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'Peopling the country by unpeopling it'

Jeremy Bentham's silences on Indigenous Australia*

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For over 50 years, historians have debated Jeremy Bentham's views on colonization. From Donald Winch in the 1960s and Lea Campos Boralevi in the 1980s, through to twenty-first century contributions by Philip Schofield, Jennifer Pitts and Peter Cain, scholars have interrogated each freshly published or newly discovered morsel of Bentham's writings to argue about when, why, and to what degree his attitude to colonization changed between the 1760s and the 1830s. As a body, this scholarship has tended to enhance Bentham's reputation as a critic of colonization, distinguishing him from those near contemporaries, like James Mill and his son, John Stuart Mill, who invoked Bentham in their own defences of empire. Not atypically, this reassessment led Peter Cain in 2011 to describe Jeremy Bentham as making 'one of the greatest contributions to anti-colonial literature anywhere in the Western world'.[1] This chapter takes up a question that the debate on Bentham and colonization has left unaddressed, but which the Bentham Project's new edition of *Panopticon versus New South Wales and other writings on Australia* gives us new scope to examine. Informed by recent scholarship, in the fields of settler colonial studies,

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Critical Indigenous Studies, and the critical history of international law, which foregrounds the experiences and dispossession of Indigenous peoples as a result of colonization, the chapter asks what happens when we view Bentham's writings on colonies through the lens of settler colonialism? And, specifically, what do Bentham's writings on Australia reveal if our analysis prioritizes the continent's Indigenous peoples and their unceded sovereignty?

The absence of the Indigenous peoples of Australia, the Americas, and Africa both from Bentham's writings on colonization and from the scholarly debate about those writings is startling. While as early as 1795 Bentham claimed boldly that the 'way of living' adopted by Aboriginal peoples in Australia was 'well known', from 1791 onwards his writings on the legitimacy and prospects of the Australian colonies either invoked Aboriginal peoples rhetorically or erased them entirely from spaces given over to 'settlers'.[2] In his Australian – as in his other – colonial writings, Bentham focused instead on different parties to colonization: metropolitan elites; convicts; settler colonizers and their descendants; or Britain's colonized subjects in India. Scholarly interpretations of Bentham's views of colonization have analysed his evolving attitudes to these groups, with the analytical waters muddied, on the one hand, by his sometimes ambiguous description of settlers as 'natives', and, on the other, by historians' tendency to accept too readily Bentham's offhand characterization of lands subjected to settler colonization as previously 'unsettled' or 'vacant'. Such erasures neither began nor ended with Bentham, but their significance in his work is important, not least because of Bentham's status as a positivist, a critic of natural rights, and a theorist of international law. By reinserting Aboriginal peoples into this debate, and interrogating not only Bentham's silences and omissions, but also those who have analysed Bentham's views on colonization, this chapter reveals Bentham's enduring – and unacknowledged – support for British *settler* colonialism and explores how and why he denied Indigenous sovereignty. In so doing, it creates the opportunity to reassess Bentham's contributions to international law, the intellectual foundations of settler colonialism, and colonialism's political, historical and historiographical legacies.

The chapter begins by outlining the debate on Bentham and colonies, suggesting that scholars' preoccupation with delineating Bentham's 'authentic' views on colonization from those better known to his nineteenth-century audience has insulated their analysis from profound shifts affecting the historians of colonialism more broadly. In particular, the advent of the 'new imperial history' (focussing

attention on the co-constitution of metropolitan and colonial thought, society and politics) and settler colonial studies (centring analysis of the relationship between settler colonizers and Indigenous peoples) demand that we explore the place of Indigenous peoples in Bentham's writings on settler colonies. The chapter concludes by reflecting more closely on where the Aboriginal peoples of Australia are, or are not, in Bentham's writings, and, in the light of recent scholarship, explores the impact of their erasure.

Bentham and colonies: the debate

At issue in the debate on Bentham and colonization are the nature and dimensions of Bentham's hostility to European colony-holding, an animus particularly evident in his two best-known works on colonies. The first, 'Jeremy Bentham to the National Convention of France', was distributed privately to members of France's National Convention in 1793 but published only in 1830 as *Emancipate Your Colonies!* Bentham's other well-known essay on colonization, 'Rid Yourselves of Ultramaria', addressed slightly more nuanced, but no less trenchant, views to liberal Spaniards in 1822. The scholarly debate arose because Bentham's criticisms of colonialism were much less clear cut in a series of his other writings dating from the 1770s through to 1831. He was, for example, mostly dismissive of the colonists' claims during the American Revolution, though recanting on this point in 1827.[3] Equally, while at times stridently critical of the East India Company, Bentham defended British rule as the *best available* option for Indian governance, despite the political harms it risked in Britain.[4] Moreover, although scathing about the establishment of a penal colony in New South Wales, Bentham intervened in favour of South Australia in 1831 and similarly promoted emigration to British colonies to reduce damaging domestic over-population.[5]

At his death in 1832, some of these writings about colonialism remained in Bentham's vast collection of unpublished, and often incomplete, manuscripts. Versions of others appeared in the digests prepared from 1802 by Bentham's French translator. As Étienne Dumont translated Bentham's writings into French, he shortened, altered, and sometimes added to them; these abstractions were in turn translated into Spanish, Russian, German and other languages. Between 1838 and 1843, Bentham's friend and literary executor John Bowring oversaw the production of 11 volumes of Bentham's writings: alongside most

of the already published texts, this series also incorporated English translations of Dumont's digests, and some previously unpublished texts from manuscript. Recognizing both the deficiencies and the very significant omissions of the Bowring volumes, in 1959 UCL established the Bentham Committee to oversee the production of the new *Collected Works of Jeremy Bentham* by researchers affiliated to the Bentham Project.[6] Each new, authoritative volume published by the Bentham Project has furthered the divide between what David Lieberman characterized as the 'historical Bentham' – the Bentham known to his nineteenth-century audience – and the 'authenticity Bentham', that is, the Bentham emerging from his manuscripts via the *Collected Works*.[7] While the scholarship of Philip Schofield, in particular, has largely pinned down the 'historical Bentham', the large scale and slow pace of the Bentham Project make identifying the 'authenticity Bentham' more troublesome. Editorial decisions from now long-distant decades have had unintended consequences, not least as new fields of scholarship and changing questions within existing fields suggest quite different thematic groupings, juxtapositions and priorities to those originally agreed upon. The so-called 'authenticity Bentham' remains highly malleable.

