

DECOLONISATION AND THE RIGHT TO PROTEST IN AUSTRALIA: PROPOSING A RIGHT TO INDIGENOUS PROTEST

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This article calls for a reconsideration of the status and function of Indigenous protest against the background of the continuing effects of colonisation on Australia's First Nations peoples. It examines the contested basis for the acquisition of sovereignty, the effects of Australia's colonial history and how this may inform the right of First Nations peoples to protest under a settler colonial legal system. It discusses this question with reference to legal philosophy, Anglo-Australian law, and the concept of protest itself. It argues that Indigenous peoples have a sovereign right of protest which arises from Australia's foundational history and from the constitutional issues at the heart of the Australian nation reflected in the Uluru Statement from the Heart, with its proposal for Voice, Treaty and Truth.

The Story of Percy Neal

In the tradition of story-telling, in which Indigenous peoples have expressed their resilience and recounted lived experiences of injustice and resistance,¹ we

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1 We make the choice to begin with a story to provide context for the subsequent discussion, but also in the attempt to make the arguments in this article slightly more consistent with Indigenous legal epistemology, as we understand it. Note, for example, Larissa Behrendt's exposition of standpoint theory, and her assertion that '[s]torytelling illuminates experiences that are often at the margins': Larissa Behrendt, 'Storytelling: The Power of First Nations Jurisprudence' in Nicole Watson and Heather Douglas (eds), *Legal Education through an Indigenous Lens: Decolonising the Law School* (Routledge, 2024) 105, 108 <<https://doi.org/10.4324/9781003473404-9>>. See also John Borrows, 'Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education' (2016) 61(4) *McGill Law Journal* 795, 820 ff; James (Sákéj) Youngblood Henderson, 'Postcolonial Indigenous Legal Consciousness' (2002) 1(1) *Indigenous Law Journal* 1; Val Napoleon and Hadley Friedland, 'An Inside Job: Engaging with Indigenous Legal Traditions through Stories' (2016) 61(4) *McGill Law Journal* 725.

start this article with a story of Indigenous protest.² It is a story set four decades ago in Queensland, during a period of time in which Queensland Premier Joh Bjelke-Petersen had restricted the right to protest and enacted laws which had a corrosive impact on Indigenous affairs in that state.³

On 28 June 1981, an Aboriginal man named Percy Neal conducted a brief, spontaneous protest on a community then known as Yarrabah Aboriginal Community Reserve, near Cairns in northern Queensland. Yarrabah was a former Anglican mission which had been transferred to the control of the Queensland Government's Department of Native Affairs in 1960.⁴ It was regarded as Crown land, and its residents, many of whom had been transferred there under the Stolen Generation policies of forced removal of Aboriginal children, were subject to a level of control so extreme that they were required to seek permission from an 'authorised officer' to use electrical goods (other than a kettle, radio, iron and shaver).⁵

As chair of the Yarrabah Council, Neal had been agitating for the federal government to take over the reserve from Queensland. With another Aboriginal community member, he went to the house of a white man who managed the local store, knocked on his door, swore at him and is reported to have told him to 'get off the reserve and that all the whites should get off the reserve'.⁶ According to the magistrate who heard the case against him, he also spat at the man, although the facts surrounding this allegation remain unclear.⁷

Neal was convicted of unlawful assault and sentenced to two months in jail. When Neal appealed against the severity of the sentence, the Queensland Court of Criminal Appeal substituted a more severe sentence of six months with hard labour.⁸

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- 2 In using appropriate terminology to describe Indigenous Peoples and the naming of related issues (such as Indigenous protest), we were guided by a number of documents: 'Aboriginal and Torres Strait Islander Peoples', *Australian Government Style Manual* (Web Page, 7 March 2025) <<https://www.stylemanual.gov.au/accessible-and-inclusive-content/inclusive-language/aboriginal-and-torres-strait-islander-peoples>>; Luke Pearson, 'Why We Will Never Find the "Most Appropriate" Term to Refer to All Indigenous Australians', *IndigenousX* (Web Page, 10 November 2015) <<https://indigenoux.com.au/why-we-will-never-find-the-most-appropriate-term-to-refer-to-all-indigenous-australians/>>. On Indigenous protest: see Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014); Fiona Skyring, *Justice: A History of the Aboriginal Legal Service of Western Australia* (UWA Publishing, 2011); Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Routledge, 2020). On protest in Australia more generally: see Verity Burgmann, *Power, Profit and Protest: Australian Social Movements and Globalisation* (Allen & Unwin, 2003).
 - 3 For a fuller discussion of this period: see Ross Fitzgerald, *From 1915 to the Early 1980s: A History of Queensland* (University of Queensland Press, 1984); Edwina Shaw (ed), *Bjelke Blues: Stories of Repression and Resistance in Joh Bjelke-Petersen's Queensland, 1969–1987* (AndAlso Books, 2019).
 - 4 John Chesterman and George Villaflor, 'Mr Neal's Invasion: Behind an Indigenous Rights Case' (2000–01) 15 *Australian Journal of Law and Society* 90, 92.
 - 5 Garth Nettheim, *Victims of the Law: Black Queenslanders Today* (George Allen & Unwin, 1981) 114, quoted in *ibid* 93.
 - 6 *Neal v The Queen* (1982) 149 CLR 305, 311 (Murphy J) ('*Neal*').
 - 7 Neither the store manager's wife nor his daughter saw this happen, and Neal himself claimed another man opened the door and spat: Chesterman and Villaflor (n 4) 94.
 - 8 This led Brisbane's *Courier-Mail* newspaper to give the case front page treatment, under the headline 'Court Triples Black Leader's Jail Term', *The Courier-Mail* (Brisbane, 13 May 1982) 1, quoted in Chesterman and Villaflor (n 4) 95. On the sentence of hard labour: see *Neal* (n 6) 307 (Gibbs CJ).

Neal appealed to the High Court of Australia which ruled that the increased sentence was invalid and reinstated Neal's original sentence.

The majority in the High Court construed this case in technical terms, as an issue of whether the Queensland Court of Criminal Appeal had followed the correct procedure when it exercised its discretion to increase the defendant's sentence.⁹ Gibbs CJ did not consider it relevant to discuss the facts of the case at all, stating that 'it would not be appropriate', given the settled practice of the High Court not to interfere with a sentence unless it involved a point of law, or 'some gross violation' of sentencing discretion.¹⁰ Brennan J attributed Mr Neal's behaviour to his 'emotional stress', although he did note that 'conduct of the kind engaged in by Mr Neal is both an unlawful and an unacceptable means of seeking political or administrative changes'.¹¹

However, there is no doubt that this was, in reality, a political case – an Aboriginal protest. Mr Neal's position as a protestor was clearly regarded by the magistrate as an aggravating factor in sentencing.¹² In his dissenting judgment, however, Murphy J disagreed with the magistrate's view, finding that reserve conditions and race relations constituted a 'special mitigating factor' in sentencing.¹³ His Honour also observed:

That Mr Neal was an 'agitator' or stirrer in the magistrate's view obviously contributed to the severe penalty. If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out in *The Soul of Man Under Socialism*, 'Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.' Mr Neal is entitled to be an agitator.¹⁴

Given the strong link between 'race relations' at Yarrabah and Mr Neal's actions, Murphy J's comment about those 'entitled' under the law to be agitators is arguably aimed not merely at those individuals in general, but at Indigenous people in particular. Thus, the comment raises the question of whether there is

9 Neal appealed against the severity of the sentence. The prosecution did not appeal against its leniency, nor did the Crown submit that the sentence was too lenient. The Queensland Court of Criminal Appeal refused the application for leave to appeal, but instead quashed the original sentence and substituted a more severe penalty. Gibbs CJ concluded that this was impermissible, in part because the Court of Criminal Appeal did not give Neal an opportunity to be heard in person: *Neal* (n 6) 307–8.

10 Ibid 309.

11 Ibid 324–5.

12 This is apparent from the remarks of the magistrate, who told Mr Neal at ibid 315–16 (Murphy J) that: Your actions in taking unto yourself the task of removing all whites from Yarrabah cannot be condoned ... I blame your type for this growing hatred of black against white. You are not giving true representation as a leader to the people who voted you their leader. As a magistrate ... I can say unequivocally that the majority of genuine Aborigines do not condone this behaviour and are not desirous in any shape or form of having changes made. They live a happy life, and it is only the likes of yourself who push this attitude of the hatred of white authority, that upset the harmonious running of these communities.

13 Ibid 315.

14 Ibid 316–17, quoting Oscar Wilde, *The Soul of Man under Socialism* (Arthur L Humphreys, 1912) 13.

some philosophical, historical or legal foundation for the claim that protest by Indigenous people has a special status before the law.

The case therefore provides an important backdrop to consider the contemporary relationship between Indigenous status and Australian law as it relates to protest. This is a particularly important question to answer in light of the failure of the 2023 Indigenous Voice Referendum.¹⁵

I INTRODUCTION: SETTLER COLONIALISM, POST-COLONIALISM AND POLITICAL PARTICIPATION

I want to hold the same privilege that is held by the loud and the heard voices so that we (Aborigines) can speak about our own things for ourselves. I want to occupy spaces of governance where I would have the capacity to protect my country against the state that eats it and pours its pollution back onto the lands of my ancestors while it starves our future into assimilated submission.¹⁶

This article seeks to conceptualise a form of protest which provides a culturally appropriate platform for the Indigenous peoples of Australia. An important starting point in this task is to consider Australia's legal and political relationship to Indigenous people, and the status of Indigenous peoples within the Australian legal system. Kate Galloway and Melissa Castan have pointed out the 'lack of clarity in the law concerning the implications of indigeneity – the state of being an Indigenous person'.¹⁷

Since the British invasion, Indigenous peoples have been subjected to countless interventions and social controls.¹⁸ Among the greatest impacts of colonisation on Indigenous peoples in Australia has been the dispossession from their lands, the imposition of Western law on Indigenous communities, and the marginalisation and silencing of Indigenous knowledge. Intervention has taken many different forms. These have included military take-over, forced assimilation, segregation, and periods of 'protective' legislation. The struggle for self-determination persists today.¹⁹ The historical trajectory of police intervention into the lives of Aboriginal people, and its results in the over-imprisonment of Indigenous Australians, has

15 Note that Mr Neal, known in later life as Alfred 'Pop Alf' Neal OAM, was a leading supporter of the Voice campaign. As one of the last surviving members of the 1967 referendum campaign, he helped organise and sponsor the 2022 Yarrabah Affirmation, in which Indigenous people re-asserted their support for the Voice as part of the Uluru Statement from the Heart: 'Yarrabah Affirmation' (Statement, 10 April 2022) <https://ulurustatement.org/wp-content/uploads/2022/05/ULU00274_TheVoice_DownloadPDF_V2_1Page.pdf>.

