Consent, Marriage and Colonialism:

Indigenous Australian Women and Colonizer Marriages

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Journal of Colonialism and Colonial History
Volume 6, Number 3, Winter 2005

In 1901, the year of Australian federation, the newly constituted State of Queensland restricted marriage between Indigenous women and non-Indigenous men. These amendments to the Aboriginal Protection Act legislation of 1897 criminalized the informal marital arrangements that criss-crossed Queensland's cultural and colonizing boundaries. The stated aims of the policy were to "protect" Indigenous women from sexual exploitation and to prevent the birth of "half-castes" or mixed descent children. Yet, as established or de facto marital relationships were considered a greater affront to the colonial/national project than casual sex, police only arrested those who "cohabited" with and openly acknowledged their Indigenous partners.

Two "Chief Protectors" - white men with "knowledge of the natives"- adjudicated over colonizer men's requests to legally marry Aboriginal women under Queensland law[1]. The Protection Act's implementation created a detailed archive of the official marital negotiations that took place between potential non-Indigenous husbands, police, protectors and the courts. Local policemen assessed and reported upon the husband's suitability to marry under Queensland's British-styled marriage law. Letters attesting to his respectability were sometimes written by the man himself, or by a lawyer engaged to write on his behalf. Most applicants were rural workers who were illiterate, semi-literate, or unable to write in English. The Indigenous woman was not required to apply for permission to marry, but the local policeman had to comment on whether the woman consented to the marriage. He was also expected to enquire as to whether she had "a tribal husband" – the term Europeans used for a spouse according to Indigenous law.

In this article, I search for clues about Indigenous women's strategies for navigating intimate gender relations across contesting societies. When Indigenous women contracted into marital agreements under the colonising regime, it appeared that their understandings of what they were consenting to differed dramatically from the colonisers'. Although the man-to-man nature of Queensland's state marriage approvals left an archive of correspondence in the masculine voice, the scenarios discussed below reveal vital clues into Aboriginal women's views and actions. Such marriage narratives involved political and social ideas of "civilisation", "freedom" and "consent", all of which - in English translation or not - had multiple, conflicting and shared meanings across cultural and colonising boundaries.

The subject of intermarriage in colonising contexts has drawn increasing interest in recent scholarship, although most studies have been concerned with investigating imperial motives.[2] Stoler's influential studies allow insights into the complexities of colonising anxieties over inter-racial desire in Dutch colonies.[3] For the United States frontier, scholars such as Sylvia Van Kirk, Peggy Pascoe, Albert Hurtado, Gunlog Fur and Sahila Belmessous analysed shifting policy interventions and people's experiences of intermarriages on American frontiers, including marriage "au façon du pays".[4] Ellinghaus, Henningham, Maynard and Haskins conducted valuable Australian and comparative studies of frontier intermarriage.[5]

Of special theoretical interest is Carole Pateman's path breaking study *The Sexual Contract,* which traced the ways in which the patriarchal conventions of the marriage contract had historically underpinned the governance of western societies. The "sexual contract" enabled state control of women and women's labor; it was "about political rights as patriarchal right and sex-right." Whereas marriage was conditional upon a performative utterance of "I do" - a voiced consent or agreement –the contract also had to be "consummated" by heterosexual sex.[6] Using general contract and social contract theory, Pateman argued that such agreements entailed "rights in the property that individuals are held to own in their persons". In addition to the sexual/marital contract

endorsed by the state, Pateman noted the ramifications of the "slave contract": "The men who (are said to) make the original contract are white men, and their fraternal pact has three aspects; the social contract, the sexual contract and the slave contract that legitimizes the rule of white over black." While Pateman acknowledged that the "contractual beginnings" of American colonization were premised upon coercion and conquest, she did not analyze the ongoing impact of the "colonizing contract" in shaping the "sexual contracts" of "settler" nations.

In *Public Vows: A History of Marriage and the Nation,* historian Nancy F. Cott convincingly demonstrated how American marriage came to represent a new kind of democratic union.[7] In the early American republic, the nation, the polity, was to be built upon the basic harmonious principle of companionate heterosexual coupling. By the early nineteenth century, although subject to state regulation, consent as a premise of marriage became "the American way".[8] Exploring the links between marriage law, state formation and governance, Cott found that marital ideals were mirrored in the ideals of governance for the nation-state. "Conjugal love" and "love of nation" featured together in discourse from the 1790s. According to Montesquieu, whose *Spirit of the Laws* had a profound influence on Jefferson and other "founding fathers", links were drawn between the new form of marriage or "domestic government" along non-authoritarian, monogamous (heterosexual) lines and a non-authoritarian form of "political government". Individual consent was thus integral to the idea of American marriage.[9] As Cott concluded: "A commitment to monogamous marriage on a Christian model lodged deep in American political theory, as vivid as belief in popular sovereignty or in voluntary consent of the governed or in the necessity of a government of laws." In the case of Native Americans, governments intervened to prevent polygamous marriage practices, while land-grants were predicated upon marital conformity.[10]

Different systems of internal governance, law, cultural priorities and philosophies shaped Indigenous contractual understandings. As Ann Marie Plane argued, American marriage law was represented and mutually constituted by Indigenous interactions with the early American courts. She concluded: "Just as English colonialism could seep into Indian lives, shaping the very meaning of Indianness itself through the bonds of matrimony, so too did marriage offer opportunities for resistance to colonization."[11] Significantly, marriage featured as a player in negotiations that shaped the cultural protocols and composition of the future nation.

