REGULATING THE 'NATIONAL LIVE STOCK' – AN EXPERIMENT IN HUMAN HUSBANDRY

Sandra S. Berns*

INTRODUCTION

In Australia, as in the United States[1] and Canada, official government policy in the 19th and 20th centuries was to 'assimilate' native peoples they had been unable to eradicate, 'remove' thousands of children from their home communities and consign them to missions, boarding schools, and foster or adoptive families. These children were forbidden to use their native language, denied access to the customs and traditions of their people, and given little education beyond the inculcation of the basic domestic and pastoral skills intended to make them docile and obedient servants. In all three jurisdictions, these policies persisted until the latter part of the 20th century. In Australia, it has become commonplace to refer to these children as the 'stolen generation', even while verbal battles erupt around the appropriateness of the term 'generation'. Some Native American and First Nations peoples call such children the 'lost birds'. Understandings of these events differ, some seeing racist malevolence and an attempt to eradicate native cultures where others assert benevolence and a sincere, if misguided, desire to improve the lives of the children concerned. Few acknowledge the profound normalcy of these removals and situate them where they belong, in an extended legal tradition of interventions and removals involving the children of social outcast groups that became entrenched in English law during the 16th and 17th centuries.

This paper will argue that these practices were legitimated by a legal tradition stretching back 450 years. That tradition, forged by the poor

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* Professor, Griffith University.

1 In several Midwestern states, more than 25 per cent of Native American children were removed from their families and placed in white foster homes or adopted by white families. This practice, under the guise of 'the best interests of the child', followed an earlier practice of removing young Native American children and placing them in residential schools. These children were returned to their reservations when their 'education' was deemed complete, often unable to speak their own languages and culturally isolated from their own people. See the brief account on <http://home.rica.net/rthoma/icwa.htm> (accessed on 29 November 2000).

law and laws seeking to compel labour, shaped the role of the state in education and training and had a profound impact upon understandings of charity and assistance. While it is not a benign tradition, it is an enduring one. The stolen generation did not happen in spite of law, but because of and under the colour of law. This essay is about an experiment that stretched across the former British Empire, an experiment in managing the 'national live stock'[2] and about a partnership between government and private religious and charitable organisations in which the separation of power and responsibility inevitably became an exercise in power without responsibility.

GATHERING FROM THE WILD: ROGUES, VAGABONDS AND STURDY BEGGARS

Following the first wave of the Black Death in 1348, massive labour shortages, the gradual collapse of traditional patterns of feudal authority and the increasing mobility of labourers had critical social consequences. While poverty was always the lot of the unskilled labourer, feudal customs and the canon law provided a safety net, even for unfree labourers. As the feudal system decayed, these traditional forms of provision also decayed. Rogues, vagabonds and sturdy beggars became emblematic of social decay and sowed the seeds of a national paranoia. Against the background of widespread vagabondage[3] and peasant uprisings[4], increasingly draconian attempts were made to curtail vagabondage and to punish 'sturdy beggars' for refusing
to work.

> 'Beggars and vagrants were feared for fomenting sedition and rebellion, spreading disease, and all manner of disorder, even witchcraft. A proclamation of 1497 actually blamed them for "heinous murders, robberies, thefts, decay of husbandry, and other enormities and

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2 In his 'Pauper Management Improved', Jeremy Bentham characterised Great Britain's paupers as part of the 'national live stock', that part which, having no feathers, walks upright on two legs. See Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 129-130.

3 Statutory attempts to eliminate vagabondage and to compel the peasant population to labour began with the *Ordinance of Labourers* 23 Edw III C1-7 (1349) which sought to compel all able bodied adults who lacked property or a recognised craft to enter agricultural labour or service. During the balance of the 14th century, legislation became increasingly draconian, 34 Edw III C9 (1360) allowing defaulting labourers to be imprisoned, and 34 Edw III C10 (1361) prescribing branding.

4 While the Peasant's Revolt (also termed Wat Tyler's Rebellion) was prompted by the imposition of a poll tax in 1381, it attracted widespread support from artisans and villains as well as from landless peasants and seems to have been prompted by the attempt in the *Statute of Labourers* to freeze wages at pre-Black Death levels.

5 Beier, A. *The Problem of the Poor in Tudor and Early Stuart England*. London: Methuen, 1983, 16.

inconveniences".'[5]

The consequences of acute poverty, such as homelessness, became a criminal offence. The dissolution of the monasteries by Henry VIII[6] and the enclosure of the commons inflamed tensions, leading to the Pilgrimage of Grace in 1536 and Kett's Rebellion in 1549.[7] During the 16th century numerous criminal provisions were enacted to compel the able-bodied poor to enter and remain in employment. Poor law administration was parish based, affirming a partnership between government and charitable and religious organisations that endures today[8] and has had far reaching consequences. A sharp distinction emerged between the 'deserving' and settled poor: initially the aged and infirmed, widows with young children, and orphans; and the mobile poor: youthful, male vagabonds typically described as 'sturdy' and 'lusty'.

By 1547, the poor law overseers could bind pauper children to 'service in husbandry' without their consent or that of their parents.[9] As the mobile population grew, its numbers swelled by Gypsies fleeing persecution in continental Europe, regulatory efforts intensified and provisions specifically targeting Gypsies appeared.[10] Mobility, understood as the wilful refusal to become a labourer, separated the deserving and the undeserving poor.

While it had long been customary for families to place their children in

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6 The monasteries were closed, allegedly for abuses, between 1536-1540. Since the monasteries had been the primary source of assistance for those unable to provide for themselves, this fuelled already rampant vagabondage.

7 Some 16,000 peasants, led by Robert Kett, rose in protest against enclosure and rampant inflation, calling for the abolition of private property. The rebellion was not put down for about two months.

8 Historically, poor relief was a matter for the Canon Law. As the increasingly powerful national government gradually entered the field, canon law provision decayed and ultimately collapsed during the English Reformation, however the 'curious partnership' between parish and government endured. The current Australian government regularly emphasises the importance of the 'partnership' between government and private charitable organisations, and increasingly relies upon such organisations to deliver welfare services and meet the needs of the poor.

9 Numerous such statutes were enacted and typically applied to children between 5 and 14. See, for example, 1 Edw VI C3 (1547), *An Act for the Punishing of Vagabonds, and for the Relief of Poor and Impotent Persons.* The concordance between harsh penalties for vagrancy and attempts to provide relief for the so-called deserving poor – the aged, the physically infirmed, and children too young to work – is a recurrent theme in the poor law. This statute also provided that absconding labourers could be 'enslaved' for two years and, if once again attempted to abscond, 'enslaved' for life, fed on bread and water, and chained as need be.

10 1 Edw VI C3 (1547) *An Act for the Punishing of Vagabonds, and for the Relief of Poor and Impotent Persons* specifically targeted Gypsies and required them to wear an identifying badge.

11 This typically happened between the ages of 12 and 14.

service[11] as a transition between childhood and adulthood, these placements were arranged between the families concerned. The statutory regimes were very different. They were class based, targeting the children of paupers and property-less labourers. Grinding poverty brought children and their parents under the surveillance of the poor law overseers. The *Statute of Artificers*[12] extended these practices more widely, making the guild system of apprenticeship compulsory, and prescribing who might take apprentices, and of what background and status. It also highlighted the emergence of 'moral panic' over a new 'undeserving' group, unmarried women, who were distrusted both because they lived outside male control and because their allegedly rampant sexuality would flood the relief rolls with illegitimate children.[13] Women and agricultural labourers were targeted by sections xxiv and xxv; the first providing that any[14] unmarried woman between twelve and forty might be bound into service by the justices and the second allowing the justices to bind any male between ten and eighteen to serve in husbandry. Anyone with half a ploughland in tillage was entitled to such an apprentice. Indentures lasted seven years during which time the apprentice received no wages, although food, clothing and accommodation were provided. The forging of the working class had begun.

The vagrancy laws also expanded their ambit, targeting not only rogues and sturdy beggars, but also mobile individuals in a variety of lawful occupations. Beier notes that:

> 'Governments sought to control a great array of "dangerous trades" through the vagrancy laws: pedlars and tinkers; all types of entertainer, from fiddlers to actors; soldiers and sailors; healers; students and clerics; and wizards … What the diverse jobs had in common was that the authorities perceived them as threats to the *status quo*… Finally, the laws were even deployed to catch petty thieves, prostitutes, drunkards, vandals and persons simply described as ''disorderly".'[15]

By defining as criminal customs and occupations associated with particular social and ethnic groups, the law forged a criminal class that it then sought to discipline, to punish, and to export.

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12 5 Eliz C4 (1563).

13 These beliefs have persisted and regularly reappear in debates about welfare provision in Australia and in the United States.

14 Quite obviously, despite the generality of the statute, 'any unmarried woman' excluded women from the propertied classes. The provision was squarely aimed at the daughters of the working poor, particularly those whose parents were financially unable to provide a marriage portion.

15 Beier, A. *The Problem of the Poor in Tudor and Early Stuart England*. London: Methuen, 1983, 30-31. Many peddlers and tinkers were of Roman origin and were believed to be hereditary thieves, often being required to wear badges to identity them as such. These statutes marked the origin of contemporary vagrancy laws.

16 5 Eliz C4 (1563).

The *Statute of Artificers*[16] regulated every aspect of work, breaking down the 'natural', seasonal cycle of labour and replacing it with one ruled by the clock and the demands of employers. According to Windschuttle:

> 'The institution of the workhouse was part of this package of legislative oppression. Dario Melossi and Massimo Pavarine have shown that the workhouse was the common ancestor of the prison, the factory and the charitable institution. Urban labourers who were unwilling to subject themselves to the wages system in the "free market" were regarded as idlers, vagabonds and rebels and were incarcerated in workhouses where they endured forced labour in a variety of manufactures. Whether in an English Bridewell workhouse, or in a Dutch *Rasp-huis*, the aim was the same, the forcible formation of a class of wage labourers'.[17]

Unlike the guilds, the *Statute of Artificers*[18] did not regulate the quality of training or limit the number of apprentices in service with a single master. In an early experiment in self-regulation, such matters were left to the discretion of employers. The outcome was predictable.

> 'A seven years" apprenticeship, enforced by law, gave the employers a source of cheap labour, and we begin to hear complaints that the number of apprentices was unduly multiplied and that boys were taking the place of men.'[19]

The poor law normalised the removal of pauper and working class children. In 1601, *An Act for the Relief of the Poor*[20] authorised parishes to compulsorily[21] apprentice not only pauper children but also the children of the working poor.[22]

> 'If two justices of the peace found that a child's parents were unable to keep and maintain them, then the child could be taken from their parents… This allowed the justices to take children for apprenticeship, without pay, whether or not their families were on poor relief; the concept of keeping families together in order to aid them was not a part

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17 Windschuttle, E. Women and the Origins of Colonial Philanthropy. IN Kennedy, R. *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 10-11.

18 5 Eliz C4 (1563).

19 Bray, R. *Boy Labour and Apprenticeship*. New York: Garland Publishing Inc., 1980, 17.

20 43 Eliz C2 (1601). This is sometimes termed the 'Elizabethan Poor Law'.

21 Neither parental consent nor the consent of the apprentice was required. Subsequently, the poor law was amended to provide that the consent of the prospective master was also unnecessary.

22 The duration of these 'apprenticeships' was extraordinary: boys being bound until the age of 24 and girls until the age of 21 or the time of their marriage, whichever was earlier. Since it was not unusual to bind out children of seven or eight, many young people would spend more than 14 years as apprentices.

