GENOCIDE, CULTURE, LAW: ABORIGINAL CHILD REMOVALS IN AUSTRALIA AND CANADA

by

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B.A./LL.B., The University of Queensland, 1995

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

August 1998

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Vancouver, Canada

Date 28 August 1998

DE-6 (2/88)

THESIS ABSTRACT

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This thesis makes the legal argument that certain histories of aboriginal child removals in Canada and Australia, that is, the residential school experience in Canada, and the program of child institutionalization in Australia, meet the definition of "genocide" in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. My primary focus is on that Convention's requirement that an act be committed with an "intent to destroy a group". My first concern in formulating legal argument around the Convention's intent requirement is to offer a theory of the legal subject implicit in legal liberalism. Legal liberalism privileges the individual, and individual responsibility, in order to underscore its founding premises of freedom and equality. The intentionality of the subject in this framework is a function of the individual, and not the wider cultural and historical conditions in which the subject exists. Using a historical socio-legal approach, I attempt to develop a framework of legal subjectivity and legal intent which reveals rather than suppresses the cultural forces at work in the production of an intent to genocide.

Having reacquainted the subject with the universe beyond the individual, I move on with the first limb of my legal argument around intent in the Genocide Convention to address the systemic means through which child removal policy was developed and enforced. In this, I confront two difficulties: firstly, the difficulty of locating in any single

person an intent to commit, and hence responsibility for, genocide; and secondly, the corresponding difficulty of finding that a system intended an action in the legal sense. I respond to both of these difficulties by arguing for a notion of legal subjectivity which comprehends organisations, and correspondingly a notion of intent which is responsive (both on an individual and an organisational level) to systematically instituted crimes such as genocide.

The second limb of my argument around intent confronts the defence of benevolent intent. In this defence, enforcers of child removals rely on a genuine belief in the benevolence of the "civilising" project they were engaged in, so that there can be no intent to destroy a group. I reveal the cultural processes at work to produce the profound disjunction between aboriginal and settler subjectivities, especially as those subjectivities crystallize around the removal of aboriginal children. I locate this disjunction in the twin imperatives of colonial culture, those of oppression and legitimation. I argue that colonial culture exacts a justification for oppression, and that aboriginal people have been "othered" (in gendered, raced, and classed terms) to provide it. Intent to destroy a group, then, will be located via an enquiry which confronts the interests of colonial culture and aligns them firstly with the oppression of aboriginal people, and secondly with the discourses which developed to render that oppression in benevolent terms. The interpretation of the Genocide Convention is thus guided by the demands of context: and in context is revealed an intent to genocide by child removal.

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dedication and acknowledgments

for the children of midnight, whose stories I have borrowed and now return

Thanks

For mind expansion and for being such a sympathetic and fine group of people, to the LL.M. class of '97 at the University of British Columbia, Vancouver, Canada, especially Frimet, Mehera, Emmet, Hannigan, Sundhya, Jo, Rebecca B., Dulce, Kelly, Rick and Tom

To Marlee Kline, who agreed to supervise me at short notice and whose astringent red pen has left the mark of fine and sensitive intellect
To John Borrows, my second reader, who insisted that justice is fairness, that gentleness is strength, and that this lawyer be storyteller, too
To the Law Foundation of British Columbia, for making a Fellow of me
To Ruth Buchanan, Karin Mickelson, Wes Pue, Doug Sanders, Harold Cardinal, June McCue and Steven Hoyer for reading and processing papers, drafts, and chapters, and for blurring with commitment the distinction between the theoretical, the political, and the personal

To Mari and Helen, who got me here; Mum, for sending the sage we planted, even if I was off with the fairies, darling; Cath, for being really sister; Dad, for making sure we were allowed back on the tennis court; Andrew, for chocolate at Easter; Karen Pearlston, who makes all things possible; Obiora Chinedu Okafor, who dwells in theory and walks in light; Wayne and Harold, for prayers in the Sweat; the Groszes, for Christmas in Harriston; Ted, for Channukkah in North York; Wendy, who rescued me from a dark night of the soul; Joanie, for stories and paintings from Grandview; Simone, Steph, Indi, Paul, and Dawn, for giving; Peter, Michael and Bridget, for smashing the State (in Madison and Vancouver); and the friends who came and went from Green College and who were so important in the last stages (Reza, Janet [it's been soooo nice], Sian, Todd [shut-up!], OJ, Andrew, Mike, Regina, Vinay and Steffan).

INTRODUCTION AND SUMMARY

Statement of thesis

This thesis makes the legal argument that certain histories of aboriginal child removals in Canada and Australia, that is, the residential school experience in Canada, and the program of child institutionalization in Australia, meet the definition of "genocide" in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. This article defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

The Convention defines genocide as certain acts (including the removal of the children of a group, to another group) "committed with an intent to destroy a group". Scholarly writing on the use of the Convention in connection with child removals is limited; and the limited domestic judicial attention (such as that found in the Australia High Court case of *Kruger*) which this part of the Convention has received is characterized by an approach to certain parts of the definition, in particular the construction of legal intent, which I wish to problematize. While I make the argument that aboriginal child removals in Australia and Canada meet the definition of genocide in

international law, the question of the consequent application of the convention in either the domestic or the international legal arena remains outside the purview of this thesis. Consequently, my project does not explore questions of remedies in response to a finding of harm. I limit myself to the characterisation of systemic child removals as a legal harm, by exploring the relationship between intent, the nature of organisational power, culture, and legal subjectivities.

My argument is that legal intent must encode the wider cultural narratives which gave rise to it so that the law can come up with a specfic response to the particular harm that is genocide. I begin this problematization of intent in the Genocide Convention in Chapter I. In this Chapter, I attempt to establish some theoretical ground rules for the material which I present on child removals and genocidal intent. This is a process of making 'rules of evidence" which respond to the particular context of aboriginal child removals in settler States. I argue in Chapter I that the judicial approach to genocidal intent is emblematic of a particular construction of the legal subject, and characterize this construction in terms of legal liberalism. I offer an alternative theory of subjectivity to open legal interpretation to the wider historical and social contexts which condition the interests (e.g. who has proper access to aboriginal land) and the attributes (e.g. race, gender) that are presently hidden in the liberal legal subject. My approach to legal interpretation sees 'law" and 'the subject" as clusters of practices which are cultural and ideological in origin, as well as operation. This precedes a framework for legal interpretation which recognizes the inherently interested nature of subjectivity, and goes on from this recognition to a method which valorizes marginality rather than privilege.

This method is focused resolutely on a political project of speaking to oppression, without relying on a metanarrative of universal subjectivity. This will become central to the argument that I will make in Chapter IV about the motives of the actors involved in child removal, and how the law ought to order them in response.

Having laid out rules of evidence according to a pattern which places the individual in the context of the world around her, I recount the narratives of aboriginal child removal in Canada and Australia and Chapters II and III. In this part of the thesis, I supplement accounts of interactions between individual perpetrators and victims by focussing on State and semi-State mechanisms such as government departments, policy, legal institutions, and the voluntary organisations which were central in these histories of compulsory assimilation. In these Chapters, I am careful to emphasize the competing narratives of aboriginal people and settlers as to what was in the best interests of aboriginal people, and the cultural forces at work to silence aboriginal people and compel the institutionalization of their children despite the evidence that the project was systemically flawed and that children were suffering rather than benefitting from removal. The official account of aboriginal child removal is one of benevolence and civilisation; of training and protection, while aboriginal children tell tales of mistreatment and abuse.

These competition between narratives come as no surprize, given the insights of Chapter I that subjectivity is inherently interested. I attempt to resolve this competition by scrutinizing in Chapter IV the reliance by the people and bodies who removed the children on a defence of benevolent intent to civilize. The perpetrating individuals and organisations concede the harm, but contest the intent to harm. The benevolence of their

civilising intent is therefore central to my project of characterizing these histories in terms of an intent to destroy a group: in terms of the legal harm of genocide. Civilising benevolence as a discourse is an ideology with roots in a colonial project, and its survival in the present points to the political nature of culture and law. The challenge for my project is to come to legal terms, through culture, with the aggressive disjunction between the benevolence on which the perpetrators rely, and narrative of catastrophe offered in response by the subjects of that so-called benevolence.

I seek in Chapter IV to develop a nuanced rebuttal of the defence of benevolent intent, a rebuttal which does not oversimplify the historical context in which all of the subjects were constituted. Having developed a theory of subjectivity in Chapter I which might make cultural concerns admissible in a court of law, I look to culture in Chapter IV to help formulate a legal truthtelling which reflects the possibility that benevolence and harm might coincide. This coincidence of benevolence and harm I explain in terms of the twin imperatives of culture, which is to say firstly that cultural discourses arise in response to the interests of the dominant group, (the imperative of interest), and secondly that this response is rendered in terms whose primary function is to cast the dominant culture in benevolent terms (the imperative of concealment). This is reflected in law: the legal liberal subject is facially neutral, and emphatically unbiased (concealment); yet he turns out to harbour hidden attributes which coincide with the standpoint of privilege. Culture, law, and the subject are all productions which are premised on one set of ideals, and whose sensibility is directed on the other hand toward the contradiction of these ideals.

My argument is that the subjectivities of aboriginal people, and especially aboriginal women, were colonized in terms of these imperatives. In particular, I analyse the imagined inferiority of aboriginal people in settler States in terms of a justification developed through the medium of culture for the discrimination visited upon aboriginal people (through the removal of their children, for example). While there is no monolithic settler culture or subjectivity, I proceed on the assumption that settler society was bound by its interest in the effacement of aboriginal people from their traditional lands. Settler communities treated aboriginal people in a way which conflicted with the basic mythologies of settler laws and cultures. This conflict was resolved by constructing aboriginal people as inferior, and then talking about discrimination in terms of the slippery discourses of protection, assimilation, and benevolence.

Having formulated an approach to legal interpretation which makes wider cultural considerations integral rather than marginal, and having analysed those cultural considerations in terms firstly of settler constructions of aboriginal people (especially aboriginal women), I move on in Chapter V to the problem at hand. This problem is the interpretation of the Genocide Convention consistent with the demands of this broadened notion of legal subjectivity. My discussion in Chapter V is led by the wording of the Convention. I deal with the question of "destruction" of a group, looking at the political machinations within which the definition of genocide was produced, and arguing that killing is not an element of the definition found in Article II.. I look at the defence of benevolent intent, taking the insights of Chapter IV as to the double imperatives of colonial culture (that is, the imperatives of privilege and benevolence) to privilege the

narratives of marginality and argue that the forcible removal of children was not motivated by benevolence; rather that it was motivated by colonial self-interest. I go on then to deal specifically with intent, looking first at the possibility of a specific intent to genocide in connection with modern bureaucratic institutions and the systemic nature of genocide. I enquire into the nature of power as it is exercized through organisations, in the search for a locus of intent and responsibility in organisations which responds both to the systemic nature of genocide and to the Convention's intent requirement. In this context, I conclude that bureaucratic organisations fragment responsibility in a manner which presents a basic challenge to our western notions of individual intent and legal responsibility. I respond to this conundrum of organisational intentionality by arguing that the Genocide Convention's element of intent requires an interpretation which finds a locale for intent in a context which has arisen to disperse it.

Why genocide?

The Genocide Convention is a legal instrument which comes out of the international human rights arena. International law deals with the actions of States, and the State is implicated in the genocidal apparatus either directly (through the legal system, government departments, and police, for instance) or indirectly (through its sponsorship of voluntary organisations such as the Churches). The recourse to international law in the present context to regulate the relationship between white settlers and aboriginal peoples in Australia and Canada is far from innovative. It has its antecedents in the use of

international law in the early years of colonization in both countries to regulate claims to land.

The forcible and systemic removal of aboriginal children has left a legacy of devastation. This is one of the few aspects of the removals which is uncontested. Law's response to a harm is to formulate it in terms of a wrong by one person against another person or their property, and a personal or proprietary remedy through which to right that wrong. This formulation relies on notions of individual intent and individual responsibility which sound, for example, in actions in tort or criminal law. I characterize genocide on the other hand as a systemic crime. The actions and intentions of individuals are correspondingly less important for my enquiry than the actions of collectives on collectives. My concern with genocide is in the potential it contains for the formulation of the harms committed on aboriginal children in terms which go beyond legalistic notions of a single perpetrator and a single victim. I attempt in this thesis to develop an approach to the definition of genocide which adds texture to notions of individual intent by responding to harms committed by and on collectives in specific cultural contexts. Genocide builds the collective nature of the harm into its definition- the destruction of a group; the removal of the children of a group - and the Genocide Convention provides a legal instrument in which aboriginal child removals as a systemic enterprise might be given legal status as a harm. In addition, the Convention builds into its definition of genocide the implications of culture, relying as it does on notions of race to define in which circumstances groups will attract the protection of the Convention. It is through culture, which I import through my

exploration of subjectivity in Chapter I, that the issues which arise around colonising intent are best explored.

Theoretical and methodological approach

I provide a critical analysis of the concept of legal intent as it is set out in the Genocide Convention. I understand 'law" and hence 'legal intent" in terms not of the development and application of rules and reasoning *simpliciter*; but rather in terms of systems of regulation which exist in a dynamic relationship with broader social and economic contexts. Hence, my method is to undertake a historical socio-legal analysis of the histories of child removal. This historical socio-legal analysis contains a critique of the theoretical underpinnings (which I will characterize as legal liberalism) of 'Law", as well as an exposition of the cultural and economic forces at play in the field of the Law. Just as legal notions of self-defence cannot be understood without an interrogation of the context which conditions intentionality, so the legal notion of intent requires an interrogation of the context which has conditioned the intentionality of the perpetrators. This approach to legal intent conceives of power not in the blunt terms of subordination and domination, and good and evil, but rather in terms of localised sites where resistance, autonomy, oppression, and benevolence operate in relation to one another. In this nuanced approach to power, certain patterns of cause and effect are nonetheless discernible, and it is through a textured understanding of the nature of these causes and the effects that a reconceptualisation of both intent and harm will be found.

The gap in the scholarship which I wish to address is a legal enquiry in which truthtelling reflects the possibility that benevolence and harm might coincide; a legal enquiry in which the stories of aboriginal subjectivities are contained along with the subjectivities of the perpetrators who cherished a misconceived ideal in some cases and in others acted in violation of their own codes of law and honour; a legal enquiry which turns the law back in on itself and confronts the failure of its basic tenets to prevent law's participation in the enterprise of genocide. I wish to account for the silence at law of certain subjectivities in favour of others: hence my insistence that the narratives of colonising benevolence be retained alongside the narrative of child torture. I wish to recode the legal narrative to include the subjectivities of harm, along with the subjectivities of power; and to find a theory of intent in which inhere the cultural and historical specificities of systemic genocide by aboriginal child removal

CHAPTER I: TRUTHTELLING AND THE SUBJECT

Maybe it's about who can do what to whom and be forgiven for it[φ]

Introduction

Law is a teller of Truth. It is law which decides who can do what to whom and the circumstances under which she might be forgiven or punished for it. Law's understanding of the people involved in the events upon which it adjudicates is contained in the legal subject. The "legal subject" is just a label which describes the notional attributes which the law gives to the people who come before it in the dramatic and mundane rituals of legal decisionmaking. The problem for using law to punish harms against aboriginal people, such as compulsory child assimilation, is that the legal subject has a heritage which actually works against certain groups of people and certain kinds of harms. The law is closed to certain kinds of truths, but its position is that it is not. Law's self-myth is cast in terms of "objectivity", "neutrality", and "fairness". In this chapter, I will attempt to dismantle that myth in the interests of building a legal subject and a legal method which encode the narratives of aboriginal people and recognise the harms caused by aboriginal child removals. This is the groundwork which must be laid before a cause of action in genocide can be constructed.

The first assumption I make is that the Western legal systems which gave birth both to the international human rights regime and the Genocide Convention, and to the

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[φ] Margaret Atwood, *The Handmaid's Tale* (Toronto: McClelland -Bantam, 1985) at 127.

domestic legal systems which I have implicated in the child removals, may be characterized in terms of legal liberalism. Legal liberalism is a legal worldview which emphasizes the individual; and law views the legal subject in corresponding terms of its isolation and autonomy. My concern with transforming the legal subject is a particular expression of a wider project of broadening the scope of the law, in both the domestic and the international legal arenas. I want to make admissible to law's enquiry those very cultural considerations which propelled genocide by child removal and which legal liberalism nonetheless makes problematic

The second assumption I make in this chapter is that law's individualistic conception of the subject bears on the way law conceives harms, and hence its ability to respond to those harms. The paradigm of individual responsibility, for instance, is an outcome of the privilege which legal liberalism confers on the individual. Legal notions of harm arise in response to wrongs inflicted on certain individual attributes (freedom, equality). I make an epistemological critique of this approach, arguing that the subject of legal liberalism presents a universalised essentialism in which all subject positions except that of the "reasonable" white man are suppressed. The liberal ideal of the subject implicates hidden practices which operate to confer privilege and at the same time to hide this move.

I contrast this approach with some feminist and postmodern approaches, which problematise the liberal subject not only to account for a range of subject positions, but also to account for the wider socio-historical context in which the subject is produced. In keeping with my concern for the wider conditions which produce an intent to genocide,

my enquiry looks at the systemic aspects of child removal. The events with which I am concerned implicate not just individuals (the child inmate of the residential school or reserve Mission; the Aboriginal Protection Officer or agent of the DIA); they implicate also collectives (the Department of Indian Affairs, the Aboriginal Protection Board; the Cree or the Walpurri people) who have their own subjectivities. This is a framework which calls for a broadened notion of the legal subject.

I begin my discussion with some remarks on the liberal legal subject. I am particularly concerned in the discussion which follows to outline the tension between the neutrality which the liberal subject claims for itself, and the bias which is revealed when close examination of that subject finds the hidden attributes of privilege.

Liberalism

Liberalism's diverse strands have in common their emphasis on the individual, who precedes the community and whose rights and freedoms are earned and formulated through the use of her reason. In the legal context, this concern with the individual resounds in a formulation of the legal actor, conceived immaculately, who exists in isolation; and whose responsibility for harms caused to others is limited by rules as to individual motive and intent. Just as legal liability is conditioned by specific notions of individual responsibility, the notional participation by the legal actor in the wider realm of the social and the political is conditioned in the liberal framework by an atomised notion of the origins and the effects of human action and interaction.This founds a methodology in which '[t]here is no other way toward an understanding of social phenomena but through

our understanding of individual actions directed toward other people and guided by their expected behaviour."[1] The good evolves locally, fostered in the breast of the individual, and "[t]he inner voice of my true sentiments defines what is the good."[2]

The outcome of these twin premises of individualism and universalism is the isomorphic identity of the liberal subject: if the premises of individualism and universalism are to be true at the same time, then difference becomes a question of illiberality, unreason; and liberal equality is guaranteed to those who are always already equal. Rationality, like equality, is laden in the liberal framework with conflicting appeals to both the local and the universal.[3] Liberal reason situates the good in both the local and the universal: the inner voice of the liberal subject produces truths which turn out to be universally agreed upon. This framework then goes on to situate subjectivity (which is supposed to be the major challenge to objectivity) in the local as well. The 'subjective" then, means anything which is not objective - and since objectivity is the means for identifying truth, the subjective is the means for identifying untruth. Taylor, working within, and critiquing, a liberal conceptual framework, argues for example that fidelity to

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[1] F A Hayek, *Individualism and the Economic Order* (1946) at 9; cited in Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 468 at 476. See also Jeffrey Reiman, *Critical Moral Liberalism: Theory and Practice* (Lanham: Rowman & Littlefield Publishers, 1997) at 2.

[2] Charles Taylor, *Sources of the Self*, at 362; cited in Quentin Skinner, "Modernity and disenchantment: some historical reflections" in James Tully, ed., *Philosophy in an Age of Pluralism: The philosophy of Charles Taylor in question* (Cambridge: Cambridge University Press, 1994) 37 at 39.

[3] This way of looking at the relationship between the subjective and the objective in a Modern/postmodern framework comes from remarks made by Mr Justice Albie Sachs, of the Constitutional Court of South Africa, during a talk at the UBC Law Faculty on April 24, 1998; where he made a distinction between globalisation (the universalisation of a particular point of view at the expense of other points of view) and what Justice Sachs described as a universal understanding based on "shared experience".

the subjective brings 'to final fruition" a 'selfish and self-absorbed", though "deeply-rooted tendency to look for our values entirely within ourselves." [4] This plays out in the legal day to day in rules of evidence, which perpetuate the legal fiction that 'there is an irreducible binary opposition between direct knowledge of the particulars, on the one hand, and on the other hand, the impersonal expert knowledges that the law calls 'extrinsic evidence'."[5] This is crucial. If the individual is the source of all legal narratives, then evidence of systemic practices will never be admissible in a court of law. Rather, harms will be explained on the basis of individual victims and perpetrators, and the privilege confered on certain groups will be hidden behind legal reasoning based on the autonomy of the individual. Fitzpatrick illustrates this in connection with racial discrimination in employment, and legal responses to it:

> The adversaries, for example, are to be left on their own..... Evidence going beyond ...individualistic dimensions will be rejected or given little weight. Instances of such evidence include social survey evidence of racial disadvantage in employment generally, or statistical information about the "racial" composition of the employer's workforce.[6]

The cultural forces at work in the production of subjects and events are then made invisible to the law, including the law of genocide.[7] I discuss these cultural forces at length

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[4] Quentin Skinner, "Modernity and disenchantment: some historical reflections" in James Tully, ed., *Philosophy in an Age of Pluralism: The philosophy of Charles Taylor in question* (Cambridge: Cambridge University Press, 1994) at 45.

[5] Mariana Valverde, "Social Facticity and the Law: A Social Expert's Eyewitness Account of the Law" (1996) 5 Social and Legal Studies 201 at 204.

[6] Peter Fizpatrick, "Racism and the Innocence of Law" (1987) 14 Journal of Law and Society 119 at 124.

[7] In *Kruger*, the Australian High Court ruled evidence of the effects of an ordinance authorising the removal of aboriginal children from their families inadmissible. See *infra* at note 406 and accompanying text.

in Chapter IV. The individual in the liberal framework is the *a priori* of social relations, and if the individual has an *a priori*, it is found in an absolute source which cannot be theorised in relational terms: nature, reason, God.[8] This 'fragile insistence that there is about each and every human being an ontological givenness that human beings themselves did not create and over which no society has or should have total control"[9] is the defining characteristic of the liberal framework. More recent versions of liberalism, such as the pluralism propounded by Will Kymlicka in his interventions into the relationship between Quebec and the rest of Canada, respond to some extent to critiques of the autonomous liberal subject. Kymlicka for example defends the importance of culture, and the possibility of harms arising in the individual as a result of her connections with the systems and world around her: 'Indians are indeed subject to racism," he writes, 'but the racism they are most concerned with is the racist denial that they are distinct peoples with their own valid cultures and communities."[10] Kymlicka offers a broader notion of the subject in describing 'current liberal orthodoxy", such as is propounded by Rawls,[11] in terms of a departure

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[8] Michael L. Morgan "Religion, history and moral discourse" in James Tully, ed., *Philosophy in an Age of Pluralism: The philosophy of Charles Taylor in question* (Cambridge: Cambridge University Press, 1994) 49 at 55.

[9] Jean Bethke Elshtain "The risks and responsibilities of affirming ordinary life" in James Tully, ed., *Philosophy in an Age of Pluralism: The philosophy of Charles Taylor in question* (Cambridge: Cambridge University Press, 1994) 67 at 77.

[10] Will Kymlicka, "Liberalism, Ethnicity and the Law" Legal Theory Workshop Series, Faculty of Law, University of Toronto, October 14, 1988 at 34.

[11] John Rawls, *A Theory of Justice* (Cambridge, Mass: The Belknap Press of Harvard University Press, 1971) provides the classic contemporary formulation of the contentless individual who is empowered with reason by virtue of the notional emptiness of the Self. "In presenting a theory of justice one is entitled to avoid the problem of defining general properties and relations and to be guided what seems reasonable." (at 131) This avoidance is the "exclusion of nearly all particular information" (140) from the notional individual. He stands, then, in the original position, from which he can make disinterested choices and rationally direct his preferences. For one of the many critiques of this framework, see James Boyle, "Is

from older notions of liberalism which account for minority rights.[12] Any oeuvre which attempts to disrupt a dominant discourse is to be welcomed, especially if that discourse has been instrumental in producing or legitimating harms. What I am particularly interested in, however, and the position to which I am irresistably returned, is the spectre of oppression which is summoned in the making of any claim for a method which boldly goes where none has gone before and found Truth. Legal pluralism in its liberal incarnation simply advocates a competition between normalising discourses, and the battle mounted against liberalism on the basis of its totalising epistemological impetus has not even been engaged.[13]

The effect of the valorisation of autonomy is a deep distrust of (personal) experience: experience and subjectivity must toe the objective line in order to be articulated as 'reasonable". The personal, which corresponds with the private and to some extent with the feminine, is also driven underground,[14] because it cannot be objectively (disinterestedly) ratified. Brewster attacks this notion that truth cannot be gleaned from

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Subjectivity Possible? The Postmodern Subject in Legal Theory" [1991] 62 University of Colorado Law Review 489 at 514, where he argues that "the key feature of this subject is that it looks empty,. but is actually full. To put it another way, the subject's biases, motivations, and assumptions are the same ones honoured in the dominant culture."

[12] Martha-Marie Kleinhans and Roderick A. Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 Canadian Journal of Law and Society, 25 at 36.

[13] For a closely-argued analysis of this point, see Martha-Marie Kleinhans and Roderick A. Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 Canadian Journal of Law and Society, 25.

[14] Anne Brewster, *Literary Formations: Post-colonialism, nationalism, globalism* (Carlton South: Melbourne University Press, 1995) at 36 averts to the shame of the personal in her discussion of aboriginal women's autobiography in Australia, arguing that critical evaluation of it buys into canonical strictures of just how "personal" or how "confessional" women's writing can properly be.

the subjective. She calls for a more complex notion of truth than can be developed in a liberal framework, averting instead to a truth that is socially specific and politically strategic:

> [W]hen talking about their lives, people lie sometimes, forget a lot, exaggerate, become confused, get things wrong. Yet they are revealing truths. These truths don't reveal the past "as it actually was", aspiring to a standard of objectivity. They give us instead the truths of our experiences. They aren't the result of empirical research or the logic of mathematical deductions....the truths in personal narratives jar us from our complacent security as interpreters "outside" the story and make us aware that our own place in the world plays a part in our interpretation and shapes the meaning we derive from them.[15]

In the legal context, where judicial findings as to historical events will bear on the freedom or in some jurisdictions even the life of a legal subject, Brewster's approach is problematic. If the subjective corresponds to the local, and the articulation of truth connotes a representation which corresponds to one's understanding of historical events, then the real and the truthful lie in the ethical commitment of the one-who-experiences to render that experience as closely as possibly to the manner in which she felt it. Bare assertion does not give rise to a truthclaim - this is knowable from the politics of propaganda. Talking about one's life is necessarily a subjective enterprise - but it is not necessarily a truthful one, either in a legal or in an experiential sense. On the other hand, 'the past as it actually was" can be revealed in as many different guises as it had participants. This is one of the most striking characteristics of the histories of aboriginal child removals which are the focus of my present concern: the emphatic disagreement between those who enforced the removals, and those who were the subject of the

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[15] Personal Narratives Group, *Interpreting Women's Lives: Feminist Theories and Personal Narratives*, cited *ibid.*, at 37.

removals, as to how they are to be properly characterized. Civilising benevolence is the standpoint of the perpetrator; hurt and outrage are the standpoints of the victims. This disagreement averts not to the unreliability of the subjective, but rather to the impossibility of the objective. Seen in this light, the objective is, once more, merely the false universalisation of the subjectivities of the one with the greatest will and the greatest resources to power. History, objectivity, truth - these are the spoils of the victor. This is a basic epistemological challenge to the truthclaims of liberal law and its systems.

Although the ideology of liberalism has always proclaimed the values of freedom and equality, liberal societies have always been underpinned by a sexual [and, one might add, a racial] contract in which these ideals have been systematically violated."[16] The neutral face of the liberal subject is a mask, a 'cipher beneath whose blankness a religious fanatacism l[ies] concealed."[17] If liberalism is premised on the sanctity of the individual and his freedoms, how is it that its expression in law provided so little protection against the attack mounted by the institutions of legal liberalism on the freedoms of aboriginal children and their communities? The persistence of a theory which proclaims one state of affairs and a practice which authorises another compromises the very neutrality on which liberalism is notionally based. 'Underlying law's incessant talk about adjudicating rights and wrongs lies a more fundamental silent process by which various philosophical claims,

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[16] Quentin Skinner, "Modernity and disenchantment: some historical reflections" in James Tully, ed., *Philosophy in an Age of Pluralism: The philosophy of Charles Taylor in question* (Cambridge: Cambridge University Press, 1994) 37 at 42.

[17] Salman Rushdie, *Midnight's Children* (London: Jonathan Cape, 1981) at 97.

particularly epistemological ones, are adjudicated."[18] This silent adjudication of epistemological claims is the house built by law in the still of the night to bound the subject. Two effects of this housebuilding are the invisibility of the interests of the master whose tools have built the house; and an artificial stasis in the subject. This stasis works to exclude certain knowledges by casting aspersions on all things outside the totalising paradigm of liberal subjectivity. The law is cognitively open but normatively closed.[19] Within this field of exclusion is revealed the systemic, the social, the relational - forces existing beyond the local; forces which are the individual's relations of ill-repute, relations to whom he has no obligation.

In the preceding pages, I have talked about the legal subject and the debt which this subject owes to liberalism and to liberalism's emphasis on the individual. My critique of the liberal subject has been based on the contradictions which inhere in its theoretical underpinnings. These contradictions have to do with distinctions between the objective and the subjective, and the self and the universal; distinctions which are used in contradictory fashion and never fully explained beyond a cursory reference to the standpoint of a neutral subject. The identity of this subject is revealed by the law's special concern to protect the rights, interests and sacred liberal freedoms of certain subjects over others. Why is it that some subjects are more equal than others? Because pivilege is the

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[18] Mariana Valverde, "Social Facticity and the Law: A Social Expert's Eyewitness Account of the Law" (1996) 5 Social and Legal Studies 201 at 206.

[19] Mariana Valverde (citing Luhmann) in "Social Facticity and the Law: A Social Expert's Eyewitness Account of the Law" (1996) 5 Social and Legal Studies 201 at 202.

identity of the neutral liberal subject: the subject is white, the subject is male, the subject is more or less well-to-do. Harms to him will incur the wrath of law, even if harms to certain other subjects will not.

The very notion of what constitutes a harm before the law depends on the extent to which the subject can formulate an injury with which the liberal subject can identify. Racial discrimination? State sponsored curtailment of the right to participate in one's family, collective, or nation? Gendered notions of motherhood to justify forcible sterilisation and the removal of one's children? These are harms with which privilege never can be acquainted. They are in fact authorised by the repressive neutrality of the liberal subject, a neutrality which implicates a certain pressure to conform. Departure from the unnamed attributes of the liberal subject necessarily means not taking part in the privilege which those attributes endow. Instead of confronting privilege, liberal subjectivity demands conformity. The name of that pressure to conform is *assimilation.* Assimilation policy is the logical conclusion of a legal and a social system built on the notion of subjects which are either identical, or unreasonable.

I turn now to some alternative approaches to the subject, on the assumption that a notion of legal subjectivity which speaks also to those beyond privilege is the basis for a legal response to injuries outside the experience of the liberal subject and his laws.

The relational subject

"The Western conception of the person as a bounded, unique, more or less integrated emotional and cognitive universe...is a rather peculiar idea within the context of the world's cultures."[20]

'Bounded unitary individualism"[21] (which is another way of describing what I have called the liberal subject) may be contrasted with a worldview which stresses connectedness rather than isolation; connectedness to the universe within which the individual exists. In the Marxian conception, for instance, '[s]ociety does not consist of individuals, but expresses the sum of interrelations, the relations within which these individuals stand."[22] Similarly, the methodological holism of the early European sociologists, especially Durkheim, posits that society produces the individual, that 'the individual finds himself in the presence of a force [society] which is superior to him and before which he bows."[23] The individual in these approaches is a product of the forces around her.

What does this mean for a concept of law which sees the subject and harms to the subject in ahistorical terms? It assails the privilege of the individual, and in particular the

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[20] Clifford Geertz, *Local Knowledge*, at 62, cited in Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualsim, Collectivism and Accountability" (1988) 11 Sydney Law Review 468.

[21] *ibid.*

[22] Alan Hunt, "Marxism, Law, Legal Theory and Jurisprudence" in Peter Fitzpatrick, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991) 102 at 105.

[23] Emile Durkheim, *The Rules of Sociological Method* (1964) 123, cited in Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 468 at 477.

neutrality of the liberal subject. Context, history, particularity: these are the forces at work behind the blank neutrality of the liberal legal landscape. If the individual does not produce the world, then the world must produce the individual. This production is the sum of the forces which society exerts on the individual. In this framework, it is not the individual who directs her own fortunes, and whose participation in the world the law regulates accordingly - the power to direct is given to the wider contexts of systems, groups, worlds and worldviews.

Theorising around legal identity, then, implicates either the individual, or the world, or both, depending on the theorist's view of the relationship between the self and the context in which that self exists, or, in other words, the relationship between the subject and the structure. Emphasis on the atomised individual, for example, limits the recognition of the force of social relations and collectives in constituting ways of knowing and being. Concern solely with social relations on the other hand makes problematic the extent to which a space might be reserved for a Self, an agent, a locus of the intentionality, responsibility and resistance which have been characterized as the intuitive attractions of liberal notions of subjectivity. 'Legal subjects are not wholly determined; they possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that constitute their legal subjectivity."[24] Irigaray calls this the double problematic of radical essentialism, and radical constructionism. The tension

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[24] Martha-Marie Kleinhans and Roderick A. Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 Canadian Journal of Law and Society, 25 at 38. See also Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 468 at 478.

between the two is perhaps overstated, since examples of extreme atomism and extreme relativism are rarely encountered in scholarly literature. The two positions might be reconciled by arguing that the individual and her wider context exist in a state of exchange: they act on, and are acted upon by each other. I retain for myself as subject the power to transform myself and the world around me; and I retain also the recognition that this power is conditioned by the extent to which I am constrained by that world.

Simply put, the world and the Self, like the subject and the object, are intertwined. They are constitutive of each other. They own and they belong to each other. Aboriginal peoples in Australia and Canada have been assimilated by the settler State in the legally sanctioned and forcible disruption to this owning and this belonging in the removal of their children. The assimilative aims and history of law in the settler State stand in stark contrast to the atomistic ideals of its founding ideology. If there is no such thing as community, and the freedom of the individual is paramount, then the purposive destruction of aboriginal culture and the denial of fundamental freedoms[25] on the basis of race and of a collective prior claim to land beg once more the interrogation of the excess of the liberal ideal. Culture and race are collective attributes. Attacks based on them can find no redress in a legal system whose subject cannot admit to these attributes in the first place. In concrete terms, this means that harm based on group indicia will be either formulated as something else (like the temporary ill-humour of an employer, in the case of racial discrimination at

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[25] The totalitarian nature of the legal regimes erected to control the lives of aboriginal peoples in Australia and Canada, especially as they relate to the regulation of familial bonds, will be discussed in Chapters II and III. Briefly, these regimes curtailed rights to marry, rear children, work, move, vote, and own or inherit property on the basis of a racial status which was bureaucratically conferred.

work), or not recognised at all. No legal response, then, which builds in the subjectivities of the people who have been harmed. In the case of child removals, the neutrality and the individual status of the subject forecloses the possibility of a legal response which goes to the very heart of the wrong: that wrong is the forcible disruption to the participation of aboriginal children and their families in a community.

> I asked if she cared about the language, the culture, the fight now to defend the life. Her knees began to move sideways, back and forth. Would you care, I asked, if the Cree language disappeared?
>
> "No," she said.
>
> "But where would you want to go?" I persisted.
>
> "Anywhere," she said.[26]

The deprivation of a sense of place and culture through the forcible imposition of foreign values is an injury to a human need which is as radically determinate as hunger and poverty. On this I am prepared to stand, in the midst of my critical analysis of falsely universalised essentialisms: I am prepared to stand on the radically determinate importance of collective identity in the same way that a politics of emancipation must insist that hunger and poverty are radically determinate. This is the very core of the charge that the forcible removal of aboriginal children was wrong. Compulsory removal from culture is a wrong. Culture is permeable, but this does not sanction violence to it imposed from the outside. Destruction of culture is wrong. This is the origin of the very notion of genocide, as it was first expressed by Lemkin in 1944.[27] Membership in a culture is an integral aspect

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[26] Boyce Richardson, *Strangers Devour the Land* (Post Mills, Vermont: Chelsea Green Publishing Co, 1991) 234.

[27] The origins of genocide theory are discussed in Chapter V at 158.

of social identity. That membership is a precondition to the freedoms which moulded liberalism's neutral subject. Disruption to it must be formulated in terms of a legal wrong with a remedy. This legal project, baldly, is to speak to suffering.