In the colonizing context, the issue of marital consent as a gendered form of nation-building and of state formation takes on a special resonance. Colonizing states imposed western notions of marriage, patriarchal land ownership and inheritance upon Indigenous peoples without necessarily having obtained their consent to be governed in the first place. Indigenous Australians had not been consulted over property issues, so violence and deep suspicion of colonizers regarding citizenship and sovereignty rights continued. Unlike many other colonies, the Australian authorities had not entered into treaties with the Indigenous men of Queensland, or of any other Australian colonies. While navigator Captain Cook was officially instructed "to obtain the consent of the natives", this never happened. When Cook first planted the British flag in north Queensland soil in 1770, this was an imperially recognized declaration of imperial sovereignty. Neither the first Governor, Arthur Phillip, nor later rulers, were instructed to engage in treaty negotiations with Indigenous Australians.[12]

Queensland's Indigenous population, whose ancestors had sustained a civilization on the continent for more than 50,000 years, was still largely living on, or in proximity to, their traditional lands. One of the bloodiest of Australia's nineteenth century frontiers, Queensland's history featured sexual violence, abduction and brutal coercion against Aboriginal women by colonizers and their well-armed native police force. A state spanning the vast Pacific coast and tropical north-east of Australia, Queensland had the highest non-Indigenous sex imbalance of all colonies. In 1861, there were 201 white men to every 100 white women in rural areas; by 1900, there were 171 men to every 100 women.[13] Adding to the predominance of bachelors were the Chinese, Japanese, Javanese, Malay, other south-east Asian and Pacific Island immigrants who worked in tropical agriculture, ocean industries and gold-mining. From the 1860s, Pacific Islanders had been imported to Queensland by sugar planters to work as indentured laborers.[14] Despite the white labor movement's objections to cheap labor competition, it was not until 1908, as part of the special "White Australia" deal struck to ensure the colony would participate in Australia's federation, that the majority were repatriated.

With the worst of the colonizing violence over, in 1901 North Queensland was a lively site of informal cross-cultural negotiation and exchange between colonizers and

Indigenous Australians. This was illustrated by economic, sexual, marital and familial arrangements. Many white, Asian and Pacific Island men lived in sexual and companionate partnerships with Aboriginal women. Indeed, they were in great demand, as they could identify and gather bush foods, cook and undertake cleaning and housework, as well as provide social and sexual companionship. As in most Australian colonies, sexual relationships and longer-term unions between Aboriginal women and non-Aboriginal men were much more common than relations between white women and Aboriginal men. The onslaughts of colonialism had so damaged Aboriginal men's economic status, that authorities judged that they were not particularly attractive prospects as husbands.[15]

Driven by economic, humanitarian and eugenicist imperatives, the Aboriginal Protection and Restriction of the Sale of Opium Act was designed to "protect" Aboriginal people from exploitation and to control their movements. When marriage regulations were stepped up in 1901, any non-Aboriginal man who cohabited with Indigenous women could be charged with a criminal offence, then fined or imprisoned. After serving prison sentences, the men who returned to their partners and families, as many tried to do, could be sent back to prison. Obtaining the Chief Protector of Aborigines' permission to marry the woman was the non-Indigenous man's only hope of keeping his de facto relationship and/or family together. Local police recommended this course of action and encouraged their applications.

Unlike in the United States, where the worst fears over "miscegenation" reflected an investment in the race "purity" of the white woman,[16] in Australia, no restrictions applied to unions between non-Indigenous women and Indigenous men.[17] While the intermarried white woman was entrusted to exert a "civilizing" effect upon her spouse, the "civilizing" capacity of the white frontiersman over his Aboriginal partner was thought to require special monitoring. Under "White Australia", colored peoples received even more scrutiny.

Reflecting upon the dislocation of Australian convict and other immigrant women from extended families, prominent historian Patricia Grimshaw argued that the Australian family was "born modern".[18] Once the full picture of frontier families is taken into account, I would argue that it was instead born "polygamous". T he frontier has been variously analyzed as a zone with a characteristic system of law and order, and as a masculine gendered space, but historians have rarely considered the distinctive "frontier family".[19] Although the white "pioneer family" was reified in colonial legend-making,[20] it was the cross-colonizer or mixed family, that characterized the "nation builders" of the frontier. This is not only a question of sexual and intimate relations, but of family formation, reproduction and child rearing. When pastoralists or their descendants compiled family trees, their extra branches went missing. However, when not obscured by colonizer dismissal of the "illegitimate" mixed descent family, the full genealogy often took on a distinctly polygamous appearance.

Recent Aboriginal autobiographies exposed the secrets of white pastoral families. In a kind of "open secret", not only the biological father and the mother, but also the Indigenous and non-Indigenous community usually knew the parentage of the mixed-descent child.[21] The white father rarely acknowledged the child publicly, but sometimes did so in very discreet private actions.[22] Frontiersmen were riled that these men's "monogamous" Christian marriages, social and legal influence rendered them untouchable by frontier police and magistrates.[23] Among the male classes of frontier society, the 1901 Amendments created intense conflict over access to Aboriginal women and undermined the shape of their existing family life. The white bush workers and miners ostensibly resented the interference of metropolitan bureaucrats because it curbed their ability to employ cheap Aboriginal labor. But they were especially angered by the newly introduced difficulties they faced in cohabiting with Aboriginal women.

For the Chief Protectors and police who administered the Act, the women's existing marriages with Indigenous men created confusion and doubts about the applicability of state law. Acting on instructions from Chief Protector Meston, police removed an Aboriginal woman Minnie to a government reserve in 1902. After complaints were lodged, it was found that she was married under Queensland law to a Pacific Islander, Mr. T, having married him in a registry office in Rockhampton. Her removal from her "legal" husband sparked an energetic campaign by white working men to protect husbands' rights.

As frontier societies viewed white male rights as more important than anyone else's, in this instance, this case is unusual in that the rights of a non-white male were at stake.

Minnie's banishment to an Aboriginal Reserve gave vent to white men's deep resentment against Meston's interference into the authority and rights of the colonizer "husband" generally. Additionally, it was more comfortable for white frontiersmen to make an issue of "colored man's" access to an Indigenous wife, for it deflected attention from their desires, which were antithetical to "White Australian" nationalism. The repatriation of "colored labor" had represented a "race" win for the white male workers, but recent regulations made it almost impossible for Pacific Islanders to obtain work, so they now posed little competition to other laborers. In fact, they needed alliances with Indigenous wives to assist their food supply, as many were impoverished. Although it was no guarantee, those Islanders who intermarried were also more likely to secure the right to stay in Queensland.[24]

The conflict that ensued as to whose rights should have primacy was not motivated by loyalty amongst all men. Although their rhetoric emphasized the rights of the "legal" husband and the "Christian" marriage, their real concern was to discount the status of the Indigenous husband. White men could not plead ignorance to the Indigenous husband's existence, for those seeking partners frequently had to negotiate directly with them, and were then obliged to fulfill reciprocal obligations. It was only by diminishing the significance of Indigenous husbands, however, that white and non-white men could ensure and morally justify their own access to Aboriginal women.

