

## Liberal forms of governing Australian Indigenous peoples

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*This article considers three different historical events from the point of view of their connections to aspects of the history of liberal political reason: the actions of the British in New South Wales in the early 19<sup>th</sup> century in their claim to sovereignty over Indigenous lands; the establishment of Aboriginal missions and subsequent removal of Aboriginal children in the early 20<sup>th</sup> century; and the Northern Territory Emergency Response and suspension of the Australian Commonwealth Racial Discrimination Act (1975) early in the 21<sup>st</sup> century. The aim is to point to gaps between present claims about liberalism and 'actual existing liberalism', review the basis for examining accounts of governance deploying 'authoritarian liberalism' and 'race war' as central concepts, and call into question the Northern Territory campaign as an 'exceptional' event.*

### INTRODUCTION

In June 2007 the Australian Government announced the Northern Territory Emergency Response, within days of a public report raising issues of sexual abuse of children in Aboriginal communities in the Territory.<sup>1</sup> The intervention was announced in the lead-up to a Federal election and comprised widespread restriction of alcohol, compulsory medical checks of Indigenous children, the quarantining of income support for basics like food, enforced school attendance, and the abolition of the permit system on Aboriginal lands. It was accompanied by the arrival of doctors,

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<sup>1</sup> R. Wild and P. Anderson, *Ampe akelyernemane meke mekarle. Little children are sacred*. Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007.

This article contains aspects of the history of many Indigenous men and women who were affected by government policies in Australia. The article could not have been written without recognising their involvement and existence. In some Aboriginal communities, seeing the names of dead people may cause sadness and distress, particularly to relatives of those people. Aboriginal people are warned that names of dead people may appear in this article. The author wishes to thank Gary Wickham, Karen Jackson and four anonymous reviewers for valuable comments on earlier drafts of the article.

police and army personnel. The intervention was at odds with the recommendations of the Wild and Anderson report itself, which emphasised the fact that while the report arose in part from allegations of child sexual abuse, this was largely a symptom of 'a breakdown of Aboriginal culture and society'.<sup>2</sup> It was claims of child sexual abuse that provided the main impetus and political rationale for the intervention, which included the suspension of the Commonwealth *Racial Discrimination Act* (1975) to enforce, among other things, income quarantining and the taking of lands. Suspension of the RDA was an attempt to force Aboriginal people to live in areas approved by the Government, through the removal of social security benefits where a child is considered to be in need of protection, or where the parents reside in specific areas, or where a child has an unsatisfactory attendance at school. Suspension of the Act was accompanied by the acquisition of Aboriginal lands by means of compulsory leases, the abandonment of the Community Development Employment Program,<sup>3</sup> and preventing a court from observing customary law and practices in sentencing offenders. As a submission to the UN Committee on the Elimination of Racial Discrimination stated:

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<sup>2</sup> 'Most Aboriginal people are willing and committed to solving problems and helping their children. They are also eager to better educate themselves...Aboriginal people are not the only victims and not the only perpetrators of sexual abuse...Much of the violence and sexual abuse occurring in Territory communities is a reflection of past, current and continuing social problems which have developed over many decades...The combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms...Existing government programs to help Aboriginal people break the cycle of poverty and violence need to work better. There is not enough coordination and communication between government departments and agencies, and this is causing a breakdown in services and poor crisis intervention. Improvements in health and social services are desperately needed...Programs need to have enough funds and resources and be a long-term commitment...Our appointment and terms of reference arose out of allegations of sexual abuse of Aboriginal children. Everything we have learned since convinces us that these are just symptoms of a breakdown of Aboriginal culture and society. There is, in our view, little point in an exercise of band-aiding individual and specific problems as each one achieves an appropriate degree of media and political hype. It has not worked in the past and will not work in the future...What is required is a determined, coordinated effort to break the cycle and provide the necessary strength, power and appropriate support and services to local communities, so they can lead themselves out of the malaise: in a word, *empowerment!*' Wild and Anderson (2007), op. cit., p.12 (emphasis in original).

<sup>3</sup> According to the Commonwealth Government, 'the Community Development Employment Projects (CDEP) program strengthens Indigenous communities and supports Indigenous people in remote areas through community development and participation opportunities that develop skills, improve capacity, work readiness and employability and link with local priorities'. Australian Government, Centrelink, at <http://www.centrelink.gov.au/internet/internet.nsf/services/cdep.htm>, accessed 17 May 2011.

The legislation was based upon a nuclear family assumption, which has little or no relevance to many Aboriginal communities. It also ignored the fact that through years of neglect of basic services to Aboriginal communities, many children would be living in situations where the provision of education services is inadequate and unattractive.<sup>4</sup>

With the defeat of the conservative Coalition Government, the new Labor government appointed a panel of experts to review the intervention, which in turn recommended the reinstatement of the *Racial Discrimination Act* and changing the compulsory income management to voluntary income management. Instead, the Government claimed to have carried out extensive consultations of its own across 73 communities, and in 2010 re-introduced an amended *Racial Discrimination Act* to maintain compulsory income management while at the same time extending it to include targeted non-Indigenous welfare recipients throughout Australia. Many Indigenous communities disputed the Government's claim that it acted in accordance with their wishes. At the time of writing, Indigenous leaders continue to challenge the Government's claim to have consulted with affected communities.<sup>5</sup>

This article considers three different kinds of events in Australian legal history and the history of European-Indigenous relations, drawn from three different parts of the country, from the point of view of their connections to aspects of the history of liberal political reason: the actions of the British in the early period of white settlement in New South Wales in their claim to sovereignty over Indigenous lands; the establishment of Aboriginal missions in the early 19<sup>th</sup> century and the subsequent forced removal of Aboriginal children; and the recent Northern Territory Emergency Response. The article examines how it may be possible to map these events, in the colonial period and in its wake, onto a history of liberal practices of governing Aborigines. A conceptual framework to examine this series of powerful

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<sup>4</sup> A. Nicholson, M. Harris, G. Gartland, *Loss of Rights – The Despair of Aboriginal Communities in the Northern Territory. A submission to the UN Committee on the Elimination of Racial Discrimination – Australia* (2010).

<sup>5</sup> Concerned Australians, *This Is What We Said. Australian Aboriginal People Give Their Views on the Northern Territory Intervention* (2010).

events includes notions of authoritarian liberalism and 'race' war, where power is understood to refer to the way in which relations of force are deployed and given concrete expression - that is, the way in which power '...is war, a war continued by other means'.<sup>6</sup> Such a framework presupposes that the art of liberal forms of government, with its injunction to govern through freedom, will attempt to protect individual liberty through such mechanisms as representative government and the rule of law, but also will attempt to specify the content of individual freedom and turn it to various goals. In some cases it will seek to enforce obligations amongst those parts of the population considered to be incapable of governing themselves. Such a framework aims to explore a somewhat unsettled opposition between power and domination on the one hand, and individual freedom on the other.<sup>7</sup>

#### LIBERAL FORMS OF GOVERNING INDIGENOUS PEOPLE

The historian Henry Reynolds described the Northern Territory intervention as an act of power which showed the world that the Australian government can interfere with the smallest details of domestic life in a blatantly discriminatory way, 'regardless of the country's international obligations and professed belief in racial equality'.<sup>8</sup> Australia is a long-standing signatory to the UN Covenant on Human Rights and the Convention on the Rights of the Child.<sup>9</sup> Although the previous Howard Government opposed signing it, Australia has now also endorsed the United Nations Declaration on the Rights of Indigenous Peoples which among others acknowledges rights to fundamental freedoms, self-determination, and freedom from any kind of discrimination.<sup>10</sup> These affirmations of liberal democratic rights and equality before

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<sup>6</sup> M. Foucault, *The birth of biopolitics: lectures at the College de France, 1978-1979* (2008) ed. A. Davidson, 90.

<sup>7</sup> M. Dean, 'Liberal government and authoritarianism' (2002) 31 *Economy and society* 1, 37-61

<sup>8</sup> H. Reynolds, 'Time immemorial' (2010) *Australian Book Review*, April 7.

<sup>9</sup> United Nations. The Universal Declaration of Human Rights (1948); United Nations. General Assembly Resolution 25, session 44 Convention on the Rights of the Child (1989).