16 Irene Watson, 'Settled and Unsettled Spaces: Are We Free to Roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007) 15, 32.

17 Kate Galloway and Melissa Castan, 'Indigenous People Cannot Be Aliens in Their Own Land. Why Challenging This Fact (Again) Is So Concerning', *The Conversation* (online, 21 October 2021) <<https://theconversation.com/indigenous-people-cannot-be-aliens-in-their-own-land-why-challenging-this-fact-again-is-so-concerning-170203>>.

18 Rob White, 'Indigenous Young People and Hyperincarceration in Australia' (2014) 15(3) *Youth Justice* 256, 257 <<https://doi.org/10.1177/1473225414562293>>.

19 Ibid.

been ‘arbitrary, discriminatory, racist and violent’.²⁰ Due to the particularly high rates of imprisonment, over-policing, and lack of training and cultural awareness in Australian legal institutions, it could be argued that Indigenous Australians require enhanced mechanisms to facilitate their calls for structural change of institutions that embed old ways of thinking and which maintain colonial powers. The over-representation of Indigenous peoples in prison in Australia is well established,²¹ impacting not only those who are incarcerated but also their families and their communities, creating poor relationships, reinforcing stereotypes, and making it more likely that younger community members will come into contact with police and the criminal justice system.²² These intergenerational effects add to the phenomenon of ‘criminalisation’ of Indigenous peoples, adding also to the mislabelling of Indigenous people as criminal by police and others out of racist and biased misconceptions.²³ Imprisonment is not a traditional Indigenous punishment and Indigenous people have argued that ‘decarceration’ is a just alternative to their over-incarceration by the state.²⁴

For generations, laws have also been passed without Indigenous peoples’ input or free and informed consent. The Voice Referendum, which did not pass, would have enshrined an Indigenous Voice to Parliament²⁵ and promoted the following human rights, as recognised by Commonwealth Parliamentary Joint Committee on Human Rights:

[T]he rights of Aboriginal and Torres Strait Islander peoples to participate in public affairs; the right to self-determination, particularly the obligation to consult with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; and the right to equality and non-discrimination...²⁶

Given the absence of a formal political voice in the Australian parliamentary process, Indigenous Australians have engaged in various protests over racial injustice and the suppression of Indigenous rights. These protests have challenged persistent forms of injustice such as over-policing, child removal, hyperincarceration, criminalisation, and state oppression and control. When the murder of George Floyd in the United States (‘US’) sparked worldwide Black Lives Matter protests

20 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and Police* (Routledge, 2020) 1 <<https://doi.org/10.4324/9781003115243>>, quoting Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991) vol 2 [13.2.3].

21 Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991) vol 1.

22 White (n 18) 258.

23 Ibid.

24 See, eg, Tracey McIntosh, ‘Indigenous Rights, Poetry and Decarceration’ in Elizabeth Stanley (ed), *Human Rights and Incarceration: Critical Explorations* (Palgrave Macmillan, 2018) 285 <https://doi.org/10.1007/978-3-319-95399-1_12>.

25 Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill (Cth). The Bill was passed by an absolute majority of each House of the Parliament but the proposal was not approved at the subsequent referendum on 14 October 2023.

26 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 5, 9 May 2023) ch 1, 8 [1.26] <https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2023/Report_5/Ministerial_responses_Report_5_of_2023/PJCHR_REPORT_-_5_OF_2023.pdf>.

in 2020,²⁷ the focus of their Australian iteration was systemic racism towards Indigenous Australians, including non-consensual policing and Indigenous deaths in custody.²⁸ During this period, Nerita Waight, Aboriginal woman and Co-chair of National Aboriginal and Torres Strait Islander Legal Services, said:

We cannot be silent while police violence is unchecked and continues to kill our people. Upholding freedom of expression and assembly at times like this is critical and we encourage governments to ensure that people attending the peaceful protests are doing so in the safest way possible. We strongly encourage governments to use methods that do not result in the further criminalisation of, or violence to, Aboriginal and Torres Strait Islander people – including fines.²⁹

This article will argue that an Indigenous right to protest should be conceptualised against the background of sovereignty issues in Australia. It will also argue that the basis for giving particular protest rights to Indigenous peoples exists both in morality and law. It arises primarily from Australia's history in relation to Indigenous people, from the unresolved legal basis on which sovereignty was acquired, and from Indigenous peoples' unequal treatment before the law. More recently, it stems from the results of this unequal treatment in the form of over-incarceration, Stolen Generations policies, and the other pressing social issues frequently identified in the Commonwealth Government's 'Closing the Gap' reports.³⁰ Against this context, a right to protest also arises out of the necessity to be heard and to have a voice. Indigenous people in Australia who have spoken publicly on this issue have noted that they have had decisions, policies, and programs made for them but not necessarily in *consultation* with them.³¹

While these issues are well-known and have been voluminously documented in decades of government reports,³² their implications for Indigenous protest are

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- 27 See discussion in Ashley Westerman, Ryan Benk and David Greene, 'In 2020, Protests Spread across the Globe with a Similar Message: Black Lives Matter', *NPR* (online, 30 December 2020) <<https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt>>.
 - 28 See also Maria Giannacopoulos, 'White Law/Black Deaths: *Nomocide* and the Foundational Absence of Consent in Australian Law' (2020) 46(2) *Australian Feminist Law Journal* 249 <<https://doi.org/10.1080/13200968.2021.1959994>>.
 - 29 'Australians' Right to Protest', *Human Rights Law Centre* (Web Page) <<https://www.hrlc.org.au/news/2020/6/18/australians-right-to-protest>>.
 - 30 'Closing the Gap' reports have been produced since the National Apology of 2008 by Prime Minister Kevin Rudd. In August 2021, a new 'Closing the Gap' fund and strategy was announced, with emphasis on partnership with Indigenous people: Bridget Brennan and Kirstie Wellauer, 'Indigenous Closing the Gap Measures to Get \$1 Billion, as Aboriginal Leaders Warn the Plan "Has to Work"', *ABC News* (online, 5 August 2021) <<https://www.abc.net.au/news/2021-08-05/australia-indigenous-closing-gap-strategy-addressed-in-pm-speech/100348748>>.
 - 31 See, eg, Tom Calma's statement that Indigenous people 'have been the passive recipients of government policies and programs that have mostly not addressed the wicked problems that confront us': Tom Calma, '2023 ANU Reconciliation Lecture' (Speech, Australian National University, 22 June 2023) <<https://www.anu.edu.au/news/all-news/2023-anu-reconciliation-lecture-full-speech-by-tom-calma>>. Marcia Langton also noted that '[f]or too long conversations have been held about us and not with us': Melissa Coade, 'Voice a Chance to Strengthen Indigenous Agency, Cut through Australia's "Bureaucratic Haze"', *The Mandarin* (online, 13 September 2023) <<https://www.themandarin.com.au/230087-langton-voice-a-chance-to-strengthen-indigenous-agency/>>.
 - 32 For example, between 2007 and October 2012, a staggering 98 government and consultant reports into Indigenous people were produced; an 'evaluation fetishism', which, according to Jon Altman and Susie

not well understood. Protests by Indigenous people are routinely dismissed or underplayed by those in authority. They may be constructed as the product of ‘emotional stress’, as did Brennan J in *Neal v The Queen* (*‘Neal’*),³³ or in terms of ‘performance’, a framing of activists as ‘comic and carnivalesque ... effectively erasing the elements of protest’ and removing ‘the necessity to negotiate and respect claims’.³⁴ Or they may be dismissed as the wild statements of radical activists, as have been the attempts of Indigenous advocates to have legal claims relating to sovereignty or recognition of Aboriginal customary law considered by the courts.³⁵

The purpose of this article is to counter that view. In doing so, we acknowledge existing academic literature on the issue of settler colonialism,³⁶ Indigenous sovereignty,³⁷ the right to self-determination of Indigenous peoples in Australia,³⁸ Indigenous jurisprudence and law,³⁹ and the history and practice of Indigenous protest.⁴⁰ Against this context, this article will develop an argument for a sovereign right of protest possessed by Indigenous peoples that is located in the contested British acquisition of sovereignty and continuing effects of colonisation. This right will be further supported by reference to English and European legal philosophy – a framework which we posit is relevant given the extent to which Australian law remains based in Anglo-European legal philosophy, and the fact that this article argues for the reform of Australian law.

This article proceeds as follows: Part II will set out the existing legal framework for the right to protest in Australia. Part III will explore concepts of sovereignty

Russell, is a problem in itself: Jon Altman and Susie Russell, ‘Too Much “Dreaming”: Evaluations of the Northern Territory National Emergency Response Intervention 2007–2012’ [2012] (3) *Evidence Base* 1 <<https://doi.org/10.4225/50/55820C87BCE12>>. See further discussion in Stephen Gray, ‘Scoring the Intervention: Fail Grades on Closing the Gap, Human Rights’ (2016) 8(23) *Indigenous Law Bulletin* 10.

33 *Neal* (n 6) 324–5.

34 Maryrose Casey, ‘Carnivalising Sovereignty: Containing Indigenous Protest within the “White” Australian Nation’ (2007) (7) *About Performance* 69, 70.