The Aboriginal woman's understanding of the marriage was probably quite different to that of her husband, and of Meston's. Minnie reportedly agreed to move to the reserve cheerfully enough, telling Mr T at the last minute "You clear out of this I don't want to see you no more". Meston stated that Minnie told him she wanted to return to "her husband" because her own people had left the district and she did not want to be alone with the "Kanakas". Motivated by his "Protector" status and knowledge of Indigenous culture, Meston was isolated in his bid to recognize the rights of the Indigenous husband. Meston was sternly rebuked for separating a "married couple" and his actions were overturned. Senior officials ruled that, even in the case of a prior customary marriage, British law over-rode Aboriginal law. Political exigencies and the primacy of Queensland's legal marriage system thus over-rode the intentions of the Aboriginal Protection Act.[25]

Rather than exploring Minnie's understandings of the matter, or reflecting upon the status of the "tribal husband" in a colonizing society, the case gave Meston cause to ponder whether Aboriginal women fully comprehended their duties as "wives". In 1903, he wrote:

> Much depends on the degree of civilization to which the woman has attained to as also is the character of the man. If she is above the ordinary type of "Gin" and if both he and she would recognize the responsibilities it might be well to insist on legal marriage.[26]

"Civilization" here became coda for an embrace of British marital contracts, with concomitant cultural understandings of the bounded obligations that followed her "consent". Although it was the same institution contemporary European feminists argued was akin to slavery, Meston's comments reflected his assumption that only British-style marriage was "civilized". (Married women's property rights were not granted until the 1880s.)[27]

Albeit in a changing colonizing context, Minnie's views of marriage accorded with personal and cultural priorities. Recognizing her responsibilities within her Indigenous community, Minnie's "legal marriage" was dispensable in a way her other marriage was not. According to Meston, Minnie's Aboriginal husband Linnay complained bitterly that she was his wife and had lived with him for over four years. Retrospectively, Meston tried to obtain the Indigenous husband's "consent" to permit Minnie to leave him. Linnay, refused. He saw himself as the prior and rightful husband in Indigenous law. Irrespective of Meston's interest in later obtaining Linnay's consent, neither he nor her legal husband, Mr. T, had been consulted regarding the government decision to send Minnie away to a reserve. Within the new regime, with state powers over Indigenous families widening, at least Minnie was still making her own decisions – though not necessarily "for love".

The case sheds light on Minnie's ideas about what she was consenting to in the marriage. Certainly, she had agreed to live with Mr. T and to participate in a sexual and domestic relationship. But the contract had limits. While her husband under British/Queensland law stayed in her country, and while she stayed near her Indigenous husband and community, she had no objections to the marriage. She did not wish to be too far away from her people – even if this meant being further away from her own traditional lands and heritage. Only with her community living nearby was she willing

to continue with this additional husband. The community itself and husband Linnay must have been essential to supporting, sustaining and ensuring the marriage continued.

Another case reveals how police efforts to obtain convictions against Chinese miners for "illegally harbouring" were thwarted by Aboriginal marital collusions. When police constable Casey arrived at the premises of Lee Chew between Maytown and Cannibal Creek in 1906, his Aboriginal companion, Dolly, ran away. When Casey caught her, Dolly said she only went to his house for "Ki ki" or food. The police stated they were targeting Chinese men because they were trying to prevent opium going into the Aboriginal community.[28] When it came time to test Dolly's evidence in court, she was nowhere to be found. A police expedition was sent out to find her, but it was unsuccessful. Casey stated she had gone "away in the ranges at Stoney Creek to hide" with her Aboriginal husband, Jacky. "I did my best to secure her, as also did Acting Sergeant Magee, but it was impossible to find her in time for the hearing so I was left without the assistance of her evidence." Magee was humiliated, blaming "unscrupulous whites" who assisted the Chinese to avoid charges of "harbouring" Aboriginal women.[29]

Although police targeted these Chinese men for cohabiting with an Aboriginal woman, she clearly had an Aboriginal husband who also lived in the district.[30] Her arrangement with the Chinese men enabled her to stay around her own people and in familiar landscapes rich in cultural meanings. Knowledge of country and support from her "tribal husband" gave her an alternative world and a means of evading and assisting others to evade Queensland's marriage restriction law.

In the 1900s, legal marriage to a non-Indigenous man was virtually the only means by which an Aboriginal woman could be exempted from the powers and restrictions of the Aboriginals Protection Act. For example, when Lizzie L was married to a white man, under Section 10, she could not be forcibly removed from her residence. But when her husband died, leaving her with cattle and horses that she looked after, police efforts were made to remove her from Croydon. She objected, stating to a Protector that she "had never been in a black's camp in her life, having been born on a Station and brought up by white people. She does not associate with the blacks nor does she speak or know anything of their language." These factors did not matter; according to the Crown Solicitor, for the exemption only applied "so long as she resides with such husband." In effect, only being married to a non-Indigenous man - and staying married - gave her citizenship status and exemption from the Act.[31]

In another case, an Aboriginal man of mixed descent (therefore classed as "non-Aboriginal) had to go through the same process of proving his respectability. The young woman he wished to wed who had been moved away from Blackwater to the Barambah reserve. She was pregnant by him and, according to her husband, was "willing to become my wife." Not only was the relationship established, but the husband was a horse breaker on Jellinbah Station near Blackwater, a prestigious occupation with a reliable income. Her unmarried status and pregnancy was probably the cause of her removal in the first place. The Chief Protector granted permission and the husband paid her train fare from the reserve. On 20 April 1909, a few days after she returned, they were married in the Methodist chapel at Emerald.[32] The child would therefore be legitimate, and as long as her husband lived, she was free from the forcible removals of the Aboriginals Act. Being married under the colonizer regime put her under the governance of the husband, but freed her from the governance of the state. Indigenous women married to Indigenous men under the tribal system did not share such entitlements.

