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Governing Sex: Removing the Right to Take Responsibility

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Abstract

The exposure in 2006 of horrific cases of sexual violence that allegedly characterised Northern Territory Aboriginal communities, evoked responses dominated by a predictable moral panic. Thus the Commonwealth Intervention of 2007 largely missed its ostensible aim of protecting sexually abused children. This essay moves beyond a moralising analysis to consider relevant social, cultural and historical factors based on specific ethnographic work. First I present a sense of some profound historically established differences *and* common themes in traditional Aboriginal and mainstream law in relation to the regulation of sexuality. Then I draw on evidence that Aboriginal people embraced the notion of 'two laws', even as the new era created profound difficulties in relation to sexual norms. Their 'right to take responsibility' (Pearson 2000) was further undermined by 'Interventions' that unashamedly diminished the ability of NT Aborigines to govern their own communities. Finally, mainstream institutions that are deeply engaged with Aboriginal communities need to consider the ways they may be perpetuating entrenched difficulties.

Keywords

Remote Indigenous communities, governance, The Intervention, sexuality.

Identifying wrongs

That crime is a category applied arbitrarily in relation to social configurations expressed in law is illustrated by cross-cultural examination, and long ago accepted as an important finding among anthropologists. (Nader 2003)

A particular *ABC Lateline* interview broadcast in May 2006¹ is widely seen as the spark that ignited a growing concern in Australia about remote community conditions that had been building for some time, and that led to the *Little Children are Sacred* report (Wild and Anderson 2007) and the Commonwealth Intervention (June 2007).² *Lateline* interviewed Nanette Rogers, a Crown Prosecutor based in Alice Springs, about a briefing paper she had written for senior police that exposed cases of horrific sexual violence towards little children, even babies, perpetrated by drunken men and petrol-sniffing youths. The cases that the Alice Springs court was required to deal with in 2006 make painful reading and Rogers gave an anguished account of why she moved from being a defender to the role of prosecutor. She was 'sick of acting for

violent Aboriginal men and putting up with the same old excuses'. These reports demonstrate the horrible dilemma of the court system between sympathetic sentencing in the name of 'justice for an oppressed people', and harsh sentencing that will add to the huge numbers of Aborigines in prison. This apparent impasse in the criminal justice system attracted little discussion or serious analysis because the focus was on *behavior* and, in particular, violence and sex. The public outcry tarred all Northern Territory remote communities with the brush of aberrant and abhorrent criminality, and Aboriginal behaviour became the focus of reform.

The shallowness of the policy responses to Rogers' revelations is evident when it was reported seven years later that the Australian Institute of Criminology found:

While there has still not been one successful prosecution for child abuse [emphasis added], the big 'law and order' crackdown and a jump in police numbers in the Territory has triggered an 82 per cent increase in the number of indigenous prisoners between March 2007 and last December. (Barker 2013)³

The publicising of the most dreadful cases created confusion between quite rare acts of vicious cruelty, sinister hints of widespread pedophilia, high levels of domestic violence and underage sexual activity. The extreme cases and evidence of social dysfunction and distress in particular places made it impossible and even improper to retain an analytic perspective: for instance, to identify the historical and institutional conditions that might be contributing to entrenching such misery. In an atmosphere of moral panic, anything and everything had to be done to stop this kind of thing, and hence the Intervention legislation met little opposition. The trouble was that 'this kind of thing' was never accurately identified.

Journalist Suzanne Smith framed the condition thus:

Behind the shabby facade of many Indigenous communities across central Australia lives a great emptiness born out of poverty, boredom, alienation, and discrimination. Add to this great sense of emptiness violence, alcohol, cannabis and inhalants and you have the right ingredients for murder and sexual assault. (Smith 2006)

Such images of a multitude of dysfunctional communities – where a 'great sense of emptiness' replaces sociality, and where poverty, boredom and alienation lead to pervasive violence – may be appropriate for some places but are bizarrely exaggerated and misleading when applied to many contemporary Aboriginal communities, as many anthropologists have documented.⁴ My own experiences are of remote Rembarrnga communities in the north, where residents are active and assertive in relation to their own conditions as perceived locally. These communities are 'dry', drunkenness is infrequent and sexual predation would not be tolerated and could not be secreted. A man of 50 at the Bulman community was indignant at the attribution of pornography and pedophilia to Aborigines: 'That thing is not from us. It is you people, white people, who are pedophiles. We never even heard of that pornography before'. Aboriginal men and women 'felt deeply offended by the way the media and some politicians and commentators had spoken about them and their culture' (Wild and Anderson 2007).

The mainstream emotions evoked by media stories of destructive violence were recruited to the task of shaping government policy, with the result that whole communities began to be disciplined through extensive bureaucratic measures. The trap of 'sentimental politics' (Berlant 2004) closed around the Aboriginal communities and the only legitimate political sentiment available was to bemoan the misery and to vigorously promote or attack the Intervention. Such responses prevented any deeper understanding of what is wrong in remote communities.

When problems are seen as located entirely within the Aboriginal social world, it is easy for the nation's institutions to deny any responsibility. Tess Lea has documented the stubborn refusal of the education system to examine its own failings in relation to Aboriginal education (Lea 2010). In this case, attention was deflected from the dilemmas of the legal system in relation to criminal proceedings. Further, the role that the courts, schools, health clinics and local government might have played in generating or exacerbating the problems being exposed was not seriously considered. Rather, governing institutions were to extend and intensify their practices, rather than modify them and engage with Aboriginal residents. 'Moral panic' is an appropriate term for such responses that refuse reflection on the deeper social and historical maladies that cause the repugnant behaviour.