<sup>10</sup> United Nations Declaration on the Rights of Indigenous Peoples. United Nations General Assembly Resolution 61/295, 2007. See especially Article 1: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law. Article 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

the law are commonly contrasted with government actions, most recently for example, Australia's policies on asylum seekers, its conduct of certain investigations under the Commonwealth *Anti-Terrorism Act* (2005), and the NT intervention. Historical investigation of the 'liberal promise' of Indigenous rights will often acknowledge attempts to extend formal equality to Aboriginal peoples while at the same time recognising the limits of this promise and the failure of rights discourse to achieve civil and economic rights.<sup>11</sup>

Of course, it is one thing to commit to the liberal principle of equal worth of all individuals. It is quite another to equate the liberalism in academic political theory with liberalism as a 'powerful historical phenomenon'.<sup>12</sup> So while theoretical versions of liberalism may be wedded to claims about individual freedoms and equal worth, these claims do not necessarily reflect 'actually existing liberalism', such as the versions of liberal rule under British imperialism and other versions of 'authoritarian liberalism'.<sup>13</sup> For example, claims concerning freedom under liberalism are often qualified by the claim that such freedom is not possessed at birth but is acquired through discipline and moral progress, and that liberal government might sometimes aim to assist in the moral development of members of subject populations.<sup>14</sup> Further, this historical argument might also entail a coming-to-terms with a Euro-centric 'developmental view of humanity' and acknowledgement by such nineteenth century liberal theorists as JS Mill or Alex de Tocqueville that non-Western peoples were 'not yet ready for self-government'.<sup>15</sup> The developmental

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<sup>11</sup> M. Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990); J. Chesterman, *Civil Rights. How Indigenous Australian's Won Formal Equality* (2005).

<sup>12</sup> B. Hindess, 'Liberalism: what's in a name?' in *Global Governmentality: Governing International Spaces*, eds. W. Larner and W. Walters (2004) 23-39.

<sup>13</sup> B. Hindess 'The liberal government of unfreedom' (2001) 26 *Alternatives*, 2, 93-111; B. Hindess, Hindess, 'Political theory and "actually existing liberalism"' (2008) 11 *Critical Review of International Social and Political Philosophy*, 3, 347-352. Foucault's approach to law and sovereignty as overly tied to outdated, negative forms of power has been much discussed. In this context, the term 'authoritarian liberalism' has been described as a 'seeming oxymoron' in considering the importance of law and sovereignty in balancing powers required to achieve individual freedom and security. G. Wickham, 'Foucault, Law, and Power: A Reassessment' (2006), 33 *Journal of Law and Society*, 4, 596-614 at 604.

<sup>14</sup> Hindess (2008) 348

<sup>15</sup> B. Hindess 'Liberalism and history', Keynote Address, *Foucault: 25 Years On* (2009) at <http://www.unisa.edu.au/hawkeinstitute/publications/foucault-25-years/hindess.pdf>, p.2

story among educated Europeans comprised the view that humanity was divided into societies and that these could be ranked along a development spectrum, with Western Europe at the top. In addition, among these 'more advanced' societies, some people – the educated and prosperous minority – have advanced further than the rest.<sup>16</sup> If this meaning of liberalism is applied to the present Australian government's relations with Indigenous Australians, the NT intervention displays not so much a contradiction of liberal political reason, or a cynical disregard for individual worth, or an mistaken exercise of the rule of law, but rather an historical instance of authoritarian liberalism in relation to the governance of peoples who, for these purposes, are regarded as either 'not yet ready for self-government', or as having 'failed' at self-government.<sup>17</sup>

There are a number of ways in which authoritarian forms of government can be seen as a characteristic feature of the history of liberal political reason. Here, liberalism is understood as a distinct form of political reason that is concerned with the practical implications of the belief that members of the population are endowed with, or capable of acquiring a capacity for autonomous, self-directing activity. Liberalism understands the social milieu as involving both government regulation and also the self-regulating activity of free interactions between individuals capable of agency.<sup>18</sup> Government may make use of this freedom and has tended to focus on the ways in which individual liberty may be recruited for governmental purposes. But how has liberal political reason dealt with those in whom the capacity for self-government is thought to be insufficiently developed? Hindess points to John Locke's discussion of what should be done about the native inhabitants of North America, which suggested that some people are so far from acquiring the capacity for self-government that they '...should simply be cleared out of the way'.<sup>19</sup> For a second group, the capacities for self-government may be developed but only through the compulsory imposition of extended periods of discipline, a view most

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<sup>16</sup> Hindess (2009), op.cit., p.4

<sup>17</sup> Hindess (2001); D. Howard-Wagner, 'From Denial to Emergency: Governing Indigenous Communities in Australia' (2010) in Fasson, D. and Pandolfi, M. eds, *Contemporary States of Emergency. The politics of Military and Humanitarian Interventions*.

<sup>18</sup> Foucault (2008); Hindess (2001)

<sup>19</sup> Hindess (2001), p. 101

influential in the history of authoritarian versions of the welfare state and in the history of colonial administration. A third group might be seen as lacking the capacities required for autonomous action for 'external reasons', such as ill-health, poverty or lack of education, and that the role of government should be to build up these capacities by establishing a supportive environment. Hindess suggests that in western societies before the middle of the 20<sup>th</sup> century the vast majority of people were thought to belong to the second category:

the category of those who would benefit from being subjected to authoritarian rule: the subject peoples of Western imperial rule and, throughout the nineteenth and early twentieth centuries, substantial groups in Western societies themselves. In spite of liberalism's undoubted commitment to liberty, only a minority were actually governed as free individuals. Another minority – whose size is, for obvious reasons, difficult to estimate - consisted of those who were more or less successfully cleared out of the way.<sup>20</sup>

Reynolds' treatment of Aboriginal sovereignty, particularly his *Aboriginal Sovereignty: Reflections on Race, State, and Nation* has attracted historiographical commentary from a number of sources that seek to debunk the assumptions underpinning particular kinds of critiques of settler sovereignty.<sup>21</sup> For example, Ian Hunter argues that many of the critiques contained in Indigenous-rights historiography in the genre of the 'history of the moral nation' embody the principle that, in its origins, the nation failed to produce a just outcome and that the injustice of this act can be objectively judged in accordance with a moral-judicial principle common to both modern Australians and their colonising forebears.<sup>22</sup> Moreover, an alternative revisionist view of the culture of the common law is linked to this 'moral history of the nation' perspective through its shared commitment to 'presentism' – the view that past actors were governed by the same norms and purposes as their present counterparts - which permits the law to function as the trans-historical frame against which the moral history of the nation can be judged. Hunter shows

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<sup>20</sup> Hindess (2001) 101

<sup>21</sup> H.Reynolds, *Aboriginal Sovereignty: Reflections on Race, State, and Nation* (1996).

<sup>22</sup> I. Hunter, 'Natural Law, Historiography, and Aboriginal Sovereignty' (2007) 11, *Legal History*, at 139

how these assumptions permeate recent history writing of the British occupation and the functioning of legal reasoning within it.

The events discussed in this paper also allow for some examination of the place of law in 'actual existing liberalism'; however, the paper rejects a view of liberal political reason as containing fundamental moral principles that carry through the period since British occupation. In addition, these powerful events are understood to not follow a continuous advance of ideas and practices over these two centuries according to some essential governing principle, or towards some final point of arrival, or according to a supra-moral regime spanning the history of the nation. Rather, they point to a set of contingent practices relating to specific problems of governing specific populations and the conditions under which these problems appear, from a liberal understanding of the task of government. The three sets of events need to be understood as demonstrating modes of governance that accord with liberal political reason, along with an increased rebalancing of law with discipline, regulation and normalisation.<sup>23</sup>

Some sociologists have argued that positing Australia as an advanced liberal state would only be possible by ignoring the 'profoundly illiberal manner' in which indigenous Australians have been governed, such as nineteenth century protection and assimilation policies, forced dispossession, child removal, segregation and denial of land tenure, or by overlooking complex hybrid links to other mentalities of governing, such as neo-conservatism.<sup>24</sup> But as the elements of authoritarian liberalism listed above suggest, liberal political reason may not necessarily demonstrate an observance of forms of rule such as autonomous citizenship. In studies based on the idea of a liberal mode of governing, autonomous individuals and individual liberty should be seen as a governmental product – the effect of interventions concerned to promote a specific 'form of life'. Hindess suggests that different conceptions of liberalism derive from a fundamental ambiguity in the

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<sup>23</sup> A. Hunt, 'Foucault's Expulsion of Law: Towards a Retrieval' (1992) 17 *Law and Social Inquiry*, 1-38.