35 See, eg, *Coe v Commonwealth of Australia* (1979) 24 ALR 118, 127–31 (Gibbs J) (*‘Coe’*); *Walker v New South Wales* (1994) 182 CLR 45 (*‘Walker’*); *Director of Public Prosecutions Reference No 1 of 1999* (1999) 8 NTLR 148, 168–9 (Martin CJ) (*‘Yunupingu Reference’*). *Yunupingu Reference* (n 35) is discussed further below.

36 See, eg, Caroline Elkins and Susan Pedersen (eds), *Settler Colonialism in the Twentieth Century: Projects, Practices, Legacies* (Routledge, 2005); Lorenzo Veracini, ‘Settler Colonialism and Decolonisation’ (2007) 6(2) *Borderlands E-Journal*; Anna Haebich, ‘Neoliberalism, Settler Colonialism and the History of Indigenous Child Removal in Australia’ (2015) 19(1) *Australian Indigenous Law Review* 20.

37 See, eg, James Aird and Allan Ardrill, ‘A “Kind of Sovereignty”: Toward a Framework for the Recognition of First Nations Sovereignities at Common Law’ (2023) 46(2) *Melbourne University Law Review* 330.

38 See, eg, Dylan Lino, ‘The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples’ (2010) 34(3) *Melbourne University Law Review* 839.

39 See, eg, CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011); Marcia Langton and Aaron Corn, *First Knowledges Law: The Way of the Ancestors*, ed Margo Neale (Thames & Hudson, 2023); Mary Graham and Morgan Brigg, ‘Why We Need Aboriginal Political Philosophy Now, More Than Ever’, *ABC Religion and Ethics* (online, 25 May 2022) <<https://www.abc.net.au/religion/why-we-need-aboriginal-political-philosophy/12865016>>; Jihad Clark, ‘Recognition of Aboriginal Law, Lore and Cultural Authority in the Victorian Treaty Process’ (Speech, National Indigenous Legal Conference, 4 December 2024) <<https://treatyauthority.au/meeting/recognition-of-aboriginal-law-lore-and-cultural-authority-in-the-victorian-treaty-process/>>.

40 On the history of Indigenous protest: see, eg, Attwood and Markus (n 2); John Maynard, *Fight for Liberty and Freedom: The Origins of Australian Aboriginal Activism* (Aboriginal Studies Press, rev ed, 2024).

and justice as well as the contribution offered by legal philosophy, arguing that Indigenous protest sits firmly within the bounds of the right to protest recognised by legal philosophers, even where it is conducted outside the law. Part IV will consider several of the major cases in which Indigenous protestors have used the Australian court system to assert their claims, noting also the extent to which the courts have used Anglo-European jurisprudence in articulating their response. Part V will apply the contributions of legal philosophy to the notion of an Indigenous right to protest. Part VI will then offer some concluding comments concerning the nature and boundaries of an Indigenous ‘right to protest’.

We note at this stage that there are several aspects of this topic which, for reasons of length, we do not explore in this article. In particular, while we do discuss some Australian case law, we do not look at the significant role of international human rights law, or human rights law as it is reflected in Australian law, including through concepts of self-determination and freedom of speech and expression. Nor do we seek to set out in detail the precise boundaries of a proposed Indigenous right to protest. These issues will be the subject of further research.

In setting out the aims and structure of this article, we note that we write primarily from the standpoint of non-Indigenous law. However, we acknowledge and respect Indigenous perspectives which view ‘protest’ essentially as an assertion of Indigenous law. As Tyler McReary has argued in relation to a Witsuwit’én environmental protest in Canada, protest ‘should be understood as a conflict between the temporalities and subjectivities normalized within Indigenous and settler capitalist law’, which ‘reflects fundamental tensions between the foundations of Witsuwit’én and Canadian law, respectively, in the relations of the gift and the commodity’.⁴¹ McReary points out that: ‘Witsuwit’én law, rather than centring personal enrichment, centres the continual renewal of kinship relations and connection to the land.’⁴² This statement is true also of Indigenous law in Australia.⁴³

Similarly, activists in the US have argued that they are not protestors but ‘protectors’ of sacred lands.⁴⁴ They believe that their role is to ‘keep Indigenous land from further environmental degradation’ and use places of protest as places of religious practice where they deepen their spirituality.⁴⁵ In Australia, some Indigenous protestors have regarded themselves as doing no more than asserting their right to uphold their law on their land.⁴⁶ Other Indigenous people have constructed the act of ‘protest’ as an assertion of an Indigenous worldview that

41 Tyler McCreary, ‘Between the Commodity and the Gift: The Coastal GasLink Pipeline and the Contested Temporalities of Canadian and Witsuwit’én Law’ (2020) 11(3) *Journal of Human Rights and the Environment* 122, 123 <<https://doi.org/10.4337/jhre.2020.03.06>>.

42 Ibid 129.

43 For another reference on Australian Indigenous law: see, eg, Danial Kelly, ‘Foundational Sources and Purposes of Authority in Madaḃin’ (2014) 4(1) *Victoria University Law and Justice Journal* 35 <<https://doi.org/10.15209/vulj.v4i1.40>>.

44 Rosalyn R LaPier, ‘New Wave of Anti-protest Laws May Infringe on Religious Freedoms for Indigenous People’, *The Conversation* (online, 12 July 2021) <<https://theconversation.com/new-wave-of-anti-protest-laws-may-infringe-on-religious-freedoms-for-indigenous-people-160733>>.

45 Ibid.

46 *Yunupingu Reference* (n 35).

differs fundamentally from that of non-Indigenous law and state practice. In the words of Teela Reid, an activist, lawyer and proud Wiradjuri and Wailwan woman from Gilgandra in New South Wales ('NSW'): 'We need to be talking about changing society, about reimagining what kind of country we want to live in. And that has to start with power, actual power in the hands of First Nations.'⁴⁷

The concept of 'protest' adopted in this article encompasses a wide range of actions, from public displays and demonstrations, including recently the practice of 'statue-shaming',⁴⁸ as well as petitions, lobbying and online activities such as the 'Justice for George Floyd' petition.⁴⁹ It would generally fall within the notion of 'peaceful assembly' recognised at international law,⁵⁰ but we also recognise that some protest encompasses actions that are neither peaceful nor lawful.

The next Part outlines the existing legal situation from the point of view of Australian courts: that is, how protests by Indigenous people fit within the broader context of protest rights in Australia.

II THE RIGHT TO PROTEST IN AUSTRALIAN LAW

While, as noted just above, the right to peaceful protest is recognised at international law, protest rights are not well recognised under Australian law. A conditional right to peaceful assembly is recognised in the common law, but only insofar as it is not overridden by laws passed by Parliament.⁵¹ The implied freedom of political communication recognised by the High Court in a line of cases since 1997 may operate as a limit on laws passed by state or federal governments.⁵² It requires laws that may limit protest rights to be 'reasonably appropriate and adapted' to achieving a legitimate objective.⁵³ It is not per se a positive right

47 Dawn Lo, 'Black Lives Matter Movement in Australia: First Nations Perspectives', *Newsroom* (online, 19 January 2021) <<https://newsroom.unsw.edu.au/news/business-law/black-lives-matter-movement-australia-first-nations-perspectives>>.

48 On statue-shaming: see Marie Hadley, Sarah Hook and Nikolas Orr, 'Ideological Vandalism of Public Art Statues: Copyright, the Moral Right of Integrity and Racial Justice' (2022) 9(2) *Griffith Journal of Law and Human Dignity* 1 <<https://doi.org/10.69970/gjlhd.v9i2.1229>>.

49 On 3 June 2020, a petition calling for justice for George Floyd broke a record as the most signed petition ever on Change.org, with over 13 million signatures. Today, it has over 19.5 million signatures: see Luke O'Reilly, 'Justice For George Floyd Petition Breaks US Website Record with 13 Million Signatures' *The Standard* (online, 3 June 2020) <<https://www.standard.co.uk/news/world/george-floyd-petition-biggest-ever-a4458311.html>>. On Aboriginal use of online forums: see Theresa Lynn Petray, 'Protest 2.0: Online Interactions and Aboriginal Activists' (2011) 33(6) *Media, Culture and Society* 923 <<https://doi.org/10.1177/0163443711411009>>.

50 This is principally as an incident of the right to peaceful assembly: see *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21.

51 See also discussion in Human Rights Law Centre, *Protest in Peril: Our Shrinking Democracy* (Report, 2 June 2024) 6 <<https://commonslibrary.org/wp-content/uploads/Protest-in-Peril-Our-Shrinking-Democracy.pdf>> ('*Protest in Peril*').

52 See especially *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *Brown v Tasmania* (2017) 261 CLR 328.

53 See, eg, *Clubb v Edwards* (2019) 267 CLR 171, 186 [5] (Kiefel CJ, Bell and Keane JJ), quoting *McCloy v New South Wales* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ).

possessed by individuals. Some states provide a degree of protection to peaceful assembly and protest as part of their human rights charters,⁵⁴ as do some state laws such as the *Peaceful Assembly Act 1992* (Qld).⁵⁵ Again, these protections are subject to ‘necessary and reasonable’ limits in the interests of public safety, public order, or the protection of the rights and freedoms of others.⁵⁶

In general, however, protests in Australia are regulated in the same way as they were traditionally under the English common law: that is, by the suite of laws designed to protect ‘public order’. ‘Public order’ offences are criminal offences aimed at suppressing conduct that causes public alarm or community disquiet. Historically, they are a reflection of state practices originating in the 19th century or earlier designed to maintain ‘law and order’, or the peace of the realm. This notion is reflected in the archaic statutory language, as well as the extraordinary nature of the powers given to police and others to act against protestors.⁵⁷ More recently, laws restricting protest are often enacted or proposed in response to political or community disquiet about particular issues,⁵⁸ including the COVID-19 pandemic and inaction on climate change. Human rights groups have expressed concern about laws passed by state and territory parliaments in recent years designed to restrict or suppress protest about political issues, including the environment, climate, and animal rights.⁵⁹

In general, the right to protest in Australia is best characterised not as a positive right, but as a ‘residual and negative’ liberty, which exists where it is not prohibited by law.⁶⁰ Thus, the laws regulating protest in Australia are a confusing patchwork of common law powers, as well as statutory offences at state, territory, federal and even local level,⁶¹ giving police broad and often vague discretion to intervene.⁶²

These laws and practices exist on a broad spectrum of seriousness. At one end is the common law practice of binding over to keep the peace, a practice with ‘an ancient pedigree dating back to 10th century Norman England’.⁶³ Binding over is not a punishment in itself, but rather a precautionary measure to prevent future

54 In particular, note section 15 of the *Human Rights Act 2004* (ACT), section 22 of the *Human Rights Act 2019* (Qld), and section 16 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

55 Section 5(1) of the Act provides that ‘[a] person has the right to assemble peacefully with others in a public place’. Note that this provision was suspended in 2014, during the operation of the G20 meeting: see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 885.

