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Civilizing the Savages: A Comparison of Assimilation Laws and Policies in the United States and Australia

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ARTICLE

CIVILIZING THE SAVAGES: A COMPARISON OF ASSIMILATION LAWS AND POLICIES IN THE UNITED STATES AND AUSTRALIA

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> It has long been the conviction of the humane amongst us, that our aboriginal inhabitants have been the victims of great wrongs, cruelties and outrage; but it is only recently that the particular nature, the atrocious character, and frightful results of these crimes have been brought distinctly before us.
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> Excerpted from the United States Indian Commission's memorial to Congress on July 14, 1868.[1]

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1. F. Prucha, American Indian Policy in Crisis 27 (1964) citing HOUSE MISCELLANEOUS DOCUMENT No. 165, 40 Congress, 2 session, serial 1350, at 1 (1868). The United States Indian Commission was a private humanitarian organization devoted to Indian Policy Reform.

INTRODUCTION

The assumption that European culture is superior to all others, especially Indigenous[2] cultures, and the necessity for European culture to subjugate and assimilate Indigenous cultures to the European world view has pervaded Anglo-European legal thought for centuries.[3] Anglo-European or Western thought has viewed Indigenous people as inferior. This thinking led to the assumption that the Indigenous people needed to be "saved" from their own social structures and cultures and taught how to live the "correct" Anglo-European lifestyle.[4] Western thinking could not comprehend or accommodate the nomadic and communal cultures of most Indigenous peoples. Western culture viewed Indigenous peoples as infantile and in need of enlightenment. Therefore, the European ethnocentrically conceived "Law of Nations" would require the Indigenous peoples to comply with European norms.[5] "Only by conquest would natives be brought from darkness to light; a light discoverable only within the Europeans' universalized vision of reason."[6]

In countries where the Indigenous and European cultural modes of thought clashed, the wealthier and more powerful European cultures dominated. This cultural domination occurred in both the United States and Australia.

The purpose of this article is to examine the assimilation policies and laws in the United States and Australia.[7] These policies warrant

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2. The word Indigenous will be capitalized throughout this article in order to express the fact that Indigenous peoples are identifiable and distinct ethnic groups. The use of capital letters to denote a peoples ethnicity is widely used in the English language. Therefore, just as "European," "Asian" and "North American" are capitalized, and each term refers to people of several nationalities, Indigenous will be capitalized. This is merely a gesture which if nothing else, attempts to equate grammatically the term "Indigenous" to "European," "North American," etc..

3. Robert Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* 1986 Wis.L.Rev. 219, 229 [hereinafter Williams I]; ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, NATIONAL REPORT VOLUME 2, p.8. Australian Government Publishing Service, Canberra. (1991). [Hereinafter ROYAL COMMISSION].

4. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era,* 40 Ark.L.Rev. 327, 349-50 (1986) [hereinafter Lacey].

5. Williams I, *supra* note 3, at 253.

6. *Id.*

7. The law relating to assimilation of the Native American Indians in the United States is strictly Federal. However, the Australian Constitution precluded the Australian Commonwealth from enacting legislation with respect to Abrorigines until it was amended in 1967. s.51(xxvi) Assented August 10, 1967, cited in John McCorquodale, ABORIGINES AND THE LAW: A DIGEST 9, (1987) [hereinafter ABORIGINES AND THE LAW]. Australian Aboriginal law was almost exclusively state law until 1967. Therefore, this article will make reference to the applicable laws from the various Australian states. For the sake of continuity, the body of the article will reference

examination and comparison because of their striking similarities. Both countries were colonized by white, predominantly British Europeans; both countries were originally occupied by noble Indigenous races; the Indigenous people were a barrier to the Anglo-Europeans' effective occupation and colonization efforts; and ultimately, the Indigenous races came under the almost complete control of the colonists.

This article will discuss the respective assimilation laws and practices of the United States and Australia and how they relate to the Native American Indians (Indians) and the Native Australian Aborigines (Aborigines). In particular, this article will discuss the Anglo-European legal thought and doctrine used to rationalize and legitimize the process of assimilation. From the implementation of the Doctrine of Discovery[8] to the mandatory education of Indigenous children, Anglo-European legal, social, and philosophical dogma was imposed upon the Indigenous peoples of both the United States and Australia.

Section I of this article briefly discusses the cultures involved. Specifically, it describes the basic cultural features of both the American Indian and the Australian Aborigine. Section I also describes the cultural ideals of the non-Indigenous colonizers who instituted the assimilation policies. The cultural ideals of the non-Indigenous European colonists are discussed in the context of the Anglo-European world view. This view embodies all of the aspects of European life from law, religion and society to family structure. The Anglo-European world view is the dominant influence behind all Anglo-European encounters with normatively divergent cultures.[9]

Section II describes the assimilation policies in Australia and the United States. The assimilation policies are examined in light of the legal concepts, doctrines, and ideologies employed by Anglo-Europeans to accomplish their goals.

Section III discusses the post "discovery" land policies. This discussion includes the "reservation" policies of the United States and

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the laws of New South Wales and the laws of the other states will be referenced in the adjoining footnotes.

8. The Doctrine of Discovery in an Anglo-European concept that deems lands inhabited by infidels void of law. Since the land is void of law it can be "discovered" and colonized via the implementation of Anglo-European law. See *infra* notes 74-117 and accompanying text.

9. For a complete discussion on the history of European legal thought as it pertains to the treatment of Indigenous cultures see, Robert Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S.Cal.L.Rev.1 [hereinafter cited as Williams II].

Australia. Section IV discusses the end of the Indigenous people's self-determination, which resulted from overbearing colonial supervision.

Section V discusses the laws and policies with respect to the education of Indigenous children. Finally Section VI concludes with a look at the similarities between the respective assimilation laws and policies of the United States and Australia. Specifically Section VI addresses the contention that the assimilation laws and policies of the United States and Australia are similar because they both were derived from the same Anglo-European world view.

The particular motives behind the United States' and Australia's policies are beyond the scope of this article.[10] Regardless of the motivation behind the assimilation policies and laws, the effects were the same. The assimilation policies destroyed cultures that had existed for tens of thousands of years before the Europeans arrived. Although the motivations behind particular assimilation laws and policies may have differed, the ultimate goal of assimilation was the same — to "civilize the savages."

I. THE CULTURES

Striking similarities are present in the Indigenous cultures and colonizing culture in both the United States and Australia.[11] The colonists' culture led them to use assimilation laws and policies to achieve their goals. For many of the Indigenous people in both countries, the colonist's goals led to the destruction of their strong and vibrant cultures.

A. The Indigenous Cultures

The Indigenous cultures in both the United States and Australia are composed of many distinct groups or tribal cultures. During the course of history and evolution in both countries, different tribal cul-

10. It is worth noting, however, that the underlying motivations may have come from different points of view. In some instances the motivation was to solve the "Indian problem" or the "Aboriginal problem" by eradicating both the Indian and the Aboriginal culture. The theory behind the policies was that if the Indians and the Aborigines were not discernable from the general population they would no longer exist. If the Indians and the Aborigines no longer existed then there would be no Indian or Aboriginal problems. In other instances the motivation was to "save" the Indigenous people and help them become like the Europeans for their own good.

11. Although there are many similarities and differences in the respective cultures of the Native American Indian and the Australian Aboriginal a detailed analysis is beyond the scope of this paper.

tures formed individual communities which operated within themselves as small "nations."[12] Therefore, it is inaccurate to refer to one Indian or Aboriginal nation.[13] Rather, there were many independent nations coexisting on the lands not unlike the different European nations coexisting on the European continent.[14] Tribal cultures varied greatly, however, certain generalizations can be made about each respective Indigenous culture.[15] Although, the American Indian's way of life was different than that of the Australian Aborigine's, general similarities between the two cultures can still be drawn.

Before the invading influence of the European colonists and explorers, a vast and thriving Indigenous race occupied the lands of the United States and Australia.[16] The Indigenous people of each land lived in harmony with the land and nature. The land was the religious center for the Indigenous people of these two nations. Their religion was the basis for all other aspects of their lives.[17] "The powers of nature, the personal quest of the soul, the acts of daily life, the solidarity of the tribe - all were religious, and were sustained by dance and ritual."[18] The central tenant of the Indigenous religions was that the land was at the center of all things and all living things were connected to the land in unity.[19] The Indigenous people believed in a creative deity of supreme importance.[20] Tribal elders, who were treated with

12. Wallace-Bruce, *Two Hundred Years On: A Reexamination of the Acquisition of Australia*, 19 GA. J.INT'L & COMP.L. 87, 97 (1989). There were about 500 different Aboriginal communities and a total population of approximately 300,000. *Id.*

13. *Id.*

14. *Id.*

15. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 3 (1970) [hereinafter DEBO]. Lacey *supra* note 4 at 330; ROYAL COMMISSION, *supra* note 3 at 7. The nomadic tribes had some different cultural characteristics from the more agrarian tribes or groups. Therefore, the comparisons made will be comparisons of the general cultural threads that run through both the Native American culture and the Australian Aboriginal culture.

16. Aboriginal history in Australia dates back somewhere between 50,000 and 100,000 years. ROYAL COMMISSION, *supra* note 3 at 6. The history of Native American Indians dates back between 12,000 and 40,000 years. S. Begley, *The First Americans*, WHEN WORLDS COLLIDE: A NEWSWEEK SPECIAL EDITION 15 (1991).

17. ABORIGINAL PEOPLE OF NEW SOUTH WALES, Published for the Aboriginal and Torres Strait Islander Commission, Australian Government Publishing Service, Canberra, 4 [hereinafter ABORIGINAL PEOPLE OF N.S.W.]. The Aborigines' spiritual beliefs permeated all aspects of their lives, defining everything from the food they were to eat to the designs they were to carve on tools and weapons. DEBO, *supra* note 15, at 4.

18. DEBO, *supra* note 15, at 4.

19. ROYAL COMMISSION, *supra* note 3, at 7. The Native American Indian viewed land as a Great Spirit, a deity in and of itself, not a commodity to be bought or sold. Lacey, *supra* note 4, at 345.

20. To the Native American Indian this deity was called The Great Spirit. The Great Spirit made everything and gave the Indian the land and thus the land possesses a religious identity.

great respect, kept the religious laws and customs and passed them down through religious rites of passage.[21] Women played an important role on the religion. Some of the deities were female and women were responsible for keeping the sacred religious customs and passing them on.[22] Religion permeated all aspects of Indigenous culture from the type of food that was eaten to the manner in which tribal societies were organized.

The vast Indigenous population was comprised of smaller entities that spoke different languages. These smaller entities were called language groups or tribes.[23] Each language group or tribe was divided further into clans.[24] The clan was the most important entity for each individual; each owing his or her clan the highest allegiance and strongest affiliation.[25] The clan often acted as a large extended family unit. A child belonged to the clan as well as to her mother and father.[26] Clan descent was either patrilineal or matrilineal depending on the clan's tribal affiliation.[27] Marriage within one's clan was forbidden.[28]

The Indigenous people were primarily nomadic hunters and gatherers.[29] Gender roles were rigidly defined and the duties of each gender did not overlap. Basically, the men hunted and the women

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Lacey, *supra* note 4, at 339. On the other hand, the Aboriginal in Australia called the deity Baiami. Baiami was the creator of all and the giver of life. Baiami also established the laws of the Aboriginal society. The creation period was called The Dreaming or Dreamtime. Various beings associated with The Dreaming took the form of animals and particular landscapes. Therefore, the land and animals have a particular religious identity to the Aboriginal. ABORIGINAL PEOPLE OF N.S.W., *supra* note 17.

