

EDITORIAL: LAW, RACE AND WHITENESS

TRISH LUKER & JENNIFER NIELSEN

We acknowledge the sovereignty of the many Indigenous Nations of Australia, and pay our respects to their ancestors, Elders and peoples—of the past, present and future.

The contributions to this special issue of the *ACRAWSA e-journal* critically interrogate the interface of Anglo-Australian law and legal systems, race and whiteness. They seek to expose the racialisation of legal discourse and call into question the normative white subject of Anglo-Australian law. Anglo-Australian law obscures the hegemonic function of whiteness through its liberal claims to neutrality, objectivity and rationality, and the promotion of formal, rather than substantive, equality. As in other discursive domains, whiteness operates within law as the invisible norm by which an originary and unquestioned legitimacy is claimed.

Groundbreaking work drawing on critical whiteness studies has highlighted law's agency in establishing and maintaining racialised power, premised on the 'normality' of whiteness and the legitimacy of its claim to privilege. In the United States, legal theorists such as Cheryl A Harris, Kimberlé Crenshaw, Richard Delgado, Mari Matsuda and others have developed the insights of critical race theory to articulate a critique of whiteness and to deconstruct the liberal notions of race and equality underpinning civil rights discourse (Crenshaw et al, 1995: xiv; and see Delgado & Stefancic (eds) 1997: Part IV). However, this work largely fails to acknowledge or address the concerns of Indigenous peoples within 'Western' societies or the complexity of 'minority'

peoples' position in relation to their society's colonial past (see Moreton-Robinson 2004a: viii).

By contrast, in Australia, Irene Watson and Aileen Moreton-Robinson have led the field in interrogating and deconstructing the function of whiteness in Anglo-Australian law and its disavowal of Indigenous sovereignty. Their scholarship is positioned within Indigenous epistemology and ontology, and draws on critical whiteness theory to expose the hegemony of whiteness within Anglo-Australian legal discursive and institutional practices. Watson has engaged in a sustained critique of the contemporary colonialism of white sovereignty, a 'sovereignty of violence, not of law that is always known' (2002: 257), which has introduced Australian legal scholarship to new conversations involving decolonisation, a process of dissolving and thinking outside law's imposed regimes of white colonial thought (Watson 1998: 31). Moreton-Robinson's work also offers a compelling paradigm for analyses of legal discourse, in that it deconstructs the 'possessive logic of patriarchal white sovereignty', which she has, for instance, deployed in relation to the reception of claims for native title recognition (2004b).

Despite these significant foundations for bringing critical whiteness theory to the important site of law, there has been only limited attention in Australia to the field. Indeed, this is the first issue of an Australian journal devoted to the theme. Moreton-Robinson has indentified the lack of attention given by Australian

legal scholars to issues related to race as indicative of our 'agency' in the 'reproduction and maintenance of racial hierarchies' (Moreton-Robinson 2007: 85). That is, our lack of engagement with the concerns and epistemologies of the raced 'other' is not merely a silence, but is also silencing, oppressive and self-serving. In editing this special issue of the *ACRAWSA e-journal*, we hope to have interrupted this silence and encouraged further scholarship in the field of critical whiteness theory and law.

Naomi Fisher opens the issue with a piece entitled 'Out of Context: The Liberalisation and Appropriation of "Customary" Law as Assimilatory Practice'. Writing up 'strong' from her position as an 'Aboriginal woman learning and journeying back to her culture, place and identity' (p 1), Fisher argues that common law's claim to have 'recognised' Aboriginal Law is erroneous because the 'dialogue' between Aboriginal Law and common law is one-sided. She points out that any claim by common law to 'recognise' Aboriginal Law is false because the common law refuses to engage in a dialogue *with* the knowledges and Law founded in Aboriginal context and ontology. The effect of the common law's liberal discourse (monologue) is to grant legitimacy and power only to itself, and thus reiterate white hegemony through the assimilation and appropriation of Aboriginal peoples and Law, enmeshing them at sites of bureaucratic and legislative intervention and control.

The hegemony of liberalism in legal discourse is further deconstructed in the contributions that follow. In 'Witnessing Whiteness: Law and Narrative Knowledge', Trish Luker critiques the privileging within legal positivism of an epistemological framework grounded in

'scientific knowledge' as the basis for demonstrable proof. Using a site of testimonial evidence from the landmark action taken by members of the Stolen Generations, Luker argues that despite evidence presented by Lorna Cubillo which revealed the systematic practice of Indigenous child removal, this was rejected by the court because it did not meet the legal standard for proof. At the same time, evidence founded in narrative forms of knowledge, which revealed the function of whiteness in supporting dominant paradigms of historical truth, were discredited.

In 'Pinned like a Butterfly: Whiteness and Racial Hatred Laws', Karen O'Connell analyses the Federal Magistrates Court's decision in *McLeod v Power* (2003), a case involving a white prison officer's complaint of racial vilification against an Aboriginal woman. Despite a finding that vindicates the Aboriginal woman, O'Connell exposes the hypervisibility accorded to 'blackness' in the decision, which sits in stark contrast to the failure to reveal the significance of whiteness. She argues that an approach to law which foregrounds embodiment in racial hatred cases can render whiteness visible and that by exposing whiteness to examination, a more coherent racial identity for whites and a richer and fairer system of law may emerge.

Greta Bird reverses the conventional focus of legal analysis in her contribution 'The White Subject as the Liberal Subject' by engaging—through personal storytelling—in an analysis of her own position as the full citizen, the 'white liberal subject'. Bird identifies a significant moment in her understanding of whiteness that enabled her to reflect on her own subjectivity as a white legal academic and to identify her experience of white race privilege. In the desire to develop an ethics of alterity, Bird explores and acknowledges

the construction of her white subjectivity living in a raced nation, to set her own ethical goals towards resisting and challenging her own whiteness.

Finex Ndhlovu's contribution, 'A Critical Discourse Analysis of the Language Question in Australia's Immigration Policies: 1901–1957', draws insights from the conceptual framework of critical discourse analysis to interrogate the use and abuse of language testing as a tool for racial and political exclusion in Australia from 1901 to 1957. Marking an important period in the development of racialisation in Australian legal discourse, the construction of 'undesirable' immigrant subjects reminds us of the unstable nature of racialised categories of otherness. This remains an abiding issue as the language question continues to feature prominently in public debates on Australia's citizenship and immigration laws.

Jennifer Nielsen's contribution, 'Whiteness and Anti-Discrimination Law—It's in the Design', analyses the racialised effect of law's liberal notion of formal equality. Using the *Anti-Discrimination Act 1977* (NSW) as a case study, she argues that despite the assertion of 'race-neutrality' promoted by formal equality, the Act operates to produce a selective colour-blindness that stabilises and reproduces the dominance of white privilege. Nielsen then extends her analysis to the contemporary discourse of substantive equality, to argue that it may remain selectively colour-blind to racial difference and thereby reiterate whiteness. She questions mainstream legal scholars' support of the 'invisibility' of law's whiteness, and calls on them to interrogate the implications of whiteness, in order to expose and challenge law's reproduction and maintenance of racial marginalisation and privilege.