23 Quigley, W. 'Five Hundred Years of English Poor Laws, 1349-1834: Regulating the

> of the law.'[23]

The discretion vested in parish officials was substantial. Although compulsory apprenticeship required the assent of two justices, the justices appear not to have been overly assiduous in their oversight and the overseers did not always trouble themselves to obtain the required permission.[24] By the 17th century the removal of children from impoverished parents had become commonplace.

While some commentators suggest that the intent of 43 Eliz was benign[25], its interaction with the *Act of Settlement*[26] enabled parishes to conveniently and expeditiously 'export' pauper children, extinguishing the settlement gained by birth. Section vii provided:

> 'That if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, though no such notice in writing be delivered and published as aforesaid.'

This provided an incentive to apprentice poor children outside their home parish, an inexpensive option for the parish since the 'premium', or cash payment that was required, was but a fraction of the cost of maintaining a pauper. While the premium averaged £5, or more in densely populated areas, it was much higher for apprentices who were difficult to place. Thus a 'lame boy' was apprenticed for the sum of £18 and another put out to a farmer for a premium of nine guineas.[27] By 1697, a further refinement emerged. One of the numerous amendments to 43 Eliz[28] provided:

> 'That it shall be lawful for the churchwardens and overseers of the poor of any parish … by the assent of two justices of the peace, … to bind poor children apprentices … but there being doubts whether the persons to whom such children are to be bound, are compellable to receive such children as apprentices, … be it therefore enacted … That where any poor children shall be appointed to be bound apprentices … the person or persons, to whom they are so appointed … shall receive and provide for them, … and if he or she shall refuse to do so, … he or she … shall forfeit the sum of ten pounds…'

Working and Non-Working Poor' (1996) 30 *Akron Law Review*; (accessed 26 November 2000); <http://www.uakron.edu/lawrev/quigley.html>.

24 Driver, F. *Power and Pauperism: The Workhouse System, 1834-1884*. Cambridge: Cambridge University Press, 1993, 148, notes that during the 1840s 'Local workhouse officers were discovered to be acting almost independently, lodging their relatives in workhouses, embezzling supplies, taking unauthorised leave and sending children out as apprentices without official consent.' It seems likely that these practices, discovered after the 1834 legislation attempted to professionalise poor relief, had been common for many years.

25 Marshall, J., *The Old Poor Law 1795-1834*, 2nd ed, London:, MacMillan, 1985, 182.

26 34 W & M C11 (1691).

27 Marshall, J., *The Old Poor Law 1795-1834*, 2nd ed, London: MacMillan, 1985, 187-

Parish officials could compel ratepayers to take on apprentices, irrespective of their need. This was typically used as a revenue-raising exercise. Apprenticing young people in a distant parish was far more satisfactory, since it ensured that they would gain settlement outside their parish of birth. The fines assisted in defraying the cost of the apprenticeships. As there were no quality control mechanisms and no effort was made to ensure that the placements provided sound training and good conditions, the apprenticeships available to paupers seldom offered training in a trade in which a journeyman could earn a living wage. Many apprenticeships were in trades relying exclusively on child labour such as that of the chimney sweep.

> 'The higher and better paid branches of any trade were filled by the sons of shopkeepers and householders, only leaving those in which a man could earn "very poor bread" to be supplied by the sons of the Poor… [M]ost of the girls were bound out to learn the art of a housewife, which in practice meant that they became household drudges… Other trades to which poor children were apprenticed were so unpleasant that a supply of labour for them could be drawn only from the most unfortunate section of the population. One of these was catgut spinning, "a very mean, nasty and stinking trade," while another was the notorious trade of the chimney sweep.'[29]

As the industrial revolution gathered momentum, children were 'apprenticed' to cotton mills, mines, and other industrial establishments and transported by the cartload from urban slums to waiting manufactories. The discretions involved were delegated to churchwardens and poor law overseers, unpaid and untrained officials selected from parish property owners with a substantial interest in minimising the cost of relief. The state established the legislative framework and withdrew, entrenching a principle of power without responsibility. The symbiotic relationship between the state and the parish had a lasting impact on provision for the poor, and laid the groundwork for some of its historically most dubious practices.

CULLING THE HERD: EXPLORING THE EMPIRE

Yet this was only part of the story. From the *Statute of Labourers*[30] onwards, servants and apprentices who absconded before their terms expired were subject to harsh penalties, including branding, imprisonment, and transportation. Petty criminals[31], workhouse inmates, prostitutes and 'street Arabs', children who lived on the streets

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191, provides details taken from parish records and from the existing indentures.

28 8 & 9 Will III C30 (1697) sv.

29 Marshall, J., *The Old Poor Law 1795-1834*, 2nd ed, London: MacMillan, 1985, 194-195.

30 (1351).

to avoid confinement in a Bridewell, were also transported to Britain's American colonies. On arrival, they were auctioned as servants. As the colonial demand for labour was almost limitless, entrepreneurs known as 'spirits' also kidnapped women and children to augment the supply obtained from parish officials.[32] The local authorities often looked the other way and some were actively engaged in the trade, as in Aberdeen and Bristol.

Initially, the law did not authorise the transportation of children, although a number were transported before the authorities became aware of this deficiency. In 1618, having discovered that its practice of exporting children was unlawful[33], the City of London sought Privy Council approval. The requisite authority was quickly provided:

> 'We are informed that the City of London, by Act of Common Council, have appointed one hundred children out of the Multitudes that swarm in that place, to be sent to Virginia, there to be bound apprentice...there are, among their number divers (children) unwilling to be carried thither, and that the City want authority to deliver, and the Virginia Company to receive and carry these persons against their will. We authorise and require the City to take charge of that service to transport to Virginia all and every of the aforesaid children.'[34]

Upon arrival, the children were auctioned as servants and labourers.[35] After the American Revolution halted transportation, the cotton mills and mines of the industrial revolution absorbed the impoverished children. By the early 19th century the situation was again critical.

> 'London has got too full of children" Police magistrate Robert Joseph Chambers claimed before the Select Committee on Emigration of 1826, and idle young hands were turning to crime. After 1838 Boards of Guardians discontinued apprenticeship and placed parish youngsters in workhouses. The workhouses too became overfull with children: from 1834-1908 one in three paupers in any given year was under 16.
>
> The Children's Friend Society for the Prevention of Juvenile Vagrancy

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31 Many of these were 'sturdy vagabonds', cast-offs from unstable master-servant relationships. Others were Gypsies arrested because of their nomadic lifestyle and because of the popular belief that all Gypsies were thieves.

32 A well-known example was Peter Williamson (1730-1779) who was kidnapped in Aberdeen. He ultimately returned to Edinburgh and successfully sued the Aberdeen Officials for slave trading. See Overview of Peter Williamson; (accessed 28 March 2001); <http://www.geo.ed.ac.uk/scotgaz/people/famous first318.html>. It is thought that the term 'kidnapping' originated during this period and that its original form may have been kid nabbing!

33 One of those it desired to transport resisted forcibly and persuaded others to share his views. At this point, the City discovered that it had no lawful means to compel him.

34 Acts of the Privy Council of James I, Vol. 5. London, 1930, 118-119.

35 Indentured Servants; (accessed 3 December 2000); <http://members.home.net/wsadams/indentur.html>. Less than half of those transported survived to be auctioned. The markets themselves were indistinguishable from those for slaves.

36 Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924*. London: Croom Helm, 1980, 28. In 1842, Western Australia enacted legislation

> offered to relieve this congestion in parish facilities and the streets through emigration to less regulated labour markets abroad… [B]etween 1830 and 1841 several hundred young people, some from charitable institutions, some from workhouses, were taken to New Brunswick, the Canadas, Swan River, South Australia and the Cape of Good Hope.'[36]

By 1850, the Poor Law[37] provided a legal foundation for exporting orphans and children placed into care by impoverished parents. The fear of sedition fused with the soul-saving mission of feminist philanthropists and evangelical child-savers to produce a moral and social climate in which the transportation of children became their salvation.[38] Through migration, pauper children would be transformed from sickly street urchins given to petty crime and idleness into sturdy servants and labourers rescued by distance from the corruption of their kin and former associates. Juvenile migration was economically attractive to the poor law authorities because it reduced over-crowding in workhouses and industrial schools and minimised costs.[39] While doubts were raised about the quality of overseas apprenticeships and some poor law unions were unwilling to participate, as England slid into a severe cyclical depression in the 1880s transportation became an irresistible option. It was sponsored by evangelical, revivalist institutions such as Dr Barnardo's and funded by donations from wealthy patrons.[40] While the law required authorisation by the Secretary of State, his discretion was substantial and he could recommend emigration if it would be to 'the child's advantage'.[41]

> 'Only measures as thorough as removal overseas were considered

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appointing a Guardian of Government Juvenile Immigrants with full powers to control the juveniles, and to sign indentures of apprenticeship for a term of two to five years. See *Juvenile Immigrants Act 1842* (6 Vic C8).

37 *Poor Law Amendment Act 1850* (UK) Part IV provided for juvenile migration and required the consent of the child given before the justices. The evidence suggests that this was often ignored by the rescue homes and regulation appears to have been lax.

38 Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924.* London: Croom Helm, 1980, 27.

39 The cost of an assisted passage was the equivalent of one year's maintenance.

40 Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924.* London: Croom Helm, 1980, 35.

41 *Reformatory and Industrial Schools Act (UK).* Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924*. London: Croom Helm, 1980. The language used is remarkably similar to that used in regulations passed under the authority of the *Aborigines Protection Act 1886* (Vic) in 1889. See Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329 at 335. *Prevention of Cruelty to Children Act 1904* (UK) also permitted child emigration. The practice was continued in the *Children Act 1908* (UK). The *Empire Settlement Acts 1922* (UK) apparently permitted the government to subsidise the cost of child migration schemes undertaken by private charitable organisations with the consent of the Secretary of State. It is clear that the formal procedures were not always adhered to. See United Kingdom. Parliament. House of Commons. *Select Committee on Health*. 3rd Report. 23 July 1998, §12. While permission was obtained from the

> sufficient to the tasks of "destroying the memories of pauperism in children" and saving them from becoming "as corrupted as their parents were before them".'[42]

Most children in the 'immigration homes' were admitted on economic grounds, the children of sole parents being particularly at risk since women did not earn a 'family wage'.[43] Little assistance was available. The middle classes believed that service was the only appropriate work for 'decent' working-class women, but servants lived-in and could not keep their children. The poor law reforms of 1834 discouraged outdoor relief[44], believing it encouraged pauperism and reduced the incentive to work. Using Bentham's principle of least eligibility[45], relief was typically workhouse based and families separated. The few women who obtained outdoor relief lost it

> '… if they left their husband's parish to take shelter with kin, if friends helped with the babies while they looked for work, if they found work, if their children were truant or if they were seen regularly in the company of gentlemen friends … The wage system and the relief system forced widowed families to the emigration homes and left widowed mothers behind alone.'[46]

Differences between working class parenting practices and those of the middle class spawned a new practice, 'philanthropic abduction', in which evangelical social workers 'rescued' children from families deemed to constitute a 'moral danger'.[47]

> ' "Among the Barnardo emigrants between 1882 and 1908, 6 per cent of boys and more than 8 per cent of girls were shipped to Canada illegally, without their parents" consent… Emigration was … part of a system of kinship management that began as soon as children were admitted to institutions…'[48]

Few parents were advised before their children's departure, those deemed 'disreputable' being advised after the fact or not at all. Once in Canada, child migrants were 'entrusted to the care of farmers often without sufficient preparation or supervision.' The children were destined

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authorities, the 'rescue homes' obtained the consent of the children by any means available.