21. ABORIGINAL PEOPLE OF N.S.W., *supra* note 17, at 4. *See also* Lacey, *supra* note 4, at 347.

22. Lacey, *supra* note 4, at 335.

23. ABORIGINAL PEOPLE OF N.S.W., *supra* note 17, at 3.

24. *Id.*; Lacey, *supra* note 4, at 332.

25. ABORIGINAL PEOPLE OF VICTORIA, PUBLISHED FOR THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION, AUSTRALIAN GOVERNMENT PUBLISHING SERVICE, CANBERRA, 4 (1990) [HEREINAFTER ABORIGINAL PEOPLE OF VIC.]; ABORIGINAL PEOPLE OF N.S.W., *supra* note 17, at 3; Lacey, *supra* note 4, at 331-2.

26. ABORIGINAL PEOPLE OF N.S.W., *supra* note 17, at 3; Lacey, *supra* note 4, at 332.

27. In the case of patrilineal descent, the child belonged to the same clan as her father. In the case of matrilineal descent, the child belonged to the same clan as her mother. ABORIGINAL PEOPLE OF N.S.W., *supra* note 17, at 3. Clan affiliation was so strong that a woman's bond with her brothers is often stronger than the bond to her husband. Lacey, *supra* note 4, at 332.

28. *Id.*

29. ABORIGINAL PEOPLE OF VIC., *supra* note 25, at 5; Lacey, *supra* note 4, at 334-5. See also John W. Ragsdale, Jr., *Indian reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L.REV. 503, 506; John W. Ragsdale, *The Dispossession of the Kansas Shawnee*, 58 UMKC L.REV. 209, 210.

gathered and prepared the food.[30] In comporting with their religious tenets, only those things necessary to sustain life were taken from the land and everything was shared within the tribe.

The above description is not a description of either the Native American Indian or the Australian Aborigine. Rather, it is a description of the basic cultural foundations of both the Indian and the Aborigine. The characteristics described as those of the "Indigenous" culture are characteristics common to the Indian and the Aborigine. The characterizations of the "Indigenous" culture made above are not exhaustive. However, they do provide a general framework for the comparison of these Indigenous cultures.

B. The Colonizing Culture and the Anglo-European World View

Both the United States and Australia were colonized by European, primarily British settlers. The way in which indigenous people have been treated throughout the development of both the United States and Australia stems from the way in which the early Europeans viewed the Indigenous and culturally divergent peoples with whom they made contact.[31] The treatment of Indigenous peoples, in each case, by the Europeans is a result of the Anglo-European world view. This world view implies superiority of the European culture over all others[32] and forms the basis for the similar treatment of Indigenous people in the United States and Australia.

For nearly one thousand years the Anglo-European world view has been evolving. This view permeates all aspects of life from legal thought to family life and religion. It is based upon two basic premises: first, the omnipotence of the Anglo-European world view; and second, "the rightness and necessity of subjugating and assimilating other peoples to that world view."[33] The first premise is shared by all cultures as a means for their perpetuation. In order for a culture to survive, there must be a belief that its world view is supreme, otherwise there would be no motivation to perpetuate its existence. This premise was shared by the Indians and by the Aborigines. However, only the European has sought to effectuate the second premise on a world scale.[34]

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30. *Id.*
31. See generally Williams I, *supra* note 3; Williams II, *supra* note 11.
32. ROYAL COMMISSION, *supra* note 3, at 8; Williams I, *supra* note 3, at 253.
33. *Id.*
34. Williams I, *supra* note 3, at 229.

Implicit in the Anglo-European world view is the European "colonizing discourse."[35] The colonizing discourse embodies two basic themes: First, the colonizing discourse viewed Indigenous inhabitants as in "constant violation of natural law and the Law of Nations."[36] Since natural law was based upon Christian ideals and the white man's conception of God and divine purpose, and the Law of Nations was based upon the European concept of civilization, the Indian and the Aborigine had no chance of fitting into the Anglo-European mold. Second, as inherent violators of natural law and the Law of Nations, the Indigenous inhabitants "possessed no rights that civilized English monarchs or subjects were bound to recognize"[37] Since the Indigenous populations had no recognized rights, their land and property could be dispossessed.[38]

The way in which European countries conducted their colonizing efforts is founded in Medieval and Renaissance ages.[39] The Anglo-European world view, with respect to its treatment of Indigenous cultures, has persisted in European colonial efforts since the Spanish colonization of the Caribbean Islands in 1493.[40] The view stems from

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35. For a more detailed history and explanation of the European colonizing discourse, *see* ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1989) [hereinafter WILLIAMS III].

36. *Id.* at 221. Natural Law is a philosophical expression initially usede by Roman jurists during the Antonine age. Black's Law Dictionary, sixth ed. at 1062. Under natural law, there were "necessary and obligatory rules of human conduct... essential to the divine purposes in the universe [that]... had been promulgated by God solely through human reason." WILLIAMS III, *supra* note 35, at 221. The Law of Nations is a "[b]ody of consenual principals which have evolved from customs and practices civilized nations utilize in regulating their relationships...." *Id.* at 816.

37. WILLIAMS III, *supra* note 35, at 221.

38. The fact that the Indigenous inhabitants could easily be dispossessed of their property because of a lack of recognized rights forms the basis of dispossession of land by the Doctrine of Discovery. *See infra* notes 75-118 and accompanying text.

39. *See generally*, Williams II, *supra* note 9. Williams contends that medieval legal thought and the force of papal supremacy created the way in which Europeans administered policies directed at Indigenous cultures. Specifically he contends that the Spanish administration in the Caribbean in the latter part of the 1400s laid the foundation for the future European confrontations with Indigenous peoples. "The colonial laws that Spain enacted, establishing a system of forced Indian labor and forced adoption of European ethical and social practices, subsequently influenced latter colonizing nations conceptions of [indigenous] status and rights." *Id.* at 9.

40. *Id.* The Spanish colonized the island of Hispanola in 1493 after Columbus' second voyage. The patterns of slavery and subjugation of the Indigenous islnders was cloaked with papal approvals and mandates that the natives be "civilized" and "Christianized." Since the Pope was a major influence in the policies in all of Europe, other European colonizing efforts followed the papally condoned Spanish precedent. *See generally* Williams II, *supra* note 9.

European ethnocentrism and papally approved colonization of the land and Christianization of the inhabitants.[41]

As the European state evolved, it endeavored to define and justify itself as "founded upon and judged by universal norms," and thus, in effect, became an "archetypical organization."[42] This archetypical organization was viewed by the Europeans as capable of being transplanted and expanded on a global scale.[43] Under this assumption, the Europeans were able to define their relationship with the rest of the world.[44] Therefore, as the Europeans expanded their material base and wealth, their conceptual foundations were "ready for the extension of the European state system [and the Anglo-European world view] beyond its borders."[45]

As the Europeans journeyed out beyond their borders, they inevitably encountered Indigenous people who did not share the Anglo-European world view. The Indigenous people proved to be a burden for the colonists who wanted their land. Consequently, the Europeans forced the indigenous people to conform to European norms and to become "European-like." [46]

Although Anglo-European legal thought has changed dramatically over time, the one constant has been the manner in which it has "steadfastly adhered to a highly systemized mythological structure in confronting its experience of normatively divergent peoples."[47] This systematic structure is derived from an Anglo-European world view that ardently believes in the omnipotence of its cause and the necessity of subjugating non-European cultures. The Anglo-European world view coupled with the European colonizing discourse created an effective tool for controlling and assimilating Indigenous cultures. This view also provided a sound justification for Anglo-European practices. With newly "discovered" land under their feet and the Anglo-European world view in their heads, European colonists sought to change thousands of years of Indian and Aboriginal culture.

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41. *Id.* at 9-10.

42. Wood, *History, Thought, and Images: The Development of International Law Organization*, 12 Va. J. Int. L. 35, 38-9.

43. *Id.*

44. *Id.*

45. *Id.*

46. Williams II, *supra* note 9, at 4.

47. Williams I, *supra* note 3, at 229.

II. The Assimilation Policies in the United States and Australia

A. *Assimilation Policies: Introduction*

Assimilation policies were based on the assumption that the "Anglo-European family model was the cornerstone of a civilized society."[48] Since every aspect of Indigenous culture was opposed to the "civilized family unit," assimilation was designed to eliminate the Indigenous culture and replace it with the civilized Anglo way of life.[49] Therefore, laws were designed to assimilate the Indigenous people into the Anglo culture. In most cases, the laws were instituted by humanitarians who were convinced that stamping out the natives' "heathen" life style was for their own good.[50]

Colonists in the United States and Australia employed four methods to achieve their goal of assimilating the Indigenous people into their respective cultures. These methods, which appear to have been intended to isolate rather than assimilate Indigenous people, were justified in the context of Anglo-European legal thought. The first method was to acquire land. Land was acquired through the Anglo-European Doctrine of Discovery. The Doctrine of Discovery justified colonists taking Indigenous peoples' lands because the colonists "discovered" the land. The land was deemed "discovered" because Indigenous people were not Christian and did not have a system of government that resembled the Europeans'. Without Christianity and European-like government the Indigenous people had no rights. Since the Indigenous people had no rights in the Anglo-European legal sense, the colonizers were free to take or "discover" their lands. The Doctrine of Discovery was not only legitimized by the Anglo-European legal ideology, it was also legitimized by the Anglo-European court systems that were transplanted in the "newly discovered" lands.[51]

The second method of assimilation was implementation of the colonist's reservation policy. Land acquisition forms the basis for colonization. The European colonists viewed the land as a commodity to be owned, developed. The Indigenous peoples' view regarding land

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48. Lacey, *supra* note 4, at 347-48.

49. *Id.*

50. See generally Francis Prucha, Americanizing the American Indian: Writings from the "Friends of the Indian" 1880-1900. (1973) [hereinafter Friends of the Indian].

51. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), note 80, *infra,* and accompanying text. *See also* Milliprum v. Nabalco, 17 A.L.R. 141 (1971), note 80, *infra,* and accompanying text.

was diametrically opposed to the Anglo-European view. The natives viewed the land as an integral part of their lives, religion, and culture. In order to "help" the "savages" become "civilized," the Anglo-European policy was to teach them how to properly respect the "value" of land. Therefore, land allotments, called reservations in the United States and reserves in Australia, were divided between tribes or bands for their use. The Indigenous peoples were required to live on governmentally designated lands, often far away from their traditional sacred lands. Reservation policy did not necessarily change the Indigenous peoples' concept of land but it was a categorical success in dispossessing the Indigenous people from their land.[52]

The third method of assimilation was aimed at denying to Indigenous people self-determination, meaning the ability to control their future. Indigenous people, after being dispossessed of their land, found themselves under the control of newly created supervisory authorities. These authorities, usually central boards of bureaus created by Anglo-European legislators, were responsible for the administration and implementation of the Anglo-European laws created to bring about assimilation. Eventually, supervisory authorities assumed almost complete control over every aspect of the Indigenous peoples' lives. The net result of dispossessing the natives of their lands and controlling their lives was that they lost their self-determination.