56 *Protest in Peril* (n 51) 7.

57 For example, consider the *Unlawful Assemblies and Processions Act 1958* (Vic), section 5 of which regulates riotous meetings and provides that ‘[i]t shall not be lawful for any persons to assemble together riotously and tumultuously and to the disturbance of the public peace at any place in Victoria’. This section also provides an indemnity for the killing, maiming or hurting of those persons who are unlawfully assembled while they are being dispersed, seized or apprehended.

58 See Maria O’Sullivan, ‘Should You Need a Permit to Protest? Here’s Why That’s a Bad Idea (and Might Be Unlawful)’, *The Conversation* (online, 8 October 2024) <<https://theconversation.com/should-you-need-a-permit-to-protest-heres-why-thats-a-bad-idea-and-might-be-unlawful-240671>>.

59 *Protest in Peril* (n 51).

60 Bronitt and McSherry (n 55) 893.

61 On laws passed at the local level: see *ibid* 912–13 [13.145].

62 *Ibid* 863.

63 *Ibid* 864, citing David Feldman, ‘The King’s Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers’ (1988) 47(1) *Cambridge Law Journal* 101.

crime. It has been used to restrain conduct which is perfectly lawful in itself, but which might provoke a breach of the peace in somebody else.⁶⁴ Complementary to this is a general power of police and individuals to arrest a person whose conduct is causing or likely to cause a breach of the peace.⁶⁵

Next, there exist loitering and ‘move on’ powers possessed by police in most Australian jurisdictions. They give police the power to direct an individual or group to move on, or leave an area, and make failing to obey that direction a criminal offence.⁶⁶ They have been used to move on or charge protestors who fail to cease to loiter.⁶⁷ More serious again are provisions which criminalise offensive language and offensive behaviour. Again, these provisions have been used against political protestors such as anti-Vietnam War protestor Desmond Ball, who was charged with this offence after climbing on a statue of King George V.⁶⁸

Towards the more serious end of the spectrum are laws prohibiting unlawful assemblies. These continue to exist at common law and in legislation in various Australian jurisdictions, including in Victoria, where the relevant provision continues to provide immunity from criminal prosecution for a person who maims or kills a rioter.⁶⁹ Next are statutory offences of obstructing the highway, which have ancient origins as well as modern forms such as the *Roads and Crimes Legislation Amendment Act 2022* (NSW).⁷⁰ Such laws continue to be used against protestors,⁷¹ as do the permit schemes which exist in various jurisdictions, which make it an offence to organise an assembly without the relevant permit or licence.⁷² Finally, there are the more serious offences such as the common law of affray, rout and riot, replaced in some jurisdictions by statutory equivalents.⁷³

Thus, protests by Indigenous people are, in a formal sense, regulated in the same way as protests in any other context. This is epitomised in the *Neal* decision,⁷⁴ discussed above, as well as in more recent cases such as *Gibson v Commissioner of Police (NSW)*,⁷⁵ in which the NSW Court of Appeal considered whether the

64 *Jordan v Burgoyne* [1963] 2 QB 744. See generally Bronitt and McSherry (n 55) 864–85.

65 Bronitt and McSherry (n 55) 881.

66 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 197–200; *Summary Offences Act 1923* (NT) ss 47AA–4A7B; *Police Powers and Responsibilities Act 2000* (Qld) ch 2 pt 5, s 791; *Summary Offences Act 1953* (SA) s 18; *Summary Offences Act 1966* (Vic) s 6; *Criminal Investigation Act 2006* (WA) ss 27, 153.

67 See Bronitt and McSherry (n 55) 901–2 [13.105].

68 *Ball v McIntyre* (1966) 9 FLR 237. For general discussion of offensive behaviour provisions: see Julia Quilter and Luke McNamara, ‘Time to Define “the Cornerstone of Public Order Legislation”: The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)’ (2013) 36(2) *University of New South Wales Law Journal* 534. See also Bronitt and McSherry (n 55) 913–29 [13.150]–[13.185]. See especially at 920–2, which discusses the *Ball v McIntyre* (n 68) case study.

69 See above n 57. On unlawful assembly: see generally Bronitt and McSherry (n 55) 931–2 [13.200].

70 *Protest in Peril* (n 51) 22.

71 Bronitt and McSherry (n 55) 932–3.

72 These schemes exist in the Australian Capital Territory (‘ACT’), the Northern Territory, Tasmania, and Western Australia: see *ibid* 933.

73 See, eg, *Crimes Act 1900* (NSW) ss 93B–93C; *Crimes Act 1958* (Vic) ss 195G–195H. See also Bronitt and McSherry (n 55) 935–42.

74 *Neal* (n 6).

75 (2020) 102 NSWLR 900 (‘*Gibson*’).

Commissioner for Police had validly prohibited a rally proposed in the Sydney CBD to protest against Indigenous deaths in custody. The Court agreed with the view of the primary judge that the case involved balancing the right to free speech with the safety of the community at large, given the risks of disease transmission during the COVID-19 pandemic.⁷⁶ Whether Aboriginality is perceived as a relevant consideration depends on the attitudes of the individual judge or magistrate. While it is sometimes referred to as a relevant factor in determining the existence of elements of an offence, or in sentencing,⁷⁷ it is usually considered in an oblique fashion,⁷⁸ and certainly not regarded as the basis for any rights distinct from those possessed by non-Indigenous people.

In addition to a lack of consideration of Indigenous identity in case law on protest in Australia, we note that certain policies can have an enhanced, differential impact on Indigenous peoples. For instance, the protest permit system operating in most states and territories in Australia (which involves the notification of protests to police authorities or local councils), has been recognised by the Victorian Aboriginal Legal Service as posing particular concerns for Indigenous communities.⁷⁹

III SOVEREIGNTY, JUSTICE AND THE CONTRIBUTION OF LEGAL PHILOSOPHY: CONCEPTUALISING THE BASIS OF AN INDIGENOUS ‘RIGHT TO PROTEST’

In jurisprudence, the question whether Indigenous people have a special right to protest raises the complex problem of whether such protests have a moral or a legal foundation. In what sense is protesting against unjust laws, or deeply perceived injustice, legitimate at all? At least some of its forms – blocking the streets, disrupting public order, destruction of property, not to mention actual violence – are against the law. For the protestor, the very point of the protest is to draw attention to the perceived injustice of the law or perhaps the legal system itself. To speak of such practices as being ‘legal’ in any sense is at first sight paradoxical and contradictory. A thing cannot be both legal and illegal at the same time.

Several conceptually distinct but closely related questions arise here. The first is whether an unjust law (that is a law which is perceived or commonly believed

76 Ibid 902–3 [6] (Bathurst CJ, Bell P and Macfarlan JA).

77 For general principles relating to sentencing of Indigenous people: see *R v Fernando* (1992) 76 A Crim R 58.

78 For example, consider *Saunders v Herold* (1991) 105 FLR 1 (‘*Saunders*’), in which an Aboriginal man’s conviction for offensive conduct was quashed. The ACT Supreme Court considered that it was ‘relevant’ that he was Aboriginal and had been left alone in police custody late at night: at 11 (Higgins J).

79 In particular, in response to a proposal by Victorian Police to introduce a permit system for protests, Associate Professor Crystal McKinnon, Board member and Chair of the Victorian Aboriginal Legal Service stated: ‘A permit system like the one proposed by the Victorian Police Association would be a return to the mission days of the police and state controlling where Aboriginal people can go and who we can see’: Victorian Aboriginal Legal Service, ‘VALS Supports Allan Government’s Rejection of Protest Permits’ (Media Release, 25 March 2024) <<https://www.vals.org.au/vals-supports-allan-governments-rejection-of-protest-permits/>>.

to be unjust) is law on a legal or moral basis at all. Closely related to this is the question of the status of an unjust legal system, that is an entire constitutional system or set of norms that is unjust. The third question concerns the circumstances in which civil disobedience or protest is justified; and although the term ‘justified’ here means ethically or morally justified, the fact that individual laws or an entire legal system are unjust adds considerable weight to the claim for a right to civil disobedience.⁸⁰ The following discussion will not attempt precisely to distinguish these various questions but will rather consider how jurisprudential discussion of each of them has translated into Australian case law, and how propositions derived from each might add weight to the claim for a special Indigenous right to protest.

A Unjust Laws and the Duty to Obey the Law

As to the first question, the status of unjust laws has been discussed in Western legal philosophy for centuries. One of Saint Augustine’s early dialogues on free will put forward the proposition that ‘a law that was unjust wouldn’t seem to be law’, and Saint Thomas Aquinas stated that an unjust law is ‘not a law, absolutely speaking, but rather a sort of perversion of law’.⁸¹ Drawing inspiration from Aquinas, John Finnis in his *Natural Law and Natural Rights* argued that a law which does not comply with his requirements of ‘practical reasonableness’ derived from his ‘basic forms of human good’⁸² may lose its moral claim to be obeyed. By this, he meant ‘that compliance with that law is ... *not* justified or required by the derivative and defeasible principle of practical reasonableness that laws impose moral obligations’.⁸³

In reaching this conclusion, Finnis pits himself philosophically, if not in strictly practical terms, against the traditional ‘positivist’ school of legal philosophy represented by John Austin, who pointed out that if he were to refuse to obey a law he considered unjust on the basis that it was not ‘law’, ‘the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity’.⁸⁴ Of course, Austin’s practical point sidesteps the question of the status of unjust laws. If the usurper hangs a freedom fighter, this does not make them any less a usurper; or, for an Aboriginal rebel, the military control exercised by the colonising state does not make it any more legitimate. Perhaps Austin’s point is that while the rebel may be morally justified in her actions, providing she is prepared to accept the consequences of

80 On the right to civil disobedience: see, eg, John Rawls, *A Theory of Justice* (Belknap Press, 1971) 371–7; Frederick A Elliston, ‘Civil Disobedience and Whistleblowing: A Comparative Appraisal of Two Forms of Dissent’ (1982) 1(1) *Journal of Business Ethics* 23. Cf Henry David Thoreau, *Civil Disobedience and Other Essays* (Dover Publications, 1993) 19–30.