Donald Winch, in his 1965 *Classical Political Economy and Colonies*, and then Lea Campos Boralevi, in her 1984 *Bentham and the Oppressed*, used both these published works and some of Bentham's manuscripts to explain his apparently contradictory views about colonialism. Whilst disagreeing with one another, they made considerable headway in excavating and accounting for Bentham's views on topics including the American Revolution and slavery. It is worth noting, in particular, Boralevi's acute observation that Bentham approached each colonial situation afresh; he did not develop a theory of colonialism that could effectively explain European imperial policy, but rather applied his theory of utility to individual instances of colonization. Thus, in some cases, Bentham argued that the benefits of colonies outweighed their very considerable costs.

In the early twenty-first century, editions published by the Bentham Project allowed historians to portray the 'authenticity Bentham' as, for the most part, a critic of colonialism. Schofield, for example, demonstrated how Bentham's growing political radicalism informed his critique of colonies in the early nineteenth century.[8] In an important series of interventions Jennifer Pitts improved understandings of Bentham's position on British India, doing most to differentiate Bentham's views from those of James and John Stuart Mill.

Moreover, when in 2011 Schofield and Stephen Engelmann published an important new edition of Bentham's 1782 essay, 'Place and Time', Pitts and Engelmann used it to reveal Bentham as considerably more tolerant of non-European cultures than nineteenth-century versions of the same piece suggested.[9]

While Bentham's attitude to Indians living under British rule has been explored carefully, his views on other colonized subjects have featured less prominently, whether in the debate between historians, or indeed in Bentham's writings themselves. For example, although Donald Winch focused on what he termed the 'white dominions' and the 'colonies of settlement' in his *Classical Political Economy and Colonies*, he did not comment on either those colonies' Indigenous peoples or Bentham's indifference to them. Even when reflecting on the strengths and limitations of his 1965 analysis three decades later, Winch dealt with 'native peoples' in one sentence.[10] In 1984, by contrast, Lea Campos Boralevi devoted a chapter of her *Bentham and the Oppressed* to 'Native People of the Colonies'. This analysis explored Bentham's attitude to India and its inhabitants, but other Indigenous peoples made only the most fleeting of appearances.[11] Confusingly, Boralevi also used the term 'native people' to describe *settler colonizers*, those who came from, or whose ancestors came from, metropolitan societies.[12] Her book divided the colonized world in two: first, the 'advanced societies', which were populated by 'colonists of European descent and civilization'; and second, the 'underdeveloped countries', with small European and majority Indigenous populations.[13] In this way, Boralevi's analysis ignored the Indigenous peoples of settler colonies.

Although in overlooking Indigenous peoples who endured settler colonialism, Boralevi and Winch mimicked Bentham, such historical and contemporary silences have both shaped our understanding of colonialism and contributed to its ongoing impact. Questions about how such silences should be conceptualized have helped shape fields including critical indigenous studies and settler colonial studies, which in turn have influenced historians of both colonialism and international law. When Patrick Wolfe reinvigorated the concept of 'settler colonialism' in the late 1990s, he identified its most salient features as the mass transfer of 'settlers' from Europe to overseas colonies, and the focused efforts of those settlers not only to acquire Indigenous land, but also to claim sovereignty over it.[14] As historians including Lisa Ford, Paul McHugh and Bain Attwood have subsequently shown, at the time of Australian colonization, European conceptualizations of sovereignty were in transition, prompted not least by the need to legitimize

settler colonialism and settler colonizers' land tenure. Increasingly, Europeans defined sovereignty in terms of jurisdiction over territory, rather than jurisdiction over individuals.[15] Settler colonizers' interest in land often, though certainly not always, outweighed their claims to Indigenous labour; this, argued Wolfe, differentiated settler colonialism from other forms of colonialism (such as, for example, plantation slavery). Settler colonialism is also now recognized as enduring: it entails the ongoing dispossession, and the attempted erasure, of Indigenous peoples through an array of physical, cultural and intellectual means.[16]

The scholars debating Jeremy Bentham's views on colonies have emphasized only the first of these features: they understand settler colonialism as a story about mass European migration. But, of course, the effort to replace Indigenous peoples with European immigrants relied, and continues to rely, on intellectual erasures and silences, as well as on physical force, violence, legal instruments, and government endorsement. When Boralevi dissected Bentham's view of the benefits of future 'colonization', for example, she wrote about 'almost uninhabited or uncultivated land, such as in Australia', where colonization 'need not entail the oppression of any long-established community of people'.[17] Like Bentham himself, Bentham scholars have characterized settler colonies by an absence of people – 'vacant', 'unpopulated', 'unoccupied' – or stressed prior inhabitants' failure to 'use' or to 'improve' land, via terms like 'uncultivated' and 'waste'. Such language reinscribes a European discourse about 'waste lands' that extends back beyond John Locke. In this discourse, lawful possession of land depended upon usage that accorded with specific European practices. Other scholars have followed Winch and Boralevi by sidestepping the implications of settler colonialism for Indigenous peoples in Bentham's work. When Peter Cain, for example, characterized Bentham as making 'one of the greatest contributions to anti-colonial literature anywhere in the Western world', he went on to suggest that this contribution was 'one which in some ways was never improved upon in Britain'.[18] Clearly this accolade is highly dependent on what colonies are assumed to be. Like Boralevi, Cain divided them into 'offshoots of Britain', with (white) settler populations occupying 'much empty land', or, alternatively, 'dependencies with large native populations'.[19] Philip Schofield has made the same distinction.[20]

Such binary divisions into, essentially, 'white' and 'non-white' colonies obscure the dynamics of settler colonialism. The problem is illuminated by critical approaches to race and indigeneity. Critical