In addition to these formal scholarly works, we are very pleased to be able to include creative works which speak to the theme of this issue (a rare event in legal scholarship). The first, by Edwina Howell, offers three short pieces of creative writing under the title, 'It's Captain Cook all Over Again ...'. Howell's work is followed by two poems by Benna Coyne. Taking advantage of the ACRAWSA e-journal's digital environment, Benna performs both poems. The first, 'Suffering from Sovereignty' is performed as a voice piece, while in the second, Benna collaborates with composer Giordano to present 'The Sound of Whiteness'.

The issue also includes a rejoinder from Denise Cuthbert to the piece by Damien Riggs published in the last issue of the journal in which Riggs criticised Cuthbert's foregrounding of the experience of white adoptive mothers in a research project examining the adoption/fostering of Indigenous children. Cuthbert responds to Riggs by providing an account of the development of her ethical research parameters in which she considered her own subjective position as a white researcher and the politics of representation. Cuthbert affirms the importance in politically-engaged research of reporting and analysing all voices, Indigenous and non-Indigenous.

Finally, there are two book reviews: Damien Riggs reviews Derek Hook's text entitled *Foucault, Psychology and the Analytics of Power*, which he finds to be an exciting extension of the work of Foucault of direct relevance to critical race theory. Kathleen Conellan reviews a collection edited by Basia Spalek and Alia Imtoual, *Religion, Spirituality and the Social Sciences*, which she describes as a 'sparkling mosaic' of significant contributions to interrogations of spirituality and faith which reveal the

hegemonic status of established religions, disguised as secularism.

To conclude, we wish to offer our gratitude to the many people who made this issue of the ACRAWSA e-journal possible. Our deep thanks to all of the contributors and to the anonymous referees who gave generously of their time and expertise. We would also like to thank Damien Riggs for his support with editorial matters, and Alan Han, who made this issue magically appear.

It is our fervent hope that this issue contributes to and encourages a greater body of scholarship which engages an interdisciplinary approach to critique and deconstruct the function of hegemonic whiteness in Anglo-Australian law.

Editors

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ACRAWSA E-JOURNAL

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LAW, RACE AND WHITENESS

EDITED BY TRISH LUKER & JENNIFER NIELSEN

ARTICLES

OUT OF CONTEXT: THE LIBERALISATION AND APPROPRIATION OF 'CUSTOMARY' LAW AS ASSIMILATORY PRACTICE

NAOMI FISHER

When white people came, they brought a culture, set of values and ontology that deemed Country and her people as *terra nullius* and Aboriginal Law non-existent. They used their reasoning to justify invasion, dispossession and genocide. Today, *terra nullius* continues, cloaked in 'post-colonial' rhetoric: that Australian society resides in an enlightened era, temporally distant from policies of protection-segregation and assimilation. Ironically, the liberal, democratic values that rooted government policies of the past continue to inform the policies of the present, securing a *contemporary enmeshment* of Aboriginal people and Law, at sites of bureaucratic and legislative intervention and control. The liberal discourse of equality is also employed to coerce Aboriginal people into seeking remedy/justice from the common law. Hegemony is furthered by the 'incorporation' of Aboriginal Law into common law legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and through bureaucratic protocols such as the Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (1986). However, 'recognition' or 'non-recognition' of Aboriginal People and Law in the discourse of equality amounts either to *incorporation* or *erasure* and grants legitimacy and power to common law jurisdictions. *Whenever* Aboriginal context and ontology is removed, our Law is *appropriated* and assimilated. Without Aboriginal knowing and seeing, it is no longer Aboriginal Law. The claim that Aboriginal Law has informed or been 'recognised' in certain pieces of legislation is therefore erroneous. Dialogue between Aboriginal Law and the common law is prevented and white hegemony is reiterated: it is therefore a 'conversation' white, democratic liberalism has with itself.

WITNESSING WHITENESS: LAW AND NARRATIVE KNOWLEDGE

TRISH LUKER

In this article, I interrogate the reception of testimonial evidence given by Lorna Cubillo in the trial of *Cubillo v Commonwealth*, the landmark action taken by members of the Stolen Generations. Drawing on Jean-François Lyotard's account of the distinction between narrative knowledge and scientific knowledge, I argue that while law makes its claim to legitimacy through demonstrable proof, it must ultimately seek an appeal to narrative forms of knowledge. The relationship between law and narrative is key to a

critical reading of *Cubillo*, which provides an important site for an analysis of the function of whiteness in the treatment of evidence in Anglo-Australian law. I argue that through reliance on legal positivism as the method of judicial interpretation, the decision privileges forms of 'scientific' knowledge which most readily support dominant paradigms of historical truth. At the same time, the significance of 'narrative' knowledge to the arguments presented in the case, particularly that which does not support notions of white cultural memory, is discredited.

PINNED LIKE A BUTTERFLY: WHITENESS AND RACIAL HATRED LAWS

KAREN O'CONNELL

This article explores ideas of whiteness and racial harm by focusing on an area of law in which these themes are pivotal: the regulation of racial hatred. Racial hatred provisions in anti-discrimination laws were established to provide a public space protected from offensive or intimidating racist behaviour. However, based as they are in equality doctrines, they also allow whites to bring claims of racial hatred against blacks. How does law respond, and how should it, when white applicants present themselves as victims of racial harm? This article argues for a legal response that makes embodiment central to the resolution of these cases.

An embodied approach to racial hatred cases can bring justice for black respondents, but also allows whiteness, which is generally obscured in law, to be rendered visible. Exposing whiteness to examination can lead to a more coherent racial identity for whites and a richer and fairer system of law.

THE WHITE SUBJECT AS LIBERAL SUBJECT

GRETA BIRD

In this article I use storytelling to explore the production of the white subject as the liberal subject—the full citizen. Drawing on Indigenous theorists such as Irene Watson and Aileen Moreton-Robinson, I critically reflect on aspects of my life and demonstrate that my whiteness is a form of property that has allowed me to shift my class position. In contrast, the Aboriginal person is denied full humanity, living in a country subjected to violent hierarchies of race. In my academic research, I have travelled far to gather data on racist practices and called for change. However, I had not realised the racism located within the practices of family members and how I had benefited from these. Here, I acknowledge that the construction of my white citizen's subjectivity in a raced nation entails a racism lodged in my unconscious. I set ethical goals for myself arising out of the understanding flowing from critical reflection on my whiteness.