Amidst conflicting expectations, even the white man who loved and respected his Aboriginal partner, and satisfied some of her and her family's expectations, let her down in so many ways. In the case of informal "illicit" relationships, priority would be awarded always to his white "legal" wife and to his legitimate white children over his Aboriginal family. Of great consequence was the government's policy to remove "lighter-skinned" children from their families. This led to repeated trauma and ongoing tragedy for Indigenous women and their children, and for the Aboriginal husbands who "grew them up".[33] The policy can be understood as part of an unspoken policy to obscure the marital, race/gender "fault-lines" of Australian colonialism. Such cracks could create fissures which could destabilize the entire political landscape of colonization.

In ideal form, marital promises amongst north Queensland's Aboriginal people were negotiated by appropriate kin, according to correct kin affiliations. Marriages were usually arranged exogamously, with partners from different clans or residential groups.

Ideally, they functioned as a means to ensure co-operation between different clans, and to cement ties between them. If not fulfilled according to expectations, such intimate obligations could also be the cause of bitter disputes.

While Aboriginal children easily grasped their structures, to the untaught western observer, the complexity of kinship relations is like advanced algebra - impossible to comprehend without the aid of extensive diagrams. Many groups had two moiety systems, which also determined marital partners. Everyone was born with a kinship classification that derived from mother/and or father. Kinship classification was not crucially based upon biological descent, but upon marriageability.[34] "Correct" marital partners usually jumped two generations, according to putative kinship relations, not necessarily biological descent. The North Queensland marital system was based on what anthropologists dubbed the "Aranda framework". For example, the Lardil, Yangkaal and the adjacent mainlanders had an eight-class subsection system. Although not necessarily realized in practice, in principle it was based upon "the exchange of women between two patrilineal land-owning groups or clans every second generation and the maintenance of 'brotherhood' groups at two different levels – the moiety and the clan complex".[35] Marriageable kin would therefore be the children of female cross-cousins or male cross-cousins. Only certain men were suitable for marriage, as they had to be "right-way" kinship classification.

"Wrong-way" marriages were one of the worst offenses, punishable by physical ordeal or even death. They were thought dangerous and destructive, wreaking social and spiritual havoc, causing natural disasters, illness or death. Nonetheless, irregular marriages were common and much flexibility existed in the system. As a safety valve, transgressive "love" matches could be accommodated by an elopement, and after an extended period of absence, their match was often accepted.[36] Sometimes kinship classifications were even realigned to correct the irregularities.[37] While "love" was emphasized in marriages by elopement, these were not necessarily associated with "free will". "Love magic" and/or sorcery implied that the will of others existed to influence the will of another.[38]

Depending on the law of a particular land-owning group, it had been usual in Australian Indigenous societies for aunts, uncles and other relatives to participate in the protracted negotiations required for arranging marriages between neighboring clans and tribes. Often the bride was promised at a young age, or even prior to her birth. Appropriate arrangements were crucial to social cohesion and central to enforcing the Indigenous law of the land and ensuring good relations between neighboring land-owning groups. In Indigenous Australian societies, the marital contract was negotiated to arrange law and order in sexual, labor and familial relations. Relatives policed the appropriate behavior of spouses and protected the woman against violence.

Polygamous unions were common, especially for older men, with multiple wives signaling prestige. While Aboriginal women rarely had multiple husbands in traditional societies, they certainly had a sequence of husbands throughout their lives, and communities also permitted discreet sexual relations with another partner.[39] By 1900, Indigenous betrothal practices were still in place and only girls who were raised in white families were excluded. Marital arrangements were the result of both family and wider community negotiation and consensus, so were matters of public knowledge. However, population displacements and other frontier economic, social and spiritual impacts, created changes in the system.[40] The presence of Europeans, Asians and Pacific Islanders had a particularly dramatic impact, widening the range of husband choices and often bringing an end to 'endogamy' or in-group marriage. Finding a 'right-way' match amongst outsiders conformed more easily to the strict guidelines of kinship law. Because outsiders were unlikely to have a fixed kinship classification, an appropriate selection could be made that matched them as "right-way" marriage partners to their Indigenous companions.[41] Indeed, their kin classification was generally allocated according to marriageability.

Australian Indigenous people saw their own highly regulated marriage laws as a marker of a truly civil society. In conjunction with the kinship rules involved, and a frequent requirement to marry outside one's own clan and group, marriage was a key ordering principle to a gendered system of law and order. In early child raising and later inter-family and group negotiations, much social energy was expended on teaching the principles of marriage and organizing the appropriate pairing of couples. While Indigenous men saw "wrong-way" marriages as a reason for dysfunctional communities, marrying "straight" also reflected a cherished value and an implicit embeddedness in landed protocols through song-lines and stories.[42] This metaphoric

journey in the "right" direction had important ramifications in defining personal identity and obligations to specific areas of land that reinforced the correctly oriented moral universe. Indeed, many Indigenous people's estimates of the white people were consequently low. Gadia (the Kimberley term for white people) behavior reflected a descent to the status of animal rather than human. Empirical evidence to back this contention was gathered from white male behavior towards Indigenous women on the frontier. Many consequently saw gadia behavior as "all the same dog – gadia mate with anyone".[43]

In the first half of the twentieth century, "Consent" was defined in the Oxford English Dictionary as: "Voluntary agreement or to acquiesce in what another proposes or desires; compliance, concurrence, permission".[44] In current Australian legal parlance, it implies "affirmative acceptance, not merely a standing by and absence of objection", "freely given by a rational and sober person".[45] In European cultures, marital consent had a long and changing philosophical, political, religious and legal tradition. For example, in 1589, church minister John Stockwood objected to children marrying without parental consent, especially the father's.[46] Samuel Bufford's 1696 "A discourse against unequal marriages"[47] objected to old persons marrying young, and persons marrying without their parents or friend's consent, or their own consent. From the early nineteenth century, the "companionate marriage" was based increasingly upon individual choice. Despite centuries-long contestations over the principles of European marriage, the institution retained historically evolved values and rituals.