The difficulties and distress that do exist in remote communities seem to me to have been betrayed by the inaccuracy and exaggeration in media reports. Extensive legislation was enacted, entailing numerous interventions into established health and welfare provisions, land ownership regimes, banking arrangements, employment practices, and local government organisations (see essays in Altman and Hinkson 2010). The Intervention applied to all remote community Aborigines, ignoring variation within and across communities. Opposition to the clumsy authoritarian methods was interpreted as opposition to the protection of vulnerable children. Nor does the regular violence and destructiveness apparent in the town camps in Alice Springs and elsewhere merit dismissal of the inhabitants of these communities as passive or paralysed human beings. Powerful social values and active social engagement are still present, as testified in Rob Moss's heart-rending account of his friendships with heavy drinking, often violent and mortally endangered town campers in Alice Springs (Moss 2010).⁵

This essay is not directed to the gargantuan task of correcting or contesting media reports and public imagery of Aboriginal life ways. Rather, by moving beyond the moralistic frameworks which dominate debates in relation to sex and children, I want to open up discussion of relevant social, cultural and historical circumstances. What concerns me here are the entrenched misunderstandings of the life worlds of Aboriginal people, particularly in remote places. Stereotypes of pervasive misery must be challenged if we are to see 'remote communities' as fully human spaces, peopled by complex, thinking, struggling human beings who have different histories and habits from the majority of what I will call mainstream Australians. The media illustrations of deprived material conditions do not necessarily involve suffering, while conditions of serious deprivation – for instance of educational and other professional services – are not considered a crisis. The fact that teachers who have regularly been sent to remote places are unprepared and untrained to deal with pupils who do not speak standard English seems to me a scandal that raises no eyebrows, whereas scandalous use is made of normal conditions, such as people sitting on the good earth surrounded by their dogs. However, this is not the place to discuss the pitfalls of popular imagery or 'difference' in general. Rather, I want to provide a sense of some profound historically established differences *and* common themes in traditional Aboriginal and mainstream law in relation to the regulation of sexuality. I am using the term 'law' loosely to refer to accepted rules and practices, in order to compare an element of these two social realms. Sexual behaviour, especially of the young, has been a source of nation-wide, indeed world-wide, tension long before conditions in remote Australia were exposed. In order to think more deeply about these social conditions, knowledge of a quite different history and conceptualisation of sexual practice is needed. Knowledge of traditional marriage arrangements can allow for some grasp of what it is Aboriginal people have faced over the decades since their world changed radically.

Promise marriage⁶

The term 'promise marriage' ('promise' in Kriol) is used by anthropologists as shorthand for the way marriages were arranged in Aboriginal Australia. The principles involved gives the concept of marriage a unique and specific meaning in relation to assumptions about age, sex, the

relationship between spouses and what is entailed socially. Buludja, a Mungarai woman who was recorded in 1948 said of her first husband:

You young [white] people think it is funny for old people to marry young ones, but we do not. You see Old Harry needed someone to get his food and look after him, and who could do it better than I? I was young and strong ... He was wise and good and respected by all. In fact ours was a typical match, what you call marriage. (Thoneman 2012 [1949])⁷

Although she does not say so, it is probable that Harry had other wives before Baludja. After Harry died, Buludja became his brother's wife, and later the wife of a young man who appears to have been her sweetheart for some years. Such a trajectory was not uncommon.

So how did promise marriage work as a system?⁸ First it was part of an extremely complex kinship based social organisation with local variations and the flexibility to accommodate a variety of particular circumstances. This encompassing kinship system involved obligations and duties, including the expectation that a man would help arrange his nephews' marriages to wives in the correct category, a duty that would be duly reciprocated at a later time. A baby girl's uncles and aunts also had the responsibility of providing a husband for her, a senior man to 'look after' the young girl and 'grow her up'. Plans for suitable matches were always in play, and formed one current of the everyday political negotiations that pervaded everyday life.

Commonly, young men were denied a wife until fully mature, even middle aged, unless – while perhaps in still their twenties – they gained an older widow as their first wife. Girls joined their promise husband's camp very young, with no ceremonial marking of the event, but they were not to engage in sexual activity until they reached puberty.⁹ Like Baludja, they were often widowed comparatively young, sometimes before puberty, and could then become the first wife of a younger man. Mainstream notions about the appropriate age of spouses are completely overturned in this system; equivalent ages and sexual activity are not essential elements of spousal relations. Notions of 'caring for' and 'looking after' are at the core. The elaborate initiation ceremonies in which teenage boys are made into men and taught to respect their elders, and the major role of powerful ceremonial cycles that rely on the cooperation between the moieties, are also core features of this social system (Maddock 1982).

This traditional marriage system was broadly equivalent in different Aboriginal societies although the extent of polygyny varied. In one respect at least, it was a way of regulating the sexuality of young women and controlling that of young men. Senior Aboriginal men were expected to be responsible and caring towards a precious young promise wife who was 'bestowed' by her uncles in long drawn out negotiations, sometimes beginning before the child was born. Her desire to remain with him had to be nurtured if she was to become contented and not make trouble by, for instance, running away.¹⁰ As a child of eight or nine, she might join a promise husband's camp as a young co-wife. He is said to 'grow her up'; that is, care for and teach her, and protect her from the young men who are likely to be 'rough'. She was to 'work for' him, assisting with the supply of food, cooking and keeping the camp in order. Thus, responsibilities were reciprocal. The younger she was, the more likely she would become identified with her promise husband's camp, including his senior wives, who would be her real or classificatory sisters. Cooperative child-rearing was supported by the co-wives being classified as 'mother' to all their children. Should a young wife run away, her husband might be held responsible, although attempts could be made to force her to return. While what we would call adultery was endemic – and accepted in some circumstances – elopements could have fatal results (Hiatt 1965). Often there was a 'single women's camp' consisting of widows who had missed out on, or refused, another husband as well as young girls not yet with a husband, an unusual circumstance. Sex was not so closely identified with marriage but bearing children

assumed a salient part of the marriage relationship. Marriage arrangements played a crucial part in the political machinations of these small-scale societies (Hiatt 1965). As part of the complex extended kinship network, they were entwined with a host of other obligations and relationships in the economic, political and ceremonial spheres. Of course the whole array of human emotions – affection, rivalry, honour, jealousy and humour – was at play, so that everyday life was enlivened by constant challenge, tension and negotiation.¹¹