A CRITICAL DISCOURSE ANALYSIS OF THE LANGUAGE QUESTION IN AUSTRALIA'S IMMIGRATION POLICIES: 1901-1957

FINEX NDHLOVU

Australia's immigration policies have remained an unsettled area subject to political disputation since the promulgation of the *Immigration Restriction Act 1901* (Cth). Section 3(a) of this Act required that all prospective immigrants from non-European countries had to pass a dictation test in any European language selected by the

immigration officer. Asian racial groups were the main target of this legislation, which was embraced as part of the 'White Australia' policy. Far from being an objective assessment of language proficiency skills, the dictation test was a discursive construct ostensibly designed to be failed and to exclude people whose political and racial affiliations were considered undesirable. Drawing on insights from the conceptual framework of critical discourse analysis, this paper traces and examines the use and abuse of language testing as a tool for racial and political exclusion in Australia from 1901 to 1957. Because it was during these years that successive Australian governments embraced explicit formal policies on testing language skills of intending immigrants, this period marks an important chapter in the history of Australia's immigration policies. Since then, the language question has continued to feature prominently in public debates on Australia's citizenship and immigration laws.

WHITENESS & ANTI-DISCRIMINATION LAW—IT'S IN THE DESIGN

JENNIFER NIELSEN

Although anti-discrimination laws have supported much social change, they have been subjected to sustained critique by legal scholars. A significant concern is that the formal 'same treatment' standard promoted by the design of anti-discrimination law is inherently problematic (Graycar & Morgan 2004) because it gives 'apparent legitimacy to outcomes which ... in effect embed inequality' (Kerruish & Purdy 1998: 150). In this article, I critique the laws' standard of formal equality, first to demonstrate the capacity of its 'neutral' response to reproduce and stabilise dominant privilege. Next, using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the Act's 'race-neutral' and 'colour-blind' practice of formal equality holds capacity to stabilise and reproduce whiteness. I then argue that substantive equality—advocated by most legal critics as promoting 'better' forms of equality—also holds the capacity to reiterate whiteness as it can be defined through terms and conditions 'designed for and skewed' in favour of 'the white majority' (Davies 2008: 317). I conclude that this holds great implications for legal scholarship that remains selectively 'colour-blind' to the significance of racial 'difference', and call on mainstream legal scholars to open spaces to interrogate the implications of our *raced position as whites* (Moreton-Robinson 2007: 85).

CREATIVE WORKS – AUTHOR BIOGRAPHIES

IT'S CAPTAIN COOK ALL OVER AGAIN ...

EDWINA HOWELL

Edwina Howell is currently a PhD candidate in the School of Political and Social Inquiry at Monash University writing a thesis on the life and activist methods of Gary Foley. She has presented guest lectures in the Centre for Australian Indigenous Studies at Monash University and a seminar in the School of Anthropology on how alternative epistemologies are contested at the McArthur River Mine. Last year she co-facilitated the subject 'Hearing the Country' and tutored in CAIS in the subject 'Culture, Power, Difference: Indigeneity and Australian Identity' and has also taught at Melbourne University in the Department of Education in the subject 'Indigenous Australian History'. She is also an officer of the Supreme Court of Victoria. Edwina's contact email is: edwina_howell@yahoo.com.au.

SUFFERING FROM SOVEREIGNTY

BENNA ZENABOMB (A.K.A BENEDICT COYNE) - POET/VOCALS

THE SOUND OF WHITENESS

BENNA ZENABOMB (A.K.A BENEDICT COYNE) - POET/VOCALS

ORBITAL DINGO (A.K.A GIORDANNO NANNI) - COMPOSER/MIXER

Benna Zenabomb/Coyne is a performance poet and law student who is passionate about social and environmental justice. He has spent the best part of the last decade involved with various environmental and social justice campaigns around Australia including riding a bicycle across Australia to promote environmental awareness and spending a couple of summers at the Aboriginal Tent Embassy. After procrastinating for years he finally buckled down and began a graduate law degree which he is thoroughly enjoying. These poems were inspired by an incredible unit at Southern Cross University's Byron Bay Summer School called Race and the Law taught by Jennifer Nielsen and Greta Bird. The poems were also inspired by the amazing writings and wisdoms critical race scholars such as Irene Watson, Michael Mansell, Ward Churchill and Aileen Moreton-Robinson. Benna recently won the Queensland State Poetry SLAM final and performed in the National Grand SLAM at the Sydney Opera House last December."

Orbital Dingo/Giordanno Nanni is a nomadic non-citizen of the world who dedicates most of his time to composing music, editing and mixing songs for Benna to sing, rap and rant on. For 8 years he explored the corridors of one of Borges' hexagons—otherwise known as academia—and came out the other end with a doctorate in colonial history, a piece of paper which testifies to his naivety in securing employment prospects, but which opened his eye to the repetition of cycles, the existential arrogance of the state vis-à-vis his fellow indigenous nomadic brothers and sisters and the instrumentality of history within the formation of social memory and collective consciousness. His most common expression is 'Orwell was right'....

THE WHITE SUBJECT AS LIBERAL SUBJECT

GRETA BIRD

Abstract

In this article I use storytelling to explore the production of the white subject as the liberal subject—the full citizen. Drawing on Indigenous theorists such as Irene Watson and Aileen Moreton-Robinson, I critically reflect on aspects of my life and demonstrate that my whiteness is a form of property that has allowed me to shift my class position. In contrast, the Aboriginal person is denied full humanity, living in a country subjected to violent hierarchies of race. In my academic research, I have travelled far to gather data on racist practices and called for change. However, I had not realised the racism located within the practices of family members and how I had benefited from these. Here, I acknowledge that the construction of my white citizen's subjectivity in a raced nation entails a racism lodged in my unconscious. I set ethical goals for myself arising out of the understanding flowing from critical reflection on my whiteness.

Introduction

The focus of this article is my reflections upon my own story and my response to my whiteness. To do this, I use poststructuralist theory both to interrogate the production of the white subject as the liberal subject—the woman/man who is a full citizen—and to reflect on the benefits flowing from this privileged subject position. I draw on the insights from Indigenous critical race theorists, in particular Irene Watson

(1998; 2005; 2007) and Aileen Moreton-Robinson (2000),¹ and whiteness theorists (eg. Frankenberg 1995) to map out the violent hierarchies of race in the Australian context and to acknowledge that my subjectivity is formed within this hierarchical system.² As Justice Brennan stated in *Mabo v Queensland [No 2]* (1992) ('*Mabo*'), Aboriginal peoples have been regarded as 'so low in the scale of social organisation' that it was 'idle to impute such people some shadow of the rights known to our [that is Anglo-Australian] law' (*Mabo* [28]). In what is a desire for justice, I call for an ethics of alterity to reshape white racist practices and law.

My ethical position is primarily drawn from the work of the philosopher, Emmanuel Levinas (1979) who, writing in response to the horrors of the European Holocaust, argues for an 'ethics of alterity'. In this ethical position, the other can never be reduced to the self; at its heart is the belief that 'the demand of the other obliges me'. Levinas (1972: 7) writes of 'the impossibility of cancelling responsibility for the other ... a duty that did not ask for consent ... that came without being offered as a choice'.³ I take from Levinasian ethics the concept that before I am 'human' comes my responsibility to the 'other'. The 'other' who calls me into being in this article is the Aboriginal person. She is denied the 'humanity' accorded the white subject in Australian economic, political and legal institutions. I do not discuss Aboriginal concepts of identity as I have no access to this knowledge.