81 Thomas Aquinas, *The Summa Theologiae of St. Thomas Aquinas*, tr Fathers of the English Dominican Province (1920, 2nd ed) vol 2 pt 1 question 92 art 1 <<https://www.newadvent.org/summa/2092.htm>>, quoted in John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 363.

82 Finnis (n 81) ch IV(2). His ‘basic forms of human good’ are life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness, and religion.

83 Ibid 365 (emphasis in original).

84 John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (Weidenfeld and Nicolson, 1954) 185, quoted in ibid 355.

disobedience, there is no doubt that as a matter of practical reality, the law is represented by the authority exercising effective military power.⁸⁵

In fact, Finnis would seem to agree with this proposition. He argues that the question of the philosophical or moral status of unjust laws is entirely logically separate to the question of the truth of the maxim *lex injusta non est lex* ('an unjust law is no law at all'). This latter proposition Finnis regards as 'pure nonsense, flatly self-contradictory'.⁸⁶ For Finnis, it is an obvious truism that an unjust law is a law; rather than contesting this point, he argues that for jurisprudence to be a worthwhile or practical pursuit it must go beyond obvious statements about the location of political and military power.

However, the question of the status of unjust laws is more complex than this. Social contract theorists from Thomas Hobbes, John Locke and David Hume onwards have asked why it is that an individual might have an obligation of loyalty to government. They locate the answer in an agreement or understanding that arises between an individual and a larger group. For Hobbes, 'each individual surrenders his [sic] sovereign power of unmitigated self-seeking to an artificial Leviathan in return for protection of his life and property',⁸⁷ enabling the person to escape the state of nature, and obliging her to obey the sovereign's commands. Hobbes argued that the obligation to obey law is absolute, regardless of the apparently immoral or unjust nature of the individual law, provided the 'sovereign maintains law and order, [and] protects my life, limb and property'.⁸⁸

Hobbes' argument has been criticised from many different positions, including by Marxists concerned with equality, as well as those arguing that principles of justice might override the simple protection of life and property.⁸⁹ For Indigenous peoples, however, even Hobbes' barest *prima facie* justification for the duty to obey does not apply. The English sovereign did not protect the life and property of Indigenous people. On the contrary, the doctrine of discovery which formed the juridical basis for the new sovereign's assumption of authority facilitated the expropriation of Indigenous land,⁹⁰ while the outright murder of Indigenous people by European colonists was facilitated by the refusal of colonial courts to hear

85 Hans Kelsen developed this notion in some detail, arguing that a 'legal order is regarded as valid if its norms are *by and large* effective': Hans Kelsen, *Pure Theory of Law*, tr Max Knight (University of California Press, 1967) 212 (emphasis in original), quoted in RWM Dias, 'Legal Politics: Norms behind the *Grundnorm*' (1968) 26(2) *Cambridge Law Journal* 233, 237. See also discussion in *R v Walker* [1989] 2 Qd R 79, 83 ('*Walker Queensland*'), to be discussed further below.

86 Finnis notes that this statement, sometimes attributed to Aquinas, 'either is pure nonsense, flatly self-contradictory, or else is a dramatisation of the point more literally made by Aquinas when he says that an unjust law is not law in the focal sense of the term "law": Finnis (n 81) 364.

87 Elliston (n 80) 25, citing Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, ed Michael Oakeshott (Basil Blackwell, 1960) chs 13–21.

88 Elliston (n 80) 25.

89 See, eg, Rawls (n 80), briefly discussed in *ibid* 26.

90 On the doctrine of discovery in Australia: see, eg, Larissa Behrendt, 'The Doctrine of Discovery in Australia' in Robert J Miller et al (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 171 <<https://doi.org/10.1093/acprof:oso/9780199579815.003.0006>>. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 31–8 (Brennan J) ('*Mabo*').

evidence from Aboriginal witnesses.⁹¹ It is difficult, therefore, to see what kind of social contract might have arisen between Indigenous people and the colonists who took their land and attempted what many have argued amounted to a genocide,⁹² particularly given that the notion of a contract implies the consent of both parties.⁹³

The argument that an unjust law or legal system need not be obeyed is simultaneously philosophical, and of compelling practical significance. Finnis has suggested criteria for determining when an unjust law, or legal system, loses its moral claim to be obeyed. One of these is when the laws impose ‘inequitable burdens on their subjects’ – although Finnis does point out that ‘it should not be concluded that the distributive injustice of a law exempts from its moral obligation those who are *not* unjustly burdened by it’.⁹⁴ This implies that those who are unjustly burdened by an unjust law are exempted from the moral obligation to obey it. Another way to put this, reflecting a tradition going back to Plato and Aristotle, is the proposition that an unjust law is no longer a law in the ‘focal’ sense (simpliciter), although it is semantically obvious that it remains a law in a secondary sense because it satisfies the criteria laid down in the given legal system for validity.⁹⁵

B Obligation to Obey the Law: Kelsen and Revolutions

It is unlikely that Hobbes’ notion of a consent-based social contract was intended to imply that those who do not benefit from or consent to the authority of a new ruler do not owe a duty of obedience to that authority. If that were so, then every conquered people would be entitled by the conqueror’s own laws to resist. It is far more likely that English legal philosophers in the 18th and 19th centuries accepted the practical force of Austin’s argument that law was the command of a sovereign backed by threat,⁹⁶ or, in short, that Aboriginal people owed a duty of obedience to the Crown because of military force.

91 On the reception of Aboriginal evidence in colonial courts: see Damen Ward, ‘Imperial Policy, Colonial Government, and Indigenous Testimony in South Australia and New Zealand in the 1840s’ in Shannaugh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010) 229 <https://doi.org/10.1057/9780230114388_13>.

92 On genocide: see, eg, Matthew Storey, ‘*Kruger v The Commonwealth*: Does Genocide Require Malice?’ (1998) 21(1) *University of New South Wales Law Journal* 224. See also the arguments put on the issue in *Kruger v Commonwealth* (1997) 190 CLR 1.

93 Arguably this adds substance to the assertion often made in acknowledgements or welcomes to Country that the relevant event takes place on the ‘unceded’ lands of the relevant Indigenous people. Apart from this, the notion of ‘cession’ would seem irrelevant to the question of how English colonisers acquired sovereignty over the Australian continent, given that the High Court has stated that the land was acquired by ‘discovery’: *Mabo* (n 90) 31–8 (Brennan J). To that point, international law scholars and others argue that the true method by which sovereignty was acquired was by invasion: see Rowan Nicholson, ‘Was the Colonisation of Australia an Invasion of Sovereign Territory?’ (2019) 20(2) *Melbourne Journal of International Law* 493. See also, on the issue of consent: Giannacopoulos (n 28).

94 Finnis (n 81) 360 (emphasis in original).

95 Ibid 365–6.

96 On Austin’s concept of law as command backed by threat: see, eg, Colin Tapper, ‘Austin on Sanctions’ (1965) 23(2) *Cambridge Law Journal* 271, 276.

Effectively, then, what happened in 1788 and the years following was a revolution, or the overthrow of one legal system or system of norms by another.⁹⁷ This process was described by the legal philosopher Hans Kelsen:

A revolution in the broader sense of the word (that includes a coup d'état) is every not legitimate change of this constitution or its replacement by another constitution. From the point of view of legal science it is irrelevant whether this change of the legal situation has been brought about by the application of force against the legitimate government or by the members of that government themselves, whether by a mass movement of the population or by a small group of individuals. Decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution valid until then.⁹⁸

Kelsen described this process as a change in the basic norm, or *Grundnorm*,⁹⁹ of a society. This change, he observed, occurs from the point of view of a legal scientist when the norms of the pre-existing society cease to be by and large effective, or to be obeyed: 'The basic norm refers only to a constitution which is actually established by legislative act or custom, and is effective. A constitution is "effective" if the norms created in conformity with it are by and large applied and obeyed.'¹⁰⁰

This statement appears at first sight to be suggesting an empirical test for whether a successful revolution has occurred – specifically, a test of whether the norms or new constitutional order established by the post-revolutionary society are by and large effective or obeyed.¹⁰¹ It is significant that Kelsen is describing a system of laws from the point of view of a legal scientist, or an objective outside observer, rather than attempting to prescribe the way in which a judge ought to adjudicate in a revolutionary situation. These are two different points of view, as various critics have pointed out.¹⁰² Arguably, this implies that Kelsen's theory is of limited application to a judge in a post-revolutionary situation, except to the extent that the theory exerts persuasive or moral force upon the judge.¹⁰³ Nevertheless, Kelsen's theory has been referred to at length in various cases in which the efficacy or validity of laws in post-revolutionary situations has arisen, including in

97 This proposition assumes that the systems of customary law prevailing amongst Indigenous people in Australia prior to 1788 qualified as 'law'. In the *Mabo* (n 90) case, Brennan J described the social and customary systems prevailing amongst the Meriam people of the Murray Islands, and observed that '[t]he findings show that Meriam society was regulated more by custom than by law': at 18.

98 Kelsen (n 85) 209.

99 The *Grundnorm* or basic norm for any given society or constitutional system is the statement that 'one ought to behave as the constitution prescribes': *ibid* 202. See more detailed discussion in Stephen Gray, 'Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v Queensland*' (1993) 2(1) *Griffith Law Review* 39, 53 ff ('Planting the Flag').

100 Howard Davies and David Holdcroft, *Jurisprudence: Texts and Commentary* (Butterworths, 1991) 135, quoting Kelsen (n 85) 210.