> Sometimes, when I think about things, there is a lot of grief and sadness in my heart. It's then that I realise how much I was denied when I was taken away.[28]

The collective features of group identity constitute culture. From this it is not difficult to extrapolate that the externally imposed disruption to a sense of belonging, a disruption which is represented for example by the policies of assimilation of aboriginal peoples in Australia and Canada,[29] amounts to an injury, and that this injury is to an individually- and collectively-held sense of group identity. The consequences of the liberal framework's disavowal of community include firstly law's difficulty in coming to terms with harms based on disruptions to culture and to the group (specifically where that group is Other): there is no tort of forcible assimilation, even if it does represent an instance of an injury to culture which has been so keenly felt as to have provoked war throughout human history. Secondly, the liberal framework's disavowal of means that law has nothing to say where people are treated badly because they claim or have imposed upon them membership in a certain collectivity. The material fact of group inequality is simply inconsistent with the liberal notion of the isolated individual.

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[28] Alice Nannup with Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Fremantle Arts Centre Press, 1992) at 211. Alice Nannup was forcibly removed and institutionalised as a child. She never saw her mother again. Her return to "her country", [which I have reproduced on the last page of this thesis] took place when she was in her eighties.

[29] I deal with these at length in Chapters II and III.

As Simon points out, "the disadvantaged pose theoretical conundrums"[30] for liberalism. If the individual is wholly responsible for and solely the author of the circumstance in which she finds herself, then the persistence of disadvantage amongst certain collectivities, such as indigenous peoples in settler states worldwide, and women for instance, must be attributable to inherent individual deficiency whose clustering around certain communities is never explicated.[31] This is the logical conclusion of the liberal subject for disadvantaged[32] communities. Since disadvantage is just another signifier for injustice, a theoretical framework for which injustice is a conundrum should have no truck with the law.

Postcards from the Edge: The Legal Subject and Narratives of Truth

My concern with transforming the legal subject is a particular expression of a wider project of broadening the interpretative scope of the law, in both the domestic and the international legal arenas. I have averted to this wider project in the introduction to this chapter. On the other hand, making the subject an entity with attributes which bear on the nature of its interests is a project which must proceed with a commitment to avoiding faulty methodology and epistemology. My critique of legal liberalism, in other words, has

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[30] Thomas W. Simon, "The Theoretical Marginalization of the Disadvantaged: A Liberal/Communitarian Failing" in C.F. Delaney, ed, *The Liberalism-Communitarianism Debate: Liberalism and Community Values* (Lanham: Rowman & Littlefield Publishers, Inc., 1994) 103 at 104.

[31] The silent justification for this is negative stereotyping, collectively-assigned (that is, by a collective onto another) characteristics whose public articulation is now less penetrably pejorative.

[32] I use this term "disadvantage" conscious of the Eurocentric tendencies of liberal legal systems to deem certain non-European lifestyles "uncivilised" or "nasty, poor, brutish, and short". This face of Eurocentrism formed the justification in many cases for State intervention into indigenous families, because non-conformity with European lifestyle, whether it was by comparison with traditional ways, or a result of European disruption of traditional ways, was grounds for the removal of children.

been based on the privilege it confers, contrary to the founding mythologies from which its subject arises, on certain hidden attributes of the legal subject. Describing this in terms of a pitfall is another way of stating two basic epistemological questions: one, is there a possibility of a subject who is not self-interested? and two, if not, on what theoretical basis should certain interests be privileged over others in the process of legal adjudication?

An emphasis on the partial nature of all knowledge is an emphasis, too, on the unrepresentability of experience and subjectivity. There can be no valorisation of any particular narrative if narratives are always unreliable, and no better claim if all claims are equally unstable. Spivak responds to this by advocating a strategic use of positivist essentialism in a scrupulously visible *political* manouevre.[33] Rather than navigating the twin shoals of the subjective and the objective in the leaking barques of rival epistemologies, the project is one of speaking to suffering, found always in the margins. The call to resist centrism becomes the political project. The metanarrative is abandoned in favour of:

> [a] deconstructive attitude, in conjunction with the agential politics of identity...[This] makes it possible for movements to commit themselves simultaneously both to the task of affirming concrete projects of identity on behalf of dominated and subjugated knowledges and to the utopian long-term project of interrogating identity-as-such....centrism as such is to be resisted and combated, and not merely one isolated instance of it, such as phallo-, ethno-, or andro-centrism.[34]

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[33] Spivak, 1987, 205, [emphasis added] cited in Anne Brewster, *Literary Formations: Post-colonialism, nationalism, globalism* (Carlton South: Melbourne University Press, 1995) at 79.

[34] R.Radhakrishnan *Diasporic Mediations: Between Home and Locations* (Minneapolis:University of Minnesota Press, 1996), at xxii.

Marie-Claire Belleau makes similar claims for a "strategic essentialism",[35] arguing that the first point of call for an emancipatory project is the recognition of difference based not on pre-given categories, (like the fixed identity of the legal subject, or the fixed identity of an essentialist construct of woman, or 'the noble savage'), but rather on material circumstances which exists now. An exploration of the epistemological origins of difference yields in strategic terms to the project of fostering dialogue and more dialogue, especially between the margins and the centre, (and, one might add, the margins and the margins) in an effort to move the political project forward. This is an approach which calls, like all political projects, for systemic as well as personal transformation:the margins speak, and the centre listens.[36]

This process of dialogue between the centre and the margins must be historicised to take account of the different positionings of these many sites: the centre's debt of listening to the margins, then, is greater than that of the margins to listen to the centre, with whose subjectivities the margins are by definition already deeply familiar. The centre is already heard and seen: its familiarity is a function of its dominant position. If history and law are the spoils of the victor, then law's attempt to engage with the sufferings of the margins requires an ethical and substantive commitment to relinquishing the privilege

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[35] This discussion of M-C Belleau's approach relies on her keynote address to "Inter/National Intersections: Law's Changing Territories", the graduate student conference held at Green College, UBC, 29April-1 May, 1998. I am also indebted to Chantal Morton for helpful discussion in the congenial surrounds of Koerner's Pub in the course of that conference.

[36] The persistence of oppressive ideologies in groups who are themselves marginalized (for example, racist attitudes in white women, sexist attitudes in black men, homophobic attitudes amongst immigrant communities) points, too, to the need for dialogue between margins.

which its narratives confer and enforce. This point will become crucial to my discussion of benevolent intent in Chapter IV.[37] It follows, then, that any construction of the subject and of the harms the law might address in that subject must to a certain extent privilege the subjectivities of the silenced and the Other if it is to respond to the illiberal connection between law and the interests of privilege (as they are formulated in the 'invisible" subjectivities of legal liberalism). It is this connection which renders more suspect the voice in the centre than the voice in the margin. The alternative (to this change in emphasis on from the centre to the margins) is the repressive universalism with which I have characterized legal liberalism. "Whose interests are being served?" is the pressing question for law; not "do you swear to tell the truth, the whole truth, and nothing but the truth?". The starting point for adjudicating between two competing narratives must be found in the locus of suffering, and not in the locus of privilege. This is a methodology and an episteme which responds to the tendency of history and the law to speak for the victor. This methodology and episteme respond also to the particularly compelling claim which the subjectivities of marginality and suffering properly make on the power of the law. Law's coercive power and its authoritative status, after all, are predicated on its aspirations to justice and fairness, and on its legitimating function of dispensing relief for harms (remedies against wrongs).

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[37] Chapter IV presents the argument that the aboriginal people have been positioned in certain (racialized and gendered) ways in order to justify their mistreatment in the interests of the settler State. I argue also that the cultural rendering of this mistreatment must respond to two imperatives, those of interest and concealment, by which I mean that culture acts in the interests of those who enforce it, and acts also to frame its practices in terms which cohere with its own myths of conduct. Hence the myth of benevolence which surrounds the removal of aboriginal children. I explore this further in Chapter V at 173

Thus far, I have sought to find a theory and a practice of legal subjectivity which are not bound up in the coercive neutrality of the individual subject of legal liberalism. I have pointed to the interests at play behind the claims to objectivity of that subject, and I have sought to disentangle the law from the interests of privilege through a self-conscious and critical method and epistemology which are vigilant against the ever-present tendencies of power to corrupt in the act of claiming privilege as against the margins. As set out in the introduction to this chapter, my primary motives in broadening law's notion of the subject have been to create space for the specificities of context, especially as those contexts arise in connection with the issue of identifying the subjects involved in the programs of child removal.

Conclusion

I will argue in Chapter V that killing is not a necessary incident of genocide; that the history of aboriginal child removals in Canada and Australia meet, without reliance on a program of widespread premeditated killing, the definition of genocide which is found in the Genocide Convention. I concede, however, that the rhetorical force of the genocide argument lies in the power it has to suggest atrocity; and that this sense of atrocity is linked historically to murder. It is for this reason that the absence[38] of killing will render precarious the project of applying the juridical conclusions of Nuremberg to subjects who

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[38] I hesitate in the use of this word "absence" in connection with murder and child removals. Child removals are a practice of colonisation, and the large-scale death of aboriginal people in the wake of colonisation has been documented. See for example Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Lights Books, 1997).

have operated in the context of these particular institutions in order to make them genociders at law: context will always condition the interpretation of the law.

This is not to say that the histories and the institutions which made those histories were not genocidal. Rather, it is to determine that a finding of genocide in connection with them must proceed with a nuanced and careful understanding of the subjective intentionality of the individuals and collectives who are the players on the stage of that history. I have deployed a critique of legal liberalism to contextualise the subject in response to the repressive tendencies of an epistemology and a methodology which do not confront the hidden interests of the liberal legal subject. This emphasis on context, rather than the individual, proceeds conscious of those interests, and seeks not to formulate a competing episteme of the good, but rather to formulate a methodology in which marginality makes the prior claim on the power of the law. The legal subject is then contextualised by marginality rather than privilege. So, too, is legal interpretation guided by a concern with suffering rather privilege. The law is then opened, textured, and given a method which encodes aboriginal narratives of child removal along with the cultural context which gave rise to them. I turn now to these narratives, before attending to culture and to genocide.

CHAPTER II: THE RESIDENTIAL SCHOOL

In the old days, the children were always told: when the sun starts to go down make sure you go home, because this old lady will come with a great basket on her back. She'll come and get you. Th'ówxeya, they call her.[39]

Introduction

This chapter looks at the program of assimilation enforced by the federal government on First Nations people in Canada through the medium of the residential school. My account is concerned with the legal mechanisms used by the settler State in safeguarding its interests through the residential school system. Consistent with the rules of relevance I laid down in my first chapter, I take a socio-legal approach, assuming from the outset that the formal workings of the law cannot be understood separately from the wider historical context which gave rise to it. Certain factors are key in my exploration. I will look at federal jurisdiction over 'Indians and the lands reserved to them", the legislative framework which was the exercise of that jurisdiction, the bureaucratic apparatus which administered the law, and the partnership between Church and State in running the residential schools. Throughout this chapter, I loosely frame the origins and the persistence of the residential school system in terms of a partnership between the

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[39] This story of Th'ówxeya belonged to Dolly Felix, Sto:lo (1987-1981). It was passed on to her daughter, Gwendolyn Point, and retold in Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas and McIntyre, 1997) at 1.

Churches, the federal government, and aboriginal peoples. I will demonstrate that Indian aspirations as to the education of their children (as laid out in treaty promises of education) differed from the assimilative aims of the Church and State in participating in the residential school system. I will also demonstrate that the stated aims of the white partners in this system (that is, the aims of a benevolent assimilation by christianisation and civilisation) were founded in assumptions of European racial superiority. This assumption led to an indifference by the Churches and the State to the welfare of aboriginal children, and a failure to act on the evidence of poor conditions and child abuse which attended the system from the early days of its State sponsorship. I am particularly interested in the disjunction between the aims of the three partners, as well as the disjunction between the benevolent stance of the Churches and State and the reality of mistreatment and neglect which characterized their aboriginal schooling practices. I turn to this first question of the aims which propelled the erection of a State-sponsored residential school system, taking as my example the concerns with aboriginal education contained in the treaties struck just before that system was built.

Education as a treaty right

"To us who are treaty Indians there is nothing more important than our treaties....[which] ensure the ...provision of education of all types and levels to all Indian people at the expense of the Federal government."[40]

Treaties express agreements made between parties who are in different bargaining positions. The specific historical and political context within which treaties between aboriginal peoples and white settlers were struck bears on the nature of the promises contained in those treaties. Dyck[41] characterizes the relationship between First Nations people and Canadian governments in terms of two primary phases. The "pre-settlement phase" is characterized by cooperation between aboriginal people and Europeans, a relatively peaceful coexistence which he argues is attributable to the dependence of "European undertakings in the New World"[42] on Indian assistance or at least Indian tolerance. The commercial and military interests of the European newcomers in British North America, and the importance of alliances with native peoples in securing those interests, led to the early use of treaties preserving Indian rights to land and resources. This relationship moves into aboriginal tutelage with the advent of "large-scale occupation and more intensive exploitation of Indian territories by...settlers",[43] which Dyck dates from

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[40] Indian Chiefs of Alberta, "Citizens Plus": position paper prepared for presentation to the Rt. Hon. P.E. Trudeau, Ottawa June 1970; cited in E.R. Daniels, *The Legal Context of Indian Education in Canada* (Ph.D. Thesis, University of Alberta, 1973) at 31.

[41] Noel Dyck, *Native Peoples and Public Policy: Sociology/Anthropology Study Guide* (Simon Fraser University: 1992).

[42] *ibid.*, at 35.

[43] *ibid.*

around 1830, and after which the British Home Office adopted a policy for assimilating Indians into colonial society by degrees. This coincided with the successful defence of British North America during the War of 1812 and the end of the need for military alliances with Indians. The colonial precursor of the DIA, the Indian department, was transferred from military to civilian control in 1830, signifying that 'the relationship between the two peoples had changed fundamentally."[44]

The imperative of assimilation policy was financial, although it had cultural and religious implications: Indian land was to be cleared for white settlement; and the "problem" of what to do with the traditional owners of that land was to be dealt with by instituting a legislative and administrative regime in which Indian people could be remade in the approximate image of colonial power. The colonial agenda was never made clear in the course of treaty negotiations, however. On the prairies, for instance, the Indians were not told that the treaties would make them subject to the legislative jurisdiction of the federal government.[45] Neither were they told that they were to be confined to reserves in the interests of assimilation.[46] One of the Treaty 8 Commissioners reports that '[i]t would have been impossible to make a treaty if we had not assured them that there was no

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[44] Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: Univesity of British Columbia Press, 1986) at 2.

[45] Canada, *Restructuring the Relationship: Royal Commission on Aboriginal Peoples (vol 2)* (Ottawa, Canadian Communication Group 1996) at 474.

[46] I refer here to the pass system, introduced in 1885, under which no Indian person could leave a reserve without authorization.

intention of confining them to reserves."[47] The absence of good faith on the part of the settlers and their representatives in the course of treaty negotiations in touched on in somewhat ambiguous terms in modern legal discourse:

> "The honour of the Crown is always involved [in the interpretation of treaty promises] and no appearance of "sharp dealing should be sanctioned." R v Williams, (1982) 24 O.R. (2d) 360

The rapidly increasing encroachment of settlers onto Indian lands during the nineteenth century impacted negatively on the aboriginal populations, which were decimated by disease in some areas, and whose survival was increasingly threatened by the disappearance in the wake of white settlement and development of their traditional sources of subsistence. 'The Tsui T'ina [for example] entered into treaty because the buffalo were getting smaller and people were starving."[48] Settlement had devastating consequences for the local indigenous populations:

> I am an Indian chief [William of the Williams Lake Shuswap] and my people are threatened by starvation. The white men have taken all the land and all the fish. A vast country was ours. It is all gone. The noise of the threshing machine and the wagon has frightened the deer and the beaver. We have nothing to eat. My people are sick. My young men are angry. All the Indians from Canoe Creek to the headwaters of the Fraser say: 'William is an old woman. He sleeps and starves in silence.' I am old and feeble amd my authority diminishes every day. I am sorely puzzled. I do not know what I say next week when the chiefs are assembled in a council. A war with the white man will end in our destruction, but death in war is not so bad as death by starvation."[49]

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[47] Treaty no 8. B.I.M.D. publication No. QS-0576-000EE-A-16, p 12; cited in John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" Western Canadian Journal of Anthropology 6 (1976) 39 at 69.

[48] Treaty 7 Elders and Tribal Council, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996) at 81.

[49] Chief William, letter to the *Victoria Colonist,* 7 November 1879; cited in Elizabeth Furniss, *Victims of Benevolence: The Dark Legacy of the Williams Lake Residential School* (Vancouver: Arsenal Pulp Press, 1995) at 42.

Aboriginal peoples were in a vulnerable negotiating position: their claims were made against the backdrop of the superior military power of Europe, and a legal system whose representatives in many cases simply did not enter into the process in good faith. The following instructions were issued for example to the colonial government in the North West Territories in 1870:

> You will turn your attention promptly to the condition of the [Hudson's Bay] company outside the province of Manitoba on the north and west, and while assuring the Indians of your desire to establish friendly relations with them, you will ascertain and report to His excellency the course you may think the most advisable to pursue whether by treaty or otherwise for the removal of any obstructions that might be presented to the flow of population into the fertile lands that lie between Manitoba and the Rocky Mountains.[50]

This bald duplicity was justified by an economic expansionism which had paternalistic overtones and which was convinced of the objective superiority of its own moral and legal position. The public face of the European treaty negotiators and their administrative superiors, then, self-consciously hides its larger concern, which is the interest of safeguarding the fledgling white nation. The State has made no pretence at benevolence within the closed circle of the administrative community, whose stated purpose (the removal of the "obstruction" which indigenous people had come to represent in this second phase of relations between the First Nations and the settlers) is at odds with the public face of its benevolent intentions toward aboriginal people

The intentions (both stated and unstated) of the settlers in entering into treaty with aboriginal peoples may be contrasted with the aspirations of the aboriginal peoples

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[50] Canada Sessional Papers, 1871, No 20, p 8, cited in Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas and McIntyre, 1981) at 63.

themselves. The treaties attempt to negotiate a line between the competing demands of cultural integrity and physical survival; and education was central to the bargains that were struck, especially in the Western treaties: '[m]ost prominent and repeated were promises of money, unrestricted hunting, education, and medical assistance."[51] The Western, or 'numbered" treaties were struck against the background of a disappearing buffalo economy on the prairies. Aboriginal people were bargaining for their very survival in a process which yielded white words whose meaning were unclear and whose general provisions allowed for an assumption by the State of jurisdiction over Indians in a manner that was never contemplated by the aboriginal participants.[52] The Eastern Treaties make no mention of education, however the Western Treaties refer to it without exception. The treaties[53] reveal a development over time of State attitudes to the provision of education to First Nations bands. Treaty 1, signed on August 3, 1871, provides for the maintenance of a school on each reserve 'whenever the Indians of the reserve should desire it". This formulation preserves Indian control to some extent by stipulating that the schools be on the reserve, and established at the pleasure of the Indians. Treaty 2, signed less than three weeks later, contains the same clause; however Treaty 3 (signed on October 3, 1873) reveals a subtle permutation in the nature of the federal commitment to native education, providing for the maintenance of schools on reserves *as may seem advisable to Her*

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[51] Treaty 7 Elders and Tribal Council, *The True Spirit and Original Intent of Treaty 7* (Montreal:McGill-Queen's University Press, 1996) at 120.

[52] Vic Savino and Erica Schumacher, "'Wherever the Indians of the Reserve Should Desire It': An Analysis of the First Nation Treaty Right to Education" (1992) 21 Man. L.J. 476 at 490.

[53] The following discussion of the treaty provisions relies for the text of the treaties provided in c 3 "Indian Treaties and Indian Rights" in E.R. Daniels *The Legal Context of Indian Education in Canada* (Ph.D. Thesis, University of Alberta, 1973) at 18.

Majesty. Treaty 4, concluded on September 21, 1874 adds the requirement that the band be settled on the reserve and prepared for a teacher; and Treaty 5, concluded on September 24, 1875, introduces the role of the Church, a role which was to be crucial in the project of assimilating Indian children.[54] This treaty provides for the use of Indian land by the Methodist Mission for Mission purposes, of which a school-house is one. Treaties 7 (September 22, 1877) and 8 (June 21, 1899) specify the payment of a salary to teachers at schools on the reserve on the condition that it seem advisable to Her Majesty so to do; although Treaty 8 omits the requirement that the Indians be settled on the reserves.

Treaty 9's omission to refer to schools *on the reserve* is ominous, and repeated in Treaty 10's general commitment to "such provisions as may from time to time be deemed advisable for the education of Indian children." This provision differs very little from the substance of s.91(24) of the *British North America Act*, which gives the federal parliament the power to make laws regarding Indians and Indian reserves. The stipulations found in the early treaties as to the wishes of the Indians, and the location of the school on the reserve, have vanished.

Jurisdiction over Canadian Indians and their education: federalism and the Indian Act

Canada is a constitutional federation of provincial states in which the competing interests of the indigenous peoples and the settler community are regulated under a plenary constitutional power over a more or less fictional collective of aboriginal peoples.

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[54] I discuss the role of the Church in the residential school system *infra* at 55 ff.

In Canada, s. 91(24) of the *British North America Act* vests jurisdiction over Indians and the lands reserved to them in the federal government, making a group in effect wards of the State on the basis of its cultural characteristics. This constitutional relationship is problematic in terms of the legal discourses on which western democratic States are founded, for these discourses rely not only on the freedom of the individual, but also on corresponding constitutional constraints on the coercive exercise of governmental power. In Canada, this role of guardianship was consolidated in the *Indian Acts* of 1876 and 1880, when Indian self-government was purportedly extinguished, and financial and social services for aboriginal people, including education, were placed under federal control. [55]

Jurisdiction over the education of Indian children, then, is historically a question of the exercise of the plenary constitutional power exercised by the federal government. Federal jurisidction over Indian education is vexed however by the ambiguous wording of head 24 of s. 91. This head appears to contain two limbs, one relating to Indians in general, and the other concerning itself exclusively with reserves. The BNA would provide for the education of Indians off the reserve only on a liberal reading of the section. The Hawthorn Report[56] does not commit itself on this point, noting in 1966 the relative paucity of litigation around the constitutional limitations of federal power over Indians.[57]

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[55] Jean Barman, Yvonne Hébert, and Don McCaskill, "The legacy of the past; an Overview" in Jean Barman, Yvonne Hébert, and Don McCaskill, eds., *Indian Education in Canada vol 1: The legacy* (Vancouver: University of British Columbia Press, 1986) 1 at 4.

[56] Canada, A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies (vol 1) HB Hawthorn, ed., Indian Affairs Branch, Ottawa, October 1966 at 211.

[57] *ibid.*

This scarcity speaks to the gap between a law which would be disinterested and a legal system whose practices reveal its collusion in the reinforcement of privilege. It comes as no great surprise that there never was a constitutional challenge to the federal government's power to school Indians off the reserves, much less to force them to that schooling.

In the pre-confederation era before the constitutional propriety of off-reserve schooling became an issue Indian education had been a regional matter. The period before confederation had produced legislation in Upper Canada, the Maritimes, and lower Canada in which the education of Indian children is dealt with directly.[58] These provide for the limited extension of regional education services to Indian children independently of treaty obligations; but appear not to have inspired much in the way of actually erecting an education system for Indian children. "Very little was accomplished by the colonies under what even today appears to be enlightened legislation."[59] More significantly, the combined Assemblies of Upper and Lower Canada enacted legislation in 1857[60] which made education a prerequisite of Indian [male] enfranchisement. This is one of the very early legislative expressions of a State policy of assimilation by education. The passage of the *British North America Act* meant that the federal government acquired in 1867 responsibility for the 50 or so provincial schools for Indians extant at the time. These

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[58] E.R. Daniels, *The Legal Context of Indian Education in Canada* (Ph.D. Thesis, University of Alberta, 1973) at 67.

[59] R.F. Davey, *The Education of Indian Children in Canada*, cited *ibid*, at 63.

[60] Canada, 20 Victoria, c. 26, s. 15.

schools were variously funded by the provinces, Indian band funds, and religious and charitable institutions.[61]

This same head of constitutional power formed the basis for the enactment of the *Indian Act*. The evolution of this Act, especially as it deals with education, provides a useful yardstick with which to measure evolving attitudes toward indigenous people and the role they would properly play in the life of the new nation. The 1876 Act, for instance, makes only passing reference to education, giving Indian bands the power to make rules and regulations with respect to "the construction and repair of school houses"[62] on the reserve. The 1880 amendments create the Department of Indian Affairs. The 1886 amendments portend a growing emphasis in the federal government on the control of aboriginal groups through the acculturation of their children. This acculturation would take place through the legitimate means of the education system: education was, after all, central to the contemporary concerns of First Nations, and to the concerns of the settler State in assimilating them. The amendment is worth reproducing at length, containing as it does a power in the Governor in Council to make regulations providing for the "removal" from the reserve of children who do not attend school there. The amendment provides more significantly for the establishment of schools off the reserves. S. 137 (2) vests in the Governor in Council the power to

> "make regulations...provid[ing] for the arrest and conveyance to school, and detention there, of truant children and of children who are prevented by their parents or guardians from attending: and

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[61] Daniels, *supra,* note 58, at 69.

[62] S. 63 (6). This reference is buried in s. 63 in a list of enumerated powers of the chief or chiefs of any band in council.

> such regulations may provide for the punishment upon summary conviction, by fine or imprisonment, or both, of parents and guardians, or persons having the charge of children who fail, refuse or neglect to cause such children to attend school."

This is the legislative genesis of the residential school system, and represents a curtailment of the limited jurisdiction over education which had survived in the band councils until 1886. Failure to send one's children to school is by 1886 an offence for which an Indian might be imprisoned. S. 138 of the Act provides that the Governor in Council may "establish an industrial school or boarding school for Indians", repeating at s. 138 (2) the power to make regulations enforcing the attendance of Indian children at those schools. Curiously, the liability in the parents of the child to imprisonment or a fine does not appear in respect of a refusal to send children to industrial or boarding schools *off the reserve* until the 1906 amendments.[63] These amendments also introduce a detailed regulatory scheme which placed the Department of Indian Affairs in charge of running the schools, both on and off the reserves. The 1906 amendments may be contrasted with the cursory reference to education made in the 1876 Act, demonstrating the development of legislative exercise of the jurisdiction which the federal government had arrogated to itself in respect of aboriginal education in section 91 (24) of the *British North America Act*. This arrogation reversed a consistent pre-confederation history of regional assumption of responsibility for Indian education, which would not be undone until 1947 when the Department of Indian Affairs initiated "with some success"[64] its attempts to re-establish the earlier trend of provincial involvement in aboriginal education.

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[63] s. 10 (3).

[64] LGP Waller, The Canadian Superintendent 1965, *The Education of Indian Children in Canada* (Toronto: Ryerson Press, 1965) at 1.

By 1906, then, federal jurisdiction over Indian education had been exercised to justify a regulatory scheme which enforced the removal of aboriginal children to off-reserve institutions, nominally for schooling. The role of treaty promises to education in all of this is complex. The Hawthorn Report gives insight into the Departmental line in the last years of the residential school system. It concludes that 'the present vigorous educational policies of the Branch are a response not to the treaties, but to a recognition of the role which education can play in the advancement of the Indian people."[65] This presents an evolution in administrative thinking. 70 years previously, former Indian commissioner Edgar Dewdney told the Federal House of Commons that reserve schooling must be pursued in the interests of honouring treaty obligations.[66] His statement, which is reproduced at length below,[67] frames education for aboriginal children in terms of treaty obligations. This is important for a legal framework which attempts to make sense of the history of residential schooling despite the divides which yawn between aboriginal and settler views of its aims and its effects. The treaties provide a site in which the aspirations of aboriginal people, especially as they were expressed in the context of the education of their children, might be introduced into the legal narrative.

Aboriginal people took to the treaty process their aspirations of cultural survival. The use of education for the purposes of assimilation violated the expression of that

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[65] Hawthorn Report, *supra,* note 56 at 245.

[66] *infra*, at note 73.

[67] *infra,* at note 73.

aspiration in the treaties. The State's motives differed somewhat: the residential school was born with the aim in the colonizing State of assimilating the Indian population by means of the forced acculturation of its children. The question as to whose motives are to be privileged in the legal and the historical narrative must confront the lack of bona fides which the settler State and its representatives demonstrated during and after the treaty negotiations. It is instructive to examine the disjunction between the "official" account of Indian education to assimilate by benevolent civilization and the aboriginal vision of education in the interests of preserving their culture. This disjunction is repeated in the gulf between the rhetoric and the practices which characterize the histories of residential schooling. I turn now to these practices; comparing them throughout this next section to the official story of (misguided) benevolence.

Schooling off the reserve

In 1879, the federal government commissioned a federal backbencher, Nicholas Flood Davin, to evaluate the American Indian residential school policy. The Davin report approved the American policy, with the proviso that the schools be operated in Canada by the Churches, who had had a presence in Indian education in British North America since 1620.[68] The end of the century brought with it two distinct versions of off-reserve schools: boarding schools for infants, and industrial schools for older children. Industrial schools placed a greater emphasis on vocational training, and tended to be bigger, require more

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[68] For a discussion of this earlier period, see J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) in c 2, "'No Notable Fruit Was Seen': Residential School Experiments in New France", 39.

funding, and located further away from reserves. It is tempting to speculate that they were modelled on the British industrial school, which was a reformatory school for juvenile delinquents.[69] Ryerson, the Chief Superintendent of Education in Upper Canada in the mid 1800s, had relied on it in developing a series of industrial schools for Indian children before confederation and the Davin Report.[70] In any case, this distinction between industrial schools and boarding schools broke down over time, due in part to the very low employment rates of industrial school graduates,[71] so that all off-reserve schools at which the students resided became known as residential schools by 1923. Day schools on the reserve were also part of the federal Indian education system, however 'were perceived as less acceptable than either boarding or industrial schools, to be established only where circumstances did not permit their preferred counterparts".[72] Dewdney, whom I introduced a few moments ago, declaimed as follows in 1891:

> "I have never had much opinion of these day schools, but we have had to establish them on the different reserves because we are bound to do so by treaty...When those children go to school for a few hours and then return to their wigwams or houses, there is not much chance to improve them. The sooner we can close the day schools and send the children to the boarding schools, the sooner we will be able to so something with them."[73]

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[69] Assembly of First Nations, *Breaking the Silence: An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals* (Ottawa: Assembly of First Nations, 1994) at 20.

[70] *ibid.*

[71] J.R. Miller, *Shingwauk's Vision*, *supra,* note 68 at 149.

[72] Jean Barman, "Aboriginal Education at the Crossroads: The Legacy of Residential Schools and the Way Ahead" in David Alan Long and Olive Patricia Dickason, eds., *Visions of the Heart: Canadian Aboriginal Issues* (Toronto: Harcourt Brace and Co, 1996) 271 at 275.

[73] Canada. Debates of the House of Commons, 1891, 1741; cited in James [sákej] Youngblood Henderson, "Treaties and Indian Education" in Marie Battiste and Jean Barman, *The Circle Unfolds: First Nations Education in Canada* (Vancouver: UBC Press, 1995) 245 at 252.

The bottom line for the DIA, however, was the dollar, so that at any given time from the 1880's to the 1960s only about a third of eligible Canadian Indian children were in attendance at a residential school.[74]

Almost from the outset it was clear that the expectations of the Indians for an education system which would bridge the divide between the old ways and the new bore resemblance to neither the project of assimilation expressed in federal Indian education policy, nor the unstated drive of the Department of Indian Affairs to enforce a program aimed at producing graduates fit to take a place at the very bottom on the white Canadian social order. The honouring by the State of the treaty promises of education for Indians so they could adjust to the onslaught of white civilization was rooted in dishonour. The schools enforced a half-day policy, so that two or three hours of instruction must suffice for the absorption of a curriculum which was nominally on a par with the provincial curricula; and this in a language not spoken by many of the children. 'Teached us in English. She speak English to us all the time. I learn a little bit of English from her. After a while I learn a little bit what she mean."[75] The residential school system conspired to keep the children in the first years of primary school, for years on end: up to 1920, 80% of the aboriginal children in federal schools were enrolled in Grade 1, 2 or 3. Enforced attendance and an inadequate academic program were compounded by the standard of

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[74] J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) at 142.

[75] Mack, 1993, at 19; cited in Barman, *supra,* note 72, at 286

voluntary missionary teaching, which the DIA recognized as wholly inadequate.[76] Provincial schools by contrast during this period retained most of their pupils until the upper elementary grades.[77]

The failures of the academic program in the system compounded its more sinister aim of taking the Indian out of the child, that is, of using the education system as a vehicle for a governmental policy of loosening by force the cultural ties of Indian children to their families and their reserves.

Finally, Th'ówx̲eya arrived at her home way up on the mountain. She took the children out of the basket and said, "El'emímeth, *my grandchildren, you sit down there." The old lady always called the children she stole her grandchildren. Th'ówx̲eya picked up a big pole and some sticks and laid them in front of the children. She said, "You children are going to drum for me when I sing."*

Federal government policy on the 'Indian problem" from confederation until after the second world war was aimed at an overall goal of assimilation,[78] and the assimilation of the unformed was without doubt an easier task than the assimilation of adult Indians, who were considered beyond the pale of white redemption. 'Education has worked as an agent of colonial subjugation with the long term objective of weakening Indian nations by causing the children to lose sight of their identities, history and spiritual knowledge."[79]

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[76] Miller, *supra,* note 74, at 177.

[77] Barman, *supra,* note 72, at 287.

[78] Dianne Longboat, "First Nations Control of Education: The Path to our Survival as Nations" in Jean Barman, Yvonne Hébert, and Don McCaskill, *Indian Education in Canada vol 2: The Challenge* (Vancouver: University of British Columbia Press, 19860) 22 at 23.

[79] *ibid.*

The banishment of the Indian was attempted through a system of punishments, sometimes severe, for indulging in cultural practices such as speaking aboriginal languages. Prohibitions against the use of native languages are one of the most widely remarked upon features of the residential school system. The importance of language for the transmission of culture cannot be overstated. The eradication of aboriginal culture was foremost among the stated objectives of the DIA in supporting the religious rush to open yet more residential schools, and the eradication of aboriginal languages was seen to amount to the effective removal of aboriginal culture at the source. If parents and their children can no longer communicate, the means for the transmission of culture from one generation to the next is severely compromised.

Residential schools varied from place to place, and from time to time, depending on many factors including prevailing cultural attitudes toward aboriginal people, funds available from Ottawa, even the particular interests and dispositions of the lay and religious staff.[80] While the literature reveals instances of culturally sensitive educational approaches, especially in the two decades preceding the end of the system in the early 1970s, it is fair to say that the history of residential schooling is characterized by an assumption of European superiority in two of the three partners in the system. This was played out in the way aboriginal children were confronted with their own cultural origins. 'The constant message [was] that because you are Native you are part of a weak,

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[80] In 1950, for instance, one school had its staff reduced from 8 to 5 when the new Mother Superior of the Sisters of Charity indicated that Indian missions were not a high priority for her. J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) at 245.

defective race, unworthy of a distinguished place in society. That is the reason you have to be looked after....That to me is not training for success, it is training for self-destruction."[81] Children were taught to view their own families from the same vantage point of racialized superiority as did their white teachers, and thus to despise any sense of Indianness in themselves. 'My father was at school to grow up to be a little white man and to enter the white world. Children were warned not to listen to their parents and grandparents when they returned home for holidays."[82] Self-hatred[83] and hatred of their own families had become inculcated in the children by the time many of them left school.

No longer able to fit back into life on the reserves, neither could they find a place in the white society for which the 'little red schoolhouse" [84] had ostensibly prepared the children. Both the DIA's assimilation policy, and the Churches' christianizing aims were

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[81] Barman, *supra,* note 72, at 295.

[82] Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas and McIntyre, 1997) at 23.

[83] This is a strong word, and I use it advisedly, because it is a term which comes up again and again in accounts by adult survivors of the residential school system. See for instance Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas and McIntyre, 1997); and Maggie Hodgson, *Impact of Residential Schools and Other Root Causes of Poor Mental Health (Suicide, Family Violence, Alcohol and Drug Abuse)* (Edmonton: Nechi Institute on Alcohol and Drug Education, 1991). For an account of an incident at Williams Lake Residential School in 1920 in which 9 boys attempted suicide, and one succeeded, see Elizabeth Furniss, *Victims of Benevolence: The Dark Legacy of the Williams Lake Residential School*, (Vancouver: Arsenal Pulp Press, 1995), c. 6. This chapter also contains an account of the official investigation which followed, and the DIA and the Church response, which was to blame (and to blame in racialized terms) the children for an excessive sensitivity to discipline. "Indians are very much adverse to any kind of restraint, and to put it mildly, are not to be believed, as a general thing when they complain about Schools or similar Institutions..." Indian Agent O'Daunt in a letter to the Secretary of the DIA, cited in Furniss at 93. So it was that children's accounts of floggings in the school preceding the suicide pact were disregarded in the Departmental investigation which followed.