Before puberty, children experienced considerable autonomy and freedom to explore, and children's sexual play was openly recognised and laughed at rather than subjected to the kind of horror, shame and disgust that would greet it in the mainstream. Further, the relationship between sexual activity and marriage is very different in mainstream and Aboriginal societies, but in both cases quite radical changes have occurred in living memory.

This brief account of the principles involved that once shaped Aboriginal marriages is informed by ethnographic writings and by my own long association with a specific community. In particular, my first putative sister in Arnhem Land, whom I met in 1975, had been with her promise husband since she was twelve. Her first son was born when she was thirteen, and she had borne four more children over the next twenty years. Yet in other ways she and her husband fulfilled the ideals of mainstream society's expectations for a good marriage. They formed a stable and sober family, with well-spaced children who were cared for assiduously and regularly sent to school – when one was available.¹² It is a sense of loyalty to these and other Rembarrnga friends that sparked my desire to elucidate the basic principles at work in these marriage arrangements that appear so foreign to other Australians (Cowlshaw 1999).

The idea of young girls being married to old men is extremely distasteful to contemporary mainstream Australians, but such distaste is a historically specific reaction.¹³ We do not have to look far afield to find arranged marriages of very young girls. In Europe from the sixteenth to the nineteenth century, the age of marriage hovered around 12 years. The age of consent was initially 10 years, and the age of marriage 12 years in the thirteenth century in Britain. Only in the nineteenth century was the age of consent raised to 13 (Robertson 2013). European marriage practices have changed gradually over decades and centuries, and have been the subject of chronic social tension, dispute and negotiation. It is the gradual working through of these disputes that gives legitimacy to the law and to particular laws, such as those that now are intended to protect children from sexual abuse. New laws cannot be suddenly imposed successfully as the populace will not accept them as legitimate.

However, Aboriginal law has been changing, as Kenneth Maddock observed in Beswick Reserve (now Barunga) in 1971-2:

... polygyny and infant bestowal are in an advanced stage of decay and the age discrepancy between men and women at first marriage would seem to be less than it must have been when their ancestors were free from alien control. Women finish school before marrying and men in their twenties have wives younger than themselves. (Maddock 1977)

He also remarked on what had *not* changed: that is, the continuing preponderance of what he called 'licit marriage', relationships that adhere to the kinship rules that allow only a limited number of people as marriage partners. This continuity with 'old law' was in accord with 'impelling forces springing from Aboriginal culture, in spite of the unfavourable environment in which it now finds itself' (Maddock 1977: 20). Similar continuity has been observed in many Aboriginal communities, indicating the depth of social and subjective significance embedded in the kinship structures that form the bedrock on which interpersonal relationships are built (Burbank 1988).

A few years after Maddock's work and in the same region, I observed equivalent conditions in Rembarrnga marriage practices. At that time all the mature women I knew had been married according to the promise system. Although polygyny had been extensive in an earlier generation, now most were monogamous, and only one man had two wives rather than many. His first wife (who had three children) was about fifteen years his senior and he had just acquired a second wife who was about fifteen years his junior. The two wives cooperated for a few years until, after some friction, the older wife retreated and formed a single women's camp. In another case, a twelve year old girl was supposed to be delivered to her promise husband and she was driven to an adjacent community and left with him. But she soon turned up at her grandmother's camp having walked back home through the bush. 'Oh well, she doesn't like him' was the women's verdict; they had fulfilled their duty. No-one, including the promise husband, considered it was possible to force this girl to stay with him.

Since then the promise system has been largely abandoned in that community. Young people choose 'sweethearts' and generally form an ongoing relationship with someone of an equivalent age. These partnerships are seldom legalised in mainstream law, yet they are, as Maddock said, licit in Aboriginal law because they adhere to the correct 'skin' or kinship categories. Partnerships with other categories are considered illicit or somewhat incestuous. The kinship system that determines patterns of relationships according to moieties, sections and 'skin' or subsections, is part of an ontology and cosmology that shapes social life and has largely retained its moral force and its significance among Rembarrnga and other remote peoples. One element of this law – the promising of young girls to mature men as marriages partners – has eroded, creating the opening for new social problems around the regulation of sexuality.

Senior Rembarrnga men and women have retained considerable moral authority and still influence young people by trying to find them appropriate partners, taking account of 'skin' (kinship category), personalities and social obligations. That is, marriage partnerships remain an element in a system of particular social attachments and obligations, relationships that are basic elements in young people's sense of meaning and value. Older relatives accept that young men and women have sexual desires and do not disapprove of their expression *per se*. While giving birth at thirteen is no longer common, such an event does not arouse the horrified reactions of the mainstream.¹⁴ There is far more concern if a young person begins to drink, 'play around' or fight, which almost entirely happens in town. Such a person is said to be 'lost' and attempts are made to look after and re-incorporate him or her into family relationships. If these efforts are unsuccessful, the individual remains lost and people say 'she can't leave that grog', or 'he wants to chase girls', recognising that the desire is too strong, stronger than the social ties. Such people may become unwelcome in the remote community and sometimes remain 'lost' in town (Austin-Broos 1996).