42 Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924.* London: Croom Helm, 1980, 33.

43 The difference between male (or family) wages and female wages was substantial, female wages being about half the male wage.

44 'Outdoor relief' did not require recipients to enter a workhouse but allowed them to remain in their own accommodation, however meagre.

45 The conditions under which paupers are relieved should always be more unpleasant and arduous than those of the 'least eligible' of the working poor.

46 Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924.* London: Croom Helm, 1980, 65-66.

47 Often widows were forced into prostitution to support themselves and their children, thus becoming 'disreputable'.

48 Parr, J. *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924.* London: Croom Helm, 1980, 67-71.

for menial occupations and provided free labour to struggling farmers.[49]

Although child migration to Canada ended in 1925, other former colonies continued to recruit child migrants and in 1948 the British parliament re-authorised child migration.[50] While the Lord Chancellor assured Commons the children would be properly supervised, in Australia the children were typically institutionalised.[51] According to the House of Commons *Report into Child Migration*:

> 'Some of the children involved regard themselves as having been "stolen"… To persuade them to volunteer for migration, glamorous stories of life in Australia were told to children far too young to make rational decisions for themselves on such a momentous matter.'[52]

[D]uring the final period in which the migration policy operated, from 1947 to 1967, between 7,000 and 10,000 children were sent to Australia. These children were placed in large, often isolated, institutions and were often subjected to harsh, sometimes intentionally brutal, regimes of work and discipline, unmodified by any real nurturing or encouragement. The institutions were inadequately supervised, monitored and inspected.[53]

The evangelical zeal characteristic of the immigration homes emphasised 'soul saving' and rescuing young people from moral danger and from pauperism. Government participation was pragmatic, emphasising the economic benefits to Britain and the need to provide 'good white stock' for the colonies.[54] Race was a central sub-text,

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49 United Kingdom. Parliament. House of Commons. *Select Committee on Health.* 3rd Report, 27 July 1998, §12.

50 *Children Act 1948* (UK).

51 See Gill, A. *Orphans of the Empire*. Alexandria: Millennium Books, 1997. The history of child migration to Australia. Institutionalisation was apparently the norm in Australia and Africa, boarding out in New Zealand. It is not entirely clear whether 'boarding out' was fostering in today's terminology or whether it was closer to a form of indentured service. The available evidence suggests that the latter was usually the case.

52 United Kingdom. Parliament. House of Commons. *Select Committee on Health*. 3rd Report, 23 July 1998, §41.

53 United Kingdom. Parliament. House of Commons. *Select Committee on Health*. 3rd Report, 23 July 1998, §13.

54 The 'good white stock' of which contemporaneous government documents spoke is eerily reminiscent of Bentham's description of paupers as 'that part of the national live stock which has no feathers to it and walks with two legs'. The quote is from *Pauper Management Improved* and is cited in Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 129.

55 According to an article in *The Age* newspaper, although the Commonwealth government recently held an inquiry into the treatment of British child migrants, it regards any compensation as 'inappropriate'. After all, the results weren't uniformly negative for the children concerned! The migration program was jointly sponsored by the British and Australian governments. See Crabb, A. 'Rebuff over Migrant

whether the emphasis was, as in Australia[55], on the need for white migrants to hold back the 'Asian hordes', or as in Rhodesia, on the need to create a white managerial elite.[56] The social identity of the child migrants was deliberately concealed, so as adults many found it difficult to obtain basic identity documents and most could not trace their kin. The grievances of former 'child migrants' are remarkably similar to those of the stolen generation:

> '[T]he most often asked question is "Who am I?"… Our crime … was that we were the children of broken relationships. Our average age was eight years and nine months. In this one act, we were stripped of our parents and our brothers and sisters. We were stripped of our grandparents and extended families… We were referred to as migrant boy number "so and so" or migrant girl number "so and so".'[57]

Despite the hegemony of theories of child development emphasising constant maternal attention and decrying institutionalisation, child migrants, like indigenous children, were institutionalised to blot out their social and cultural origins. For the child migrants, institutionalisation remained the norm until the program ended in the late 1960s. For indigenous children, particularly those of mixed blood, boarding out and adoption supplemented institutionalisation in the attempt to eradicate aboriginal identity. For both, the intent was identical: to destroy cultural and familial ties and mould the children into the labourers required by the post-war economy.

The history sketched thus far has been primarily a British history, for it was in British law and practice that this experiment in managing the national live stock originated. The cultural practices developed for managing the poor and forging a compliant working class were exported along with pauper children. They took root in Canada and in the United States just as they did in Australia and New Zealand. In each jurisdiction subtle variations developed, traces of local colour added to a varied tapestry. It is to their elaboration in Australia that we now turn. As we explore this elaboration, it is important to remember that far more than law was 'received' into Australia and imposed on its conquered indigenous people. Cultural practices and beliefs, the flesh on the legal skeleton, were also received, as were understandings of poverty, charity and the obligation of the upper classes to provide moral instruction and uplift to the 'deserving poor'. These provided the raw material for what was to come, arriving with the First Fleet in 1788.

Youngsters' *The Age*, 17 January 2001; (accessed 4 March 2001); <http://www.theage.com.au/news/2001/01/17/FFX41U6G0IC.html>.

56 United Kingdom. Parliament. House of Commons. *Select Committee on Health*. 3rd

SUBDUING THE 'NATIONAL LIVE STOCK': POVERTY, CRIMINALITY, AND SEDATION

Long before Australia was conquered, the family had become a vexed and ambiguous signifier. While the men of the English upper classes were consolidating their control over family property[58] and over the reproductive behaviour of their children[59], and coverture deprived married women of legal personality, the families of the poor were simultaneously threatening and unimportant. So long as they were 'settled' and self-sufficient, typically through the labour of all of their members and reliance upon an extended network of kin, they could be ignored, valued or even romanticised. Should they fail to do so, they were simultaneously all-important and irrelevant. By 1788, when the overcrowding of prisons and workhouses forced the government to find an alternative dumping ground for a growing and increasingly restive underclass[60], a complex and internally contradictory set of social practices for 'managing the poor' had evolved. As Mandeville argued:

> 'From what has been said it is manifest, that in a free Nation where Slaves are not allow'd [sic] of, the surest Wealth consists in a Multitude of laborious Poor; for besides that they are the never-failing Nursery of Fleets and Armies, without them there could be no Enjoyment, and no Product of any Country could be valuable. To make the Society happy and People easy under the meanest Circumstances, it is requisite that great Numbers of them should be Ignorant as well as Poor. Knowledge both enlarges

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Report, 23 July 1998, §17-18.

57 United Kingdom. Parliament. House of Commons. *Select Committee on Health*. 3rd Report, 23 July 1998, §68.

58 By 1724, the dower right of married women had been eliminated throughout England and Wales (11 Geo I C18, (1724) s17) and married women had long since lost the right to bequeath any property by will (*Statute of Wills* 34 & 35 Hen VIII C5, (1542-43) s14).

59 *Lord Hardwicke's Act* 26 Geo II, C33 (1753) required all marriages to be solemnised in the Church of England and was enacted to allay the concerns of wealthy parents that their sons and daughters might elope with 'undesirables' and thus disperse the family fortune.

60 The transportation of the 'Tolpuddle Martyrs' in 1833 for taking an illegal oath under a statute enacted to punish mutiny at sea emphasises the fear of potential sedition among the working class. The Tolpuddle Martyrs sought to organise a union of agricultural workers to seek higher wages.

61 de Mandeville, B. 'An Essay on Charity and Charity Schools', *The Fable of the Bees: Or, Private Vices, Publick* [sic] *Benefits With an Essay on Charity and Charity Schools*. 6th ed. London: Oxford University Press, 1732, 267, 286.

62 Jeremy Bentham distinguished sharply between poverty and pauperism. While the poor were often at risk of becoming paupers, paupers for Bentham were fundamentally economic beings, not as consumers but as producers. To this end, he described the 'indigent in *Pauper Management Improved* as "that part of the national live stock which has no feathers to it and walks with two legs." Because they walked upon two feet, two hands were free for useful labor [sic]. To Bentham the hands of the pauper were less the extensions of his body than his body was the extension of his hands. "People" produce and consume; hands only produce. Thus the categories of his "Table of Cases Calling for Relief" were classes of "hands." There were insane hands, imperfect hands, feeble hands, ruptured ("tender") hands, as well as out-of-place hands, stigmatized [sic] hands, lazy

> and multiplies our Desires, and the fewer things a Man wishes for, the more easily his Necessities may be supply'd [sic].'[61]

While poverty was normal, pauperism was different.[62] It could only be eradicated if the children of paupers were removed from their depraved kin before they were tainted with pauper habits.[63] Thus:

> 'The main social role of the Evangelicals was the establishment of philanthropic institutions aimed at providing shelter and aid for the poor but, at the same time, separating them from the cultural and political influence of their peers and turning them into docile and industrious citizens.'[64]

When, in 1788, a penal colony was established at Sydney cove, these ideas were part of established cultural practice. Ruling class women rapidly became involved in philanthropic activities.[65] Fearing that the children of convicts and emancipists would replicate the juvenile 'crime wave' sweeping England, charity schools were established.[66] These institutions were to inculcate moral values and industrious habits in the children of convicts, emancipists and indigenous people and to prepare them for their lives as servants and labourers: disciplined, punctual, servile and obedient. A manual for servants by Eliza Darling[67] offered this advice to students at the Female Industrial School:

> 'Obey the orders which your masters or mistresses give you … always remembering that it is their place to command and your duty to obey, and that it is the great God himself who appoints to all persons their stations and duties.'[68]

With the exception of the Native Institution, where students were actively recruited and there is some evidence of coercion after its removal from Parramatta to Black Town,[69] admission was by application.[70] Like the

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hands, unchaste hands, and so on.' See Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 130.

63 The parallel with the current rhetoric of 'welfare dependence' is remarkable although the 'remedy' has changed.

64 Windschuttle, E. Women and the Origins of Colonial Philanthropy. IN Kennedy, R. *Australian Welfare History: Critical Essays.* Melbourne: Macmillan Australia, 1982, 11.

65 Windschuttle, E. Women and the Origins of Colonial Philanthropy. IN Kennedy, R. *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 13.

66 Among these were the Female and Male Orphan Schools and the Native Institution.

67 She was the wife of the NSW Governor and the founder of the Female Industrial School.

68 Cited in Windschuttle, E. Women and the Origins of Colonial Philanthropy. IN Kennedy, R. *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 24.

69 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991.

70 The mere fact that parents were required to apply to have their children admitted does not mean that they 'chose' to do so. Because there was no entitlement to relief and such charity as was available from religious organisations was administered grudgingly and required that the individual seeking relief 'be of good character and deserving', many parents had no real choice. Deserted wives were particularly vulnerable, and those who found work frequently had to place their children in charity schools in

Male and Female Orphan Schools, the Female School of Industry demanded complete guardianship of the girls and young women under its care. Students remained at the school until 18 unless they were placed in service earlier. Contact with parents was minimal and closely supervised, lest the girls revert to their former habits.[71] Although the 'monitorial system'[72] provided a basic education and the girls were well clothed and nourished, the real aim of the School was the eradication of lower class cultural practices and the creation of docile servants.