[84] This is Harold Cardinal's term: "The Little Red Schoolhouse: Gallons of White Paint" in *The Unjust Society: The Tragedy Of Canada's Indians* (Edmonton: M.G.Hurtig, 1969) at 51.

implemented according to the cultural values of the people who enforced them. These values were constructed around these fictional hierarchies of race. White school staff in Anglican institutions were disciplined or dismissed for marrying native people[85]: the institutions themselves did not appear to take their assimilative aims very seriously. These values produced a silent agenda of keeping residential school graduates at the very bottom of the white social order by designing a curriculum which fit them for lowly-paid occupations only. Girls were to learn domestic skills like sewing, shirt making, knitting, cooking, laundry, dairying, ironing and general household duties[86]; while the boys were to learn agriculture, carpentry, shoemaking, blacksmithing, tinsmithing and printing.[87] Moreover, the curriculum did not reflect practices in the schools. In 1968, R.F.Davey, the director of the DIA's educational services, conducted a review of the system up to 1950, concluding that the training "contained very little of instructional value but consisted mainly of the performance of repetitive, routine chores of little or no educational value."[88] School staff, almost without exception, refused to send their own children to the school.[89]

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[85] J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) at 213.

[86] This included sewing the residents' clothing, with materials chosen (like the food and the building materials) with economy in mind: Miller records for example the making of girls' underwear from Robin Hood flour bags. *Ibid.*, at 299.

[87] Canada, *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples (vol 1)* (Ottawa: Canadian Communication Group, 1996) at 339.

[88] R.F. Davey, *Residential Schools, Past and Future*, cited *ibid.*, at 345.

[89] J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) at 180.

Provincial schools in some areas admitted Indian children before the federal government made the federal school system compulsory for Indian children. Indeed, in British Columbia in the early history of its settlement, the presence of Indian children in provincial schools was necessary to make up the numbers required for funding,[90] and the Superintendent of Education wrote in 1886 that 'there is no authority given in the School Act to refuse them admittance. Since the inception of the present School system they have been admitted on an equality with other pupils."[91] Federal pressure to exclude the children, however, mounted as settler population levels rose, so that by World War I Indian students in provincial schools had become the exception rather than the rule. The enforcement of the federal jurisdiction over education had little bearing on the curriculum laid down for Indian children - the School Branch of the Department of Indian Affairs had adopted a uniform curriculum in 1895 which was based on its provincial counterparts. The difficulty for the Indian students in residential schools was that they had three hours a day, harvest permitting, in which to learn material which their provincially-educated peers were expected to absorb in a five-hour day.[92]

The residential school system in British Columbia warrants special discussion for it boasted almost a quarter of residential schools in Canada by the turn of the century.[93]

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[90] Barman, *supra,* note 72, at 276.

[91] Pope, 1886, in BCSE, OC; cited in Barman, *supra,* note 72, at 277.

[92] Gresko, 1986, at 96, cited in Barnan *supra*, note 72 at 286.

[93] Fournier and Crey, *supra,* note 82, at 56.

This was despite the relatively infrequent use of treaties in the region.[94] British Columbia was the site of rapid settler population growth at the end of the nineteenth century, a rise which coincided with the formalization of the federal system of residential schooling and funding in partnership with the Churches. No treaty promises of education were needed in the BC context to invite the assimilation of aboriginal children. The federal system was in place to supply the settler demand for an assimilative program which would respond to settler thirst for aboriginal land. The residential school system was used "more brutally and thoroughly in British Columbia than anywhere else in Canada. The Anglican and United Churches, and the Roman Catholic Church, divided up the province into small religious fiefdoms."

The curriculum was instituted in conditions which guaranteed that its stated aims could never be met. Before then, the system attracted poorly-paid, untrained teachers who were expected to conduct classes in buildings infested with disease and subject to overcrowding. The industrial school at Regina, for instance, had problems recruiting Indian pupils following the death from tuberculosis of six out of seven children sent there from one reserve,[95] and Duncan C. Scott, the Deputy Superintendent-General of Indian

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[94] The provincial government in British Columbia has simply assumed that it has a fee simple in provincial lands, although there were fourteen treaties signed on Vancouver Island in the 1850s, in which land was exchanged for small reserves, blankets, and fishing and hunting rights. On the mainland, Miller argues that the federal government tried to deflect Indian requests for treaty provision for schooling during the negotiations for Treaty 8, struck in British Columbia and Northern Alberta in 1899 (at 143). This indicates some ambivalence in the federal government about the residential school system, despite the fact that by 1896 it was contributing to the maintenance of all of the residential schools in British Columbia. (Fournier and Crey, *supra,* note 82, at 56)

[95] Miller, *supra,* note 89, at 348

Affairs, himself wrote in 1914 that 'fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein".[96] Death rates are closely connected to funding levels, which rose after W.W.II. as the federal government began to offload Indian education onto the provincial governments and Indian children began to be funnelled into non-native schools also situated off the reserve.[97] The potential for child abuse was fully realized, and has been documented elsewhere.[98]

> "By the time Emily left Kuper Island in 1959, at the age of eleven, she had been repeatedly assaulted and sexually abused by Father Jackson and three other priests, one of whom plied her with alcohol before raping her. A nun, Sister Margaret, known for peeping at the girls in the shower and grabbing their breasts, was infuriated when Emily resisted her advances. 'She took a big stick with bark on it....she told me to say I'd fallen on the stick and that she was just trying to get it out.' In the years that followed, Emily would have to twice undergo reconstructive vaginal sugery. Father Jackson also wanted to make sure no one would talk. On the sisters' first trip home at Christmas, he suspended Rose by her feet over the side of the boat, threatening to release her into the freezing waves unless she promised to stay silent."[99]

The residential school system was predicated on an institutional structure which was dangerous, body and soul, for the children who lived and died in it. It was a 'bizarre

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[96] Duncan C. Scott, "Indian Affairs, 1867-1912" in Adam Shortt and Arthur G. Doughty, *Canada and its Provinces (vol 7)* at 615, cited in Canada, *Looking Forward, Looking Back* (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996), at 357.

[97] Noel Dyck, *Differing Visions: Administering Indian Residential Schooling in Prince Albert 1867-1995* (Saskatchewan: Prince Albert Grand Council, 1997) at 71.

[98] "'Sadness, Pain and Misery Were My Legacy as an Indian': Abuse" c. 11 in Miller, *supra,* note 89, at 317; "Discipline and Abuse" c 10.3 in Canada, *Looking Forward, Looking Back* (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996) 365; Roland Chrisjohn and Sherri Young, *The circle game: shadows and substance in the Indian residential school experience in Canada* (Penticton: Theytus Books, 1997); Linda Jaine, ed., *Residential Schools: The Stolen Years* (Saskatoon: University of Saskatchewan Extension Press, 1992); Elizabeth Furniss, *Victims of Benevolence: The Dark Legacy of the Williams Lake Residential School*, 2nd ed. (Vancouver: Arsenal Pulp Press, 1995).

[99] Suzanne Fournier and Ernie Crey, *supra* note 82 at 48.

situation – a school system structured so that it could not succeed pedagogically".[100] This systemic mistreatment cannot simply be laid at the door of an outdated ideology of race and culture. Rather, it is more fruitful to analyse it as an effect of the institutional arrangements made between the Church and the State, contrary to the vision of aboriginal peoples. The contradiction of a system set up to fail arises in the conflicting aims of the three partners in the system, and is compounded by the overriding financial concern of the State to minimise its expenditure in the cause of aboriginal assimilation. I attend now to the systemic origins of this contradiction, as well as the financial context in which it was played out.

Three partners: Church, State, and Indian parents

The State and the Churches enjoyed a "delicate" and often "tempestuous" [101] alliance as partners in the residential school system. Their interdependence was as much a case of complementary aims (assimilation and christianisation) as mutual legitimation. Coercive measures, summoned by discourses of Indian backwardness, posed theoretical problems for a democratic State which was notionally committed to ideals of equality and freedom, and to the corresponding prohibition on State intervention into the private sphere. Aboriginal family and culture demonstrably belong to the private, and State intervention in them require special measures in liberal democracies. As Valverde has

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[100] J.R. Miller, *supra,* note 89 at 419.

[101] Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 79.

argued, coercive measures were unproblematic in other colonial contexts such as Africa or India, where 'British rule was unabashedly undemocratic" [102]; but in the Canadian context, a less direct involvement of the State in the business of coercive moral and vocational instruction was called for. The commitment of liberal States to formal equality helps to explain the important function of voluntary organizations, operating outside the formal control of the State, in moral and child reform.

'The State has historically found it convenient to leave moral rehabilitation to private agencies"[103] which do not face the same ideological constraints as does the State in the notional divide between the public and the private. This approach demonstrates the contradictions which inhere in the State. It supercedes the notion that the State is the sole origin of power by demonstrating that it is neither monolithic nor omnipotent; and that governance is exercised through a range of tactics and practices extending beyond the formal apparatus of the State to the informal mechanisms of civil society, and beyond. Civil society is made up of the informal regulatory mechanisms of culture: the family, the school, the Churches, cultural organs, private relations, gender, sexual and ethnic identity.[104] Hall describes these as the place where power is constructed, even if it is in the

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[102] Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland and Stewart, 1991) at 104.

[103] *ibid.*, at 165.

[104] Stuart Hall, "Gramsci's relevance for the study of race and ethnicity" in David Morely and Kuan-Hsing Chen, eds., *Stuart Hall: Critical Dialogues in Cultural* Studies (London: Routledge, 1996) 411 at 428.

end formally exercised by the State.[105] The complementarity of the State and civil society in the insidious regulation of the private is well illustrated in the residential school system. Valverde's analysis lends itself to the partnership in the residential school between the Church and the State, because the Church is deeply implicated in the both the residential schools, and in the private agencies who assumed the task of reforming morals in Canada in the period in which the residential school system was structurally entrenched. Contemporary Christian publications on morality, for instance, show an emphasis on the moral purity (or, the 'whiteness') of the child. In 1920, the three mottoes of the Women's Christian Temperance Union were "a white life for two" (a single standard of sexual conduct), "every child has the right to be well born", and "save the children and you mold the nation".[106] The religious and moral imprimatur given by the voluntary organizations to the forcible assimilation of Indian children, then, dovetailed neatly with the interests of the settler State, and served to provide a ready guide for the interpretation of the ambiguous promises made to Indians in return for the surrender of their land.

The RCAP report outlines the political influence of the Churches in Ottawa at the end of the nineteenth century as pivotal in the federal abdication in favour of the Churches of responsibility for Indian education after confederation.[107] The very first experiments in

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[105] Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland and Stewart, 1991) at 165.

[106] *ibid.*, at 60. Valverde documents similar emphases in Church agencies on the moral health of the child and the bearing this health would have on the racial and physical health of the new nation. See for instance at 71-72, and at 130.

[107] Canada, *Looking Forward, Looking Back* (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996) at 353.

residential schooling in Canada had been made by the Churches. It is too simple to say that the history of Church involvement in Indian education is paved, like the road to hell, with good intentions and religious zeal.[108] The Churches had in fact their own interests in mind in seizing on the christianisation of aboriginal children. The promises of enlarged congregations, and donations made in the name of the worthy cause of aboriginal conversion,[109] operated side by side with both an assumption in the Churches (and the people who staffed their institutions) of racial superiority, as well as the hope of a heavenly reward. This exercise of temporal jurisdiction bore on the school curricula, which supplemented skills training with instruction in the values of the society the children were expected to join.[110]

The first priority of the Churches was religious instruction: assimilation would follow on the heels of this primary objective. Excessive catechism drew complaints from both the students and their parents, whose vision of education had not included the conversion of their children away from the old ways. Teachers were correspondingly drawn from the ranks of missionaries and religious, some of whom were better qualified than others.[111] Lowly rates of pay determined the quality of the staff who found their way

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[108] "The clergy seem to be going wild on the subject of Indian education and it is time some limit should be fixed as to their demands". Martin Benson, senior clerk in the education section, 1907 NAC RG 10, vol 7185 file 1/25-1-7-1 MR C 8762 To the deputy superintendent General from M. Benson 23 October 1907, cited *ibid.*

[109] Dyck, *supra*, note 97, at 20.

[110] DIA Annual Report, 1986, pp. 398-399; cited in Canada, *Looking Forward, Looking Back* (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996) at 340.

[111] Basil Johnston recounts the varied levels of scholarly attainment in the religious staff at the school he attended intermittently from 1939-1950. Basil Johnston, *Indian School Days* (Toronto: Key Porter, 1988).

into residential schools. Many of them were members of religious orders, unpaid for their labours and held in correspondingly high esteem by non-natives for their selflessnss. They were benevolently described at the end of the nineteenth century in terms of their 'infinite patience and tact", [112] even if they were 'without scholarly attainments".[113] When none were available, and this was increasingly the case as vocations dwindled after W.W.II, teachers in residential schools came from the ranks of the unqualified who could find employment nowhere else.

> "In my own elementary school days...I found myself taking over the class because my teacher, a misfit, has-been or never-was sent out by his superiors from Quebec to teach savages in a wilderness school because he had failed utterly in civilization, couldn't speak English well enough to make himself understood."[114]

In addition to the interests of political ideology and religious conversion, the reliance of the Davin report on the control by the Churches of residential schools was inspired by an unwillingness on the part of the federal government to meet 'the large expense entailed upon the country by the maintenance" of that system.[115] This is something of an exaggeration, given that federal funding per pupil yearly to cover food, board and teaching expenses in 1910 was slightly less than the federal funding per inmate for food alone at the German prisoner of war camp in British Columbia during world War

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[112] Lejac school correspondence, 1910, cited *supra,* note 107 at 283.

[113] *ibid.*

[114] Harold Cardinal, *The Unjust Society: The Tragedy Of Canada's Indians* (Edmonton, M.G. Hurtig, 1969) at 54. See also Miller, *supra,* note 95, at 320 for an account of residential schools being used as "dumping grounds" for troublesome clergy members.

[115] Jean Barman, Yvonne Hébert and Don McCaskill "The legacy of the past; an Overview" in *Indian Education in Canada vol 1: The Legacy* (Vancouver: University of British Columbia Press, 1986) 1 at 8.

II, and less than a third of the fees charged by a private British Columbia boarding school in 1900.[116] In the day schools, which were administered on the reserve by the federal government, grants were raised in 1910 from $12 to $17 per child yearly, when the comparable provincial outlay per child in British Columbia was $34 yearly. Similarly, in Manitoba in 1938, the per capita grant for students attending a provincially-funded school for the deaf was $642, while the federal per capita grant for residential school students was $180.[117] This gap between funding for Indian education and non-Indian education would not be closed until the 19050's, in the last stages of residential school system's operation. The vocational training with which nominally half of residential schools students' time was taken up was conditioned inevitably in these straitened economic circumstances by the need to supplement the meagre incomes of the schools. "Although the theory of residential schooling emphasized the importance of work to the inculcation of needed skills the reality in most schools until the 1950s was that work was a means of supporting the institution rather than a form of instruction."[118] Consistent with both the stated aims of the DIA and its hidden economic and cultural concerns, instruction at the residential school served the dual purpose of keeping the residential schools afloat, and of providing low-status vocational training to the inmates.

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[116] Barman, *supra,* note 33, at 288.

[117] Canada, *Looking Forward, Looking* Back (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996) at 355.

[118] Miller, *supra,* note 85, at 288.

The third partner in the residential school system is made up of the Indian populations themselves. Their role in this bears discussion; for the question of the collusion of aboriginal people in the removal of their own children comes up frequently in the context of modern assessments of these historical events. Education, after all, was at the heart of later treaty promises. It is easy enough to make the argument that the residential school system was beneficial for the children who went through it by pointing to the role which aboriginal parents played in seeking education for their children and voluntarily sending them to school. This argument demonstrates however a profound innocence as to the breech between aboriginal and white expectations around education for aboriginal children. There is no question that aboriginal people petitioned colonial and then federal governments, and the Churches, for the establishment of schools on the reserves.[119] "The native people participated in the creation of schools, whatever they might have thought of the way the institutions evolved."[120] Central to this participation for aboriginal peoples was the recognition that the change which confronted them was lasting; that it threatened their physical and cultural survival. Education in the ways of the white man was seen to respond to the imperatives of preserving aboriginal life and culture in the face of this inevitable change. There is a direct relationship between the proximity of threat to aboriginal culture, and the availability of children for schools. Very early Catholic attempts at residential schooling in new France, for instance, failed for want of available

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[119] *ibid.*, at 407; and see also Isobel Mcfadden, *Living by Bells: The story of five Indian Schools (1874-1970)* (Committee on Education for Mission and Stewardship, The United Church of Canada, 1971) at 2 where she describes how the initiative of an Indian "Princess" led to the establishment of a residential school in Port Simpson, British Columbia.

[120] J.R. Miller, *Shingwauk's Vision* (Toronto: University of Toronto Press, 1996) at 407.

pupils and the means to coerce Indians into giving their children to the black robes. The practice of exchanging children as part of diplomacy and commerce is averted to in some quarters,[121] which may also account for the very early cooperation of some aboriginal people in the schooling experiment. The system also attracted orphans and the children of destitute parents throughout its history.[122]

By the nineteenth century, however, education meant the promise of aboriginal survival:

> Although they had very different aspirations for their children than did officers of the Department of Indian Affairs, Indian communities did not deny the possible utility of formal educational training within Canadian society. Instead, they sought to discover ways of acquiring positive educational opportunities for their children without surrendering to the demeaning presumption that educated Indians would surely want to separate themselves from their families and cultures.[123]

The aspirations of aboriginal people in the middle and toward the end of the nineteenth century that State- and Church-sponsored education could be a means of

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[121] Miller describes Huron men promising the Jesuits children in the 1630s against the wishes of Huron women (at 407). Morris reports the following from the third day of treaty negotiations for treaty number 3, 1871: Chief of Lac Seule: "If you give what I ask, the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us, and in return I will lend you one of my daughters and one of my sons for you to teach what is good..." Alexander Morris, *Treaties of Canada and the Indians of Manitoba and the North West Territories including the negotiations on which they were based, and other information relating thereto* (Toronto: Belford Clarke, 1880) at 63.

[122] Miller, *supra,* note 120, at 407, in connection with a settlement in Selkirk in the 1820s; and Basil Johnston, *Indian School Days* (Toronto: Key Porter, 1988) reports at 19 that in 1939, "most of the 135 inmates of Spanish...came from broken homes; some were orphans; others were committed to the institution as punishment for some misdemeanor; and a few were enrolled by their parents in order to receive some education and training." This points to the relatively small number of parents who held the system in any esteem at this point; and provides an example of a trend which would become important in the 1950s and after of using the residential school system as a receptacle for Indian children with social or behavioural problems. There is also the question of what constituted a broken home in the judgment of the DIA.

[123] Noel Dyck, *Differing Visions: Administering Indian Residential Schooling in Prince Albert 1867-1995* (Saskatchewan: Prince Albert Grand Council, 1997) at 15.

cultural self-defence, change into a pattern of resistance to the residential school as soon as the conflict between the three partners' aims becomes apparent. It is somewhat disingenuous to argue that Indian parents freely submitted their children to the schools after these early hopes were disappointed by the assimilative aims of the schools, and by the reckless manner in which those aims were pursued. It is no coincidence that the measures contained in the Indian Act to ensure attendance at residential schools became increasingly coercive at the end of the nineteenth century.[124] They followed a trend of increased authoritarian control and surveillance of aboriginal people after the 1885 rebellion.[125] This trend sounded in the enforcement of school attendance. The Churches had lobbied for the introduction of the coercive measures, and they lobbied too for their enforcement.[126] They were spurred on by the DIA's decision in 1892 to change the funding arrangements from grants (taken in part from reservation funding) to a per capita system where the survival of a school depended on its having high attendance rates. Despite Deputy Superintendent General Duncan Scott Campbell's barefaced assertions to the contrary[127] the pass system was used to prevent parents from visiting their children to

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[124] These measures were sporadically enforced in some cases, for example in the case of southern prairie Indians "irritated" by the disappearance of the buffalo. J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) cites at 128 a Commissioner Reed in 1891 as follows: "I think it would be well not to enforce too rigidly attendance at schools. Everything that is likely to irritate the Indians is to be avoided as much as possible."

[125] Noel Dyck, *Differing Visions: Administering Indian Residential Schooling in Prince Albert 1867-1995* (Saskatchewan: Prince Albert Grand Council, 1997) at 22.

[126] Miller, *supra,* note 124, at 128 and 137.

[127] Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, *The Administration of Indian Affairs in Canada* (Canadian Institute of International Affairs, 1931), on the pass system: "If there were strict confinement to reserve limits, the system would have had many objectionable features, but neither officials nor Indians considered the reserve as more than a "pied a terre". The Indians wander away from it and return to it as the nomadic instinct prompts." At 26.

ensure their well-being.[128] Residential schools were often at great distances from the reserves in order to discourage contact between child and parent. Parents were expected to fund their children's travel between the school and the reserve[129] home for the two months holiday officially allotted them every year.[130] The financial burden of travelling to visit their children at school also fell on the parents. Because of the destitution to which aboriginal people had been reduced by the reserve system, in many cases there was no money for visits. Parents were often illiterate, or tending trap lines, so that tales of abuse were slow to reach them. Some did not believe what their children told them; some were simply afraid:

> "I have a boy at St. Joseph's Industrial School - he has been there four years...he has run away three times...he said he ran away because he was badly fed and beaten - I never saw any marks on him, and made no complaint to the Fathers. I sent him back to school each time he came home....I did not complain to the Fathers about my boy's treatment because I was scared."[131]

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[128] Maggie Hodgson, *Impact of Residential Schools and Other Root Causes of Poor Mental Health (Suicide, Family Violence, Alcohol and Drug Abuse)* (Edmonton: Nechi Institute on Alcohol and Drug Education, 1991) at 14.

[129] Dyck, *supra,* note 125, at 78.

[130] This holiday period was used as a disciplinary measure against the children. I have a statement of claim relating to present litigation by a former residential school student against the Oblate Fathers and the Federal government, which alleges that the student was prevented by school staff from spending the holiday period with her father and sister as recently as the 1970s. This is an allegation which is made repeatedly in the residential school stories. Where it is not made, there are other narratives of the estrangement between families brought on by compulsory assimilation for ten months of the year. See for instance Boyce Richardson, *Strangers Devour the Land* (Post Mills, Vermont: Chelsea Green Publishing., 1991) at 227.

[131] Charlie Johnson, Alkali Lake, testifying at an inquest into the death of an Indian boy at Williams Lake in 1902. The inquest recommended a departmental investigation. This blamed the harsh regime of discipline at the Williams Lake residential school on the waywardness of the aboriginal children at the school. See Elizabeth Furniss, *supra* note 49, at 66-79.

And with cause. The federal government called in its police to act as truant officers to aboriginal children in 1933, and in 1945, family allowance payments were tied to the attendance of children at residential schools.[132]

There is ample evidence to dispel the myth of benevolence surrounding the system in favour of aboriginal narratives of abuse and suffering. The view that aboriginal people colluded in the abuse of their children by sending them voluntarily to school either racialises the nature of aboriginal parenting, relying on the premise that aboriginal people are more likely than white people to demonstrate a lack of care or affection for their children; or it racialises the nature of aboriginal truthtelling, relying on a premise that the tales of abuse told by former inmates are fictional; and motivated for instance by the hope of compensation from the federal government or the Christian Churches.[133] The Indian Act had in fact set up a totalitarian system of governance in which aboriginal parents simply had limited say in the rearing of their own children. Locating responsibility for the residential school system in the State-enforced powerlessness of aboriginal people themselves is an act of bad faith. It is, in fact, an act of racism.

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[132] Miller, *supra,* note 118, at 170.

[133] For a good example of this, see "Canada's Mythical Holocaust" Alberta Report, January 26, 1998, 6. "In none of the media coverage was the possibility raised that the schools were on the whole beneficial and widely supported by the Indians who attended them and voluntarily sent their children to them. Nor was the possibility admitted that the Indian leaders who now revile the schools might be motivated by the prospect of federal compensation." At 6.

Transition, and finale

At no time in the history of the system did the schools produce the well-educated graduates who might have borne out, assuming the value of white education for Indian children, the propriety of the regime of discipline and punishment to which they were subject by force. The system fell out of favour by 1948, when the federal education strategy began to focus on the potential in the provincial school system for educating Indians.[134] This shift in emphasis has many causes; briefly, in the renewed activism of Indian Canada on the return of its finest from the War in Europe, and in the hearings of the Special Joint Committee of the Senate and the House of Commons in 1946 which received 137 briefs from Aboriginal groups, 126 of which dealt with schooling, for example. The dramatic increases in Indian population levels in the 30's after a long period of steady decline meant that the system was at crisis point by the late forties, coinciding with a declining number of religious volunteers available to staff the schools and a spate of fires which had gutted nine residential schools and four day schools between 1936 and 1944.[135] Officially, the policy of ending the residential school system found its legislative expression in the *Indian Act* amendments of 1951, s 113 (b) of which permitted the federal government to make financial agreements with provincial and other authorities for Indian children to attend public and private schools. The winding up process was hindered however by the resistance of the Churches, especially the Catholic Oblate Fathers who ran

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[134] Dyck, *supra,* note 125, at 71.

[135] Miller, *supra,* note 118, at 382. Miller also notes in c 12 the persistence of arson in the residential schools.

three fifths of the schools in the fifties, and by the increasing use of the schools by the welfare system as receptacles for children taken from 'unsuitable" conditions on the reserves. Changes to DIA policy with respect to education were implemented nonetheless, with little or no consultation with First Nations communities.[136] The aim of assimilation had been overtaken by integration, a fine distinction which was perhaps lost on the Indian children who now took their places during the day beside white peers whose culture was alien in the same sense that the residential school environment had been. Kirkness and Selkirk Bowman discuss the difficulties of the Indian child in the provincial education system, locating them in cultural differences which produce low academic achievement.[137] Schooling in provincial schools spelt an end to the forcible removal from the reserves of aboriginal children for years on end. To this extent, attendance at provincial schools was a better solution to the question of Indian education than was offered by the residential school system. By 1960 almost 25% of the 38, 000 young Indians in school were attending provincial institutions.[138] This peaked at 60% in 1970,[139] before falling to 43% in 1986,[140] reflecting Indian ambivalence about participating in an integrated provincial

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[136] Verna J. Kirkness and Sheena Selkirk Bowman, *First Nations and Schools: Triumphs and Struggles* (Toronto: Canadian Education Association, 1992) at 12.

[137] *ibid.*

[138] Jean Barman, Yvonne Hébert and Don McCaskill, "The legacy of the past: an Overview" in *Indian Education in Canada vol 1: The Legacy* (Vancouver: University of British Columbia Press, 1986) 1 at 13.

[139] Jean Barman, "Aboriginal Education at the Crossroads: The Legacy of Residential Schools and the Way Ahead" in David Alan Long and Olive Patricia Dickason, *Visions of the Heart: Canadian Aboriginal Issues* (Toronto: Harcourt Brace and Co, 1996) 271 at 293.

[140] Jerry Paquette, *Aboriginal Self-Government and Education in Canada* (Ontario: Institute of Intergovernmental Relations, 1986) at 1.

school system which freed the federal government from its treaty responsibilities[141] and could not guarantee the fundaments of respect for difference which had been manifestly lacking historically in the provision by State mechanisms of education for aboriginal children.

The other, more pressing aspect of the decreased emphasis on the educational function of residential schools in the 50s has to do with the rise of the welfare system. The long-standing informal welfare function of the system[142] was formalized in the 50s when child welfare workers began to remove children from the reserves in their 'best interests" and place them in residential schools. 60% of school inmates at a Saskatchewan school in 1965-1966, for instance, were there for social rather than educational reasons.[143] There was no corresponding emphasis in staff training on behavioural problems in children, leading once more to the hazardous situation of overworked staff operating in marginal conditions. 'The cost to the federal purse of maintaining residential schools was low in comparison with most institutional programs providing for social development and child welfare precisely because of a departmental philosophy of caring for Indian children at 'the least public expense'."[144] The results of forced institutionalization and inadequate funding in connection with aboriginal children were obvious. They had been documented in report

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[141] Sykes Powderface, "Self-Government Means Biting the Hand that Feeds Us" in Leroy Little Bear, Menno Boldt and J. Anthony Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 164 at 172.

[142] I avert to this *supra,* at note 122.

[143] Dyck, *supra,* note 125 at 78.

[144] *ibid.*

after departmental report.[145] Institutional abuse can persist only if the conditions allow it; and its persistence into the 1980s[146] despite a century of documented evidence as to the tragic consequences of inadequate funding and supervision speaks to the lack of esteem in which aboriginal children were held by the State, and the Churches. It also speaks to the effect of legally invisible attributes like race and culture on the checks and balances which have evolved in democratic societies to check the abuse of power: children are not believed because they are aboriginal, their parents have no power to prevent their removal or rescue them because they are aboriginal, legal and administrative procedures to safeguard the wellbeing of the children are not followed because the children are aboriginal. These attributes operate in the present. I have not dealt with child removals through the formal mechanism of the welfare system, simply because I cannot do them justice within the constraints of this thesis. I confine myself here to noting the continued violation of aboriginal rights and freedoms in the removal of their children through the

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[145] The Bryce report, for instance, documented in 1907 alarming mortality rates across the west. Individual institutions were the subject of periodic departmental evaluations such as was made in 1905 at Emanuel by a physician whose recommendations were not acted on for financial reasons. Miller, at 28. Sixty thousand files documenting the abuse arising in the context of the failure of the education system in residential schools were handed over to the Royal Commission on Aboriginal Peoples in 1993 by DIAND, the modern incarnation of the Department of Indian Affairs. Suzanne Fournier and Ernie Crey, *Stolen from our embrace: the Abduction of First Nations Children and the Restoration of Aboriginal* Communities (Vancouver: Douglas and McIntyre, 1997) at 49. For a particularly disturbing account of departmental failure to act on the evidence of abuse at a residential school, and the complicity of the legal system in that failure, see generally Elizabeth Furniss, *Victims of Benevolence; The Dark Legacy of the Williams Lake Residential School* (Vancouver: Arsenal Pulp Press, 1995).

[146] A former residential school supervisor was convicted August 17, 1998 of 14 counts of sexual assault on teenage students in his care at a Catholic residential school in British Columbia from 1967 to 1979 (reported in the *Vancouver Sun*, August 17, 1998, at A5). I have also in my possession a statement of claim relating to the alleged abuse of aboriginal children by staff in a residential school in Saskatchewan from 1978-1984.

intervention of the welfare system, despite the change of rhetoric and administrative means which have surrounded aboriginal child removals.

In 1969, when the DIA formally ended its educational partnership with the Churches, there were 52 residential schools operating. This number had fallen by 1979 to 12, with the remainder being closed or turned over to Indian control by the mid-80's. This was the end of the residential school system. The *Indian Act* and its comprehensive powers for the control of Indians and the education of their children remains more or less undisturbed in its Victorian integrity, and the treaty process remains as fraught as ever with the difficulties inherent in the competing interests and the imbalance of power of the parties, irrespective of the protestations in the State of its own benevolence.

Concluding remarks

Now the children were free. They didn't know where they were going and they didn't know where they had come from, but they started out down the mountain, trying to find their way home.

The historical and legal context within which the residential school was born calls for an analysis which bears in mind the respective positions, interests, and aspirations of the three partners in it. The treaty process provides an apposite site for a critical analysis of the disjunction between the Indian view of treaty and its cultural effects on the one hand, and on the other the stance of benevolence with which the Canadian State, Christian Churches, and certain discourses in modern popular culture have characterized Indian

policy,[147] especially the assimilation policy on which the partnership between the Church and the State in the residential school system was founded.

The best interests of Indian communities have been hurt and outraged through the destructive project of the assimilation of their children through the residential school system. In the forced acculturation of the children against their will there is injury. In the conditions imposed upon them against the will (and in many cases the knowledge) of their communities there is injury. In the persistence of those conditions despite the State and the churches' knowledge of the shortcomings of the system there is injury. Most strikingly, however, there is the question of benevolence to be counterposed against the compelling histories of child mistreatment at the hands of the Churches and the State. The question of benevolence is answered by pointing not only to the surface, where assimilation policy is articulated; but also beneath the surface to the systems at work to frustrate the official aims of the State.

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[147] Valverde provides a statement which neatly contains the contradictions inherent in the "protective" system of administrative coercion. The following is from Duncan Scott, the Deputy Superintendent of the DIA in 1924: "The policy of the Dominion has always been to protect the Indians, to guard their identity as a race and at the same time to apply methods which will destroy that identity and lead eventually to their disappearance as a separate division of the population." Duncan Scott, *Handbook of Canada* at 19; cited in Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland and Stewart, 1991) at 115.

CHAPTER III: CHILD REMOVALS IN AUSTRALIA: THE STOLEN GENERATIONS

Introduction

This chapter continues the exploration of aboriginal child removals, this time in the context of the Australian history. Throughout I interrogate the notion of the benign intentions of the State, pitting as in Chapter II the discourses of "protection" and "civilisation" against the lived experiences of the children who were institutionalised and for whom compulsory assimilation came to signify a bureaucratic program of mistreatment and suffering. I begin by situating my discussion in the colonial history which gave birth to the legislative schemes on which the removal of aboriginal children was based. I go on to undertake an examination of the place of indigenous people in the Australian constitutional system, before turning to contemporary views of race, and the assimilative frameworks erected as law, as policy, as bureaucracy, in the Churches, and in the institutions into which the children were removed.

Colonization

The history of European settlement in Australia begins in 1788, when the First Fleet arrived on the East Coast with its cargo of members of the British criminal underclasses. Early contact between the British and the local people was relatively peaceful, escalating into violent encounters only as the colonial project evolved and

incursions for farming and settlement were made westward into the hunting grounds and sacred sites of the indigenous people. The struggle for land has been at the heart of the conflict between black and white Australia ever since, and settler law and governments have regulated that struggle by sanction and enforcement of the disruption of aboriginal peoples' connection to their lands. This attempt to remove the indigenous presence from the Australian landscape so as to facilitate the growth of the settler order was accompanied by an assault on the cultural and the (perceived) biological indicia of indigenous existence, an assault conditioned always by prevailing and elastic notions of race and racial difference.

Encounters between Aboriginal people and settlers in Australia became hostile as the settler uses of land became inconsistent with the traditional uses of indigenous people. Aboriginal retaliatory raids then became the justification for a range of responses, which escalated as the feud between black and white world views intensified. Martial law was declared for example in 1808 in Tasmania, and soldiers, settlers and vigilante groups avenged Aboriginal retaliation for land theft by 'wholesale slaughter of men, women and children". [148] White settlers killed some 10, 000 Aboriginal people in Queensland between 1824 and 1908,[149] prompting Aboriginal 'protection" legislation in 1897. Similar legislation was enacted in Victoria, Western Australia, New South Wales, South Australia,

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[148] Colin Tatz, "Assimilation Nonsense: Australia and the Stolen Generations" (1995) International Network 14 at 14.

[149] *ibid.*, at 14. The Protection legislation is discussed in detail *infra* at 82.

and the Northern Territory.[150] Protection as a policy was buttressed from the early years of this century by an increasing emphasis on the assimilation of aboriginal children, especially those of mixed descent. The Protection schemes, which in overview made indigenous children (and in some cases adults) wards respectively of a state[151] Protector of Aborigines, became the basis of the forced removal of children of mixed blood into white foster and adoptive homes, and "assimilation" homes, often run by the Churches; and was adopted nationally as a policy in 1937.[152] Estimates as to the number of children involved vary, however the historian Peter Read puts the number at 100,000 across Australia over a period of a century.[153] *Bringing them home* does not furnish statistics of death rates among Australian Aboriginal children removed under Protection legislation, however it outlines conditions in State institutions[154] which mirror those described in the literature on

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[150] The *Aboriginals Ordinance* 1918 (NT) for example made the Protector of Aborigines the guardian of all Aboriginal children in the Northern Territory (this guardianship later extended to all Aboriginal people). Federal legislative power is limited in Australia to the heads of power enumerated in s. 51 of the Commonwealth Constitution. This contained no power to makes laws respecting indigenous people until 1967, when a 'race power' was inserted following a national referendum. The race power was required in order to enact legislation allowing Aboriginal people to vote in federal elections. Federal legislation pursuant to the Territories was enacted via s. 122 of the Commonwealth Constitution, which confers a wide power to make laws for the government of territories. It was this power under which the Aboriginals Ordinance was enacted. See generally Australia, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, April 1997), Part 2.

[151] In order to avoid confusion, I have used "state" to refer to the provincial Australian regions, and "State" to refer to the wider systems of public governance.

[152] Australia, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, April 1997) at 220.

[153] Peter Read, "The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883-1969" cited *ibid.*, at 15.

