Stolen Generation

SEPARATED: AUSTRALIAN ABORIGINAL CHILDHOOD SEPARATIONS AND GUARDIANSHIP LAW

By Antonio Buti

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STATE policies toward indigenous peoples occasioned deep and persistent conflicts throughout the history of British colonialism. The core policy – a bias in favor of 'Christian civilization' and against 'tribal' societies – continued into post-colonial administrations, disrupting indigenous social networks on a grand scale, tearing whole peoples from their ancestral lands and bringing many to extinction.[1]

Much of the assault against indigenous peoples was not directly military, but was engineered by state social service agencies, whose mission paralleled the church missionary agenda: to assimilate what remained of indigenous peoples after the ravages of disease and murder. A primary method of assimilation in colonial and post-colonial states involved the separation of indigenous children from their families.

Although separation of children was typically done in the name of 'care' and 'education', it was not necessary for state agencies to allege actual family neglect or abuse. The theory of 'civilization' postulated an a priori deficiency. Separation was said to be in the children's 'best interests' because indigenous societies were, by definition, inherently deficient; evidence of particular deficiencies was not necessary.

Australia is a prime example of the development and continuation of this colonial policy into post-colonial government. To its credit, Australia also provides an example of a state regime capable of self-study and change.

Separated, by Antonio Buti, focuses on the legal issues and historical understanding of family separation within the context of Australian state institutions of Aboriginal guardianship. The book provides a detailed, scholarly examination of the period from British-European settlement in the late 18th century through to the mid-20th century, when state policy began to shift toward recognition of the integrity of Aboriginal society.

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1. See P d'Errico 'Being and Thingness: Notes Toward a Critique of "Christian Civilization"' (2003) 3 Ayaangwaamizin, International Journal of Indigenous Philosophy 89.

Buti proceeds from the premise that, because state policy was founded on a theory of the 'best interests' of the children, 'An examination of the state guardian's role is critical to any examination of the historical scheme of separating Aboriginal children from their families'.[2] The central issue, he argues, is whether the state guardian complied with duties and accountability obligations, as postulated by the common law jurisprudence of the time.

As Buti notes, controversies about responsibilities of the state to Aboriginal children continue today. *Separated* is therefore both a historiography of the state's self-imposed 'guardianship' duties and a contribution to contemporary debates. Moreover, because state practices and policies of indigenous family destruction are so consistent across such a large part of the colonised world, Buti's research speaks to a much wider audience than Australia alone. Scholars and advocates in the United States and Canada, for example, would do well to study this book.[3]

Buti's method is to appraise the legal issues within political, social and ideological contexts. He starts with an overview of guardianship law and the development of the child's 'best interests' principle, followed by detailed investigation of social welfare legislation and policies, including comparative analysis of Aboriginal and Anglo-European child welfare schemes. He then informs this historical and analytical framework with testimonial and documentary evidence and allegations of ill-treatment and breaches of state guardianship duties in relation to Aboriginal children.

The book closes with an argument for remedial litigation of guardianship issues within the structure of fiduciary law, which, Buti argues, is better suited than tort law to recognise alleged breaches of state responsibility to Aboriginal children. He admits that litigation is an unwieldy vehicle for meeting the needs and demands of the 'separated,' but hopes that the guardianship analysis may act as a catalyst for a political solution.

Guardianship concepts are deeply entwined with overall colonial and state policies toward indigenous peoples. One well-known formulation of the relationship between an Anglo-European state and indigenous peoples is the American doctrine of 'ward-guardian,' formulated by Chief Justice John Marshall as a cornerstone of United States law.[4] This notion was intended not as a specific plan for children or families,

2. At p 3.
3. For an understanding of the Canadian controversy, which centres on the boarding school system, see R Chrisjohn & SL Young, *The Circle Game: Shadows And Substance in the Indian Residential School Experience in Canada* (Penticton: Theytus Books, 1997); JS Milloy *'A National Crime': The Canadian Government and the Residential School System, 1879–1986* (Winnipeg: University of Manitoba Press, 1999). No comparable level of controversy about child removal has yet occurred in the United States.
4. See *Cherokee Nation v Georgia*, 5 Pet. 1 (1831), second in the so-called 'Marshall Trilogy' of cases that form the foundation of US federal Indian law. Marshall suggested that the relation between indigenous nations and the United States 'resembles that of a ward to his guardian'. This description, although stated as metaphor and dictum, became a dogmatic axiom in federal Indian law.

but rather as a way of defining the state-indigenous relationship as a whole: the state was pictured as a 'guardian' in an overarching sense. The primary aim was, in fact, not the care of social needs, but the acquisition of property: the 'guardian' had control of the 'ward's' lands.