The Indigenous concept of individual "consent" must also be situated in the context of their own cultural and historical worlds and their specific understandings of marriage. For example, the matter of marital consent centres on the decisions of those with bestowal rights of wives. We gain clues to the conceptual complexities laid down in language when we consider, for example, in Warlpiri, that this aspect of verbal agreement is also linked with words relating to jarralyku or "floodout", the water frees itself of its banks, or "freed up/unbounded".[48] Indigenous histories of "consent" featured "dreaming stories", where immoral marital choices and sexual behaviour led to dramatic consequences.[49] In the frontier system, the legacies of European and Indigenous histories of consent merged and shaped the colonising experience.

The person most relevant in the matter of marital consent was not necessarily that of the prospective wife or husband, but that of the appropriate "bestowing" kin member. Contractual arrangements were conducted by those in the girl's parents' generation, usually her uncle on her mother's side, but her mother's consent was also sought. In practice, such arrangements could not always be enforced and, depending on her age, the woman had a degree of choice and autonomy. Whereas the young girl was not in such a strong bargaining position, the grown woman could be, and the mature woman usually was. She could assert her own wishes as she grew, and her mother also exercised input into her affairs.[50] An Aboriginal woman's consent to intermarry on a colonising frontier – and that of her kin, community and husband - became part of a social and trading negotiation amongst all parties. In Queensland, Aborigines could strategically negotiate with likely husbands who would seek legal marriage and with the pastoralist landowners and managers who sought more discreet unions. Numerous women were also negotiating with the newcomers outside their community frameworks, especially when such unions were a means of escaping violent or difficult existing marriages.

Police "Protection" detracted from Indigenous people's powers to independently negotiate marriages. Under the Act, police powers to remove people and to break up family groups were virtually impossible to avoid and the question of freedom of consent that was considered a motif of democratic nations became largely irrelevant. When the colony of Queensland introduced its first Marriage Acts in 1864, only four years after its separation from the colony of New South Wales, marriage was to be conditional upon informed consent. Conforming to British law, they required the full consent of both parties, and in the case of applicants under 21, of their father or another parents. Persons such as minors and the mentally ill, who were declared not capable of providing consent, were consequently excluded from the provisions. Marriage was formalized by being carried out only by approved registrars or clergy and marriage had to be registered at a central agency. Such registration could assist in preventing plural marriage and bigamy and verified the legal rights of husbands, wife and children.

Marriages could only take place in a registry office between 8am and 8pm and during such a ceremony, the office doors had to remain open. This ensured that marriages were open to the public and to anyone who wished to object or to hear the public voicing of

individual consent in the wedding vows. This was then followed by each party signing the register, observed by at least two official witnesses. “Individual”, familial, and wider community consent and approval were thus prerequisite to the marriage proceedings. The Marriage Certificate then became an important identification document, bearing details of birthplace, age and occupation, and details of parents, father’s occupation, and mother’s maiden name. Unlike many United States marriage Acts that included racial categories[51], the Queensland Marriage Act lacked “race” categories of exclusion. Although covered in the Aboriginals Act, Queensland’s Crown Solicitor advised the Chief Protector that his powers could not over-rule the decisions of authorized marriage celebrants.

Measurement of “modernity” was often carried out against other societies globally. Since James Cook’s 1770 journey to Australia, the imagined distinction between “modern” marriage as marriage by consent and “primitive” marriage as marriage by coercion prevailed in contemporary scientific discourse. British scientists and authors regularly cited Australian Indigenes as exemplars of the most primitive people and practices, including “marriage by capture”, in which wife abduction was depicted as a standard courtship ritual.

For some centuries, British and European writers had been interested in the evolution of human marriage, drawing upon histories by Greek and Roman authors for evidence of its precursors in earlier “brute” societies.[52] The publications of eighteenth century navigators provided new “evidence” of the “primitive peoples” they saw as living history documents. The distinguished Scottish legal Advocate, James Grant, thus singled out Terra del Fuegans and Australians as proof of “earlier societies” that had “no form of marriage”.[53] The Australian’s small dwellings, minimal clothing and warmer climate supposedly proved the “loose intercourse of sexes” and lack of marital order.[54] Grant emphasized the dual principles of British law as property ownership and monogamy. In his historical narrative, property made sexual relations orderly:

> [With] the right of exclusive property in individuals, the union of the sexes, though subject to no determinate rule, will assume a new appearance. The preservation of property requires the services of the female as well as the male part of the society....Their union will now be stamped with a sense of duty and permanency. The regulation of it becomes an object of state policy. The ties of marriage are defined, and the state of children is ascertained. Thus property, and the institution of marriage, mutually confirm each other.[55]

Late nineteenth century authors believed that Australian Aborigines practiced “group marriage”, forced marriage and savage sexual rituals.[56] Westermarck’s 1891 study, History of Human Marriage, explored the “origins and development of marriage”, whilst Ernest Crawley’s 1902 work The Mystic Rose: A Study of Primitive Marriage and of Primitive thought in its Bearing on Marriage, portrayed marriage ceremonies as deriving from a “primitive religious mental habit”.[57] Overlooking white frontiersmen’s behavior, such armchair accounts of plural practices popularized an image of Aboriginal men as the most brutal and of Aboriginal marriage as the most primitive.[58]

As we have observed in the cases of the widow Lizzie, and the case of the horsebreaker of Jellinbah, state-endorsed marriage offered certain rights Indigenous people lacked, and certain common law protections. If married to a white man or even an Aboriginal man of mixed descent, the Indigenous woman was covered by the legal notion of couverture; as “wife”, she was femme covert, and obtained the civil status of her husband. She thus gained freedom from the many powers of the Aboriginal Act – powers that affected her freedom of movement, her employment and wages. Although Indigenous people were not a discrete “nationality”, under the Act, their rights were severely impeded.[59] Formal marriage to a non-Indigenous man potentially offered freedoms and protection for herself and children to stay in her own country - benefits that informal and “secret” unions could not always guarantee. In other words, formal marriage to a member of the colonizer class allowed Indigenous women a quick route to enhanced civil status, and the freedoms of the new state’s citizenship rights. The so-called “bondage” of marriage enabled her to escape the bondage of state Aboriginal institutions.