[154] See for example at 134: "That's where the food was scarce again. Hardly anything...night time we used to cry with hunger, y'know, lice, no food. And we used to go out there to the town dump...we had to

Canadian residential schools. It follows that the death rates in the context of Aboriginal child institutionalisation in Australia will have approached those in the Canadian context. Thus far there coincide in the histories of aboriginal childhood in Australia and Canada State-sponsored removals, legally sanctioned and inspired by the assimilative aims of the colonial State.

Jurisdiction

Prior to federation in 1901, colonial governments on the continent which would come to be known as "Australia" legitimated themselves on the basis of an ambiguous legal relationship to the British Crown, and then by their respective state constitutions, which vest in the respective governments plenary powers to make laws with respect to the "peace, order and good government" of a colony. State (both federal and provincial) power to regulate the affairs of indigenous people in Australia has been conditioned since federation by the powers enumerated for the federal government in the Commonwealth Constitution, drafted in the last decade of the nineteenth century, when responsibility for aboriginal administration had been abdicated by the British Crown in favour of the colonial legislatures[155]; and by the terms of the state (provincial) constitutions, which are still constrained by their respective provision on peace, order, and good government. The Commonwealth Constitution explicitly excluded Australian indigenous people from the

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come and scrounge at the dump, y'know, eating old bread and smashing tomato sauce bottle and licking them. Half of the time our food we got from the rubbish dump. Always hungry there."

[155] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 34.

purview of Commonwealth power until 1967, when the Constitution was amended following a referendum in which a proposal to remove that prohibition received bipartisan support and an affirmative vote of 89%. In the period from 1901-1967, then, control over aboriginal life in Australia was based in separate provincial legislative schemes animated by the broad constitutional powers of the states, (in contrast with the Canadian system, where jurisdiction over the indigenous peoples has been exercised since federation in 1867 by the federal government, in the main according to the demands of the *Indian Act* and regulations made under it). In this period between federation and the 1967 referendum, six separate state legislatures exercised jurisdiction over the aboriginal people in their respective regions, while the Commonwealth exercised jurisdiction in the Northern Territories after 1911 pursuant to its constitutional power to make laws with respect to the Australian Territories. Despite the jurisdictional differences, the separate legislative schemes in this period are broadly similar; and the enactment and then the implementation of each was dependent on the policies of the administrative bodies charged with the responsibility of enforcing it.

Early approaches: Reserves and Protection

It is difficult to grapple with early legal approaches to aboriginal people without reaching for an understanding of the way white Australia them. In Australia, racialised difference plays out in particular ways, for 'the Australian aboriginal" was endowed with a fictional unitary identity whose content was derived from the position which s/he notionally occupied on the very bottom of the mythical hierarchy of race. Skin colour is central to this racial hierarchy. Social Darwinism, which did not lose influence until well

into this century, yielded the view that lighter skin indicated evolutionary superiority. Australian Aborigines were seen therefore to occupy a lower place on the evolutionary scale than New Zealand Maori or North American Indians.[156] AP Elkin's seminal work[157] on Australian Aboriginals, which survived four editions, contains as late as 1964 a reference to the "smaller quantity of his [that is to say, the Australian aboriginal's] brain matter",[158] a view which was consistent with assertions in 1938 by experts at Harvard University that "the Australian aborigines represent the most primitive type of homo sapiens existent today."[159] White Australia viewed Black Australia with an unsympathetic curiosity aroused by the putative racial as well as the social inferiority of aboriginal people. This bore on the particular violence which was meted out to Australian indigenous people in the form of illegal measures on the frontier, such as massacres and poisonings (committed by squatters as well as the fledgling militias which followed the settlers inland), which went largely unpunished and which were noted uncritically in the popular press. The Sydney *Sunday Sun*, for instance, published in 1933 a celebration of certain killings of indigenous people,[160] and an article entitled 'Murray - Scourge of the Myalls. Man Whose Gun Keeps White Men Safe In The Wilds",[161] by freelance journalist

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[156] Andrew Markus, *Governing Savages* (Sydney: Allen and Unwin Australia, 1990) at 144.

[157] AP Elkin, *The Australian Aborigines: How to Understand Them*, 4th ed., (Sydney: Angus and Robertson, 1964) at 3.

[158] *ibid.*, at 9.

[159] Andrew Markus, *Governing Savages*, (Sydney, Allen and Unwin Australia, 1990) at 38.

[160] *ibid.*, at 47. Markus does not provide a date.

[161] *Sunday Sun* 28 May 1933 21; cited *ibid.* at 47.

Ernestine Hill, who made her living from tales of the "benighted" savages of the Australian interior.

Legal measures such as the restrictions found in the protection legislation discussed above,[162] also take particular form because of the way in which Australian indigeneity was constructed. Most importantly for the positioning at law of indigenous people in the settler State was the abject refusal of the law to recognise the prior claims of the indigenous people to their land. This was expressed in the notorious legal fiction of *terra nullius*, which persisted until it was overruled by the Australian High Court in 1992.[163] *Terra nullius* is a concept borrowed by the colonial and then the Australian legal system from contemporary international law. It makes the land of indigenous people "empty" for settlement by newcomers to it where the local inhabitants are seen to display no organised system of government or land usage on which a claim to that land might be founded. Aboriginal relationships to each other and to the land are controlled by a strict and ancient code,[164] of which European settlers were apparently ignorant. The manifest incongruence of aboriginal culture with the European conception of organised social and legal systems found its way into the settler law through a formulation which simply rendered that culture invisible. If the aboriginal people had no claim to the land, there was no legal requirement to treaty with them, hence the absence of a treaty-making process

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[162] *infra* at 82.

[163] *Mabo v Queensland* (1992) 175 CLR 1.

[164] Alice Nannup's recollections of her early girlhood before she was removed make extensive reference to these laws. She complains at times of the strictness of the code. See Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) for instance at 21.

between European government and Australian aboriginal people, an absence which is unique in settler colonies. Treaties were used in Canada, the United States, and in New Zealand to negotiate land claims. They are central to the bargaining position in the present of indigenous people in those countries, because of the political power which a land base (derived from the treaty-based reserve system) respresents.

Australian aboriginal populations have had historically no legally or politically sanctioned claim to land, despite the very limited use of a reserve system. Reserves have existed at the pleasure of the Crown, which set aside unwanted areas of land in which the inhabitants were vested no legal interest, and to which they could be confined at the direction of an administrator. They imply no ownership in a collective and no respective rights to the resources beneath them. The purpose of the reserves was initially segregation, and for two reasons: to protect indigenous people from the excesses of the settlers on the colonial frontier, and to keep them away from white people until they disappeared according to the natural order. The failure of indigenous peoples to disappear, however, challenged the idea that they were condemned by evolution, and the idea that they must be absorbed somehow into white society took hold. Elkin describes the reserves as "preparation centres for life in the larger world".[165] The reserves assumed a function of assimilation rather than segregation as the dictates of policy made themselves felt. The idea was to remake the aboriginal in the image of her white masters, at a safe remove, until she was fit to take her place in the wider society.

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[165] AP Elkin, *The Australian Aborigines: How to Understand Them*, 4th ed., (Sydney, Angus and Robertson, 1964), at 375.

In addition to the absence of a resource base to which indigenous people in Australia could lay claim, the particular characterisation of race in Australia bears on the nature of the assimilation policies implemented to deal with the vexed question of the prior inhabitants and their place in the evolving colonial order. In particular, the removal of aboriginal children would be targeted at children of mixed descent. This characteristic is another important basis on which aboriginal child removals in Canada and Australia can be distinguished. In Canada, the racialization of indigeneity did not so damn the Indians that the white blood of their children could be the only summons for the settler State to the rescue, protection, and preservation of the 'best interests" of the aboriginal child. In other words, all status Indian children were potentially subject to the residential school system. In Australia, it was 'European blood" which attracted the coercive power of the State and the institutions of civil society, and it was children of mixed descent who were the primary focus of the child removal policy. In contrast with the events in Canada, then, the notion of racial intermingling is one of the characterising features of the Australian history of aboriginal child removals.

Notions of the racial inferiority of indigenous people had led to the view that they were dying out, in an analysis where the wish was emphatically father to the thought. High infant mortality rates and low birth rates in indigenous communities up to the 1930s[166] ensured that the proportion of children was small in comparison with non-aboriginal

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[166] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 210.

communities, and served to perpetuate the "dying pillow" analysis. The Chief Protector of Aboriginals in Western Australia made the following statement in 1937:

> "Within one hundred years the pure black will be extinct. But the half-caste problem [is] increasing every year. Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population....Perhaps it would take one hundred years, perhaps longer, but the race was dying. The pure blooded Aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of twenty and upwards. That showed the magnitude of the problem."[167]

Aboriginal people were to be kept apart from white society until they died out. Provincial policy prior to 1930 had in most regions sought to segregate aboriginal and white people through the use of reserves in order to preserve the perfect integrity of all things British from the corrupting influence of indigenous Australia. In conjunction with isolating indigenous people on reserves, the states had instituted one by one an aboriginal "protection" scheme, described as follows in 1938 by aboriginal activists William Ferguson and John Patten:

> You hypocritically claim that you are trying to "protect" us; but your modern policy of "protection" (so-called) is killing us off just as surely as the pioneer policy of giving us poisoned damper and shooting us down like dingoes![168]

The confluence of apparent State benevolence and contemporary attitudes to race form the basis of the protection legislation,[169] whose ostensible aim was humanitarian but

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[167] reported in the Brisbane *Telegraph*, May 1937.

[168] Andrew Markus, *Governing Savages*, (Sydney, Allen and Unwin Australia, 1990) at 178-179.

[169] *Aborigines Protection Act* 1909 (NSW), *Aborigines Protection Act* 1869 (Victoria); *Aboriginal Protection ad Restriction of the Sale of Opium Act* 1897 (QLD), *Aborigines Protection Act* 1886 (WA); *An Ordinance for the Protection, Maintenance and Upbringing of Orphans and Other Destitute Children* and *Aborigines Act* 1844 (SA) and the *Aborigines Act* 1911 (SA); and in the Northern Territory, which was annexed to South Australia until 1911 and was administered by the Commonwealth thereafter, *the Northern Territory Aboriginals Act* 1910 (SA) and the *Aboriginal Ordinance* 1911 (Cth). Similarly, the Australian Capital Territory was not self-governing until 1989, so that the NSW protection legislation applied there in addition to certain Commonwealth ordinances.

whose legal thrust was to exercise control through protection boards over the smallest aspects of indigenous life, in response to the demands of orderly white settlement, and the contemporary concern to keep white and black Australia at a decent distance from each other. Peggy Brock discusses the protection scheme at length.[170] Its principal aim was the curtailment which it authorised of the most basic freedoms of aboriginal people. Protection legislation gave senior bureaucrats, or "Protectors", the power to decide who was aboriginal and therefore beyond the pale of Australian citizenship and the rights and freedoms entailed by membership in that community. Where lineage was unclear, (and given the disruption to aboriginal life at which the white legal system was aimed, in its colonial benevolence, this must have often been the case,) the relevant administrator of aboriginal affairs (usually, the Protector) had the power to determine it according to a person's appearance: skin colour, essentially. This approach is emblematic of the very category of "race", which withstands even less legal than scientific scrutiny: "In a survey of Australian legislation...67 legal classifications of race"[171] are identifiable, and most of them concern themselves with the racial status of the aboriginal mother.[172] Aboriginal "status" was the basis on which the Protector exercised his power to regulate where

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[170] "Aboriginal Families and the Law in the Era of Segregation and Assimilation: 1890s-1950s" in Diane Kirkby, ed., *Sex, Power & Justice: historical perspectives of law in Australia* (Melbourne: Oxford University Press) at 133.

[171] *ibid.*, page number not supplied in course materials.

[172] In Canada, Indian status followed the status of the father.

aboriginal people, (adults and children) could live[173] and work, and the funds to which they had access.

> "Your father...left you four hundred pounds." The department never even bothered to let me know that my family had died, let alone anything about a will...if aboriginal people received an inheritance, any money left to them became the property of the Aborigines department.[174]

The extensive administrative power of the Aboriginal Protection Board, in combination with the policy of segregation, created the artificial community of the reserve, which was in some respects a totalitarian enclave.

> The compound was set up just like a little town. At the bottom end of the main street was the Big House - that's the superintendent's quarters - and this faced the church which was at the top end of the street....there were black trackers for policemen, too...[175]

The corrupting tendencies of power were fully realised. This comes as no surprise. The curtailment of State power which is the complement to liberal ideals of freedom and equality are based on a recognition that power travels the path of least resistance. Where resistance is simply illegal, there is no bar to the arbitrary exercise of power. In this case the liberal democratic ideal was suspended on the basis of race. This is the story of a young aboriginal man tortured around 1920 for attempting to leave the reserve without permission:

> Then they took Norman down to the shed, stripped him and tarred and feathered him. The trackers brought him up to the compound and paraded him around to show eveybody. He was covered in feathers and all you could see were his eyes....when they'd finished they took Norman away and

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[173] The *Aborigines Regulation* 1916, based on the *Aborigines Act* 1910 (Vic) provides for example that "all quadroons, octoroon and half-caste lads over 18...shall leave and shall not be allowed on the Station or reserve again except for brief visits to family at the discretion of the Station manager".

[174] Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) at 179.

[175] *ibid.*, at 171.

> locked him up.... It took hours and hours for that poor boy to get the tar off, and it took a lot of his skin with it.[176]

One of the more sinister aspects of the protection legislation is its emphasis on child welfare, and the power it conferred on the Protector to act as legal guardian of all aboriginal children. This included the power to separate them from their parents and to consent to their adoption. While implementation dates, legislative specifics, and definitions of aboriginality vary, all states and both territories had by 1909 invested in a bureaucratic apparatus the power make decisions regarding the custody of aboriginal children. The Protection scheme would form the legislative basis of the history of forced removals of aboriginal children in Australia, a history which did not emerge into white Australian consciousness until the publication in 1997 of the report of the Human Rights and Equal Opportunity Commission into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.[177]

Assimilation: to smile and smile and be a villain

Armitage identifies 1930 as the beginning of the policy of assimilation,[178] although in light of the number of jurisdictions (and hence variations in policy and bureaucratic implementations of that policy) which this history comprehends, this figure should be read

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[176] Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) at 75.

[177] Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997).

[178] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 19.

as a guide only. It was implemented in various guises until it was abandoned forty years later. Assimilation policy was aimed from the outset at the absorption of light-skinned aboriginals into the wider society: earlier preoccupations with skin colour characterized the new policy as it had the old.

> "Well," [Mr Neville, Chief Protector of Aboriginals in Western Australia] said; "how many children have you got?"
> "Four" I said, and little Ron came running out the door.
> "Who's this little fellow?" he asked.
> "He's my son, Ron," I said. Mr Neville got a hold of him and shook his hand.
> "What a beautiful child," he said, "and hazel eyes! hazel eyes!" He kept on saying that about his eyes.[179]

Complete separation of white and black people had been vigorously defended in the annual report of the Queensland Protector of Aborigines (1933), where the presence of people of mixed descent is called a "social blot", intermarriage is "absolutely prohibited", and the possibility of the sterilisation of aboriginal women is described, rather regretfully one feels, as "an absolutely unacceptable solution".[180] Despite the Queensland Protector's sensibilities, assimilation policy recognised people of mixed descent as a feature, if transitory, of the social if not the political landscape, and they, unlike racially "pure" aboriginals, were to be brought to live amongst white people. They were to be reclaimed as white.

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[179] Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) at 167.

[180] Annual Report of the Protector of Aborigines, QPP, 1933, at 9-10. Cited in Henry Reynold, *Dispossession: Black Australians and White Invaders* (Sydney: Allen and Unwin, 1989) at 206.

This construction of race is found as early as 1837 in the British House of Commons' Select Committee on Aborigines,[181] which urges an emphasis on the absorption of racially mixed children into white Australia. Paul Hasluck, Minister for Territories from 1951 to 1963 and a central figure in the development of assimilation as a nation-wide policy during his tenure, explains this policy emphasis in his 1988 memoir, *Shades of Darkness:*[182]

> This may have been due in part to the simple fact that...the products of successful assimilation could be predicted more confidently than in the case of full-blooded aborigines still living in tribal conditions.... Instead of saying they were part aboriginal we should recognise them as part European.[183]

Early encounters between aboriginal and white people in both Australia and Canada produced mixed offspring in both contexts. The social positioning of these children varied over time, depending on the operative construction of race and the related extent to which white women were present.[184] Although they were considered to be superior to "full-bloods", these children occupied a marginal space in Australian settler society. As the Darwinian views of the late nineteenth and early twentieth centuries gave way,[185] racial admixture re-entered the realm of the thinkable, potentially a source of a

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[181] Perry, Richard J., *...From Time Immemorial: Indigenous Peoples and State Systems* (Austin: University of Texas Press, 1996) at 180.

[182] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988).

[183] *ibid.*, at 69.

[184] This intersection between race and gender in the colonial project will be dealt with in detail in Chapter IV.

[185] *The Report of the Advisory Commission on the Political Development in the Northwest Territories, Aboriginal - White Intergroup Relations: Protection versus Assimilation - the Australian Case* June 1966 attributes this change of race consciousness to the assumption by Australia of the mandate over German New Guinea in the 1920s and the growth of anthropological research (at 41).

new class of docile labourers who would be more educable than 'full bloods": the aim to make indigenous Australia white took care to maintain the barriers of class and race outside the territory of the lowest classes.

> One time when Mr Neville came we were all in the sewing room, and he was standing talking to the sewing mistress. They were talking about education and other things, and I heard him say."Oh, it's all right, as long as they can write their name and count money...that's all the education they need." Well I think that tells you what he thought of us.[186]

This manner of reconciling the concern for the racial purity of the ruling elites with the great unexpressed desire to make black Australia disappear was not universally well received, however, incurring criticism from above and from below,[187] and this ambivalence is borne out in the operation simultaneously of policies of assimilation and of segregation in different states, and even in the same state depending on the descent of a person as determined by the colour of her or his skin. The special attention visited upon children of mixed descent fluctuated in the earlier part of the twentieth century between policies characterized by strict segregation of aboriginals and part-aboriginals on reserves set up for that very reason, to assimilation of people of mixed descent. Attempts to assimilate 'full-bloods" would be made nowhere in Australia until after World War II. Where separation was enforced, however, it was permanent. There was no idea of sending children home to summer with their families, as was the notion in the residential school

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[186] Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) at 71.

[187] "A variety of harsh words were expressed about the Chief Protector's outrageous suggestion that marriages between black and white ...should be condoned." Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 109.

system in Canada. The connection between aboriginal children and their communities was to be irretrievably severed.

Assimilation of indigenous people into white Australia was seen to have its historical antecedents in patterns of migration in Europe over the course of the previous millennium. As Paul Hasluck, that scientist of race, observes in his memoirs, 'In Europe, you might see someone with higher cheekbones than usual or someone with the epicanthine fold at the corner of his eyes and you might speculate that his remote ancestor had been one of Attila's Huns, but otherwise absorption of the race was complete."[188] Similarly, it was predicted that, while 'some of the population would be a little duskier than others, [indigenous and non-indigenous Australians] would really be indistinguishable from one another" in the course of a few generations.[189] This is a curious bureaucratic position to arrive at. Agriculturalist settler populations were particularly hostile toward towards aboriginal people.[190] White people in urban communities had contact with indigenous people (and this is still the case at the end of the 90s) which was limited to those dispossessed aboriginals (many of whom had been driven there by exclusion from the reserves) who lived in shanties on the fringes of rural towns like Theodore, where I was raised. Aboriginal people had uniformly low status across the spectrum of dominant

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[188] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988) at 29.

[189] *ibid.*

[190] This hostility persists into the present. My younger sister recently took a job with the North Queensland Land Council, an organisation which is run by and advocates the interests of indigenous people, and found herself the subject of negative community reaction as a result in our hometown in rural central Queensland.

cultures and populations, yet their adminsitrative caretakers did not take this into account in the pursuit of their assimilation project. Reynold characterizes white Australia before the 1940s as obsessed by colour; that is, by fear of invasion from the North, or the Yellow Peril; of swamping by immigrants, arriving from Mediterranean Europe in the wake of World War I; and of the growth of the half-caste population in North Australia.[191] Forcing aboriginal people into the fringes of white society in this climate, the same climate which sustained the notorious White Australia Policy,[192] was in no sense an act of administrative mercy, and it is difficult to see how the authors of assimilation policy could have been convinced of the benevolence of their undertaking in light of the evidence, visible in the towns and the reserves, that it was in fact the mother of cruelty.

The separate governments charged with "protecting" indigenous populations unified their policy approach in 1937, when senior administrators met in Canberra to discuss the aboriginal question. Aboriginal populations are concentrated in Western Australia, the Northern Territory, and Queensland, and the 1937 Conference of Commonwealth and State Authorities on Aboriginal Welfare, convened by the federal government and attended by representatives of all states except Tasmania,[193] was dominated by the Chief Protectors of those three regions. AO Neville, Dr Cook and JW

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[191] Reynold, Henry, *Dispossession: Black Australians and White Invaders* (Sydney: Allen and Unwin, 1989) at 205.

[192] The White Australia Policy, abolished in the 1960s, was the child of anti-Chinese immigration laws passed in response to riots directed at Chinese immigrant workers on the Australian goldfields in the nineteenth century.

[193] Tasmania denied until the 1960s that it had an indigenous population, and pursued an aggressive policy of segregation during the period when other jurisdictions emphasized assimilation.

Bleakley respectively presented his own theory, developed over long periods in office dealing with the daily minutiae of controlling aboriginal life under the protection schemes. The conference was impressed in particular by Neville's idea of absorption, and his focus on the education of half-caste children as the best means of achieving it. The Brisbane *Telegraph* reports from the conference:

> Sixty years ago, [Mr Neville] said, there were over 60 000 full-blooded natives in Western Australia. Today there are only 20 000. In time there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying. The pure blooded aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of twenty and upward...therefore the idea was to keep the pure blacks segregated and absorb the half-castes into the white population.[194]

Victoria had been implementing a forced assimilation policy for 'half-castes" since 1910. In Queensland, the Chief Protector of Native Affairs from 1913-1942 was JW Bleakley, a segregationist who had made such extensive use of the reserve system that by the 1930s fully a third of indigenous people in the state were living on reserves. Apparently enduring a crisis of conscience in 1928, Bleakley recommended that racially mixed children be taken off the reserves.

> Often the white people came - we didn't know who they were - would come into our camps. And if the aboriginal group was taken unawares, they would stuff us into flour bags and pretend we weren't there....we knew if we sneezed...we'd be taken away. During the raids on the camps it was not unusual for people to be shot - shot in the arm or the leg. You can understand the terror that we lived in, the fright - not knowing when someone will come unawares and do whatever they were doing - either disrupting our family life, camp life, or shooting at us.[195]

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[194] cited in Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 30.

[195] Woman surrendered at 5 years to Mt Margaret Mission for schooling in the 1930s. *Ibid.*, at 26.

His concern with 'rescuing half-caste children from the camps and sending them to a home for care and education",[196] expressed as policy in Queensland, had so impressed the Commonwealth Government (which had jurisdiction, as will be recalled, over the indigenous people of the Northern Territory) that it commissioned Bleakley's assistance in undertaking a review and report of the Territory's aboriginal administration to guide policy there. This report emerged in 1933,[197] and resembled closely the position arrived at by the National Missionary Council of Australia during its conference in the same year. In 1937, the assimilationist approach of the most influential of the Chief Protectors (AO Neville, Dr Cook and JW Bleakley) won the day, and the conference agreed that 'the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption."[198] Full bloods were to be educated if 'detribalised", and uncivilised natives were to be preserved as far as possible in their 'normal tribal state", though Hasluck, who attended the conference and whose service to the aboriginal community would later earn him the high office of Governor-General, writes in 1988 that 'it was implicit that eventually [tribalised aboriginals] too might be assimilated after a long transitional period

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[196] J.W. Bleakley, *The Aboriginals and Half-Castes of Central Australia and Northern Australia*, cited in Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) , at 58.

[197] Australia, Department of the Interior, *Aboriginals: Commonwealth Government's Policy in Respect of the Northern Territory* (Canberra: Government Printer 1933). Cited *ibid.*, at 249.

[198] Conference proceedings, cited in Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 32.

of several generations",[199] during which time they would presumably have been civilised in the benevolent surrounds of the reserve.

This policy statement formalised and unified the aboriginal policy position of each of the jurisdictions, effecting an increased commitment to assimilation, at least for children of mixed descent. Discussion before the policy was articulated revealed that the 'knowledgeable" [200] officials who attended the conference did not have "a common experience"[201] of aboriginal Australia. Diverse economic, climatic, even racial conditions caused uncertainty as to how to address the aboriginal problem, and this uncertainty reared its ugly head at the conference. It is worth noting here that contemporary statements by officials from the respective administrative bodies reveal a level of engagement with indigenous realities and subjectivities that obscures the possibility of considered debate over how best to proceed with the task of reconciling the traditional owners of the land with their colonial masters. Western Australia in the early 1930s was the locus for example of allegations of aboriginal slavery and mistreatment, and abuse of Aboriginal women. These appeared in the local and international press, including articles by Mary Bennett, who focused her attention on the administration of aboriginal affairs. The Western Australian Government responded by establishing a Royal Commission into the Conditions of Aborigines, headed by a Perth magistrate, HD Moseley. The Moseley

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[199] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988) at 69.

[200] *ibid.*, at 67.

[201] *ibid.*

Commission heard evidence which was highly critical of the practice of removing half-caste children from their mothers, but was persuaded by AO Neville's response, which was emphatically to invoke the best interests of the children. The Commission also heard evidence from Dr Cyril Bryan, who suggested that 'miscegenation", or 'breeding out the black" was the solution to the problem of Aborigines in Australia. Moseley went on to recommend the extension, rather than the diminution, of the Chief Protector's powers over all people of part or full aboriginal descent.

The good men of the respective Departments of Aboriginal Affairs struggled with their task of unifying the diverse problems of aboriginal despotism into a single policy position, however; and the resounding successes of the 1937 conference, which unified the provincial policies on the basis of the forcible assimilation of children of mixed descent, were repeated in 1951, at the first meeting of federal and state Ministers concerned with aboriginal affairs. The policy statement which resulted demonstrates an interesting shift in language. The discourses of race and protection have been blunted by the rhetorical force of rights discourse in a belated attempt by the State to honour its commitment to the ideals of liberal equality. From 1951, "all aborigines shall attain the same manner of living as other Australians, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and being influenced by the same beliefs, hopes, and loyalties."[202] The language of miscegenation and assimilation had been replaced

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[202] Native Welfare Meeting of Commonwealth and State Ministers held at Canberra, 3-4 September 1951, cited in Lorna Lippman, *Generations of Resistance: The Aboriginal Struggle for Justice* (Melbourne: Longman Cheshire, 1981) at 45.

following the horrors of Nazi racism by a less penetrable discourse of integration and equal rights. Lippman notes the more positive aspects of this policy shift, such as increased emphasis (at least notionally) on access for indigenous people on and off the reserves to health, education, and housing;[203] however the experience of indigenous Australia in this period belies the fine words of the policy documents which expressed the benevolent aims of the State. The rate at which children were being removed from their families actually increased in the 1950's and 1960's.[204] The universe which lies between the official account of child removals and the reality of child thefts is emblematic of the gulf between the benevolent discourses of the State and the coercive actions which it justified on the basis of those words. Paul Hasluck's memoirs[205] are redolent with his concern to relieve the pressing social problems faced by his wards, but there is manifestly lacking in them any cognisance of the role that he and his department might have played in creating those problems in the first instance, or of the incongruence between his account of departmental programs and the nature of the services which aboriginal people actually received on the reserves. AO Neville is similarly unable to form an opinion untainted by the subjective self-interest of the liberal State who paid his wage:

> When Mr Neville said the government were going to build houses we thought they'd be proper houses. But these were just tin shacks. They built them out of a few sheets of corrugated iron knocked together into two rooms. There wasn't any lining on the walls and they didn't even reach all the way down to the ground. There was a gap of about eight inches between the floor and where the

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[203] *ibid.*, at 39.

[204] Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 34.

[205] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988). See for example his discussion of assimilation policy in Chapter 4 of that text.

wall began, so the wind used to tear through. The floor had no covering, it was just dirt, and I didn't like the idea of that for the kids.[206]

Instead there is a steadfast belief in the right to formal equality of indigenous and non-indigenous Australia, expressed as a goal of aboriginal citizenship, alongside an equally unshakeable faith in the inferiority of the "darker skinned races":

> Men are simply not equal...they are (not) the same as one another. I do not believe in equality in that sense...any more than I believe that all the horses in any race will finish in a straight line. The only equality I consider possible is equality before the law and equality in the rights of citizenship.[207]

Child removals: `they soon forget their offspring'

'No dominant political order is likely to survive very long if it does not intensely colonize the space of subjectivity itself."[208] The subjectivity of aboriginal Australia was the hearth of resistance to the expanding colonial order, so that destruction of that subjectivity, of the possibility of aboriginal identity cast in terms of the political and proprietary entitlement which would flow from cultural unity, formed the basis of attempts to make aboriginal Australia white. Central to assimilation policy and the legislation which enabled its enforcement was the acculturation of the child of mixed descent, or the theft of her subjectivity.

> We were told our mother was...a prostitute and she didn't care about us. They [foster family] used to warn us that when we got older we'd have to watch it because we'd turn into sluts and

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[206] Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) at 63.

[207] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988) at 127.

[208] Terry Eagleton, *The Significance of Theory* (Oxford: Basil Blackwell, 1990) at 36.

> alcoholics, so we had to be very careful. If you were white you didn't have that dirtiness in you...It was in our breed, in us to be like that.[209]

The putative promiscuity of aboriginal women and girls, certainly a function of gender, bears on the extent of psychological and sexual abuse in institutions (in which one in ten girls allege sexual abuse)[210] and foster placements (in which three in ten girls allege sexual abuse).[211] Gender determined also which children were taken, and how they were treated once they had been removed. The regulation of female sexuality was central to a program of 'biological" assimilation, so that in NSW for example 81% of children removed up to 1921 were female, a preponderance which had not significantly changed by 1936.[212] Similar patterns are described in the Northern Territory. At Kahlin Compound, a training institution for girls and boys established in 1913 the boys were free to roam around outside but where 'the girls had to be locked up in dormitories like birds in a cage."[213] Children born to unmarried aboriginal mothers were a likely target for the intervention of the State: since 'there was a tendency to regard any child born out of wedlock as likely to become a neglected child....it was thought to be in the best interests of the child that it was seen as an orphan rather than a bastard"[214] and the removal and

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[209] Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 157.

[210] at 163.

[211] *ibid.*

[212] *ibid.* at 43.

[213] *ibid.* at 133.

[214] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988) at 16.

institutionalisation or fostering out of the child was seen to prevent that imminent state of neglect in an approach which discovered still more territory for the regulation of aboriginal women's sexual lives.

Other gendered notions of aboriginal people prevailed to the detriment of indigenous women. The nature of aboriginal mothering was demonized for instance in the popular press by Daisy Bates, a self-styled expert on aboriginal life and 'a public figure of increasing stature in the 1930s" to whom a brain of incisive brilliance and a command of more than 100 aboriginal languages was attributed.[215] She gained fame with her stories of aboriginal depravity, and her rapt audience thrilled to tales of cannibalistic practices towards children:

> "The women quite frankly admitted to her that they had killed and eaten some of their children, for they liked 'baby meat'. Bates wrote that 'a frightful hunger' for baby meat overcame mothers. Babies were also killed when a young boy was in poor health; a baby was killed and cooked, and the fat of the baby was rubbed all over the boy, who ate his sibling 'in the morning and the evening until it was all finished, and he had become strong again, and grew fat and big'"[216]

Cannibalism in Australian and North American aboriginal people is in fact a figment of the colonial imagination. It is a literary conceit deployed by Nobel Prize winner Patrick White in *A Fringe of Leaves* as late as 1976, and figures too in the poetry of Duncan Cambell Scott, whose Onondaga Madonna's 'rebel lips are dabbled with the stains of feuds and forays".[217] It is to baseless and sensationalist pandering to the

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[215] The Melbourne *Age*, 15 September 1956; cited in Andrew Markus, *Governing Savages* (Sydney: Allen & Unwin, 1990) at 42.

[216] D. Bates, *The Passing of the Aborigines*, (1938) cited *ibid.*, at 44.

[217] cited by Titley in *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 31.

imperatives of Empire that settler culture owes these three examples of racialized misogyny.

Bureaucratic analysis of the nature of the relationship between the aboriginal mother and her child varied, depending on the aims and the self-styling of the administrator. One of the early local Protectors in Western Australia, James Isdell, wrote that he would "not hesitate for one moment to separate any half-caste from its aboriginal mother, no matter how frantic her momentary grief might be ...they soon forget their offspring."[218] It is difficult to reconcile such an approach with any appreciation of the humanity of aboriginal peoples. AO Neville, on the other hand, cites the "tremendous affection for their children" of "coloured races all over the world" in the same document as that in which he assures the 1937 conference that while he initially had some trouble with the mothers of quarter-caste children placed in homes, after a while they were "usually content to leave them there, and some eventually forgot all about them."[219]

> Separating her from me was a grill. There was chicken wire across there...I can remember sitting here at this grill waiting for her to come out of the door of one of these wards here so that I can just see her. She wouldn't come out because it hurt her to see me.[220]

Administrative authority was built it seems on a bare assertion of expertise, with tragic consequences for familial relationships and the survival of indigenous cultures.

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[218] Cited in *Bringing them home* at 104. No date is supplied, however the context would situate it between 1906 and 1909.

[219] Conference proceedings, Conference of Commonwealth and State Aboriginal Authorities, Canberra, 21 to 23 April, 1937; cited in Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 44. No page number supplied.

[220] Australia, *Bringing them home*: *Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 82.

> My parents were continually trying to get us back. Eventually they gave up and started drinking. They separated. My father ended up in jail. He died before my mother. On her death bed she called his name and all us kids. [221]

Removal of children of mixed descent in the name of racial and cultural assimilation was a cornerstone of State policy on aboriginal people from the early years of the twentieth century. It was a practice which incurred criticism throughout its history, criticism which took on the language of human rights shortly after World War II, when the Government Secretary advised that child removals might violate 'the present conception of human rights and to outrage the feelings of the average observer."[222] In October 1951, the President of the Aborigines Advancement League received widespread publicity when he described child removals as "cruel" and "the most hated task of every patrol officer".[223] This is a view which is supported by Ted Evans, a patrol officer who was later to be a senior administrator in the Northern Territory. In 1982, Evans wrote:

> In 1950 I was given instructions to remove a total of seven children. Despite my efforts to assuage the fears of both the mothers and the children, the final attempt at separation was accompanied by such heart-rending scenes that I officially refused to continue to obey such future instructions.[224]

Evans was in a minority in the Territory, administered from 1951 by Paul Hasluck, who instituted a welfare administration for the Northern Territory which Armitage describes as unsurpassed in the thoroughness with which it applied the policy of

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[221] Confidential submission 106, New South Wales: woman removed at 11 months in the late 1950s with her three siblings; children fostered in two separate non-indigenous families. *Bringing them home*, at 213.

[222] *Bringing them home*, at 142.

[223] *ibid.*

[224] Ted Evans, "The Mechanics of Change", *Nelen Yebu* 12 (1982) 3-11, cited in Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 59.

assimilation.[225] Hasluck's view of the matter is unambiguous: the test for removal, he writes in a minute of 12 September 1952, is "simply what action is likely to be conducive to a happy future life for the child."[226] A 1953 enquiry into conditions at the Rhetta Dixon Home, operating in the Northern Territory during Hasluck's tenure, concludes on the basis of the emotional and physical abuse rife in the institution, that '[t]he home...is a failure."[227]

The happiness of that future life was in fact severely compromised by the system of forced removals, and *Bringing them home* documents study upon study which links childhood separations with increased incidence of alcoholism, inability to form close relationships with other people, suicide, delinquency, incarceration, mental illness, and retarded learning and cognitive skills.[228] This is the human face of assimilation policy, and its name is misery.

> I've seen the old lady four times in my life. She's 86 years old. We were sitting on the bench [the first time]. I said, "I'm your son". "Oh", she said, and her eyes just sparkled. Then a second later she said, "You're not my son." Well mate, the blinking pain. Didn't recognise me. The last time she saw me I was three years old.[229]

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[225] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995) at 59.

[226] Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925-1965* (Melbourne: Melbourne University Press, 1988) at 121.

[227] cited in *Bringing them home* at 143.

[228] see c. 11, at 177-232.

[229] Australia, *Bringing them home*: *Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 236.