<sup>24</sup> R.Hogg and K.Carrington, 'Governing Rural Australia: Land, Space and Race' in G.Wickham and G.Pavlich eds *Rethinking Law, Society and Governance. Foucault's Bequest* (2001), p.58; G. Pavlich, 'Transforming Images: Society, Law and Critique', in G.Wickham and G. Pavlich, op. cit, p.6.



liberal project. In the discourse of liberal politics, the figure of a community of autonomous individuals appears as a given reality, serving to identify the character and limits of legitimate government, while at the same time it may appear as a 'yet to be realised positivity, serving to define the objective for a variety of governmental projects'.<sup>25</sup>

It is in these senses that any opposition between liberal and authoritarian rationalities of governing is regarded as highly unstable.<sup>26</sup> This is particularly the case when legal powers protecting liberal freedoms are given normative content by specialist knowledges in the formally non-political domains of civil society. As Dean explains, the liberal project of 'governing through freedom' entails divisions between and within populations in such a way as to require authoritarian or despotic forms of governing. So liberal government encompasses a defined legal-political order as well as a 'liberal police', a feature of liberalism that has long been noted by such intellectual stances as post-colonialism, feminism and the governmentality literatures. It is by examining this liberal police that we come to understand the substantive content of the self-governing individual and its 'others', which then forms the basis of liberal divisions of a population. The liberal conception of government as arising from knowledges of civil society 'feeds the authoritarian dimension of liberal government':

liberal government encompasses both the constitutionally defined legal-political order and a liberal police established by a knowledge of spheres, processes and agencies outside this domain, eg. civil society, economy, population, etc.. In order to understand the authoritarian potential of liberal government we need to comprehend both aspects of the liberal order.<sup>27</sup>

## DISCOURSES OF SOVEREIGNTY AND DISCOURSES OF WAR

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<sup>25</sup> B. Hindess, 'Liberalism, socialism and democracy: variations on a governmental theme' in A. Barry, T. Osborne and N. Rose eds *Foucault and Political Reason. Liberalism, neo-liberalism and rationalities of government* (1996), p.66.

<sup>26</sup> M. Dean, 'Liberal government and authoritarianism', op. cit. (2002).

<sup>27</sup> id., p. 57. See also M. Dean, *Governing Societies: Political perspectives on domestic and international rule*, (2007)

A glimpse of the relations of Indigenous peoples in their accommodation and resistance to the early settlers of New South Wales provides one standpoint on the exercise of power. In her account of attempts to impose sovereignty on the territory in the earliest period of occupation by British authorities, Lisa Ford documents how colonial authorities used diplomacy as the basis of state-indigenous relations, but when negotiation and conciliation failed '...the colony made war'. In the period 1790-1816, military campaigns sent out to kill or capture Aborigines contained no declaration of martial law, as this would have assumed an assertion of sovereign authority over subjects or citizens.<sup>28</sup> In 1805 Judge Advocate Atkins suggested that though Aborigines were 'within the Pale of H.M. Protection' they could not be legally tried because they were 'totally ignorant' of the 'meaning and tendency' of British legal proceedings. He advised the governor to meet Aboriginal depredations with decentralised violence 'through the formation and deployment of local militia', while settlers were excused in law of charges of murder for shooting Aborigines who stole their corn.<sup>29</sup> Ford argues:

...if imperial protection of Aborigines in New South Wales did not equate to jurisdiction over them, retaliation might be a legitimate response to Aboriginal violence under European principles of natural law ... the government of New South Wales did not equate settler sovereignty with territorial jurisdiction. Indigenous people marked the juridical boundaries of the colony.<sup>30</sup>

Instances of legal pluralism included an Aboriginal highwayman who in 1815 was incarcerated for two weeks to induce him to return the money he stole, without any intervention by a court. The following year, Macquarie asked outlaw Aborigines to surrender so they could be 'forgiven and pardoned', an offer that Ford described as a 'jumble of diplomacy and jurisdiction' but also a recognition that Aborigines 'had yet

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<sup>28</sup> L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*, (2010) 45

<sup>29</sup> *id.*, p.47

<sup>30</sup> *id.*, p.47. Ford observes that 'protection' was a vague term used to describe the status of foreigners residing in Britain or the status of a weak sovereign under the thrall of a stronger one. 'Neither status necessarily implied the loss of individual liberties or of corporate sovereignty'.

to submit themselves to His Majesty's protection (and) had some corporate or individual choice in the matter'.<sup>31</sup>

At this time, in both Australasia and North America, settler administrators and judges began to understand indigenous jurisdiction as a threat to settler sovereignty. Governor Macquarie's 1816 Proclamation stated that armed individuals or groups of Aborigines appearing near towns would be considered 'enemies' of the colony and would be treated accordingly. Macquarie asserted that Aboriginal jurisdiction could be geographically (not juridically) displaced by a new special category – the Public Peace – and that barbarous Aboriginal customs might be displaced by British law. On these terms Aborigines could not bring arms near farms or congregate in family groups, without risking summary execution. Indigenous violence near farms was clearly regarded as an act of war. According to Ford, Macquarie's argument invoked a particular liberal (but nevertheless, by 1816, anomalous) iteration of the ancient laws of conquest, whereby local law subsisted until displaced by the King, although British conquest would automatically invalidate any local customary laws that were 'barbarous' or against natural law. Much of this position was enunciated in the form of opinion of the Chief Justice and others sitting, requested by legal officers such as the Attorney General, and in many cases the opinion was acknowledged as such, in many instances referred to as an expression of 'mere principle'.<sup>32</sup>

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<sup>31</sup> *id.*, 52

<sup>32</sup> See for example *R.v Ballard* 23 April 1823. 'The Chief Justice observed, that, sitting alone, he should not like to pronounce [sic] any opinion upon a matter of so much importance; and, indeed, it would be much more advisable that an opinion should not be rendered necessary. He would state, however, that he could easily imagine cases in which the Aboriginal natives would clearly come within the provisions of the municipal law, and in which he did not consider that they would. If, for instance, a dispute arose amongst a tribe, and that they decided [sic] it according to their own customs, and what was, in fact the ancient law of England - namely, by battle, and that one or more of the combatants were slain, such a case would, clearly not be cognizable by our law. If, on the other hand, a native, living in the town, and who, by such residence, had placed himself within the protection of the municipal law, was attacked and slain by any other native, then he conceived the native by whom he was slain would be rendered amenable to our law. These remarks, however His Honor stated, were only made in passing, and upon mere general principles. Should the case require to be raised in a formal manner for the consideration of the Court, he would have an opportunity of conferring with, and taking the opinion of the other Judges on so novel and so important an enquiry'. *Decisions of the Superior Courts of New South Wales 1788-1791* at [http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r\\_v\\_ballard\\_or\\_barrett\\_1829.htm](http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_ballard_or_barrett_1829.htm)

By the end of the 18<sup>th</sup> century, Ford suggests, Enlightenment philosophy had created a new ideological universe in which Aborigines were a people 'so savage that they were unable to claim property or to constitute political society'.<sup>33</sup> Throughout the 19<sup>th</sup> century, narratives of peril and 'fear of one's life' continued to have salience as a justifiable homicide defence in settler killings of Aborigines in the more distant Australian peripheries, when the colony could not or would not exercise jurisdiction over Indigenous peoples. The settlers had a monopoly on legal evidence, as legal practice privileged the words of 'respectable men' and relegated Aboriginal testimony to rumour.<sup>34</sup> At the end of that century, 'race science' constituted yet another ideological universe to buttress policies of separation and exclusion of Aboriginal populations, the effects of which are still being experienced.

So until 1836 in New South Wales, and after the settlement of Port Phillip District in 1838, law was used both as a method of Aboriginal civilization and an instrument of terror, but, as Ford observes, the gradual establishment of settler jurisdiction did not displace either Aboriginal customary law nor frontier settler violence. In 1836, the complicated jurisdictional story around the case of *R v Murrell*, and particularly the decision of the jurist William Burton, finally determined the common-law status of Indigenous jurisdiction and sovereignty. Aborigines were entitled to be regarded as a 'free and independent people', but the various tribes had not attained 'to such a position in point of numbers and civilization...as to be entitled to be recognised as so many sovereign states governed by laws of their own', which Ford describes as 'a mix of Enlightenment stadial logic with law'.<sup>35</sup> Using Vattel as his main source, Burton argued that Aborigines had no property or dominion in land because, as savages and barbarians, they had not appropriated it to themselves through cultivation. He assumed also that Aborigines were protected by the British sovereign

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<sup>33</sup> Ford, op.cit., n.15, p. 74-75.