Under the coloniser marriage regime, marriage to a non-indigenous man also enabled her access to goods for herself and her family. She had more rights to keep her property, including a home and earnings, and to enjoy greater freedom of movement than if she was under the Aboriginals Act.[60] When making their decisions, Indigenous women had wider community and resource pressures in mind, including enhancing her potential to obtain trade goods and food to fulfil complex kin responsibilities. On an individual level, “legal” colonizer marriages would often seem a viable choice, for only through

such marriage under the colonizer regime, could she prevent her non-Indigenous partner being harassed by police, fined or imprisoned. Only through this means could she live with him, and prevent herself being exiled.

Under the Aboriginals Protection Act, the state effectively took on the role of "father" and Indigenous families lost more and more power over their own families and their children. Although not written into Queensland's Marriage Act, such protective "guardianship" effectively saw Aboriginal Australians categorised – along with minors and lunatics – as people who required the state – in a kind of loco parentis and father of the bride role - to provide consent in regard to their life choices. The Protector thus made the decision about the woman's consent in the same fashion as in the case of a minor who lacked guardians. Moreover, as Indigenous marriage was not formally recognized under Queensland law, children born into such marriages were "illegitimate".[61] Lack of formal recognition of Indigenous marriage seriously weakened Indigenous parental rights. If married under the coloniser law, however, Aboriginal women married to colonizer men, were more likely to keep their babies.

For our purposes, the existence of various kinds of husbands – tribal husbands, Indigenous lovers, illicit colonizer husbands and legal colonizer husbands - renders Pateman's monogamous "sexual contract" model too simple and monocultural. Cross-cultural interactions created dramatic contractual flux in a nation in the process of formation. In reality, Indigenous people in colonizing zones were subject to two "governing bodies" – Indigenous community/kin governance and that of the colonizer state. Modernizing and hybridizing forces were at work on the Indigenous side of colonizing frontiers.[62] Gender contestations from women, between clans, and across age groups were part and parcel of Indigenous society, as well as colonizer society. Within acceptable frameworks, men and women nudged the boundaries. Colonialism shifted the range of options and variables available to both groups. Values and expectations might be deeply internalized; but they could also be adjusted, according to perceived advantages and disadvantages, and according to who might be watching. Despite the introduction of state restrictions on intermarriage and cohabitation, when populations mingled on common lands, families continued to be formed that traversed cultural boundaries. White men – including those married to white women -conducted ongoing sexual liaisons with Aboriginal women and, in informal and state regulated marriages, they had children together. Aboriginal women had children by both her white and Aboriginal husbands.

This paper has attempted to shift the focus away from the vagaries of Imperial coloniser legislation and logic, to instead unsettle Eurocentric assumptions about what Aboriginal women were consenting to. In the context of colonial dispossession and frontier violence, it was inevitable that women's choices and consent were tempered by the exigencies of asymmetrical power relations and coercion. However, numerous Aboriginal women on Queensland frontiers did consent to long-term sexual and long-term partnerships with coloniser men. And in many cases, Aboriginal women legally married coloniser men under Queensland law. To Indigenous people, the entry of a western legal marriage did not nullify their existing arrangements. Consequently, the women did not envisage an exclusive contract, and nor did their Indigenous husbands. As we have seen in the case of Minnie, her understandings of the marital agreement contrasted with Mr T's. While Dolly may have been living as wife to the Chinese man, Lee Chew, she could readily escape police with her Aboriginal husband. He was not just a decoy, but an actual alternative husband with whom she was in a longer and highly significant relationship in her own familial and cultural world.

Despite no formal recognition of any other kind of Aboriginal law, in its role as intermarriage authorizer, the state sought to respect the original husband's contractual rights. British/Queensland law emphasized consent, especially the woman's, and in the case of minors, her father or a parent's. Bizarrely, in intermarriage cases, Protectors also viewed the consent of the Aboriginal husband as relevant. In turn, he would need to consult with the bestowers, the girl's mother's uncle, and other kin involved in the contractual deal within their own society. As Indigenous law had been unilaterally quashed by the introduction of British law, it was remarkable that Queensland authorities paid such consideration to Indigenous customary laws of marriage. Could it be that the ruling classes regarded respect for the rights of husband as more trans-cultural or trans-colonial than the sacred British notions of property in land? Colonizer men's competing interests impeded taking such fraternal collusion too far. In the ongoing colonising context of high demand for Indigenous women, any Protector's attempt to guard the interests of either Indigenous spouse would be fraught. They were undermined by the democratic sway of the white frontiersmen's campaigns for a free rein over Indigenous labour and sexual services.

The fraternal male "sexual/marital contract" as analysed by Pateman and Cott got mixed up with, enmeshed in, and subverted by the cross-cultural complexities of the colonising contract and the competing imperatives of nation formation. With different understandings of their male colonizer entitlements, the authorised "protectors" and the colonizer frontiersmen of different nationalities entered into a class and sexual contest over rights to colonized women. While official deference was paid to Indigenous men's bride-rights, when tested in the courts, western marriage over-rode the rights of the Indigenous husband. However, Protectors walked a fine line. A fatal conflict of laws threatened to revivify – between newly imposed colonial law and the land-sustained law of Indigenous Australia. Throughout Australia, wife-stealing had led to the murder of a number of white men by Aboriginal men. If Indigenous men's rights to wives were ignored, authorities foresaw the risks of a return to frontier violence and social disorder.