This very general portrait hardly does justice to the uneven and complicated processes of social change, let alone the deep thought these matters evoke among those most affected by them. But one question that emerges is why the promise system lost its legitimacy within a robust kinship structure that retained its social and subjective force. One factor was that mainstream law had made the marriages of young girls illegal and this law was increasingly, though unevenly, being enforced. I suggest that two more principles of Aboriginal social arrangements are relevant. First the authority of senior men – and senior women – over younger men, boys and girls was fragile, and yielded when the young people gained support from mainstream law. Traditionally, Aboriginal society eschewed formal authority to a remarkable degree. A senior man commented to me: 'Our law is not written down. Before we had no bosses; we had ceremony'. That is, the law was expressed, affirmed and embedded in ceremony, and kinship categories were an essential part of it. While older men and women influenced marriages arrangement, any person's authority was severely limited by their dependence on others, according to moieties, clans and small kinship groupings. An autocrat could not hold sway in this system because

cooperation was recognised as essential to social functioning. But further, there is a great deal of individual autonomy built into Aboriginal traditions. When the young Rembarrnga girl ran away from her promise husband, and the women shrugged and said 'she doesn't like him', they indicated their acceptance of this young girl's desires and emotions as a legitimate basis of the social outcome.¹⁵ Together the principles of anti-autocracy and individual autonomy illustrate the capacity of Aboriginal society to adjust to new conditions (Maddock 1982). But the marvelous flexibility and mutability apparent here becomes an Achilles' heel when faced with the hierarchical and authoritarian principles that feature in mainstream society. Rather than meeting social difference with an orientation towards negotiation, mainstream society looks to formal rules and laws outside individual desire to determine social arrangements and the outcome of disputes.

When I first got to know my putative Rembarrnga brother-in-law, he told me the story of how he had come close to being arrested for taking his 12-year-old promise wife (my putative sister mentioned above). The Director of Native Affairs, Harry Giese, came to the cattle station where they worked. In my brother-in-law's words:

They tried whitefella law but blackfella law beat it ... Mr Giese came up to Mainoru and asked the girls 'You got a promise husband?' and the girls said 'Yes we got 'im'. 'Well alright then'. (Cowlshaw 1999: 145-6)

That is, after the promise marriage system was explained to him, the Director said 'Alright, you can have her'. This is not just the fantasy of an old Aboriginal man who did not understand the personal power and intentions of the Director of Native Affairs. The incident also points to a certain flexibility in the governance practices of that specific era, as well as to Rembarrnga willingness to discuss and negotiate matters of extreme personal importance. The authorities could and did make allowances for Aboriginal law in informal, local and unpredictable ways some time before 'self-determination' was official government policy.

The imposition of British law was, in some respects, more gradual and benign in these later settled regions of Australia than it had been in the south. In the 1960s Harry Giese was in charge of what he saw as a modernising regime in the Northern Territory, and was able to respond to particular conditions. Local police or patrol officers could refrain from prosecuting white or black individuals for illegal interracial sexual activities if they were seen as responsible people.¹⁶ Even before that, in the 1930s, and in the midst of absurd and destructive racial laws, patrol and police officers were instructed not to interfere when something that appeared criminal was actually a 'tribal matter' (Cowlshaw 1999: 148). At a later time, magistrates and judges could take account of 'cultural factors' when sentencing offenders, and this was the source of prosecutor Rogers' concern when she said: 'sometimes Aboriginal culture practices do not benefit the victim. They benefit, more often than not, the offender' (Rogers 2006). This goes to the question of gender inequality, which is differently expressed in Aboriginal and mainstream society but raises other complex questions that I cannot take up here. In 2006, the Federal Courts were barred from taking account of customary laws or cultural background when determining bail or sentencing an offender, and the Intervention legislation extended these provisions to the Northern Territory criminal courts.¹⁷

Thus the Australian state's older, more flexible and accommodating responses to Aboriginal law have now been overridden by neo-liberal principles that refuse to recognise the contrasting history and life ways of some citizens of Australia. That earlier accommodation is even held responsible for the apparent dysfunction that became the subject of public concern (Sutton 2009). The neo-liberal label, though, does not itself 'explain' very much: a closer look at mainstream law is needed to gain further insights.¹⁸

The law and 'little children'

A man who participated in the *Little Children are Sacred* report complained:

Why does the government stand by and let underage sex happen? In our law the promise system is a very highly respected system but from the white perspective if an old man takes his young promised wife then there is immediate and serious action. But when young people who are under-age have sex with one another, which in Aboriginal law is seen as a very serious breaking of law, there is no action from the white law. (Wild and Anderson 2007)

This man perceives a serious contradiction in mainstream law. The promise marriage system that once regulated the sexuality of the young is now illegal. Nothing has taken its place to shape and control the sexuality of youth which, I venture to suggest, this man would see as a natural expression of desire needing social regulation. Moralising about sexual expression appears to be absent from Aboriginal social life: children are not forced to internalise a sense of sin or danger associated with sexual behaviour. A *wrong* partner is what is disturbing and attracts censure, particularly someone in a wrong kinship category.

'The law' in mainstream discourses is popularly spoken of as if it arose *sui generis* as a set of legitimate rules that govern citizens' behaviour, rather than as a social construct with a social history that achieves its social acceptance and legitimacy over time. The legitimacy of the law in the eyes of citizens depends on its organic relationship with the society in which the laws have developed. Brendan Edgeworth, following Cover, explains:

... all legal orders need to be located in a broader narrative in order to establish their legitimacy for the reason that citizens need to have reasons to follow legal rules above and beyond the penalties that apply in the event of disobedience, or the invalidity that accompanies failure to follow prescribed procedures. This requirement is particularly important in relation to the appearance of a new system of law. ... because law and legal systems are neither self-justifying nor self-legitimizing. (Edgeworth 2013: 4)

Obviously British law was not legitimate in Aboriginal eyes in 1788 and, in a great number of ways, Indigenous precepts and practices conflicted with the settlers' system of law. It took many decades for anthropologists to grasp the complexities of the marriage system and to understand how kinship categories were reproduced over time; and this hard won anthropological knowledge seems not to have penetrated the population at large. Understanding of Aboriginal laws and traditions is sadly lacking even in the highly educated and sophisticated segments of the mainstream population.