The fourth method of assimilation was directed toward educating the Indigenous children. In order for the natives to be assimilated into the Anglo-European culture, they must be educated in the Anglo-European way.[53] Implicit in this method of education is the notion that the Indigenous peoples were completely incapable of educating their own children. Furthermore, this Anglo-European educational scheme required the complete renunciation of the Indigenous culture. Indigenous children, in both the United States and Australia, were forcibly and involuntarily taken from their natural parents to "schools" which "taught" them to act in a civilized manner. Often these children never saw their natural parents again and never learned the ways their ancestors had lived for thousands of years before them.

The Anglo-European world view could not comprehend the Indigenous life style including Indigenous religion, society, and work

52. John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L.REV. 503.

53. David Bryan, *Cultural Relativism - Power in Service of Interests: The Particular Case of Native American Education*, 32 Buffalo L.Rev. 643, 668.

ethic. The Europeans' efforts to make Indigenous people more European-like was naturally met with opposition by the Indigenous populations. Chief Crazy Horse, the legendary Oglala Sioux Chief, succinctly and eloquently described Indian sentiment towards Anglo-European encroachment upon Indian land and existence. He said:

> We did not ask you white men to come here. The great Spirit gave us this country as a home. You had yours. We did not interfere with you. The Great Spirit gave us plenty of land to live on, and buffalo, deer, antelope and other game. But you have come here; you are taking my land from me; you are killing off our game, so it is hard for us to live. Now, you tell us to work for a living, but the Great Spirit did not make us work, but to live by hunting. You white men can work if you want to. We do not interfere with you, and again you say, why do you not become civilized? We do not want your civilization! We would live as our fathers did, and their fathers before them.[54]

The idea that all other world views must be changed in order to conform with the Anglo-European world view forms the basis for assimilation policies. The Anglo-European world view embodies paternalistic ideals:[55] It sees the Indigenous culture as infantile and in need of fatherly guidance. From this paternalistic point of view, the colonists believed that indigenous people did not know what was in their best interest; they had to change their ways to conform with the ways of European settlers. Indigenous populations were left with very little control over their own lives. Mr. Tombo Winters, Senior Field Officer of the Western Aboriginal Legal Service in Brewarrina, New South Wales, Australia, summed up the sentiments of this lack of self-determination by saying:

> I am one of the blokes that feel that Aboriginal people are always asked to be the improvers. We have to be the improvers. We are the most looked after people in Australia. Everyone seems to know what's good for us, and we don't seem to know what's good for ourselves. . . It is about time we were left alone to say what's good for ourselves. You know, people have been telling us for a long time as I can remember [sic]-I grew up an a mission. I was told what was

54. Crazy Horse's statement was made in the late 1870s. TOUCH THE EARTH: A SELF-PORTRAIT OF INDIAN EXISTENCE (T.C. McLuhan ed. 1971).

55. See Friends of the Indian, *supra* note 50, at 1-10.

> good for me from the day I was born, and they are still telling us what's good for us.[56]

It should not be inferred that the attempts to assimilate other cultures and world views was based on malice. Although there were opportunists motivated by greed, corruption, and dishonesty who sought to take advantage of the indigenous people, many of the assimilation policies were instituted and carried out by people having humanitarian motives who truly believed they were doing the right thing.[57] However, "[s]elf-assurance in the righteousness of one's course does not alone determine rightness and is not enough to guarantee success."[58] That the institution of these assimilation policies were justified on a humanitarian basis makes them no less brutal.[59]

The official assimilation period in the United States lasted from the end of the Civil War in 1865 to approximately 1934.[60] During this time the Angle-European legal system was used to assimilate the American Indian.[61] The goal was to "make the Indian identical to the white man by destroying all aspects of the Indian way of life, from his concept of property to the length of his hair."[62] Although efforts were made to civilize the Indian from the time the first European settlers arrived, assimilation was the primary objective from 1865 to 1934. The reformers endeavored to assimilate the Indian because being Indian was the worst thing for the Indian.[63] Merrill E. Gates, a prominent Indian reformer and former president of the Board of Indian Commissioners, described why the tribal way of life was so evil and disagreeable to the Anglo-European:

> The whole discipline of the tribal life is intended to make each men and woman as much as possible like every other man and woman. The rigid tyranny of tribal custom, the narrowness of the lines of efforts to which tribal life and action are limited, the intense emphasis with which tribal life demands of the individual absolute conformity to its customs and standards, and insists upon uniformity of action and feel-

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56. J.H. Wootten, Report of the Inquiry into the Death of Lloyd Boney, Australian Government Publishing Service, Canberra (1991), cited in ROYAL COMMISSION *supra* note 3, at 508. Mr. Winters is also the State Representative of the North-Western Regional Aboriginal Land Council.

57. DEBO, *supra* note 15, at vii; Friends of the Indian, *supra* note 50, at 1-10.

58. Friends of the Indian, *supra* note 50, at 10.

59. ROYAL COMMISSION, *supra* note 3, at 502.

60. Lacey, *supra* note 4, at 350.

61. *Id.*

62. *Id.*

63. *See generally*, Friends of the Indian, *supra* note 50.

> ing on the part of all as a condition of the maintenance of the life of the tribe . . . [are] features of savage life. . . .[64]

An early example of assimilation policy in the United States was President Grant's Peace Policy of 1873.[65]According to Columbus Delano, President Grant's secretary of the Interior, the Peace Policy was, inter alia, to provide the Indian with the "comforts and benefits of Christian civilization"[66] and ultimately, to prepare the Indian to "assume the duties and privileges of citizenship."[67] Thus, the goal was to destroy the Indian culture and create a homogeneous class with the same culture, ideology and beliefs as the rest of the Americans. Of course, the Anglo-European world view would not have to be altered at all. Ironically, the Indian was forced into absolute conformity to the Anglo-European customs, standards, actions, and feelings as a condition of being accepted as an American citizen.

In Australia, attempts to civilize the Aborigines date back to arrival of the British in 1788.[68] Just as in the United States, efforts to civilize and assimilate the Indigenous people did not become official policy until many years later. The assimilation policy was officially adopted by the Australian government and the Territory Aboriginal Affairs authorities in 1937.[69] However, the assimilation policy was not adopted by all of Australia's states until 1951.[70] There was no commonly defined assimilation policy in Australia until 1961.

> The policy of assimilation means that all Aborigines and part-Aborgines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs as other Australians.[71]

This definition came about when Australia was experiencing a large influx of immigrants from various European countries.[72] European

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64. *Id.*, at 339.

65. FRANCIS PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN 1865-1900, 31 (1976).

66. *Id.*

67. *Id.* at 32.

68. *See generally*, ROYAL COMMISSION, *supra* note 3, at 510.

69. ROYAL COMMISSION, *supra* note 3, at 510.

70. Some states did not adopt the assimilation policy until it suited a particular political or economic goal. For example, Queesnland did not adopt the policy until minerals were discovered on aboriginal Reserves. *Id.*

71. Native Welfare Conference, *Commonwealth and State Authorities: Proceedings and Decisions*, 1961, Excerpted in ROYAL COMMISSION, *supra* note 3, at 510-11.

72. *Id.* at 511.

migration brought with it the seeds of the Anglo-European world view and "the same conditioned consciousness that animated the New World conquests of their colonizing forefathers."[73] While the assimilation policy purported to offer the Aborigine the same rights and privileges of all Australian citizens, such rights and privileges were highly conditional upon the Aborigine forsaking her own heritage and culture and embracing the same responsibilities, customs, and beliefs of all other Australians.[74] This policy, like the American policy, sought to produce a homogeneous class of citizens that conformed to the Anglo-European world view.

The general goals of the assimilation policies in both the United States and Australia seem to have been the same. Both sought to have the Indigenous people of their respective lands become part of the normative citizenry. The assimilation policies strove to create a new group of citizens in their culture at the expense of the indigenous people's culture. Meanwhile, the Anglo-European culture would remain unchanged.

B. The First Conflict: Land Rights and the Doctrine of Discovery

The Europeans journeyed across vast oceans to the United States and Australia intending to colonize and live in their "newly discovered" lands. But Indigenous people were already there and they proved to be a burden on the European's colonizing efforts. In order to accomplish their goals of colonizing their new-found lands, the Anglo-Europeans found that they would have to take the land from the Indigenous people. "Colonial takeover was premised on the assumption that European culture was superior to all others, and that Europeans could define the world in their terms."[75] Therefore the Europeans could establish a colony "by persuading the indigenous inhabitants to submit themselves to [their] overlordship; by purchasing from those inhabitants the right to settle part or parts of it; by unilateral possession, on the basis of first discovery and effective occupation."[76]

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73. *See, e.g.* Williams II, *supra* note 9, at 4 and accompanying text.

74. ROYAL COMISSION, *supra* note 3, at 511.

75. *See generally*, Williams I, *supra* note 3, and ROYAL COMISSION, *supra* note 3, at 8.

76. A. Frost, New South Wales as *terra nullius*; the British Denial of Aboriginal Land Rights, Historical Studies, 514 (1977), cited in ROYAL COMISSION, *supra* note 3, at 8.

The colonists sought to rationalize and legalize the taking of indigenous people's property using Anglo-European legal principles.[77] By transplanting and implementing their own legal system and doctrine in their new land, the Anglo-European colonists were able to dispossess the indigenous population in the United States and Australia of their land. The acquisition of indigenous people's land was accomplished by classifying the land *terra nullius*,[78] or ownerless land. As *terra nullius*, the colonists could claim land rights by discovery and first possession.

The Doctrine of Discovery came to be the primary means by which the colonists claimed title to the "new" land in both the United States and Australia.[79] This doctrine applied to all landfalls made by the Anglo-European explorers and colonists. The main objective of employing the doctrine was to discover land already inhabited by people.[80] Justifying the employment of the Doctrine depended upon whether the native inhabitants were "civilized." If the native inhabitants were not "civilized," the Doctrine of Discovery deemed the land free of law and thus free to be discovered. The Anglo-Europeans could employ the Doctrine of discovery in order to legally take possession of occupied land. They would not have to contend with the land rights of the Indigenous people because, as *terra nullius*, the Indigenous had no rights in the land, according to Anglo-European law. Therefore, the Indigenous cultures lost control over their land because

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77. Here there is a difference in the way in which the colonizers acquired land. In general, where there were Indigenous inhabitants, "sovereignty could only be obtained by cession or, exceptionally, by conquest." McLachlan, *Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm - A Review Article*, 37 INT'L & COMP. L.Q. 368, 378. Sovereignty by cession or conquest requires either a treaty or a full scale war and surrender. In the United States, numerous treaties were made with the Indians. *See generally*, FELIX COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 62-108 (1982). The Australian government, on the other hand, made no attempt to form treaties with the Aborigines. McLachlan, *supra* at 378.