Using this theoretical framework I critique the privileges attaching to the liberal, white subject of law. However, I cannot end there, as justice demands not only the removal of the legal barriers to full citizenship for Aboriginal peoples. It requires the adoption of an alternative imagining of the ethical life and a subsequent reshaping of the law. In my theoretical position my identity is fluid, rather than fixed; it is constructed through the operation of discursive practices (Derrida 1992; Lacan 1982). The subject 'I' is not an independent, autonomous person; I exist only interdependently, as the result of relations with others. This I theorise as an emancipatory position. If I become critically self-reflexive and bring into consciousness the racist discourses and microphysics of power that circulate through society, and indeed through my body, there is an opportunity to resist at each node of power (Foucault 1980). Out of this self-reflexivity and the bringing of repressed knowledge into consciousness, a transformation of person, and ultimately of structures, can occur. In this context, I desire to bring the privilege of whiteness out of my unconscious and take responsibility for my part in the violent racism that permeates Australian society. As Cixous (1976: 880) writes: 'because the unconscious, that other limitless country, is the place where the repressed manage to survive'.

To be born into whiteness in Australia is to be born into humanity. It is to have your birth celebrated by the nation and your death mourned. It is to assume the mantle of the liberal subject. In contrast, to be born Aboriginal is to be constituted as 'less than human, without entitlement to rights, as the humanly unrecognisable' (Butler 2006: 98). Watson has passionately documented this in her work, most powerfully in her article 'Illusionists and Hunters' (2005).

Spivak (1988: 271) speaks of marking positionality when engaging in research, and in later work, explores how Western philosophers in seminal works actively prevent non-Europeans from occupying positions as fully human subjects (1999). My whiteness, in a country that privileges whiteness, allows me a 'natural' subjectivity that is denied to non-white persons. My ability to speak is presumed (Moreton-Robinson 2000). I share in the modernist orthodoxy of a neutral, objective position of reason. The stories I choose to tell are clothed in the legitimacy of the white, university-educated lawyer. If I regard the 'problems' in Aboriginal communities as flowing from a 'welfare mentality' and the failure of the white state to impose policies of 'zero tolerance' and to maintain 'law and order' I will be regarded as reasonable, pragmatic and compassionate; indeed I may be deserving of a federal government grant (Watson 2007).

To tell a story of white colonial practices, white privilege and white abuse and neglect as the primary causes of Aboriginal trauma and disadvantage is to cast aside the cloak of the 'reasonable man' and put on a 'black armband'. It is to take a critical position in the history wars, to decry the 2007 'invasion' of Aboriginal lands (Watson 2007) and to court illegitimacy.

Storytelling

In this article I use storytelling as a way of being critically self-reflexive about my assumptions and my practices (Gordon 2005). In using this methodology, I desire not only to critique law's claims to innocence (Fitzpatrick 1990) but to engage in a transformative process.

Storytelling, sometimes called narrative or auto-ethnography, is a method used by critical race theorists in the United

States (Delgado 2002; Williams 1991), and feminists to destabilise the Western production of knowledge. Knowledge is, in Western systems, theorised as arising from a positivist methodology, one that reifies objectivity, dispassion and neutrality (Davies 2008). In contrast, storytelling is a method that asserts that desire and subject position are always implicated in knowledge production. In law, a discipline dominated by positivist theory and methods, storytelling by white law professors is rare. Conference papers and articles are mostly written from a third-person, 'objective' position. There is a deliberate distancing of the person 'speaking' from the events they describe. This serves to render the speech dry, dispassionate, inauthentic and therefore scholarly. Duncan Kennedy's piece (1990) 'Legal Education as Training for Hierarchy' is one of the few essays by a white, male law professor that exposes the techniques of dress, manner and language used to produce the 'reasonable man of law'. However, Kennedy is unaware of his white privilege and the impact that whiteness has on his subject position. Patricia Williams, a female Afro-American law professor, does not share Kennedy's experience; she describes feeling like an 'alien' in law school (1991).

My storytelling in this paper seeks to remove the cloak of reason woven in the academy and reveal my skin of spirit and emotion. I want to expose the reproduction of white privilege in my life and explore the ways in which I can challenge this discursive practice (Frankenberg 1995). As Margaret Davies (2008: 215) writes: 'knowledge cannot be disentangled from social meanings and ... personal history does influence what you know and how you know it'. I take responsibility for my part in the injustices issuing forth from my position as white subject and citizen by using this

knowledge to inform my daily practice as a law teacher.

Born into a large, struggling working class family where no one had ever gone beyond Year 8 and many, such as my aunts and mother, had left school below or at the legal age of 14, I had a valuable property right: I was white (Harris 1993). This affected my life in ways that, until recently, I was largely unconscious about. As a law student at university I felt my outsider status keenly in terms of my class and gender. It took a long time and the patience, generosity and scholarship of many Aboriginal people before I became aware of my position of privilege (Moreton-Robinson 2000; Watson 1998; Lucashenko 1993, 2008). This transformative process continues. There is a danger in storytelling by white people that it enables whitefellas to construct themselves as 'victims'. The space opened for Indigenous scholars in the academy, arising from their lived experience of racism, may be colonised by white people writing about the existential pain (rather than the undoubted pleasures), of their race privilege. Aware of the danger I nevertheless write, trusting that to document white privilege is a positive contribution to ending that privilege. As Cixous (1975: 87) asserts:

[w]riting is precisely *the* very possibility of change, the space that can serve as a springboard for subversive thought, the precursory movement of a transformation of social and cultural structures.

White Lies

White history 'works through radical effacement, so that there never was a human, there never was a life, and no murder has, therefore, ever taken place' (Butler 2006: 147). This is the 'white lie' at

the heart and on the lips of the nation. In *Cooper v Stuart* (1889) the Privy Council declared that the colony established in New South Wales 'consisted of a tract of territory practically unoccupied without settled inhabitants or settled law ... it was peacefully annexed to the British dominions' (*Cooper v Stuart* 1889: 291) ('Cooper'). 'As soon' their lordships decided 'as colonial land becomes the subject of settlement and commerce, all transactions [are] governed by English law' (*Cooper* 292). In this judgment, the concept of property is constructed from a white ontology. 'Settlement' of land and 'commerce' are the basis of property rights. The case was used as authority in *Milirrpum v Nabalco* (1971) where Justice Blackburn found that the Aboriginal plaintiffs had no property rights in land as they did not have to right to enjoy the land, to exclude others or to trade it as a commodity (*Milirrpum v Nabalco* 272). Property requires an exclusion of others and a desire for profits. Alienability is a central feature of white property. Borders must be erected and a dominion of all within the borders instituted; 'Possession [is] ... defined to include only the cultural practices of whites' (Harris 1993: 1721).