The imported law, which developed a huge and changing array of regulations and legislation to deal with Indigenous populations, reached its peak in the 1950s (McCorquodale 1987). Edgeworth observes that 'the imposition of the colonist's law can never be other than unlawful according to local law' (2013: 4).¹⁹ But how this 'unlawful' law is understood by Indigenous subjects has seldom been systematically documented. It is assumed that, in settler colonies such as Australia, local Indigenous law erodes over time in a long drawn out, one-directional process, as the imported law is gradually accepted – or at least recognised – as sovereign. A more nuanced understanding of what happened in Aboriginal communities in the north over time, as 'white law' was introduced, accepted or rejected, accommodated or resisted, can be suggested by examining ethnographic investigation of specific responses, such as that conducted by Maddock.²⁰

In the early 1970s, Aboriginal men conceptualised their legal environment as having two different systems of law in operation, and they wanted to follow both. They were aware of their limited knowledge of 'white law' but 'thought to keep their hold on the old law and to get a hold on the new' (Maddock 1977: 15). That is, 'they aspire neither to revert to a pre-European past nor to assimilate themselves in conformity to government policy' (Maddock 1977: 22). Most importantly, they did not perceive these two laws as incompatible.²¹ But what was actually happening to the system of promise marriage presents a somewhat different picture: as Maddock (1977: 20) said, 'marriage has not remained the same' (see also Burbank 1988: 115).

I suggest that one reason for these men's acceptance of the imported law was because it appeared directed to equivalent ends as the old law. In particular, practices that protect vulnerable young people from those who might target them for sexual gratification are apparent in both mainstream Australian law and in Aboriginal traditional practice.²² The law concerning the age of consent (16 in Australia) is intended for such protection, and an equivalent protection was part of the promise marriage system in Aboriginal societies because, as has been frequently asserted, girls from an early age needed protection from those young men who had no wives. In neither case, of course, was protection guaranteed. Also, neither system necessarily worked smoothly. I do not suggest that the 'intentions' of these laws and practices are a matter of unified or conscious decision making but nor am I merely referring to a function we might infer. Other intentions may well be at work, such as senior men furthering their own libidinal desires. In my experience, such intentions are widely recognised and widely detested. Rather, I am speaking of what is asserted by Aboriginal men and women, and what has caused them concern as the system erodes, as articulated in Wild and Anderson's report.

The regulation of teenage sex

It was the notion of *little* children being the target of sexual desire that aroused the utter repugnance and emotional horror that Marcia Langton referred to as a 'visual and intellectual pornography in Australian media and public debates' that 'parodied the horrible suffering of Aboriginal people' (Langton 2007: 145). As noted above, the horror made analytical consideration of the related conditions appear heartless and inappropriate. But it should be clear by now that historically established social conditions need to be considered if the genesis of these social problems is to be understood. While the *Little Children are Sacred* report has been criticised for its unacknowledged promotion of mainstream 'moral' (read 'sexual') values, its authors did explicitly recognise the radically different history of sexual practices and interdictions that are a reality in the social lives of Aboriginal people and, further, that the social values that bear on Aboriginal youth are in flux.

Two features of that report contradict some assumptions in the public debates. The first is the acute and active concern that the Aboriginal parents show for their children, something that public debate implied was absent. The report shows how parents are often bemused by the changes in mainstream laws and policies, as well as by the changing desires their children display. As noted above, theirs is not an authoritarian culture. As traditional prospects and the dispersed forms of authority embedded in the intricate social arrangements and values seem to be losing their power over the imaginations of remote dwelling Aboriginal children, adults are calling upon mainstream law for help. The report shows that Aboriginal adults are troubled by the way the laws and social practices being promulgated by institutions and personnel of the state seem to exacerbate the confusion and vulnerability of their children. It also stresses the opportunities available to involve Aboriginal people in the changes they themselves want to make. 'Changes devised and managed from Canberra will not work' is a repeated message in the report. Soon after the Intervention was announced, one of the authors of the report, Pat Anderson, said that it was 'based on ignorance and prejudice', and that it ignored her report's central recommendation to consult with and involve indigenous people.²³ Thus, the input of

Aboriginal adults into the enquiry not only contradicts the image of generalised parental neglect and passive adults but it also highlights specific aspects of their communities' predicament that were ignored in the Commonwealth response.

The second surprise is that *most* of the child sexuality that troubles these parents and the authors of the report involve pubescent teenagers apparently voluntarily engaging in sexual activities that expose them to danger or are problematic for other reasons. Yet these sexual activities of pre- and post-pubescent children are quite different phenomena from sexual violence and abuse of 'little' children and babies that were the focus of 'the pornographic reality show'. Such atrocities are included in this report, and they point to aberrant behaviours that are not unique to Aboriginal communities. The apparently heightened level of atrocities in remote Australia is surely generated in conditions of social disruption and loss of authority and respect associated with colonial conditions which are, I would argue, exacerbated by the increasingly neo-liberal thrust of government policies and institutional practice.