In this larger context, Buti's exploration of guardianship law in its common law fiduciary sense, and his suggested deployment of it as a vehicle to protect and compensate Aboriginal children and families is all the more remarkable and creative. In the face of the fictitious 'protection' offered by the state's overarching assertion of 'guardianship,' Buti turns the tables and presents a context and an argument for taking the state's assertion of guardianship seriously – and enforcing it.

It is important to understand that while underlying state policies affecting Aborigines (a combination of 18th century race theories and 19th century social Darwinism) have by now been widely repudiated, their social effects and institutional residue persist. Indeed, it may be said that contemporary law and politics have not yet done more than nibble at the edges of the disaster created by the wholesale disruption of indigenous families.

Kinship systems – complex networks of clan and family relations – are the heart of 'tribal,' non-state societies. The goal of colonising policy was to disrupt these networks, to extract 'individuals' from the kinship nexus and incorporate them into market-driven contractual networks to serve state-based societies.[5] The seemingly most direct way was intervention at the most intimate level of family existence: separation of children from their parents.

In addition to extraction of individuals for incorporation into labor markets, separation of Aboriginal children from families had another intended goal: prevention of Aboriginal societies from reforming and perpetuating themselves, so that their lands could be taken without opposition. This latter goal typically also involved creation of 'reserves,' the name itself indicating that Aboriginal peoples were being confined to an area within, and smaller than, their original territories, and implying that this confinement was done for their benefit, as a concession or 'protective' measure.

Interestingly, Aboriginal children were not the only ones separated by state policy. As Buti explains, they were joined by children subjected to the deportation strictures of the Poor Laws in Britain. In this combination, one may see the outlines of an overall social policy of a developing market society, in which humans are defined by their capacity to exchange and be exchanged. The deported children were taken from families rendered progressively superfluous by ongoing market economic processes operating since at least the time of the enclosures.

An important difference is that while Poor Law deportations were built on a perception of existing need – family neglect and deprivation – state policy toward Aborigines was built out of whole cloth: destruction of Aboriginal families was not the premise, but the intended result. As Buti points out, state officials sought 'unfettered power

to remove Aboriginal children from their families'.[5] The rhetoric of 'guardianship' was a guise made possible only by belief in race superiority and the 'white man's burden.'

It may be that a belief in eugenics does not exclude genuine personal concern for beings of a 'weaker race,' said to be dying out. But given the concomitant desire for Aboriginal labor and land, one is hard pressed to find any but a self-serving motive in official assertions of concern for the well-being of Aboriginal children. Only by ignoring ways in which state policies were implicated in both Aboriginal separations and Poor Law deportations may one speak of the separation of children from families generally as a policy to 'rescue' the children. In each instance, the terminology of humanistic concern provides a morally acceptable discourse for economic and political dispossession.

It is startling to consider that these colonial policies and practices continued well into our own times. Buti points out that special powers to remove Aboriginal children remained law until the mid-1960s and early 1970s, despite publication and judicial recognition of social and psychological research showing serious adverse consequences resulting from maternal deprivation for children generally. It was not until the very end of the 20th century that the law began to develop a different paradigm.

The *Mabo* case[6] in Australia is a sign of a sea change in the jurisprudence of state relations with indigenous peoples. Justices Deane and Gaudron spoke of the dispossession of Aboriginal peoples from their homelands as a 'conflagration of oppression and conflict ... leav[ing] a national legacy of unutterable shame',[7] and representing 'the darkest aspect of the history of [the] nation'.[8]

Would that every regime founded in oppression were gifted with judges of such vision and courage to lay a foundation in legal thinking for social, political, and economic changes – indeed, reparations – that are necessary to bring about conditions of peace and justice in the aftermath of officially sanctioned and implemented degradation. Indeed, one may say that until such developments occur – until at least a foundation is laid – a post-colonial condition has not been achieved.

Despite the brave opinions expressed in *Mabo*, and though they have been adopted by some justices on the Family Court of Australia in recognising the 'devastating

5. In the words of Karl Polanyi: 'This effect of the establishment of a labor market is conspicuously apparent in colonial regions.... The natives are to be forced to make a living by selling their labor. To this end, their traditional institutions must be destroyed, and prevented from reforming, since, as a rule, the individual in primitive society is not threatened by starvation unless the community as a whole is in a like predicament': *The Great Transformation* (Boston: Beacon Press, 1944) 163.
5. At p 59.
6. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
7. Ibid, 104.
8. Ibid, 109.

effects' of placing Aboriginal children in non-Aboriginal environments,[9] Buti concludes that redress of the damage 'is unlikely to come by way of a judicial solution'.[10] He argues that there is greater hope for a 'political, non-legal solution to the demands for reparations'.[11]

Buti's genius in *Separated* is to catch the state in its nakedness and make it susceptible to the implications of its own discursive clothing. His analysis may well be the catalyst for real social change.

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9. At p 178.
10. At p 192.
11. At p 193.