Personal Narrative

In December 2005, I attended the ACRAWA *Whiteness and Horizons of Race* Conference and then an ACRAWA masterclass. The morning of the second day of the masterclass, I was overwhelmed by flashback memories, reliving scenes from my childhood. Experiences rising from my unconscious became vivid and pressing. I was again a young girl, surrounded by my mother's family, and I began to feel the privilege of whiteness at a deep level, beyond cognitive awareness.

The 'white lie' of *terra nullius* allowed the 'settlement' of my Irish ancestors on the

Australian landscape. At the linguistic level, my 'mother tongue' was English, the official language. I was allowed to speak the language my parents spoke and to learn family stories from them. This privilege allowed my identity to be constituted in ways that were not available to Aboriginal peoples, large numbers of whom were removed from their families (Roach 1992; Valentine 2004). On my mother's side, I had English relatives, however going to a catholic school and being taught by Irish nuns, I formed an Irish-Australian identity. The nuns were very critical of the oppression of the Irish by the English and students at the school did not openly speak of any English ancestry. Even now, I think of myself as from an Irish background thus repressing my English heritage. I prefer to keep unconscious my genetic and lived complicity with the genocidal behaviours perpetrated in Australia.

My sense of belonging to the broader society developed during school years. Undeniably 'Australian', my race was an unconscious quality, something that neither I nor anyone else questioned. Returning from World War II, my father was rewarded for his defence of 'mother' Britain by entitlement to a low-interest war service home loan, something I later found Aboriginal soldiers were denied (Due 2008). This gift from a grateful nation reduced our housing costs enough to allow mum and dad to support and educate their five children on low-wage work.

Along with the English language, my 'mother tongue', came the concepts of 'good' and 'evil' and so on. English is a language built on binary terms where one term is hierarchised over the other. And, within the hierarchy of this language structure, the 'European' person is deemed superior to the non-European. Power constructs the value accorded to the terms while rendering

the process 'natural' and hiding the mechanisms of power (Foucault 1980). My subjectivity was formed inside this language and is still defined by it (Lacan 1982; Derrida 1992; Grosz 1989). In English 'whiteness' and associated terms connote 'good' but blackness, darkness and so on are linked to 'evil'. The European fairytales that filled my childhood were peopled with fair skinned, blue-eyed princes and princesses; later Superman, dressed in the colours of the American flag and with bulging muscles, became a hero. At my Irish catholic school, the statues and paintings of Jesus, Mary, Joseph, the saints and the guardian angels showed them fair skinned and blue-eyed, belying the reality of the Holy Family's Middle Eastern genealogy; Jesus, Mary and Joseph were re-skinned and reshaped by the merchants of religion.

On Saturday night, if Dad had a win on the horses, we went to see a film. Here were brave white cowboys shooting Native Americans and taming the 'West'. The only Australian film I can remember seeing was one about bushrangers. There was never any mention of Aboriginal people or their struggle for their country. As school children, we sold newspapers to fish and chip shops and used the money received for the starving 'black babies'. Vaguely, we thought these black children, worse off than us, were in Africa. There was never any mention of Aboriginal children in Australia requiring assistance. They were absent from the collective, white unconscious. The non-white other existed only beyond borders as the 'white man's burden', as heathens requiring salvation.

White Mythology

Born into a white skin I shared in the multi-layered mythology of white

supremacy. I was of a disadvantaged, (Anglo)-Irish background and female, but if I put in enough effort I could be acceptable to the 'establishment.' If I were Aboriginal that option would have been closed to me.

I have in my academic work long acknowledged white privilege and white failure to 'construct its racist practices as crimes'.⁴ However, inspired by the ACRAWSA masterclass I began to critically reflect on my life. My grandmother Muriel was raped and birthed her first baby at 14, then my mother and later two other children. Muriel's sister, my great Auntie Gret, left home at an early age and earned her living waiting on tables. The money she sent home enabled my great gran dad to pay for a few acres of land on which he tried to make a living growing fruit and flowers. My mother grew up in this environment.

During World War II, Auntie Gret started up a delicatessen in Elwood in Victoria. Here, she sold cooked rabbits and 'Greta's Home Made Jams'. The labels on the jars and the gingham tops were home made, but the jam was mass-produced in large tins and later spooned into jars. Enterprise such as this, and later my mother's work in the shop, enabled Auntie Gret to get enough money together to lease a hotel in Euston in rural NSW at the end of the war.

When I was 14, Auntie Gret sent money for my sister and I to catch a bus to Euston. On this and later trips I began to learn how Auntie Gret engaged in a performance that produced her as the most powerful person in the small town and I found, as is often the case, that the powerful are able to break the law with impunity. In contrast, those who are 'other'—Aboriginal people in the district who lacked power—could be arrested

for minor offences, such as swearing (Bird 1987). Most of Aunty Gret's trade was done on Sundays when the pub was supposed to serve only 'bona fide travellers'. However a bit of negotiation, and gifts of alcohol, kept the local police away from her hotel on Sundays, and she (illegally) served locals in the bar. Locals, however, did not include everyone.

Aunty Gret's Racist Practices

Aunty Gret would not allow Aborigines to be served in her pub; a common apartheid-like practice in rural Australia as I later discovered. She told me that letting Aborigines in would 'end up in fights' and lead to the police having to come in and restore order. She described her concern that her licence could be under threat if there was 'trouble'. Greta Carter was a 'self-made' woman, proud of maintaining 'law and order' and not given to self reflection.

Aunty Gret was the family success story. I loved her dearly and she was a strong role model for me. However, I noticed that she was always prepared to sell alcohol to Aborigines at the back of the pub, often well after business hours. At times like Good Friday when hotels were supposed to be closed, she would drop off alcohol in the bush. Aunty Gret told me that Aborigines liked to drink outside, particularly nearby on the banks of the Murray River, or in the bush beyond the town centre. I did not question her about this at the time. Noticing the shadowy figures at the back of the pub and money changing hands I was still in a state of abysmal ignorance about race. There was no realisation that an apartheid system was operating in the provision of services throughout Australia; that understanding came much later.

The Beginning of Awareness of Whiteness

In 1976, I studied a unit called Aborigines and the Criminal Justice System taught by the late Elizabeth Eggleston. For my research paper I took my two small children and my mother and went back to Robinvale, Euston and Mildura and did some fieldwork interviews. I began to uncover the reality of Aboriginal life in these towns. Aunty Gret had by then retired and sold the Royal Hotel. Elizabeth Eggleston asked me to be her research assistant on her book *Fear, Favour or Affection* (1976), the first Australian text to document racism in the criminal justice system. Some years later, inspired by Elizabeth's work, with the kids (9 and 10 years old) and their father, I travelled in an old Vanguard station wagon and slept in a tent in various camping grounds in Western and South Australia and engaged in fieldwork around these issues. Through interviews and participant observation on this trip, the law was unveiled. My positivist notions of law were shattered; the legal system was not innocent (Fitzpatrick 1990); indeed it could accurately be described as a system of injustice. The situation Elizabeth had uncovered was continuing: Aboriginal people were grossly over-represented in the criminal justice system, often for minor, public order offences (Bird 1987).