> 'Evangelical philanthropy appealed to the caring and nurturing roles that women had traditionally believed to be their special province. However, their real interests were the wider ones of preventing immorality, saving souls and teaching the lower orders the habits of obedience and submission… These women believed their activities to be a form of social therapy but they should be regarded, rather, as attempts to create a system of social control.'[73]

Rearing the 'National Live Stock': Law as Social Control

During the second half of the 19th century, the colonial governments enacted child welfare legislation. While the detail varied, the framework was criminal, not civil.[74] Two broad legislative patterns emerged. In the first, child welfare provisions were contained in statutes enacted specifically to address child welfare issues. Queensland, Victoria[75], New South Wales[76] and Western Australia followed this pattern. In the second, that in South Australia, child welfare provisions were part of general legislation dealing with 'destitute persons'.

Parsing Neglect: Queensland

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order to keep their jobs. Unwed mothers, of course, were not 'deserving'.

71 Windschuttle, E. Women and the Origins of Colonial Philanthropy. IN Kennedy, R. *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 18. She describes the disapproval of the teachers when the children were given fruit by their kin whilst on the way to Sunday School, causing the children to laugh and become disorderly and disobedient.

72 This was also known as the 'Madras System' and involved the use of senior pupils to instruct more junior pupils in rote learning, operating by a strict and regimented timetable involving total submission and a complete absence of liberty. See Windschuttle, E. Women and the Origins of Colonial Philanthropy. IN Kennedy, R. *Australian Welfare History: Critical Essays.*, Melbourne: Macmillan Australia, 1982, 22.

73 Windschuttle, 'Feeding the Poor', 72.

74 This carried on the tradition established after the Black Death of criminalising the characteristic stigmata of poverty.

75 See Jaggs, D. *Neglected and Criminal: Foundations of Child Welfare Legislation in Victoria*. Melbourne: Phillip Institute of Technology: Centre for Youth and Community Studies, 1986. The *Neglected and Criminal Children's Act 1864* (Vic),

In Queensland, the *Children's Protection Act 1896*[77] carried criminal penalties for parents or guardians who wilfully neglected, abandoned, ill-treated or exposed any child under their control. Neglect was broadly defined, and included allowing the child to frequent places in which liquor was served and places frequented by prostitutes, even where the prostitute was the child's mother. An allegedly neglected child was taken to a 'place of safety' until the hearing. While the court hearing should have provided a safeguard, destitute parents usually found it impossible to challenge the allegations and the middle class definition of 'neglect' ensured a wide ambit.

After Federation, *The State Children Act 1911* (Qld) created a new legal status, that of 'State child'. A 'State child' was defined as:

> 'A neglected child, convicted child, or any other child received into or committed to an institution or to the care of the Department, or placed out or apprenticed under the authority of this Act.'[78]

It also established the State Children Department. The Director became the legal guardian[79] of all State children under 18 and maintained control of their property until they reached 21.[80] Continuing the partnership between government and private charitable organisations, s14 allowed the Governor to establish appropriate institutions or to license privately run institutions to receive State children.[81] 'Neglected' children were taken into custody without a warrant[82] and held until the Children's Court heard the matter. Once declared 'State children', they could be apprenticed for up to five years without their consent or that of their parents.[83]

For impoverished (white) mothers, the only hope lay in s35. It provided that:

> 'The Director may place out any State child with the child's own mother … in her own home, provided that she is a woman of good repute, and provided that in the case of the child's own mother she is a widow or deserted wife, the wife of an invalid, or a wife living apart from her husband under circumstances explained to the satisfaction of the Minister. In such case the Minister may pay to such mother … such sum as may be prescribed.'[84]

Boarding out thus represented the first official government assistance to widows and deserted wives. Mothers could only obtain State assistance

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the *Neglected Children's Act 1887* (Vic), and the *Infant Life Protection Act 1890* (Vic) were enacted in rapid succession, undoubtedly because the mass movements to the goldfields compelled action.

76 See *Reformatory and Industrial Schools Act 1901* (NSW), *Infant Protection Act 1904* (NSW), *Children's Protection Act 1902* (NSW), *State Children Relief Act 1901* (NSW) and *Neglected Children and Juvenile Offenders Act 1905* (NSW).

77 60 Vic No 26 (Qld).

78 *The State Children Act 1911* (Qld) s4.

if their children were first declared 'neglected', a form of ritual legal humiliation superadded to the requirement that they be 'deserving'. Despite this, single parents had few alternatives and boarding out enabled them to care for their own children at home. Before such assistance became available:

> '[W]omen solely responsible for the support of their children faced a limited range of options that included work in the home, such as sewing and washing, supplemented by assistance from a charitable society, or full-time employment in domestic service or factories, which at times necessitated the institutionalisation of their children.'[85]

Destitute or Neglected: Western Australia

In Western Australia, the *State Children Act 1907* (WA) allowed the State to take control of 'destitute' and 'neglected' children. The legislation was extremely detailed, distinguishing between destitute children and neglected children. A 'destitute' child was defined by s4 as:

> 'Any child who has no sufficient means of subsistence apparent to the Court, and whose near relatives are, in the opinion of the Court, in indigent circumstances and unable to support such child…'

Section 4 defined a neglected child as any child who:

> '1. Habitually begs or receives alms, whether under the pretext of sale or otherwise, or frequents any public place for the purpose of so begging or receiving alms; or
> 2. Wanders about, or frequents any public place, or sleeps in the open air, and does not satisfy the Court that he or she has a home or settled place of abode; or
> 3. Resides in any reputed brothel, or associates or dwells with any person known to the police or reputed to be a prostitute, whether such person is the mother of such child or not; or
> 4. Associates or dwells with any person who has been convicted of vagrancy, or is known to the police as of bad repute, or who has been or is reputed to be a thief or habitual drunkard; or
> 5. Is under the guardianship of any person whom the Court shall consider unfit to have such guardianship; or
> 6. Is illegitimate, and whose mother is dead or unable to maintain or take charge of such child; or
> 7. Is living under such conditions as to indicate that the child is lapsing or likely to lapse into a career of vice or crime;
> 8. Not being duly licensed for that purpose, is engaged in street trading.'[86]

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79 *The State Children Act 1911* (Qld) s10.
80 This included the earnings of those who were indentured or in service.
81 *The State Children Act 1911* (Qld) s15.
82 *The State Children Act 1911* (Qld) s20.
83 *The State Children Act 1911* (Qld) s33. Indentures terminated at age 21.
84 *The State Children Act 1911* (Qld).

The cultural assumptions embedded in the definition of 'neglect' are striking. Both neglected and destitute children could be institutionalised, placed in foster care, placed in the home of a police officer, or, if charged with a crime, placed in a police gaol or lockup.[87] Those ultimately declared 'State children' could be indentured, institutionalised, fostered, boarded out with a relative, or placed for adoption.[88] As in Queensland, State children could also be placed with private persons or organisations willing to maintain them.[89] The statutory language is often reminiscent of Tudor legislation, s118 defining as neglected any child under fourteen employed by any circus or acrobatic entertainment. The legislation emphasised the distrust of and contempt for those who were not of settled habits or earned their living in suspect ways.

Nourishing Elizabethan Attitudes: South Australia

South Australia[90] enacted compendious legislation dealing with 'destitute persons', including children.[91] Part III of the Act established industrial and reformatory schools, providing that destitute and neglected children might be received and detained in industrial schools until the age of 16 for boys and 18 years for girls. While parents could apply for their children's release, they were required to satisfy the Board of their ability to maintain the child. If the parent was a known or reputed thief, prostitute or drunkard or had ever been convicted of vagrancy, no such order could be made.

The primary purpose of the *Destitute Persons Act 1881* (SA) was to enable the State to obtain support from relatives for persons who would otherwise be state charges. Section 49 provided that monies could be recovered from grandparents, parents and step-parents for the support of children confined to industrial schools. Most of the support provisions[92] were identical to those in the Elizabethan poor law[93], however s14 reflected 19th century loathing of unmarried mothers and the prevailing belief that they would lie about their children's parentage to obtain money from wealthy and naïve men.

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85 Twomey, C. "Without Natural Protectors": Responses to Wife Desertion in Gold-Rush Victoria' (1997) *Australian Historical Studies*, 24.

86 The provisions of the *Neglected Children and Juvenile Offenders Act 1905* (NSW) were almost identical.

87 *State Children Act 1907* (WA) s23.

88 *State Children Act 1907* (WA) ss41, 42.

89 *State Children Act 1907* (WA) s80. Again this continues the partnership between government and private charitable organisations.

90 The *Destitute Persons Act 1881* (SA) also covered the Northern Territory.

91 The definitions of 'destitute' and 'neglected children' were similar to those in Western Australia. See *Destitute Persons Act 1881* (SA) s3.

> 'The provisions of this Act shall extend to … illegitimate children, as against the father or mother of such children: Provided that no man shall be taken to be the father of any illegitimate child upon the oath of the mother only: Provided also that no man shall be adjudged to be the father of any illegitimate child upon the evidence of the mother, unless such evidence be corroborated in some material particular by other and independent testimony: And provided also, that if it shall be shown that, at the time such child was begotten, the mother was a common prostitute, no order shall be made hereunder…'[94]

Indentured children's wages were deposited in a Savings Bank and could only be accessed with the consent of the Board.[95] Section 88 provided that any person who encouraged an inmate or indentured child to abscond or who harboured an absconding child was to be fined £20 or imprisoned for up to two months, either with or without hard labour.[96] While subsequent legislation[97] modified the position slightly, the basic framework remained intact and even the 1926 amendments were cosmetic rather than substantive.[98]

Pregnant women who sought admission to the lying-in ward remained in the service of the Board for six months after birth, during which period they were to nurse their babies and undertake any other tasks required of them. They were also required to prove that they were able to make proper provision for the child upon discharge. If they could not do so, the child remained in the custody of the Board and the mother was required to pay the Board for its support.[99] If the mother defaulted on any act required, she could be fined up to £25 for each default.

Interestingly, the *Destitute Persons Act 1881* (SA) moderated the general colonial refusal to provide government relief. The Destitute Board could provide relief by way of gift or loan whilst maintenance was sought from kin.[100] Both the assistance and the manner of its provision are remarkably similar to the provisions of the various indigenous protection acts, and mark the closest approximation to a statutory poor law in any Australian colony.

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92 *Destitute Persons Act 1881* (SA) ss5-8.

93 43 Eliz C3 (1601).

94 The language of this provision is borrowed from the *Poor Law Amendment Act 1834* (UK). It was enacted because it was believed that unmarried mothers under the Elizabethan Poor Law fraudulently named the wealthiest man in their acquaintance as the putative father so as to extract support.

95 *Destitute Persons Act 1881* (SA) s68.

96 The level of the fines prescribed in the *Destitute Persons Act 1881* (SA) is quite extraordinary and wholly beyond the capacity of the parents, who would inevitably be imprisoned for any violation.

97 *Children's Protection Act 1899* (SA), *State Children's Act 1895* (SA).

98 *Maintenance Act 1926* (SA).

Crawling for Crumbs: The State/Charity Compact

The most singular difference between the Australian colonies (and later the States and Commonwealth) and England was the absence of any entitlement to poor relief.[101] During the colonial period, the idea of a poor law was vigorously resisted.

> 'Victorians of all classes… execrated the very idea of a poor law: the working class, because it symbolized the misery and oppression of the poor in the Old Country; the bourgeoisie, because poor laws meant rates on property, cumbersome and expensive administrations, and possibly unpleasant social duties… Social optimism, and class collaboration under bourgeois leadership … meant that a combination of voluntary charity and *ad hoc* government relief at times of special distress was perceived to be, certainly in bourgeois eyes, coping adequately.'[102]

Unlike English law, which entrenched a right to relief, poor relief in the colonies was a matter for private charity[103], grudgingly administered along complex hierarchies of desert.