As we have observed, in the early 1900s, some Aboriginal women were renegotiating their freedoms and rights with colonials via Queensland coloniser's marriage system. Many Indigenous people may have reasoned that positive exchanges with the colonizers – whether for material goods, "protection", "love or freedom from other bonds - were desirable. Even if the woman was aiming to escape an unsatisfactory marriage, by bringing the colonizers/outsiders into their own kinship system, her husband benefited from her entwining the non-indigenous husband into reciprocal obligations of benefit to their kin. Indigenous women and men still understood "marriage" – de facto or Queensland "legal" marriages - through the prism of their kin-based system. Entering any kind of union with a coloniser man thus became part of her wider community's ongoing negotiations with the coloniser state. In the absence of enforceable treaties, such negotiations could involve obtaining "protection" from the state by a member of the coloniser class or obtaining defined goods. Aboriginal societies thus saw white and Asian husbands as part of nexus of extended kin and trading relationships to obtain something back from the colonisers. No matter what his color, Aboriginal kin reciprocity obligated the husband to fulfill a range of responsibilities. These might include the provision of food, other supplies, shelter and other protective duties advantageous to the woman herself, her Indigenous husband and her kin.

The woman's participation in an informal or formal marriage with a coloniser did not imply consent to monogamy. Like the polygamous pastoralists who kept "secret" and illicit Aboriginal wives, many Aboriginal women with Indigenous husbands considered relations with non-Indigenous men as secondary. Complex negotiations with colonisers and their own community created a fluid two-way marital frontier with a cross-cultural, plural marriage system.

When navigating intimate gender relations across contesting societies, Indigenous women – and their husbands and kin - strategically negotiated co-existing and complementary marital contracts across diverse cultural, political and legal frontiers. Access to the multiple partners traditionally more acceptable to Indigenous men now became the "unbounded" prerogative of Indigenous women. As well as sometimes providing "love matches", plural marriages under the coloniser regime proved a useful device for gaining key resources, rights to property and other civil freedoms. These diverse frontier marriages reflected an Indigenous modernising agenda that did not necessarily imply the "wives" had consented to monogamy, or to dislocating themselves or their children from their Indigenous community. Such unions both upheld and challenged the principles of the Indigenous and the coloniser marriage systems. Consent by Aboriginal women to formal marital arrangements with coloniser men therefore represented one of the many marital innovations wrought out of gendered engagements with colonialism.

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Endnotes

1. *"British"* and *"Queensland"* are used simultaneously in discussing laws and principles of governance; Queensland was a colony until 1901.The term *"frontier"* is used here to describe a place of colonial power relations where Indigenous and non-indigenous people were still living side by side and contesting power relations. The terms *Indigenous Australians* and Aboriginal people are used interchangeably. Movement of Queensland Aboriginal peoples makes it difficult to identify particular language groups, especially from archival evidence.

2. N. Henningham, ""Picking up Colonial Experience:" White Men, Sexuality and Marriage in North Queensland, 1890–1910", Martin Crotty and Doug Scobie, eds., *Raiding Clio's Closet* (Parkville: History Department, University of Melbourne, 1997): 89–104; K. Ellinghaus, "Margins of Acceptability: Class, Education, and Interracial Marriage in Australia and North America", *Frontiers* 23, 3, (December 2002).

3. Ann Laura Stoler, "Sexual Affronts and Racial Frontiers: European identities and the Cultural politics of Exclusion in Colonial Southeast Asia" in F. Cooper and A. Stoler, eds., *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley: University of California, 1997).

4. Sahila Belmessous, "Assimilation and Racialism in Seventeenth and Eighteenth-Century French Colonial Policy", *The American Historical Review,* 110, 2 (April 2005): 322–349 contains a fuller list of bibliographical references; Albert L. Hurtado, *Intimate Frontiers: Sex, Gender and culture in Old California* (Albuquerque: University of New Mexico Press, 1999.); Gunlog Fur, "The Struggle for Civilized Marriages", paper for CISH Conference, Sydney 2005, Indigenous Peoples and Settlers panel; Sylvia van Kirk, "From "Marrying-In" to "Marrying-Out": Changing Patterns of Aboriginal/Non-Aboriginal Marriage in Colonial Canada" *Frontiers: A Journal of Women Studies* 23.3 (2002), 1–11.

5. Victoria Haskins and John Maynard, "Sex, Race and Power: Aboriginal Men and White Women in Australian History", *Australian Historical Studies,* 126 (October 2005) lists the literature in detail.

6. Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) 5, 18, 164.

7. N. Cott, *Public Vows: a history of marriage and the nation,* (Cambridge: Harvard University Press, 2000), 1–4; Chapters 1–3.

8. Jan Lewis, "The Republican Wife: Virtue and Seduction in the Early Republic", *The William and Mary Quarterly,* XLIV, 4, (October 1987), 689–721.

9. Cott, 23; 19, from *Spirit, 316, 270,* cited 21; 23, 27.

10. Cott, p 26–27; chapter 2.

11. Ann Marie Plane, *Colonial Intimacies: Indian Marriage in early New England* (Ithaca: Cornell University Press, 2000), 180.

12. In 1992 the High Court of Australia overturned the "legal fiction" that Australia had been taken over on the basis of its being unoccupied, or *terra nullius* .

13. G. Reekie, ed., *On the edge: women's experiences of Queensland* (St Lucia: University of Queensland, 1994) 18;F. McDonald, *Marriage in Australia* (Canberra: ANU, 1975), 134.

14. K. Saunders, *Workers in bondage: the origins and bases of unfree labour in Queensland, 1824–1916* (St Lucia: University of Queensland Press, 1982).

15. Ellinghaus, 2002; Liz Reed, "White girl "gone off with the blacks"" *Hecate,* vol 28, issue 1 (2002), 9; Haskins and Maynard, 2005.

16. M. Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth Century South (*New Haven: Yale University Press, 1997).

17. This anomaly was probably not widely known, for occasionally a young woman or her guardian still sought permission to marry a man of Aboriginal descent.

18. Grimshaw, "Women and the family in Australian History, in E. Windschuttle, ed., *Women, Class and History,* (Sydney: Fontana, 1980) 37–52; Grimshaw, C. McConville, E. McEwen, eds., *Families in Colonial Australia* (Sydney: George Allen & Unwin, 1985; Grimshaw, M. Lake, A. McGrath, A. Quartly, *Creating a Nation* (Ringwood: Penguin, Ringwood, 1994).

19. The Australian Centre for Indigenous History, ANU, held a conference on *Narrating Frontier Families in Australia and North America* in August 2004.

