australia's sovereignty. Howard renders 'them' external and unnamed *nobodies* who pose a threat to white sovereignty and must be killed (da Silva 2009; Foucault 2004: 61).<sup>3</sup>

## **5 'PM Leads the Way Against Evil'**

The Intervention reproduces this post-9/11 regime of governmentality. With the insertion of 'Indigenous Violence' into the *ACC Act*, Howard and Brough simultaneously insert their policy within governmental and juridical rationalities that, over the course of the Tampa event and 9/11, worked to represent the ACC as an organisation poised to prevent terrorism and protect our borders. Brough reproduces and extends this rhetoric. Building on the three-word slogan he uses to sell the Intervention to the electorate: 'stabilise, normalise and exit,' he tells the press 'we'll have managers on the ground ... we'll have adequate policing as well ... Law and order, good governance, then you get normality' (2007c: 76; 2007d).

As this statement asserts that white managers and police aim to establish law, order, governance and *normality* in targeted Aboriginal communities, it explicates Foucault's (2004) conceptualisation of 'biopower mode'. As Foucault argues: '[i]n a normalising society, race or racism is the precondition that makes killing acceptable ... Once the state functions in biopower mode, racism alone can justify the murderous function of the State' (2004: 256). Brough's reference to 'normality,' in this context, prepares the ground for the deployment of the settler-colonial state's forces and special coercive powers. Compounded by his use of war-like rhetoric – as he repetitively uses the phrase 'on the ground' – it also suggests that such forces will be 'fighting' security 'threats' in order to establish 'the rule of law'. *The Daily Telegraph* and *The Australian* echo this representation. Under the headline 'War on Child Abuse,' the *Telegraph* announces: 'PM leads the way against evil' (Farr 2007: 5). These headlines work to equate targeted Aboriginal communities with the 'axis of evil' and, in turn, they represent targeted Aboriginal people as potential 'terrorists'. *The Australian* also heralds Howard's policy with the headline: 'Crusade to Save Aboriginal Kids' (Karvelas 2007b: 1). The use of the word 'crusade', here, implicates this policy within long and complex histories of military conquests carried out by Christian white soldiers. It (re) casts Howard and Brough, and the forces they command, as part of

a white campaign into ungoverned and external territories occupied by terrorists.

This force is materialised by the Australian Federal Police's International Deployment Group. Alongside the ACC's examiners and over 600 military personnel operating under 'Operation Outreach', they are deployed to establish eighteen new police stations in targeted Aboriginal communities. Working under the codename 'Operation Themis', that invokes the Greek goddess of divine law, this force further reconstructs the Intervention as an incursion into *international* battlefields to install the 'rule of law' in two ways. The first lies in their mission statement, as it states: 'the IDG contributes to the development, maintenance or restoration of the rule of law in countries that seek Australia's support' (Australian Federal Police 2015).

The mobilisation of this force within targeted Aboriginal communities, then, suggests that they can be classified as foreign territories that are not only void of law and order but also 'seek' the Australia's support. This move works to reproduce the Intervention as a benevolent 'civilising' and 'normalising' mission. As Brough says: 'this is a great national endeavour, it is the right thing to do, and now is the right time to do it' (2007b: 17). Here, Brough's use of colonial rhetoric recalls the name a ship that brought white invaders and Captain James Cook to the continent: 'the Endeavour'. He reiterates *terra nullius* as he represents white men and women within the military and police force as 'white knights' 'fighting' to protect 'common values' extend white civility and 'the rule of law' across the globe.

Sherene H Razack (2004) identifies this mythology as a component of the post-9/11 New World Order. Writing from the settler-colonial terrain in Canada, she argues that such discourses 'offer': 'an identity that is profoundly racially structured. We are hailed as civilised beings who inhabit ordered democracies, citizens who are called upon to look after, instruct or defend ourselves against, the uncivilised Other' (2004: 155). The deployment of the IDG, then, reproduces post-9/11 biopolitical regimes of governmentality that construct the obliteration of Aboriginal sovereignty over country as 'necessary' in order to *normalise*

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targeted Aboriginal communities and assure their 'assistance into modernity' (Razack 2004: 155)