101 See discussion in Gray, 'Planting the Flag' (n 99) 53–4.

102 See, eg, Dias (n 82); JW Harris, 'When and Why Does the *Grundnorm* Change?' (1971) 29(1) *Cambridge Law Journal* 103. See also discussion in Gray 'Planting the Flag' (n 99) 55–7.

103 JW Harris argues that Kelsen's theory has 'indirect social suggestive force' for judges, adding that the 'pure theory assumes that this legal-science verbal behaviour is not only what judges do indulge in, but also what they ought to indulge in': Harris (n 102) 125–6.

Pakistan,¹⁰⁴ in Zimbabwe (known at the time as Rhodesia),¹⁰⁵ in Grenada after an American invasion,¹⁰⁶ and more recently in Fiji.¹⁰⁷

IV INDIGENOUS PROTESTORS AND THE ACQUISITION OF SOVEREIGNTY IN AUSTRALIAN LAW

The following section concerns the treatment of these questions of legal philosophy in Australian courts. The questions raised are fundamental – whether the British validly acquired sovereignty over the Australian continent, the method by which it was acquired, and the implications for Indigenous people, including the existence of their obligation to obey the law. The cases are well-known, and were brought by well-known Indigenous protestors. They show that, at the very least, there is doubt over the answers to these fundamental questions in relation to Indigenous people – a doubt which is sufficient, it will be argued, to establish an Indigenous right to protest which goes further than that possessed by protestors whose obligation to obey the law rests upon a firmer philosophical basis.

A Sovereignty in the Australian Courts: The *Walker*, *Coe* and *Mabo* Cases

The first Australian case to discuss Kelsen's theory was the 1989 case of *R v Walker* ('*Walker Queensland*') in the Court of Criminal Appeal in Queensland.¹⁰⁸ The case concerned the Aboriginal activist Denis Walker, the son of well-known poet Oodgeroo Noonuccal (Kath Walker), and a leader in the Australian branch of the Black Panther Party. Walker had been charged and convicted in the District Court at Brisbane of criminal damage to property arising from incidents at Amity Point, on Stradbroke Island.¹⁰⁹ He appealed on the basis that the District Court had no jurisdiction to hear the offences charged, because when Captain James Cook claimed possession of the east coast of Australia in 1770,

he exceeded the authority conferred upon him. His instructions were that he should take possession of 'convenient situations' on the continent, but only 'with the consent of the native' peoples. Whatever may be said of other Aboriginal inhabitants of Australia at the time, the Nunukel people of Stradbroke Island gave, it was said, no such consent.¹¹⁰

McPherson J in the Court of Criminal Appeal rejected this submission, essentially on the basis that subsequent conduct of the British, New South Wales and then Queensland authorities unequivocally ratified Captain Cook's claim. Following this, however, McPherson J considered

104 See *State v Dosso* PLD 1958 SC 533 (Supreme Court of Pakistan), discussed in Gray, 'Planting the Flag' (n 99) 54.

105 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.

106 *Mitchell v DPP* [1986] LRC (Const) 35.

107 George Williams, 'Republic of Fiji v Prasad: Introduction' (2001) 2(1) *Melbourne Journal of International Law* 144, 148.

108 *Walker Queensland* (n 85).

109 *Ibid* 80 (McPherson J).

110 *Ibid*.

how it is that judges and others in Queensland apply, and regard themselves as bound to apply, these laws to Stradbroke Island; and, conversely, why the Nunukel people, who in times long past once exercised sovereignty over Stradbroke Island, are, without any formal displacement of their own legal system, now expected and obliged to submit to laws not of their own making.¹¹¹

According to McPherson J, this question is simply

one which the law does not attempt to answer. More accurately, it is one for which the courts, which administer the law, do not and in law are not required to respond except, in the words of Professor Wade, to say that the obedience of courts to the law they apply is 'simply a political fact'...¹¹²

McPherson J went on to say:

Why courts recognise one particular legislative authority rather than another has much to do with the efficacy, within the territory in which the courts adjudicate, of the laws they obey and enforce. 'A legal order' says Kelsen, 'is regarded as valid if its norms are by and large effective'... Whether a legal order is effective depends in turn upon a mixture of history, politics and experience, of which courts may be conscious but into the details of which they do not delve as relevant adjudicative facts... If notions of the foregoing kind are invoked, it may be said that the Nunukel legal system was at some unspecified time after 1788 overthrown by a revolution which introduced a new legal order for Stradbroke Island. The appellant obviously contests the legitimacy of that event, but the efficacy and durability of the regime, which displaced it and which now prevails, is not open to question.¹¹³

It is questionable whether McPherson J's interpretation of the effect of Kelsen's theory is correct – in particular, whether Kelsen would have regarded a municipal court as incapable of questioning whether it should recognise one particular legislative authority as sovereign rather than another. McPherson J refers to a 1968 article by Reginald Dias, who 'reminds us that elements of durability and morality enter, or ought to enter, into the question of the efficacy of the legal order and the processes followed by courts in deciding whether or not to recognise a new legal order'.¹¹⁴ This suggests that, in a post-revolutionary situation, courts are not bound to apply the laws of the revolutionary government – or, indeed, those promulgated by the previous government, and under which the judges of the relevant court are likely to have been appointed. Rather, they may rather consider other factors, such as morality or compliance with human rights. This reflects the practice of most judges of the various courts in the post-revolutionary cases referred to above. It is also arguably open to an Australian court to follow this practice and consider the question of the validity of the acquisition of sovereignty.¹¹⁵

However, Australian courts have consistently refused to entertain the question of the validity of the acquisition of sovereignty by the British Crown over the Australian continent, on each occasion Aboriginal advocates have invited them to consider it. The first such case was *Coe v Commonwealth* ('Coe'),¹¹⁶ again a case brought by an Aboriginal activist, Paul Coe. In response to Coe's argument that

111 Ibid 83.

112 Ibid, quoting HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) *Cambridge Law Journal* 172, 189.

113 *Walker Queensland* (n 85) 83–4 (citations omitted).

114 Ibid 84, discussing Dias (n 85).

115 Gray, 'Planting the Flag' (n 99) 59–63.

116 *Coe* (n 35).

sovereignty had been wrongfully proclaimed, Gibbs J stated that the ‘annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged’.¹¹⁷ This view was repeated in *Mabo v Queensland [No 2]* (‘*Mabo*’),¹¹⁸ in which Brennan J repeated the view of Gibbs J in *New South Wales v Commonwealth* (‘*Seas and Submerged Lands Case*’)¹¹⁹ that ‘[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.’¹²⁰

These statements make it unlikely that an Australian court will ever again consider a challenge to the acquisition of sovereignty itself. However, they do not make it clear that no challenge to the *manner* of acquisition of sovereignty can ever be entertained. Murphy J in dissent in *Coe* pointed out that the Privy Council case of *Cooper v Stuart*,¹²¹ which was traditionally assumed to form the basis of the doctrine that the colony of New South Wales was acquired by settlement of a ‘practically unoccupied’ territory,¹²² was not binding on the High Court. His Honour added that:

There is a wealth of historical material to support the claim that the aboriginal people had occupied Australia for many thousands of years ... that they had a complex social and political organization; that their laws were settled and of great antiquity ... Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines [sic] did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide.¹²³

This view is consistent with that of McPherson J in *Walker Queensland*. The observation quoted above that the Nunukel legal system was overthrown by a revolution is entirely at odds with the notion that the continent was ‘settled’. It constitutes an admission both that the Nunukel people possessed a ‘legal system’ (contrary to the suggestion of Gibbs J in *Coe*),¹²⁴ and that the process by which their legal system was overthrown was not peaceful.

Admittedly, the High Court in *Mabo* rejected the notion that sovereignty was acquired over Australia by anything other than settlement. However, Brennan J at least harboured some doubts, noting first the ‘misgivings’ (as characterised by his Honour) expressed by William Blackstone about the practice of ‘seising on countries already peopled, and driving out or massacring the innocent and

117 Ibid 128.

118 *Mabo* (n 90).

119 (1975) 135 CLR 337 (‘*Seas and Submerged Lands Case*’).

120 Ibid 388, quoted in *Mabo* (n 90) 31. See more detailed discussion in Gray, ‘Planting the Flag’ (n 99) 41–3.

121 (1889) 14 App Cas 286.

122 ‘[T]he Privy Council stated that the colony of New South Wales was not acquired by conquest, but was “practically unoccupied, without settled inhabitants or settled law at the time it was peacefully annexed to the British dominions”’: *Coe* (n 35) 137 (Murphy J), quoting *ibid* 291.

123 *Coe* (n 35) 138.

124 ‘The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised’: *ibid* 129 (Gibbs J).

defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour'.¹²⁵ Brennan J also noted that the enlarged doctrine of terra nullius enunciated by Emer de Vattel at the end of the 18th century, which permitted acquisition of sovereignty by occupation of a previously occupied territory, applied only where the lands concerned had been left uncultivated by the indigenous people: 'It may be doubted whether, even if these justifications were accepted, the facts would have sufficed to permit acquisition of the Murray Islands as though the Islands were terra nullius. The Meriam people were, as Moynihan J found, devoted gardeners.'¹²⁶

Deane and Gaudron JJ also cast some doubt over the traditional view that the British acquired sovereignty over Australia by 'settlement', at least as that term was understood and accepted in the international law of the period:

[T]here are problems about the establishment of the Colony in so far as the international law of the time is concerned. In particular, contemporary international law would seem to have required a degree of actual occupation of a 'discovered' territory over which sovereignty was claimed by settlement and it is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions.¹²⁷

V ANALYSIS: AN INDIGENOUS RIGHT TO PROTEST

The foregoing discussion highlights several points relevant to the existence of a special Indigenous right to protest. Firstly, discussions in legal philosophy of the origins of a duty to obey the law raise significant queries about why Indigenous people, in particular, should obey the law – certainly, it is difficult to see how such a duty could have arisen in colonial history from a social contract, or from express or implied consent. Secondly, there are significant queries concerning the manner in which the British acquired sovereignty over Australia – in particular, whether the refusal of Australian courts to consider the issue has a valid legal or moral basis, and whether 'settlement' as the basis for the acquisition of sovereignty is soundly based in legal philosophy or in international or Australian law.