78. ROYAL COMMISSION, *supra* note 3, at 8.

79. In the United States the doctrine of discovery was established judicially by the Supreme Court case Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). In Australia, Justice Blackburn ruled in 1971 that all Aboriginal rights to land were extinguished after the arrival of the British in 1788. After 1788, the laws of England were the Laws of the "new" land, and therefore, only title that was legislated by the British could be Australian law. The native title was never so legislated, and thus could not be part of Australian law. *See also,* Milirrpum v. Nabalco, as referred to in ROYAL COMMISSION, *supra* note 3, at 8.

80. Under the Doctrine of Discovery, "the first Christian nation claiming discovery of a non-Christian land was to have priority among the other European nations in dealing with the natives for the possessory rights to property." John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L.REV. 503, 507. *See also* Francis Prucha, THE GREAT FATHER 7 (1984).

of the implementation of laws that they neither created, consented to, nor understood.

Sir William Blackstone discussed the legitimacy of transplanting English laws abroad in Commentaries on the Laws of England.[81] According to Blackstone:

> [I]f an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there enforced. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries that have already laws of their own, the King may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, *unless such as are against the law of God, as in the case of an infidel country.*[82]

Fortunately for the colonists, neither the Indians nor the Aborigines were Christian.[83] They were immediately classified as heathens, savages, and infidels.[84] Since the native infidel laws did not have to be recognized, it was as if there were no laws establishing ownership of the land, thus making the land *terra nullius*. Where there is no established or recognized land ownership it may be established by possession and first discovery.[85]

As mentioned earlier, colonial takeover in the United States and Australia was premised on the assumption that the "European culture was superior to all others, and that Europeans could define the world in their terms."[86] Therefore, the driving force behind the colonial dispossession of Indigenous people from their lands was based upon the Anglo-European world view and the ethnocentrically motivated conception that all other cultures or world views must be subjugated to

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81. Blackstone, *Commentaries on the Laws of England*, vol. 1, Of the Rights of Persons (1756).

82. *Id.* at 104, cited in ROYAL COMISSION, *supra* note 3, at 9 [emphasis added]. Blackstone's comments were embodied in the development of the American legal system, but they have no direct relationship with the policy toward the Aborigines in Australia because the British did not land in Australia until 1788. ABORIGINAL PEOPLE OF N.S.W., *supra* note 17, at 3. Blackstone's comments do however, shed light on the prevailing view of the dominance of English laws and culture in the latter part of the 1700s.

83. In fact, the Indian and Aboriginal ways of life were diametrically opposed to Anglo-European Christian beliefs. *See generally*, ROYAL COMISSION, *supra* note 3; Lacey, *supra* note 4; DEBO, supra note 17; ABORIGINAL PEOPLE OF N.S.W., *supra* note 12.

84. *See supra* notes 31-47 and accompanying text.

85. *See* A. Frost, *supra* note 76.

86. ROYAL COMMISSION, *supra* note 3, at 8.

the Anglo-European norm.[87] This concept also formed the basis of what would define the term "discovery" in present day legal terms. Discovery, as it pertains here, is still defined as "the foundation for a claim of national ownership or sovereignty . . . the finding of a country, continent, or island previously unknown, or previously known only to its uncivilized inhabitants."[88] Therefore, a land could still conceivably be "discovered" if the discovering culture does not consider the Indigenous culture to be civilized.

Perhaps the most important legitimization of the Doctrine of Discovery with respect to Anglo-European colonizing efforts occurred in the United States in 1823 in the case, *Johnson v. M'Intosh*.[89] In *Johnson*, Chief Justice John Marshall held European descended governments are "vest[ed] [with] superior rights of sovereignty over non-Western indigenous peoples and their territories."[90] The Supreme Court's conclusion in *Johnson* was based directly upon the European powers and ideas with respect to Indigenous peoples.[91] In *Johnson*, the Supreme Court was faced with the issue of whether title to land sold by an Indian tribe was superior to title granted by a United States governmental patent.[92] The Court concluded that the governmental grant conferred superior title because "discovery gave title to [European] government . . . which title might be consummated by possession."[93] The Supreme Court held that the United States government had exclusive title to the land "subject only to Indian Right of occupancy . . . ."[94]

The Court was forced to recognize that the Indians had possession and occupancy of their land because this evident truth could not, in good conscience, be denied. However, the Court concluded that "[the Indians'] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the *original fundamental principle, that discovery gave exclusive title to those made it.*"[95] Therefore, the United States could extinguish the

87. *See* Williams II, *supra* note 9, at 4; Williams I, *supra* note 3, at 229; *see also* notes 48-74, *supra*, and accompanying text.

88. Black's Law Dictionary (sixth ed. 1990) at 466 [emphasis added].

89. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

90. *See* WILLIAMS III, *supra note 35.*

91. COHEN, *supra* note 77, at 486-87.

92. *Johnson*, 21 U.S. at 573.

93. *Id.*

94. *Id.*, at 574.

95. *Id.* [Emphasis added.]

Indians' right to possess their own land, land which they had possessed form "time immemorial."[96] Furthermore, the Indians could not transfer their aboriginal homelands without governmental approval.[97]

The Anglo-European world view that only that which is civilized can be recognized is evident from the decision in *Johnson v. M'Intosh.* That Chief Justice Marshall chose to describe the Doctrine of Discovery as "the original fundamental principle"[98] is ironic. The more original and more fundamental principle is that of Indigenous title and possession. Normatively divergent Indigenous cultures are considered inherently less sophisticated and enlightened than the Anglo-European culture and therefore, must succumb to the superior culture. The principles derived from *Johnson* have remained as the foundation for defining original Indian land title in the United States.[99]

Nearly sixty years after *Johnson*, Australia's Judicial Committee of the Privy Council was faced with a similar case. In *Cooper v. Stuart*,[100] the Judicial Committee had to decide whether the Crown's fee simple grant of the territory of New South Wales was valid.[101] The committee held that since the land did not have an "established system of law" it was terra nullius.[102] Lord Watson, writing for the committee, held:

> The extent to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstance. There is a great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class.[103]

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96. COHEN, *supra* note 77, at 487.

97. *Id.*

98. *Johnson*, 21 U.S. at 574.

99. *Id.* at 488. *See also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)(recognizing Indian title to the land but acknowledging the superior right of the sovereign as a result of the European discovery); United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946)(recognizing Indian title but acknowledging that the sovereign possessed exclusive power to extinguish the Indian right of occupancy at will).

100. Cooper v. Stuart, 14 App.Cas. 286 (P.C. 1889).

101. Wallace-Bruce, *Two Hundred Years On: A Reexamination of the Acquisition of Australia*, 19 GA. J.INT'L L. 87, 100 (1987).

102. *Id.*

103. *Cooper*, 14 App. Cas. at 291, cited in McLachlan, *supra* note 77, at 383.

The Judicial Committee classified the State of New South Wales as *terra nullius* even though there were inhabitants on the land and even though they had a rudimentary system of law.[104] Since New South Wales was terra nullius, the colonial government in Australia was not required to purchase the land from the Aborigines. The Colonial government obtained lawful possession and occupation of the land because it was considered to have been "peacefully annexed to the British dominions."[105] The holding in *Cooper v. Stuart* was affirmed by the High Court of Australia in *Coe v. The Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland* in 1979.[106] In *Coe*, Australia was once again declared to have been *terra nullius* when the colonist arrived. In his opinion, Justice Gibbs said that the concept of Australian being *terra nullius* was "fundamental' to Australia."[107]

In a second case, *Milirrpum v. Nabalco*,[108] Justice Blackburn held that the Aborigines had a system of law and government that "provided a stable order of society."[109] Even though Justice Blackburn acknowledged the existence of this Aboriginal system of government, he adopted Lord Watson's classification of the land in *Cooper*.[110] Justice Blackburn ruled that all Aborigines' land rights were extinguished in 1788 after the first colonists arrived.[111] When the colonists arrived in Australia they claimed the land for the British Crown[112] and the laws of England were instituted. English law did not provide for Aboriginal land title.[113] Justice Blackburn held that the Aborigines' land rights were extinguished because such rights had never been legislated by the British and were thus not part of Australian law.[114]

In keeping with the spirit of the Doctrine of Discovery and the concept of *terra nullius*, Chief Justice Marshall, Lord Watson, and Justice Blackburn perpetuated the ethnocentrically conceived notion that

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104. *See* Wallace-Bruce, *supra* note 101, at 96-100.

105. *Cooper*, 14 App. Cas. at 291, cited in Wallace-Bruce at 101.

106. 53 A.L.R. 403 (1979).

107. *Id.*, cited in Wallace-Bruce, *supra*, at 101.

108. Milirrpum v. Nabalco, 17 A.L.R. 141 (1971)(The Gove Land Rights Case).

109. *Id.* at 267, cited in Wallace-Bruce, *supra* note 101, at 100.

110. McLachlan, *supra* note 77, at 383.

111. ROYAL COMMISSION, *supra* note 3, at 10.

112. Despite instructions to negotiate with the Aborigines, Captain James Cook claimed Australia on the basis of first discovery. His claim was substantiated by the symbolic act of flying the British flag as various places along the eastern coast. *Id.* at 11. Two hundred years later, in a symbolic protest, an Aborigine named Burnum Burnum flew the Aboriginal flag over Dover and claimed possession of Great Britain. *Id.*

113. *Id.*

114. *Id.*

the Anglo-European world view is superior to all others and that Europeans can define the world in their terms.[115] The Doctrine of Discovery has been the primary device by which Indigenous peoples in the United States and Australia have been denied fundamental human rights and self determination.[116] Through the Doctrine of Discovery, the Anglo-European colonizers were able to justify their acquisition of Indigenous lands and vest in themselves superior rights and sovereignty over Indigenous cultures.[117] Therefore, through the use of the Doctrine of Discovery, Anglo-European colonizers were able to "assert lawful power to impose [their] vision of truth on non-[Anglo-European] peoples through a racist, colonizing rule of law."[118]

C. The Effects of Dispossession

The Indigenous populations, the Indians and the Aborigines, occupied their lands for thousands of years before the European colonists arrived on their shores. During these years the Indigenous cultures enjoyed complete self-determination and autonomy over both themselves and their land.[119] The land played a vital role in Indigenous life, both spiritually and economically.[120] Being dispossessed of one's land is devastating enough, but coupled with being dispossessed of the center of religious, social and economic order is catastrophic. Once dispossessed of their land, the Indigenous people's lives fell under the control of strangers and invaders who "neither shared their culture nor their perspective on any issues because they have not shared their history."[121]

With the disappearance of sacred tribal lands and encroachment by the colonists, many Indigenous people were forced to fight for their homelands. Uprisings by Indigenous people in both the United States and Australia served to perpetuate the white settler's idea that they were savages. The more Indigenous people fought and were perceived as savages and infidels the more the white man could justify taking their land by violent means. In turn, this image of the Indigenous people as savages justified the colonist's genocidal policies of assimilating and pacifying them.

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115. *Id. See also* WILLIAMS III, *supra* note 35.
116. WILLIAMS III, *supra* note 35, at 325.
117. *Id.*
118. *Id.*
119. ROYAL COMISSION, *supra* note 3, at 502.
120. *See* section I, *supra.*
121. ROYAL COMISSION, *supra* note 3, at 502.