The more common anxiety is about a range of behaviours from very early sexual activity and experimentation among children and young teenagers, to casual prostitution for immediate rewards, to organised operations run, in one case, by a taxi driver. Some young girls sell sexual favours to white men in mining camps. There are serious concerns here but not of a kind that is exceptional. The sexuality of young people is a common source of social anxiety. The criminalisation of juvenile sex, a feature of most bodies of modern law, ostensibly serves to protect vulnerable young people. This law is not, of course, intended to satisfy the desires of young people but to pre-empt them. Young boys and girls are being protected from coercion and this is achieved by disallowing their 'consent' before the age of 16 or 17 in Australian states. Like other laws that try to regulate sexuality, the specification of an 'age of consent' is often not complied with and nor are breaches heavily policed; if they were we would have massive criminalisation of very young people. In 2010 over 25 per cent of year 10 school students (approximately 15 years old) reported having had sexual intercourse, and 70 per cent had some sexual experience (Agius et al. 2010). Also, much sexual abuse goes unreported in Australia generally for reasons that apply cross-culturally: shame and also fear of, or emotional attachment to, abusive relatives or family friends or authoritative persons.

The discretionary policing of teenage sexuality that is accepted in relation to mainstream youth appears arbitrary and erratic in relation to Aboriginal youth.²⁴ This was painfully illustrated when a young Rembarrnga man, charged with 'carnal knowledge' of his young girlfriend, escaped from police custody and committed suicide (Cowlshaw 2012). It is important to note that there is a defense in mainstream law when a younger person consents to have sex with someone who is not much older. Thus, many of those charged with carnal knowledge would be unlikely to have merited a criminal conviction in an Australian court. The important point is that Aboriginal teenagers are not an exception in becoming sexually active earlier than mainstream law and practice deems proper, although they may be more vulnerable to sexual exploitation by adults. Tony Redmond's research into the present predicament of young settlement dwellers as they experience a rapidly changing social environment exacerbated by mainstream misperceptions, is especially sensitive to these considerations (Redmond 2007).

I am attempting to illustrate the complexity and depth of the problems to which the Commonwealth Government responded so crudely in order to reap political rewards from public dismay. While there is never a perfect fit between what is forbidden morally and what is decreed illegal, western law accommodates society's shifting values through legislative adjustment. Thus western norms and laws have changed dramatically over a few decades in relation to marriage, adultery, illegitimacy, divorce, homosexuality and arranged marriages. However, colonised peoples continue to be subjected to an alien body of law with only

fortuitous concessions made to established social customs and the difficulties of changing values.

Finale

The aim of this essay is a modest one; that is, to bring to a non-anthropological readership some background to understanding the public scandals of 2006-07 by showing what is involved while the mainstream legal system tries to establish its legitimacy in Aboriginal Australia, especially in relation to different sexual mores and practices. No such considerations emerged in the public debates around these matters and very little in academic debate, partly I believe, due to the fear of being seen as insufficiently outraged about the suffering of children and the awful crimes that were exposed. I hope to have given a glimpse of relevant complexities in relation to the legal history and context, contrasting traditional practices, Aboriginal parents and children's difficulties with changing conditions, and the blunders of the Intervention.

The Northern Territory National Emergency Response Act of 2007, the legislative basis of the Commonwealth Intervention, met many objections to its discriminatory foundation, hurried formulation and political opportunism. These objections are valid whether or not specific elements of programs bring some benefit. In fact, it is possible to agree with Marcia Langton and Bess Price that the intervention has been beneficial in *some* ways for *some* Aboriginal people; *and* to agree with critics such as Larissa Behrendt that the legislation was, on the whole, coercive, authoritarian and paternalistic in principle and practice, and thus an overall retrograde policy change (see Altman and Hinkson 2010; Hinkson and Altman 2007).²⁵ However, in relation to the scandalous publicity surrounding sexual violence towards children, the evidence is that the Intervention missed its mark entirely (see for example Redmond 2007).

Remote dwellers in my experience do not discuss the Intervention in terms of the for-or-against binary that obscures the actual practices that have been instituted. Rembarrnga people show varied responses. All appreciate their police station, income management is hated and liked by different people, and there is much ambivalence about the new management regime. More important, there is a weary familiarity with – and a stubborn resistance to – the knowledge that Aboriginal communities are expected to mimic whitefella towns or be made to suffer the consequences of their difference. As Desmond Manderson says: “The rule of law still holds out a promise of equality to be looked forward to *once Aboriginal people become normal* [emphasis added]” (Manderson 2008: 262-3).²⁶ I fear that Aboriginal people may never be allowed to be ‘normal’ within Australian discourses. Their value in the national imagination is in remaining radically other.

The Intervention is a stark example of neo-liberalism, where normative judgments are accepted as legitimate and enforceable. Thus it is possible to deny the Aboriginal ‘right to take responsibility’ (Pearson 2000) because the Aboriginal people in the conditions that the Rogers report exposed can be viewed as unable to take responsibility. This is because there is no public or official recognition of what it is that such people are trying to hold onto in remote places. But that is another essay.

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¹ Available at <http://www.abc.net.au/lateline/content/2006/s1639133.htm> (accessed 12 February 2014).

² Available at <http://www.abc.net.au/lateline/content/2006/s1639127.htm> (accessed 12 February 2014).