At a practical level, the proposition that it is legitimate to protest against an unjust law reflects the practice of Aboriginal activists and protestors for decades. As has been highlighted above, there are a number of cases in which Indigenous protestors have argued that they did not cede sovereignty, or that sovereignty was never validly acquired,¹²⁸ that their laws survive in various forms, or that they are not subject to the jurisdiction of the introduced criminal law.¹²⁹ Other Indigenous people have refused to put their arguments in terms acceptable to the dominant

125 *Mabo* (n 90) 33, quoting W Blackstone, *Commentaries on the Laws of England* (17th edition, 1830) vol 1 bk 2, 7.

126 *Mabo* (n 90) 33.

127 *Ibid* 78 (citations omitted).

128 *Coe* (n 35).

129 Note particularly *Walker* (n 35) 49 (Mason CJ).

legal system, preferring instead to stake their claims on the basis of Indigenous law alone.¹³⁰ All such claims have generally been rejected by the courts.¹³¹ Decisions to this effect are in fact less dramatic iterations of Austin's grim affirmation of the power of the courts to hang those who disobey the laws. They amount to a bald assertion of judicial and ultimately military power, and ignore the broader questions of legal philosophy and justice – questions which are not merely performative assertions of irreconcilable Indigenous points of view, but which sit firmly at the centre of a Western legal philosophical tradition.

It may be argued that our call for an Indigenous right to protest grants special legal protection to one part of Australian society and constitutes differential or special treatment. This type of argument is reflected in Justice Keane's comments in *Love v Commonwealth* ('*Love*') that Aboriginal Australians do not 'enjoy a constitutionally privileged political relationship with the Australian body politic'.¹³² In *Love*, the High Court held by majority (in a 4:3 split) that Indigenous persons who were also non-citizens could not be deported as 'aliens' within the meaning of section 51(xix) of the *Constitution*.¹³³ In doing so, the majority held that the common law recognises the unique spiritual and metaphysical connection of Aboriginal people with country.¹³⁴ For instance, Gordon J stated:

[T]he Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was *not* severed or extinguished by European 'settlement'.¹³⁵

Edelman J also referred to the 'powerful spiritual and cultural connections Aboriginal people have generally with the lands of Australia'¹³⁶ and importantly, for the purposes of this article, noted: 'To treat differences as though they were alike is not equality. It is a denial of community. Any tolerant view of community must recognise that community is based upon difference.'¹³⁷

We would argue that recognising an Indigenous right to protest is not a constitutional privilege but is, rather, a reflection of Indigenous peoples' inherent

130 This occurred in *Yunupingu Reference* (n 35), in which an Aboriginal leader, Galarrwuy Yunupingu, was charged with assault and criminal damage following an incident involving a professional photographer, Michael McRostie, who had taken pictures of Aboriginal children without permission. Yunupingu's defence of 'honest claim of right' would have succeeded if he had been willing to testify that he believed his right to enforce his law on his land was recognised by the general law. He refused to give evidence in these terms, instead asserting that he had a right to enforce his own Aboriginal law on his land. For discussion: see Stephen Gray, 'An Honest Claim of Right' (1998) 23(2) *Alternative Law Journal* 97. See also Stephen Gray, 'Over-regulation of Indigenous Law? The Burial and Cremations Bill 2019 (NT)' (2021) 46(1) *Alternative Law Journal* 47 <<https://doi.org/10.1177/1037969X20974796>>.

131 'The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state': *Mabo* (n 90) 31 (Brennan J), quoting *Seas and Submerged Lands Case* (n 119) 388 (Gibbs J).

132 (2020) 270 CLR 152, 221 [178] ('*Love*').

133 *Ibid.*

134 *Ibid* 189 [71] (Bell J), 252–3 [269] (Nettle J), 260–1 [289]–[293], 262 [298], 273 [337] (Gordon J), 289 [396] (Edelman J).

135 *Ibid* 260 [289] (emphasis in original) (citations omitted).

136 *Ibid* 314 [451].

137 *Ibid* 315 [453].

and pre-existing rights. It recognises the unique discrimination and long-term, intergenerational structural inequalities experienced by colonised peoples, as well as serving to achieve substantive and not merely formal equality. As Brennan J observed in *Gerhardy v Brown*, formal equality may be ‘an engine of oppression destructive of human dignity if the law entrenches inequalities “in the political, economic, social, cultural or any other field of public life”’.¹³⁸ Thus, this argument entails rejecting the reasoning of the High Court in *Bugmy v The Queen* that there ‘is no warrant ... to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender’,¹³⁹ since to do so would entail treating Indigenous people differently to non-Indigenous people. We argue that taking these matters into account is in fact a recognition of the need to achieve substantive equality.

This argument reflects postcolonial scholarship from Canada. For example, Brenda Gunn suggests that the liberal conception of reconciliation is problematic as it does not allow for ‘any special or differential rights and privileges’.¹⁴⁰ Patrick Macklem has also outlined examples of recognition of differentiated rights for Indigenous persons under international law.¹⁴¹ He states: ‘Differentiated rights of indigenous peoples represent legal commitments to address adverse distributional consequences produced by assertions of territorial sovereignty over indigenous peoples and indigenous territory.’¹⁴²

This article aims to advance what some authors have labelled a ‘postcolonial legal consciousness’.¹⁴³ Another way to conceptualise this in theoretical terms follows an article by Francine Rochford, who has invoked Jürgen Habermas, conceptualising ‘mass protest – even illegal protest ... as a necessary adjunct to the process of discursive will formation that contributes to the “legitimation” of

138 (1985) 159 CLR 70, 129.

139 (2013) 249 CLR 571, 592 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (*‘Bugmy’*). For criticism of the reasoning in this decision: see, eg, Thalia Anthony, ‘Indigenising Sentencing? *Bugmy v The Queen*’ (2013) 35(2) *Sydney Law Review* 451; Thalia Anthony, Lorana Bartels and Anthony Hopkins, ‘Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice’ (2015) 39(1) *Melbourne University Law Review* 47.

140 Brenda Gunn, ‘Protecting Indigenous Peoples’ Lands: Making Room for the Application of Indigenous Peoples’ Laws within the Canadian Legal System’ (2007) 6(1) *Indigenous Law Journal* 31, 48. Gunn notes that due to this approach, ‘Aboriginal peoples’ rights to their land must be made to fit into the existing Canadian legal system. In order to provide adequate protection of Aboriginal peoples’ land, we must move away from the recognition based on these liberal concepts towards basing these rights on Indigenous legal traditions’: at 48.

141 See Patrick Macklem, ‘Indigenous Rights and Multinational Corporations at International Law’ (2001) 24(3) *Hastings International and Comparative Law Review* 475. For instance, Macklem notes at 479 that the International Labour Organization (‘ILO’):

has long advocated the protection of differentiated indigenous rights at international law. ILO Convention 169, for example, enshrines the right of indigenous peoples to ‘participate in the formulation, implementation and evaluation of plans and programmes for national and international development which may affect them directly.’ More recently, the United Nations Draft Declaration on the Rights of Indigenous Peoples aspires to enshrine international rights that attach to indigenous peoples on account of their indigenous difference.

142 Ibid 482.

143 Henderson (n 1).

law in complex regulatory systems'.¹⁴⁴ Habermas sees this process as essential to the legitimacy of democratic societies in a 'post-enlightenment' world, where the sacred could no longer be seen as the ultimate source and justification for legal authority.¹⁴⁵ Law is legitimate to the extent to which it is underpinned by a process of will formation which 'has the characteristics of an ideal communication community'.¹⁴⁶ This ideal communication community must take the form of a 'neutral dialogue' ruled by 'conversational restraint'.

However, civil disobedience is necessary in this scheme, as a way of 'bypassing the mechanisms of social power'.¹⁴⁷ Protest movements are necessary as a reaction to the 'colonization of the life-world' by late-stage capitalism, and particularly corporatisation and economic rationalism.¹⁴⁸ The process of will formation lends meaning to the social polity, which would otherwise suffer from the 'anomie' arising from the absence of the sacred. However, that process may itself suffer from 'anomie' where it is subverted by corporatisation, and individual disenfranchisement.¹⁴⁹ Climate change is the apogee of this process, since it raises 'existential stakes' requiring 'exceptional ameliorative measures'.¹⁵⁰ In such a situation, protest is the only way to reinfuse the social body with meaning.

Thus, we would argue that the 'life-world' of Australian Indigenous peoples has been colonised, albeit for a longer period, and during an earlier stage in the development of the modern capitalist state. Indigenous peoples routinely speak of the illegitimacy of the Australian state from their point of view – assertions of continuing sovereignty, or of unceded land, are illustrations of precisely this point. As indicated by the experiences of over-incarceration and the Stolen Generations, Indigenous peoples clearly suffer from the 'anomie' or loss of meaning associated with this colonisation process.¹⁵¹ That this is a problem for the entire Australian nation, and not just for Aboriginal peoples, has been recognised by scholars and activists for decades – arguably, since the anthropologist WEH Stanner first

144 Francine Rochford, 'Morally Motivated Protest in the Face of Orthodoxy: Environmental Crisis and Dissent in Australian Democracy' (2020) 11(3) *Journal of Human Rights and the Environment* 54, 55 <<https://doi.org/10.4337/jhre.2020.03.03>>.

145 Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System*, tr Thomas McCarthy (Polity Press, 1987) vol 2, 53, discussed in *ibid* 56.

146 Rochford (n 144) 57.

147 *Ibid* 59.

148 *Ibid*, quoting Habermas (n 145) 277.

149 Rochford (n 144) 60.

150 Mike Slaven and James Heydon, 'Crisis, Deliberation, and Extinction Rebellion' (2020) 8(1) *Critical Studies on Security* 59, 59 <<https://doi.org/10.1080/21624887.2020.1735831>>, quoted in *ibid* 65.