During this fieldwork, I met many generous Aboriginal people who shared with me their perspectives on the Australian criminal justice system. I saw the apartheid system working and realised that Australia was not post-colonial in any sense; rather it continued as a colonial state (Watson 1998; Moreton-Robinson 2007). I reflected that the treatment Aboriginal people had received would engender anger towards all white people and was amazed that many were prepared to

get to know me and to encourage me in the work I was doing.

On my return to Monash University I was awarded a scholarship for postgraduate study in law at Cambridge. Aunt Greta offered me an extra \$2000 as the 'Greta Carter Scholarship' and I gratefully accepted. It was not until the ACRAWSA masterclass that I saw the connection between Aunt Greta's racist practices as a publican and the 'scholarship' she gave me for Cambridge. In my field work I had been investigating white racist practices far from home—unconscious that I had benefited, not only from the structural racism in Australian society, but also from the racist practices my aunt employed in making a profit in her pub. As a student at Cambridge University, I donned the university's academic robes and fantasised that I belonged in that world (however a fellow student reminded me of the 'pecking order in the human barnyard', exuding his superior position in that barnyard).

White Law School

At university in the 1960s, on a Commonwealth scholarship, my first demonstration was in support of the Gurindji people. The Gurindji had walked off the Wave Hill station in August 1966 to protest against their working conditions and the theft of their land by Lord Vestey, the British 'landowner'. Even so, I did not query my professors and lecturers in the law faculty who taught British history (law) without any mention of the 'peaceful settlement', let alone the invasion, of Australia. The major focus was the British Civil War of the mid 17th century and the struggle by the emerging, mercantile middle class to strip the monarch of their sovereign powers and vest these powers in a property-based parliament (Stanley 2007: xiii), a parliament dominated by

the new, mercantile class. Predictably, the vote was regarded as too dangerous to be offered to the property-less.

In Legal History we studied many documents translated from Latin and Old French. The unit concerned English legal history and the melding of Anglo-Saxon and Norman legal concepts, particularly concerning the title to lands. We were being prepared for the important study of (white) property. There was no mention of the centuries of Aboriginal law that cared for country. In this version of law and history, Australia was lawless and *terra nullius* until the arrival of the British.

Property Law did not interrogate how a whole continent was transferred from the custodianship/ownership of Aboriginal and Torres Strait Islander peoples to that of a British sovereign. We spent one third of a year-long course learning the legal means for tying up landed estates in England. 'Estates in tail male' were reliant on convoluted, feudal legal rules designed to ensure that the eldest son took the whole of the estate. This prevented the huge, aristocratic land holdings becoming fragmented. Growing up on the outskirts of Melbourne, on the working-class side of the river Yarra, my experience was a world away from English landed estates.

Much later I was pleased to see in *Mabo (No 2)* and *Wik Peoples v Queensland* (1996), some enlightened judges criticising the continuing influence of feudal legal concepts in Australian property law. However, in spite of these aporias (Derrida 1992) the property system in Australia is still based on a racist system. The 'tide of history' concept has done much to reinvent the discredited *terra nullius* doctrine, especially in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002).⁵

The legislative native title regime has delivered little and is, at the conceptual level, steeped in racism and continuing to dispossess. The definition of 'native title' is based on white concepts of Aboriginal peoples' tradition and culture; concepts that are deeply offensive and serve to privilege white dealings with land (Atkinson 2008).

In the hallowed, sandstone buildings that housed the Faculty of Law at that time, I heard lectures on the 'injustices' in the legal system. This fed my desire for a more just society. However, there was never a mention of the injuries Aboriginal peoples were suffering as a result of the invasion and theft of their lands and the setting up of the system of concentration camps, euphemistically called 'reserves' or 'missions'. Tort law did not examine the fiduciary relationship between government and their Aboriginal wards, and contract law had nothing to say about the unfair employment contracts for Aboriginal workers on pastoral properties, where rations of tea, sugar and tobacco served as 'wages'.⁶ In any case, this material on 'injustice' was often dealt with in special Honours seminars that only a minority of students attended. The 'whitestream' courses dealt with pressing black letter, commercial issues.

Constitutional Law was taught in the final year of the law degree by Professor Colin Howard. Although most of our classes in other units had been run on the Socratic method, involving dialogue between teacher and the students, he decided against this in favour of straight lecturing. Howard told us: 'You will not be contributing to this subject because you have nothing worthwhile to contribute'. His announcement was met with stamping of feet and loud hissing, but this was as far as our rebellion went in the law classroom. We knew that our assessment for the unit was in his hands

and by this, our final year, we had been fashioned into Foucauldian docile bodies, the proper body of the liberal subject (Thornton 2000).

Although Howard was on the left in his political leanings, his teaching of constitutional law was quite orthodox. He uncritically accepted the sovereignty in Australia of the British monarch. The issue of sovereignty was barely touched on, although, to give him his due no white academics were critical of the concept at that time. Years later in a newspaper opinion piece Professor Howard castigated the setting up of ATSIC (Aboriginal and Torres Strait Islander Commission) describing the body as the establishment of a 'black Parliament.' Even though he was 'the' constitutional law 'expert', I saw a flaw in his logic. ATSIC was very firmly on a government leash. Besides, it did not have any taxation powers or other means of fundraising and was dependent on federal parliament's largesse. I had thought that parliament was sovereign for such reasons as its power to pass legislation and its power over supply. How could ATSIC be a 'black Parliament?'

Reflecting on my University of Melbourne degree I realise now that 'whiteness' permeated the law curriculum, a naked display of Foucault's assertion that power produces knowledge (Foucault 1980). Those of us from working-class backgrounds were a tiny minority in the law school. This was my introduction to the concepts of 'good schools' and 'old school ties'. Many students had careers in 'daddy's firm' or 'uncle's firm' already secured. My working class background made me feel an outsider in the law school as did my gender. My whiteness went unnoticed, but it was my most important quality, one that made me part of the club. There were no Aboriginal students: their absence was

'unmarked', by both academics and the student body (Frankenberg 2001). I joined the Rhythm and Blues Club, found 'soul mates' and became active politically in civil disobedience in the anti-Vietnam War movement.

Articled Clerkship

Graduating with a LLB Honours degree, I obtained articles with a Queen Street law firm in Melbourne.

Re-reading that sentence, it suggests the system of obtaining articles was operating on 'merit'. However, this was not the case. This firm was the one my great Auntie Gret, now a hotel owner, used for her legal business. Auntie got me an introduction to the firm. I wore a tweed suit, refined lip stick and tamed my long tresses. Later one of the partners told me to wear a hat and gloves to court and offered to give me the name of a decent dressmaker.