- ³ The numbers were already extremely high (see <http://www.smh.com.au/national/hollow-promises-an-enduring-tragedy-20130524-2k6nh.html#ixzz2UHEILGNR> (accessed 12 February 2014)). The problem is not just in remote communities: Aboriginal Legal Services throughout the country deal with entrenched engagement with the criminal justice system that the law cannot reverse.
- ⁴ In relation to remote communities only, see for instance Burbank 1988; Eickelkamp 2011; Musharbash 2008. While some anthropologists have detailed serious 'dysfunction' in some remote communities, they also reveal the complexities involved (Austin-Broos 2009; Robinson 1997; Tonkinson 2011). It appears obvious that chronic disjunction between community interests and state processes (Mahood 2012) will only be overcome if Aboriginal people become actively involved in their own governance.
- ⁵ See also Mahood (2007, 2012) for ingenious and brilliant accounts of how two kinds of people in remote communities stymie each other's work at every turn so that it becomes difficult for the service providers to provide what Aboriginal people need and want as they try to reproduce the central values of their own social being.
- ⁶ I am somewhat uncomfortable presenting a brief account of such complex and easily misunderstood matters but I hope readers can imagine these differently structured relationships by thinking outside their usual categories.
- ⁷ Buludja also comments on sexuality more generally, affirming common themes and stark differences from what she sees as whitefellas' practices. While the publication of Buludja's story by pastoralist Eric Thoneman (2012) provides a rare and valuable glimpse of an Aboriginal woman's understanding of the world, it is marred by the original transcriber having sometimes intervened with his own additions and interpretations of her spoken words.
- ⁸ Readers should be aware that it is difficult to depict such social complexities in ordinary English to an Australian public that is unfamiliar with this radically different regime. Detailed accounts of marriage in this region are in Hiatt (1965) and Maddock (1982).
- ⁹ Phyllis Kaberry found that 'full sexual intercourse was not allowed until after puberty... sexual intercourse without penetration did take place but only infrequently' (1939: 94). Her detailed work on women in the Kimberly area supports my observations about sexuality, childhood and patterns of authority.
- ¹⁰ A foundational belief in individual autonomy is another complicating factor. In Aboriginal societies, the desires of individuals, including children, are accorded a legitimacy that is not apparent in mainstream society.
- ¹¹ Hiatt's 1964 monograph, *Kinship and Conflict* explores how conflicts of interest were resolved in a society with no formalised authority system. He concluded: 'The genius of the Australian polity lay in its deployment of the goodwill inherent in kinship as a central principle of organization for society as a whole' (Hiatt 1996: 98). The film *Ten Canoes* made among the people with whom Hiatt worked, depicted this social world.
- ¹² It is the negative public imagery that led me to mention such qualities as 'sober', 'stable' and 'caring'. The Rembarrnga families I know are generally very stable, and caring for their children is a foremost pastime, which some do more zealously than others. While there has been occasional domestic violence when otherwise gentle men have been drinking, such disruptions are deplored by all, including the perpetrators.
- ¹³ This example illustrates Povinelli's observation of the limits of multicultural convictions as Australian law and policy makers refuse recognition when an Aboriginal practice is deemed 'repugnant', not to be countenanced.
- ¹⁴ The health workers, both white and Aboriginal, are likely to show disapproval and concern for the babies' well-being.
- ¹⁵ This mild response may have been less common in the past, depending on particular circumstances, or in other regions (see Hiatt 1996: 94).
- ¹⁶ Harry Giese later epitomised a 'welfare mentality' that was anathema to the next policy change, known as 'self-determination'. His openly paternalistic but personally engaged practices seem benign and appropriate in comparison with the impersonal and alien forms of power that intruded into remote places with the Intervention.
- ¹⁷ See website <http://www.lawcouncil.asn.au/lawcouncil/index.php/ct-menu-item-62/ct-menu-item-138/ct-menu-item-154> (accessed 9 January 2014).
- ¹⁸ As Nader has said, the 'constructivist' view of crime that saw criminologists asking not why some people committed crimes and not others but why some acts were considered criminal 'has now begun to be wound back as neo-liberal principles have gained acceptance' (Nader 2012: 55-57; see also Lattas and Morris in Altman and Hinkson 2010).
- ¹⁹ It should be noted in passing that it was a moral discourse, including that of the necessity of human progress, that legitimised the body of law concerning Aborigines in the eyes of settlers, a discourse that automatically condemned Aboriginal social practices wholesale.
- ²⁰ Anthropologists have made systematic studies of non-western and pre-modern systems of law, and many Australian ethnographies have explored the rules, religion, philosophy and values of Aboriginal societies. However, ethnographies, based on intensive field-work inevitably tend to take the form of a still portrait of a single community rather than a moving picture over time, or a comparative study across space, which would require sustained and multi-sited research.
- ²¹ Austin-Broos (1996) summarised anthropological literature on the notion of 'two laws' and documented central Australian Aborigines understanding of 'Aranda Law' and 'God's Law', with an emergent concept of 'government law'.
- ²² That such predators are familiar throughout the world today and in the past is an example of the public secret (Taussig 1999), something that is widely known yet not to be mentioned, discussed, or openly referred to. Otherwise law-abiding, respectable 'good citizens' can harbour sexual desires that horrify their fellow citizens, but such desires are not matters of rational debate for fear of giving them legitimacy. Another public secret is the avid

interest many children have in sex, which mainstream children learn very early to deny or hide. The crass coyness about sex evident in mainstream public culture today allows for the ubiquity of 'underage' sex to remain in the realm of sleazy exploitation, therapeutic research and legal surveillance.

²³See www.theaustralian.com.au/news/nation/intervention-based-on-ignorance-anderson/story-e6frg6nf-1226050762666

²⁴For exploration of the former point, see Carrington (1998), Redmond (2007) and, of the latter, see Burbank (1988) Redmond (2007).

²⁵Many scholars and public commentators disputed the Intervention, sometimes deploying the voices of remote Aboriginal residents selectively and strategically to support one side or another. Such disputes are directed to questions of governance and seldom contribute to understanding how new circumstances affect social relations in Aboriginal communities.

²⁶Manderson (2008) showed that the principle behind the 2007 Intervention legislation was the same as that called upon in the 1831 Tasmanian Proclamation; that is, the promise of legal protection '*but not yet*'.