The Church

As in Canada, the role of the Churches in the forced removal of aboriginal children was both crucial and complex. Church leaders formed the core of the small group of humanitarian advocates of aboriginal welfare in Australia, a role which they have yet to relinquish.[230] Church representatives were influential in the formation of State policy, and it was they who lobbied the Commonwealth in the early years after federation in 1901 to exercise jurisdiction over aborigines informally through the conditions it attached to fiscal grants made yearly to the states. In addition, it was missionaries, acting in concert with the scientific lobby, who persuaded provincial governments and the federal government to increase the size and number of reserves.[231] While the reserves were intended to be inviolable in the sense that the Protector had the power closely to monitor movements into and out of them, (in the interests as I have demonstrated of either segregation or assimilation, or both) the close historical relationship between aboriginal welfare and church groups across the British Empire made missionary activity on the reserves as welcome by the Protectors as it was inevitable. Missions were established permanently on some of the reserves, and their principle focus was on the children. Church organisations had not yet lost the sympathetic mould into which they had been cast for a millennium by European elites in respect of the task of overseeing the religious and moral development

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[230] In 1997, the Australian Council of Churches earned the wrath of the Federal Government by placing full page advertisements in the national daily protesting the government's unsympathetic handling of aboriginal entitlements to land.

[231] Andrew Markus, *Governing Savages*, (Sydney: Allen and Unwin Australia, 1990) at 67.

of children, a task of benevolent influence to which they were seen as peculiarly suited in the context of aboriginal people, whose poverty and dispossession automatically made them the proper subjects of the ministrations of religious organisations. The Commonwealth Minister for the Interior made a statement in the Lower House in 1939 to the effect that religious training was essential to the project of training aborigines to respect white law, authority, and property, and that missions would fulfil this function on the reserves.[232] The reputation of religious orders as educators of children and as dispensers of mercy to the poor ensured their participation in the program of assimilation, even when it meant the disruption of the bond between parent and child, which Christianity apparently conceives of as sacred only if a white mother and a white father are involved.

> I think this is the one main thing I'm bitter about today, depriving me of my father. It just makes no sense. They wanted me to have white people's ways, yet they denied me my [white] father. How does that make any sense?[233]

In Chapter II I discussed the economic advantages in the abdication by the state of responsibility for children insitutionalised under its auspices. This dynamic is also operative in the Australian context, and must have weighed heavily on financially straitened Boards of Protection. This holy alliance between the Church and the State in regulating aboriginal life manifest itself not only in the establishment of missions on the reserves, but also in the delegation of administrative responsibility by Protectors to

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[232] Lorna Lippman, *Generations of Resistance: The Aboriginal Struggle for Justice* (Melbourne: Longman Cheshire, 1981) at 35.

[233] Alice Nannup, Lauren Marsh and Stephen Kinnane, *When the Pelican Laughed* (South Fremantle: Freemantle Arts Centre Press, 1992) at 51.

missionaries, who were then empowered to exercise disciplinary authority over aboriginal people within the confines of the reserve-based missions. In addition to State aid for reserve-based missions, grants of land and funding for schools and teachers were also made to missions established off the reserves, so that the partnership between the Church and the State in intervening in indigenous life might be characterized as successful to the extent that it was well-established and highly effective. The benevolent regard with which the State viewed religious organisations was not shared by Aboriginal people, who did not view the Churches in quite the same terms, since the zeal to convert was at the heart of missionary programs on the reserves which were aimed at the disruption of aboriginal culture; and many of the institutions into which children were removed were run by religious organisations. The missionary concern with the minds and souls of the children at the expense of their connections to their people and their land earned for the missionaries "an evil reputation among Aborigines as people who stole children."[234]

Institutionalisation

Four in five (81%) of witnesses to the HREOC Inquiry had been institutionalised in childhood,[235] so that it is fair to conclude that institutionalisation was the first offensive in the arsenal of weapons deployed against the aboriginal family by the State. The several jurisdictions varied in the institutional models which they implemented to receive the

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[234] Henry Reynold, *Dispossession: Black Australians and White Invaders* (Sydney: Allen and Unwin, 1989) at 170.

[235] *ibid.*, at 187.

children they removed, and in the extent to which those institutions were even subject to regulation. The institutions into which the children were placed varied depending on location and on the whim it seems of the Chief Protector. The administrative ideal was to have all aboriginal children in institutions. Off the reserves, these included 'homes" like Sister Kate's in Western Australia, the Retta Dixon Home in the Northern Territory, St. Joseph's Orphanage in Western Australia, and Colebrook Home in South Australia, all of which were run by Churches.

Children removed from the reserves and from their families living off the reserves found themselves in homes for aboriginal children, such as Cootamundra Girls' Home in NSW, and The Bungalow in the Northern Territory. Jurisdiction over these homes reflected the complex pattern of the legislative and policy schemes in place nation-wide - some homes were set up and run by the Churches in partnership with the Protection Boards; some were run by the State; some by humanitarian organisations whose willingness to take in children orphaned by an act of the State was credential enough. In Victoria in 1957 there were at least 68 institutions managed by 44 different non-government agencies[236] in which aboriginal children had been placed. State-run training institutions featured as an alternative to work placement programs, in an arrangement which mirrors the Canadian industrial schools, where girls learnt to keep white house and boys learned to farm their native land.

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[236] Australia, *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 62.

Recollections of the homes by the children detained in them vary depending on the conditions which obtained in them and the treatment the children received. There are in fact positive accounts of childhood in institutions, accounts which are limited to two specific institutions, during the tenure of specific supervisors.[237] Like the residential school in the early years of its operation, these homes were intended for younger children, who were then placed in certain work programs by the Protection Boards in early adolescence. The nature of the work depended as in the Canadian context on gender. Girls were often the subject of domestic placements with white families, while boys were sent to stations to work as agricultural labourers. This work was poorly paid - the Protection Board was entitled to the bulk of wages earned by its charges, which it held in trust until that charge turned 21 - and the children badly treated. One in ten girls placed in work programs alleges sexual abuse.[238] Resulting pregnancies invited the intervention once more of the system of forced removals, so that generations of children were removed in a cycle of separations, and in a legal and political environment where there was no redress, no where to run to, nothing to do but to endure.

> It has been known for years that these unfortunate people are exploited. Girls of 12, 14 and 15 years of age have been hired out to stations and have become pregnant. Young male aborigines who have been sent to stations receive no payment for their services...Some are paid as little as sixpence a week pocket money and a small sum is retained on their behalf by the Board. In some instances they have difficulty later in recovering that amount from the Board.[239]

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[237] *ibid.*, at 169.

[238] *Bringing them home*, *op.cit.* at note 62, at 164.

[239] Speech in NSW Parliament, 1940, quoted in NSW Government Submission to the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. See *Bringing them home* at 164.

The proportion of aboriginal children in institutional care was dependent on the resources available, and the basis on which they were removed into them depended on the fluctuating vision of race which animated the policies of assimilation. Light-skinned children could be raised in those institutions, or kept in them until they could be fostered or adopted into white families; and dark-skinned children could be kept in them away from the pernicious influence of their aboriginal forebears (even if no white family was prepared to foster or adopt them). Administrative zeal and institutional capacity were not always well synchronised, however. In NSW in the late 1930s, when the number of stolen children exceeded room in Protection Board institutions, the Board's response was to increase its reliance on the Children's Court. Children deemed "uncontrollable" by that court became the responsibility of the Child Welfare Department, under whose auspices State corrective institutions such as Parramatta Girls Home were run. Skin colour was in this period unofficially an offence for which a child could be incarcerated.

On the reserves, reliance was placed on dormitories to moderate carefully the traditional function of the elders, who were the repositories of knowledge about the old ways. These were strictly segregated by gender, and were often set up on the fringes of the reserves. Children born on the reserve were kept apart in this manner from the rest of the reserve community, including the elders and the children's mothers, after the children reached the age of about four years. The lack of funding which all of the institutions had in common meant that the conditions which prevailed in them jeopardized the health, physical and emotional, of the children for whom institutional life was the norm; and made nonsense of the administrative argument that removal of children was in their best interest.

The girls' dormitory at the Hermannsburg Mission in the Northern Territory is described in 1923 as an airless dungeon in which 30 girls weather hot nights cramped in together;[240] and the abuse by institution supervisors which is the result of conditions of extreme overwork, attitudes of racial superiority, and lack of training was a feature of child institutionalization. The Moore River school in Western Australia allegedly flogged its inmates during the 1950s with a cat-o'-nine-tails, now held in the WA museum.[241] *Bringing them home* has attempted to cite part of every evidence it received from a stolen child. The accounts of institutional abuse in the report make for shocking reading.

Bureaucracy

In Chapter I I scrutinized the falsely universalised liberal subject, calling for a methodology which asks "whose interests are being served?" instead of "who makes the better claim to the good?". In the present Chapter, this latter assertion of a privileged epistemology resurfaces in the legislative and administrative elision of the best interests of indigenous people with the best interests of the colonial and post-colonial State[242] in Australia and Canada. This analysis lends insight into the reliance by bureaucratic agents such as Paul Hasluck and his dedicated band of officials on the "best interests" of the aboriginal child as a justification for removing her. Whose interests are being served? The

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[240] *ibid.*, at 139.

[241] *ibid.*, at 159.

[242] In this part of the paper, I continue to use the term "State" consistent with my analysis in the preceding chapters, that is, to comprehend apparatus such as the legislature and the executive, as well as the police, the Church, and bureaucratic and educational institutions.

national interest; defined within the gilded walls of a political apparatus to which indigenous people have no entree.[243] The oppressive power of the universal reveals itself in this emphatic silencing of aboriginal subjectivities. Evidence (available from the end of the nineteenth century) that institutionalisation left lasting scars on children[244] was ignored in the State's dual project of disciplining aboriginal life and childhood in a manner which was consonant with its own interests, and at the same time of rendering it in language which made invisible the chasm between the cherished ideals of liberal society (freedom, equality, democracy) and the carceral archipelago in which aboriginal peoples had been confined.

Menno Boldt has argued in the Canadian context that this conception of the national interest renders irrelevant the contributions of atomised State actors such as ministers or bureaucrats[245]; however, the views of administrative agents such as the Protectors who were instrumental in the development and enforcement of assimilation policy, were crucial in the regulation of indigenous life in Australia earlier this century. The Protectors did not always coincide. Boldt's insight into the collective nature of the colonial ideal is useful, however, in arriving at an understanding of the political and discursive context which produced those views. Bureaucratic difference over whether aboriginal people should be assimilated or segregated is a tension founded on oppositional

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[243] Menno Boldt, "Policy", c. 2 in *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993) 65 at 72.

[244] *Bringing them home*, at 189.

[245] *ibid.*, at 76.

conceptions of aboriginal disappearance and how it might best be achieved, working always within the framework of a State which has convinced itself of its own benevolence. The point of departure is always the same, and that point is the exclusion of black Australian subjectivities from the white settler society which lay claim to its lands in 1788 by planting a flag which flowered into genocide.

The plenary powers of Boards of Protection exaggerated the golem-like[246] tendency of bureaucratic regimes to take on autonomous characteristics beyond the intention and influence of their State creators. The schemes of Protection founded invasive bureaucratic powers which enabled a Queensland Protector to write with pride in 1959 that "we know the name, family history and living conditions of every aboriginal in the state".[247] While this is an almost universal feature of modern western capitalism, this program of surveillance was unique in the case of aboriginal people in 1959: white people did not suffer the same intrusion. If the legal scope of the power over aboriginal life was virtually limitless, the margins beyond that scope shrank correspondingly:

> My grandmother was taken from up Tennant Creek [in the Northern Territory]. They brought her down to The Bungalow [at Alice Springs]. Then she had Uncle Billy and my Mum to an Aboriginal Protection Officer. She had no say in that from what I can gather.[248]

That intimate knowledge in the colonizer of the colonized was accompanied by an estrangement of subjectivities between the two which has characterized the relationship

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[246] Thanks to my colleague Margaret Hall for suggesting this image, a Jewish mythological figure which assumes a mischievous life independent of its creator.

[247] Australia, *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 81.

[248] *ibid.*, at 147.

after contact between indigenous people and European settlers. This presents a paradox: marginality's knowledge of the centre is inversely proportionate to the extent of the power which the centre exercises over the margins.

While indigenous peoples' ways of looking at the world emphasize, although to varying degrees, connection and relationship, European worldviews have valorised autonomy and atomisation. Bureaucracy is the response of the State to that atomisation, because bureaucracy is the outcome and the means of estrangement between the ruler and the subject, and moral reasoning becomes distorted, even perverted, in a political arrangement where an appreciation of consequence is disrupted along a line of command. By this I avert to the multiple actors who are involved in this political relationship - in ascending order, crudely, there is the indigenous child and its community, the patrol officer responsible for the taking of the child, the caretaker in the holding institutions, the Protection Board and its officers, the Churches, and the legislature. In the Canadian context, there is the child and community, the residential school staff, the DIA, the Churches, and the legislature. It is connection and a willingness to engage with the subjectivities of the other, *especially when it is Other*, which make visible the pain which results in the one because of the actions of the Other. Where the Protector decides on a course of action, the Legislature approves it, the Protection Board and staff in the holding institutions facilitate it, the police officer enforces it and the child is the subject of it, the pain of the indigenous child, and any sense of responsibility for having caused it, is rendered invisible, and a test for removal which speaks the language of that child's future *happiness* becomes inevitable. A patrol officer who hates his task of taking children from

the arms of their mothers because it is counterintuitive does not see his actions in *moral* terms because the directive to take those children comes from a source which he is conditioned to see as authoritative. In this sense, the colonizer and the colonized begin to resemble each other: one is the dupe of the mythology of atomism, the Other is its victim; and colonization is an assault on the humanity of the one who holds the power as well as the one who is the subject of it.

The other actors in this historical episode, that is, those other than the child, are conversely removed from the consequences of policy enforcement so that a directive, based in an administrative policy, and its outcome, that is, the act of removal, can coincide in neither spatial nor in discursive terms. The chain of cause and effect which is the basis not only of moral reasoning but also of subjective engagement is broken. Balint is right to emphasize the importance of community in her work on genocide, and, recognising the estrangement which is the mother of widespread killing, suggests "a notion of being in community....hear[ing] the Other, to know no stranger, to absorb, to reflect, to listen, to hear, and to act. Every other person is basically you."[249] This approach not only points to the connectedness which is the prerequisite of Balint's anti-genocide community; it puts us on notice that there is no magic in having been born into a Jewish or an SS family in Nazi Germany, or an aboriginal or white family in Australia - we are all human, and it is the denial of this common humanity which is the silent justification for genocide and the premise on which atomism is built.

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[249] Jennifer Balint, *Towards the Anti-Genocide Community* (1994) 1 Australian Journal of Human Rights 12 at 21.

Since law concerns itself with speaking to suffering, ("remedies" for "wrongs"), and since the bricks and mortar of the bureaucratic State (especially as it has revealed itself in its dealings with indigenous children) obscure the suffering which is the reasonably foreseeable outcome of the actions which that bureaucracy facilitates, to speak of law as the champion of the weak in this instance is a fiction. "Our legal institutions do not hear the voices of the oppressed....Yet it is these same institutions that we nominate as their protectors."[250] The legislative regime which gave State sanction to the Boards of Protection was not without legal challenge,[251] however an examination of the role of the courts in the removal of aboriginal children demonstrates a failure in the judicial system to safeguard the rights of aboriginal people from hostile State apparatus:

> Early one morning in November 1952 the manager from Burnt Bridge Mission came to our home with a policeman. I could hear him saying to Mum: "I am taking the two girls and placing them in Cootamundra Home." My father was saying, "What right have you?" The manager said he can do what he likes, they said my father had a bad character...as he associated with aboriginal people. Next morning we were in court. I remember the judge saying, "those girls don't look neglected to me." The manager was saying all sorts of things. He wanted us placed in Cootamundra Home, so we were sent away.[252]

Conclusion

Assimilation policy in Australia between federation and the change of government in 1972 was enforced through the mechanism of the law. It was the legislative regimes of

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[250] *ibid.*, at 36.

[251] In *Bray* v *Milera* 1935 SASR 301 the South Australian Supreme Court upheld a regulation passed pursuant to the Aborigines Act 1911 (SA), which gave the Chief Protector absolute discretion to remove an aboriginal half-caste from a reserve of institution.

[252] Australia, *Bringing them home*: *Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sterling Press, April 1997) at 53.

Protection[253] which enabled the State legitimately to exercise its power over aboriginal people. If the State is the locus of the legitimate use of coercive power, then law is the means by which that power is held in check. In particular, it is the weak and the dispossessed who are the proper subjects of law's protective power; indeed, it is this function which was invoked in the "protection" legislation which made child removals lawful. This distortion of the legitimate role of the State and its use of coercive power, and the use of legal means to oppress rather than to protect indigenous people and their children, point to the self-interested nature of political power, in this context as it relates to the traditional owners of land in settler societies. The common interests of the apparatus of State power produced, through the enforcement of assimilation policy, a police State in which power over aboriginal life was vested in bureaucrats beyond the reach of the law, so that the claims of law to justice and to impartiality may be seen in this context at least as white lies. Justice is neither blind, nor colour-blind. Since assimilation is aimed at the disruption of indigenous culture, and since it is children who are the empty vessels of culture, it was children and their parents, especially their mothers, who bore the brunt of that administrative lawlessness. Forced child removals continue into the present through the interventions of the welfare State and the juvenile justice system in Australia. An attempt to engage with the subjectivities of the aboriginal child taken by the agents of assimilation might lead us to a deeper understanding of State interests in those removals, and an end to State-sanctioned child theft in the modern context.

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[253] discussed *supra* at 76 ff.

CHAPTER IV: INTEREST, CONCEALMENT, BENEVOLENCE: ABORIGINAL SUBJECTIVITY IN SETTLER LAW AND CULTURE

The unitary character known as "the white man" has never existed, nor has "the Indian"....Indians, Hispanics, Asians, blacks, Anglos, business-people, workers, politicians, bureaucrats, natives, and new-comers, we share the same region and its history, but we wait to be introduced.[254]

Introduction

In this part of my thesis, I return explicitly to the question of genocidal intent. I will atempt to contruct in this chapter a rebuttal to the settler defence of benevolent intent. In the preceding two chapters, I gave accounts of the effects of removal policy which contradict the official position that the policy was in the best interests of aboriginal people. I go on now to broaden my account to situate aboriginal child removals within a larger project of European settlement in Australia and Canada, settlement which took place at the cost of aboriginal connections to their traditional lands and their cultures. This context is at the heart of the mistreatment of aboriginal children at the hands of the settler State and its allied institutions.

> I am an Indian, and these are some of the things that being an Indian has entailed for me. What has happened to me as an Indian will never happen to you.[255]

Those harms can find no redress in the law, however, until law's subject becomes acquainted with them.

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[254] Patricia Nelson Limerick, *The Legacy of Conquest*, at 349, cited in Lyman H. Legters, "The American Genocide" in Fremont J. Lyden and Lyman H. Legters, *Native Americans and Public Policy* (Pittsburgh: University of Pittsburgh Press, 1992) 101 at 109-110.

[255] Noel Dyck, *What is the Indian 'Problem': Tutelage and Resistance in Canadian Indian Administration* (St. John's, Newfoundland: 1991) at 22.

The position of settler benevolence is emblematic of law's self-myth of neutrality. When law accepts the position of settler benevolence, then that position gives content to a standard of legal intent. Settler benevolence, then, is very much a legal question in the context of making the charge of genocide stick to histories of aboriginal children removal. A legal position which accepts the notion of settler benevolence (which includes the present contention that 'the (misguided) standards of the time" are sufficient to prevent a finding of legal intent) chooses between the competing narratives of settler and aboriginal histories. I argued in Chapter I that this is inevitable, that adjudication can never be without privileging one subjectivity over another. What I am interested in here is the discourses which the law and culture mobilise in order to conceal the choices they make and the biases that they hold. What accounts for this divide between the neutrality of the subject, and the partisan method of the law? What forces are at work in a system which is premised on one set of ideals, and whose sensibility is directed toward the contradiction of those ideals? My response to these questions is found in culture.[256] I am interested in the dynamics at work firstly to encode the interests of the people who enforce cultural practices, and secondly to hide those interests. Rather than extracting oppression from an individual intent based on transparent self-delusion, I am concerned to enter into a more

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[256] By culture I mean the beliefs, mores, and habitual practices (including the aesthetic and economic practices); as well as the formal artefacts, stories, and histories of a collectivity at a particular time and place. This definition has its origins in modern anthropological study, and has been mobilised for example by Edward Burnett Tylor in *Primitive Culture: Researches Into The Development Of Mythology, Philosophy, Religion, Language, Art, And Custom* (London: J. Murray, 1903). I am interested in culture because its concern with systems and practices is a useful starting point for the interrogation of notions such as the *a priori* real, and the objective. "Race", then, and "gender", can be constructively examined in terms of their fluctuating social contexts and implications, rather than as definitions with a single fixed meaning.

critical engagement with wider cultural forces which operate to position subjects in certain relationships with each other. I locate the origins of oppression in a cultural dynamic which pursues us into the present.

I look at law as a cultural project which encodes certain interests and which functions at the same time to conceal its bias, that is, to conceal its basic concern to privilege certain subjectivities over others. The legal subject in this approach is no longer neutral; not even facially so. Rather, the legal subject becomes a site around which these cultural codes of interest and concealment cluster and harden. My thoughts in this chapter, then, are directed firstly to an interrogation of the legal subject, and thence to the construction of a subject who has a claim to legal protection *because of*, and not despite, her colour, sex, class, or land of origin. I try to make visible the cultural codes which operate behind the white face of the neutral subject in order to reveal the tendency of any culture to prefer one subjectivity over all others. I take as my example the subjectivities of aboriginal people in the settler State. The aboriginal subject is my first port of call in the histories of aboriginal child removal, and attempts to make legal argument around those histories. Law cannot understand these events in terms of the facially neutral subject. The subject in this case is emphatically raced, gendered, and colonized. These attributes were the very basis of the invitation which settler government and semi-government agencies wrote for themselves in forcibly disrupting aboriginal private life. Since my larger project is concerned with the removal of children, and since motherhood and female sexuality are central to the legal grounds given historically for aboriginal child removals, I am particularly concerned with the subjectivities of aboriginal women. I seek to interrogate as

well as to bridge the gap between their subjectivities, and the unitary subject of law. It is in culture that are found the "dangerous supplements"[257] to the unitary legal subject which precede the visibility at law of harms such as 'the things that being an Indian [for example] has entailed for me". This visibility is the end of the myth of benevolence.

The colonial enterprise

Everything about history is rooted in the earth[258]

"There is a particular world balance of power within which any analysis of culture, ideology and socio-economic conditions has to be situated."[259]Australia and Canada are both settler States which colonized their indigenous populations. I have discussed the early colonial history of Canada and Australia in Chapters II[260] and III.[261] I am concerned now to look more closely at the cultural discourses which sprang up around these colonial histories. My immediate project is to look at the cultural matrices within which the law is given form, especially as they bound the subjectivities of aboriginal women. This approach of taking this world balance of power, (by which Chandra Mohanty means the world order

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[257] This refers to the influential text edited by Peter Fitzpatrick, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991), in which the limits of the unitary subject are critically explored.

[258] Edward Said, *Culture and Imperialism* (New York: Random House, 1993), at 7.

[259] Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 255 at 257.

[260] see Chapter II at 39 ff.

[261] see Chapter III at 117.

which is the result of European colonialism[262]) as a starting point for analysing both local and global events comes from postcolonial theory. I will take a few moments now to discuss that body of theory, before I go on to adopt its method by talking more explicitly about colonial history, in Australia and Canada. I do this in order to further my enquiry into the cultural forces at play in the construction of the aboriginal subjectivity in the settler States of Australia and Canada. My concern with the introduction of these subjectivities founds a rebuttal to the settler argument of benevolent intent.

The theoretical trends emerging from the academy in the 1980s which might be grouped under the banner of postcolonialism have in common their concern to make visible the local effects of global movement *en masse* of European populations for economic gain which have occurred over the last half-millennium. This concern with the postcolonial is developed chiefly in the writings of Third World academics working in First World universities. In countries like Australia and Canada, where the comparatively small numbers of indigenous peoples conditions the effects of the decolonising impulse and the end of European dominance is difficult to foresee, postcolonial theory has a particular concern with the continued oppression of indigenous peoples under white systems of governance - aboriginal peoples in settler States who together are known as the Fourth World. To the extent that postcolonial writing concerns itself with the situation of the now in a colonial then, it is a rich source for analyses of culture in settler States.

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[262] Colonialism means the local entrenchment of systems of governance from foreign quarters, and is a consequence of imperialism, that is, "the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory." Edward Said, *Culture and Imperialism* (New York: Random House, 1993 at 9.

Collections of postcolonial writing typically include work on indigenous peoples in settler States.[263] The distinction between postcolonial States and settler States is usefully made, however, in connection with the sheer scope of the regulatory mechanisms which make up the settler State,[264] and the corresponding potential for totalitarian intervention into aboriginal life which this implies. This potential is of especial concern for my project of exploring the disjunction between what law says and what it does, and the particular expressions of that disjunction in the settler context.

It is instructive also to situate the culture of the settler State in a particular imperial moment, that is, in the 'British century" between the Napoleonic wars and W.W.I, when a world market in agrarian products, and a capitalist labour market (formed in Australia and Canada through massive immigration) combined to demand the specialised local production of agricultural and mineral exports.[265] Ehrensaft and Armstrong call this "dominion capitalism".[266] It emphasizes the importance of land and its confiscation from its traditional owners; and sheds light on the particular methods developed by the law to

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[263] See for example Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997), and in that work M. Annette Jaimes with Theresa Halsey, "American Indian Women: At the Centre of Indigenous Resistance in Contemporary North America" at 298; and Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, *The empire writes back: theory and practice in post-colonial literatures* (London: Routledge, 1989).

[264] Daiva Stasiulis and Nira Yuval-Davis, "Introduction: Beyond Dichotomies - Gender, Race, Ethnicity and Class in Settler Societies" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 1 at 3.

[265] This discussion relates to Donald Denoon's analysis, in *Settler Capitalism: the Dynamics of Dependent Development in the Southern Hemisphere* (Oxford: Clarendon Press, 1983) cited *ibid.*, at 10.

[266] Philip Ehrensaft and Warwick Armstrong, "The formation of dominion capitalism: economic truncation and class structure" in A. Moscovitch and G. Drover, eds., *Inequality*, cited *ibid.*, at 10.

regulate the interests of indigenous people in their land. Colonialism developed in settler States with a particular interest in acquiring land from its indigenous inhabitants. This is one of the specific features of colonization in Australia and Canada. Law concretises to some extent the cultures of Empire and settler expansion in the new nations. Land is the lifeblood of Empire, and the law reflects the changing attitudes to indigenous people which followed on their refusal to surrender their traditional lands. Domestic opposition to colonial expansion, opposition based in moral as well as mercantile objections, made the British establishment and its legal system resistant initially to the legally-sanctioned disruption of the ancient connections between indigenous peoples and their lands - hence the emphasis by Britain on commerce rather than conquest, and evangelisation in the interests of benighted natives, rather than the self-interest of that State from which the evangelisers were sprung.

The British Parliament and Home Office responded to early reports of atrocities against aboriginal people[267] by directing that settler governments honour the indigenous peoples in the enjoyment of their lands. The legal culture of Britain underwent something of a transformation in the new colonial environment, however. The formal constraints which liberal notions of equality and freedom placed on the law were overtaken by the settler thirst for land, and the inability and perhaps lack of interest in the governing elites to contain the violence which this thirst incited against the aboriginal owners of that land.

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[267] The decimation of aboriginal populations in Australia following white settlement is discussed by Jan Jindy Pettman, "Race, Ethnicity and Gender in Australia" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 65 at 67.

Legal doctrines were erected to legitimate *ex post facto* the arrival of white settlers in Australia and Canada and the assumption by them of sovereignty over the lands of the indigenous peoples. In Australia, the fiction of *terra nullius* sustained via international law the argument that Australia was not conquered territory. This meant that it was empty land; that it had no inhabitants for the purposes of settler claims to land. In Canada, widespread use of treaties in the nineteenth century, a process hastened by the disappearance of means of aboriginal subsistence in the wake of settlement, formed the legal basis for settler incursions onto aboriginal land. The legal status of these treaties is still unclear. Law was the instrument of the oppressor in a historical episode where the insupportable became by increments the inevitable, and the motives of the colonizer could never be revealed as other than benevolent, heroic even.[268]

Colonial culture demanded settler access to aboriginal land, and law evolved to provide that access. Law relied at the same time on discourses of benevolence in order to satisfy the cultural and political imperatives of legitimation. The benevolence of these motives remains a persistent theme in relationships between aboriginal and white populations in Australia and Canada at the end of this century. Assertions of good

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[268] Charlotte Brontë's *Jane Eyre* (Boston: Bedford Books of St. Martin's Press, 1996) provides a good illustration of this in St John Rivers, whose missionary zeal is rendered with some sympathy, and whose call to Jane to accompany him in his journey to the dark heart of evangelical self-sacrifice in India forms her other "great temptation" (apart, that is, from the desire to become Rochester's mistress despite having learned that he keeps his mad Jamaican wife locked in the attic of his British house). The genuineness of missionary commitment to the project of evangelisation cannot be doubted: "My vocation? [St John asks.] My great work? My hopes of ...carrying knowledge into the realms of ignorance - of substituting peace for war - freedom for bondage - religion for superstition - the hope of heaven for the fear of hell?" (at 376). It is equally difficult to assail the proposition that a paternalistic and racially-based superiority complex built the fundaments of this commitment.

intentions purportedly suffice to prevent the attachment of legal liability for historical wrongs in the settler State and the Churches they sponsored.[269] Aboriginal people respond to these assertions by telling stories of mistreatment and abuse. In theoretical terms, this response amounts to a dangerous supplement to the facially neutral subjectivities of Empire. The indigenous narrative demands that the clever elision between colonial culture and colonial benevolence be scrutinised[270]; that this elision be properly characterized as an expression of the interests of colonial culture.

'Throughout this country of ours there are many places where the remains of my people lay exposed to the elements."[271] The indigenous history of colonization tells a story of death, dispossession, and resistance; and it is a history which was told by white people as well. Conrad, writing at the end of the nineteenth century, describes colonialism in terms of '[t]he conquest of the earth", and 'the taking [of the earth] away from those who have a different complexion or slightly flatter noses than ourselves".[272] This story is the obverse of the benign legal construction of British colonial expansion in its domestic incarnation. It is a history of death on a mass scale, especially on, but not restricted to, the colonial frontier where forces of law and order could not contain the assault spearheaded

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[269] See *Kruger et al* v *Commonwealth* (1997) 146 ALR 126.

[270] For a good discussion of the "benevolent motives" approach, see Roland Chrisjohn and Sherri Young, *The Circle Game* (Penticton: Theytus Books, 1997) in connection with residential schooling in Canada. This work problematises the bare assertion by the agents of colonisation, especially the Churches, that they acted (however misguidedly) in the best interests of the aboriginal children forcibly assimilated in the residential school system.

[271] Barbara Flick, "Colonization and decolonization: An Aboriginal Experience" in Sophie Watson, *Playing the State: Australian Feminist Interventions* (London: Verso, 1990) at 61.

[272] Joseph Conrad, *Heart of Darkness* (New York: Penguin Books, 1991).

by white settlers, many of them squatters, on the traditional owners of the lands to which they laid claim.[273] It is a history of aboriginal life and culture exchanged with legal impunity for land. This impunity sounded on several fronts: in the failure of the settler legal system to recognise a harm in the displacement of aboriginal people, in the corresponding formulation in the settler legal system of legal codes which positively justified the extinguishment of aboriginal connections to their ancestral land,[274] in the use of legal institutions to enforce government policies that were in discord with the basic mythologies of those legal institutions:

> The Welfare and Police told my parents that they would have to get a house, furniture, plenty of food in the cupboard and my Dad had to get a job. It was very hard in those days what Welfare put on my parents. Just couldn't happen. People wouldn't let black people have a good home[275]....At court my parents knew it was the last time they would see their kids....The kids was glad to see Mum and Dad at court. They were jumping all over them glad to see them. When the Welfare took the kids off Mum and Dad they were holding out their arms trying to stay with Mum and Dad. Everyone was crying sad. Sad. Sad.[276]

The legal invisibility of harms committed on aboriginal people sounded also in the selective enforcement of the law against its own principles so that wrongs committed against aboriginal people, even when they could be formulated in terms recognisable to the settler legal system, were not punished in the same measure they were in the context of

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[273] Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (Sydney: Allen and Unwin, 1992) at 18.

[274] The application of the international law doctrine of *terra nullius* is a good example of this.

[275] The question of aboriginal access to housing is still vexed in the present. One of my sisters recently quit her lease in Taroom, a small rural community in Queensland, Australia. On doing so, she was advised by her landlord not to advertise her imminent departure in case aboriginal people should apply to rent the house.

[276] Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander children from Their Families*, (Sydney: Sterling Press, 1997) at 209.

white victims and complainants. Similarly, aboriginal defendants were treated differently by the settler legal system.[277] To this extent, the role of settler law in the colonial enterprise is to legitimate power, rather than to check its exercise. The way that the subject is constructed is a measure of law's cultural origins - the unitary subject is consciously unraced, and the law's response to harms committed in the name of race is likewise to invoke the cultural myth of equality, or to develope a de jure response which seldom translates into a de facto transformation of practice.[278]

Legitimation belongs as much to the discursive as to the political, and the "twinning of legitimation and power" to which Said refers[279] is both a cause and an effect of the uneven political relationship between the indigenous people and the colonising powers. Foreclosed by the cold logic of the legitimating discourses which sprang up around British territorial expansion, aboriginal culture notionally submits to law and its institutions, and the emergence of further indigenous cultural narratives[280] is closely circumscribed. This is the relationship of colonial culture to imperialism - culture is a product of the need to silence the indigenous other on the one hand, and on the other of the unfettered coercive potential unleashed by the power imbalance which characterizes

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[277] The higher rates of incarceration for aboriginal people, and the discrimination they face at the hands of the criminal justice system, has been extensively documented in both Australia and Canada.

[278] Peter Fitzpatrick develops this in "Racism and the Innocence of Law" (1987) 14 Journal of Law and Society 119. This article talks about the problems faced by people of colour who have sought to rely on anti-discrimination provisions in the workplace, and found that the tribunals set up by to adjudicate those provisions are filled by people who simply discount narratives of racism in favour of employer "tiredness", for instance, or employee "difficulty".

[279] Edward Said, *Culture and Imperialism* (New York: Random House, 1993), at 290.

[280] *ibid.*, at xiii.

the relationship between indigenous peoples and settler society in both Australia and Canada.[281]

In this last section, I have attempted to make a few points about the subjectivities of aboriginal people by drawing attention to the relationship between law and colonial culture. My argument is that law understands the subject in terms of the dictates of culture. This presents a problem for a theory of the law which is predicated on the notion of a legal subject who is always neutral. The specific context to which I apply this argument is that of aboriginal women in settler States. Their subjectivities, it follows, are a function of the culture of Empire, a culture which tends to the repression of aboriginal people. I have tried to show that law has played a positive role in the oppression of aboriginal people. I now turn to the racialized cultural origins of that role.

Race

Imperialism in Australia and Canada meant contact between European and indigenous cultures. It also involved the collision of interests which gave form to those cultures. Culture reflects the interests of those who enforce its practice. This is a banal conclusion: race has a particular function in the cultural projects of interest and concealment. 'Racism is an ideology and a whole set of social relations which are historically generated and materially based, and which reinforce or deny rights and social

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[281] Abdel-Malek, *Social Dialectics: Nation and Revolution* at 145-146, cited in Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 255 at 257.

interests."[282] The cultural process of constructing race has been called 'racialization".[283] This term is useful, because it confronts the cultural implications of "race" and allows for its critical use as a tool for analysis, without weighing into the fruitless and unedifying debate about biologically-determined racial hierarchies which is still being conducted in the North American academy and popular press.[284] Race, then, can be theorised as a cultural effect which changes in harmony with changes to the culture of Empire; and indigenous people are not "raced" on the spurious and contested grounds of biological indicia or physical characteristics[285] - rather, they are *racialised* according to the dictates of the prevailing cultural climate. If this prevailing culture of Empire casts itself in terms of dominance in the centre over territory in the margins, and indigenous people are a feature of those margins, then the racialization of indigenous people must also be a product of the superiority complex of Europe. Aboriginal people are endowed with certain

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[282] Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (Sydney: Allen and Unwin, 1992) at 56.

[283]This term has its origins in the English academy, and has been widely used among contemporary critical race theorists. Miles, (1989: 70) cited in Frances Henry, (et. al.), eds., *The Colour of Democracy: Racism in Canadian Society* (Toronto: Harcourt Brace, 1995) at 4 defines racialisation in terms of "processes by which meanings are attributed to particular objects, features and processes, in such a way that the latter are given special significance and carry or are embodied with a set of additional meanings." This definition may be compared with the definition of culture which I offer at note 256: both concern themselves with the attribution of meaning through practice, as opposed to a framework in which meaning arises from pregiven ontological standards.

[284] For contemporary examples of this, see J. Philippe Rushton, *Race, Evolution, And Behaviour: A Life History Perspective* (New Brunswick, New Jersey: Transaction Publishers, 1995); and Richard J. Herrnstein and Charles Murray, *The bell curve: intelligence and class structure in American life* (New York: Free Press, 1994).