Race Theory, for example, demonstrates how hegemonic structures and ideas in society – including not only the courts, or the common law, but also scholarly disciplines – are constructed in a way that obscures white normativity. In consequence, as Cheryl Harris argues, to praise a law or a policy for being ostensibly 'colour-blind', may be to ignore its profoundly different impact on white and black citizens; impacts that are determined by structural inequalities. Critical Race Theory reminds us that while 'race' is a construction, 'racism' has powerful manifestations.[21] Meanwhile, Critical Indigenous Studies warns against conflating 'race' and 'indigeneity'. In this vein, Aileen Moreton-Robinson highlights how Indigenous sovereignty is first erased, and then that erasure rationalized, by what she terms 'white possessive logics'. These refer to structures of thinking, legislating, and knowing, all of which deny the possibility of Indigenous sovereignty, unless that sovereignty takes a form that accords with (incommensurable) Western criteria.[22] This shows how European notions of 'waste lands' and 'possession' helped disavow Aboriginal sovereignty twice over. First, ignorantly, Europeans failed to acknowledge that Aboriginal Australians did indeed occupy, inhabit and cultivate their sovereign territory.[23] Second, self-servingly, they refused to recognize that their own constructions of sovereignty were not universal, but specific to Europe, and incommensurable with Indigenous sovereignty.[24] Antony Anghie, in laying out a framework for a critical history of international law, reminds scholars to focus on how hegemonic European notions of sovereignty have been 'constituted through colonialism' and underpinned by the 'persistently hierarchical structure of the global order'.[25]

Jennifer Pitts' work points to a different way that Indigenous peoples might be silenced or erased from historical scholarship. Her work implicitly posits settler colonies and their Indigenous peoples as less central to Britain's imperial project and history than British India, the West Indies, or tropical Africa. Pitts has argued, particularly in relation to Bentham's 1782 essay 'Place and Time', that he offered 'something of an antidote to liberal imperialism and to the interventionist universalism that is its heir'. Bentham, she claims, 'almost ostentatiously' declined 'to typecast societies as savage or civilized' and should not be read 'as a participant in the imperial liberalism of the nineteenth century but as a counterpoint to it'.[26] Pitts' analysis effectively disentangles Bentham's views from those of the 'Benthamites', who sought to harness his name and reputation to their own projects. Especially in her co-authored article with Stephen Engelmann, Pitts

demonstrates how the 'authenticity' Bentham diverged from the 'historical' Bentham. The 2011 Schofield-Engelmann edition of 'Place and Time' reveals Bentham as more tolerant and open-minded than suggested by either Dumont's 1802 or Richard Smith's 1830s version of the same essay.[27] But to stress Bentham's relatively more tolerant views on India risks obscuring his denigration and dismissal of colonized subjects elsewhere. In fact, in the decades after 1782, when Bentham did consider the Indigenous peoples of North America, Southern Africa and Australasia, he typically resorted to exactly the dichotomy of 'civilized' and 'savage'. If, like Pitts, we risk allowing India's inhabitants to represent all those who were colonized, we miss Bentham's denial of the existence, humanity and rights of the Indigenous peoples who stood in the way of settler colonialism.[28]

One work that does directly, if briefly, consider Bentham's attitude to Indigenous people in settler colonies (whilst also distinguishing him from the Benthamites), is Gunhild Hoogensen's 2005 *International Relations, Security and Jeremy Bentham*.[29] Hoogensen argued that Bentham thought that while white and creole colonists in the Americas 'deserved' emancipation from imperial rule, subjects of the East India Company rule would 'benefit' from further guidance. According to Hoogensen, Bentham struggled when these two classes of colonial subjects – resident colonizers and colonized – occupied 'the same area'. This was a problem Bentham could not resolve; he was 'not comfortable with emancipation for all people'.[30] Hoogensen did not use the terminology of 'settler colonialism', but her focus on the space occupied by colonialism and the uncomfortable juxtaposition of colonizers and Indigenous peoples suggests this would be a useful lens to apply.

As this discussion has demonstrated, previous scholarship has overlooked the implications of settler colonialism for our understanding of Bentham.[31] Historians must be conscious that rendering Indigenous peoples invisible in their scholarship helps legitimize settler claims to sovereignty. As Adam Barker remarked, 'Understanding settler colonialism by definition requires piercing this invisibility, revealing that which colonial power would obscure for its own interests'.[32] Turning now to Bentham's newly edited writings on Australia, I seek the Indigenous presence in those writings and question Indigenous absences in order to reveal the mindset that created, enabled, and still fuels, settler colonialism.

Bentham and Australia

The Bentham Project's *Panopticon versus New South Wales* provokes three questions with respect to the Indigenous peoples of Australia. The first relates to Indigenous invisibility. The legal fiction of *terra nullius* – where sovereignty over the Australian continent was claimed on the basis that no one occupied the land – was bolstered by textual and visual erasures of Indigenous peoples from the time of James Cook's 1770 visit to eastern Australia.[33] Certainly, in Bentham's renderings, Australia appears almost as if literally uninhabited prior to European colonization. *Almost*, but not absolutely, uninhabited. So what do the faint traces – the shadows – of the Indigenous peoples of Australia in Bentham's writings reveal?[34] The second question is provoked particularly by Bentham's 1831 intervention on South Australia, but has roots in the early 1800s. This relates to land, and to Bentham's conceptualization of possession, property and sovereignty. Did the ways in which Indigenous sovereignty was 'unthinkable' for Bentham shift over time? Both these concerns highlight the central logic of settler colonialism as a phenomenon: erase the natives – or at least their sovereignty – and seize their land; seize the land and erase the natives. Finally, did Bentham particularly distinguish 'Australia' and its Indigenous peoples from other Indigenous peoples and settler colonies, and if so, how should this backhanded recognition be read?

'New Wales': silencing the 'very dregs even of savage life'

Written in mid-1791, Bentham's 'New Wales' slightly predated his better-known attack on French colonialism, *Emancipate Your Colonies!* Neither *Emancipate*, nor its 1822 counterpart criticizing Spanish colonialism, 'Rid Yourselves of Ultramaria', attended to the mechanics of establishing a colony: rather they focused on the political and economic costs of maintaining existing colonies. By contrast, 'New Wales' also addressed the practical obstacles to founding a sustainable colony, and especially a penal colony. It reveals that Bentham found little to recommend the New South Wales venture.[35] He saw penal transportation as a poor way to effect colonization, with its unwilling vectors and probable imbalance between men and women.[36] In fact, Bentham's sole, oblique, reference to the Indigenous peoples of Australia in 'New Wales' addressed the demographic problem that having too few white women posed for the colony. In response, Bentham raised – but then dismissed – what might be called 'the Sabine solution'. That is, he

invoked the Romans' eighth-century BCE attempt to populate Rome via the abduction and rape of the Sabine women. Bentham was not explicit about which population Australia's colonizers might so raid, but did suggest 'peopling the country by unpeopling it after the manner of Mexico and Peru'. This aside evokes the widespread abuse of Aboriginal women by British colonists, and suggests both that Bentham had Indigenous women in mind, and that he was cognisant of the likely consequences of colonialism for them.[37]