On critical reflection, I am faced with the knowledge that it was not my own efforts or talents that counted in getting articles in Queen Street. The 'liberal promise' (Thornton 1990) that we are all equal citizens and make our way in the world as a result of merit is shattered by this experience. It was not my Honours degree; it was the fact that I had a relative with property that opened the doors of that firm. My talent lay in my ability to use the aporia Auntie Gret had opened to pass through to an articled clerkship. I had to appear to be enough like them to merit a place in their firm. My birthed skin colour allowed me to pull off this counterfeit. I aimed to look like a Melbourne University law graduate at the interview and to speak like one too. I was performing as a liberal subject (Butler 1990: 24). The elocution classes given by the nuns allowed me to sound appropriately middle class. As Nietzsche writes: 'there is no "being" behind doing,

effecting, becoming; ... the deed is everything' (1969: 45). To paraphrase Butler (1990), my class identity was 'performatively constituted' at the interview, a possibility that flowed from my whiteness.

After getting to know my values and my lack of contacts (I could not bring any wealthy clients into the firm), the partners suggested I apply for a job as an academic. Perhaps my lingering unworldliness was a negative for me too. A senior associate asked me to have an affair with him. I said: 'But you're a married man.' He replied in a professional voice: 'My dear, that's the type that has affairs'. I refused to take up his offer and further scuttled my prospects with the firm in the process. After a year in that law practice the scenario of a university job began to look attractive; my 'whiteness' eased me into an academic appointment at the fledgling Faculty of Law at Monash University.

Aborigines as Non-Citizens: Outlaws

I was a citizen: born a white subject, I entered the gates of the law school without much difficulty. At that time no Aboriginal person had entered law school in Australia. To require an exemption from Aboriginality in order to receive any of the fruits of citizenship demonstrates that Aboriginal people were cast into the borderlands, neither inside nor outside of law. They had what Giorgio Agamben (1998) calls *zoe* (bare life), biological life, but were denied *bios*, the political life granted to citizens. As Agamben (1998: 126) points out:

[T]he so called sacred and inalienable rights of man show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to the citizens of a state.

The British colonies in Australia and later Australian governments did not apply democratic legal norms in respect of Aboriginal peoples: they were indeed 'non-human'. Like the inmates of Guantanamo Bay today or the asylum seekers on Nauru they were/are dealt with by the executive, not according to the rule of law. This is what I take Justice Brennan to mean when he stated in the *Mabo* decision that Aboriginal peoples were not dispossessed by the common law, but by executive Acts. Law provided the legitimating tactic for the original theft of the continent. However the casting of Aboriginal people beyond the law soon ensured that the executive could deal with their bodies without restraint. Genocidal behaviours were carried out with impunity and justified in cases—such as *Kruger v Commonwealth* (1997) and *Cubillo and Gunner v Commonwealth* (2001)—as in Aboriginal peoples' 'best interests' (Clark 2001).

The recent 'history wars', a pet project of defeated Prime Minister Howard, has Keith Windshuttle asserting that 'there was very little bloodshed' in the 'settlement' of Australia and that Aboriginal people were 'fascinated' by whites (Lateline 2003). But we know from Aboriginal oral histories that there was bloodshed and worse (Patrick 2003). The resistance left wounds and scar tissue both on the bodies and spirits of Aboriginal survivors and inscribed on the nation's psyche, although as a nation we deny it (Bird 2005).

Now Aboriginal people are being faced with the 'new paternalism': a paternalism laced with racism that has led to the 2007 military 'invasion' of Aboriginal lands (Foley 2008), the suspension of the permit system and the forced transfer of land to the federal government, a situation that has Watson (2005) writing of the contemporary 'nigger hunts'. Foucault (1980) tells us

that governance is about the management and control of bodies. Aboriginal bodies need to be controlled by the state, in order to protect white privilege and white property. Until 1967, Aboriginal people were absented from law, except as wards of the state. Nowadays, the construction of Aboriginal people as chaotic and dysfunctional is used to support the argument that Aboriginal communities based on communal native title do not work. The government proposed capitalist, single freehold title to land as the resolution.

Conclusion

Levinas (1972: 55) writes that 'the responsibility that owes nothing to my freedom is my responsibility for the freedom of others. There, where I could have remained spectator, I am responsible, that is to say again speaking'. In the face of Aboriginal trauma at the hands of white Australians, those of us who are white Australians cannot stand silent. The injustice Aboriginal peoples suffer calls forth in me a responsibility that is not chosen, that began before memory or consciousness. In writing of this ethical position, Levinas uses the image of the face, not to signify an actual face but because 'the face is a trace of otherness inscribed on the ground of self' (Douzinas and Warrington 1994: 166).

I write this essay as a first step towards responsibility for the legal and other privileges arising out of my whiteness. I call for an opening of the borders at the level of ontology and a collective mourning of the broken, raped and murdered bodies of Aboriginal peoples. To begin taking responsibility, I have explored some of the ways in which my whiteness has given me privileges. I have partaken of the 'stolen goods' derived

from the invasion of Aboriginal country. I have received a 'good' education, proper health care and I own real estate. My success could be read as an example of 'merit' and part of the 'lucky country' narrative—proof that Australian citizenship delivers on 'the liberal promise' (Thornton 1990). However, using critical self-reflexivity demonstrates that in large part these 'gifts' have been directly linked to my aunt's racist practices as a publican and have flowed from the white property, inherent in her and my body. This white property has facilitated my shift from my birthed position in a working-class family to the position of a middle-class academic lawyer. It has enabled me at the level of language and other discursive practices to assume an identity as the liberal subject.

I am aware of the difficulty of resisting my culturally produced white body, the property that has brought me into full citizenship. As Butler (1990: 93) writes:

it is necessary to take into account the full complexity and subtlety of the law and to cure ourselves of the illusion of a true body beyond the law. If subversion is possible, it will be a subversion within the terms of the law, through the possibilities that emerge when the law turns against itself.

Critical self-reflection and storytelling is worth little if it provides merely a personal catharsis.

The bringing into consciousness of my white privilege is transformative only once it is put into action in my daily life. To my curriculum design, teaching practices, discursive strategies, research and indeed, to my life outside the academy, I can bring the fruits of my critical self-reflexivity (Lindsay 2007). Supported by the scholarship and collegiality of Indigenous critical race

scholars and supportive white colleagues, I can continue what is a transformative process, both personally and at the level of institutional structures—towards a legal subject that is no longer confined to those who are white, and towards an ethics of alterity and its hope of justice.

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Notes

¹ Critical race theory emerged in the United States through the work of theorists such as Richard Delgado, Mari Matsuda and Patricia Williams. This critique of law was based primarily on the oppression of Afro-Americans and Latinos in the North American context. In Australia, theorists such as Irene Watson and Aileen Moreton-Robinson have developed a new philosophical critique, what may be called Indigenous critical race theory (see Watson 1998; 2005; 2007 and Moreton-Robinson 2000).

² For a discussion of subjectivity see Lacan (1982). Lacan sees the subject as desiring coherence and mastery, but always on the edge of chaos.

³ Douzinas, explaining how this ethics shapes subjectivity, writes: 'My uniqueness is the result of the direct and personal appeal the other makes on me ... Before my identity and my subjectivity are constituted they have been subjected not to law but to the other' (Douzinas and Warrington 1994: 165).