<sup>34</sup> id., p. 103.

<sup>35</sup> id.,p.200. 'According to stadial theory, often ascribed to Adam Smith, peoples pass through four distinct stages of development based on the sophistication of their means of subsistence or economy. The means of subsistence were held to shape "manners", conduct, and the "moral" progress of a people as they passed from primitive savagery (hunting and gathering), to barbarism (pastoralism), agriculture, and finally to civilized commerce and foreign trade'. B. Buchan (2005) 'The empire of political thought: civilization, savagery and perceptions of Indigenous government' (2005) 18 *History of the Human Sciences* 2, 10.

as individuals, not as corporate groups, and as such, under the law of nations, they fell within the jurisdiction of colonial courts and governance.

Paul Muldoon argues that if one views the Murrell case from the perspective of war, it is possible to see the extent to which the unity proclaimed through the discourse of sovereignty was in fact the victory of one 'race' over another.<sup>36</sup> Rather than the problem of justice in the post-colonial state lying with issues around custom and giving it proper recognition through a system of law, as some critics have argued, Muldoon's focus instead is on the discourse of sovereignty itself and the question of the so-called universality of sovereignty as a system of rule. The real problem is not so much that the 'barbarians' have not been recognised as 'sovereigns' but rather that sovereignty, conceived as a specific territorial system of rule, continues to be the measure of politics. Hence, Muldoon seeks to displace the 'discourse of sovereignty' in favour of a 'discourse of war' as the main grid of intelligibility in understanding relations of power in colonial Australia and its aftermath. Sovereignty functions as a stratagem by which one 'race' achieves domination over another. It is in this sense that the institutionalisation of British sovereignty does not so much represent the beginning of the reign of law, but rather a 'partisan victory' – a victory of a modern western conception of politics over another system of governance that did not rely on the figure of the sovereign or the principal of territoriality.<sup>37</sup> So *R v Murrell* is treated by Muldoon as a sign of an historical conflict over law – a conflict in which sovereignty emerges as one of the tools to subjugate Indigenous inhabitants. Indeed, the Murrell case re-enacted the foundation myth of political community:

By turning New Holland into a political nothingness and then filling it with law, Burton completed the Hobbesian metamorphosis in which the sovereign reclaims the state of nature for 'society'. Not only did this deny the act of conquest that was underway, it robbed the Aborigines of both the justice and intelligibility of the war they waged against it. After *Murrell*, their resistance

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<sup>36</sup> P. Muldoon, 'The Sovereign Exceptions: Colonization and the Foundation of Society' (2008) 17 *Social and Legal Studies*, 1, 59-74.

<sup>37</sup> *id.*, p.61

to settlement had no other language in which to speak than that of criminality.<sup>38</sup>

The instructions given to Captain Cook in 1770 were to cultivate good relations with the inhabitants and to take possession 'with the Consent of the Natives'. But consent was clearly not attempted. The British failure to negotiate is often attributed to the legal doctrine of 'terra nullius' but, as Kercher has shown, this doctrine was applied long after the initial occupation.<sup>39</sup> Buchan points instead to British efforts to represent the Indigenous inhabitants as lacking an effective form of government by drawing on particular aspects of European thought around concepts of property, society and government.<sup>40</sup> In seeking to determine whether Aborigines were 'uncivilised' or 'savage' and hence lacking effective forms of government, the British 'were not simply aiming at factual description, but were engaged in the linguistic and conceptual representation of these peoples as subjects who could legitimately be dispossessed

...by representing the Indigenous inhabitants of Australia as lacking effective government, the British did not simply mistakenly or perfidiously fail to acknowledge pre-existing Indigenous forms of government. Rather, the very structure of their thought, and the language used to articulate it, led them to deny the possibility (at an official level) that Indigenous people could indeed possess their own legitimate forms of government.<sup>41</sup>

Other more political concepts of a nation as a self-governing community were available to the British, but were rejected. In 1841 Justice Willis attempted to adopt the concept as it was applied in the United States, but this was opposed by authorities in Sydney. Further, in *R v Murrell* (1836), defence counsel argued that Aborigines had 'manners and customs of their own' – 'in point of strictness and analogy to our law, we were bound to obey their laws not they obey ours'.<sup>42</sup> But notions of a more advanced, superior civilisation enabled the mainly British political

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<sup>38</sup> id., p. 69

<sup>39</sup> B. Kercher, *An Unruly Child: A History of Law in Australia* (1995).

<sup>40</sup> B. Buchan, 'The empire of political thought: civilization, savagery and perceptions of Indigenous government' (2005) 18 *History of the Human Sciences* 2, 1-22.

<sup>41</sup> Buchan, op. cit., p. 12.

<sup>42</sup> Muldoon, op. cit., p. 67.

thinkers to portray Indigenous peoples, especially as a consequence of their 'primitive' means of subsistence, as being in want of effective government, or indeed any government at all.<sup>43</sup>

By the early twentieth century the bare-life conditions of Aboriginal peoples were such that the Australian national and state governments took it upon themselves to attack Aboriginal communities as a matter of policy. Firstly, the newly-formed national government revoked the citizenship rights of Australian Aboriginal peoples. Secondly, the state welfare boards removed thousands of children from their parents and placed them in foster homes or institutions:

The watershed cases of the 1830s...redefined settler sovereignty as a territorial measure of authority that left little or no space for indigenous rights to property, to sovereignty, or to jurisdiction. They re-crafted plural settler polities into modern nation-states whose legitimacy was predicated on the subordination of indigenous rights. The many acts of dissolution, oppression, and marginalisation that followed were all performances of sovereignty. State legislation displaced Aborigines from their country to missions – a systematic attempt to erase indigeneity through spatial, social, and legal domination.<sup>44</sup>

We may observe, in these manoeuvres of displacement, glimpses of a merging of sovereign and disciplinary forms of power that are made bare by the presence of the white overlord. We may also observe the category of race as central to a series of questions around the constitution of political power in the colonial period, but which are occluded as these questions begin to merge around disciplinary forms of power based around science, rationality and specialisation.<sup>45</sup> 'The people' is replaced by questions of population and a series of questions about its wealth, health, distribution and its bio-technical existence, while its attachment to 'race' becomes submerged. The constitution of specifically liberal forms of governing moves beyond

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<sup>43</sup> Buchan, op. cit., p. 4.

<sup>44</sup> Ford, op. cit., p. 205-6.

<sup>45</sup> M.Dutton, '911: The after-life of colonial governmentality' (2009) 12 *Postcolonial Studies* 3, at 306

the binary of 'them and us', 'Europe and its Other' to cluster around a more complicated sets of concerns about life based on 'statistical probabilities and rational normative discourses'.<sup>46</sup> Foucault's notion of governmentality contains an elaboration of a 'warlike relation' that still is 'rumbling away...beneath political power'.<sup>47</sup>

#### COMBAT, STRATEGY, TACTIC, MANOEUVRE

Almost forty years after the settlement of the Port Philip District, the missions had become sites of rigorous and systematic attempts to destroy families, economic independence and Aboriginal identity. The missions produce evidence of resistance to sovereignty, which Muldoon suggests had no other language to speak other than that of criminality. The activities of the Aborigines Protection Board in the colony of Victoria, built around discipline and biopolitics, are framed in the language of law which derived from the various Victorian Aboriginal Protection Acts.<sup>48</sup> That their actions are consistent with the conduct of war – combat, strategy, tactic and manoeuvre - are evidenced in the machinations of the Protection Board as it sought to implement a series of measures to close the missions and break up familial relationships. Moreover, these actions were willed rather than determined by contemporary ideological shaping, as is evidenced by the statements of political adversaries. Many contemporary observers understood claims to British sovereignty to be a fiction.