As well as the new penal colony, 'New Wales' also condemned colonialism in general. In this context, Bentham considered the rights and prospects of non-European indigenous populations, although not specifically the Aboriginal peoples of Australia.[38] By convention, European powers in the eighteenth century laid claim to sovereignty via one of three methods: conquest, cession or discovery. Bentham did not adopt these categories exactly, and his divergence from them suggests how problematic their distinctions were in practice. In 'New Wales', Bentham differentiated between *conquests* and *colonies*.[39] *Conquests* he defined as entailing the subjugation of one people by an invading nation, as in Britain's growing empire in the 'East Indies'; or what Bentham described as the Incas' 'more civilised' rule over the ancient Peruvians. In these cases, Bentham accepted the potential benefits of colonial – or 'civilised' – rule. For India, he wrote, 'the quiet and secure and steady government of European masters' constituted 'a less evil than the least bad of their own bloody and fluctuating and unsecure and barbarous ones'.[40]

Bentham's deployment of the term *colonies* was more ambiguous. In 'New Wales', he described colonies as 'wild' and 'at a distance': it was clear that this distance had both geographical and cultural dimensions.[41] Bentham's colonies were inhabited – exclusively, it seems – by 'colonists': these settlers, like their ancient Greek predecessors, came from, or were descended from, the mother country, and did not include the local Indigenous population. Unlike in some of his later works, Bentham did not discuss treaties as devices for ceding sovereignty in colonies in 1791. Tellingly, he placed Spain and Portugal's contemporary possessions in the Americas in the category of colony, but categorized the Incas' earlier rule over the ancient Peruvians as a conquest.[42] In this way, he treated European settler colonies as being without prior or Indigenous inhabitants, or at least without prior inhabitants who were worthy of consideration.[43] Similarly, when addressing the legitimacy of James Cook's possessive claim over Australia, Australia's Aboriginal peoples and their sovereignty did not affect Bentham's analysis; he

conceptualized those Aboriginal peoples as 'outside' colonial society. Rather, he dwelt on whether earlier visits by the Dutch might upset Britain's claims, and whether the short duration of the *Endeavour*'s visit to the eastern coast was sufficient to transform 'discovery' into 'possession'.[44] In sum, the Indigenous peoples of Australia featured either rhetorically, or not at all, in Bentham's 1791 analysis of New South Wales.

A decade later, Bentham's 1803 essay, *A Plea for the Constitution*, mounted an exploration of the legal basis of colonial power, in order to argue that New South Wales had been illegally founded.[45] Bentham did not, though, invoke the Aboriginal peoples of Australia, or their unceded sovereignty, as evidence of this illegal foundation. As in 'New Wales', his definition of 'colony' remained focused on British jurisdiction over British people, rather than territory. Bentham's taxonomy of New South Wales, for example, divided the population into ten groups – none of which included Aborigines. His analysis of the Ordinances issued to secure the colony 'against injuries from the *native savages*' further emphasized this exclusion of Aboriginal peoples from colonial society: Bentham categorized such Ordinances as 'security against mischiefs from without'.[46] As this awkward formulation suggests, the exclusion of Indigenous peoples from his conceptualization of New South Wales required some effort on Bentham's part. His 'Letter to Lord Pelham', written and printed in 1802, drew on the journal of New South Wales' Judge Advocate David Collins to demonstrate the threat Aborigines posed to the colony. The Indigenous peoples of Australia, concluded Bentham, were 'a set of brutes in human shape, the very dregs even of savage life'.[47] This exclusion from the colony, and even from humanity, was underlined in 'A Plea for the Constitution' by a rare, and possibly unique, passage in Bentham's writing that identified individual Indigenous people.[48] Almost as unusually, Bentham here not only acknowledged the Indigenous peoples of Australia, but sought to differentiate them from their counterparts in North America.

The discussion in question addressed the legal instruments deployed when founding colonies. In North America, companies of settlers had been issued with legal charters; but this had not been the case for the penal colony in New South Wales. Bentham also highlighted a difference in how the British engaged with the Indigenous peoples of America and Australia respectively. European colonization in North America (which in this instance Bentham characterized as conquest) had been accompanied by treaty-making with

First Nations. By contrast, he wrote, '[N]o wampum, nor any substitute for wampum, has either been received or given in New South Wales'.[49] According to Bentham, New South Wales was not a *conquest*: rather, it had been *colonized* or *acquired*.[50] The basis of British sovereignty in both America and Australia would continue to be debated, particularly in the 1820s and 1830s, but Bentham's discussion of the apparently casual 'acquisition' of New South Wales shows how he construed Indigenous incapacity when it came to sovereignty. Bentham referred to the Eora kinsmen, Bennelong and Yemmerrawanne, who had travelled to England in 1793 with former Governor Arthur Phillip. 'When', wrote Bentham,

> from their immense continental island, *Benillong* and *Yem-mer-ra-wannie* did us the honour to bestow a glance upon this our little one, it was in the character of private gentlemen, travelling for their amusement, or at least for our's: they signed no *treaty* with his Majesty, nor brought with them any diplomatic powers.[51]

In denying the Eora visitors diplomatic powers, Bentham was arguing that Australia's Indigenous peoples lacked any recognizable government and any claim to sovereignty; their alleged 'savagery' placed them outside the colony.