This operation, however, cannot be extrapolated from regional dynamics. In the second instance, the deployment of the IDG ramifies throughout the Asia Pacific Region in order to further reassert and legitimate white sovereignty. The totalising grasp of the War on Terror is overlaid by regional regimes of white expansion and securitisation that posit targeted Aboriginal communities both outside the settler-colonial state's borders and awaiting settlement. As Perera argues, 'in the context of the global war on terror, inside and outside become intersecting domains for the staging and reaffirmation of Australia as a white nation and a launching ground for renewed missions of racial salvation' (2009a: 119). The catalogue of the IDG's current missions exposes this imperial trajectory. Alongside targeted Aboriginal communities, the IDG are operative in the Solomon Islands, Timor-Leste, Nauru, Samoa, Tonga, Vanuatu and Papua New Guinea (Australian Federal Police 2015). They are represented as white knights installing 'the rule of law' in a region that become known, since the beginning of the War on Terror and the Bali Bombings, as the 'Arc of Insecurity' that surrounds Australia's coast-line to the North.

In this context, the deployment of the IDG into targeted Aboriginal communities not only redraws the settler-colonial state's borders; it also represents the Intervention as a celebrated 'civilising mission' that will protect white Australia from security threats by (re)establishing and extending white sovereignty within the region. This representation is compounded in two ways. The first lies in the name given to AFP officers when they arrive in the Northern Territory. They are referred to in legal documents as 'First Contact Police' (Northern Territory Magistrates Court 2009). The second lies in an advertisement used to recruit members of the Australian Federal Police to join in Operation Themis and the IDG Officers. Found in the pages of a special edition of the Australian Federal Police Association Magazine that commemorates 9/11, it quotes Brevet Sergeant Crea, Operating Commander in the Bulman Themis Station. He says: 'It's exciting to

be a part of a Police Force that is rapidly expanding and planning for the future ... get the map out, it's a new world out there' (AUSPOL Australian Federal Police Association 2011: 18).

These rhetorical moves efface Indigenous sovereignty over country. In the name of the settler-colonial state's self-preservation, they culminate to further represent the Intervention as a 'civilising mission' that will extend the colonial frontier into otherwise lawless and violent terrain occupied by potential security threats. More specifically, the suggestion that their mission will expand into a 'new world' where 'first contact police' are necessary recasts the AFP, military personnel and ACC investigators as paramilitary officers working to install the rule of law and protect Australia's interests.

## **Conclusion**

As I move to conclude this paper, Pether's refrain that it is only possible to *gesture* towards final conclusions is brought into sharp relief. As the Intervention grows more punitive with each consecutive government and the War on Terror continues, it would be inconsistent to suggest that analysis can be 'finished' and 'conclusions' can be drawn. Buttressed by post-9/11 biopolitical regimes of securitisation, the settler-colonial state consistently recalibrates and reproduces colonial law in order to reassert white sovereignty and justify the state's claims to legitimacy. For instance, the state's attempt to establish the 'rule of law' in targeted Aboriginal communities continues apace. In the 2014 Federal Budget, ½ billion dollars were cut from Indigenous funding. Of that \$13.4 million were cut from the Aboriginal Legal Aid budget while, in contrast, an extra \$54 million was provided for police infrastructure in remote Aboriginal communities (McQuire 2014). With each of these moments of foundational colonial violence, race always already operates in the name of the settler-colonial state's self-preservation. And with each of these violent moments, I argue, Pether's call to action becomes more all the more urgent. She argues that we must aim to expose 'the rule of law ... as the legitimating servant of the exercise of state power' (1998: 20).

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### **Notes**

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- 1 Formally entitled the *Northern Territory National Emergency Response Act*, this incursion is widely referred to as the 'Intervention.'
  - 2 In the space of this paper, I am not able to recount the events that unfolded on the Tampa in such a way that would do it justice. The work of Giannacopoulos (2005, 2007, 2009) and Marr and Wilkinson (2003) redresses my over-simplification of the events.
  - 3 I use the verb 'kill' in the Foucaultian sense: 'When I say 'killing,' I obviously do not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection and so on' (Foucault 2004: 256)

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