In Victoria during the mid- to late 19<sup>th</sup> century, the colonial government established missions to 'protect' the remaining survivors of the British occupation, which had reduced the original inhabitants from more than 15,000 in 1834 to below 3,000 in 1851, and by the 1920s to about 500 people.<sup>49</sup> The official statistics are premised on resolution of a range of definitional issues regarding Aboriginal identity,

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<sup>46</sup> *id.*

<sup>47</sup> *Id.*, p.305; M. Foucault *Society must be defended. Lectures at the College de France, 1975-1976*. Trans. D. Macey, (1976/2003).

<sup>48</sup> A. Hunt, 'Foucault's Expulsion of Law: Towards a Retrieval', *op. cit.*, 1-38; A. Hunt and G. Wickham, *Foucault and Law. Towards a Sociology of Law as Governance* (1994); N. Rose and M. Valverde, M 'Governed by Law?' (1998) 7 *Social and Legal Studies*, 541-551.

<sup>49</sup> A. Campbell, *Victorian Aborigines. John Bulmer's Recollections 1855-1908* (1994) xii; R. Broome, *Aboriginal Victorians. A History since 1800*, (2005).



especially the counting of Aboriginal children, since after the passing of Aboriginal Acts during the last half of the 19<sup>th</sup> century most children of mixed European and Indigenous parentage were not regarded as Aborigines.<sup>50</sup> There were an estimated thirty cultural-language groups made up of hundreds of clans or land-owning groups comprised perhaps 60,000 people before the European arrival.<sup>51</sup> Compared with other districts, the Victorian colonial experience was distinctive in that there were few convicts, the occupation was swift due to fewer geographical obstacles (such as the Blue Mountains west of Sydney), the abundance of rich grasslands for sheep grazing, and because the Whig liberal outlook in Britain at the time sought unprecedented steps to try to protect Aboriginal people from the murderous onslaught experienced in other parts of the country. At the time of settlement of the Port Phillip District the Whigs were in government in Britain and influenced by a pressure group of humanitarians and evangelicals, and the latter, known as the Clapham Sect, had pressured the Liberal Government to assist emancipation of African slaves in the British West Indies. The Sect then looked to indigenous peoples in the British Empire, establishing a select committee to call for better protection and attempt to ameliorate the effects of British colonialism on those peoples.<sup>52</sup>

The policies of protection after the mid-19<sup>th</sup> century were motivated in part by what was seen to be the inability of the authorities to safeguard Aboriginal people from settler violence and secure access to schooling and other services in the face of European resistance. On the other hand, as Broome suggests, the motive may be to convince the British government to allow pastoral settlement to go ahead on the south-eastern coast. Sandor observed that a major objective of placing on reservations a population of tuberculotic and otherwise unhealthy Aborigines was to minimize the health risk to Europeans - the Port Phillip Association had set down its aims for protection as '... the civilization of the native tribes...and pastoral pursuits'.<sup>53</sup>

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<sup>50</sup> P. Read, 'How Many Separated Aboriginal Children? (2003) 49 *Australian Journal of Politics and History*, 2, 155-163.

<sup>51</sup> Broome, op. cit., p. xxi

<sup>52</sup> Broome, op. cit., p. Xxiii.

<sup>53</sup> D. Sandor, (1990) 'Protecting' Aboriginal Children: Segregation, Assimilation and Collusion (1990), p. 3.

Whatever the motives, at least three-quarters of the Aboriginal population in the Port Phillip district died during the period of 'protectionism'.<sup>54</sup> Broome claims the influence of so-called 'humanitarians and evangelicals' led to the only treaty ever offered to Aborigines in Australia, later retracted by the Colonial Office, and the establishment of the first protectorate legislation enacted by a colonial government, a unique Aboriginal administration and a network of Aboriginal reserves and missions.<sup>55</sup>

A central Board for the Protection of Aborigines was established in 1860, based on an earlier Protectorate formed in 1838, to act as guardian and protector of indigenous people in the colony. From the 1860s a Royal Commission was appointed to investigate increasing rates of Aboriginal mortality as well as allegations of mismanagement at the mission stations. A new *Aborigines Protection Act 1886* gave the Board new powers to define Aboriginality, and those subsequently classified as 'half-caste' were increasing in number and cost.<sup>56</sup> Thus began a period of governance of Indigenous people, lasting until at least the 1970s, which Broome describes as culturally the most dangerous: the breaking up of families, removal from land, and denial of identity.<sup>57</sup> The takeover of land and the spread of European settlement continued through the colony of Victoria; at the same time, rates of morbidity and mortality among Aborigines increased and the costs of maintaining

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<sup>54</sup> S. Andrews, 'Victoria' in W.M. Murray (ed.) *The Struggle for Dignity*, 1963.

<sup>55</sup> Broome, op. cit., p. xxvi.

<sup>56</sup> Victoria. *The Aborigines Protection Act 1886*. An Act to amend an Act intituled (sic) *An Act to provide of the Protection and Management of the Aboriginal Natives of Victoria*, Victorian Government Gazette, 10 December 1886. s.4.

The following persons shall be deemed to be aboriginals (sic) within the meaning of the Principal Act:-

- (1) Every aboriginal native of Victoria.
  - (2) Every half-caste who habitually associating and living with an aboriginal within the meaning of this section has prior to the date of the coming into operation of this Act completed the thirty-fourth year of his or her age
  - (3) Every female half-caste who has prior to the date aforesaid been married to an aboriginal within the meaning of this section and is at the date aforesaid living with such aboriginal
  - (4) Every infant unable to earn his or her own living, the child of an aboriginal within the meaning of this section, living with such aboriginal'
  - (5) Any half-caste other than is hereinbefore specified who for the time being holds a licence in writing from the Board under regulations to be made in that behalf to reside upon any place prescribed as a place where any aboriginal or any tribe of aboriginals may reside Victoria.
- Aborigines Protection Act 1886 s. 4 .*

<sup>57</sup> Broome, op. cit., pp. 185-206.

mission stations rose. Public utterances of officials during this period reflected the racial thinking of the period, but as Broome shows, leaders such as Victorian Premier John Murray privately confessed to the 'usurper's anxieties about ownership':

though the white man may have a legal right to the land, we must not forget that, after all, in a higher court, the blackfellow would be able to establish a much stronger moral right to the land than any of our white friends who own them today.<sup>58</sup>

However, in the absence of this 'higher court', the imagery of liberal government was to maximise the freedom of subjects and to govern through this freedom. From this point of view, a function of the missions was to deny sovereignty in relation to Aboriginal peoples, or at the very least maintain an ambivalence by means of a 'Protectorate', while at the same time establishing relations of force over populations considered only partly Aboriginal. As an element of a genealogy of self-determination,<sup>59</sup> liberal governance thus set about defining and separating out a 'half-caste' population and then obliging this population to be free to join the labour force and compete in the marketplace. This obligation to observe the discipline of the market was founded not on a discourse of sovereignty and law but rather political economy and the discourse of norms. The code of normalization refers to a field of human sciences, which incorporated theories of race.<sup>60</sup> Underpinned by the designation of some Aboriginal populations as 'non-Aboriginal', and achieved through the establishment and expansion of the system of mission stations and subsequent separations within it, the fate of Aborigines could appear as an expression of individuals' actions in the world rather than an expression of race war. Resistance to these attacks on identity and culture similarly could appear as individual, isolated and non-political, if the latter refers to the 'action of the norm' rather than a response to political domination.

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<sup>58</sup> Op. cit., p. 199

<sup>59</sup> P. O'Malley 'Indigenous Governance' in *Governing Australia. Studies in Contemporary Rationalities of Government*, ed. M. Dean and B. Hindess (1998) 159

<sup>60</sup> M. Foucault ((1976/2003), p. 38.

The mundane management of Indigenous peoples in the missions provides glimpses of how resistance came to be translated according to liberal forms of governing.<sup>61</sup> The Office of the Board for Protection of the Aborigines was located in the City Bank Chambers in Melbourne; in 1890 its Chairman was the Chief Secretary in the Victorian Government, and the members consisted of members of the Victorian parliament, educationists and an assortment of senior public servants. Albert Le Souef, for example, was Director of the Zoological Gardens, and Alexander Morrison was headmaster of Scotch College, a leading Melbourne private school. The Board exercised close and ongoing connections with each of the missions spread around the colony, and provided detailed advice and guidance on matters of staffing, funding, and rules over the movement of the inhabitants of the missions. The missions themselves were usually headed by a minister of religion, who reported to a General Inspector and Secretary. Schooling, religious services, and work on the mission were the daily routine, and a daily 'roll call' was conducted.