Bentham had laid the groundwork for this denial in 'Nonsense Upon Stilts', his 1795 critique of the French Declaration of Rights, in which he identified the Indigenous peoples of Australia as exemplifying 'savage nations or rather races of mankind'. Arrogantly, Bentham dismissed 'the savages of New South Wales, *whose way of living is so well known to us*', as 'below the level' of beasts in happiness. Bentham's inability to recognize Aboriginal government or sovereignty had significant consequences, as he went on to outline: 'No government, consequently no rights: no rights, consequently no property: no legal security, no liberty'.[52] To be without government was to be incapable of civilization; yet civilization could only flourish with the security that flowed from government. Bentham thus permanently excluded Australian Aborigines from both. The speed with which Bentham moved to disavow Indigenous sovereignty – indeed to deny Indigenous peoples' capacity for sovereignty – suggests at least tacit acknowledgment of the inconsistencies in Britain's claims to its colonies. As Antony Anghie has argued, the discourses of disqualification applied by Europeans to Indigenous sovereignty shift constantly, driven by the always incomplete task of shoring up settler claims to legitimacy.[53]

'Vacant Lands' in the 'Institute of Political Economy' (1801)

Jeremy Bentham's writings from the early 1800s set out the tangible benefits of colonialism, and not just its costs. These benefits, according to Bentham, arose when colonies provided a destination for an excess of metropolitan population, or, in certain cases, for excess capital.[54] But, as Philip Schofield has shown, even as Bentham identified the potential benefits of colonies, his critique of colony-holding strengthened in the 1810s and 1820s, when he argued that colonialism served only regressive 'sinister interests' in the metropole.[55] These nineteenth-century writings also illuminate Bentham's evolving attitudes to settler colonialism and to land, and, as a consequence, although he did not acknowledge them as such, to the Indigenous owners of land. While Bentham's 1801 essay 'Institute of Political Economy' was not directly concerned with Australia, it reveals how Bentham discounted the rights of those displaced and dispossessed by burgeoning settler colonialism.

In one fragment of that 1801 work, Bentham argued that an *increase of land* was an *increase of wealth*, land being 'no less indispensable' than labour to wealth's production.[56] He went on to justify what today would be termed settler colonialism. Colonies, argued Bentham, helped avoid ruinous over-population in Britain; they also provided benefits to those who took up their 'fresh' land.[57] In this analysis, Bentham identified colonies that he knew had Indigenous populations: his text specified Egypt and America, while his marginal notes referred to New Holland, tropical and southern Africa, and the West Indies. Despite this cognisance, Bentham in each case presumed what he variously described as 'fresh land', 'unappropriated land', and the parts of the earth 'as yet vacant'.[58] Bentham's dismissal of non-European peoples' use of land, and his equally strong association between the use of land and its lawful possession, shows how hegemonic contemporary discourse on waste land had become.[59] This discourse contributed to the new conception of sovereignty as jurisdiction over territory, and underpinned the land grab that characterized settler colonialism.

Thirty years later Bentham explicitly endorsed this discourse. In June 1829, he wrote a postscript for the otherwise unaltered text of his 1793 address to the National Convention of France, which would be published for the first time the following year as *Emancipate Your Colonies!* This brief postscript has caused historians much consternation, for at a time when Bentham was known also to champion Canadian self-government, it expressed support for British rule in India,

and even China. However, if different types of colonialism are disaggregated, the postscript can be read as providing unambiguous support for British *settler colonialism*, or for the right to self-determination of white settler colonizers in British settler colonies. In the postscript, Bentham spoke favourably of Australian colonization and particularly the new settlement at Swan River in what would become Western Australia, predicting that Australia's settlements would emancipate themselves to become representative democracies.[60] In Bentham's view, Australia's white settlers (like those of Canada) deserved emancipation; non-white subjects in India did not. Once again, the postscript rendered Indigenous peoples in the settler colonies invisible and their 'rights' irrelevant. This would be even more apparent in Bentham's final work on colonization, his 1831 endorsement of a proposal for a South Australian colony.

'The greatest happiness of all the inhabitants': Colonization Company Proposal

By the late 1820s, the ideas of Edward Gibbon Wakefield, and those who would become known as the 'systematic colonizers', were starting to circulate in Britain. Promising to establish profitable colonial settlements 'without cost or burden to the mother country', a series of colonies based more or less closely on Wakefield's plans were founded in the 1830s and 1840s, including in South Australia and across New Zealand. In his 1829 *A Letter from Sydney*, Wakefield decried the damage to both economy and society that the wide dispersal of land-hungry settler colonizers caused: in essence, he charged, capital and labour had not been mixed in the right proportions in Britain's settler colonies. Wakefield proposed instead to devolve the establishment of new colonies to colonization companies. These, via the controlled sale of land for a fixed price, would create concentrated settlements served with essential infrastructure and populated by a skilled and socially differentiated (white) population. The 'sufficient price' paid for land would fund the emigration of labourers from Britain, but also preclude those immigrant labourers from rushing into land ownership themselves.[61] Although Wakefield's plans were most substantially implemented in South Australia and New Zealand, they were influential across Britain's expanding mid-century empire of settlement. One of Wakefield's foundational assumptions was that land had little or no value while it remained 'unimproved' by Europeans: systematic colonization was predicated on the acquisition of colonial land by colonizing companies either for nothing, or for

very little. During the 1830s, the systematic colonizers would become more responsive to concerns about the impact of settler colonialism on Indigenous peoples, but the attention they paid to their rights or needs remained tokenistic at best.[62]

Against this background, in August 1831 Bentham wrote a response to the National Colonization Society's newly released plan for a South Australian colony. Wakefield subsequently made much of how he had 'converted' Bentham to systematic colonization via the South Australian plan,[63] although historians including Bruce Buchan and John Gascoigne have argued for Bentham's 'influence over' the systematic colonizers.[64] As Tim Causer and Philip Schofield note, no direct correspondence between Wakefield and Bentham remains extant and it is not known when they first met.[65] While the nature of Bentham and Wakefield's relationship remains tantalizingly unclear, Bentham's 1831 engagement with Wakefieldian thinking in his 'Colonization Company Proposal' reveals the place of the Indigenous peoples of Australia in his late envisioning of the continent's future.

The systematic colonizers' plan for South Australia assumed the availability of 'waste land liable to be appropriated' by emigrant Britons and their descendants.[66] Their *Proposal to His Majesty's Government for Founding a Colony on the Southern Coast of Australia* recommended that the British Crown gift this land to the colonizing company; the occupation and industry of immigrants would then transform it according to Wakefield's theories. Adopting Lockean notions of land use, the systematic colonizers' plan connected the value of land to particular European modes of 'occupation', while downplaying the (obvious) value of land to both colonizing company and settlers. This proposal did refer to the Indigenous peoples of South Australia, although not in terms that recognized Indigenous sovereignty or possession of land; no payment to the land's Indigenous owners, for example, was envisaged. Despite making provision for a militia, the systematic colonizers' *Proposal* did not explicitly construe Aborigines as a threat to their endeavour.[67] Thus, when the proposed colony was described as 'a spot now absolutely desert and removed from any settlement', this referred solely to its distance from other British colonies. Indeed, Aborigines made no appearance in the systematic colonizers' 1831 discussions of South Australia's foundation, modes of land disposal, or government.