References

- Agius PA, Pitts MK, Smith AMA and Mitchell A (2010) Sexual behaviour and related knowledge among a representative sample of secondary school students between 1997 and 2008. *ANZ Journal of Public Health* 34(5): 476-481.
- Altman J and Hinkson M (eds) (2010) *Culture Crisis: Anthropology and Politics in Remote Aboriginal Australia*. Sydney: UNSW Press.
- Austin-Broos D (1996) 'Two laws', ontologies, histories: Ways of being aranda today. *TAJA* 7: 1-20.
- Austin-Broos D (2009) *Arrernte Present, Arrernte Past: Invasion, Violence and Imagination in Indigenous Central Australia*. Chicago: Chicago University Press.
- Barker M (2013) Hollow promises: An enduring tragedy. *Sydney Morning Herald*, 25 May.
- Berlant L (2004) Compassion (and withholding). In Berlant L (ed.) *Compassion: The Culture and Politics of an Emotion*. New York: Routledge.
- Burbank V (1988) *Aboriginal Adolescence: Maidenhood in an Australian Community*. New Brunswick: Rutgers University Press.
- Carrington K (1998) *Who Killed Leigh Leigh*. Melbourne, Random House.
- Cowlshaw G (1999) *Rednecks, Eggheads and Blackfellas: A Study of Racial Power and Intimacy in Australia*. Sydney and Michigan: Allen and Unwin with University of Michigan Press.
- Cowlshaw G (2012) Reproducing criminality; how cure can enhance cause. In Carrington K, Ball M, O'Brien E and Tauri J (eds) (2012) *Crime, Justice and Social Democracy*. Oxford: Palgrave Macmillan.
- Edgeworth B (2013) Native title: A vehicle for change and empowerment? Paper presented at workshop, Faculty of Law, University of New South Wales, Sydney, 5-6 April.
- Eickelkamp U (ed.) (2011) *Growing Up in Central Australia*, Oxford: Berghahn Books.
- Hiatt L (1965) *Kinship and Conflict*. Canberra: Australian National University.
- Hiatt L (1996) *Arguments about Aborigines*. Melbourne: Cambridge University Press.
- Hinkson M and Altman J (eds) (2007) *Coercive Reconciliation: Stabilize, Normalize, Exit Aboriginal Australia*. North Carlton, Victoria: Arena Publications Association.
- Kaberry P (1939) *Aboriginal Woman: Sacred and Profane*. London: George Routledge and Sons Ltd.
- Langton M (2007) Trapped in the Aboriginal reality show. *Griffith Review* 19: 145-62.
- Lea T (2010) Indigenous education and training: what are we here for? In Altman J and Hinkson M (eds) *Culture Crisis: Anthropology and Politics in Remote Aboriginal Australia*. Sydney: UNSW Press: 195-211.

- Maddock K. (1977) Two laws in one community. In Berndt R (ed.) *Aborigines and Change*. Canberra: Australian Institute of Aboriginal Studies: 13-32.
- Maddock K (1982) *The Australian Aborigines: A Portrait of their Society*, Ringwood, Victoria: Penguin.
- Mahood K (2007) Blow-ins on the cold desert wind. *Griffith Review* 15: 1-4.
- Mahood K (2012) Kartiya are like Toyotas. *Griffith Review* 36: 1-5.
- Manderson D (2008) Not Yet: Aboriginal people and the deferral of the rule of law. *Arena Journal* 29/30: 219-272.
- McCorquodale J (1987) *Aborigines and the Law: A Digest*. Canberra: Aboriginal Studies Press.
- Moss R (2010) *The Hard Light of Day: An Artist's Story of Friendships in Arrernte Country*. St. Lucia: University of Queensland Press.
- Musharbash Y (2008) *Yuendumu Everyday*. Canberra: Aboriginal Studies Press.
- Nader L (2003) Crime as a category – domestic and globalised. In Parnell PC and Cane SC (eds) *Crime's Power: Anthropologists and the Ethnography of Crime*. New York: Palgrave.
- Pearson N (2000) *Our Right to Take Responsibility*. Cairns: Noel Pearson and Associates.
- Redmond A (2007) Sex, shame and violence: an Anthropological understanding and the sexual abuse issue in the Kimberley and beyond. Unpublished paper presented at Indigenous workshop. Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies.
- Robertson S (2013) *Children and Youth in History: Teaching Module, Age of Consent Laws*. Sydney: University of Sydney. Available at <http://chnm.gmu.edu/cyh/teaching-modules/230> (accessed 13 December 2013).
- Robinson G (1997) Trouble lines: resistance, externalisation and individuation. *Social Analysis* 41: 122-154.
- Rogers S (2006) Crown Prosecutor speaks out about abuse in Central Australia. *ABC Lateline*, 15 May. Available at <http://www.abc.net.au/lateline/content/2006/s1639127.htm> (accessed 13 December 2013).
- Smith S (2006) Paper reveals sexual abuse, violence in NT Indigenous communities. *ABC Lateline*, 15 May. Available at <http://www.abc.net.au/lateline/content/2006/s1639133.htm> (accessed 13 December 2013).
- Sutton P (2009) *The Politics of Suffering: Indigenous Australians and the End of the Liberal Consensus*. Melbourne: Melbourne University Press.
- Taussig M (1999) *Defacement: Public Secrecy and the Labor of the Negative*. Stanford, Stanford University Press.
- Thoneman E (2012 [1949]) *Tell the White Man: Buludja's Story*, Melbourne: Rodeck Books.
- Tonkinson M (2011). Being Mardu: change and challenge for some Western Desert young people. In Eickelkamp U (ed.) *Growing up in Central Australia*. Oxford: Berghahn Books.
- Wild R and Anderson P (2007) *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. Darwin: Northern Territory Government.