In the United States there were numerous Indian "uprisings" during the Civil War era.[122] These uprisings caused the United States to engage military troops to subdue the Indians by force.[123] There were flagrant abuses of military force against the Indians, one of the most shocking of which occurred at Sand Creek in Colorado.[124] At their Sand Creek campsite, a group of Indians from different tribes who had banded together to fight the white man,[125] decided to seek peace. These Indians met with leaders of the American military. While the Americans offered no formal peace arrangements, the Indians believed peace would result from the meeting.[126] With this belief, the Indians returned to their Sand Creek campsite.[127] On November 29, 1864, without warning, the American military attacked the Sand Creek campsite.[128] The American soldiers "slaughtered the defenseless Indians in the most brutal manner, killing men, women, and children" despite the Indians flying of the American flag and the white flag of peace.[129]

Australia also had its share of frontier violence. Although the early British policies appeared to demonstrate concern for the Aborigines,[130] "the *de facto* policy was to expropriate their land to establish a viable British settlement."[131] In the quest to establish a "viable British settlement," the frontier policy, as practiced by the colonists and police, was one of "pacification."[132] This pacification was conducted with weapons and evolved into a "quite, half-hidden and sporadic war. No colonial government could openly endorse murder; it was illegal. But they could turn a blind eye to what became permissible frontier activities. Native and general police parties were granted the authority to 'quieten' Aboriginal people who resisted non-Aboriginal rule."[133]

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122. *See generally*, F. Prucha, *supra* note 65.

123. *Id.*, at 8.

124. *Id.*, at 9-11.

125. The group consisted of a large number of Cheyenne and a small number of Arapaho. *Id.*, at 9.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. The instructions to Captain Arthur Phillips, the first Governor of New South Wales, was "to endeavor by every possible means to open intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them." ROYAL COMISSION, *supra* note 3, at 11.

131. *Id.*, at 12.

132. *Id.*, at 13.

133. *Id.*

The earlier British rhetoric was abandoned in favor of the systematic slaughter of Aborigines who opposed subjugation to British rule. In fact, on the island of Tasmania, off the southern coast of Victoria, complete genocide was conducted until there were no Aborigines left on the island.[134]

It is easy to rationalize the "pacification" of Indigenous people by saying that they killed European new-comers first. However, no rational thinking Anglo-European would ponder the virtue of fighting to fend off an invasion of her home soil. This is precisely what the Indians and the Aborigines were doing during their so called uprisings. Ironically, Anglo-Europeans considered the act of defending their own home-land as noble and yet characterized Indians and Aborigines as savages for attempting to do the same.

III. THE END OF SELF-DETERMINATION

Indigenous people had lived for thousands of years on the lands comprising the United States and Australia when the Anglo-European colonists arrived. Before the invading influence of Anglo-European culture, Indigenous people in North America and Australia were self determined with complete control over their lives. But self-determination is not easily defined. It is generally "easier to determine when self-determination does not exist than it is to articulate policies and processes which would be universally accepted as being both consistent with the concept and achievable in practice."[135] In 1990, the Australian House of Representatives Standing Committee on Aboriginal Affairs defined self-determination for Aborigines as, "control over the ultimate decision about a wide range of matters including political status, and economic, social and cultural development. . .[and] having the resources and capacity to control the future of their own communities within the legal structure common to all Australians."[136] Conceptually, the notion of self-determination is the freedom to make one's own choices. Therefore, it follows that self-determination is the antithesis of assimilation.[137]

134. Robert Huges, FATAL SHORE: THE EPIC OF AUSTRALIA'S FOUNDING, 120 (1986). "It took less than seventy-five years of white settlement to whipe (*sic*) out most of the people who had occupied Tasmania for some thirty thousand years; it was the only true genocide in English colonial history." *Id.*

135. ROYAL COMISSION, *supra* note 3, at 504.

136. *Id.*, citing Australia Parliament House of Representatives Standing Committee on Aboriginal Affairs, *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control Management and Resources*, 12 Australian Government Publishing Service (1990).

137. ROYAL COMISSION, *supra* note 3, at 503.

Just as dispossessing Indigenous people of their land was the central mechanism for instituting Anglo-European legal doctrine, the terminating of Indigenous people's self-determination was a central mechanism in implementing and perpetuating the values of the Anglo-European world view.[138] Without self-determination the Indigenous people have no say about policies that directly affect them and their culture. If Indigenous people do not have any say regarding their future, it is easier for those in power to force them in directions they would never choose.

The removal of Indigenous people's self-determination came in the form of strict governmental control over almost every aspect of their lives. The first step in this total governmental control was the creation of a supervisory authority. Supervisory authorities performed the roles of teacher, guardian and warden of the Indigenous people and were responsible for the implementation of governmental policies of the day. Providing supervisory authority over Indigenous people was seen as the most efficient means by which the Anglo-Europeans could instill their world view.

A. The Creation of a Control Mechanism

Supervisory authorities were employed in both the United States and Australia. In the United States, the first governmental agency to have authority over "all matters relevant to Indian affairs. . ." was the War Department, created on August 7, 1789.[139] In 1824, a full time body devoted solely to Indian affairs was created by the Secretary of War.[140] This body was called the Bureau of Indian Affairs and it remains today.[141] The original duties of the Bureau of Indian Affairs

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138. Rennard Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. Kan. L. Rev. 713 (describing the laws of the 19th and 20th centuries as genocidal with respect to eradication of both Native Americans, and the Native American culture). *See also* John W. Ragsdale, Jr., *The Movement to Assimilate the American Indians: A Jurisdictional Study*, 57 UMKC L. Rev. 399, 400.

> For half a millennium,. . . European-derived legal thought has sought to erase the difference presented by [Indigenous people] in order to sustain its own discursive context; European norms and value structures. Animated by a central orienting myth of its own universalized, hierarchical position among all other discoursed, the white man's archaic, European-derived law respecting [Indigenous people] is ultimately *genocidal* in both pratice and intent.

Williams I, *supra* note 3, at 265 [emphasis added].

139. The United States Department of the Interior, Federal Indian Law, Association on American Indian Affairs, 216 (1958) [hereinafter Department of Interior]. The statute creating the War Department was the Act of August 7, 1789, 1 Stat. 49, 50.

140. House Doc. 146, 19th Cong., 1st sess., at 6.

141. Department of Interior, *supra* note 134, at 217.

included "provid[ing] for the organization of the department of Indian Affairs"[142] and directing the administration of the civilization fund.[143] The civilization fund was created by annual appropriations, to introduce the Indians to the "habits and arts of civilization."[144] Although the policies and authority of the Bureau of Indian Affairs have changed over time, until the middle of the 1900's "nearly every aspect of Indian life was subject to considerable discretion on the part of [Bureau] officials."[145]

In addition to the Bureau of Indian Affairs, the United States Congress created other supplementary positions of authority over Indian affairs. In the Act of July 9, 1832, Congress created the office of Commissioner of Indian Affairs.[146] The Commissioner of Indian Affairs would be appointed by the President and approved by the United States Senate.[147] The Commissioner was to "have the direction and management of all Indian affairs, and all matters arising out of Indian relations. . . ."[148]

Remarkably similar supervisory authority was created in New South Wales, Australia. In 1909, the legislature in New South Wales enacted the Aborigines Protection Act.[149] The Act provides that there "be a board called the 'Aborigines Welfare Board' which shall consist of eleven members."[150] Ten of the eleven members of the Board are to be appointed by the Governor of New South Wales.[151] The powers given the Aborigines Protection Act grants the Aborigi-

142. *Id.* at 218.

143. *Id.* at 217.

144. *Id.* at 217, fn. 26.

145. *Id.* at 222.

146. The Act of July 9, 1832, § 1, 4 Stat. 136 (codified as 25 U.S.C. §§ 1-2).

147. *Id.*

148. *Id.*

149. Aborigines Protection Act, Act No. 25, 1909 § 4(1). The laws affecting Aborigines must be discussed in terms of laws created by the five Australian States. This is so, because clause 26 of the Australian Constitution prohibited the Commonwealth from making laws about Aborigines. ROYAL COMISSION, *supra* note 3, at 518. Section 127 of the Australian Constitution excluded Aborigines from the national census. *Id.* These constitutional provisions were in effect until 1967 when 90% of the Australian people voted to change the constitution allowing the commonwealth to make laws regarding Aborigines and requiring Aborigines to be included in the national census. *Id.* For the sake of time and continuity, the body of this article will only contain references to the laws of New South Wales. References to appropriate laws of the other Australian states will be made in the footnotes as required.

150. Aborigines Protection Act, Act No. 25, 1909 § 4(1).

151. Aborigines Protection Act, §§ 4(2)(b)(i-viii). Part (viii) of this section provides that two of the board members must be Aborigines. Although this does not amount to total self-determination, two members of a board of eleven does not constitute much power. However, this still gives the Aborigines at least some voice.

nes Welfare Board the power *inter alia* to "apportion, distribute, and apply as it may seem most fitting, any moneys voted by Parliament, and any other funds in its possession or control . . . *for the purpose of assisting aborigines to become assimilated into the general life of the community*;"[152] and "to exercise a general supervision and care *over all aborigines and over all matters affecting the interests and welfare of aborigines* . . . ."[153]

The United States and Australia created supervisory authorities with extraordinary power. Statutes and policies implemented and enforced by these authorities gave the United States and Australian governments nearly complete control over the futures of Indigenous people. As a result of the broad powers given to supervisory authorities, the Indians and the Aborigines were unable to have a voice in the decisions which would dramatically affect their futures and cultures.

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152. Aborigines Protection Act § 7(1)(a) [emphasis added].

In Victoria, the Aborigines Act of 1957 created the Aborigine Welfare Board. Section 1 of this act provided that this was to promote Aborigines "*with a view to their assimilation into the general community*." ABORIGINES AND THE LAW, *supra* note 7, at 88 [emphasis in original].

In the Northern Territory, the Welfare Ordinance of 1953 empowered the 'Director of Welfare' to promote the Aborigine's "social, economic, and political advancement for the purpose of assissting them and their descendants to take their place as members of the community of the Commonwealth." § 8 Welfare Ordinance of 1953, cited in ABORIGINES AND THE LAW, *supra* note 7, at 33.

In South Australia, the Aboriginal Affairs Act of 162 created the 'Aboriginal Affairs Board.' *Id.* at 72. Section 15(g) of this act empowered the Aboriginal Affairs Board to "promote social, economic, and political development of Aborigines and persons of Aborigine blood *until their integration into the general community*." § 15(g) Aboriginal Affairs Act of 1963, cited in ABORIGINES AND THE LAW, *supra* note 7, at 72 [emphasis added].

153. Aborigines Protection Act § 7(1)(e) [emphasis added].

In Victoria, the Aborigines Prtection Act of 1869 created the 'Board for the Protection of Aborigines.' Section 3 Aborigines Protection Act 1869 (33 Vic. No. 349), cited in ABORIGINES AND THE LAW, *supra* note 7, at 81. This board was given very broad and general regulatory powers over Aborigine's residence, contracts for employment, and the care, custody and education of children. § 2(a), (b) and (c) Aborigines Protection Act 1869, cited in ABORIGINES AND THE LAW, *supra* note 7, at 81.