Instead, Indigenous peoples were only mentioned when the systematic colonizers discussed the colony's 'Situation': here they were invoked, like kangaroos, as a measure of habitability. For example, Port

Lincoln – one possible site for the initial settlement – was described thus: 'On this favoured spot the inhabitants must be numerous, for the whole coast appeared to us to be covered with the fires of the natives'; 'this spot was far more thickly peopled than any other part of the southern coast'.[68] Kangaroo Island, by contrast, where the earliest party of South Australian settlers would actually alight, was described as having 'no native inhabitants'.[69]

Bentham's response to the systematic colonizers' *Proposal* omitted even such fleeting acknowledgement of the Indigenous peoples inhabiting southern Australia. It began by considering the three different parties who would have to co-operate to found the colony.[70] As in Bentham's 1803 taxonomy of New South Wales, none of these parties included Aborigines: his imagined South Australia excluded Indigenous peoples without comment.[71] But those peoples cannot have been utterly absent from Bentham's mind. The analysis mounted in his 'Colonization Company Proposal' identified 14 disadvantages for colonies where the population was dispersed, rather than concentrated, and the very first was 'insecurity against damage to person and property from the hostility of the uncivilized aborigines'. A marginal note recorded – bluntly – the decision in contemporary Van Diemen's Land 'absolutely to extirpate the natives'.[72] Yet Bentham's analysis anticipated no expenditure for defence, nor weapons, nor indeed for any trade goods or presents for South Australia's Indigenous peoples. The costs he calculated did not include funds for land purchases from Indigenous owners. For Bentham, it seems, the systematic colonizers' principle of concentrated European settlement simply obviated any risk from Aborigines.[73]

Bentham's 'Colonization Company Proposal' identified the 'all-comprehensive end' of South Australian government as 'the greatest happiness of all the inhabitants'. Again, however, all the ways he explored to guarantee this outcome ignored Indigenous peoples and the impact of colonization on them. For example, he imagined future colonists becoming dissatisfied with absentee investors, who expatriated profits from land sales while resident settlers shouldered the costs of government. Bentham stressed the foundational, and transformative, role played by such aggrieved settlers. Without them, he observed, 'those same lands would be uninhabited, unoccupied and nothing worth'.[74] Again, Bentham unquestioningly accepted the connection between the 'appropriate' use of land and an individual's, or a society's, capacity to possess that land. Nor did he comment on the two interlocking principles the systematic colonizers' *Proposal*

set out for the disposal of so-called 'waste land'. The first was that anyone '*able* and *willing*' to cultivate land should be allowed to do so; the second, by contrast, specified that no one who was '*unwilling* or *unable*' to cultivate waste land 'should be allowed to appropriate the same under any pretext whatsoever'.[75] Together, the propositions responded to, whilst also working to deny, the possibility of Indigenous possession. This formulation intersected with Bentham's readiness – from a position of profound ignorance – to dismiss Aboriginal society, culture and sovereignty. Bentham did not feel the need to know the Indigenous peoples of Australia; he was already able to classify them as 'savages', and on that basis to disregard their capacity, rights and sovereignty; even to deny their presence. As Brenna Bhandar has argued, the 'discourse of savagery' effectively made 'aboriginal rights to their land a nonquestion'.[76]

Civilization and savagery, or possession and dispossession: law, government and property in a settler colonial context

Causer and Schofield's edition of *Panopticon versus New South Wales* allows us to interrogate the construction of settler colonial societies and their claims to sovereignty. But the collection of four decades' worth of Bentham's reflections on the British colonization of Australia also highlights the too often silenced counterpart to those settler claims and societies: Indigenous dispossession and the denial of Indigenous sovereignty. Until now, the debate on 'Bentham and colonization' has not addressed Bentham's embrace of settler colonialism as such. Instead, Bentham has increasingly been cast as a critic of colonialism, his antipathy inferred from his advocacy of settler self-government in the French, Spanish, and latterly British, Empires. To accept this version of the 'authenticity Bentham', however, is to look away from how Bentham, like many other European political thinkers and philosophers, contributed to colonialism. Bentham deployed and elaborated existing understandings of sovereignty, civilization, and possession to become an advocate of settler colonialism. It serves settler colonialism's ongoing interests if twenty-first century scholarship on political thought is not attentive to its specific forms.

It is worth noting that Bentham found these concepts difficult. As Hoogensen argued, he struggled to envisage a colony inhabited simultaneously by both (so-called) 'civilized' and 'uncivilized' peoples,

precisely because such a juxtaposition threatened the future security and representative government that Bentham thought 'civilized' colonizers deserved.[77] Bentham's Australian writings suggest that his solution was to exclude the 'uncivilized' (that is, Indigenous peoples) from the colony, both conceptually and legally. The Indigenous peoples of Australia persisted in Bentham's writings on Australia only as a shadow on the landscape, a feature of space, but not of place; Bentham rendered colonies as settler places. Bhandar points to Bentham's tautological renderings of 'savagery' and civilization. 'Savagery', she writes, 'defined by the lack of respect for property law, is that which property law must guard itself against'. Yet, 'the "beneficent genius" that civilises savagery is security', which stems from government, law, and property.[78] Bentham's writings on Australia and his 1795 essay 'Nonsense Upon Stilts' encapsulate Bhandar's argument almost perfectly. The latter, of course, explicitly posited Australia's Indigenous peoples as the antithesis of civilized France. To be savage, for Jeremy Bentham, was to be *permanently* excluded from government, liberty, property and rights.[79] Bhandar also shows how Bentham's work on 'abstract notions of ownership' would help shore up the new, territorial, conceptions of sovereignty that rose to prominence in tandem with nineteenth-century settler colonialism. Such abstraction helped transform land into a commodity, into 'free and fungible' property, and facilitated Indigenous dispossession.[80]