> 'Most applicants for relief underwent a ritual of stigmatization [sic] and humiliation in the process of inquiry. They were caseworked and then branded Deserving (or worthy), Undeserving, or Doubtful. … For many of the public institutional charities, applicants had to present themselves before a committee to prove their indigence.'[104]

The opprobrium attached to single mothers, the interventions of feminist philanthropists, the absence of institutionalised relief, and the increasing prevalence of statutory child welfare provisions ensured that many poor children fell into the hands of the 'child savers'.[105] What had, in England, been accomplished collectively by the strictures on outdoor relief and the pressure applied to destitute mothers to relinquish their children to the rescue homes was, in Australia, accomplished by the absence of formal welfare provision coupled with the soul-saving

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99 *Destitute Persons Act 1881* (SA) ss93, 94. The mother might be required to pay up to two shillings and sixpence weekly.

100 This was, of course, discretionary, allowing the Board to invoke criteria of 'desert' as they saw fit.

101 South Australia was a partial exception, the Destitute Persons Board providing some relief by way of gift or loan to those without means.

102 Kennedy, R. Charity and Ideology in Colonial Victoria. IN Kennedy, R. (ed) *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 51, 61.

103 As the need became more overwhelming, government funds were provided to support institutions managed by private charitable organisations.

104 Kennedy, R. Charity and Ideology in Colonial Victoria. IN Kennedy, R. (ed) *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 67. A similar process of stigmatisation took place in Sydney, where the Benevolent Society visited applicants for relief to determine whether or not they were 'deserving'. See Conley, M. The "Undeserving" Poor: Welfare and Labour Policy. IN Kennedy, R. (ed) *Australian Welfare History: Critical Essays*, Melbourne: Macmillan Australia, 1982, 283-285.

mission of feminist philanthropists and home visitors.

> 'The traditional method of dealing with destitute children was to separate them from their families and place them in large institutions. … In its heyday, the Asylum housed over 1,000 children, all in uniform, called by numbers rather than name, who, if one committee member was to be believed, were given to beating each other in "play"… The women of the Boarding-Out Society argued that the "barrack" system was harsh, too expensive, inefficient in terms of achieving the desired object (efficient and humble male labourers and female servants) and inappropriately male dominated. Their alternative, boarding out, was dependent on women, especially an inspectorial army of "lady visitors", and on a viable family unit which could offer cheap child care expertise in the form of a semi-professional mother.'[106]

In New South Wales, as in other colonies, some children were 'boarded out' with their mothers.[107] Boarding out provided economic support for (white) widows and for 'deserving' (white) deserted wives who paid lip service to middle class mores. It also allowed feminist philanthropists to reclaim territory in their mission of civilising the 'rough poor', through the institution of 'friendly visitors' who dispensed advice on child rearing and maintained oversight of the care provided.

> 'The friendly visitors' strategy of family-centred casework reasserted charity's historic mission of social suppression and control at a new level of intensity… Donzelot reveals the contradiction inherent in such

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105 During the 1850s, men seeking wealth in the goldfields deserted thousands of women and children. For a discussion of the impact of male mobility see Twomey, C.' "Without Natural Protectors": Responses to Wife Desertion in Gold-Rush Victoria' (1997) *Australian Historical Studies*, 24. Twomey notes that the typical response was to improve the position of men, and thus hopefully reinstate the male breadwinner as the family's economic salvation.

106 Godden, J. 'The Work for Them, and the Glory for Us!': Sydney Women's Philanthropy, 1870-1900. IN Kennedy, R. (ed) *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 84, 93-94. The 'boarding out' movement marked the origins of foster care.

107 In NSW it was formalised in 1881, through the establishment of the State Children Relief Board.

108 Kennedy, R. Charity and Ideology in Colonial Victoria. IN Kennedy, R. (ed) *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982,78. By 1898 the Charity Organisation Society had approached parliament seeking 'punitive legislation' to deal with the idle. Pauper families were to be placed under the 'supervision' of a person acting in the dual role of 'friendly visitor' and policewoman. If three months intensive casework did not produce 'respectable and industrious citizens', the father was to be exiled to a labour colony.

109 Similar moves were underway in England. Driver notes the introduction of the cottage system for workhouse children and the increasing practice of boarding out. See Driver, F. *Power and Pauperism: The Workhouse System, 1834-1884*. Cambridge: Cambridge University Press, 1993, 66-68, 100-105. In England, as in Australia, feminist philanthropists largely spearheaded these developments.

110 The mass desertions caused by successive gold rushes in Australia and New Zealand

> casework: by foisting the alleged autonomy and superiority of bourgeois family values onto the stricken, visitors subjected proletarian families to scrutiny, supervision and, if need be, dissolution.'[108]

The boarding out movement began a move away from institutionalisation for children.[109] While colonial governments insisted that both outdoor and indoor relief were a matter for private charity, they intervened more directly in providing relief for widows and deserted wives.[110] The final years of the 19th century were, however, marked by a resurgence of philanthropic child-saving that was:

> 'The local manifestation of a paternalistic, religious, social reform movement which was taking place in other advanced countries. … [C]hild-savers in Britain, America and Australia saw their work as a holy war, in which slums were the battlefield and slum children were the prize. Unlike the orphanages, which took children on application, and the police … child-savers sought out "tainted" children in the inner city slums.'[111]

Rogues and Sturdy Vagabonds: Vagrancy Law in Australia

As in England, the statutory prohibition of vagrancy and begging targeted the mobile poor and proscribed conduct deemed 'disorderly'.[112] These statutes referred to 'idle and disorderly persons', 'incorrigible rogues', and 'rogues and sturdy vagabonds'.[113] As in Elizabethan England, they delineated a wide range of 'offences', including soliciting for prostitution, being a habitual drunkard, and

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created a crisis ultimately forcing action. Twomey, C. '"Without Natural Protectors": Responses to Wife Desertion in Gold-Rush Victoria' (1997) *Australian Historical Studies*, 24. While Commonwealth provision for invalid and old age pensioners was enacted in 1908 (*Invalid and Old Age Pensions Act 1908* (Cth)), Commonwealth provision for widows, divorcees and deserted wives did not eventuate until the early 1940s.

111 Jaggs, D. *Neglected and Criminal: Foundations of Child Welfare Legislation in Victoria*. Melbourne: Phillip Institute of Technology: Centre for Youth and Community Studies, 1986, 52. See further Swain, S. '"I am Directed to Remind You of Your Duty to your Family": Public Surveillance of Mothering in Victoria, Australia, 1920-40' (1999) 8 *Women's History Review*, 247, at 247-249 which outlines the history of the Victorian Society for the Prevention of Cruelty to Children, from its founding in 1896 to its alliance with feminist philanthropists who joined forces with male professionals to impose middle class child rearing practices on working class families.

112 Legislation prohibiting vagrancy often also prohibited prostitution, prostitution being defined as a form of vagrancy, and obscene publications. See *Vagrancy Act* 15 Vict C4 (1851) (Qld) ss3 and 5, dealing with obscene publications and language, and *Vagrancy Act 1901* (NSW) ss4(c) and 7.

113 See for example, *Vagrancy Act 1901* (NSW); *Vagrancy Act* 15 Vict C4 (1851) (Qld).

114 See, for example, *Vagrancy Act 1901* (NSW) s4.

115 *Vagrancy Act 1901* (NSW) s7.

116 *Vagrancy Act 1901* (NSW) s8.

117 The historical record clearly indicates overreaching by emancipists, convicts on tickets-of-leave and others, with respect to indigenous women. See the discussion of these forms of sexual exploitation in Kidd, R. *The Way We Civilise*. Brisbane: University of Queensland Press, 1997; and Arkley, L. *The Hated Protector: The Story*

keeping a house frequented by reputed thieves.[114] The vagrancy statutes also regulated a broad range of undesirable public conduct, from singing obscene songs[115] to using abusive language.[116] The only real sign of 'local adaptation' appeared in provisions criminalising 'lodging or wandering in company with any of the aboriginal natives of this colony'. Enacted partly to discourage sexual liaisons between emancipists and indigenous women[117] and partly to control emancipists and keep them firmly within the labouring population, these provisions underwrote the social distance between two impoverished populations, one white and one black.[118] The atavistic loathing for mobile individuals and the belief that only the possibility of state violence could keep the poor at their labours were hallmarks of colonial vagrancy laws.

In uneasy tension with regulatory regimes seeking to transform emancipists into docile servants and labourers was a strand of transplanted radicalism that envisioned Australia as a nation of cottagers.

> 'The prevalence of wife desertion … was to be overcome by offering men the promise of self-sufficiency on their own farms… Conservatives also stressed the advantages of fixity in one place, contrasting the stability of the farmer with the nomadism of the miner.'[119]

Evangelistic reformers, working class radicals and social conservatives alike advocated the bucolic vision of a society of virtuous small farmers.[120] In one magic stroke, urban social problems would vanish. Once women and children were removed from the corruption and temptation of urban life (to which they easily fell prey), and men restored to their proper (and laborious) roles, charity would be unnecessary and scenes of bucolic virtue flourish.

AUGMENTING THE 'NATIONAL LIVE STOCK': LAW AND THE INDIGENOUS PEOPLE

The themes permeating the poor law – the criminalisation of vagrancy and disorderly conduct, the assumption that pauperism was wilful, the

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of Charles Wightman Sievwright – Protector of Aborigines 1839-42. Mentone: Orbit Press, 2000.

118 *Vagrancy Act* 15 Vic C4 (1851) (Qld) s2; *Vagrancy Act 1901* (NSW) s4(1). These statutes also regulated a variety of other 'illicit' activities: prostitution, obscene language and publications, peddling, street performances… the list is remarkably like that catalogued by Beier. See note 15 Beier, A. *The Problem of the Poor in Tudor and Early Stuart England*. London: Methuen, 1983 at footnote 15 and the accompanying quotation.

119 Twomey, C. '"Without Natral Protectors": Responses to Wife Desertion in Gold-Rush Victoria' (1997) *Australian Historical Studies*, 24, 40-41.

120 The underlying social vision is akin to that in George Elgar Hicks' 1857 painting 'The Sinews of Old England'. See the discussion in Betterton, R. *Looking On: Images of Femininity in the Visual Arts and Media*. London: Pandora Press, 1887, 79-81. The

belief that children could only be 'saved' from pauperism if they were 'rescued' from lower class culture – provided the basic cultural and legal resources for dealing with indigenous people. Suffused with nostalgia for an agrarian ideal and clinging to a class based connection between virtue and manual labour for the lower orders, colonisation commenced from the belief that a settled Christian European lifestyle was the only valuable and truly human life. Against this background, an attempt to 'rescue' the children of indigenous people[121] and transform them into a simulacrum of English servants and labourers was inevitable.[122]

In the Beginning: The Native Institution at Parramatta

Initially, the colonial authorities in New South Wales assumed that indigenous people would welcome the 'benefits' of English civilisation. Despite initial curiosity, and apparent lack of hostility, as European settlement expanded and swallowed up the traditional lands of the coastal tribes, encounters between indigenous people and the Europeans became increasingly hostile. After land grants to indigenous men who had served as Native Guides[123] failed to induce them to adopt an agrarian lifestyle, Governor Macquarie established a Native Institution at Parramatta to 'civilise' the natives of both sexes. Its rules and regulations were gazetted on 10 December 1814.[124] Land was also set aside for the use of adult natives, in the hope that some would adopt a settled lifestyle.[125] The schooling consisted of rudimentary literacy and numeracy, the rudiments of the Christian religion and agrarian, mechanical and domestic skills. Contact between the children and their parents was restricted[126], although initially the parents were able to watch their children through the open paling fence surrounding the Institution and an annual feast was held to which parents and other indigenous people were invited. Patterned on workhouse schools in England, the Native Institution was intended to fit the students for their future lives as labourers and servants.[127] To this end:

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author comments on the obsessive concern with the immorality of the working class and the belief in the redemptive power of a rural setting and manual labour.