[285] Peggy Brock provides a good discussion of the way that "race" was made to function in Protection legislation in Australia. The competing and arbitrary definitions of "aboriginal" found in those acts illustrate the point I am attempting to make about the cultural rather than the scientific heritage of the very category of "race". See Peggy Brock, "Aboriginal families and the law in the era of segregation and assimilation, 1890s-1950s" in Diane Kirkby, ed., *Sex, Power and Justice* (Melbourne: Oxford University Press, 1995) 133.

characteristics, grouped conveniently under the umbrella of 'race", which reflect the cultural project of reinforcing their marginal status. Cultural characteristics (authentic, inauthentic, or even invented[286]) are *racialised*, and seen to ground the legal inferiority of aboriginal people and hence the justness of government imposed from the centre against the will of the racialised margins. "Exotic" physical characteristics are sufficient but not necessary in this formulation, so that collectivities are racialised in the racial mythology of the British ruling class on the basis of their poverty, ("the degenerate races" of the London working class[287]), or in the case of the Irish,[288] the French, or the Germans,[289] of their geography.

Reliance on race is Empire's referent of Otherness[290] and its disavowal of connection. There is no possibility of an economic project based on domination and

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[286] The "expert" writings of Daisy Bates, an amateur anthropologist who had contact with Western Australian aboriginal people in the early decades of the twentieth century, reads like Gothic fiction: "The women quited frankly admitted to her that they had killed and eaten some of their children". Daisy Bates, *The Passing of the Aborigines*, 1938, cited in Andrew Markus, *Governing Savages* (Sydney: Allen & Unwin, 1990) at 42. In the context of Chinese immigration to Canada and the racialisation of "the Oriental", see the preamble to the Act to Regulate the Chinese Population of British Columbia, SBC 1884, c. 4, which cites "the pestilential habits", habitual desecration "of graveyards by the removal of bodies therefrom", and "uselessness in instances of emergency" of Chinese immigrants in British Columbia in support of an Act passed to enforce the anti-Asian immigration policies which developed there toward the end of the nineteenth century.

[287] Anna Davin, "Imperialism and Motherhood" (1978) 5 History Workshop 9 at 20.

[288] Daiva Stasiulis and Rhada Jhappan, "The Fractious Politics of a Settler Society: Canada" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 95 at 108.

[289] Homi K. Bhabha, "'Race', Time, and the Revision of Modernity" in Moore-Gilbert, Bart, Gareth Stanton and Willy Maley, eds., *Postcolonial Criticism* (London: Longman, 1997), 166 at 178.

[290] Otherness is a term which comes from psychosemiotics, in particular Jacques Derrida. It has to do with the oppositional formation of identity through linguistic processes, and relies heavily on Freud's gendered notions of female sexuality. In postcolonial theory (for instance in the writings of Spivak) the term is used to signify the practices through which a group (e.g. white settlers) constructs itself and its notions of

subjugation unless the subject collectivities are "othered", because estrangement measures the distance (and hence the barriers to sympathetic engagement) between differing subjectivities. Racialization is a function of this othering. The racialised other is the "not us" who exists outside the social, moral and legal codes developed by white English elites over time to protect themselves from the Other. Culture exacts a justification for oppression. Racism provides it. The inferiority of any person who is othered by the cultural imagination justifies a departure from culturally imposed codes which evolve for the notional protection of the persons who are subject to it. The failure of aboriginal populations independently to have formulated identical codes in their own societies translates in the colonial enterprise to an invitation to dominance. Their absence in the uncivilised, the colonized, the *estranged*, places the indigenous subject beyond the nominal protection of these codes and the law which is their most formal expression.[291]

Peter Fitzpatrick scrutinises the relationship between racism and the birth of the nation.[292] In his account, the settler nation and its white subjects take identity in opposition to the fantastic attributes which they have projected onto existent peoples, in a move he terms "the pretence of desperate difference."[293] Desperate for its persistence in the

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subjectivity in opposition to a another group, often in the interests of subordinating it. Like racialisation, it is a cultural practice whose dynamics reveal and conceal the interests of the dominant group.

[291] In both the Australian and the Canadian contexts, legal schemes erected around indigenous people were formulated in terms of their protection. Canadian aboriginals were contained in reserves, as were Australian aboriginals; and both had their freedom of movement and their access to formal citizenship restricted. This protective legal scheme fulfilled double functions of control and apparent benevolence in the apparatus of the State.

[292] Peter Fitzpatrick, "'We know what it is when you do not ask us': Nationalism as Racism" in Peter Fitzpatrick, ed., *Nationalism, Racism and the Rule of Law* (Aldershot: Dartmouth, 1995) at 3.

[293] *ibid.*, at 22.

absence of rigorous scientific or anthropological justification, racialised difference took its particular features as the nineteenth century wore on from discourses of eugenics,[294] the product of "an onanistic search for the origins of race" [295] whose outcome was predisposed by the assumption of British cultural (and hence racial) superiority. Since the law is the instrument of colonization, and raced difference is the bar to legal protection, the subject of colour never *can* be a *legal* subject in the colonial State. There is more than *pretence* of desperate difference, here, however - there is fear: fear, genuinely felt, in the heart of the white woman and man of those "creatures, only recently redeemed from nakedness, whose minds are still sunk in unfathomable night."[296] Malouf has sympathetically rendered here one of the themes of colonial literature: the mythological battle against dissipation and regression which is fought by every Englishman who takes up the white man's burden and ventures madly into the midday sun of the antipodes. Dissipation and regression are the unwilling relinquishment of the codes of culture which separate the white person from the black. The aboriginal enemy is conjured from the attributes of inferiority, attributes which were planted and which flourished then in the fertile of soil of the colonial cultural imagination. Aboriginal people in this mythology are inferior, Other, less than - and this in a legal and cultural cosmology in which all subjects are notionally equal.

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[294] Other racialised justifications for the colonial project are found in the doctrines of manifest destiny, the disappearing indigene, and fatal impact, discussed in Daiva Stasiulis and Nira Yuval-Davis, "Introduction: Beyond Dichotomies - Gender, Race, Ethnicity and Class in Settler Societies" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 1 at 11, and at 20.

[295] Homi K. Bhabha, "'Race', Time, and the Revision of Modernity" in Moore-Gilbert, Bart, Gareth Stanton and Willy Maley, eds., *Postcolonial Criticism* (London: Longman, 1997), 166 at 176.

[296] David Malouf, *Remembering Babylon* (Toronto: Alfred A. Knoft, 1993) at 169.

Eugenic discourse is played out in the colonial context by a concern with both preserving the integrity, and improving the racial quality of the imperial stock. This meant a concern to limit the reproduction of "undesirables" so as to prevent the deterioration of the white "race", a concern made especially urgent by the increasing (and perilous) proximity with the raced Other which the colonial enterprise entailed. Malouf has explored it in the context of working class agriculturists in the Australian north-east in the nineteenth century; and this inchoate fear of regression is a theme reflected too in the moral agitations of middle class colonists in English Canada in the nineteenth century,[297] especially toward the end of the century. Serious social vices (prostitution and "sexual licentiousness", unwed motherhood, alcohol and drug addiction, and poverty) had transported themselves from England to the colonies. This was proof not of the basic inequities of the English socio-political order, but rather of the threat to civilisation represented by the "inherently subversive" characteristics to which people outside the white middle class were seen to tend[298] and from which aboriginal people, too, were to be redeemed. The related discourses of eugenics and moral reform persisted up until W.W.II. in both Canada and Australia. They provide two instances of cultural practices which developed in oppressive response to the racialised Other.

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[297] On this, see the literature on moral reform in Canada in the nineteenth and early twentieth centuries, such as Mariana Valverde's *The Age of Light, Soap, and Water: Moral Reform in English Canada 1885-1925* (Toronto: McClelland Stewart, 1991), and Carolyn Strange and Tina Loo, *Making Good: Law and Moral Regulation in Canada 1867-1939* (Toronto: University of Toronto Press, 1997). There is comparable literature on moral reform in Australia: see for instance Patricia Grimshaw, Marilyn Lake, Ann McGrath and Marian Quartly, *Creating a Nation* (McPhee Gribble, 1994).

[298] For a good discussion of this, see John McLaren, "Recalculating the Wages of Sin: the Social and Legal Construction of Prostitution, 1850-1920", 23 (1) Manitoba L.J. (1995) 524 especially at 526.

Racialization as a cultural process, then, is one of the most important characteristics of the colonial project; integral to nationbuilding and sanctioned overtly by contemporary discourses of law and science. In its emphasis on social practices, racialization discourse stresses the wider conditions and practices in which and through which historical events are produced. This is useful because it refutes any conception of racism or sexism for instance which relies on the reductive terms of an individual animus. This latter analysis of racism finds a personalised intention to inflict injury as a cause rather than as an effect of racism, and relies on a pathology of irrational prejudice or stupidity to explain away endemic and systemic racism. This pathology is an easy means to prevent our *identifying* now with the events of the past. *To understand colonial forebears in terms of their backwardness and lack of cultural sophistication is to fall headlong into the same dynamic of unsympathetic engagement with otherness which was the precondition of the mistreatment of indigenous people by colonists on both continents in the past.* Chrisjohn and Young confront this assumption that the mistreatment of aboriginal people is a thing of the past. They also confront the assumption that contemporary attitudes and cultural practices would preclude events from which the cultural imaginations of the mainstream now recoil (such as aboriginal child removals) from recurring in the present.[299]

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[299] See generally, Roland Chrisjohn and Sherry Young, *The Circle Game: shadows and substance in the Indian residential school experience in Canada* (Penticton: Theytus Books, 1997)

Gender and Race

Just as Empire had come by the 19th century to constitute an important part of English cultural self-identity, so is gender implicated in the production of Englishness and hence of Empire. As Spivak argues:

> [W]hat is at stake for feminist individualism in the age of imperialism, is precisely the making of human beings, the constitution and interpellation of the subject not only as individual but as individualist. That stake is represented on two registers: childbearing and soul-making.[300]

The neutral subject of English common law is a cultural production. So, too, is womanhood constructed in response to the interests of colonial culture. The feminine as an attribute is integral to the building of Empire because white women (unless they were poor, and hence unfit) were the keepers of the imperial bloodlines; because gendered notions of aboriginal subjectivity were operative in the process of othering which I discussed a moment ago, and because Empire depended on the low-status labour, in and out of the home, of both aboriginal and non-aboriginal women. The next section is my interrogation of the cultural practices of gender in the colonial context, especially as they functioned to "other" aboriginal women.

Davin writes that the 'home was the cradle of the race - empire's first line of defence."[301] Motherhood was a basic component of the ideology of racial health and purity by which Empire was beset,[302] so that the burdens of the colonising project fell on both

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[300] Gayatri C. Spivak, "Three Women's Texts and a Critique of Imperialism" in Bart Moore-Gilbert, Gareth Stanton and Willy Maley, eds., *Postcolonial Criticism* (London: Longman, 1997), 145 at 147

[301] Anna Davin, *supra* note 287., at 53.

[302] *ibid.*, at 12.

indigenous women and white women, although they were experienced in different ways. The cult of motherhood and the confinement of white women to the domestic sphere were cultural tools which reduced women to the maternal and the sexual. The maternal was exaggerated in white middle and upper class women, even though their children were cared for by women workers drawn from the non-white and white working class.[303] The sexual, on the other hand, became the characteristic which defined the poor white or black woman Other, disrupted her notional right to uninterrupted enjoyment of a private domestic sphere, and made her a bad mother, except to the children of the better off. One of the effects of this intrusion into indigenous motherhood was the systematic removal of aboriginal children from their families. The derangement of the indigenous family is not only the price of settler claims to aboriginal land and the corresponding displacement of aboriginal communities - it is integral to the staking of that claim. In this sense, the aboriginal family has no "home"; and it is empire's first line of attack.

In both indigenous and white society, the mother is constructed as the bearer of culture.[304] If Empire is a cultural project, and I have argued throughout that it is, then the control of motherhood is integral to colonization; and the control of women, white and aboriginal, becomes a precondition for the sustained health and life of the settler colony

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[303] Vocational training was part of the program of institutionalisation of aboriginal children in both Australia and Canada. For girls, this training was domestic: childcare, housekeeping, cooking, sewing, ironing, for instance. I discuss this at length below at 18-19.

[304] Bea Medicine, an Amerindian scholar, writes that "[w]omen are primary socializers of our children. Culture is transmitted primarily through the mother. Cited in Jaimes, M. Annette with Theresa Halsey, "American Indian Women: At the Centre of Indigenous Resistance in Contemporary North America" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 298 at 304.

and nation. The very categories of colonizer and colonized were 'secured through forms of sexual control that defined the domestic arrangements of Europeans and the cultural investments by which they identified themselves."[305] The curtailment of women's freedoms in the interests of Empire has implications for race as well as gender. Race and gender provide the justification for the cultural practices of inequality, practices summoned by the interests of Empire.

The European concern to constrain the mother is reworked in the settler context by the introduction of policies which emphasized the disruption of the bond of the aboriginal mother and her child. The regulation of motherhood through the widespread practice of forcibly sterilising indigenous women is reported in both North America[306] and Australia[307]; and State intervention into the maternal lives of those aboriginal women who had borne children was just as intrusive. The residential school system in Canada was an enforced system of child institutionalisation away from their families and off the reserves. Widely condemned for both the assimilationist nature of its aims, and for the failure to achieve any of those aims (i.e. those of education and vocational training), the residential schools enforced the disruption of the mother/child connection for generations, with

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[305] Ann Laura Stoler,"Making Empire Respectable: The politics of Race and Sexual Morality in Twentieth-century Colonial Cultures" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 344 at 345.

[306] M. Annette Jaimes, with Theresa Halsey, "American Indian Women: At the Centre of Indigenous Resistance in Contemporary North America" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 298 at 326.

[307] Anne Deveson, *Australians at Risk* (Stanmore: Cassell Australia, 1978) at 298.

consequences that resound in Canadian indigenous communities still.[308] In Australia, policies of removal and institutionalisation of the mixed-descent children (especially the female children[309]) of aboriginal women under the imprimatur of 'Protection" legislation were similarly aimed at intervening in the transmission of culture to the child from the mother, as well as from the wider indigenous community.[310]

Half-breed children in Canada received attention from Christian philanthropists, but interestingly, this attention was expressed in terms of the threat that orphaned half-breed children posed to the moral purity of the colony,[311] and the discourses around the removal of aboriginal children in Canada were not characterized to the same extent as the Australian discourses by a perspicuous fixation with degrees of whiteness and the colour of a child's eyes or skin.[312] *Whiteness*, constructed explicitly as biology, was the

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[308] Chapter 10, "Residential Schools" in Canada, *Looking Forward, Looking Back* (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996) at 333 discusses the failures of the residential school system at length. See *e.g.* at 376 where the 1992 statement of Grand Chief Edward John of the First Nations task force group is given: "The federal government established the system of Indian residential schools which was operated by various church denominations. Therefore, both the federal government and churches must be held accountable for the pain inflicted on our people. We are hurt, devastated and outraged. The effect of the Indian residential school system is like a disease ripping through our communities."

[309] Barbara Cummings, Jenny Blokland and Rebecca La Forgia, "Lessons from the Stolen Generations Litigation" (1997) 19 Adel LR 25 at 27.

[310] This chapter of Australian history is explored in Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander children from Their Families*, (Sydney: Sterling Press, 1997).

[311] Brock, *supra,* note 285, at 153.

[312] This stance in Canadian policy and practice may be contrasted with the personal views of Duncan Campbell Scott. Titley argues that Scott's poetry posits the "pure-blooded Indian" as a "relentless savage; the half-breed, however, shows traits of civilization." Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: Unviersity of British Columbia Press, 1986) at 31.

justification made for State intervention into the domestic spheres of mixed populations in Australia, an intervention executed, body and soul, on the children of aboriginal women. In Canada, *aboriginality*, was constructed in cultural terms as the justification for State intervention by child removal. In the end, disappearance is the goal, but race is the name which the colonial enterprise gives to the project of regulating the existence of the traditional landowners; and racialization accounts for the different paths which were pursued to achieve that goal.one of the bases of the differences between countries is found in the different specifics of gendering and racialization on either side of the Pacific. The racial hierarchy (developed on the say-so of eugenics) placed Australian aboriginals on the very bottom of the social and anthropological order,[313] while North American Indians were placed relatively high, with the result that the focus in Canada was less explicitly on children of mixed descent and their mothers. Canadian aboriginal people were seen to be inherently civilizable. "There is fine material among the natives to make good British citizens", writes Duncan C. Scott in 1931.[314] European blood may have been desirable, but it was not needed. Race, culture, and the regulation of motherhood are at work as fundaments of the colonial enterprise in both contexts, since aboriginal motherhood and mothering are centrally implicated in the removal of aboriginal child from family. The ways in which racialization bears differently on child removals in these two separate histories provide a neat if tragic illustration of the intimate relationship between theoretical

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[313] see Chapter III, *supra* at 77.

[314] Duncan C. Scott, *The Administration of Indian Affairs in Canada* (Canadian Institute of International Affairs, 1931) at 11.

conceptions of the subject, and the law's ability to understand the history of that subject in terms of legal harms: if race, gender and colonization are legally invisible beneath the white face of the reasonable man, then harms perpetrated *in the name of* those cultural effects are likewise unobserved, unprevented, uncompensated.

The domestic sphere was the constructive locus, then, for white male concerns around imperial bloodlines and the women who carried or threatened them. The expression of these concerns in terms of race is a function of culture's call to justify the imperial project. Aboriginal women were constructed as sexually available, racially and morally inferior: all of which combined to make them bad mothers, justify the forcible removal of their children, and colonize their subjectivities in specific directions:

> "The tropics provided a site of European pornographic fantasies long before conquest was underway, but with a sustained European presence in colonized territories, sexual prescriptions by class, race and gender became increasingly central to the politics of rule and subject to new forms of scrutiny by colonial States."[315]

Prescriptions by race and gender are the practices which have evolved to justify the inferior cultural position which Empire's anti-indigenous project was compelled to give to aboriginal women. The changing racialization and gendering of Métis women with the diminution of the economic role of the Métis provides a good illustration of this theme, that is, the theme which ties social practices to cultural imperatives.

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[315] Ann Laura Stoler, "Making Empire Respectable: The politics of Race and Sexual Morality in Twentieth-century Colonial Cultures" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 344 at 345.

The Métis population in Canada[316] is the product of ties between French fur traders and local aboriginal women. Aboriginal protocols of diplomacy and trade in the New France region in the earlier period of trade between First Nations and Europeans in fur sanctioned intermarriage with allies.[317] To this extent, there is room to characterize intercourse (whether sexual or commercial) across the racialized divide of culture, even in a colonial context, as mutually satisfying. It is difficult, however, to get a firm grasp on the positioning of the aboriginal women who took part in these trade arrangements and marriages at the behest of protocol. '[W]e cannot assume that all Aboriginal traditions universally respected and honoured women,"[318] and Payment, in a rare study of the histories of Métis women, argues that the marriages were on the whole unhappy.[319] Since women are seen to be the bearers of culture, and since aboriginal descent was increasingly

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[316] The Métis population evolved in Western Canada around the drainage basin of Hudson's Bay, which was the site of an extensive trade in fur between culturally diverse Indian populations (Cree, Ojibwa, Assiniboine, and the Chipewyan, for instance) and French and English traders, begun in 1670 with the founding of the Hudson's Bay Company. An important history of Métis women is recorded in Sylvia Van Kirk, *"Many Tender Ties": Women in Fur-Trade Society, 1670-1870* (Winnipeg: Watson & Dwyer Publishing, 1980).

[317] Canada, *Report of the Royal Commission on Aboriginal Peoples (vol 1): Looking Forward, Looking Back* (Ottawa: Canada Communication Group, October 1996) at 148; Daiva Stasiulis and Radha Jhappan, "The Fractious Politics of a Settler Society: Canada" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 95 at 114.

[318] Emma LaRocque, "The Colonization of a Native Woman Scholar" in Christine Miller and Patricia Chuchryk, eds., *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 11 at 14.

[319] Diane P. Payment, "'*La vie en rose*'? Métis women at Batoche, 1870 to 1920 in Christine Miller and Patricia Chuchryk, eds., *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 19 at 32 ff. Recollections of unhappy intracultural marriages are hardly rare, however, and I hesitate to draw any conclusions as to the specific functioning of race and racialisation in Métis marriages from these observations.

seen to be a liability,[320] the repression of indigenous elements of Métis culture around the turn of the eighteenth century into the nineteenth[321] amounts to a repression of the mother. It is difficult to see how the downward social and economic pressures associated with aboriginal ancestry and hence with women in this context could not have conditioned the intimacies of married co-existence. Racism, in other words, pervades the private in the same measure that it pervades the public. In any case, these alliances were initally encouraged by the French State and Church for their military and assimilative value. This changed when evidence of "reverse assimilation" in the men and the children came to light, and the end of the fur trade in the early years of the nineteenth century, when the Métis became culturally positioned as an aboriginal population which would eventually be displaced by settlement from its lands.[322] This was in telling contrast with the cultural place they and their ancestors had assumed as more or less equal trading and domestic partners with the French and the English. As McGillivray puts it, "Where difference is useful, cultural interference is minimal and reciprocal. Where difference is a problem, the

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[320] This change in the social acceptability of aboriginal descent in Canada is connected with the increase in the numbers of white women settlers, pointing to the function of race as a cultural effect, and to the importance of "racialisation" rather than "race" as an analytic approach. On this, see Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Winnipeg: Watson & Dwyer, 1980) at 173.

[321] *ibid.*, at 20.

[322] Canadian Prime Minister Macdonald in 1870 on the Métis population: "[these] impulsive half-breeds must be kept down by a strong hand until they are swamped by the influx of settlers". Cited in Daiva Stasiulis and Radha Jhappan, "The Fractious Politics of a Settler Society: Canada" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 95 at 114.

choices for nineteenth-century colonial governments were annihilation,...relocation, or assimilation."[323]

Questions about the women's volition in intercultural marriage aside, the Canadian Métis population may be seen as an exception to the pattern of often violent encounter[324] between white men and aboriginal women which precedes the appearance in Australia and Canada of people of mixed descent and the 'half-caste" (or quarter-caste, or octoroon, depending on the more or less arbitrary statutory definitions around aboriginal people which Brock discusses[325]) population concentrated in the Australian North. These relations took place along the multiple intersections between gender and race, and theorising them is fraught with difficulty. The thesis I have used to explain the divide between law's objectives and its practices would tend to the conclusion that exploitation was the result of the othering process used to justify the mistreatment of all aboriginal women all of the time at the hands of white culture and white law. I do not wish, however, to make unwarranted assumptions about the agency and hence the subjectivity of

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[323] Anne McGillivray, "Therapies of Freedom: The Colonization of Aboriginal Childhood" in Anne McGillivray, ed., *Governing Childhood* (Aldershot: Dartmouth Publishing, 1997) 135 at 138.

[324] The statistics of rape of aboriginal girl children in institutions following forced removal from their families are high in both Australia and Canada. The interventions of the welfare system in this century in both countries have left many aboriginal girls in foster care, where the incidence of sexual abuse by white foster fathers is also high.

[325] Peggy Brock, "Aboriginal families and the law in the era of segregation and assimilation, 1890s-1950s" in Diane Kirkby, ed., *Sex, Power and Justice* (Melbourne: Oxford University Press, 1995) 133.

aboriginal women by telling the stories of their encounters with white men in the somewhat oversimplified terms of the interests of Empire.[326]

There is the view on the one hand that white men were merciless exploiters and then abandoners of aboriginal women; patriarchs who could not be made responsible for the children of these unions, and whose absence (coupled with the constructed unfitness of aboriginal women to parent their own children) invited the interventions of the Australian State in its later role as *pater familias* and guardian of aboriginal children. There is evidence on the other hand that the sexual services of aboriginal women in some Australian regions were offered to white settlers by their own communities, a practice which secured access to goods via the effective sale of the female body.[327] There is also evidence that these relations were mutually affectionate.

Oppression, Law, Culture

The culture of colonization must satisfy the double demands of interest and concealment: the cultural positioning of aboriginal women was a product of Empire's concern to disrupt the cycle of aboriginal culture and efface aboriginal people from the

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[326] This question of essentialising aboriginal identity by characterising all aboriginal people all of the time as victims of the colonial project has been countered via accounts of aboriginal resistance and agency. I concur in the anti-essentialist project; however, I agree with Shelley Gavigan in her argument (presented during a talk she gave at the Canadian Law and Society Association Conference in Ottawa, Ontario, in June 1998) that accounts of the relationship between aboriginal people and settlers must bear in mind the power exerted by white society over indigenous people; that discussions of agency and resistance must take place within the matrix of that power imbalance. To do otherwise is to underplay the devastation wrought on indigenous communities by white settlement - and I am not in the business of concurring with legal history in the invisibility of harms against aboriginal people.

[327] Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (Sydney: Allen and Unwin, 1992) at 29.

settler landscape. The reduction of aboriginal women to the "double registers of mothering and sex" was felt by white women, too. My point is that it was felt by aboriginal women differently; and that this difference is a function of the interests of Empire. This is oppression. Legitimation requires that the oppression of aboriginal women be rendered in terms which are consonant with Empire's founding mythologies of equality and freedom. The single solution to this discursive knot is to make aboriginal people inferior to white people. These notions of inferiority are gendered, so that sex and motherhood in aboriginal women are constructed in particular ways which are a function always of the wider project of colonization. It is via this discourse of aboriginal inferiority and otherness that oppression becomes protection; that the theft of aboriginal children is in their best interests; that genocide is cast in terms of benevolence.

Class

Subjectivity is oppressive to the extent that its legal rendering departs from the lived experience of the subject. The neuter is always already equal. Difference is then invisible. Discrimination is invisible. The subject as neuter oppresses aboriginal women not only because it cannot render the gendered and racialized particularities of their experience. The oppressive neuter is also classless, which turns out to mean that it is placed in a certain context of material privilege whose absence represents just one more oppressive dissonance between the legal subject and the experience of aboriginal women. I turn now to class, situating aboriginal women in a class system erected by the demands of Empire for labour, and labour of a certain kind.

Class is a name which attaches to the dynamic process through which people become situated on a social and material hierarchy. This hierarchy does not necessarily imply fixed relations: both class and class mobility are features and processes of capitalist societies. Primarily, it is produced by disparities in resources between capital and labour, disparities in which the State is instrumental. Class in capitalist societies is inescapably gendered: women participate in the labour market in capacities (service industry, domestic labour, part-time work) characterized by their low or absent rates of pay. The nature of this participation is a function of gender, and it is in this sense that class is a feminist issue. Mercantile capitalism, of which colonialism is a particularly virulent expression, depends in other words on the poverty of women. Since poverty is feminized, gender is one of the chief determinants of class identity. The subordination of women in the home, or the house for those denied one,[328] recurs in the market place; and the capitalist market place is the public face of Empire. Conversely, gender identity is fluid across boundaries of class, so that poor women are constructed differently from middle and upper class women. Oppositions between the virgin mother and the whore are erected along class lines.[329] Poor women become characterized by the failures of their mothering skills and the looseness of their morals. So it is that the divide between the public and the private, and the corresponding prohibition against State intervention into the domestic begins to

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[328] In drawing the distinction between a house and a home I contrast the cultural boundaries erected to protect the white middle and upper class "home" from the proper intervention of the State; with the vulnerability of the houses of poor and non-white people from State control.

[329] Theorising requires some level of abstraction. I understand that high-class 'hookers' and virtuous peasant girls are a feature, too, of the cultural landscape which I am attempting to render.

crumble. The State and its organisations function in a *pas de deux* with culture - they reinforce each other, so that the cultural demands of oppression and legitimation must be met, too, by the State. The poverty of women, then, is legitimated by a return to the individual subject: the neuter is genderless, classless, raceless. Whose fault is oppression? The poverty of lower class mothers is sprung immaculately from the mothers themselves. High infant mortality rates among the English poor around the turn of the century, for instance, were blamed on lax mothering practices and limited health education.[330] Marx calls these the "cunning discourses in the bourgeoisie"[331] of combining charity with revenge, and regarding poverty as the punishable fault of the poor themselves.[332] Class, race, and gender converge in this mythology of self-inflicted poverty. Aboriginal people are poor because they are inferior, women are poor because they are inferior, and their children will be poor because poverty (like race and gender) is hereditary and self-chosen at the same time.

Middle-class English agitation on the subject of infant mortality, which Davin explains as a concern to replenish the imperial stock,[333] led to the appointment of health "visitors" by local English authorities. Since bad mothering was seen to be a function of

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[330] See generally Anna Davin, "Imperialism and Motherhood" (1978) 5 History Workshop 9.

[331] Karl Marx, "Critical...Notes on...Social Reform" in William Connolly, ed., Legitimacy and the State (Oxford: Basil Blackwell, 1984) 21 at 25.

[332] *ibid.*

[333] "The history of nations is determined not on the battlefield but in the nursery, and the battalions which give lasting victory are the battalions of babies." Saleeby, *Race and Culture*, 285 cited *supra* note 287, at 29. Davin notes that middle class white feminist activists at the time were at the forefront of this concern with infant mortality rates.

poverty and class, the middle and upper class origins of the visitors were sufficient qualification for giving advice on how to keep house and family in pristine order. Somerset Maugham renders in fiction this State-sponsored intrusion:

> "The district visitor excited their bitter hatred. She came in without so much as a by your leave...she poked her nose into corners, and if she didn't say the place was dirty you could see what she thought right enough."[334]

The link between class and the construction of boundaries between the public and the private, especially as they have revolved around motherhood, means that there is no necessary connection between race and State intervention into the lives of aboriginal women: it might be argued that the story of State regulation of aboriginal women's existences is retold without significant variation in the context of white women, and that *poverty*, not *race*, is the invitation into the domestic which the capitalist State writes for itself. The relationship between race and class, however, replicates to some extent the relationship between class and gender, so that it becomes impossible to approach the issue of the subjectivities of aboriginal women in collective without reaching for an understanding of the impact of constructions of race on the economic position of indigenous women. "I know that poverty is not ours alone. Your people have it too, but in those earlier days you at least had dreams, you had a tomorrow."[335] This statement speaks to the differential effects of poverty on differently-constituted groups, and speaks also to

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[334] *Of Human Bondage*, at 560, cited in Anna Davin, "Imperialism and Motherhood" (1978) 5 History Workshop *ibid.*, at 37.

[335] Campbell, 1973, cited in Julia Emberley, "Aboriginal Women's Writing and the Cultural Politics of Representation" in Miller, Christine and Patricia Chuchryk, eds., *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 97 at 101. Further bibliographical details have not been provided.

the dangers of analogising race and gender, for instance. Analogising race and class, or obscuring the one in favour of the other, is to this extent misconceived. Women grouped together as a class are differently constituted within that class. Since indigenous women have had in common their poverty, marginalized as they are in the settler societies whose success depends on their subjection as women and as aboriginals, class becomes another marker for their commonality in identity and hence in legal subjectivity - but skin colour bears on the nature of their participation in the labour market in the first instance, and hence on their class identity.

The origins of poverty in race for example, and the perpetuation of poverty through race, may be traced in part to the kind of work and vocational training available to aboriginal women. The autonomy and influence of aboriginal women were undermined by their exclusion from the cash economy,[336] except in the narrow areas prescribed by the domestic. Aboriginal girls have been trained for, and then put to work in the homes of settler families as domestics in both Australia and Canada - indeed, this training of girls in domestic labour was the heart of education and assimilation projects in both jurisdictions. In domestic service in Australia, as in South Africa and the American South, a labour hierarchy evolved, correlating with skin colour. Lighter-skinned girls were given the charge of children; darker-skinned girls heavier domestic duties: 'Black women who were often characterized as unreliable or dirty mothers were responsible for home and child care

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[336] Daiva Stasiulis and Nira Yuval-Davis, "Introduction: Beyond Dichotomies - Gender, Race, Ethnicity and Class in Settler Societies" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 1 at 12

for white women".[337] Institutionalisation in childhood of aboriginal girls provided the means for close State surveillance of their class positioning through enforced participation in certain kinds of labour only - and that labour was overwhelmingly domestic. The education programs available to aboriginal children in the institutions to which they had been removed in no sense approximated the expressed aims of the State as to their care and their training. Chronic underfunding meant incompetent teaching, defective buildings, and insufficient food and clothing. Training was divided along gender lines - girls were trained for domestic labour; boys for agricultural labour - and was explicitly limited to the levels required for the participation by young aboriginal people in the labour market in its lowest-paid and least prestigious sectors. Girls who were academically gifted were denied access to schooling beyond their early teens on the basis of their 'inability" or their 'unsuitability", so that career aspirations beyond the ranks of the domestic working class were stifled with alacrity.[338] So it is that race, gender and class intersected to confine aboriginal women to certain of the margins of colonial society, and I turn now to some theoretical considerations which arize to help illuminate my search for a legal subjectivity which is cognisant of its colonial cultural origins.

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[337] Jan Pettman, *supra* note 327, at 31

[338] Canada, *Report of the Royal Commission on Aboriginal Peoples (vol 1): Looking Forward, Looking Back* (Ottawa: Canada Communication Group, October 1996) at 344-346; JR Miller, *Shingwauk's Vision*, (Toronto: University of Toronto Press, 1996); Australia; *Bringing them home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander children from Their Families*, (Sydney: Sterling Press, 1997), at 171

The Intersectionality Thesis

Thus far, I have attempted to introduce the specificities of context into legal notions of subjectivity. Those specificities I have theorized as cultural effects, that is, as productions of the interests of Empire. Racialization, for instance, and gender, I have examined in terms of changing cultural imperatives, rather than in terms of pre-given categories like 'the noble savage" or 'the jezebel". I have attempted to disturb the neutrality of the legal subject through race, gender and class-based critiques. All of these are useful. The subject, however, is raced, gendered and classed at the same time. Which attribute has prior claim? Is it even a question of priority, or is the emphasis on one a failure to address the others as sites of oppression?

White women, for example, are conditioned in postcolonial societies to be unaware of their own ethnicity. There is no magic, and neither is there a pernicious intention in this: it is an effect of a cultural practice whose foremost aim is to obscure its own sleight of hand. Race is an issue for the Othered, not the mainstream. White women have tended therefore to emphasize gender at the expense of race.[339] This setting of priorities has been bitterly contested by aboriginal women, and black feminist critics in the US. These critics argue that the assumption by white women of gender solidarity across the lines of race or

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[339] Catharine MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987).

ethnicity allows them to stop short of confronting their own stake in the oppression of colonized women[340]:

> Most white women were never really sister nor acted in defence of aboriginal women's interests. This is why many aboriginal women stress racism rather than sexism as their primary concern in exchanges with white women, observing that sexism neither led white women to bond with aboriginal men against women, nor led white women to identify with and support aboriginal women.[341]

This failure is painfully ironic, since it arises in the claim to solidarity. On the other hand, strategic emphases on race leave unexplored the potential of gender critiques for furthering an emancipatory political agenda. By this last I mean an agenda which unselfconsciously privileges the marginalized, and which insists on the radical determinacy[342] of human hunger, poverty, and suffering; or, as Vasuki Nesiah puts it, the "critically de-hegemonic project, [the] critically political project". [343]

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[340] See generally Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 255; and Vasuki Nesiah, "Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship" 16 Harv. Women's L.J. 189 (1993).

[341] Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (Sydney: Allen and Unwin, 1992), at 32-33.

[342] By using this term, I am invoking the tension between the discursive and the material. Attempts to destabilise subjectivity assail the notion of pre-given, or determined categories, and encounter at the same time the charge that they are so labile as to present limited possibilities for political projects aimed at relieving material conditions like oppression. This is what I mean when I say that I insist on the radical determinacy of oppression: I seek to destabilise the pre-given status of the neutral subject, but in no sense do I concede that this implicates a material world in which all is relative and anything goes. On the contrary: my efforts to broaden the scope of the subject are directed to making oppressive material conditions visible.

[343] Vasuki Nesiah, "Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship" 16 Harv. Women's L.J. 189 (1993) at 204.

In the end, strategy must remain strategy: it is simply a tool which must be used critically in trying to achieve the aims of the emancipatory project. An alternative approach to strategically emphasising one attribute over another is to analyse the subject by looking at the way that these attributes operate together, relationally, intersectionally. This is the intersectionality thesis: attributes function relationally, and depend on the specificities of context. All members of one collectivity are not the same, and the culturally conditioned attributes of collective membership mask subjective realities constituted differently within the bounds of those attributes, without them, and across them.

> "Women are constituted as women through the complex interaction between class, culture, religion, and other ideological institutions and frameworks. ...[R]eductive cross-comparisons result in the colonization of the specifics of daily existence and the complexities of political interests that women of different social classes and cultures represent and mobilize."[344]

This is a radical departure from the ahistoricity of the neutral subject. Not only is the subject endowed by the intersectionality thesis with culturally-determined attributes; the subject in this formulation is basically unfixed except by the bounds of her own truthclaim.