From the *Act* and its regulations, and in the records and correspondence of the Protection Board, it is clear that a number of strategies were put in place during the last decades of the 19<sup>th</sup> and the early 20<sup>th</sup> century to try to draw the different Aboriginal groups into a dependent, perhaps suppliant relationship with settler society. This was attempted through a range of strategies that problematised fundamental elements of life-politics - the constitution of Aboriginal identity, the control of bodies and spaces in which Aboriginal people would live and labour, and the placing into 'darkness and silence' the possibility of alternate powers to claim possession and occupation of the land.<sup>62</sup> Regulations under the *Act* stipulated that Aborigines were required to live on the mission, and at the same time required to perform work to be permitted to draw rations: '...any Aboriginal, residing on a proscribed Station shall do some reasonable amount of work, and anyone refusing to

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<sup>61</sup> O'Malley, op. cit., p. 158.

<sup>62</sup> M. Foucault *Society must be defended. Lectures at the College de France, 1975-1976*, (1976/2003). op. cit, p. 70.

do so when required shall have his supplies stopped until he resumes work'.<sup>63</sup> The Board instructed its managers and agents on the missions that Aborigines were required to 'provide for their own wants': 'it is not intended that the Aborigines should derive their subsistence wholly from the liberality of the Government and, indeed, the sum voted for the supply of stores each year is inadequate to provide for their wants'.<sup>64</sup> By the turn of the 20<sup>th</sup> century there were six missions spread across the colony. The Board tried unsuccessfully to close many of the missions and transfer 'Blacks' (also called 'full bloods') to a single mission in a remote area of the state at Lake Tyers. The Act of 1886 reversed the definition of 'Aboriginal' so that those people who were seen as 'part-Aboriginal' were no longer Aboriginal under the terms of the Act. Regulations forbade half-caste people access to the mission stations and their families, which had the immediate effect of separating family groups, reducing the productiveness of the missions, and denying Aboriginal identity. The purpose was to 'merge' Aborigines with the white population. With the anticipated 'dying out' of the 'Blacks', this tactic would remove the Aboriginal population – it would 'simply be cleared out of the way'.<sup>65</sup>

Children were removed from their parents on the missions when they were old enough to work, and under the authority of the Protection Board were sent out to service following a period of training, or for adoption with non-Aboriginal families. From 1900, Aboriginal children removed from their families and the communities in the mission stations were passed over to the Department of Neglected Children and Reformatory Schools to be placed in an institution or sent out to 'service'. Under this administration Aboriginal children were subject to provisions akin to a system of indeterminate sentencing that for many years had been applied to non-Indigenous offenders. Older people were given three years to find work and accommodation and were then excluded from the missions and their families.<sup>66</sup> The records of the Protection Board indicate that the first signs of 'trouble' and criminality with the

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<sup>63</sup> Public Records Office (PRO). Central Board for the Protection of Aborigines: Correspondence Files 1889-1946, Victorian Public Records Office 1694 P0000, Unit 1 (1896).

<sup>64</sup> Id.

<sup>65</sup> Hindess (2001), op. cit. p.101

<sup>66</sup> D. McCallum, 'Law and Governance in Australian Aboriginal Communities: Liberal and Neo-liberal Political Reason' (2005) 13 *The International Journal of Children's Rights*, 3, 333-350.

policy of removing children from the missions were the half-castes 'hanging around the missions' when they were supposed to be joining the workforce, and drawing on the rations of their full-blood relatives on the mission stations.

I am sorry to say that there is a general tendency among the young people to be lazy, disobedient, and careless, which, if not stopped in due time, will become very troublesome to the Board and dangerous to the white population as well as for themselves.<sup>67</sup>

The Board had reported the ongoing problem of the young half-caste men 'ready to take advantage' of anyone receiving rations.<sup>68</sup> Under the *Act*, rations for half-castes were stopped immediately they reached the lawful age, but the Aborigines Board knew that they were drawing on the rations of their families living on the mission and that this was a disincentive to 'moving them on'.

We found that those who could not make their rations last were those [crossed out and replaced by the word] *families* who had friends and visitors. Half caste people who have no business on the Station. Only three pounds of meat has been given to these people per week as it was thought best they should to some extent rely on their own rations.<sup>69</sup>

The Board's records show that trouble-making is consistently depicted as activities which put at risk the Government's aim of reducing the size of the missions, and that access to rations explained the failure of the scheme to move the half-castes off the mission. It was the policies of removal, however, that underpinned a criminalizing of the 'young half-caste'. The Board wanted 'our young half-caste people' to persevere in making a living '... otherwise they would just return to the mission'. Biopolitical interventions extended to concerns about Aboriginal men wanting to marry 'girls of mixed blood', who were forced to run away from the missions because such unions were not allowed for under the *Act*. In such cases, the men ran away from the

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<sup>67</sup> Victoria, 1899-1900. 35<sup>th</sup> Report of the Board for the Protection of the Aborigines, Victorian Parliamentary Papers (VPP), Session 1900, vol.4.

<sup>68</sup> Victoria, 1890. Annual Report of the Board for the Protection of Aborigines 1890. Victorian Parliamentary Papers (VPP), Government Printer, Melbourne.

<sup>69</sup> Victoria, no date [early 1890s]

mission and were 'forced to immorality and take to their old way of inducing girls to go with them and thus they live together without being married at all'.<sup>70</sup>

In the correspondence between the Board and the managers of the missions and their supervisors, the issues of 'blood' and 'colour' presented a continuing concern for administrators. They reported on constant attempts by Aborigines to challenge the regulation that deemed 'full-bloods' the only legitimate recipients of rations. It was also made clear that children from other colonies were being supported by the Board by moving onto missions and drawing rations. The 'trouble-making' involved in wilful sharing of resources demonstrates a racialised disparity with the white lawbreakers. Compared with the European policies of building support for the norms of family life, Aboriginal getting-together with family and sharing resources was instead criminalized by those administering the Act. Resistance to the official definition of 'Aboriginal' was itself an offence.<sup>71</sup> So the racialised disparity of criminalizing Aboriginal people who were found to be breaking the provisions of the Act, by attempting to draw rations and support from their families on the mission, was accompanied by another provision that allowed those same children who had been separated from their parents and sent into foster care or into service to be institutionalized for an indefinite period, without any appearance before a court. Disparities also appeared in the judgment about who should and who should not be entitled to reside on the mission. Again, these were administrative decisions underpinned by changes to legislation in the 1890 Act making it an offence to 'harbor any aborigine ... unless such aborigine shall from illness or from the result of accident or other cause be in urgent need of succour'.<sup>72</sup> It is in these terms that we can begin to interpret Muldoon's claim that Aboriginal resistance to settlement '...had no other language in which to speak than that of criminality'.<sup>73</sup> Throughout this period, systems of security underpinned by law (in the case of the Northern Territory, the 'legal' segregation of persons defined as Aborigines beginning with the

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<sup>70</sup> Victoria (1890), id.

<sup>71</sup> Victoria. Aborigines Protection Act 1890, s.13.

<sup>72</sup> id.

<sup>73</sup> Muldoon, op. cit. p. 69

*Northern Territories Aborigines Act 1910*) established a juridical combination of law and regulation that gave protection officers direct powers over basic life circumstances, in particular, control over miscegenation.<sup>74</sup>

Scientific views of the superiority and inferiority of races had become prominent among some Europeans as a rationale for the 'clearing away' of those referred to as the 'full bloods'. Once again, the translation of race science requires a local, practical engagement with the particular circumstances of the Australian colonial setting.<sup>75</sup> What came to be taken as a given in science shifted in the 19<sup>th</sup> century to accommodate a range of different perspectives on the origins of Australian Aborigines and their likely destiny. There is evidence that environmentalism influenced early 19<sup>th</sup> century ethnographers' views on the condition of Aboriginal people, indicating that their supposed lack of sophistication and civilization was due to the inadequacies of their environment, while towards the end of the century the view that Aborigines were different in their 'natural' capacities and were remnants of an about-to-be extinct race became more prominent.<sup>76</sup> But throughout the 19<sup>th</sup> century the focus of scientific attention was on the origins and significance of racial differences in Indigenous people as these might affect the future of the white race in the new settlement in Australia. In the lead-up to World War 1, many scientists were convinced that Aborigines were the remnants of an earlier Caucasian invasion which had either eliminated or absorbed the first inhabitants and hence provided the groundwork on which to speculate about the white race in the antipodes. Anderson observes that the doctors who were drawn to Aboriginal studies seemed to be more interested in discerning racial types and tracing human genealogies than recording the 'pathophysiological mechanism' that led to Aboriginal demise on contact with the white invader.<sup>77</sup> But many did not countenance the continued deterioration of the Aboriginal population. Scientific enquiry may have accepted that culture derived from inherited racial capacities rather than historical circumstances, and that 'race

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<sup>74</sup> D. Howard-Wagner, *op. cit.*, p.221.