121 While the 'soul savers' devoted particular attention to children of racially mixed backgrounds, because they were believed to be more readily assimilated into European society, the first attempts at 'rescue' were those of Governor Macquarie.

122 For a discussion of the interplay of these attitudes in late 18th century thought in Australia, see McGregor, R. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*. Melbourne: University of Melbourne Press, 1997, 1-18.

123 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991, 37-53.

124 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991, 59.

125 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991, 59-63.

126 In both its educational program and the restricted contact between parents and children, the Native Institution was almost identical to the Male and Female Orphan

> 'This programme was to consist primarily of industrial training and moral discipline; a regime intended to transmit the values of "independent" labour… For boys, this meant manual and agricultural work … for girls, household and other domestic duties. The moral discipline was designed to inculcate the virtues of obedience, honesty, labour and punctuality, "sentiments and habits … foreign to the [culture] to which they belong".'[128]

At the Native Institution, the children rose at six and laboured for two hours before prayers and breakfast. Following breakfast, one and one half-hours were devoted to reading and writing, and thirty minutes to basic arithmetic. Their schooling completed, they resumed work before breaking for lunch and recreation. After lunch, schooling resumed for one hour. Thereafter the children worked until supper, recreation and prayers before retiring at eight.[129] Only two and one quarter hours were allowed daily for meals and play. Regimentation accustomed the children to their future routine as unskilled workers and ensured their obedience and docility. The graduates were to be placed as labourers or in service.[130]

> 'One of the older girls was placed in service … She would not have been consulted regarding her choice of employment … and their class-structured thinking demanded that institutionalised girls should be servants. This particular girl had other ideas, and ran away from her employer … [Her master] refused to "receive her again"; so William Hall asked … what he should do … The reply was official and harsh: "[Her

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Schools and the Female Industrial School.

127 Jeremy Bentham would have recognised the substance, if not the detail, of the program at the Native Institution as profoundly similar to that he proposed for turning the children of paupers into productive labourers and servants. See Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 174-186.

128 Driver, F. *Power and Pauperism: The Workhouse System, 1834-1884*. Cambridge: Cambridge University Press, 1993, 96.

129 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991, 206.

130 Initially carpentry was seen as appropriate for boys; sewing, knitting and housewifery for girls. The boys were to be apprenticed as farm workers and labourers, the girls as servants.

131 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991, 214.

132 See, for example, *An Act for Better Regulating Apprentices, and Persons Working under Contract* 6 Geo III C25 (1766), which prescribed three months imprisonment for servants leaving before the expiry of their contracts.

133 Similar laws were enacted in the colonies. See, for example, *Masters and Servants Act 1878* (SA) s7; *Apprentices Act 1828* (NSW) s4 (providing that the laws of England relating to master and apprentice extend to NSW, and to Queensland which was then part of NSW). The *Apprentices Act 1901* (NSW) s4 provided that should any apprentice refuse to serve as required a warrant might be issued and the matter heard in a summary manner before two justices. If the apprentice continued to refuse, he or she might be committed to gaol for one month before being returned to serve out the indentures.

134 'I have much pleasure in reporting to Your Lordship that the Institution, established by Me some few Years since at Parramatta for the Support and Instruction of the

> master] should take her before the Magistrates…".'[131]

English statutes prescribing criminal penalties[132] for those who breached their contract of service or indentures became part of colonial law at settlement.[133] Servants often absconded, and those recaptured were punished. Where the master refused to receive a servant back, imprisonment was common.

While Governor Macquarie had reported glowingly on the progress of the Native Institution and its reception by indigenous people[134], over the years, most of the children absconded or were spirited away by relatives. Families were reluctant to enrol their children[135] both because they became estranged from their culture and because some children had died while attending. After languishing for years, the Native Institution closed in 1833, bringing the first experiment in indigenous education to a close.

The Mission Era: An Uneasy Partnership

As European settlements encroached on indigenous lands and habitats became degraded and unable to sustain traditional lifestyles, missions and protectorates were established in most of the colonies. They dispensed government rations and blankets, and sought to protect residents from ongoing violence and hostility from settlers. During the 19th century, many missionaries, particularly in the eastern colonies, were evangelicals.

> 'The Wesleyan Reverend William Walker encapsulated the pessimism of the Evangelical outlook in his statement that Aboriginals were "the progeny of him who was cursed to be a servant of servants to his brethren".'[136]

The missionaries sought to Christianise indigenous people and inculcate Euro-Christian beliefs about the holiness of manual labour. Indigenous children were trained to be servants and labourers in the mission schools and efforts were made to acculturate both adults and children to an agricultural/pastoral way of life. The missions were to

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Aborigines of the Colony, has succeeded far beyond my most sanguine Expectations, the Children having made very great Progress in all those Useful and Necessary Branches of Instruction they are taught, evincing good Natural Understandings and an Aptitude for learning whatever is proposed to be taught them … Nothing has yet been done in this Colony that has so much Conciliated the Adult Natives to the Interests of the British government generally as the Establishment of this Institution, as they appear to be highly gratified and delighted beyond description with the Contented and happy Appearance of their children.' Dispatch, Macquarie to Bathhurst, 24 March 1819, *Historical Records of Australia*, Series 1, Vol X, 95.

135 See Brook, J. and Kohen, J. *The Parramatta Native Institution and the Black Town: A History*. Sydney: University of New South Wales Press, 1991, 228. When the Native Institution was closed, the three remaining girls were dispatched to the Wellington

become self-sufficient communities[137] producing most of what was needed by their residents and perhaps generating a small surplus. The vision and the reality were light years apart. Most could not attain self-sufficiency due to their location, government willingness to shift them to pacify squatters[138] and the age and ill health of many residents. The fiction of self-sufficiency was disastrous, leaving the missionaries unable to meet the needs of the residents on available resources. These beliefs and the division of responsibility between church and state allowed colonial governments to avoid responsibility to provide for the basic nutritional, health and sanitation needs of mission residents.[139]

As hierarchical racial taxonomies dominated scientific thinking during the latter part of the 19th century, Aboriginal people came to be seen as a doomed race, one for which civilisation was impossible.[140]

> 'As the Enlightenment vision of universal human progress faded, as attempts to civilise and convert failed, and as racial attitudes hardened, it came to be considered that the best that could be done for the Aboriginals was to protect them from overt injustice and brutality – for the short time they had left upon this earth. If, as increasingly came to be taken for granted, the Aboriginals were incapable of attaining the status of civilisation, they were equally incapable of living within a civilised community.'[141]

During the first sixty years of settlement, while indigenous people were 'legally' British subjects, in reality they enjoyed none of the rights of British subjects. Despite repeated 'reminders' from London that settlers were to treat the natives kindly and compensate them for the loss of their habitations, individual Aboriginals were fawned over and treated as living 'exhibits' whilst the majority were violently dispossessed of their country and livelihood.

Statutes specifically dealing with indigenous people appear in the 1840s in the free colonies and a little later in the convict colonies, at much the same time as statutes dealing with child migrants. Two statutes enacted

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Valley Mission.

136 McGregor, R. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*. Melbourne: University of Melbourne Press, 1997, 9. In short, they were children of Ham, an argument chillingly similar to that used to justify slavery in the American south.

137 This echoed the approach of both Locke and Bentham to the workhouse.

138 See the story of Coranderrk Mission in Victoria; (accessed 28 May 2001); <http://www.mov.vic.gov.au/perspectives/Coranderrk/>.

139 Given that mission dwellers were, officially, government wards, governments had fiduciary responsibilities to the indigenous communities. These were evaded through delegation of the day-to-day management of the missions to the various religious and charitable bodies. See Kidd, R. *The Way We Civilise*. Brisbane: University of Queensland Press, 1997, 36-79.

in the early 1840s in Western Australia are particularly interesting. The earliest of these, the *Juvenile Immigrants Act 1842* (WA), regulated the provision of apprenticeships to child migrants. A Guardian of Government Juvenile Immigrants was appointed and the statute prescribed the punishment of disobedient apprentices and provided redress for apprentices whose masters failed to provide training or subjected them to ill treatment. The second, the *Aborigines Act 1844* (WA) was much more limited. It forbade enticing indigenous girls away from charity and industrial schools or from service. Because it focussed solely on the risk of miscegenation it did not impose obligations on masters or servants.

Within a few years, wholly discrete regulatory traditions were established for white settlers and for indigenous people. While these were parallel streams[142], they remained separate for almost two hundred years. Only the penal provisions, such as the laws prohibiting vagrancy, were more general and even here the earliest colonial vagrancy laws specifically address white settlers and proscribe 'wandering in company with indigenous people'. They do not address indigenous people as legal subjects, prescribing their conduct, but merely set out what may be done to or with them, and by whom.

Subduing the National Livestock: Victoria

Victoria became the first colony to enact comprehensive legislation following years of Crown directives and official orders, such as that barring indigenous people from Geelong.[143] The legislation established the Board for the Protection of Aborigines and gave the colonial government broadly based powers over indigenous people, ratifying pre-existing practice. The colonial government provided subsistence funding to missions[144], affirming the partnership between private organisations and the state that typified the administration of the poor law.

> 'The Anglican and Presbyterian/Moravian missionaries not only reported to their home churches but also to the state instrumentality, the Board for

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140 See generally, McGregor, R. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*. Melbourne: University of Melbourne Press, 1997, 19-59. This was the period in which the eugenics movement was taking hold in the United States, a movement that ultimately led to the institutionalisation and sterilisation of 'defective' children and adults. This reached its apogee with *Buck v Bell* 274 US 200 (1927).

141 McGregor, R. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*. Melbourne: University of Melbourne Press, 1997, 18.

142 The most interesting and fruitful comparisons are between the general laws dealing with destitute children and neglected children, and those dealing with indigenous children. These will be considered in the sections that follow.

> the Protection of Aborigines, from which they received resources to provide minimal food, clothing and shelter for mission residents.'[145]

The partnership provided significant advantages for both sides. Religious organisations received government funding, and legal control over indigenous people, enabling them to extend their activities beyond those permitted by their own resources. Colonial governments, in turn, were able to legislate without committing government resources to staff missions, the assumption being that anything beyond rations and blankets would be charitably provided or produced by the missions. Day-to-day administration was delegated to religious and charitable organisations.[146] These organisations served two masters, the State and the church, and it is hardly surprising that the welfare of their indigenous charges often ranked a distant third, against the background of inadequate funding and the routine shifting of missions to make way for squatters. State oversight was generally limited to receiving the reports of those responsible for running the missions and dealing with the complaints of squatters about the conduct of mission residents.[147]

The legislation empowered the Governor to determine where aboriginal people lived, to set the terms of contracts entered with Europeans, and to apportion the earnings of employed residents and government funding set aside for their benefit among residents.[148] The Governor was also responsible for the care, custody and education of indigenous children. Some of the detail is remarkable, s5 providing that chattels such as bedding and clothing issued to indigenous people were issued merely by

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143 Arkley, L. *The Hated Protector: The Story of Charles Wightman Sievwright – Protector of Aborigines 1839-42*. Mentone: Orbit Press, 2000, 73-75, describes the events surrounding this and its impact.