In the Northern Territory, the Aboriginals Ordinance of 1911 created the position of 'Chief Protector.' ABORIGINES AND THE LAW, *supra* note 7, at 26. The Chief Protector had the power to exercise general supervior care over "all matters affecting Aboriginals welfare." *Id.*

In Queensland, the Aboriginals Protection and Restriction of Sale of Opium Act of 1897 gave the 'Protector of the Aborigines' the power to remove, maintain, discipline, care, and educate Aboriginal children and abolish Aboriginal religious rites that were, in the opinion of the protector, "injurious to the welfare of the Aboriginals and reserves." Aboriginals Protection and Restriction of Sale of Opium Act of 1897, cited in ABORIGINES AND THE LAW, *supra* note 7, at 55.

In South Australia, the Aboriginal Affairs Act of 1962 gave the 'Aboriginal Affairs Board' the power to exercise general supervision and care "*over all matters affecting the welfare of Aborigines or persons of Aboriginal blood.*" § 15(c) Aboriginal Affairs Act of 1962, cited in ABORIGINES AND THE LAW, *supra* note 7 at 72 [emphasis added].

Implicit in the concept of self-determination is the notion of political power. If one does not have a voice in the political process in a democratic society one does not have political power, and thus, no self-determination. In an effort to keep the Indians and Aborigines from achieving any political power, the governments in the United States and Australia did not recognize Indigenous people as citizens. It was not until June 2, 1924 that Indians in the United States were granted unconditional citizenship.[154] Citizenship was not granted to the Aborigines in Australia until 1967.[155]

IV. Reservation Policy

After the Anglo-European colonizers dispossessed the Indians and the Aborgines of their land and set up supervisory authorities, the colonizers began to create and implement laws. Some of these laws were concerned with the land from which the natives had previously been dispossessed. In most cases, the Indigenous people were removed from land the Anglo-Europeans found to be most suitable and profitable. This left the Indigenous people without a home. The Anglo-Europeans were faced with a dilemma: where would they put the Indigenous people?

The governments and the supervisory authorities decided to appropriate sections of land and "reserve" them for the use of Indigenous populations. These reserved lands were usually less desirable. Being moved from their homelands was particularly devastating to Indigenous people since they had such a strong spiritual link to that land.[156] In 1983, D. L. Japanangka described the Aborigine's sentiments regarding the land. His words are strikingly similar to those of Chief Crazy Horse.[157] Japanangka said:

> I got this place from my father . . . there are many important sacred places in this country, and I must look after them. I thought and thought about my country, and about asking for it . . . . We want to live in our own place, Aborigines only, . . . and look after our own places. We will stay and fight for our

154. Act of June 2, 1924, 43 Stat. 253, ante, 420. The phrase "unconditional citizenship" is used here because Indians were allowed to obtain citizenship prior to 1924. However, in order to do so, they were required to meet certain provisions such as adopting the habits of a civilized life (Act of February 8, 1887 § 6), accepting an allotment under the Daes Act (see section IV-B, *infra*), and serving in the armed forces (Act of November 6, 1919, ante, 232). See Kappler, Indian Affairs: Laws and Treaties, Vol. 1 at 1165-6 (1941).

155. Royal Comission, *supra* note 3, at 518.

156. *See* notes 15-30, *supra* and accompanying text.

157. *See* note 51, *supra* and accompanying text.

> country, and never let it go again. . . . This is our place. Our fathers and grandfathers hunted here. We in turn should look after these things [sacred sites, objects], then when we die our sons will get them and care for them.[158]

A. The American Policy

In the United States Indians were moved onto reserved lands or "reservations" which were used to dispossess them of land that was deemed useful. If the reservation land turned out to be valuable to the government at a later date, the Indians were moved to another reservation.[159] The reservations in the United States were primarily created by statute, treaty, or executive order.[160] Just as in the Australian context, the American Indian reservations were lands acquired or appropriated for the use and benefit of Indians.[161] In his 1872 report to the United States Congress, the Commissioner of Indian Affairs, Commissioner Walker, described the function of an Indian reservation:

> the Indians should be made as comfortable on, and as comfortable off, their reservations as it was in the power of the Government to make them; that such of them as went right should be protected and fed, and such as went wrong should be harassed and scourged without intermission. . . . Such a use of the strong arm of Government is not war, but discipline.[162]

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158. D.L. Japanangka, *Settle Down Country*, 21-2 (1983), cited in ROYAL COMISSION, *supra* note 3, at 468.

159. For example, in Georgia there was gold found on the Cherokee reservation and the state attempted to remove the tribe from the land. John W. Ragsdale, Jr., *Indian Reservations an the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L.REV. 503, 508. Since legislation with respect to Indian tribes is delegated solely to the Federal government by the United States Constitution, the Supreme Court held in Wochester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that the state of Georgia was precluded from removing the Cherokees from their reservation. However, President Andrew Jackson, with congressional authorization, induced the tribes to "exchange" their now wealthy land for other reservations west of the Mississippi river. John W. Ragsdale, Jr., *Indian Reservtions and the Preservation of Tribal Culture: Beyond Wardship to Stewards*hip, 59 UMKC L.REV. 503, 509. When some tribes refused to leave their homes, they were "cajoled, pressured, threatened, forcefully up-rooted, or physically driven across the Mississippi." *Id.*

160. Although there were several different ways that reservations were created, for the purpose of statutory comparison between the Untied States and Australia, only the statutory reservations will be discussed. For further explanation of the other types of reservations, see generally, Department of Interior, *supra* note 139, Chap. IX, at 583-645.

161. *Id.*

162. Rep. Comm. Ind. Aff., 1872, at 6, cited in FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 19 (1988).

The reservation policy could not operate with Commissioner Walker's level of "discipline" unless a broad range of governmental control was exercised over the reservations and the Indians living on them. Commissioner Walker discussed the need for such governmental control in his 1872 report to Congress.[163] He expressed before Congress the need to "place all members of this [the Indian] race under the strict reformatory control [of] the agents of the Government."[164] In order for this level of control to be achieved, the "right of the Government to keep Indians upon the reservations assigned to them, and to arrest and return them whenever they wander away, [must] be placed beyond dispute."[165] There was never any statutory authority for confining Indians to the reservations. However, the supervisory authorities used the fact that the Indians were classified as "wards" of the United States government to exercise such a power. This concept was gleaned from the statement of "Policy of Indian Affairs" from the "Report on Indians Taxed and Not Taxed, at the Eleventh Census, 1890." This report declared that Indians were not considered to be "citizen[s] of the United States, but ward[s] of the nation."[166] As wards of the nation the Indians were not allowed to "leave the reservation without permission."[167]

B. Taking Reservation Policy One Step Further: The Dawes Act

The reservation policy in the United States was not achieving assimilation as had been hoped. Indians in the United States viewed land not as something to be owned but as something to share amongst all people.[168] This concept was diametrically opposed to the Anglo-European view that land was to be individually owned. To Europeans, there could be no civilization without the desire to own land.[169] Therefore, the efforts to assimilate Indians into the Anglo-European/American mold were directed toward the Indian's conception of land. The Indian's way of life revolved around the communal possession of land. Divesting the tribe of its communally held land would in effect destroy the tribal system. For the Indian reformers, the destruction of

163. COHEN, *supra* note 162, at 19.

164. *Id.* at 11-12.

165. *Id.*

166. H.R. Misc. Doc. No. 340, 53rd Cong., 1st sess., pt. 15 at 68 (1894), cited in COHEN, *supra* note 162, at 177.

167. *Id.* It has not been established nor recognized that there is no legal authority for sequestering any Indian on a reservation. *Id.*

168. *See* notes 10-23, *supra* and accompanying text.

169. Lacey, *supra* note 2, at 338.

the tribal system was not only viewed as beneficial, it was viewed as necessary to assimilate and civilize Indians.[170] Taking the land away from the tribe and allotting parcels of land to individual Indians would give all Indians the proper Anglo-European respect for property.[171] Once Indians attained the proper respect for property they would be encouraged to adopt the Anglo-European world view.[172] This view of Indians was the driving force behind the General Allotment Act, enacted by Congress in 1887.[173]

The General Allotment Act, or the Dawes Act, was designed to "create a new role for the Indian in American society."[174] The Act was the antithesis of the reservation policy which granted land to Indian tribes for the use of the entire tribe. The act took Indian reservation land away from the tribe and allocated parcels to individual Indians.[175] The power and discretion to allocate Indian lands was vested in the President of the United States.[176] After eligible Indians were allotted land, any remaining land was available for purchase by the United States government.[177] Furthermore, legal title to the allotted lands was to be held in trust by the United States government for twenty-five years and any purchase money received from the sale of excess lands was to be held in trust by the government for the sole use of the tribe to whom the land belonged.[178] The trust money however, would become available to the tribe after twenty-five years only through congressional appropriation.[179]

The Dawes Act did not succeed in transforming the Indian into good "little red Farmer Jones and native Old MacDonalds."[180] The Act did, however, succeed in dispossessing Indians of more than one hundred million acres of their lands,[181] lands that ultimately ended in the hands of non-Indian American citizens.[182] Before the Dawes Act was passed there were approximately 156 million acres of Indian

170. *Id.* at 350.
171. *Id.*
172. *Id.*
173. Chap. 119, 24 Stat. 338 (codified as amended at 25 U.S.C. §§ 331-4, 339, 341-2, 348-9, 354, 381).
174. COHEN, *supra* note 162, at 380.
175. 25 U.S.C. 331 *et seq.*
176. 25 U.S.C. 331.
177. 25 U.S.C. 334.
178. 25 U.S.C. 349.
179. *Id.*
180. Rennard Strickland, *Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy*, 3 AM. IND. L.REV. 313, 320 (1975).
181. Lacey, *supra* note 4, at 355.
182. *Id. See also* Strickland, *supra* note 180, at 320.

land.[183] By the end of the United States assimilation era in 1934 the total amount of Indian lands had dwindled to 48 million acres.[184] The Dawes Act created a new place in American society for the Indian, a place without land, without the tribe, and without the advantages of being white and Christian.

C. *The Australian Policy*

In Australia, the lands set aside for the use of the Aborigines were called reserves. The Aborigines Protection Act defines a reserve as an "area of land heretofore or hereafter reserved from sale of lease under any Act dealing with Crown lands, or given by or acquired from any private person, for the use of aborigines."[185] Furthermore, the Act gives the Aborigines Welfare Board authority to "manage and regulate the use of reserves."[186] The Act thus gave the Aborigines Welfare Board complete control over appropriation, acquisition, and management of the reserves.

It should not be inferred from this reservation policy that the land set aside "for the use of aborigines" was given to them. Section eight of the Aborigines Protection Act vested the land rights to the reserves

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183. Lacey, *supra* note 4, at 355.

184. *Id.*

185. Aborigines Protection Act § 3.

In Western Australia, the Aborigines Act of 1889 provided that crown lands may be reserved "as the governor sees fit for the use and benefit of the Aborigines." ABORIGINES AND THE LAW, *supra* note 7, at 93.

In the Northern Territory, the Social Welfare Ordinance of 1964 gave the 'Director of Social Welfare' complete supervisory authority over the use and management of the reserves in the Northern Territory. § 10(b) Social Welfare Ordinance of 1964, cited in ABORIGINES AND THE LAW, *supra* note 7, at 39.