Jeremy Bentham's career coincided with an era of 'world crisis', set against a conjuncture that included the American, French and Haitian Revolutions, and the massive expansion of British imperial power in Asia and across its settler colonies.[81] From this global canvas, and on the slimmest of evidential bases, Bentham chose the Indigenous peoples of Australia as his archetypal – and also most degraded – 'savages'. Bentham had global pretensions, and although his notion of a 'Universal Jurisprudence' stalled, he was hailed in his lifetime, as Jennifer Pitts and David Armitage both remind us, as the 'legislator of the world'. Armitage, in a characteristically elegant exploration of Bentham's universal vision, warns against 'throwing the universalist baby out with the imperialist bathwater'.[82] But in differentiating Bentham from his successors and acolytes, we should beware perpetuating the damaging myths and silences on which Bentham's 'criticisms' of colonialism rested. Although Indigenous sovereignty would be denied – explicitly or practically – in Britain's settler colonies throughout the nineteenth century, not all of Bentham's British contemporaries accepted the characterization of Indigenous

peoples as savage or uncivilized.[83] Thus, asking why Bentham posited Australian Aborigines as his particular antithesis to civilization gives us an opportunity to discuss how the edifice of British sovereignty was constructed, extended and defended. We must continue to explore both his denial of Aboriginal sovereignty, and the enacting of this denial through silences and erasures, and only ever the faintest of traces of Australia's Indigenous peoples.

Notes

1 Cain 2011, 24.
2 Bentham, ed. Schofield, Pease-Watkin, and Blamires. 2002, 329–30; 'New Wales' in Bentham, ed. Causer and Schofield 2022, 3–22.
3 Winch 1997, 147–54, at 149–50; Campos Boralevi 1984, ch. 6; Schofield 2006, 58–9, 217: Bentham thought it would have been advantageous for the American colonists to remain British.
4 Schofield 2006, 201, 218, quoting UC viii. 137–8, 11, 14 September 1827.
5 'Colonization Company Proposal' in Bentham, ed. Causer and Schofield 2022, 401–32. Semmel 1961, 513–25, noted Bentham's 1831 support for Edward Gibbon Wakefield's South Australian project.
6 The construction of the 'historical' Bentham is clearly explained in Schofield 2009, 29–43.
7 Lieberman 2000, 108.
8 Schofield 2006, 202.
9 Bentham, ed. Schofield and Engelmann 2011; Pitts 2007; Pitts 2011; Engelmann and Pitts 2011.
10 Winch 1965. It was only in a 1997 reflection on his and Boralevi's earlier work that Winch noted: 'Neither in Australia nor Latin America did Bentham choose to confront any of the issues raised by the native populations … presumably because he believed that any solution that suited the European colonists would redound to the benefit of the aboriginals as well.' Winch 1997, 149.
11 Boralevi 1984, ch. 6, 'Native People of the Colonies'. Boralevi's characterization of Bentham's views of Indians is contested by more recent scholarship, including that of Engelmann and Pitts.
12 Boralevi 1984, 126, discusses Bentham's 'passionate defence of the interests of the native people of the French and English colonies in Canada, and in particular, of the Spanish colonies in "Ultramaria", who were in his opinion oppressed by the government of *their* mother country'. Emphasis added.
13 Boralevi 1984, 128, 133.
14 Wolfe 1999; Wolfe 2001.
15 Ford 2010; McHugh 2004; Attwood 2008, 72–82.
16 As Tracey Banivanua Mar and Penelope Edmonds put it: 'settler colonists went … to new lands to appropriate them and to establish new and improved replicas of the societies they left. As a result Indigenous peoples … found an ever-decreasing place for themselves in settler colonies as changing demographics enabled ever more extensive dispossession. Settlers, in the end, tended not to emigrate to assimilate into Indigenous societies, but rather emigrated to replace them'. Banivanua Mar and Edmonds 2010, 2.
17 Boralevi 1984, 127, 129.
18 Cain 2011, 24.
19 Cain 2011, 2, 10.
20 Schofield 2006, 215–17, and notes 57–61. Schofield's analysis here is of 'Non-faciendum the fourth: increasing the quantity of land, viz., by colonization', included in Bentham, ed. Quinn 2019, 21–7.
21 Harris 1993.

22 Moreton-Robinson 2015, xii–xiii; Land 2015; Black 2011.
23 Pascoe 2018.
24 Moreton-Robinson 2015, xx–xxiii.
25 Anghie 2005, 38; Pitts 2018, 15–16.
26 Pitts 2011. Pitts argues that Bentham wrote in 'Place and Time' more precisely and impartially of nations that are 'unletter'd, however civilized in other respects'. However, Pitts' argument rests on considerable special pleading, and is coloured by its focus on India, and especially by the new edition of 'Place and Time'. Pitts' recent work is alert to the problems of the 'conventional narrative', which both depicts modern international law as a European product and export, rather than 'partly forged in the course of European imperial expansion and through European interactions with extra-European states and societies', and 'suggests that the (European) blocks of modern international law were truly universalist': Pitts 2018, 14.
27 Engelmann and Pitts 2011; 'De l'influence des temps et des lieux en matière de législation' in Bentham, ed Dumont 1802; Bentham, ed. Schofield and Engelmann 2011.
28 Pitts' conclusions have become hegemonic, e.g. Buchan 2008, 13. Pitts' 2018 *Boundaries of the International* positions itself as a contribution to Anghie's project of critical international law. In this, Pitts charts Bentham's shift from his work of the 1780s to, in his 1827 'International Law' sketch, the restriction of international law to civilized nations. Pitts suggests Bentham's transition may have reflected 'the shift of the centre of gravity of imperial domains from the settler colonies of the Americas … to India and other non-white populations', but stresses that Bentham had earlier 'insisted on the emancipation of all colonies, India specifically included, and not just colonies whose loudest voices were white settlers'. Pitts 2018, 122, 141–2, 144–5. This explanation does not consider the claims or experience of Indigenous peoples in settler colonies during an era of mass immigration from the British Isles, nor Bentham's apparent obliviousness to them: Middleton 2019, 195–7.
29 Hoogensen 2005, 149–54. Hoogensen graciously linked Boralevi's ambiguity on 'native people' to the imprecise terms Bentham himself deployed for colonial populations.
30 Hoogensen 2005, 149–50, 152–4. She finds further evidence of this in the 1829 postscript to *Emancipate Your Colonies!*
31 A recent and important exception to this is provided by Arneil 2020.
32 Barker 2012.
33 On terra nullius, see Moreton-Robinson 2015, 18, who notes that this legal fiction positioned Indigenous peoples 'as trespassers'. Kercher 2002; Miller *et al*. 2010, 171–87. Sovereignty was claimed on the basis that no one occupied the land; a fiction instantiated in the late nineteenth century, and challenged legally, if not conclusively overturned, only in 1992.
34 Discussing the challenges of colonial archives for historians of Indigenous peoples, Tracey Banivanua Mar spoke of these 'shadows' as 'whisper-thin': quoted in Evans 2017, 155.
35 'New Wales' in Bentham, ed. Causer and Schofield 2022, 14–16.
36 'New Wales' in Bentham, ed. Causer and Schofield 2022, 4–6.
37 'New Wales' in Bentham, ed. Causer and Schofield 2022, 6. On the role played by sexual violence in settler colonization, see, e.g., Atkinson 2002, 57–64; Woollacott 2015, 152–78. On settler colonizers' persistent mischaracterizations of Aboriginal women: Conor 2014.
38 'New Wales' in Bentham, ed. Causer and Schofield 2022, 4.
39 This distinction is more apparent in Bentham's writings (including 'A Plea for the Constitution' of 1803) on New South Wales than in his well-known appeals to France and Spain, where he was more likely – as Boralevi notes – to distinguish between existing colonies and future colonization. Bentham did not invoke contemporaneous discussions of the 'doctrine of discovery'. See Miller *et al.* 2010; Arneil 1996.
40 'New Wales' in Bentham, ed. Causer and Schofield 2022, 9. Note that 'New Wales' was written a decade after 'Place and Time'. Here, and elsewhere, Bentham persistently qualified his opposition to colony-holding by justifying the governance of a less 'civilized' population by a more 'civilized' colonizing power. Bentham deployed this qualification to justify continued governance; later 'liberal imperialists' were to suggest that imperial activity to 'civilize' was in fact a moral responsibility. See Mantena 2007.
41 'New Wales' in Bentham, ed. Causer and Schofield 2022, 8.
42 'New Wales' in Bentham, ed. Causer and Schofield 2022, 9.