The truth in this discursive universe is found in the stories of aboriginal women, mostly poor, some destitute; Cree women, young and old; Koori women living traditional or urban lifestyles.

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[344] Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 255 at 265.

> You won't find anything about the hell we went through in history books, but it happened, every little bit of it is true.[345]

Neither will this hell be made visible in the law, until the double interests of culture (that is, of oppression and legitimation) are confronted in the interests of a legal narrative which speaks to suffering.

The State

In the forgoing discussion about the subjectivities of aboriginal women, I have emphasized the cultural productions of racialization, class, gender, and Empire. As yet, the relationship between the State and culture remains unexplored in my discussion, and I turn now to this very question in order to trace the path of the imperial project of oppression to the formal apparatus of the settler State. If culture is to blame for the oppression of aboriginal women, how is the State implicated? More importantly, how are culture's twin imperatives (the imperatives of oppression and legitimation) expressed in the workings of the settler State?

Classical Marxist economism, a theoretical approach which reads economic relationships as the basic determinants of other social and political interactions; and the State as the instrument of the corresponding dominance of capital over labour. The State, as the successful claimant of a monopoly over the use of force, is instrumental in the production of social relations through its interventions in the labour market, and through the formal and informal mechanisms of power with which it regulates participation in

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[345] Alice Nannup, *When the Pelican Laughed* (South Fremantle: Fremantle Arts Centre Press, 1992) at 218.

social life on either side of the divide between the public and the private. While it is 'heavily implicated in the constitution and reproduction of ...class, gender, race and cultural difference",[346] the State is not a unitary force. It regulates contradictory claims, and acts in an *ad hoc* manner according in part to the impulses and the loyalties of the fragmented individuals who are its agents.

The intersectionality thesis calls for the situation of State agents in their own intersections - the State agent, too, is raced, classed, and gendered: there are certain privileged social and ethnic enclaves into which the State cannot effectively penetrate.[347] This is the starting point for an analysis of the difficulty of casting the State and its interventions into the public and the private in the neutral terms which liberal theorising around the institutions of civil[348] and political society presupposes. 'The public domain is usually occupied by men who are white, English speaking, middle class and above, middle aged and above, and at least publicly heterosexual....Male power is incorporated into State structures."[349] Feminist scholarship on gender bias in the judiciary, for example, has shown how legal institutions have conspired in the reinforcement of the very biases against women from which we have sought legal protection. This is the framework within which

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[346] Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (Sydney: Allen and Unwin, 1992), at 78.

[347] Daiva Stasiulis, and Nira Yuval-Davis, "Introduction: Beyond Dichotomies - Gender, Race, Ethnicity and Class in Settler Societies" in Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) 1 at 17.

[348] By civil society I mean social space, networks, institutions and social relations (family, voluntary associations) - relational groupings distinct from the State, although not entirely separate from the State.

[349] Jan Pettman, *supra.* note 346, at 61.

colonial fantasies about the exotic aboriginal mother are formulated as policy, receive parliamentary sanction, are carried out by coercion[350] - and then described in terms of justice and liberal ideals of equality. This is the framework within which colonial concerns to disrupt the cycle of aboriginal culture (which ensures the connection of indigenous people to their lands) resound in the forcible removal of aboriginal children, mostly girls, from their mothers - and calls it benevolent so that no intent to harm can be found to ground a legal action against the State.

The marginalisation of indigenous people has been the cause and the effect of intrusions by the State into the minutiae of aboriginal existence. This intimate relationship has been conditioned not only by the agents of the State in whose mighty pens converge the currents of multiple constitution. Dispossession of aboriginal people by the State has been effected through the isolation of indigenous people on reserves of wasteland unfit for the agricultural purposes of colonial expansion. Confined to the reserves, unable to provide for themselves, and faulted for it, aboriginal people have been forced into a reliance on the State through the welfare system, a reliance for which they have been pilloried; a reliance which exaggerates the disciplinary functions of the State and increases the opportunity for State surveillance. The dependence of aboriginal people on the State means that 'the form and substance of their relations with national and state governments are matters of fundamental significance in their everyday life and future prospects as

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[350] The troubled relationship between police and indigenous people in both Australia and Canada is seen in the high rates of aboriginal detention in both contexts. See Verity Burgmann, *Power and Protest: Movements for Change in Australian Society* (St. Leonards: Allen and Unwin, 1993) at 27.

indigenous peoples."[351] They are perennially on the edge of extinction, assimilation and crisis. The present situation of aboriginal people in settler States is used against them, as if they themselves were the cause of their own disadvantage: but the coercive power of the State, born in the discourses of Empire, sanctioned by the law, and carried out by institutions with formal and informal alliances with the State, has been the cause of aboriginal oppression. That oppression arises in response to the demands of settler culture. Its face is benevolence, but its name is misery.

Conclusion

I began this chapter with an exposition of the hidden interests of Empire and the colonial project in the ostensibly rational frameworks erected to justify the ravishment of the New World (as if there were no Old one) and its indigenous people in the name of progress and civilising benevolence. This veneer of benevolence persists into the present. Harms committed in the name of Empire are seen as incidents of history, a history which recedes into the murky waters of long since discredited notions of racial and sexual superiority. This temporal divide, in fact, is apparently the precondition to the visibility of past harms committed on the body of the aboriginal people - wrongs were contemporaneously invisible, unseen by the white colonial observer and his law. This aggressive disjunction between the now of aboriginal suffering and the critical recognition of its origins must put settler culture on its guard at the end of this century. We must be

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[351] Noel Dyck, "Aboriginal Peoples and Nation-States: An Introduction to the Analytical Issues" in Noel Dyck, ed., *Indigenous Peoples and the Nation State: 'Fourth World' Politics in Canada, Australia, and Norway* (St. John's: Institute of Social and Economic Research, 1985) 1 at 1.

alive in the present to the same dynamic; vigilant in the awareness which we derive from history that that dynamic of disjunction is likely to obscure the relationship between the present interests of white people in settler States on the one hand and the continued failure, on the other, of aboriginal people to thrive on the wasted lands reserved to them.

I have located the oppression of aboriginal people squarely in culture. I have argued that culture has colonized the subjectivities of these people; and that the attributes of race, gender, and class are cultural products guided always by the twin imperatives of oppression and legitimation. In simple terms, this means that aboriginal women have been othered (in raced, gendered and classed terms) to justify their mistreatment at the hands of Empire and its legal institutions; and that that othering has taken place beneath a slippery discourse of benevolence.

This approach ties the interests of the State with the oppression of aboriginal women, so that the apparent benevolence of State intentions regarding aboriginal women, and the corresponding failure of the legal system to give these harms a name, might be rebutted with the compelling events of a history which has been obscured up until the present by the inscrutible mien of the reasonable man. 'Without a renewed will to intervene in the unacceptable, we face the prospect of being becalmed in a historically empty space in which our sole direction is found by gazing back spellbound at the epoch behind us, in a perpetual present."[352]

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[352] McClintock, Anne *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (New York: Routledge, 1995) at 396

CHAPTER V: THE REMOVAL OF ABORIGINAL CHILDREN AS A GENOCIDAL PRACTICE

The umbilical cord between genocidal practice and State power has never been stronger.[353]

Introduction

International law has made the destruction of certain groups of people a crime against humanity relatively recently. It has called this crime genocide, and codified it in the International Convention on the Prevention and Punishment of the Crime of Genocide.[354] My aims in this chapter are to take the words of the Convention and interpret them bearing a few things in mind. Firstly, I want to set the interpretation of the Convention in a specific historical context, and in connection with a particular series of harms. The historical context I am concerned with is European imperialism and its effects on the aboriginal people who dwelt in the lands of the so-called New World. The particular harms I am trying to make visible through the means of the Genocide Convention is the forcible removal of aboriginal children from their families in Australia and Canada. This chapter will focus on the meaning of "genocide" in an attempt to make the histories of aboriginal child removals in the wake of colonization legally visible as harms. In other words, I make in this chapter the legal argument that these histories meet the definition of genocide in the Genocide Convention.

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[353] Irving Horowitz, "Genocide: State Power and Mass Murder" cited in Peter J. Stoett, "This age of genocide: conceptual and institutional implications" (1995) International Journal 594 at 618.

[354] Dec 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

I identify two problems for this project, both of which arise because the definition of genocide found in the Convention is ambiguous, and because there has been limited scholarly and juridical discussion as to what the definition might mean. The first problem relates to the tension between the Convention's ambiguous definition of genocide, and the regime of systematic murder from which "genocide" takes its name and its discursive power. There is no specific element of killing in the Convention's definition; but the definition is linked in the popular and legal imagination with mass murders in Central Europe in W.W.II. In connection with child removals, then, my first concern is to ask whether the absence of killing in a series of events (such as forcible child removals) means that the definition of genocide has not been met in the Convention.

The second problem deals with the Convention's requirement that there be an "intent" to destroy a group. I encounter a singular divide between settler accounts of their intentions toward aboriginal children in removing them, and aboriginal accounts of settler intentions. This divide is repeated in the way that contemporary views of past intentions and practices diverge depending on who tells the story of child removals. These divides mark the terrain around the issue of legal intent. I respond to this second problem of competing accounts of intent, and how this competition ought to be resolved in the context of the Genocide Convention, from two directions. The first part of my discussion of intent constructs a rebuttal to the argument of benevolent intent. I do this by referring to the larger colonial project of clearing aboriginal lands for settler development, and the corresponding cultural processes of self-interest and denial which are implicated in that project. Settler protestations of benevolence in the removal of aboriginal children are then

seen in terms of cultural productions and necessary fictions to buttress the imperial project, rather than as adequate responses to harms inflicted in the name of a fictive benevolence.

The second part of my response to the question of genocidal intent confronts the idea that legal responsibility for genocidal practices should follow a finding of specific intent to genocide. In both countries, aboriginal child removals were carried out systematically. The perpetrators of child removals, in other words, were individuals operating in the context of State and semi-State organizations such as government departments, Churches and legal institutions. This means that the enterprise of genocide can never be located in a single person bearing responsibility and a specific intent. I attempt to forestall any argument that no single person intended to commit genocide because they were acting under organisational orders (the "cog-in-the-wheel" argument), as well as to forestall the corresponding argument that organisational intentionality depends first on there being an identifiable (individual) resting place for genocidal intent. I do this by formulating a systemic analysis of genocide, and an approach to intent which corresponds to this analysis.

I turn first to a discussion of the Genocide Convention, going on then to apply the Convention to the histories of aboriginal child removals and Australia and Canada.

Making a Definition

Genocide is the name which Polish legal scholar Raphael Lemkin gave in 1944 to a special category of harms which had reached their peak in the ovens and gas chambers of

Central Europe in that year and the year before it. He was not only concerned with mass death, however. He was concerned rather to find a name in law for crimes committed on groups as groups, regardless of whether they were committed on the body or the cultural soul. This was his vision:

> New conceptions require new terms.... [genocide] is intended to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. [355]

His formulation, or at least, a version of it, was codified in international law in the Convention on the Prevention and Punishment of the Crime of Genocide[356] Its formal legal expression is an ambiguous[357] document whose interpretation is fraught with difficulty. I respond to this difficulty by looking origins of the text, the text itself, and its contemporary applications.

Coming up with a formulation which would express in law the cultural distaste for the collective destruction which had characterized WWII was one of the earliest matters

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[355] This is found in Raphael Lemkin, *Axis Rule in Occupied Europe.* I have taken this text from the judgment of Kiteley J in Daishowa v Friends of the Lubicon [1995] O.J. No 3619, when the case was before her in the Ontario Court of Justice (General Division).

[356] approved Dec. 9, 1948, S. TREATY DOC. NO. 1, 81st Cong., 2d Sess., 78 U.N.T.S. 277 (registered Jan. 12, 1951).

[357] Judge Oda of the International Court of Justice referred in the 1996 case of Bosnia and Herzogovina v. Yugoslavia to the "extremely vague and uncertain" nature of the Convention's provisions, and to the confusion among its drafters. Cited without further reference in Christine Gray, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzogovina v Yugoslavia), Admissibility, and Jurisdiction" (1997) 46 International and Comparative Law Quarterly, 688 at 692.

that the UN attended to after its founding Convention in San Francisco in 1945. The first draft (the Secretariat's draft) of the legal instrument which was to contain that formulation was the work of several international legal consultants, including Lemkin, who were retained by ECOSOC for that very purpose. The text of that first draft "clearly articulated the nature of genocide as consisting not only in the systematic killing of members of a targeted population, but also in policies devoted to bringing about the 'planned disintegration of the political, social, or economic structure of a group or nation' or 'the systematic moral debasement of a group'".[358] This was in keeping with Lemkin's formulation of genocide under three kinds, each of which was to be viewed with equal seriousness: genocide by war of extermination (and into this would fit the recent slaughter in Rwanda); genocide by cultural extinction; and genocide by extermination of certain members of a group and the compulsory assimilation of others of those members.[359] Typologies of genocide are not uncommon, but Lemkin's is particularly important for its recognition that the project of genocide operates through multiple strategies, all of which deserve the attention of the law.

In July 1946, The General Assembly refused to put the Secretariat's draft to the vote, citing "important philosophical disagreements" [360] among some of its member States as to the contents of the proposed Convention. The history of the permutations which the

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[358] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Lights Books, 1997) at 408

[359] *ibid.*

[360] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Lights Books, 1997) at 363.

definition of genocide underwent at the hands of the second committee (from which Lemkin was excluded) which was struck to refine that definition makes for fascinating reading. It also puts paid to the notion that the law is a neutral text. Kuper refers to these machinations,[361] but the definitive account is provided by Churchill.[362] His account is detailed and skeptical, and points particularly to the political manouevering between the Soviet and the American representatives of the ad hoc committee to come up with a definition which could not be used against those respective countries in their domestic treatment of certain groups. The Soviets, for instance, pushed for the excision from the definition of economic aggregates in order to avoid the charge of genocide with respect to the class warfare they had engaged in since 1917. The Americans, on the other hand, were concerned about their domestic record of State-sponsored terrorism against African Americans, especially in the patterns of lynching which had reached their heights in the American South in the 1930s.[363]

> Not only had authorities at all levels declined to take decisive action to quell Klan-style activity, they had in many cases encouraged it, and, in more than a few, could be shown to have actively participated in it.[364]

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[361] Leo Kuper, "Genocide: Its Political Use in the Twentieth Century" cited in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994) at 24 note 9.

[362] See Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City lights Books, 1997), especially in "The United States and the Genocide Convention: The Saga of an Outlaw State, 1948-1988", 363.

[363] *ibid.*, at 374.

[364] The literature which exists on the Klu Klux Klan is extensive, and it reveals the extent of public and private participation in racially-motivated persecutions and killings of African Americans by the Klu Klux Klan. The KKK is said, for instance, to have enjoyed the semi-official blessing of President Woodrow Wilson. *Ibid.*, at 375.

This concern, along with concern over the American policy of sterilising African American, Chicana and Indian women without their consent,[365] would be expressed on the public record in the 1950s and again in the 1970s when the American Senate argued over whether or not the Convention ought to be ratified.[366] Lemkin, vilified in the American public record,[367] was prevented from testifying before the American Senate in its first round of hearings.[368]

The definition which remained on the UN floor after the Americans and the Soviets had satisfied the imperatives of their domestic programs of oppression was passed then with minor alterations[369] by ECOSOC's Sixth (Legal) Committee, the Iranian member of which spoke for a definition of genocide which limited it to physical genocide.[370] This new version removed every reference to culture except the forcible

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[365] M. Annette Jaimes, with Theresa Halsey, "American Indian Women: At the Centre of Indigenous Resistance in Contemporary North America" in Anne McClintock, Aamir Mufti, and Ella Shohat, eds., *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (London: University of Minnesota Press, 1997) 298 at 326. This practice is described in the context of Australian aboriginal women in Anne Deveson, *Australians at Risk* (Stanmore: Cassell Australia, 1978) at 298.

[366] Churchill, *supra* note 360, at 363.

[367] Vambery, a contemporary critic of Lemkin, described the definition as "little more than a slippery and evasive piece of inflammatory legal inventiveness" cited in James J. Martin, *The Man Who Invented 'Genocide': The Public Career and Consequences of Raphael Lemkin* (Torrance: Institute for Historical Review, 1984).

[368] "According to New Jersey's Republican Senator H. Alexander Smith....he and his colleagues were 'irritated no end' by the idea that '...a Jew...who comes from a foreign country [and] speaks broken English' should be the Convention's 'biggest propagandist'." LaBlanc, *U.S. and the Genocide Convention,* in Ward Churchill, *supra* note 360 at 373.

[369] U.N. GAOR 6th Comm., 3d Sess., 82d mtg., at 184 (1948) cited in Matthew Lippman, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" [1994] 8 Temple International and Comparative Law Journal 1 at 36.

[370] UN GAOR 6th Comm., 3d Sess. 83d mtg at 200 (Mr Abdoh, Iran): "It would be better if [physical and cultural genocide] were not artificially placed on the same level and if the scope of the convention were

removal of children. This is curious, since there was a clear and present danger that the American program of compulsory aboriginal child removal and assimilation[371] would satisfy the expurgated definition of genocide which made it into the Convention in the end. The reservations which the American Senate would make to the Convention when it ratified it in 1986 supplied the deficit, however. I discuss this in a moment.[372] This possibility was also raised in the Canadian Parliament before it ratified the Convention in 1952,[373] and the formulation which Canada then adopted in its domestic legal expression of the crime of genocide reflected the Canadian ambivalence about its history of compulsory aboriginal assimilation. The present definition of 'genocide" contained in the Canadian Criminal Code[374] defines genocide in terms of 'killing" an 'identifiable" group, and 'inflicting conditions of life calculated to bring about its physical destruction." This would feature in the Daishowa Litigation which I referred to above.[375]

These were the machinations at the UN level which preceded the final draft of the Genocide Convention. '[N]o generally accepted definition of genocide is available in the literature."[376] The legal definition is fraught with ambiguity. While crimes of this nature are

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limited to the idea of physical genocide...which had shocked the conscience of mankind and inspired the preparation of the convention."

[371] The Canadian residential school system was modelled on the American system. See *supra* at 45.

[372] *infra*, at 171.

[373] Davis and Zannis, *Genocide Machine*, at 23; cited *supra* note 360 at 378.

[374] R.S.C. 1985, c. C-46, s. 318(2).

[375] *infra* note 378, at para 136.

[376] Frank Chalk and Kurt Jonahssohn, *The History and Sociology of Genocide*, cited without page reference *supra* note 360 at 399.

as old as human history, the idea of sanctioning them in law is innovative. Although extralegal considerations will bear on the interpretation which is adopted in the end, the search for meaning must start with the text of the Genocide Convention itself.

The Genocide Convention

Article II of the Convention defines the crime of genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such:
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> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Where mass killings occur along national, ethnic, racial or religious lines,[377] the popular and the legal imagination are stirred to respond that they are genocidal.[378] Genocide has been called the 'ultimate crime',[379] a crime 'so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term genocide

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[377] Art. II, *International Convention on the Prevention and Punishment of the Crime of Genocide*, Dec 9, 1948, 78 U.N.T.S. 277.

[378] MacPherson J in the Ontario Court of Appeal in Daishowa Inc. v Friends of the Lubicon [1998] O.J. No. 1429 at para 134 states that "In my view, the plain and ordinary meaning of the word "genocide" is the intentional killing of a group of people." He goes on at para 135 to say that "the essence of the meaning of the word 'genocide' is the physical destruction of a group identified on a racial, political, ethnic or cultural basis"; and at para 141 to say "[t]he Holocaust in Europe in the 1940s and the tragic events in parts of Africa and in the former Yugoslavia in this decade - these are what ordinary people think about when the word 'genocide' is employed."

[379] Payam Akhavan, "Enforcement of the Genocide Convention: A Challenge to Civilisation" [1995] 8 Harvard Human Rights Journal 229 at 229.

has had to be coined to define it."[380] Stoett[381] suggests a minimalist version of genocide to read "physical destruction" into the definition so that actual killing is required. Subarticle II (a), however, is the only part of the definition which actually refers to killing. Moreover, subarticles (b) to (e) deal with measures undertaken with an intent to destroy a group *without* killing it. The black letter of the law in this context yields no plain or ordinary meaning.

The political considerations at work in the formulation of the Convention's point to the conclusion that genocide means physical genocide only. The definition contained in Article II, however, buries its sole reference to killing in subarticle (a), relying on "acts committed with the intent to destroy...a group" to import the element of killing. "Destruction" extends to life, but not to culture. Since the defining characteristics of a group will often be cultural, however, destruction of the indicia of a culture must amount to the destruction of a group. The destruction of a group can be accomplished without killing the members of that group, so that the Convention's element of group destruction does not necessarily imply mass murder. Lemkin alludes to his when he talks about the "disintegration of the political and social institutions of culture [and] language",[382] for instance, as genocide.

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[380] From the concluding speech of French Prosecutor Champetier de Ribes before the International Military Tribunal at Nuremberg, cited in Payam Ahkavan, "Enforcement of the Genocide Convention: A Challenge to Civilisation" [1995] 8 Harvard Human Rights Journal 229 at 229.

[381] Peter J. Stoett, "This Age of Genocide: conceptual and institutional implications" (1995) 50 International Journal 595.

[382] *supra* at 159.

The project of applying the Genocide Convention to child removals confronts the intentions of the most influential of its framers (the Americans) that genocide involve killing. This I concede: but legislative intention is just one of a host of tools which the law deploys in the interpretation of ambiguous legal texts. Alternative approaches to the meaning of Article II of the Genocide Convention might begin by challenging the paramountcy of the intention half a century ago of certain of its framers as an exegetic tool for uncovering genocide's legal meaning in the modern context. This challenge is mounted in recognition of the self-interest which was at work in the production of this text. It is good law and good practice to impugn the legislative motives of pressure groups who exercized influence in order to escape censure for crimes which permitted or participated in domestically. This alternative approach to Stoett's minimalist definition contextualizes the Convention's definition by calling for an interpretation which responds both to current practice and to a political and cultural will to make those practices resonate in law. Killing is not *necessarily* an element of the Convention's definition of genocide. This may be shortly stated from the text of the Convention; but it is buttressed by an interrogation of the motives and the machinations which were at play in the production of the Genocide Convention. This buttressing is necessary in light of the ambiguities which attend the text and the conflicting scholarly and judicial opinion which surrounds it.

Intention to Genocide

Article II refers to a requisite intent to destroy specified groups. Destruction on a scale envisaged by the Convention (destruction of a group) requires access to disciplinary mechanisms (police forces, military) of which States can most easily avail themselves:

States are therefore likely agents of genocide, and States are the actors with which the Convention concerns itself in the sense that they are responsible under the Convention for disciplining its occurrence.[383] In the absence of revolution, however, States are also unlikely to admit to an intent to commit genocide on a human collectivity. This is borne out in the political posturing by Turkey which has accompanied the attempt of Armenians in the United States to have the American Congress recognize the history of mass killings along ethnic lines in Turkey at the beginning of this century.[384] The Turkish stance has been to impugn the integrity of scholarship which asserts even the occurrence of those killings: the history of group destruction in this century is characterized by a chasm between what a State does, and what it will admit to. Andreopoulos[385] provides a table[386] which contrasts specific accounts of group destruction by killing, such as occurred in the Ottoman Empire between 1915 and 1918, East Timor from 1975-1982, and Iraq in 1988, with the "code words in the language of power", or the bureaucratic rendering of those genocides into a doublespeak in which intention is forcibly disappeared. Respectively, "communal warfare", "stability" in the face of a communist subversion, and the economic

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[383] Article VI of the Genocide Convention provides that "[p]ersons charged with genocide...shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

[384] The narration of this story by Richard G. Hovannisian, "Etiology and Sequelae of the Armenian Genocide" in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994) 111 makes for gripping reading.

[385] George J. Andreopoulos, "Introduction: the Calculus of Genocide" in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994), 1

[386] at 13.

development of a 'backward mountain people" have been advanced by States to justify widespread group destruction occurring within their own borders.

Colonial encounters between certain European powers and the local populations of the countries they conquered and settled illustrate my point here. I am attempting to emphasize the competition between official discourses and indigenous realities for the power to label historical events. Indigenous peoples confront daily the reality of the incursion of development onto their traditional lands and sources of subsistence. The physical as well as the cultural destruction of indigenous groups is an uncontested incident of colonization and industrialisation. Charny develops this thesis in the context of the deaths of indigenous people in the wake of colonization.[387] Grosser has described the effects of colonization on indigenous peoples as massacres without struggle (*Massakern ohne Kampf*),[388] however the physical destruction of Indian groups in Amazonian Brazil, for example, through the destruction of the environment is not seen as genocidal because there was 'no special malice or motivation to eliminate the Indians as an ethnic or cultural group".[389] Indeed, taking possession of the land of indigenous people in this instance was seen to have exclusively economic motivations, so that the charge of genocide could not be made to stick.

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[387] Israel W. Charny, "Toward a Generic Definition of Genocide" in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994) 64 at 76.

[388] Alfred Grosser, *Ermordung Der Menschheit: Der Genozid im Gedaechtnis der Voelker*, (Munich: Carl Hanser Verlag, 1990) at 54.

[389] Jennifer Balint, "Towards the Anti-Genocide Community: the Role of Law" (1994) 1 Australian Journal of Human Rights 12 at 36.

In the settler context of Canada and Australia, State power is a complex of complementary and competing interests bound by a common politico-legal heritage, and a common interest in the dispossession of aboriginal peoples from their lands. Because of the liberal democratic heritage of both countries, this interest cannot be served by brandishing policies of straight out slaughter. Political power requires for its easy maintenance the cultural sanction of forces which are essentially coercive. This cultural sanction, the search by the State for the requital of its love of most of its subjects, most of the time, is at the heart of the divide between colonial and indigenous accounts of what has happened to Aboriginal children at the hands of the Australian and Canadian State. Neither country could pursue an officially-sanctioned program of killing aboriginal people. The processes through which aboriginal people have been divested of their lands, their culture, and their children are more complex. The processes of child removal, developed in the interests of the colonial project, reflect the genuine cultural orthodoxy of colonial benevolence. This does not mean that aboriginal child removals were benevolent. It simply means that the non-native cultural and State position is that child removals were thought to be in the interests of aboriginal people at the time. This is a crucial distinction, and one which does not seek to deny the genuine commitment to service of some of the people and the organisations who participated in the program of child removals. For law, this means that the wider cultural context of colonization, and all of the legitimating discourses which were deployed in the service of the colonial project, must condition our notions of intent.

'[A] State cannot excuse itself [from culpability for genocide] by claiming that [a] practice was lawful under its own laws or that its people did not (or do not) share the outrage of the international community".[390] In the Western democratic context, this means that assertions by States and by Churches that they were acting in the best interests of children by removing them from their families is not necessarily an adequate response to a charge of genocide. Notions of racial superiority may have prevented settlers and their representatives from recognising that the destruction of aboriginal people as a group amounted to a harm. This does not mean that they did not intend the destruction of the group. Documents detailing governmental policy toward indigenous people in colonial Australia and Canada reveal a clear intention to eradicate them. At the first national conference on Aboriginal Affairs in Australia in 1937, A. O. Neville, who was one of the authors of the removal policy in Australia, asked, "Are we going to have a population of 1 million blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there were any Aborigines in Australia?"[391] The Convention's intent requirement must be understood in light of the extra-legal factors which conditioned the settler mind. There is no question that there was an intent to destroy a group. This intent is furnished by the State itself in the documents of its colonial past. Benevolence as a response speaks not to intent to destroy a group. Rather it speaks

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[390] Australia; *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, April 1997) at 270.

[391] cited by Dr Fiona Paisley, "Assimilation: A protest as old as the policy" The Australian, 5 June 1997. Quoted in Stuart Bradfield, "Australia's Response to the Stolen Generations Report: A Preliminary Investigation" International Network on Holocaust and Genocide, September 1995 at 13.

to the legitimation of that intent in the specific context of colonial encounters between white and aboriginal world views and claims to land.

In formal legal terms, I am arguing for a broadened or maximalist definition of genocide by trying to encode the colonial context into the legal narrative. A maximalist construction of genocide depends not only on the finding that killing is not an element of genocide; it also relies on a nuanced approach to intent, one which takes account of the racialized relationship between aboriginal and settler populations and the corresponding impossibility that a settler might admit to herself that the destruction of aboriginal people as a group was wrong. This broadened definition accords with existing standards of legal intent, such as might be found in certain branches of common-law based regimes such as Tort or criminal law. The American Ratification of the Genocide Convention in 1986 included a reservation which specified that 'intent" to destroy meant a specific intent.[392] This is a recognition of the use which might be made of other legal standards of intent against the settler State. The element of intent is satisfied in those branches where a legal actor might reasonably have foreseen the consequences of her actions, and recklessly disregards them. Sarah Pritchard has pursued this line in her work,[393] and it is a construction which might be used to take account of the history of colonization which surrounds the displacement and hence the threatened extinction of ethnic and racial

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[392] Ward Churchill, *supra* note 360 at 335. "Intent to destroy...in Article II means tbe specific intent to destroy, in whole or substantial part..."

[393] Sarah Pritchard, "International Law" c.7 in title 1 "Aborigines and Torres Strait Islanders", *Laws of Australia* (Sydney: The Law Book Company, 1993). Her work is relied on in Ch 13 of *Bringing them home.*

groups. "State negligence, imperial expansion, [or] economic exploitation"[394] might then be the basis for a charge of genocide. This construction of Article II has especial significance for indigenous peoples. It is also more intellectually satisfying in light of expanded notions of human rights in the last half of this century.[395] This is another way of saying that changing cultural and historical contexts call for changing approaches to law and its responses to harms. The law must conduct its enquiries to the best of its knowledge, and the best of its knowledge is a function of its present, not its past.

Midnight's children: Child removals as a practice of colonization

In the end, all the Indian there is in the race should be dead[396]

Australia and Canada share a history of the forced removal of indigenous children from their families in the name variously of assimilation, segregation, and, latterly, integration. These labels describe different approaches in changing contexts to the question of what European colonists thought they ought to do with the aboriginal populations who had been displaced from their lands in the wake of settler development. Aboriginal child removals, regardless of the signifier which policy attaches to them, are motivated by the State's interest in effacing the aboriginal presence from land reclaimed for settlers against the will of their traditional owners. This is uncontroversial, and may be

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[394] Peter J. Stoett, "This Age of Genocide", (1995) 50 International Journal 595 at 600.

[395] *ibid.*, at 616.

[396] David A Nock, *A Victorian Missionary and Canadian Indian Policy*, cited in Canada, *Looking Forward, Looking Back* (vol 1) Report of the Royal Commission on Aboriginal Peoples (Ottawa, Canadian Communication Group 1996)(Ottawa: Canada Communication Group, October 1996) at 365.

posited quite apart from the question of whether this motivation can ever be called benevolent. Aboriginal child removals cannot be understood independently of the colonial context. Aboriginal child removals are a practice of colonization. The legal response to them must take this into account.

Since history is written by the victor, and since settler culture reflects settler interests, the labels affixed to aboriginal child removals by policy must be understood as products of culture rather than definitive approximations of practice. The practices of enforced child removals persist, but their cultural and political representations change. The constant in this slippery disjunction between policy and practice is colonial self-interest. This is the single most crucial factor which an interpretation of the child removal limb of the Genocide Convention must take into account: the question of intent must be answered via an interrogation of cultural practice and the hand which colonial self-interest has had in that practice.

> [Genocide comprehends] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such:...
>
> (e) Forcibly transferring children of the group to another group.

When aboriginal children are taken away from their families, when they are institutionalized in the name of assimilation, culture is the target of the State. The forced removal of children is motivated by an intention, often explicated, to destroy culture rather than life - it is precisely this characteristic which has made it palatable as an act of liberal democratic government in the Canadian and Australian contexts.

Benevolent child removal as colonial discourse

I have sought throughout this chapter to vex the question of the motives of those who enforced child removals. It is a question which has been answered in other contexts by judicial pronouncement that child removal policies were adopted 'not for the purpose of exterminating indigenous people, but their preservation."[397] The violent assimilation of Aboriginal people was justified then as now by the benevolent intentions of the agencies who oversaw the removal of children from their families. In Australia, the federal Minister for Aboriginal and Torres Strait Islander Affairs, John Herron, was reported as recently as October 1996 in the national daily to have said that "...we must recognise...that a lot of people have benefited from being forcibly removed from their families as children." [398]

In chapters II and III I was careful to emphasize disjunction between the official account of both the causes and the effects of the forced removal of children on the one hand, and the stories which Aboriginal people have to tell of child rape and child torture in government sponsored institutions on the other:

> I've seen girls naked, strapped to chairs and whipped. We've all been through the locking up period, locked in dark rooms. I had this problem of fainting when I was growing up and I got belted every time I fainted and this is belted, not just on the hands or nothing. I've seen my sister dragged by the hair into those block rooms and belted because she's trying to protect me...How could this be for my own good? Please tell me.[399]

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[397] Australia, *National Report of the Royal Commission into Aboriginal Deaths in Custody*, volume 5 para 36.3.7.

[398] The Weekend Australian, 5-6 October 1996; quoted in Jocelynne A. Scutt, *The Incredible Woman: Power and Sexual Politics (vol 2)*, (Melbourne: Artemis Publishing, 1997) at 217.

[399] Woman removed to Cootamundra Girls Home in the 1940s, *Bringing them home*, *supra*, note 390 at 161.

The accounts of mistreatment are widespread and extensively documented. They should not be understood simply in terms of the failures of the people who staffed the residential schools or the government agents who came up with removal policy and enforced it. Neither should they be understood as aberrances which disturb an otherwise unruffled history of benevolent child care. Rather, the mistreatment of aboriginal children in the institutions into which they had been forcibly removed should be understood as a symptom of a system which was predisposed to fail by the indifference of the Churches and the State to the welfare of aboriginal children. This indifference is demonstrated by the persistence of the separation policy despite the ample evidence of child mistreatment that was being perpetrated in its name. The abuse of aboriginal children was set up by the conditions which prevailed in the schools and homes. The Churches and the State created those conditions in their failure to ensure adequate institutional funding or supervision. Non-aboriginal reliance on the benevolent motives of the people and the organisations who institutionalized aboriginal children is to this extent disingenuous, although the processes at work to turn practices of mistreatment into discourses of benevolence invite scrutiny.

Chrisjohn and Young in the Canadian context describe the State version as the "standard account".[400] I quote this at length, for it speaks to the complex of organisations involved, as well as to questions of how to situate the past in the present in a way which

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[400] Roland Chrisjohn and Sherri Young, *The Circle Game: Shadows and Substance in the Indian residential School Experience in Canada* (Penticton: Theytus Books, 1997), especially at c. 1.

does not 'place[ ] the incomprehensible in the cold storage of history and thus [falsify] it in a revolting way." [401]

> Residential Schools were created out of the largesse of the federal government and the missionary imperatives of the major Churches as a means of bring the advantages of Christian civilisation to Aboriginal populations. With the benefit of late-20th century hindsight, some of the means with which this task was undertaken may be seen to have been unfortunate, but it is important to understand that this work was undertaken with the best of humanitarian intentions. Now, in any large organisation, isolated incidents of abuse may occur, and such abuses may have occurred in some Indian Residential Schools.[402]

The disjunction between aboriginal and settler accounts of aboriginal child removals finds its way into legal storytelling. The recent decision of the Australian High Court in *Kruger, Bray* v *Commonwealth,*[403] delivered on 31 July 1997, deals explicitly with the issue of forced removals as genocide; leaving open for the most part the question of whether there is a limit on Commonwealth power to make laws authorising genocide. The case was brought against the Australian Government, which exercizes jurisdiction over the Northern Territory. Federal protection legislation authorized an ordinance under which the aboriginal plaintiff had been forcibly taken from her mother as a child, with profoundly negative consequences for the quality of her childhood and adult life. She sought damages from the federal government, relying in part on a breach of federal responsibilities under the Genocide Convention in so doing. Dawson J (43) (with whom McHugh J agreed), Toohey J (64), Gaudron J (89) and Gummow J (150) found that the

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[401] Jean Amery, *At the Mind's Limit*, cited *ibid.* at 1.

[402] *ibid.*, at 1.

[403] (1997) 146 ALR 126.

Aboriginal Ordinance was not a law authorising genocide as defined in the Convention[404] because it was required to be administered in the interests of Aboriginal people generally. The Court demonstrates in this conclusion a failure to enquire into the double processes at work to hide the interests of the colonising State and at the same time to obscure that very process. The Court went on to rule that it was unnecessary to decide the question of constitutional limitations in relationship to genocide. Gaudron J does indicate a preparedness at 88 to find that the Commonwealth Constitution does not authorize laws permitting genocide; and both she (at 117) and Gummow J (at 154) make reference to the limitations placed on the Court in this case by the procedure adopted for determining the action,[405] so prevented evidence of the operation of the ordinance from being judicially entertained.