20. J. Hirst, "The Pioneer Legend", *Historical Studies,*18 (October 1978), 71, 316–337; S. Morgan, *My Pl* ace, (Fremantle: Fremantle Arts Centre Press) 1988, p 402–3; 415; S. Kinnane, *Shadowlines* (Fremantle: Fremantle Arts Centre Press, 2003), 32–3.

21. See J. Huggins, *Aunty Ri* ta (Canberra: Aboriginal Studies Press, Canberra, 1994), 22.

22. Some fathers attempted to leave their inheritance to mixed-descent children, but this was not widespread.

23. The same pattern applied in other states with restrictive legislation against cohabitation and intermarriage – see A. McGrath, *"Born in the Cattle": Aborigines in Cattle Country* (Sydney: Allen & Unwin, 1987)

24. Marriage of Half Caste and Aboriginal Women – 1901 in QSA A/58764. Report of Northern Protector 1900, Queensland State Archives (QSA) Col/142; 4884/01 (old numbering system); C. Moore, "Good-bye, Queensland, good-bye, White Australia; Good-bye Christians": Australia's South Sea Islander Community and Deportation, 1901–1908", *The New Federalist,* 4 (December 2000), 22–29.

25. The Law Reform Commission, 18, *Aboriginal customary law – marriage, children and the distribution of property* (Sydney: Law Reform Commission, 1982), 8.

26. A. Meston to Under Secretary of Lands, 5 September 1903 in Queensland State Archives (hereafter QSA) A/58929.

27. Commonwealth Franchise Act enabled the vote to all residents "except for lunatics and certain classes of criminals. Asians, Africans and Australian Aborigines were excluded. A..McGrath, "Beneath the Skin: Australian Citizenship, Rights and Aboriginal Women", in R. Howe, ed., *Women & the State. The Australian Experience,* a special edition of the *Journal of Australian Studies* (June 1993).

28. Constable David Twaddle of Mayton, 8 Oct 1906, Report on Constable Creedy v Ah Kow, 20 October 1906 ; Lee Chew Statement, 22 Feb 1912 ; various correspondence, QSA A 45206.

29. Magee to Police Inspector, 23 February 1912, QSA A45206.

30. P Bowen Sub Inspector to 20 Oct 1906, QSA A/45206.

31. Crown Solicitor, Memo, 14/1/07 ; Richard Howard to Under Secretary, Home Secretary's Office, 7 January, 1907 ; QSA, A/589/2; Henningham, 63.

32. Various correspondence, QSA A/58766

33. Child removal practice was the subject of a major investigation. *Bringing Them Home Report: National Inquiry into the Separation of Aboriginal and Tores Strait Islander Children from their families (*Canberra: Commonwealth of Australia, 1997).

34. David McKnight, *Of Marriage, Violence and Sorcery: the Quest for Power in Northern Queensland* (Aldershot: Ashgate, 2005), xv.

35. David Turner, *Australian Aboriginal Social Organization* (Canberra: Humanities Press/Australian Institute of Aboriginal Studies, 1980) 60–63; David McKnight, *Going the Whiteman's Way,* (Aldershot: Ashgate, 2004), 60–1.

36. McKnight (2004), 74; 23.

37. David McKnight (2004); (2005)

38. McKnight (2005) xxi, 175, 186–7, 210.

39. L. Hiatt, *Arguments about Aborigines: Australia and the evolution of social anthropology* (Cambridge: CUP, 1996).

40. McKnight (2005), 55.

41. McGrath (1987).

42. M. Hokari, *Radikaru Oraru Hisutori – Osutoraria Senjumin Aborijini no Rekishijissenn* (Doing History!—Radical Oral History —-Historical Practices of Indigenous Australians) (Tokyo: Ochanomizu Shobo, 2004); Rose (1992).

43. Amy Lawrie, pers comm., 17 July 1978, AIATSIS; McGrath (1987) 1987; Rose (1992).

44. *Oxford English Dictionary* (Oxford: Clarendon Press, 1933) 851.

45. *Butterworths Concise Australian Legal Dictionary,* (Chatsworth: LexisNexis Butterworths, Australia, 2004) 86–7.

46. John Stockwood, *A Bartholmew fairing for parents* (1589) (Michigan: Early English books online, Ann Arbor.)

47. Samuel Bufford *A discourse against unequal marriages* (London: Dan Browne, 1696); Proquest, *early English books online,* Michigan: Ann Arbor .

48. David Nash, personal communication, October 2005.

49. M. Hokari, (2004); Rose (1992).

50. Deborah Bird Rose, *Dingo Makes us Human,* (Cambridge: CUP, 1992) Chapter 8.

51. Rachel F Moran, *Interracial Intimacy: the regulation of race and romance* (Chicago: U Chicago, 2001).

52. James Grant, *Essays on the Origin of Society, Language, Property, Government, Jurisdiction, Contracts, and Marriage,* (London: FFJ Robinson, 1785) 194; 191–4.

53. *Dictionary of National Biography,* (London: Smith, Elder & Co, 1890) XXII, 390.

54. Grant, 206–8; 196–7.

55. Grant, 206–8.

56. A. McGrath, "The White Man's Looking Glass: Aboriginal Colonial Gender Relations at Port Jackson", *Australian Historical Studies,* 95 (October 1990).

57. E. Westermarck, *The history of human marriage* (London: Macmillan, 1901); E. Crawley, *The Mystic rose: a study of primitive marriage and of primitive thought in its bearing on marriage (*New York: Boni and Liveright, 1927).

58. McGrath (1990).

59. QSA, CRS A/58766. Administrators stated that they generally "did not interfere" with Aboriginal women legally married to non-Aborigines. While some stated that the woman was no longer under the Act, other administrators were confused about her legal status and whether the Aboriginal Acts still applied to her.

60. Henry Reynolds, *Nowhere People* (Camberwell: Viking/ Penguin, 2005); Mary Ann Jebb and Anna Haebich in K. Saunders and R. Evans, *Gender Relations in Australia: Domination and Negotiation* (Harcourt Brace Jovanovich: Sydney, 1992).

61. Grimshaw et al (1994), Ch 4.

62. On the "metis" as "laboratories of modernity", see Stoler (1997), 226–7.