144 The funding appears to have been sufficient for basic rations (flour, sugar and tea) and blankets, although the blankets and clothing were 'loaned' rather than given to the residents!

145 Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329 at 335.

146 A contemporary parallel may be found in the proliferation of private prisons, and, more recently, detention centres for illegal immigrants seeking protection visas. While these are run for monetary rather than spiritual profit, the mechanisms are similar.

147 As had been the case with workhouses and rescue homes, essentially no government oversight was maintained.

148 Effectively, this assimilated indigenous people to paupers.

149 The *Destitute Persons Act 1881* (SA) contained similar provisions regarding the relief made available to destitute persons.

150 This represents a marked change from the practice of Governor Macquarie and his successors providing apparently copious amounts of 'spiritous beverage' to the local indigenous people on the occasion of the annual feast.

151 *Aborigines Protection Act 1886* (Vic). Given that the *Aborigines Protection Act 1869* (Vic) had specifically deemed half-castes and children of half-castes who habitually associated with aborigines to be aborigines, this represented a substantial change in policy, perhaps for economic reasons.

way of 'loan'[149], while s6 forbade harbouring aboriginals and providing them with intoxicating liquor.[150] In practice, those powers not requiring the use of force were delegated to the Board or to mission staff.

By 1886 these powers were deemed insufficient and Victoria enacted legislation excluding individuals of mixed descent from indigenous reserves, marking the first attempt at legally enforced assimilation.[151] While the legislation provided[152] that half-castes might continue to apply to the Board for assistance[153], exclusion from the missions was traumatic. This policy was bitterly resented and damaged communal ties already weakened by colonisation and the mission system.[154] Those excluded from the reserves found it almost impossible to survive, leaving them no choice but to appeal to the Board for assistance. The legislation extended the Board's powers over children of mixed descent, and allowed mission officials to send orphans of mixed descent to an orphanage or industrial school and compelled those fourteen or older to enter service. The term 'orphan' was broadly interpreted, meaning simply children whose parents were unable to support them.[155] Grimshaw notes that:

> 'Koorie women were … not only subjected to instruction on appropriate ways of mothering but to constant daily monitoring of their performance. If missionaries removed children from their mothers' care to be placed in the "dormitory", mothers effectively lost any real say in their treatment. Control was also exercised over Aboriginal mothers by directing their … movements across the colony, undermining the mothers' efforts to cope with a host of obstacles: their persistent dire poverty; their husbands' need to shift about seeking paid seasonal work, occasioning frequent absences; the ill-health and premature deaths of

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152 *Aborigines Protection Act 1886* (Vic) s6.

153 The period was 3 years in respect of rations and 5 years in respect of clothing and blankets. The evidence suggests that provision was far from generous. The colonial government did not provide relief to other residents of Victoria, although widows and deserted wives who were of good character might have their children boarded out to them, and thus were indirectly supported.

154 See Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329, at 340.

155 See Chesterman, J. and Galligan, B. *Citizens Without Rights: Aborigines and Australian Citizenship*. Melbourne: Cambridge University Press, 1997, 37. A loose interpretation of the word 'orphan' seems to have been characteristic of the era. Most of the children in the Male and Female Orphan Schools had living (albeit destitute) parents, as did most of the child migrants. In practice, 'orphan' appears to have meant without parents or other kin able to provide financial support.

156 Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329, at 337.

157 See generally, Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329.

> spouses; and their distance from supportive kin, who were similarly forcibly scattered across the colony.'[156]

Those expelled from the missions lived a marginal existence, applying to the Board for rations, emergency shelter or funds to visit their children on distant missions.[157] Deprived of subsistence other than begging for handouts from the Board, many mothers were compelled to place their children in orphanages and industrial schools, something seen as a triumph for Board policies.[158] These institutions were responsible for breaking in '*the wilder and less charming children … for the labour market*' and were little more than '*a social agency conducted by the servant employing class for the purpose of supplying their own kind with cheap scullery hands*'.[159]

The missionaries were increasingly torn between their two masters. Fearful that their 'civilising agenda' had not borne sufficient fruit to warrant a continuation of state funding[160] and not always able to attract charitable donations from wealthy co-religionists, they became assiduous in removing children from their mothers, often when very young. Officials from the Department for Neglected Children also applied pressure; suggesting that 'early removal' would alleviate the difficulties encountered in placing rebellious older children. Young children could be boarded out[161] more easily, and would be more readily assimilated, minimising the expense of maintaining them on the missions.

By 1899, it was no longer necessary for Koorie children to be declared 'neglected' to place them in 'care'. That placement would lead to 'an improvement in their care and education' was sufficient.[162] All Koorie children were at risk of removal, even the minimal requirement of 'neglect' having been eliminated. This change was accomplished by

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158 See generally, Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329. at 340-341. When the applicant was denied emergency rations and permission to return to the Mission for a few months, she was forced some months later to seek permission to send her two sons to the orphanage or industrial schools. This request was duly granted. While these outcomes were brutal, they were similar to those under the *Neglected and Deserted Children's Act 1864* (Vic) and its successors, where mothers unable to establish their 'deserving character' and lack of moral vices were likewise compelled to admit their children to industrial schools or orphanages.

159 Kennedy, R. Charity and Ideology in Colonial Victoria. IN Kennedy, R. (ed) *Australian Welfare History: Critical Essays*. Melbourne: Macmillan Australia, 1982, 67, 71.

160 'Leading charities' in Victoria apparently received about two-thirds of their income from the state. These were the powerful and fashionable public charities. The funding available for private charities and for mission settlements was scant and thinly spread.

161 It is unclear whether boarding-out was fostering in the modern sense or whether it was akin to a period of indentured service, as with the Canadian child migrants.

162 This was accomplished by regulation under the 1886 legislation. See Grimshaw, P. 'Colonising Motherhood: Evangelical Social Reformers and Koorie Women in Victoria, Australia, 1880s to the early 1900s' (1999) 8 *Women's History Review*, 329, at 341.

regulation, highlighting the power of the Board and its willingness to exercise that power with the complicity of the evangelical missionaries. Both the government and its religious allies believed that 'child saving' was the only hope for indigenous advancement. The powers that Bentham[163] (and before him, Locke)[164] had dreamt of for pauper children were realised with indigenous children. The solutions deployed in Victoria would, over the next decade, be replicated across continental Australia.

While the *Aborigines Protection Act 1909* (NSW) resiled from the attempt to exclude individuals of mixed descent from reserves, it extended the Board's powers over indigenous children. Section 11(1) permitted the Board to apprentice any aboriginal child and the 'neglected' child of any person apparently having aboriginal blood to any master. The legislation also allowed the Board to collect any wages payable and expend them as it saw fit for the welfare of the apprentice. It was within the discretion of the Board to declare any indigenous child a 'neglected child' within the terms of the *Neglected Children and Juvenile Offenders Act 1905* (NSW).[165] Section 13 deemed 'any person' who 'entices' an aboriginal apprentice, or 'entices' the child of any aborigine or apparently aboriginal person to leave any school, home or institution guilty of an offence. The use of the old common law tort of seduction, here given statutory form and penal rather than civil consequences, emphasised the extinction of parental rights.[166]

These provisions are lineal descendants of those dealing with the poor. The control over the movement of adults, the power to remove children, and the regulation of social contacts reflect a broader social agenda: one of surveillance, power and control. Aboriginality, like pauperism, was legally defined as excluding adult status. Speaking more boldly than many of his contemporaries, Jeremy Bentham had argued that the poor ought to be regarded as minors.

> ' "The comparative weakness of their faculties, moral and intellectual, the result of the want of education, assimilates their condition … to that of minors. The money of the poor man, like that of the school boy, *burns* … in his pocket." The poor, he said, "are a sort of grown children." In this demeaned status, the poor in need of relief, whether or not they were beggars, were in no position to be choosers… [T]heir

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The ground is remarkably similar to that in UK legislation permitting transportation of children. See *Reformatory and Industrial Schools Act 1891* (UK).

163 Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 174-186.

164 Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 116-117. Locke advocated rounding up all males 14-49 found begging and imprisoning them at hard labour until they could be impressed. Those who were older or disabled, as well as women and children, were to be confined to a house of correction and the children soundly whipped!

> only alternative was to starve or to accept relief "upon terms which it is thought fit to be offered," that is, under confinement … And, as if to underline the inferiority of the indigent, Bentham revived the all-but-defunct practice of badging them. "*Soldiers* wear *uniforms*, why not paupers? – those who save the country, why not those who are saved by it?".'[167]

For Victoria's indigenous people, reduced to destitution by colonisation and the destruction of habitat, aboriginality signified permanent status as a minor and legitimated the erasure of parental rights, eradicating parental authority and placing parents on the same legal level as their children. All that could be hoped for was that some of the children might ultimately be assimilated into settler society, at least at the lowest level, as labourers and lower servants.[168]

Legislating a Taxonomy: Western Australia

Whereas Victoria legislated generally for indigenous people, the first racially specific law in WA applied only to Aboriginal girls in schools or service.[169] Section 1 spoke of the desirability of providing a remedy against '*mischievous and evil-disposed persons enticing away the girls of that race*'.[170] To that end, a person found guilty was to be fined £2 for a first offence and £5 for each subsequent offence. At once protective (in that it assumed a carnal motivation[171]) and repressive (in negating the agency of aboriginal girls), it reflected the fear of racial intermixture.

General legislation followed.[172] The Protector's powers were narrower than those of the Victorian Governor. Initially, the Board lacked the power to regulate the movements of indigenous adults, although the power over apprentices and prisoners was extensive.[173] The Resident Magistrate had the authority to apprentice indigenous children. If an apprentice misbehaved or absconded, the matter was to be investigated by the Justices, and if proved the apprentice was liable to imprisonment for a term

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165 Given the breadth of that definition, this posed little or no difficulty!

166 Similar legislation applied to children confined to Industrial Schools under the *Destitute Persons Act 1881* (SA) s86 and similar statutes. It is not clear whether the 'mischief' sought to be avoided was removal by the child's parents or kin, or something more directly akin to seduction.

167 Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 111.

168 While the 'doomed race theory' suggested that this effort would be futile, much of this attention was focussed upon children of mixed racial background; children who, it was thought, might ultimately be assimilated into European society at the lowest level.

169 8 Vic C6 (1844) (WA) *An Act to Prevent the Enticing Away the Girls of the Aboriginal Race from School, or from any Service in which they are Employed.*

170 8 Vic C6 (1844).

171 This assumption was clearly correct. See Arkley, L. *The Hated Protector: The Story of Charles Wightman Sievwright – Protector of Aborigines 1839-42*. Mentone: Orbit Press, 2000, 17-19.

not exceeding one month.[174] These provisions are identical to those in laws dealing with neglected and destitute children and child migrants.[175]

The *Aborigines Act 1905* (WA) was different. It introduced broadly based powers over the lives and movements of indigenous people. Section 12 gave the Minister power to cause any aboriginal to be removed to a reserve and deemed it an offence for such to resist. While s13 allowed certain indigenous persons to be exempted from s12, s14 imposed penalties for unlawfully entering upon a reserve or removing any person from a reserve. The statute extended the power over aboriginal children[176], providing that they might be detained in any aboriginal institution, industrial school or orphanage or apprenticed to any suitable person with or without the consent of their parents. Indigenous children became, at birth, State children, the State delegating its responsibility to the religious and philanthropic organisations running missions and reserves and replicating the division between power and responsibility in Victoria.