The inability of the High Court in *Kruger* to look to the effects of the legislation to find a genocidal intent is emblematic of the conflicting impulses of a legalistic definition which requires the isolation of intent precisely where it is least likely to be found.[406] This is

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[404] The Commonwealth Parliament enacted domestic legislation based on the Genocide Convention in 1949. Article 2 of the Genocide Convention Act 1949 (Cth) exactly reproduces the definition in the Convention. This may be compared with the definition which found its way into the Canadian Criminal Code, discussed above at 163.

[405] that is, a referral of questions from a preliminary hearing by Brennan CJ to the Full Court for consideration.

[406] This approach is found also in the Canadian Supreme Court in *Van der Peet* (Supreme Court of Canada, August 1996) which sets out the test for the existence of native rights in terms of the precontact customs of Aboriginal people. This parallels the Australian High Court's approach in *Mabo*, (1992) 175 CLR 1 where native title is given content by precontact customs. Both Courts evince here a failure to take into account the history of colonial disruption to those very customs. The State has disrupted traditional ways of life, and then enforced a test for Aboriginal rights which relies on the undisrupted persistence of traditional ways of life.

'the subtle refined cruelty of intellectual racism and colonialism"[407] of which Bannerji speaks. Colonial history must inform the interpretation of a legislative power to act in the best interests of Aboriginal people. If this history is taken into account, the legislative and bureaucratic rendering of the best interests of Aboriginal people is not so much inconsistent with an intent to commit genocide than inherent in it. It is, after all, 'possible to have a law...that can, through a perverted collective morality, become a murderous weapon."[408] The Genocide Convention has potential as a means for recognition of the loss of life and culture which are the darker aspects of colonization. That potential founders however on the question of an intent to destroy a group. This question is plagued by the disjunction between the official and the unofficial versions of the story of child removals. An exploration of the potential of the Genocide Convention to offer rhetorical and legal purchase to indigenous people in the process of decolonization, then, requires a closer analysis of the relationship between Aboriginal peoples and colonising States.

Genocide, Systems, the State

Once the State has been founded, there can no longer be any heroes.

Hegel, Philosophy of Right

Much of the contemporary literature on genocide cited in the first section of this chapter opens with statements about the atrocities of the second world war, positioning

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[407] Himani Bannerji, *Thinking through: essays on feminism, Marxism and anti-racism* (Toronto: Women's Press, 1995) at 58.

[408] Barbara Harff, *Genocide and Human Rights: International Legal and Political issues* vol 20 book 3 Monograph Series in World Affairs (Denver, Graduate School of International Studies, 1984) 67.

genocide in a particular historical moment. While this is consistent with the birth of the concept legally, genocide has its antecedents in ancient (and probably pre-) history. The slaying of the Innocents, the purging of Sodom and Gomorra: these are biblical references to acts of genocide, in the latter case at the whim of a loving creator, even.[409] 'The whole people must be wiped out of existence, and none be left to think of them or shed a tear."[410] This is the tenor of our ancient texts. It is also the tenor of Modernity. Humanity it seems shares a murderous predisposition to the contempt of outsiders. I am the Jew, and I am the German.

The loving creator in the modern context is the State, who, Godlike, is defined by its monopoly on the use of force. It is States who are the perpetrators of genocide. 'From its inception as a concept in international law, genocide has been seen mainly as a crime of states".[411] The State is a label which has been affixed to a complex of formal apparatus which exercize coercive power. These include government departments, legal institutions, and schools; but as my analysis in chapters II and III shows, State power has been exercized and summoned through mechanisms such as culture and voluntary organisations which are connected with the State in a less direct fashion. The Churches, for example, have been crucial in these histories of child removal. The relationship between the State,

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[409] Grosser cites numerous examples of biblical acts of genocide in *Ermordung der Menschheit: Der Genozid im Gedaechtnis der Voelker*, (Munich: Carl Hanser Verlag, 1990) at 28-29.

[410] Homer, *The Iliad*, cited in Bill Leadbetter, "Genocide in Antiquity" vol 11 no 3 International Network on Holocaust and Genocide at 7.

[411] Frank Chalk, "Redefining Genocide" in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadephia: University of Pennsylvania Press, 1994) 47 at 58.

voluntary organisations, and culture should thus be kept in mind in the following discussion.

The Genocide Convention has singular importance as a formulation which builds into its definition of genocide the systemic nature of this crime. Both the Australian and the Canadian governments mobilized individuals via systems and organisations to enforce separation policy. This is one way of distinguishing genocide from crimes such as homicide or assault. There is no such thing as genocide committed on an individual. It is a crime committed on groups. More precizely, genocide is committed on individuals, but in their capacity as members of a group.[412] The local effects are the same, but only up to a point. Assault or homicide may have systemic causes, but their present legal formulation makes no direct reference to them.

The Genocide Convention on the other hand builds the systemic nature of genocide into its definition. Since the modern State is bureaucratic, and since it functions via organisations ("apparatus") as well as individuals, making States the perpetrators of genocide necessarily implies that a systemic analysis be used in writing a legal narrative around genocidal events. It is the State and semi-State apparatus which have created the conditions for genocide. Legal resort to formulations of individual harms means taking individual perpetrators out of the context of the very conditions which produced those harms.

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[412] This is Lemkin's formulation. Refer to his definition *supra* at 160.

'Only under extraordinary circumstances and when provoked can people be motivated to become genociders."[413] This is the view to which analyses of genocide incline, and it is useful in certain contexts. In the present context of aboriginal child removals, it is more profitable to look at genocide as domestic, as *banal*, even as inevitable. It is to the nature of the modern democratic State that we owe the conditions of genocide. It is also in the State that are found the conditions in which a genocidal intent will never be uncovered. This is the legacy of the cultural imperative of concealment. As Foucault remarks, "Analysis should not concern itself with power at the level of conscious intention or decision....Instead it is a case of studying power at the point where its intention, if it has one, is completely invested in its real and effective practices."[414] Instead of engaging in a fruitless search for intention or contrition where it least likely to be found, Foucault insists that political analysis shift its scrutiny to practice and effect. Handsome is, after all, as handsome does: and benevolence is not a question of what a State or an organisation is prepared to admit to. Nor is it even a question of what a cultural position makes settlers say, and say in all honesty, to the question of what their motives have been. Rather, the benevolence of a State toward its subjects is found in the material and psychical conditions it enforces on its subjects. Freedom, hope, dignity: these are the children of benevolence. This framework is concerned less with the politico-legal why than with the how. "How?" By aboriginal child removal. "Why?" is a question which

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[413] Barbara Harff, "Genocide as State Terrorism" in Michael Stohl and George A. Lopez *Government Violence and Repression: An Agenda for Research* (New York: Greenwood Press, 1996) 166 at 168.

[414] Michel Foucault, "The Juridical Apparatus" in William Connolly, ed., *Legitimacy and the State* (Oxford, Basil Blackwell, 1984) 201 at 211.

has no fixed answer. "Why" is simply not good enough. Where there is injury, there must be redress.

Intent and the Organisation

Thus far, I have addressed the two of the three objectives I set out in the introduction to this chapter. I have talked about whether the Genocide Convention imports killing into its definition of genocide, concluding that it does not. I moved then to the question of genocidal intent. I have argued for a standard of legal intent which confronts the colonial interests which inspired separation policy, as well as the discourses of legitimation which colonial and settler culture have constructed around those separations. I turn now to the last of my objectives. In this part of the chapter, I return to the State. My concern now is to talk about the special problem of finding an intention in the case of crimes which have been perpetrated through systems. States and their organizations are responsible for genocide, but in what locale resides the requisite intent to genocide?

Bureaucracy is a systemic enterprise. It is a cultural production with constitutive force, constituted itself by individuals who are both subjects and objects before, during, and after bureaucracy. Analyses of the external constitution of functionaries who exercize power within the boundaries of the organization must not only situate those functionaries, those subjects, within a cultural context in the wider social sense. They must account also for the more particular cultural effects implicated wherever coercive power is

bureaucratically enforced. In the discussion which follows, I will use Weber's analysis of bureaucracy in the modern State,[415] although I do note its limitations shortly.

Part of the constitutive power of bureaucracy resides in its culture. This has two implications. Firstly, bureaucracy is not immune from the cultural and ethical values of the wider society.[416] The double imperatives of colonial culture (interest and concealment), and the racialized and gendered notions of aboriginal people which those imperatives produced, have been enforced in public and private bureaucracies, although private bureaucracies (such as were found in Church organizations) must rely on their connections with the State to mobilize coercive measures. The public domain is staffed by privilege. It is a treasury of 'men who are white, English speaking, middle class and above, middle aged and above, and at least publicly heterosexual....Male power is incorporated into State structures."[417] Feminist scholarship on gender bias in the judiciary, for example, has shown how the Courts have conspired in the systemic reinforcement of the very biases against women from which we have sought legal protection. This is the framework within which colonial fantasies about the exotic aboriginal mother are formulated as policy, receive

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[415] Max Weber, "Legitimacy, Politics and the State" in William Connolly, ed., *Legitimacy and the State* (Oxford: Basil Blackwell, 1984) 32.

[416] On this, see Davina Cooper, "Institutional Illegality and Disobedience: Local Government Narratives" (1996) 16 Oxford Journal of Legal Studies, 255.

[417] Weber, *supra* note 415 at 61.

parliamentary sanction, are carried out by coercion[418] - and then described in terms of justice and liberal ideals of equality.

The second implication of the connection I have made between bureaucracy and culture lies in the 'internal" culture(s) which are a characteristic of all collectivities, including organisations. This internal culture, like all cultures, is enforced through a system of rewards and disciplines. The quotation which follows relates to the exercize of bureaucratic power through the military in Germany during World War II:

> I once asked [my father], 'Why did you stay a colonel when others reached the rank of general?....You could have been a group leader if you hadn't acted so stupidly". And my father looked at me, he didn't get angry or anything - but he said, "You just don't know what you're talking about"[419]

This pressure to conform[420] is a function of this system of rewards and disciplines. Bureaucratic culture calls for the stifling of intuition and of the exercize of personal judgment,[421] the repression of freedom and of responsibility, the disaggregation of the whole into unrelated parts. These are the interventions of bureaucracy in the constitution

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[418] The troubled relationship between police and indigenous people in both Australia and Canada is seen in the high rates of aboriginal detention in both contexts. See Verity Burgmann, *Power and Protest: Movements for Change in Australian Society* (St. Leonards: Allen and Unwin, 1993) at 27. The agents for removal of children have been the police and church officials in Australia. In Canada, agents of the Department of Indian Affairs and, again, church officials were instrumental in enforced removals.

[419] Dan Bar-On, *Legacy of Silence: Encounters with Children of the Third Reich* (Cambridge, Mass: Harvard University Press, 1989) at 223.

[420] Weber, *supra* note 415, at 33-34. Weber also situates the power of modern bureaucracy in the tendency to conform (from which authority and hence power is derived), and the imprimatur of the law.

[421] The primacy of bureaucratic method over individual ethical response is illustrated in SS interventions in Rumania during W.W.II. "Taken aback...by the horrors of old-fashioned spontaneous pogroms, they often intervened to save Jews from sheer butchery so that the killing could be done in what according to them was a civilised way." Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: The Viking Press, 1965) at 190.

of the subject. They amount to the constitutive force of a "spirit of formalistic impersonality - *sine ira et studio*, without hatred and without passion, and hence without affection or enthusiasm."[422] They become in turn the interventions of the subject in the constitution of bureaucracy. Neighbourly love as an organising principle[423] becomes in the bureaucratic context *rücksichtlose Härte*[424] (ruthless toughness).

> Gilbert looked up, his copper face glowing in the light from the logs. "He says the white man has no emotion."[425]

This culture of enforced conformity to the counterintuitive renders the individuals who operate in that culture to a certain extent irrelevant. This explains the "autonomy of process" which characterizes the modern bureaucratic state. There is no ethical impulse, there is only power:

> Modern societies are becoming increasingly like self-regulating machines, whose human tenders are needed only to make the minor adjustments demanded by the machine itself. As the whole system grows more and more complex, each individual is able to understand and control less and less of it. In area after area of both public and private life, no single identifiable office or individual

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[422] Max Weber, *Economy and Society: An Outline of Interpretive Sociology,* vol. 1, ed. by G. Roth and C. Wittich (Berkeley: University of California Press, 1978) at 225.

[423] This is a reference to Lord Atkin's dicta on negligence. He explicitly derives this from the Christian doctrine of neighbourly love, in whose honour he calls his principle "the Neighbourhood Principle", holding that liability at common law for negligence is not divorced from moral considerations: rather it is "based upon a general public sentiment of moral wrongdoing for which the offender must pay" (per Lord Atkin in Donoghue v Stevenson (1932) AC 562 at 580). This is an interesting illustration of my argument as to the relationship between individuals (a judge), and systems (culture, and legal doctrine).

[424] This is a bureaucratic slogan from the Third Reich, which makes a good out of the repression of intuition. *Supra.*, note 421 at 161. This approach might also be seen in terms of the liberal injunction against the emotional, the local, the subjective.

[425] Boyce Richardson, *Strangers Devour the Land* (Post Mills, Vermont: Chelsea Green Publishing., 1991) at 151.

> commands either the knowledge or the authority to make decisions. A search for the responsible party leads though an endless maze of committees, bureaus, offices, and anonymous bodies.[426]

The functionary of the modern bureaucratic state has no *volens*: she is a "cog in the wheel" whose presence is a mere incident to bureaucratic operation. The bureaucratic organisation is "capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings. It thus makes possible a particularly high degree of calculability of results for the heads of the organisation and for those acting in relation to it. There is a curious confluence of the utterly predictable with the completely unintentional. The efficacy of bureaucracy lies in the fragmentation through its parts of the knowledge and power which reside in it as a system. The relationship between the power (and hence the positive intent) of the organisation and the power of the individuals who work in it is therefore inversely proportionate. *This is the conundrum of organisational intentionality*. Systemically-enforced harms are a measure not only of the power of the system (the more powerful the system, the greater the potential for harm, and the smaller the potential for finding a locus of individual intent for that harm); they are a measure too of the lack of ethical or even legal control which is a function of the specificities of bureaucratic power.

The State, in both its formal and its informal incarnations, is legitimated through law. It is placed beyond law's reach, however, via the bureaucratic apparatus which fragments the local to perfect the exercize of power, and perfect the rational; and then

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[426] John H. Schaar, "Legitimacy in the Modern State" in William Connolly, ed., *Legitimacy and the State* (Oxford: Basil Blackwell, 1984), 104 at 119.

finds no locale on which to afix responsibility for the harms which follow from the nature of bureaucratic power. Programmatic harms require a specific legal approach to intentionality if law is not simply to assign them unchecked to the margins of history. This approach must attend to the specificities of the bureaucratic subject and the exercize of its power.

The Weberian approach to the exercize of bureaucratic power is to some extent a caricature. It cannot account for change and dissent in modern bureaucracies because it conceives of bureaucratic workers as isomorphic, as faceless functionaries who are wholly constituted and without agency. This approach must submit to the same critique as legal liberalism: it offers a limited framework within which to construct the legal subject. All workers in bureaucracies are not identically placed. The power each exercizes is a function not just of the extent to which she conforms to the culture of bureaucracy; it is a function too of a hierarchy in which bureaucratic elites like Duncan C. Scott, Paul Hasluck, and the nameless functionaries who attend to the banal aspects of genocide have different relationships to power and an intent to cause the effects of its exercize. There is no response in Weber's formulation to the totalising aims of bureaucracy beyond submission in the individual and the collective. His model is useful, however, in talking about just why it is so difficult to pin down intention in the modern bureaucries. It is also useful for its reliance on the constitutive nature of (bureaucratic) culture. I turn now more specifically to this question of legal intent in the bureaucratic subject, bearing in mind the forgoing discussion about the constitution of the subject and the community in liberal legal terms.

Law, Intent, and the Bureaucratic Subject

The rise of bureaucracy, which Stone describes as one of the most significant demographic trends in our century,[427] and which Weber calls 'precisely the characteristic of the modern state",[428] presents new possibilities for the perpetration of harms. Liberal notions of the subject and her intentionality founder in the face of these possibilities. To the extent that the Modern may be characterized by its perfection of the bureaucratic form, and to the extent that genocide is a bureaucratic crime,[429] genocide is the essence of modern Western civilisation.[430] The challenge for law is the challenge of remaking our legal notions of the subject and intent so that the bureaucratic State's monopoly on the exercize of force can be curtailed by law, and curtailed despite the invisibility of individual responsibility for, and hence of apparent intent to harm. This is Arendt's[431] view of legal intent in the context of a genocidal program sponsored by the German State. She reports from the trial of Adolf Eichmann, a Nazi bureaucrat who was tried in Israel and whose

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[427] Christopher D. Stone, "Large Organisations and the Law at the Pass: Toward a General Theory of Compliance Strategy" (1981) Wisconsin Law Review 861 at 863.

[428] *ibid.*, at 37.

[429] My characterisation of genocide as a bureaucratic crime comes from Hannah Arendt, especially in *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: The Viking Press, 1965). I do not assert that all genocides are carried out via institutional means; however I do argue that the systemic nature of the genocides with which Arendt is concerned is echoed in the systemic nature of the aboriginal child removals with which I am concerned, and have found her analysis very useful.

[430] Jennifer Balint, "Towards the Anti-Genocide Community: The Role of Law" vol 1(1) 1994 Australian Journal of Human Rights 12 at 12.

[431] *supra*, note 429.

legal defence rested on the bureaucratic fragmentation of responsibility which I have just discussed:

> Foremost among the larger issues at stake in the Eichmann trial was the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime. On nothing, perhaps, has civilized jurisprudence prided itself more than on this taking into account of the subjective factor.[432]

This analysis averts to the legal response demanded by the rise of administrative harms: a response which vexes older legal notions of intent to unmask the smiling villain of the bureaucratic State. This response takes place bearing in mind the insights of critiques of legal liberalism, critiques which likewise unmask the subject to reveal the context which resides in it, legal recognition or no. *Individual action must be understood in the context in which it was undertaken so that intentionality is fixable through its being contextualized, as in the Eichmann trial. Second, the notion of an individual defendant in the prosecution of crimes which have been systemically implemented is supplemented by approaches which target the organisation itself as the perpetrator.* The criminal perpetrator and the system are in this response co-defendents. The individual and structure are tried, jointly and severally. This is consistent with a theoretical approach which not only recognizes the dialectic between the constituted and the constituting subject, who are contained in the same person or in the collective; but also the subjectivity and the agency of the organisation, itself constituted and constitutive. It rests on a recasting of legal culture and correspondingly of law's approach to the subject and her intentionality. In this approach are found the theoretical preconditions for a rigorously-argued response to the

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[432] Arendt, *supra,* note 429 at 277.

conundrum of organisational intentionality. This response finds an intent in both the individual and the system by casting both as subjects and constructing legal notions of intent *within* the specificities of the context in which those subjects are constituted. These specificities are found in the particular power dynamics of organisations, dynamics which, following Weber, account for the absence of intent pleaded by individuals whose hands attend the bureaucratic machine. They are also found in hierarchical positioning, and this last is the means by which it is Hitler who is pursued by the law, and not the boy who oiled the wheels of the train bound for Dachau. The higher up a person is on the chain of bureaucratic command, the greater is the power she exercizes, although judgements as to the point at which the relationship between the exercize of power and its origins is intimate enough to ground a finding of legal intent will be conditioned by culture.

Remedies

Stone takes an approach which looks at both individual and collective responsibility in bureaucratic settings, suggesting legal responses to wrongs of this nature. He considers remedies against the individual, where the degree of control exercized and hence the degree of culpability demonstrated by a person warrant tracking her or him 'through the bureaucratic thicket" [433] which I have described[434] as characteristic of the modern organisation. Proceedings against an individual might issue in two directions,

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[433] Christopher D. Stone, "Large Organisations and the Law at the Pass: Toward a General Theory of Compliance Strategy" (1981) Wisconsin Law Review 861 at 865.

[434] *supra* at 203 where I talk about a bureaucratic "culture of enforced conformity to the counterintuitive".

depending on the way intentionality is approached. In negligence, firstly, the absence of the knowledge conditions which precede an intention in the legal subject is not necessarily fatal to a judgment against the person and to that extent a finding of (constructive) intent: a plea of ignorance either as to the actions which occurred or as to their harmful nature[435] is met by the normative judgment of reasonable foreseeability: the subject should have known.[436] Sarah Pritchard uses this approach to legal intent in her work on child removals as genocide,[437] arguing that proof of reasonable foreseeability is provided in the visible destruction of aboriginal peoples as a group.[438] Remedies of this nature include remedies in tort, where the individual inflicts a harm, most visibly a physical harm, directly on the body of another. Damages in a civil suit for assault or battery in the case of police or prison warden brutality, flowing from the perpetrator to the victim, fall into this class; as do the criminal proceedings in train in both Australia and Canada against individuals who

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[435] The imprimatur of the law in this respect will found a defence, for its imperial authority is persuasive as to the question of whether a thing is a harm or a good. Law is, after all, the ritualised ethic of the Modern, as my discussion of the Neighborhood Principle (*supra* at note 423) demonstrates - but its normative conclusiveness, assailable since the trials of Socrates and Jesus, has been tarnished in specific connection with human rights since Nuremberg.

[436] David Luban, Alan Strudler and David Wasserman, "Moral Responsibility in the Age of Bureaucracy" [1992] 90 Michigan Law Review 2348 at 2387. These authors elaborate on this position of culpability in the absence of intent or knowledge by placing premptive duties on employees to investigate the nature of the work and the consequences of their actions. This approach represents one of the few attempts in the scholarly writing to make a case for strict liability in the context of bureaucratic responsibility, but it demonstrates a lack of subtlety in its understanding of the nature of the subject. In this formulation, there is no bureaucratic culture of secrecy, hierarchy, or reward for obedience.

[437] Sarah Pritchard, "International Law" c.7 in title 1 "Aborigines and Torres Strait Islanders", *Laws of Australia* (Sydney: The Law Book Company, 1993).

[438] This appoach is reinforced by the documentation of aboriginal mistreatment available to and even collected by the departments and Churches which I outline in Chapter II for instance. See *supra* at 78.

abused aboriginal children in institutional settings.[439] This finding of individual liability has institutional ramifications to the extent that an organisation and/or its leadership might then be held to be liable as principal for the acts of its agents. Findings against an institution in the way of vicarious liability rely on a prior finding of local responsibility, and is hence of marginal importance to a project which seeks to attach liability where responsibility cannot be localized.

Dr Pritchard's is an approach in which the connection between intent and a harm is simply assumed from the visibility of the harm. It does not address questions of the socio-legal conditions in which a harm will be visible in the first place; and neither does it look beyond the individual in its characterisation of who the legal subjects are. This is problematic for a project which seeks to look at aboriginal child removals in the systemic terms which I have argued are one of the most attractive features of the Genocide Convention as opposed to domestic causes of action. I offer an approach to intent which confronts the historical and socio-legal contexts within which the interpretation of any legal instrument, including the Genocide Convention, will take place. Nonetheless, Dr Pritchard's approach brings law's attention to those aspects of child removals which might be addressed in a characterisation of subjects and harms in individual terms; and it was

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[439] Information on these suits can be found in the Australian context in Tony Buti, "Removal of Indigenous Children From Their Families: The National Enquiry and what came before - the Push for Reparation" (1998) 3 Australian Indigenous Law Reporter, 1 at 18. In Canada, suits are similarly being pursued by individual claimants, many of whom are represented by a small number of lawyers. The Merchant Legal Group in Regina, Saskatchewan, for instance, represents 400 claimants (personal communication with Tony Merchant, Principle, Merchant Legal Group, Friday 23 July 1998). The federal police force, the RCMP, has also established a residential school task force in Vancouver, British Columbia.

used in *Bringing them home* to conclude that the removal of the stolen generations was genocidal.

The second context in which proceedings against an individual might issue is through the construction of liability in the absence of intent. This absence has been relied upon in trials for bureaucratically perpetrated war crimes, and the cog-in-the-wheel defence which attaches to it is compelling for several reasons. It typically accounts for the length and complexity of trials for war crimes, and persists in our legal schema with good reason. Intentionally in the subject ranges from Oedipal ignorance, which founds strict liability and where punishment is unjust, to constructive knowledge ("reasonable foreseeability", in the tortious formulation discussed above), to actual knowledge.

> There was a black and white shot of her and another woman, in the two-piece bathing suits and platform shoes and picture hats of the time; they were wearing cat's eye sunglasses and sitting in deck chairs by a swimming pool. The swimming pool was beside their house, which was near the camp with the ovens. The woman said she didn't notice much that she found unusual. She denied knowing about the ovens.[440]

Bearing in mind the vexed relationship between law, governance, and popular opinion (or "community standards"), Stone is right to avert to the prevailing moral constraints[441] which must guide findings of individual liability in institutional settings where the knowledge conditions[442] which precede liability and individual intent will not be

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[440] Margaret Atwood, *The Handmaid's Tale*, (Toronto: McClelland-Bantam, 1985) at 137. Atwood has this character commit suicide on the day after this interview.

[441] Christopher D. Stone, "Large Organisations and the Law at the Pass: Toward a General Theory of Compliance Strategy" (1981) Wisconsin Law Review 861 at 865.

[442] For an interesting discussion of this see David Luban, Alan Strudler and David Wasserman, "Moral Responsibility in the Age of Bureaucracy" [1992] 90 Michigan Law Review 2348 at 2363-2365.

met because the function of the modern organisation is to disperse them. It may not be good political strategy to imagine and then set in train trials of certain of the agents of the Department of Indian Affairs, or the Aboriginal Protection Boards for genocide by child removal, for this very reason. Auschwitz and the international human rights regime which is its legacy make short work of the epistemological excuse ('I didn't know') and the positivist excuse ('I was acting under orders'), but their force in domestic legal regimes and in the communities whose normative frameworks sustained the actions in question should not be overestimated, even if those normative frameworks no longer have currency. 'The strength...of the positivist excuse may render [its] historic rejection...an empty or very partial victory."[443] It is wise in neither political nor in legal terms to pursue change based on the norms set out in the Genocide Convention without careful scrutiny of the relationship between 'prevailing community standards" [444] and the assignment of legal liability on the basis of an ignorance from which no constructive knowledge can be extracted.

Realpolitik and the Genocide Convention

The international regime of human rights law presents a challenge to the political interpretations of Sate legitimacy which inhere in the modern State, and a call for the return, or more correctly, the birth of democracy in the States which participate in that

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[443] *ibid.*, at 2352.

[444] The Australian High Court in *Kruger* has stated that judgments about historical events should be made according to the standards which prevailed at the time the events unfolded.

regime in part by signing the multitude of human rights instruments which proliferate in the United Nations system. The difficulties of describing child removals in Australia and Canada in terms of genocide have been canvassed: briefly, they lie in the unexplicated requirement that child removals occur in the context of a wider program of contemporaneous killings, in the cultural processes at work to manufacture benevolence, and in the difficulty of constructing an intent in the apparatus of the bureaucratic State to destroy a group. As the above discussion of *Kruger* shows,[445] the project of legal redress for the victims of child removals is more likely to meet with success in domestic legal arenas where reliance is placed on processes (such as in criminal or tort law, which emphasize the isolated nature of both the subject and the object of the abuse, and which proceed on a case by case basis). Throughout this chapter, however, I have argued that genocide in the colonial context is a systemic enterprize whose occurrence is as much a function of Statehood as it is a function of the abuse of power by individuals; harms produced in and by a set of circumstances which are inadequately theorized by an atomized approach to forced removals.

Genocide has not fared well as the basis for legal processes whether domestic or international: in the international context, the politics of the international human rights regime have produced a notable lack of enforcement of the procedures in the Genocide Convention.[446] It is not the text of the Genocide Convention which requires that death

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[445] *supra,* at 176.

[446] Leo Kuper, "Theoretical Issues Relating to Genocide" in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions* (Philadephia: University of Pennsylvania Press, 1994) 31 at 42.

occur in conjunction with child removals in order for these histories to be given the name of "genocide"; rather, it is the political considerations which operate around attempts to invoke the Convention which form the primary obstacle to the naming of this crime. These political considerations have operated in the recent ad hoc trials in Rwanda and the former Yugoslavia, where the UN itself placed administrative and financial hurdles in the way of legal process.[447] Forcing an account internationally for the forced removal of children would require scenes of historical slaughter which are furnished in direct connection by neither the Canadian nor Australian child removals - while death has been an incident of the maltreatment of the children, an international community which cannot follow the causal chain of Aboriginal deaths in Amazonian South America (from the incursions of settlers, to the destruction of environments, to the death of the peoples who have depended for centuries on those environments for sustenance) is unlikely to see responsibility for the abuse of children in State-run institutions in genocidal terms.

The text of the Convention and the history of its deployment since 1948 requires special interrogation of the role of the United States in mapping out the boundaries of the emerging field of international human rights law. The enforcement and even the symbolic reliance by the international community on the standards which the Convention purports to set out (abbreviated as they are by the political manoeuvres which leading up to its

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[447] M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five years: the Need to Establish a Permanent International Criminal Court (1997) 10 Harvard Human Rights Journal 11 at 41. See, too, John Webb, "Substantive and Procedural Hurdles in the application of the Genocide Convention to alleged Crimes in the former Yugoslavia" (1993) 23 Georgia Journal of International and Comparative Law 377.

adoption in the General Assembly) has been undermined in this period by the American stance on the Convention's meaning as well as its legitimacy. The willingness of the US to lend support to the Convention has been circumscribed by its involvement since 1948 in events which meet even a minimalist interpretation of the Convention (Vietnam, Indonesia, East Timor, Iraq).

> In none of the "episodes" occurring prior to 1990 - encompassing....the US-sponsored 1965 Indonesian extermination of perhaps a half-million communists" to the holocaust in Burundi and Bangladesh in 1972 - was the Genocide Convention invoked by the United Nations. Indeed, with the notable exception of the Khmer Rouge "autogenocide" in Cambodia/Kampuchea - which was showcased...as a post hoc justification for US aggression there - none were ever described as being genocidal by mainstream journalists and commentators. It was not until the [...] US ratification...that it became permissible for the UN to employ the term in serious fashion, and then only with respect to *some* perpetrators in *certain* instances. [448]

This is the *Realpolitik* which drives the legal enforcement, though not the necessarily the interpretation, of the Genocide Convention; so that an affirmative international legal response to a claim of genocide for the victims of forced child removal policies is, I suggest, unlikely in the climate which prevails at present in the international politico-legal community. There has been no formal charge of genocide against the US for its actions in Iraq since 1990, despite a death total there of over a quarter of a million troops in the course of the war, many of whom were in retreat, and some of whom were buried alive in emplacements by US soldiers using rome ploughs; and an estimated half million deaths, mostly of children, following the US-led embargo on food, medical supplies and materials for infrastructural repair.[449]

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[448] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Lights Books, 1997) at 390.

[449] *ibid.*, at 389.

> The US has moved decisively to domesticate [the convention], harnessing international law entirely to the needs and dictates of American policy. Universal condemnation of the crime of genocide is thus being coopted to a point at which condemnation accrues only to genocide which, whether in form of in function, have failed to receive the sanction of the US. [450]

A confrontation of political limits is in no sense an abdication of hope, however, or of an ethical impulse to find a name in law for the crime of aboriginal child removals. Limits must be identified before they can be challenged and dismantled. Neither are the uses which can be made of the Genocide Convention limited to the formal field of international human rights prosecutions. International human rights enjoy an increasing status in the domestic legal systems of both Australia and Canada. Formal legal adjudication is not the only forum in which pronouncements of the legal status of events are made. *Bringing them home*, for instance, has tendered the conclusion[451] that the removals were genocidal, provoking precisely the kind of national and cultural debate which ought to have taken place a century ago. This momentum must be maintained, regardless of the reluctance of domestic and international legal fora to apply the Convention. It must be maintained in the interests of prevention, as well as punishment; for the cultural imperatives of interest and concealment operate with just as much vigour in the present as ever they did in the past. Just as the rhetoric of rights inspired increased rates of aboriginal child removals in both Australia and Canada in the 1950s, so is it used in the present to frustrate any critical enquiry into the rates of aboriginal children who are still being apprehended by the welfare system. This is precisely the logic to which I averted

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[450] *ibid.*, at 391.

[451] at 270-275.

in Chapter IV.[452] It is a logic which sees harms, and cannot trace them to their source. It is a logic in which the lessons of the past are left unlearned, and the present must reinvent for itself the knowledge of its own folly. Harms persist, settler society develops discourses to justify them, and midnight's children watch the clock in waiting for mothers and fathers who have been forced to relinquish them.

Conclusion

The interpretation of the legal instrument at hand will depend on the political and the cultural will to find a legal expression for the harm of aboriginal child removals. Recognition of harm will absolutely depend on encoding in law and standards of legal intent the historical specificities which created that harm. Legal interpretation is value-laden: there is nothing novel in this argument. In the absence of an unambiguous statement in the Convention of what "genocide" really means, importing a requirement of killing, for example, is itself a question of historical specificity. Killing and genocide go together because political expediency has decreed that they do; not because the law has decreed it.

This alliance between culture and law might be turned around in the postcolonial mood of the international human rights regime and made to work in other ways. The modern response of the State and the apparatus of its power (Churches, educational institutions, bureaucracy, the police) to charges of historical mistreatment of aboriginal people has been the assertion of benevolent intent. This veneer of benevolence persists

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[452] at 146.

into the present, so that analyses of the realities of indigenous people construct harms committed in the name of Empire as incidents of a history which recedes into the murky waters of long since discredited notions of racial and sexual superiority. This temporal divide, in fact, is apparently the precondition to the visibility of harms against aboriginal people - they were contemporaneously invisible; and this aggressive disjunction between the now of aboriginal suffering and the critical recognition of its origins must put us on our guard at the end of this century that the same dynamic is likely to obscure the relationship between the present interests of white people in settler States like Australia and Canada and the continued failure of aboriginal people to thrive on the wasted lands we have reserved to them. When aboriginal child removals become visible as harms, then culture and history might decree that the law must find a way to punish those harms and, more importantly, to prevent their recurrence. Decisions about what the Genocide Convention really means are cultural, and political. The lesson of human rights *Realpolitik* is that law, culture and politics exist in dynamic relationship with each other. I urge that the pretence that there is a "true" meaning of genocide in the Convention be abandoned. The cultural sanction which has relatively recently attached to aboriginal child removals in the international legal mainstream[453] is sufficient to efface the question mark which hangs over killing, colonial benevolence, and organizational intentionality.

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[453] Cultural sanction has always attached to aboriginal child removals in the marginal communities from which the children were taken. Mainstream cultural sanction (both domestic and international) has followed on the widespread publication in both Australia and Canada of the histories of child removal. This is recent in both countries; and represents both a cause and an effect of changes in cultural positioning of the populations on either side of the colonial divide.

Settler societies will adopt the discourse of intent to genocide only when their cultures evolve toward an ethical decision to relinquish their own privilege. This is not a merely Utopian position. The reform of rape and domestic violence law following feminist critiques shows that there is space in the complex workings of our cultural and political organization and organizations for change which speaks to the margins rather than the centre. If this were not the case, then there would be no political means except violence and no hope in the cause of peace. When dominant national collectivities are confronted with atrocities in which they were complicit either because they knew or because they benefited, they are called to undertake a process of redefining themselves and their cultural myths. Legal process has a role to play in the work of cultural redefinition, because culture and the law are partners in a dance where the leader and the follower are unfixed. Cultural transformation and legal transformation succour each other, and recasting aboriginal child removals in genocidal terms is a gambit in which the law quite consciously assumes the lead. 'Myths of founding and refounding often centre on legal proceedings."[454] Socrates, Jesus Christ, Joan of Arc, Copernicus, Nuremberg: the trial and legal process is drama and catharsis in which norms are summoned, examined, and refashioned. Australians know this from the High Court decision of *Mabo*, and Canadians know it from the Quebec Reference handed down by the Supreme Court in August 1998. Buttressed by a method which valorizes the subjectivities of the margins, and pursued intent through the maze of the modern organization, the law might penetrate the ambiguity of the legal text (the

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[454] Mark J. Osiel, "Ever Again: Legal Remembrance of Administrative Massacre" [1995] 144 University of Pennsylvania Law Review 463 at 464.

Genocide Convention) to give a name to these crimes. Naming is the first foray of both culture and the law in the struggle of memory against forgetting.[455]

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[455] "[T]he struggle of man against power is the struggle of memory against forgetting." Milan Kundera, *The Book of Laughter and Forgetting*

This is the place where the old snake lives, and I'd always been told by my mother that we mustn't go to a pool without making our peace. If you've been away you can't just go back there and walk around or do what you like, that's the law. [Three of my children], and my two little grandchildren were with me, and I said to them, "I can't reach down there, but just cup your hands and give me the water." Then I told them, "You've got to tell me if you see a rainbow when I blow."

When we got to the edge of the pool Noel went down and got some water, put his hands into mine, and I took it. I put the water in my mouth and I blew hard towards the sun. As I blew this big rainbow came, and I said "Yinda ngurra - I belong."

Alice Nannup, removed from her mother at age 12

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