151 For a detailed discussion of this issue, including the link to the concept of 'anomie' elaborated upon by Durkheim: see Colin Tatz, *Aboriginal Suicide Is Different: A Portrait of Life and Self-Destruction* (Aboriginal Studies Press, 2nd ed, 2005). Colin Tatz argues at xxii–xxiii:

To understand Aboriginal suicide, one has to understand Aboriginal history: their way of life has been destroyed, resulting in a loss of structure, cohesion and meaning ... Aboriginal society has negated its formerly precious social attributes – kinship, reciprocity, mutuality, sharing, care of young and old, incest taboos. A people with previously ordered lives now have lives which are disordered. The inevitable outward indicators of despair are evident – alcohol and drug abuse and the attention of the police.

articulated the ‘Great Australian Silence’ in his Boyer Lecture of 1968.¹⁵² While it is ironic in a sense that Indigenous people, whose life-world traditionally is based upon a concept of the sacred, might found their right to protest upon a theory of legitimacy based on the absence of sacred meaning in post-Enlightenment societies, it is nevertheless completely appropriate. Protest is an attempt to reinfuse their world with meaning, in a society which has deprived them of it – and ultimately, restore a sense of legitimacy to the Australian political and legal system as a whole.

VI CONCLUSIONS: THE SCOPE AND BOUNDARIES OF AN INDIGENOUS RIGHT TO PROTEST

In this article, we have attempted to present a historically informed analysis of Indigenous protest which considers the contemporary discriminations facing the Indigenous peoples of Australia.

Currently the law treats protests by Indigenous peoples in a similar way to protests in any other context, essentially by ‘balancing’ freedom of expression and public order issues. This article demonstrates that there is scope to argue that the law should treat Indigenous protest differently, because of the contested way in which sovereignty was acquired, and the highly questionable way in which the acquisition of sovereignty continues to be justified by the courts,¹⁵³ as well as the history of dispossession of land, and its intergenerational effects including mass incarceration.

We recognise that the proposition that Indigenous people have a special right to protest raises significant issues for the introduced, or colonial, body of Australian law. As noted above, the recognition of such rights subsisting in one group of people within the Australian population might be viewed by some as infringing upon the central principle of equality before the law, or the notion that like cases should be treated alike.¹⁵⁴ Another limitation might be that enunciated by Brennan J in *Mabo*, that the ‘Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency’.¹⁵⁵

At a broader level, the proposed existence of such a right raises a significant question of principle and policy: if Indigenous people possess a right to protest, who else might possess it? If the right is based in the fact that Indigenous people did not

152 See, eg, Anna Clark, ‘Friday Essay: The Great Australian Silence 50 Years On’, *The Conversation* (online, 3 August 2018) <<https://theconversation.com/friday-essay-the-great-australian-silence-50-years-on-100737>>.

153 See above nn 101–7, 111–13, concerning the misapplication of Kelsen’s theory to deny Indigenous litigants the ability to question the manner of acquisition of sovereignty, a theoretical position which contrasts with that taken in other jurisdictions such as Pakistan, Zimbabwe, Grenada and Fiji.

154 For a consideration of these issues in the context of an argument that courts should take Indigenous disadvantage into account in sentencing: see *Bugmy* (n 139). See also Sarah Krasnostein, ‘Too Much Individualisation, Not Enough Justice: *Bugmy v The Queen*’ (2014) 39(1) *Alternative Law Journal* 12 <<https://doi.org/10.1177/1037969x1403900104>>.

155 *Mabo* (n 90) 29.

consent to the acquisition of sovereignty by the British colonisers, does it follow that any conquered group possesses a legal right to protest against their conquerors? It might be argued, for example, that the Irish possess such a right against the English, the West Papuans against the Indonesians, or the Indigenous people of New Caledonia against the French. A second question concerns the implications of basing a right to protest on the history of unjust treatment suffered by Indigenous people. If Australian history affords Indigenous people such a right, does this mean that any individual or group who has been treated unjustly, or believes her or himself to have been treated unjustly, has a legal right to protest? Migrant workers, or African-Americans, or the white working class in Donald Trump's America, might all argue they have a right to protest based on history of real or alleged unjust treatment. So might anti-vaxxers, sovereign citizens, or anti-abortionists, or members of just about any group who believe themselves victimised.

However, few groups other than Indigenous peoples in Canada, the United States and New Zealand¹⁵⁶ have experienced the combination of disadvantages suffered by Australian Indigenous people; that is, the contested and unrecognised basis for the acquisition of sovereignty, accompanied by the history of massacre, over-incarceration and the other harms of colonisation. These harms mean that, as argued above, the philosophical basis not only for obedience to individual laws but to the legal system as a whole remains objectively problematic where Indigenous people are concerned. Thus, recognising an Indigenous right to protest does not raise a 'floodgates' argument. The same combination of factors simply does not apply to other groups who might argue they, like Indigenous people, have a right to protest.

Nevertheless, significant questions remain about the nature and boundaries of an Indigenous right to protest. The first of these is which Indigenous people possess the right; whether it is restricted, for example, to native titleholders, or traditional owners, exercising the right on their land. We argue that no such restriction should exist. The combination of factors outlined above apply equally to all Indigenous people in Australia, whether or not they are traditional owners, members of the Stolen Generations, or have been incarcerated.

A second question is whether the proposed right to protest extends only to matters specifically related to Indigenous history and rights – such as over-incarceration, sovereignty, or environmental issues. We argue that the right would be restricted to such matters. It would not give any special rights to Indigenous people who might wish to protest about COVID restrictions, abortion, vaccination rules, or other matters unrelated to Indigenous history and colonisation.

A third, more difficult question is what kind of protest actions the right encompasses. Does it allow Indigenous people to block roads? Damage or destroy statues or other symbols of colonial power, or carry out property damage more generally? Throw food and drink at politicians? What about other violent acts? While the vast majority of Indigenous protests have been, and continue to be non-

156 Otherwise known as CANZUS: see Kirsty Gover, 'Settler-State Political Theory, "CANZUS" and the *UN Declaration on the Rights of Indigenous Peoples*' (2015) 26(2) *European Journal of International Law* 345 <<https://doi.org/10.1093/ejil/chv019>>.

violent, occasional protests such as ‘statue shaming’, or the actions urged in their writings by the Black Power movement,¹⁵⁷ have arguably crossed the line. It is conceivable that future protestors may wish to take this course. We accept that acts of personal violence could not be recognised as ‘legal’, no matter what the victim symbolised or had done. However, the destruction of property in some situations might be accepted as encompassed within such a right. We suggest that the bounds of an Indigenous right to protest are likely similar to the rights encompassed within the right to peaceful assembly at international law. The precise boundaries of this right would need to be worked out on a case by case basis.

In addition, we argue that the Indigenous right to protest should be recognised as a factor required to be taken into account by decision-makers (usually, judges and magistrates) when considering an Indigenous person’s guilt or innocence of a criminal offence arising from an act of protest. As we noted above, Indigeneity and Indigenous rights are often referred to obliquely, or as it were in passing, in the context of such offences.¹⁵⁸ In treating Indigenous matters in this way, decision-makers are likely reflecting the prevailing view of the Anglo-Australian law that Indigeneity does not ‘matter’, that all people are treated equally before the law. The fact that on no rational view can this attitude be maintained is therefore a matter to be acknowledged, while downgrading its significance.

Recognition of a right to protest would mean that this position can no longer be maintained. Decision-makers would be required specifically to consider the impact of Indigenous history, colonisation, and Indigeneity itself. It would not necessarily be a determining factor, but would be a necessary factor added to the ‘balance’ which generally forms part of the adjudication of guilt. For example, when considering whether a permit to hold a protest had validly been refused, a court would need explicitly to consider this factor.¹⁵⁹ As an example, Fagan J in *Commissioner of Police (NSW) v Bassi*, which concerned the Black Lives Matter protest litigation, stated:

The Court recognises that a strong public interest attaches to any expression of public opinion in this manner. In this case the particular cause that the organiser wishes to advance is awareness of what he and others of like mind perceive as unequal treatment of indigenous people in this country by police and concern with respect to deaths of indigenous people that have occurred whilst in custody, and concern with the known high rates of incarceration of indigenous people relative to other members of the community.¹⁶⁰

So too would it need to take this factor into account when considering whether language was ‘offensive’ in the context in which it was uttered.¹⁶¹ Some parallel

157 Black Power activists in Australia in the late 1960s discussed and in some cases advocated the use of violence: see Jennifer Clark, *Aborigines and Activism: Race, Aborigines and the Coming of the Sixties to Australia* (University of Western Australia Press, 2008) 208–11.

158 See, eg, *Saunders* (n 78); *Gibson* (n 75).

159 *Gibson* (n 75) 902 [5] (Bathurst CJ, Bell P and Macfarland JA).

160 [2020] NSWSC 710, [18]. We note that Fagan J’s decision was reversed by the NSW Court of Appeal. However, as other judges have noted, ‘the Court of Appeal did not cast doubt on the correctness of his Honour’s observations set out above’: *Commissioner of Police v Gray* [2020] NSWSC 867, [61] (Adamson J).

161 *Saunders* (n 78).

might be drawn with the bail legislation in Victoria, which explicitly requires a decision-maker to consider factors arising from Aboriginality when making a bail determination, including historical and ongoing discriminatory systemic factors, and the impact of any experience of trauma and intergenerational trauma.¹⁶²

In this article we have situated our analysis within the context of settler colonialism, Indigenous resistance and cultural rights. We have conceptualised Indigenous protest as a means of reclaiming culture, language, knowledge and sovereignty. Against this background, we argue that any discussion of protest in Australia must be carried out against an understanding of the systemic, continuing effects of colonialism and thus Indigenous protest must be reconceptualised as an act of decolonisation.

162 See *Bail Act 1977* (Vic) s 3A, which provides, inter alia, that:

In making a determination under this Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including the following:

- (a) the historical and ongoing discriminatory systemic factors that have resulted in Aboriginal people being over-represented in the criminal justice system, including in the remand population;
- (b) the risk of harm and trauma that being in custody poses to Aboriginal people ...