The most radical development, reflecting the rise of racial science and the influence of eugenics, was the statutory use of detailed racial classifications similar to those used in the American south. While the distinction between Aborigines and half-castes was familiar, it was elaborated upon in ways that blurred the line between biology and culture.[177] A half-caste is defined '*as any person being the offspring of an aboriginal mother and other than an aboriginal father*'[178] but excluding those '*deemed to be aboriginal*' because they habitually consorted with aboriginal people.[179] Quadroons were excluded from the half-caste category and we find the suggestion of an assumption that they would gradually be absorbed into the white population. An individual's place in the racial hierarchy is provisional. While she or he is assigned a putative identity at birth, that place can readily be lost if behavioural codes are violated.

Among the most interesting provisions are those prohibiting contact between female aboriginals and pearlers. When this statute was enacted there were almost 400 pearl luggers and 3500 divers working the waters around Broome. Most divers were Japanese, primarily from

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172 *Aborigines Protection Act 1886* (WA).

173 *Aborigines Protection Act 1886* (WA) s36 provided that it should be lawful for any Resident Magistrate to indenture any half-caste or other aboriginal child to any master until such child reaches the age of 21.

174 *Aborigines Protection Act 1886* (WA) s37. The section also provided that in the event of ill treatment by the master or mistress the master might be fined or imprisoned and the mistress fined.

175 See, for example, *Juvenile Immigrants Act 1842* (WA) s2; *Destitute Persons Act 1881* (SA).

176 *Aborigines Act 1905* (WA) s8 and s60.

Taiji province, although others included Malays and Aborigines. The 'evil' the statute sought to prohibit was sexual liaisons between indigenous women and Japanese and Malay divers. Inter-racial cohabitation is criminalised, the statute providing that any '*male person other than an aboriginal who cohabits with any female aboriginal, not being his wife, shall be guilty of an offence against this Act.*'[180] Ostensibly, these provisions protected indigenous women against overreaching. In actuality, the fine encouraged cohabitants to abandon their indigenous partners and their children to avoid payment.

The *Aborigines Act 1905* (WA)[181] made it unlawful to employ an Aboriginal person without a permit. The protector became the legal guardian of indigenous and half-caste children, and had the power to seek maintenance from the reputed father of half-caste children. In language drawn directly from the *Poor Law Amendment Act 1834* (UK) it provided that such action could not be taken merely upon the oath of the mother.[182] The mother could not seek maintenance herself. The vision expressed in John Locke's 'Report to the Board of Trade on the "Relief and Employment of the Poor" ' in the 17th century is remarkably similar to that imposed on indigenous people:

> 'Locke thought the House of Correction too good for the indigent seeking relief on the rates. They were too commodious, too lacking in discipline to satisfy the celebrated author of *An Essay Concerning Human Understanding*. Instead he favoured a form of what became the eighteenth-century practice of "contracting for the whole poor": a master would be paid a *per diem* allowance for each able-bodied male, from whom he could attempt to profit by extracting maximum labour. The same treatment would be given women and children … except that the children would be soundly whipped.'[183]

The barely concealed Lockean contempt for those who fail to exploit the land by converting it to private property[184] here was applied to those who sought to exploit the kindness of their fellows by 'failing' to work. These belief structures, transplanted to Australia and wedded with newly fashionable scientific notions of racial and eugenic

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177 In this context, one does well to recall that the first legislation enacted by the Commonwealth parliament established the White Australia policy. See *Immigration Act 1901* (Cth).

178 Remarkably, the definition provisions in s2 do not apply to s3. Section 3 includes as a half-caste any person born of an aboriginal parent on either side and the child of any such person, and 'deems' as half-castes aboriginals who cohabit with aborigines, associate with aborigines or are under sixteen years.

179 *Aborigines Act 1905* (WA) ss2-3.

180 *Aborigines Act 1905* (WA) ss40-44.

181 *Aborigines Act 1905* (WA) ss17, 18.

182 *Aborigines Act 1905* (WA) s34. See *Poor Law Amendment Act 1834* (UK) s72, which provided that the Guardians might seek support from the putative father, but that this could not be done merely on the oath of the mother. The section provided further that the monies collected from the putative father were to be paid to the Guardians and used

superiority, were used to justify the practice of isolating and containing indigenous people on reserves and removing their children whilst retaining any monies they might earn.

From Pauper to Protected: New South Wales

Although NSW (which originally incorporated Queensland) was relatively slow to introduce comprehensive legislation, the history of the Aboriginal Institution and later of Blacktown suggests that early efforts centred on persuading local indigenous groups to adopt semi-settled habits. Early laws touching on indigenous people and on relationships between indigenous people and settlers were simply the provisions in vagrancy laws discussed earlier[185] and fell squarely within poor law traditions.[186] So did provisions in the *Industrial and Reformatories Schools Act 1865* (NSW) permitting the removal of any destitute child, and identifying as 'destitute' any child born of an Aboriginal or half-caste mother.[187] The first general statute was enacted in 1909[188] and replaced an untidy collection of earlier provisions, including the supply of liquors to the *Aborigines Prevention Act 1909* (NSW).[189] It established the Board for the Protection of Aborigines, which had the power to distribute funds set aside by Parliament for the relief of aborigines, to distribute blankets, clothing and relief to aborigines at its discretion[190] and to determine who might enter upon a reserve.[191] The Board was entitled to eject any aborigine guilty of misconduct or was capable of earning a living off the reserve. The statute was relatively moderate in tone and did not repeat Victoria's attempt to exclude half-castes from reserves or Western Australia's foray into racial classification.

Over the next half century, racially based statutes went through numerous iterations, but the central themes remained remarkably consistent: the assimilation of indigenous men and women to the undeserving poor, the institutionalisation of indigenous children and

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only for the support of the child until it reached the age of seven. The mother was to receive no part of the monies, nor could the funds thus collected be used to defray the costs of supporting the mother. A similar provision appears in the *Destitute Persons Act 1881* (SA), s14 of which empowers the Destitute Board to seek support for the child.

183 Bahmueller, C. *The National Charity Company: Jeremy Bentham's Silent Revolution*. Berkeley: University of California Press, 1981, 117.

184 Locke, J. *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett*. Cambridge: Cambridge University Press, 1963, Second Treatise, §43.

185 See, for example, *Vagrancy Act 1851* (NSW).

186 The vagrancy legislation is extraordinarily compendious, regulating gaming, obscene publications and language, prostitution and diverse other matters besides 'vagrancy'. Its breadth makes it clear that the real target was not simply homelessness but a lifestyle of which the upper classes disapproved.

187 Here, as in the vagrancy laws, the racial designation is 'grafted' onto existing legal traditions aimed at destroying the culture of the underclass.

188 *Aborigines Protection Act 1909* (NSW).

their placement in 'foster homes', the appropriation of the earnings of indigenous men and women and their accumulation in mission and reserve trust accounts.[192] Other themes were also constants. The partnership between governments and missionaries of various denominations persisted, as did the pervasive under funding of missions and reserves[193], exacerbating the problems caused by cultural annihilation and the introduction of European diseases.

The gulf between programs for indigenous people and those for settlers more generally were emphasised by the exclusion of indigenous people from Commonwealth old age and disability provision. Government funding was far below the level needed to provide adequate conditions and even supplemented by charitable donations, conditions were marginal.[194] Self-sufficiency was a constant theme, yet conditions made this impossible. Only where the wages of indigenous stockmen and domestic servants were held in trust (and misappropriated for general purposes) did a form of 'self-sufficiency' emerge. Here, the network of missions and reserves emulated Bentham's fever-dream of a quasi-independent 'pauper kingdom', a nation within a nation occupied by different classes of 'hands' from whom labour was extracted in an experiment in human husbandry, yielding profit to its shareholders.

The Persistence of Memory

Even where the legislation seemingly has some protective impetus[195], the history woven around and through it emphasises its demeaning and self-serving character. The Protectors justified the removal of indigenous children by the need to prepare them for their future roles as scullery maids and stockmen. They were to work, and ultimately live in the wider community. The expropriation of the wages of mission residents, the paternalistic restrictions on the employment of indigenous adults and other restrictions on their relationships with non-indigenous people ensured that

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189 Ironically, the early governors of NSW had used liquor to 'entice' the local natives to join them for feasts, such as those held at the Native Institution in its early years.

190 *Aborigines Protection Act 1909* (NSW) s7.

191 *Aborigines Protection Act 1909* (NSW) s8.

192 Many of these funds remain unaccounted for. It is clear that they were not expended by or for the benefit of the indigenous workers, to whom the funds belonged.

193 Government funding seems to have been barely sufficient to provide rations. The missionaries who ran the missions routinely sought funding from church headquarters and from prosperous sympathisers.

194 See Arkley, L. *The Hated Protector: The Story of Charles Wightman Sievwright – Protector of Aborigines 1839-42*. Mentone: Orbit Press, 2000; McGregor, R. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*; Grimshaw, P. and Stevens, C. *White Man's Dreaming: Killalpaninna Mission 1866-1915*. Melbourne: Oxford University Press, 1994.

195 During this period, the phrase most often used was 'smoothing the pillow of a dying race'!

196 This was particularly true in Queensland and the Northern Territory, where racially

non-coercive forms of social and cultural exchange were still-born.[196]

Laws and policies are not accidental within a historically grounded system. The legal traditions that criminalised the stigmata of poverty, that asserted the superior claim of the state with respect to the education and training of children, and that classified the poor as deserving and undeserving provided the legal resources to deal with two distinct groups. The policies underlying the creation of the stolen generation, like the policies underlying the export of the 'child migrants', were part of a tradition of 'human husbandry' whose central themes were entrenched by the beginning of the 17th century. They were also part of a liberal intellectual tradition in which the connection between labour, virtue and peculiarly western understandings of property[197] was axiomatic. For 17th and 18th century Englishmen, property (or propriety) went well beyond material possessions, encompassing lives, liberties and estates and having its origins in his industry. Forged by the social contract theory of John Locke and by utilitarian thinkers such as Jeremy Bentham, it was an intellectual tradition that saw in labour the source of all value. While claimed to be an egalitarian tradition, its equality lay exclusively in the formal equality of the bargain. Those who failed to labour and amass private property, whether paupers in England or indigenous people in Australia and the Americas were a species of children who must be confined and compelled to labour. By their refusal to labour and to amass property, they had demonstrated their childlike nature. While humanity required that they be given enough to keep them alive, nothing more was required. Their own children, safeguarded from the 'pernicious' influence of their parents and provided with suitable models, might, with proper training, learn to serve their betters and thus gain their subsistence, thus becoming fully members of political society.

While the pathways followed by the child migrants and those followed by indigenous children ultimately diverged, both represented

restrictive laws sought to prevent de facto relationships between Chinese workers and merchants and indigenous women, despite the acknowledgment that the women were typically well treated and enjoyed a better life than they otherwise would. See McGregor, R. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*. Melbourne: University of Melbourne Press, 1997.

197 Locke, J. *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett*. Cambridge: Cambridge University Press, 1963, 332-341, §32-§45 is directly on point, setting out the connection between labour and private property and implicitly suggesting that those peoples who have not developed a system of private property are wasteful.