<sup>75</sup> W. Anderson 'From subjugated knowledge to conjugated subjects: science and globalisation, or postcolonial studies' (2009) 12 *Postcolonial Studies*, 4,

<sup>76</sup> Hindess (2001) *op. cit.*, p 103.

<sup>77</sup> W. Anderson, *The Cultivation of Whiteness. Science, Health and Racial Destiny in Australia* (2002).



struggle' shaped history. But many were also alert to the Lamarckian dynamic evidenced in Aboriginal peoples' rapid adaptation to local needs. Rarely were early Australian doctors driven to an uncompromising hereditary view of the Aboriginal condition, and most supported and argued for the view that 'a change in environment would change the race'.<sup>78</sup>

Nevertheless, contemporary observers were appalled at the effects of European settlement on Aboriginal health. A non-medical visitor to the Lake Tyers settlement in 1918 was able to observe the emaciated condition of the people and how the sea-air and winter conditions was obviously having serious effects on children suffering from tuberculosis.<sup>79</sup> There was an international scandal about Australia's policies of Aboriginal child removal in the 1920s and 30s when mission educator and activist Mary Bennett, in her 1933 paper to the Dominion Women's British Commonwealth League in London, denounced the removal of Aboriginal women and girls as 'akin to slavery' and as contravening the League of Nations Covenant and Slavery Convention.<sup>80</sup>

In the following decades, government sought to construct rationalities of rule that developed from ideas of assimilation, and then self-government, in contexts of continuing dissent. For example, the period between 1967, when constitutional amendment allowed Indigenous people to be counted as citizens and new policies advocated self-determination, and 1996, coinciding with the election of a conservative coalition government, is regarded as a discursive break in the history of Indigenous affairs. Language changed, new entities and categories were brought into being. But as Howard Wagner observes, the language of self-determination and autonomy was largely a 'federal-government construct' which in effect allowed any

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<sup>78</sup> Ibid, p.67.

<sup>79</sup> Public Records Office (PRO). Correspondence 16 May 1918. Central Board for the Protection of Aborigines: Correspondence Files 1889-1946, Victorian Public Records Office 1694 P0000, Unit 1.

<sup>80</sup> F. Paisley, 'Race and Remembrance: Contesting Aboriginal Child Removal in the Inter-War Years' (1997) *Australian Humanities Review*, November; D. McCallum 'Informal powers and the removal of Aboriginal children: consequences for health and social order' (2007) 35 *International Journal of the Sociology of Law*, 1, 29-40.

tentative moves towards Indigenous self-government to be declared later as simply a failure.<sup>81</sup> These moves helped to provide the political conditions for attempts to return agency for the circumstances of their existence back upon Aboriginal peoples themselves.

#### AUTHORITARIAN LIBERALISM / 'RACE' WAR

Decades later, a group called Concerned Australians submitted a report on the Northern Territory Emergency Response to the United Nations Committee on the Elimination of Racial Discrimination, arguing that some of the worst human rights violations in the Western world were taking place in the Northern Territory.<sup>82</sup> In keeping with the post-9/11 descriptions and analyses of extraordinary governmental interventions in which 'normal law' is apparently suspended, such as the US establishment of a prison at Guantanamo Bay, the NT intervention as been described in the language of 'special measures' and 'martial law', a mission to 'stabilize', 'normalize' and 'exit'.<sup>83</sup> The Australian Prime Minister spoke of 'the national emergency' as Australia's version of Hurricane Katrina.<sup>84</sup> The intervention was 'operationalized' under military command and used the language of strategy and tactics to describe its activities. The majority of the measures in fact required new Commonwealth Government legislation to proceed.<sup>85</sup> The *Social Security and Other Legislation Amendment (Welfare Payments Reform) Act 2007* mandated that 50 percent of income support and family assistance payments to Indigenous people living in remote parts of the Northern Territory be managed by the government. The funds could only be used for items considered essential by the government, such as

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<sup>81</sup> D. Howard-Wagner (2010), op. cit, p. 223.

<sup>82</sup> A. Nicholson, M. Harris, G. Gartland (2010), op. cit., n.3, p.5.

<sup>83</sup> D. Tedmanson and D. Wadiwel 'Neoptolemus: the governmentality of new race/pleasure wars?' (2010), 16 *Culture and Organization* 1, 7-22.

<sup>84</sup> J.Howard *National Emergency Response to Protect Aboriginal Children* (2007).

<sup>85</sup> Northern Territory National Emergency Response Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 (2007) Cth; Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 (2007) (Cth).

food, clothes, rent, electricity, medicine and basic household goods. Not only did this law underpin the government's activities in the NT, it was then extended throughout non-Indigenous welfare recipients across Australia, in order to satisfy requirements for revising the *Racial Discrimination Act (1975)*, which prohibits legislation discriminating against groups on the basis of race. Income quarantining for welfare recipients was initiated under so-called emergency circumstances and its 'exceptionality' as a legal provision under social security legislation became a legal 'norm'. It is in this sense that the 'exceptional decision' came to affirm law's normality – 'that the exception to the law is itself of the law and that the exception's attendant sovereign rule is constituted by law'.<sup>86</sup>

Three weeks after the announcement of the emergency response, the affected NT Indigenous organisations asked for a two-staged plan to address problems of child abuse in remote Aboriginal communities, including an emergency response agreed quickly between Governments and community leaders, and a more comprehensive plan and costed financial commitment for more resources for communities, police, child protection and health services, tougher restrictions on sale of alcohol, community based family support, improved access to mediation, treatment and rehabilitation services, and better access to primary health care and education services.<sup>87</sup> Aboriginal community organisations commented on issues of the safety of children and families in the following terms:

Effective child abuse prevention and child protection occurs where local community agencies, police and child protection staff work in a collaborative and coordinated manner...The emergency measures announced by the Australian Government lack insight into effective child protection interventions and in effect seek to strengthen only one partner in the three way partnership – the Northern Territory police. Whilst the allocation of increased police resources for Aboriginal communities is a priority, other key elements of the child protection system also require immediate additional

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<sup>86</sup> P.Fitzpatrick and R. Joyce, 'The Normality of the Exception in Democracy's Empire' (2007) 34 *Journal of Law and Society* 1, 65-76.

<sup>87</sup> Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal Children in the Northern Territory* (2007).

resources. Only by providing additional resources for police, local Aboriginal agencies and statutory child protection staff to all play their part in child protection interventions will we see a significant improvement in how abuse is reported and dealt with.<sup>88</sup>

This advice was echoed in the Australian Human Rights Commission Report on the intervention,<sup>89</sup> and by the Wild and Anderson report itself.<sup>90</sup> AHRC reiterated that Wild and Anderson had recommended ‘...a radical change in the way government and non-government organisations consult, engage with and support Aboriginal people’. Wild and Anderson stated

...it was a common theme of discussions that many Aboriginal people felt disempowered, confused, overwhelmed, and disillusioned with this situation leading to communities being weakened to the point that the likelihood of children being sexually abused is increased and the community ability to deal with it is decreased.<sup>91</sup>

On the question of law, however, evidence forwarded to the UN Committee on the Elimination of Racial Discrimination shows that the consultation and consent required before a ‘special measure’ is introduced did not take place. This means that the legislation introducing the special measure appeared to be ‘inconsistent with the Racial Discrimination Act’.<sup>92</sup>

On 20th October 2010, Gurindji workers and residents from the remote Aboriginal communities of Kalkaringi and Dagaragu stopped work in protest against the intervention. Gurindji leaders say that the closure of the Community Development Employment Projects (CDEP), local government reforms and the seizure of land and assets under the intervention have had a devastating impact on the community. The Labor government promised to phase out remaining CDEP programs and transition

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<sup>88</sup> id., p.10.