186. Aborigines Protection Act § 7(1)(d).

In Western Australia, the 1963 Native Welfare Act was enacted. It provided, *inter alia*, for the Department of Native Welfare to spend monies to manage reserves. Native Welfare Act of 1963, cited in ABORIGINES AND THE LAW, *supra* note 7, at 100.

In Queensland, the Aboriginals Protection Act and Restriction of the Sale of Opium Act of 1897 authorized the 'Protector of the Aboriginals' to remove Aborigines to reserves. Aboriginals Protection Act and Restriction of the Sale of Opium Act of 1897, cited in ABORIGINES AND THE LAW, *supra* note 7, at 55. More than 40 years later, the state of Queensland enacted the Aboriginals Preservation and Protection Act of 1939, which continued to allow the removal of Aborigines to reserves. Aboriginals Preservation and Protection Act of 1939, cited in ABORIGINES AND THE LAW, *supra* note 7, at 58-9.

In South Australia, the Aborigines Act of 1934 gave the 'Chief Protector' of the Aborigines the power to manage reserves and to remove Aborigines to reserves as well as to move them within reserves. § 14 Aborigines Act of 1934, cited in ABORIGINES AND THE LAW, *supra* note 7, at 71.

in the Aborgines Welfare Board.[187] The Aborigines Welfare Board was also vested with rights to "[a]ny building erected on a reserve. . .[and] all cattle, horses, pigs, sheep, machinery, and property. . .purchased or acquired for the benefit of aborigines."[188]

Not only did the Aborigines Welfare Board have control over the land and things on it, the Board had control over who was allowed to be on the reserve.[189] The Aborigines Protection Act provided that only aborigines and those acting under authority of the Board were allowed on the reserve.[190] Furthermore, the Board had the authority to remove from the reserve any aborigine "guilty of misconduct."[191] Perhaps the most invasive power granted to the Aborigines Welfare Board was committing Aborigines to the control of the Board. An Aborigine would be committed to the control of the Board and placed on a reserve if the person, in the opinion of the Board, was "living in insanitary [sic] or undesirable conditions."[192] Once on the reserve, the person could not leave or be taken out of the reserve without "lawful authority"[193] or "written consent of the board."[194]

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187. Aborigines Protection Act § 8(1). *See also* Aborigines Act of 1934 (South Australia), *supra* note 186; Aboriginals Preservation and Protection Act of 1939 (Queensland), *supra* note 186; Native Welfare Act of 1963 (Western Australia), *supra* note 186; Aborigines Act of 1889 (Western Australia), *supra* note 185.

188. Aborigines Protection Act § 8(3). *See also* Aborigines Act of 1934 (South Australia), *supra* note 186; Aboriginals Preservation and Protection Act of 1939 (Queensland), *supra* note 186; Native Welfare Act of 1963 (Western Australia), *supra* note 186; Aborigines Act of 1889 (Western Australia), *supra* note 185.

189. Aborigines Protection Act § 8(1). *See also* Aborigines Act of 1934 (South Australia), *supra* note 186; Aboriginals Preservation and Protection Act of 1939 (Queensland), *supra* note 186; Native Welfare Act of 1963 (Western Australia), *supra* note 186; Aborigines Act of 1889 (Western Australia), *supra* note 185. Social Welfare Ordinance of 1964 (Northern Territory).

190. Aborigines Protection Act § 8(1). *See also* Aborigines Act of 1934 (South Australia), *supra* note 186; Aboriginals Preservation and Protection Act of 1939 (Queensland), *supra* note 186; Native Welfare Act of 1963 (Western Australia), *supra* note 186; Aborigines Act of 1889 (Western Australia), *supra* note 185.

191. Aborigines Protection Act § 8(2). *See also* Aborigines Act of 1934 (South Australia), *supra* note 186; Aboriginals Preservation and Protection Act of 1939 (Queensland), *supra* note 186; Native Welfare Act of 1963 (Western Australia), *supra* note 186; Aborigines Act of 1889 (Western Australia), *supra* note 185.

192. Aborigines Protection Act § 8(A)(1).

In the Northern Territory, the Aboriginal Ordinance of 1911 placed Aborigines under the control of the 'Chief Protector' if in his opinion it was "necessary or desirable for the Aborigines best interest." Aboriginal Ordinance of 1911, cited in ABORIGINES AND THE LAW, *supra* note 7, at 26.

193. Aborigines Protection Act § 8(B). *See also* Aborigines Act of 1934 (South Australia), *supra* note 186; Aboriginals Preservation and Protection Act of 1939 (Queensland), *supra* note 186; Native Welfare Act of 1963 (Western Australia), *supra* note 186; Aborigines Act of 1889 (Western Australia), *supra* note 185.

194. Aborigines Protection Act § 8(C).

With Indigenous people out of the way, the Europeans no longer had that obstacle in their continuing quest to colonize and conquer. However, the Indigenous people could never be a productive part of the "New European Order" unless they had the same goals, aspirations, desires, and beliefs as the Anglo-European world view expounds. Therefore, the Indigenous people had to be educated in the ways of the white man. Since, as the saying goes, you can't teach an old dog new tricks, the Europeans focused their educational efforts on the Indigenous children. The idea that young minds are more malleable probably explains why the old style, status quo oriented Anglo-European world view could not flex to understand the Indigenous cultures they encountered.

V. Education of Indigenous Children

As noted earlier, assimilation required the destruction of the Indigenous culture. A culture cannot be perpetuated if it is not taught to the children. Indigenous societies have always had a means of educating their children.[195] The knowledge of the Indigenous society was passed from older generations to younger generations via observation and initiation.[196] Therefore, in Indigenous children were educated even though their cultures' knowledge was not written or stored in libraries.[197] However, the Anglo-European world view did not consider this to be "real" education.[198]

The Europeans thought the children would only continue to learn savagery if they were left with their uncivilized parents. Therefore, education projects and institutions aimed at "properly" educating the Indigenous children were established. These institutions sought to teach native children to be part of the Anglo-European norm and to deny their native heritage. Such policies were carried out both in Australia and the United States.

In the United States, the Indian education policies were directed at completely eliminating the Indigenous way of life and indoctrinating Indian children into Anglo-European world view.[199] Many American Indian reformers considered education to be the best way to "save" the Indian child.[200] Addressing the need to submerge Indian

195. Royal Comission, *supra* note 3, at 335.
196. *Id.*
197. *Id.*
198. Lacey, *supra* note 4, at 356.
199. *Id.*
200. *Id.* at 357.

children into the American culture through Indian school, Richard Henry Pratt, a prominent Indian education reformer, said, "[i]n Indian civilization I am a Baptist, because I believe in immersing the Indians in our civilization and when we get them under holding them there until they are thoroughly soaked."[201]

In 1892, the United States Congress, made the education of Indian children mandatory.[202] Section 282 of Title 25 of the United States Code provides that, '[t]he Secretary of the Interior is authorized to make and enforce such rules and regulations as may be necessary to secure the enrollment and regular attendance of eligible Indian children. . . ."[203] At first glance this statute does not appear to be detrimental to the Indian family or child. However, in 1893, Congress enacted a law that would "prevent the issuing of rations or the furnishing of subsistence either in money or in kind to the head of any Indian family for or on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year. . . ."[204] The policy of mandatory schooling for children may seem benign on its face; however, its implementation had devastating effects.

Thomas J. Morgan, Commissioner of Indian Affairs in 1889, discussed why Indian children should be taken from their tribes and families for education:

> In the camp, they [the Indian children] know but an alien language; in the school, they learn to understand and speak English. In the camp, they form habits of idleness; in the school, they acquire habits of industry. In the camp, they listen only to stories of war, rapine, bloodshed; in the school they become familiar with the great and good characters of history. In the camp, life is without meaning and labor without system; in the school, noble purposes are awakened, ambition aroused and time labor systemized.[205]

The children who attended the schools were physically removed from their families, often for years at a time.[206] The children were not allowed to speak in their native tongue and there were severe punish-

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201. PRUCHA, *supra* note 65, at 275.

202. Act of July 13, 1892, chap. 164, § 1, 27 Stat. 120, 143 (superseded by 25 U.S.C. § 282 (1982)). Federally funded boarding schools existed since 1879. Lacey, *supra* note 4, at 356.

203. *Id.*

204. Act of March 3, 1893, 27 Stat. 628. See Also David Bryan, *Cultural Relativism - Power in Service of Interests: The Particular Case of Native American Education*, 32 Buffalo L.Rev. 643, 675.

205. FRIENDS OF THE INDIAN, *supra* note 50, at 243-44.

206. Lacey, *supra* note 4, 357; Bryan, *supra* note 204, at 675.

ments if they did.[207] They were required to dress and look like the Anglo-Europeans.[208] The children were taught proper Anglo-European gender roles. Boys were taught farming and girls were taught household skills.[209] Therefore, except when necessary, "boys [were not to] be assigned to ordinary kitchen duties."[210] The schools were dedicated to eradicating the tribal heritage of Indian children. They were constantly taught that the Indian way of life was "savage and barbaric" and were encouraged to "completely repudiate their parents."[211] On the other hand, American history, culture, and ideals were glorified.[212] Many Indian children were taken from their families to other states for schooling. Eventually, the United States Congress passed a law providing that "[n]o Indian child shall be taken from any school in any State or Territory to a school in any other State or Territory against its will or without the written consent of its parents."[213] However, this law was often ignored; Indian agents resorted to child-snatching.[214] The tactics used by the Indian agents to capture the children were extreme. The agents went into the tribes and "with the detachment of police" seized the children.[215] Some of the children resisted being taken:

> They fought like brought-to-bay bobcats. They would fall as they struggled against the ropes, and their long black hair would make traces in the deep dust of the road, and their clothing was rent, but unlike the brought-to-bay bobcats, they would make no sounds and there were not tears; only silence and sweat that muddied the dust of their faces.[216]

The conditions in the schools were appalling. There was not enough food and the facilities were overcrowded.[217] The children

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207. Lacey, *supra* note 4, 357; Bryan, *supra* note 204, at 674.

208. The children attending the schools were "required to wear white man's clothes, cut their hair short, and pay strict attention to personal cleanliness." Lacey, *supra* note 4, 357.

209. *Id.* at 358.

210. BOARD IND. COMM'R, ANNUAL REPORT CVII (1890). In fact the slogan for the time was "Kill the Indian in him and save the man." Richard H. Pratt, THE ADVANTAGE OF MINGLING INDIANS WITH WHITES, in Americanizing the American Indian (Frank Prucha ed. 1973) 261; *See also* Bryan, *supra* note 204, at 675.