43 On how discourses of disqualification have shifted over time, see Anghie 2005.
44 'New Wales' in Bentham, ed. Causer and Schofield 2022, 17–18. Here, Bentham seemed to temper arguments for the relevance of 'discovery'. In the US context, see Marshall's 1823 discussion of how discovery gave title to colonizers, but this title was consummated by possession: Williams 1990, 313.
45 In her examination of 'A Plea for the Constitution', Lauren Benton notes as an aside that Bentham did 'not address many of the legal issues that would become the focus of conflict in the colony in coming decades', including 'the legal status of Aborigines'. Benton 2009, 191–6.
46 'A Plea for the Constitution', in Bentham, ed. Causer and Schofield 2022, 361.
47 'Correspondence, sent to William Wilberforce, of Jeremy Bentham with Sir Charles Bunbury' in Bentham, ed. Causer and Schofield 2022, 31–2; 'Letter to Lord Pelham' in ibid., 94; 'Second Letter to Lord Pelham' in ibid., 185, 241.
48 'A Plea for the Constitution' in Bentham, ed. Causer and Schofield 2022, 344–5, Section 6, on the 'Nullity of Legislation in New South Wales for want of an Assembly to consent'.
49 'Wampum' referred to the material manifestation of treaties favoured by some east coast First Nations, particularly the Iroquois: see Edmonds 2016, 52.
50 In seeming contrast with his 1791 comments, however, which showed how conquered territories could benefit from more civilized government, Bentham thought New South Wales was better off as a colony. Despite 'all its peculiarities and all its faults' it had at least 'not added that vulgar and crowning folly of distant *conquest*'. But see also notes 39 and 44 on contemporary debates in the context of the United States.
51 'A Plea for the Constitution', in Bentham, ed. Causer and Schofield 2022, 345.
52 Bentham, ed Schofield, Pease-Watkin, and Blamires 2002, 329–30. Emphasis added.
53 Anghie 2005, ch. 2.
54 Winch 1965, 31–6.
55 Schofield 2006, 202.
56 Bentham, ed. Quinn 2019, 21.
57 Bentham, ed. Quinn 2019, 21.
58 Bentham, ed. Quinn 2019, 21, 3, 23.
59 On the development of this discourse, see Arneil 1996, ch. 6.
60 Bentham, ed. Schofield, Pease-Watkin, and Blamires 2002, 314–15.
61 [Wakefield] 1829.
62 Attwood 2013, 50–82.
63 Semmel 1968; Winch 1997, 149; Winch 1965, 129; Schofield 2006, 219–20.
64 Buchan and Gascoigne refer more persuasively to 'Benthamite' and 'utilitarian' influence than to Bentham himself, suggesting that it was the 'historical' rather than 'authenticity' Bentham, whose influence they could perceive: Buchan 2008, 124; Gascoigne 2002, ch. 3.
65 'Editorial Introduction' in Bentham, ed. Causer and Schofield 2022, xcviii.
66 [National Colonization Society] 1831, 3–4. See also 'Edward Gibbon Wakefield on the Colonization Society's Plan, 23 Aug. 1831' in Bentham, ed. Causer and Schofield 2022, 435–6.
67 [National Colonization Society] 1831, 18. Note that this is a contrast to Bentham's 1802 'Letters to Lord Pelham', which drew on David Collins's publications to depict Aborigines as a threat.
68 [National Colonization Society] 1831, 25, 26, 29. This evidence was drawn from the expedition of Nicholas Baudin; the *Proposal* also used Matthew Flinders' account of his expedition: [National Colonization Society] 1831, 22.
69 [National Colonization Society] 1831, 28.
70 'Colonization Company Proposal' in Bentham, ed. Causer and Schofield 2022, 403.
71 'Colonization Company Proposal' in Bentham, ed. Causer and Schofield 2022, 413–16.
72 'Colonization Company Proposal' in Bentham, ed. Causer and Schofield 2022, 409.
73 Bentham described this principle as 'dispersion-preventing'.
74 'Colonization Company Proposal' in Bentham, ed. Causer and Schofield 2022, 423.
75 [National Colonization Society] 1831, 4.
76 Bhandar 2018, 96.
77 Hoogensen 2005, 149–50.
78 Bhandar 2018, 101.
79 Bentham, ed. Schofield, Pease-Watkin, and Blamires 2002.

80 Bhandar 2018, 96.
81 Bayly 2004, ch. 3.
82 Pitts 2005; Armitage 2011, 65, 82.
83 Laidlaw 2021.

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