<sup>89</sup> Australian Human Rights Commission. *Social Justice Report* (2007).

<sup>90</sup> ‘In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities, whether these be in remote, regional or urban settings. We have been conscious throughout our enquiries of the need for that consultation and for Aboriginal people to be involved’. Wild and Anderson (2007) op. cit., n.1, p.21.

<sup>91</sup> Wild and Anderson, op.cit., p. 50.

<sup>92</sup> A. Nicholson, M. Harris, G. Gartland (2010), op. cit., n.3, p.9.

Aboriginal workers into 'real jobs', but instead hundreds have been forced onto income management and local services are struggling or have collapsed. Dagaragu is the site of the original Wave Hill walk-off, where Gurindji stockman went on strike against Vestey's station to fight for equal wages and the return of traditional homelands. The Gurindji people have a proud history of standing up for Aboriginal rights. They say that since the intervention these hard won rights have been stripped away. Protest spokesperson John Leemans said the community is sick of being bullied by the government and wants control of local employment, housing programs and Aboriginal Land handed back to the community:

Prior to the Intervention we had nearly 300 CDEP workers employed in municipal services, construction and maintenance roles. When the government took over and abolished the community council and CDEP everything came to a halt. We went two years without regular rubbish collection because the truck was seized. Houses and buildings are in desperate need of repair but there's no funding for workers or materials. If you go out to Dagaragu you'll see the evidence these cuts have had on our people. Everything we built has gone - the old CDEP office, the brick making shed, the nursery, the health clinic, the old family centre. Soon we may lose the bakery. Houses that are now under Territory Housing control are overcrowded and falling apart. The damage is just overwhelming. We now we have around 40 workers left on CDEP and training programs. Many are working 35 hour weeks but under the new laws they're working for nothing but a Centrelink payment. It's worse than working for the dole, because half goes onto the BasicCard and can only be spent at approved stores. History is being repeated here, with our people forced to work for rations again.<sup>93</sup>

In October 2010, representatives from trade unions and residents of neighbouring communities joined with the Gurindji people. Many Gurindji also travelled to Alice Springs to join national rallies calling for 'Jobs with Justice' for Aboriginal workers and an end to the intervention. These protests were supported by numerous

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<sup>93</sup> J. Leemans (2010) Gurindji strike against Government Intervention: "History is being repeated here". Media Release 18 October 2010.

organisation including Unions NT, the CFMEU, Tangentyere Council and the National Association of Community Legal Centres. 'The government has got to listen to the Australian people, the churches, the unions, the UN. Everybody around the world is condemning this intervention and the government can't ignore the world. They have to demolish this law'.<sup>94</sup> In May 2011, Rev. Dr. Djiniyini Gondarra OAM, a senior elder and Dhurili Clan leader of the Yolngu peoples of Northeast Arnhem Land, met privately with the UN High Commissioner for Human Rights, Navi Pillay. At the top of their agenda was the still ongoing intervention, which had been heavily criticized by the United Nations Committee on the Convention to Eliminate Racial Discrimination, the UN Human Rights Committee and the UN Special Rapporteur on Indigenous Rights. At the time of writing, the High Commissioner is due to again visit Australia to examine the current human rights record of the Australian Government.

A recent discussion of the 'exceptionality' of Northern Territory Emergency Response drew attention to the sexuality and 'pleasure' elements of the intervention – the ways in which violence, pleasure, and sovereign power intersect to discursively produce a punitive response and an 'intensively moralising' public discourse about Indigenous Australians.<sup>95</sup> A 'forth pillar' of sovereignty was proposed: a pleasure derived from the freedom to define the pleasure of 'others' – that is, a pleasure is accrued from the freedom to do violence to 'others'. For its part, law becomes an expression of a perpetual form of victory that guarantees a continuing free hand for the victors. Tedmanson and Wadiwel argue that the NT intervention created 'racialized zones of exception' controlling the purchase and use of items – for example, tobacco, alcohol, pornography – that would not be tolerated or even arguable if proposed for any other Australian communities. The rationalities of rule at work here had new materials and contexts through which to mount programs of disciplinary biopolitics, but they belong to broadly the same genre as the missions; in their focus on governing space and territoriality, they are also consistent with the legal and non-legal mechanisms at play in the foundational

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<sup>94</sup> Leemans (2010), op. cit, p.1

<sup>95</sup> D. Tedmanson and D. Wadiwel, 'Neoptolemus: the governmentality of new race/pleasure wars?' (2010), 16 *Culture and Organization*, 1, pp. 7-22

removal of Indigenous jurisdiction and sovereignty – they were, in other words, ‘unexceptional’ as liberal techniques of governing. On the freedoms under liberal political reason, an exercise of the free hand of the victor is by no means connected to equality. On the contrary, as these authors argue, it conveys the opposite sense.

Citing Foucault:

Freedom is the ability to deprive others of their freedom – essentially the freedom of egoism, of greed – a taste for battle, conquest and plunder...the freedom of these warriors is not the freedom of tolerance and equality for all; it is the freedom that can be exercised only through domination.<sup>96</sup>

The recommendations provided to government in the *Little Children are Sacred Report* stressed the fundamental importance of consultations with Indigenous communities before any action was taken on its findings. Instead, the NT intervention continued the tactics of government that have characterized the management of ‘Aboriginal Affairs’ since colonization. According to the Aboriginal Medical Service Cooperative, the Aboriginal and Torres Strait Islander Commission had campaigned since the early 1990s for funding to implement child abuse prevention strategies. ATSIC was subsequently closed down, with a previous Minister for Indigenous Affairs in 2007 describing it as a ‘fraud’.<sup>97</sup> An example of good governance often provided by Indigenous organisations was the National Aboriginal Health Strategy in 1989, which although the policy remains unimplemented, was described as ‘the first occasion in Australian history since 1788 that Aboriginal peoples and Australian governments had worked together under the Aboriginal decision making process of consensus’.<sup>98</sup>

## CONCLUSION

The NT intervention is an overwhelmingly punitive response to a report which in fact highlighted the need for a series of ordered social policy responses that had been sought by Aboriginal communities for decades, and to economic and community

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<sup>96</sup> Foucault [1976] 2003, 157, 148, cited in Tedmanson and Wadiwel, op. cit., p. 13.

<sup>97</sup> *National Indigenous Times* (2007).

<sup>98</sup> Aboriginal Medical Service Cooperative Ltd, Correspondence (2007)

disintegration wrought by the appropriation of land and the imposition of an invaders' law and culture. The criminalising of Indigenous Australians is linked to assemblages of power located in the partisan victories around sovereignty and interpretations of Aboriginal resistance to rule;<sup>99</sup> the administrative knowledges around concepts of family abuse that interpret economic and social dislocation as intentioned perpetrations of child abuse and deviance;<sup>100</sup> and the freedom of the victor to perpetually subjugate through the normalising power of legal mechanisms that seek to control of sex, sexuality and reproduction.<sup>101</sup> The NT intervention displays a further element observed by Muldoon – more general criminalising of the population by means of its exclusion from the social sphere: the blue bill-boards announcing the alcohol restrictions, the intense power through the shaming of the people:

...so as far as we're concerned, its too much exertion brought to bear on naughty children. We are not naughty children. We are very deep thinking people and we utilize our law of the land to assist us to where we want to get. The biggest thing that we have an argument with the government is, we're not white people. We have our own language. We have our own ceremonies. We have our own land. What we want from government is real help and real funding rather than putting law on top of our Law<sup>102</sup>

The significance of these events was to turn the history of the raw violent colonizing of Aboriginal people living in the outback, detailed in countless appeals for resources to stem the economic and social disintegration, into a story of the collapse and failure of Aboriginal culture and way of life. Such disintegration was now so dramatic, so hopeless and helpless, that the people had supposedly turned to violence on their families and children, a performance played out on news services across Australia in ways which could only be met with revulsion and outrage. Such

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<sup>99</sup> P. Muldoon, op. cit.

<sup>100</sup> D. McCallum, D., 'Representing and intervening in child abuse. Law, statistics, community' (2008), 41 *Communication, Politics & Culture* (formerly *Southern Review*) 1, 63-77.

<sup>101</sup> Tedmanson and Wadiwel

<sup>102</sup> Concerned Australians, op. cit., p. 21.



strategic preparations make the eventual police and military strike a highly predictable event, and in historical terms, anything but exceptional.