211. Lacey, *supra* note 4, 360-1. *See also* Bryan, *supra* note 204, at 675.

212. Lacey, *supra* note 4, 357.

213. Act of June 10, 1896, chap. 398, § 1, 29 Stat. 348 (codified as amended at 25 U.S.C. § 287).

214. Lacey, *supra* note 4, 359; *see also* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES (S. UNGER ed. 1977).

215. W. HAGAN, INDIAN POLICE AND JUDGES; EXPERIMENTS IN ACCULTURATION AND CONTROL 110 (1966).

216. *Id.*

217. Lacey, *supra* note 4, 360; Bryan, *supra* note 204, at 675.

were required to work long hours and many of them died.[218] Children who graduated from the schools found that they "faced a world in which [they] had no real place."[219] The graduate was confronted by discrimination from whites, yet, if she tried to return to the tribe, she realized she has lost her knowledge of tribal ways.[220]

In Australia, the education of Native children became compulsory, at least in New South Wales, after the passage of the Aboriginal Protection Act.[221] Section 11 of the Act granted the Aborigines Welfare Board[222] authority to establish "homes for the reception, maintenance, education, and training of wards. . . ."[223] A ward was defined in this act as "a child who [has] been admitted to the control of the

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218. Lacey, *supra* note 4, 360, citing L. MERRIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928); *see also* Bryan, *supra* note 204, at 675.

219. Lacey, *supra* note 4, 361. *See also* Bryan, *supra* note 204, at 675.

220. Lacey, *supra* note 4, 361-2.

> It seemed to be of little or no concern that Indian children abused for many years at boarding schools, finished their education fit for neither Indian nor white societies; they floundered in a place between their native culture of which they had never quite become a part, and the military facsimile of white culture imposed upon them during their school years.

Bryan, *supra* note 204, at 674.

221. Aboriginal Protection Act 1909-1943. Once again, there was no national Aborigine policy in Australia until 1967, when the Australian Constitution was changed allowing the Commonwealth to make laws regarding Aborigines. ROYAL COMISSION, *supra* note 3, at 518.

222. See note 221, *supra*. *See also* notes 149-153, *supra*, and accompanying text.

223. Aborigines Protection Act § 11.

In Victoria, the Aborigines Protection Act of 1869 granted the Board of Protection of Aborigines, *inter alia*, the power over the care, custody, and education of Aboriginal children. Aborigines Protection Act 869, cited in ABORIGINES AND THE LAW, *supra* note 7, at 81.

In Western Australia, the Native Welfare Act of 1963, granted the Department of Native Welfare the power over custody, maintenance, and education of Aboriginal children. Native Welfare Act 1963, cited in ABORIGINES AND THE LAW, *supra* note 7, at 100.

In the Northern Territory, the Aboriginals Ordinance of 1918 declared the 'Chief Protector' the Guardian of all Aboriginal children under 18 years of age. Aborigines Ordinance 1918, cited in ABORIGINES AND THE LAW, *supra* note 7, at 27. This guardianship was effective regardless of whether or not the child had living natural parents. *Id.*

In Queensland, the Aboriginals Protection and Restriction of the Sale of Opium Act of 1897 gave the 'Protector of Aboriginals' very broad powers over children. These powers incuded the removal, maintenance, discipline, care, custody, and education of Aboriginal children. Aboriginals Protection and Restriction of the sale of Opium Act of 1897, cited in ABORIGINES AND THE LAW, *supra* note 7, at 55.

In South Australia, the Aborigines Act of 1934 declared the 'Chief Protector' to be the legal guardian of all Aboriginal children under 21 years of age. § 10 Aborigines Act 1934, cited in ABORIGINES AND THE LAW, *supra* note 7, at 70-1. Furthermore, the Aboriginal Affairs Act of 1962 granted the Aborignal Affairs Board and the minister of Aboriginal Affairs the "absolute discretion. . . for the maintenance and educaton of children of Aborigines and persons of Aboriginal blood." § 15(e) Aboriginal Affairs Act 1962, cited in ABORIGINES AND THE LAW, *supra* note 7, at 72.

board or committed to a home" under section 11.[224] Furthermore, the Aborigines Welfare Board was given authority to "admit a child to its control."[225] Since a child, for the purposes of this act, was defined as "an aborigine under eighteen years of age,"[226] the Aborigines Welfare Board had the power to bring under its control any Aborigine child for the purposes of education, training, and maintenance.

Just as in the Indian schools in the United States the Aborigine schools in Australia were not what would normally be called schools. Aborigine children who became wards were taken from their parents for the same reasons. Anglo-Europeans did not perceive the Aborigine parents to be competent to raise their own children even though their ancestors had been successfully rearing children for thousands of years.[227] Since the Aborigines did not share the Anglo-European world view they could not possibly be able to properly and effectively rear and educate the children.

The practice of taking Aboriginal children away from their parents was so pervasive in Australia that "[t]here is no Aboriginal family that is untouched by this policy."[228] Aborigines were told that they were offensive and inferior. While institutionalized, Aborigine children were told that their culture was repulsive and repugnant.[229] Once a child was old enough to leave the school, she experienced a "loss of role, of place and of family in the community."[230] She faced a European culture that did not want her and an Aboriginal culture that no longer knew her.

The Aborigines Protection Act did not stop merely with education. Section 11(A)(1) gave the Aborigines Welfare Board the authority to, "by indenture, bind or cause to be bound any ward as an apprentice or . . . place any ward in other suitable employment."[231] Before a ward was indentured, the Aborigines Welfare Board had to be satisfied that the ward would be provided proper "maintenance,

224. Aborigines Protection Act § 3.

225. Aborigines Protection Act § 11(D)(1)(a).

226. Aborigines Protection Act § 3. *See also* Aborigines Ordinance 118 (Northern Territory); Aborigines Act 1934 (South Australia).

227. "European preceptions of what constitutes a stable living environment underlie welfare assumptons." ROYAL COMISSION, *supra* note 3, at 73. Welfare principles and policies were the driving force behind the institutionalization of Aboriginal Children. *Id.*

228. ROYAL COMISSION, *supra* note 3, at 74, citing N. D'Souza, *The Secretariat for National Aboriginal and Islander Child Care (SNAICC)*, RCIADIC SUBMISSION 05/118-VII, at 5 (1990).

229. ROYAL COMISSION, *supra* note 3, at 73.

230. *Id.*

231. Aborigines Protection Act § 11(A)(1).

training, care, and religious instruction. . . ."[232] If the Aborigines Welfare Board was not satisfied that an indentured child would receive these, the child was placed in a home "for the purpose of being maintained, educated, and trained."[233]

If a child or ward was not placed in a home under section 11 and not indentured she would be "boarded-out." A child who was "boarded-out" was "placed in the care of some foster parent for the propose of being nursed, maintained, trained, or educated by such person or in such person's home."[234] That child would be educated in the same style as she would have been in a section 11 home. That is to say, there would be very little actual education and a large amount of work done by the child. The foster parent in turn, would be paid by the government for educating the child.[235]

VI. Conclusion

Both the American and Australian colonists brought to their new lands the same heritage. They shared similar views with respect to land, religion, and society. American Indians and Australian Aborigines are geographically a world apart, yet, these two distinct Indigenous cultures are extraordinarily similar. Even more extraordinary is the fact that similar policies could be instituted in two countries a world apart to effectuate similar goals and create similar results.

The American and Australian colonists reacted the same way when they encountered the Indians and the Aborigines. They saw themselves as superior to the natives, and thus felt justified in dominating them. Anglo-Europeans perceive all other cultures as being inferior. Therefore, Anglo-Europeans believe other cultures should conform to their standards, by assimilation. The Anglo-European colonists in America and Australia believed the natives of their respective new lands needed enlightenment, which only the Anglo-European world view could provide.[236] Therefore, the assimilation policies of the United States and Australia were based on ethnocentric notions and ideologies that the Anglo-European way was the only way.

The Anglo-Europeans' conquests of divergent Indigenous cultures and usurpation of Indigenous peoples' lands was justified by the

232. Aborigines Protection Act § 11(A)(2).
233. Aborigines Protection Act § 11(B)(2).
234. Aborigines Protection Act § 3.
235. Aborigines Protection Act § 11(D)(1)(c).
236. Williams I, *supra* note 3.

Doctrine of Discovery.[237] The Doctrine of Discovery and the concept of *terra nullius* served to make legitimate and "legalize" the wholesale dispossession of Indigenous peoples' lands in Australia and the United States. The Doctrine of Discovery and the concept of *terra nullius* were judicially approved in the *United States in Johnson v. M'Intosh*,[238] and in Australia in *Cooper v. Stuart*.[239] The Doctrine of Discovery has "proved itself to be a perfect instrument of empire."[240] The doctrine justified the destruction of Indigenous cultures and the proliferation of Anglo-European culture. "The Doctrine of Discovery was nothing more than a reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principal-one culture's argument to support its conquest and colonization of a newly discovered, alien world."[241]

The Doctrine of Discovery evolved into a large scale policy of denying Indigenous people self-determination. Indigenous people in the United States and Australia were denied self-determination through the implementation of powerful supervisory authorities. These authorities wielded a powerful sword that cut a swathe through every aspect of Indigenous life.

With their land, livelihood, and ability to make choices affecting their future taken from them, the Indigenous people of the United States and Australia became wards of the state. As wards of the state, they were sequestered from their traditional and sacred lands, on reserves or reservations. The Indigenous culture and vision was denied respect and legitimacy.[242]

Indigenous children were taken from their natural parents for the purpose of indoctrinating them into the Anglo-European culture. Instead of going to schools, however, the Indigenous children were sent to places that resembled work camps. There they were taught to live as clean, correct, and virtuous Anglo-Europeans. Unfortunately, these children became a class of people stripped of their heritage and dignity, unfamiliar with their own world and shunned by those who promised them a new world.

The striking similarities between the way the United States and Australia conducted their policies with respect to Indigenous people is

237. WILLIAMS III, *supra* note 77, at 325.
238. Johnson v. M'intosh, 21 U.S. (8 Wheat.) 543 (1823).
239. Cooper v. Stuart, 14 App. Cas. 286 (P.C. 1889).
240. WILLIAMS III, *supra* note 77, at 325.
241. *Id.* at 326.
242. *Id.* at 327.

not based upon mere chance: Their policies and the rationales behind them, are too consistently similar to be merely coincidental. Furthermore, there are striking similarities between the people who colonized the United States and Australia. These similarities compel the conclusion that there is a predetermined Anglo-European world view of non-Europeans. This view allowed the European colonists to strip Indigenous people in the United States and Australia of their land, religion and culture in furtherance of Christianity and the Crown.

Yet, despite all of the European legal and governmental efforts to eradicate the "inferior" Indigenous cultures of the United States and Australia, these cultures survive.

> The vitality of our race still persists. We have not lived for naught. We are the original discovers of this continent, and the conquerors of it from the animal kingdom, and on it first taught the arts of peace and war, and first planted the institutions of virtue, truth and liberty. The European nations found us here and were made aware that it was possible for men to exist and subsist here. We have given to the European people on this continent our thought forces the best blood of our ancestors having intermingled with [that of] their best statesmen and leading citizens. We have made ourselves an indestructible element in their national history. We have shown that what they believed were arid and desert places were habitable and capable of sustaining millions of people. We have led the vanguard of civilization in our conflicts with them for tribal existence from ocean to ocean. The race that has rendered this service to the other nations of mankind cannot utterly perish.[243]

243. Creek Tribal Records, 35664; 59 Cong. 2 sess., *Sen. Rep. No.* 5013 I, 627 f., cited in A. DEBO. THE ROAD TO DISAPPEARANCE 377 (1941).