⁴ See Bird (1987). These words were written in 1984 after a fieldwork trip in WA and South Australia.

⁵ Dr Wayne Atkinson, Yorta Yorta man and Research Fellow at the University of Melbourne and Justice Tony North, judge of the Federal Court delivered papers on the deficiencies in the native title regime on Saturday 13th September 2008 at the third National Legal Indigenous Conference (North 2008).

⁶ On the liability in tort see *Trevorrow v State of South Australia (No 5)* [2007].

FORBIDDEN KNOWLEDGE? THE POLITICS OF VOICE, WHITE PRIVILEGE AND THE ETHICS OF RESEARCH

DENISE CUTHBERT

Response

In the last issue of this journal (2008, 4(1)) Damien Riggs criticised my work (2000a; 2001) on non-Aboriginal adoptive/foster mothers of Aboriginal children in his article 'White mothers, Indigenous families and the politics of voice'. Riggs raises some challenging issues around the politics of voice and the privileging of whiteness that go beyond my now dated case-studies, and have implications for all researchers concerned with critical race issues. I use the opportunity provided by the editors to enlarge the critical space (re-) opened by Riggs and to address some key points related to my own work and some considerations which have bearings on the ethics of research.

It is useful to provide a brief background to the research which may go some way to addressing Riggs' concerns with its design and methodology. In 1996, in the final stages of the Human Rights and Equal Opportunity Commission's inquiry into the forced removal of Indigenous children (1997), I began work on the same subject. Scrupulously—I now consider it, over-scrupulously—I sought a point of entry into this field which would not, as I saw it then, encroach on, or compromise, the primacy and authority of Aboriginal voices/ experience on the issue of Indigenous child removal and its consequences. I was certainly well-versed in one version of the 'politics of voice' via the terms formulated in the Bell-Huggins et al debate (Bell and Nelson, 1989; Huggins et al 1991), and considered then that certain areas of

inquiry were properly not my 'business' as a white researcher. In this and some other respects, this research is the product of a particular historical moment. Riggs criticises the partiality of my research design on this point: why didn't I speak to Aboriginal mothers? Why did I not also speak to stolen children? For the reasons outlined here, I ruled out as inappropriate for me research with stolen children or their families. The research was designed specifically as a critical inquiry into white experience for the insight it might bring to our understanding of non-Indigenous complicity in Indigenous child removal. As a consequence of this, the research is partial (as indeed all research is) as Riggs correctly notes.

Thus willingly constrained, I continued to work on Indigenous child removal and on the national assimilation project as it took shape in the period after the Second World War. The question of the white women who adopted and fostered Aboriginal children during these years—on which I had seen no research—emerged. Here, it seemed, was a way in which I could contribute to knowledge on this chapter in Indigenous-settler relations within the ethical research parameters I had set. Through the subject of the white women who adopted/fostered Indigenous children, I saw a way in which I might combine my commitment to Indigenous issues with my commitment to feminist inquiry, while observing the principle of not attempting to speak for, or on behalf of, Indigenous peoples. I hoped that this inquiry might shed some light on the

ways in which the national project of Indigenous assimilation played out in the private spaces of non-Indigenous families (drawing on the child-rearing labour of white women to do the job of assimilation on behalf of the state) following provocative leads from Deborah Bird Rose who writes that the violence of colonisation impacts on both colonised and coloniser and that this impact may also be seen to be gendered in its effect (1996; 1997; Cuthbert 2000). Riggs finds the resultant research objectionable and generative of firstly, what he sees as my uncritical enshrining of white privilege and, secondly, the perpetuation of violence against Indigenous people, which is the main focus of his essay.

I no longer adhere strictly to the scruples which then prevented me from embarking on a research design which incorporated both black and white experience but my reasons for revising this position are less aligned to the critical points raised by Riggs and much closer to the reasoning outlined by David Hollinsworth (1995). He argues that a regime in which Aboriginal 'speech' is only deemed possible in the face of white 'silence' results in compromised speech wrested from racist paternalism, existing in an 'epistemological no-go zone' which is antithetical both to good scholarship and to a thorough-going anti-colonial and anti-racist political project. I remain open on the 'politics of voice'. Due to my own on-going difficulties in settling this question to my satisfaction, when approaching the work of others, I do so in full awareness of the enormous personal, ethical and political challenges entailed in work of this kind; and the very uncomfortable space researchers, particularly white researchers as noted by Riggs, occupy when researching and writing on whiteness and race in the settler-colonial situation.

Riggs' second concern with my research design and methodology—that the exclusive focus on white experience bespeaks and perpetuates white privilege and colonial violence—is an extremely difficult point to negotiate, as he acknowledges. To the many points made by Riggs, I add this consideration: it is hard to know how white privilege might be critically analysed and examined unless it is critically analysed and examined. It is hard to know how this might be done other than by listening to white voices, reading white words, analysing white legislation, examining white media representations, and so forth. While acknowledging that this work is difficult, deeply uncomfortable, potentially compromised and compromising, and when undertaken by white academics bound to perpetuate white privilege at some level, it is necessary to allow for some critical space in which work of this kind can be pursued. By the very reason of its hegemonic status, white privilege continues to demand critical attention. Foregrounding white experience precisely so that racism and white privilege might be examined and understood is not logically equivalent to foregrounding white experience so as further to enshrine white privilege, power and violence. If it were, there would be little or no room for the sustained critical analysis these issues so patently call for. Arguably, the risks in not doing work of this kind outweigh those entailed in undertaking it: partial, flawed, provisional though it might be. We all need to work, and support each others' efforts, to find, maintain and defend the discursive and institutional space for this work to continue. Make no mistake, there are others who would seek to shut it down (see, for example, @ndy, 2008 and Richardson, 2007).

One remedy posited by Riggs against the perpetuation of colonial violence

which he sees enacted in giving space to the voices of non-Aboriginal adoptive/foster mothers to be heard, is to leave the voices of these women 'unspoken'. Some voices, Riggs argues, are so inherently violent and so objectionable, that they should not be spoken at all. Riggs' position may be responded to in a number of ways, which time and space prevent. I make only the following points. Truth and reconciliation commissions are built on dialogue and reciprocity that include not only the voices of those injured but also those who perpetrated those injuries. To shut out some voices is to render such efforts futile. Further, while familiar with the work of Frankenberg (Cuthbert, 2000a) and others in the (then) emerging field of whiteness studies, my empirical research with white women readily confirmed that white privilege is not a monolith. Different whites are positioned differently in relation to whiteness; race intersects with gender and class in complex ways. Listening to the stories of these women—most painful, all complex, some surprising and others offensive—confirmed the need for a variegated response to, and theorisation of, whiteness (just as it sorely challenged certain feminist precepts about research with women).

Further, the politics of colonialism played out very differently in the lives of different women. Some of the white women were actively complicit in the assimilation project and this led them to seek out Indigenous children for adoption; others adopted Indigenous children simply because they became available at the time they sought to adopt; and others still had no idea the child/ren they adopted were Indigenous. The politics enacted in the lives of these women ranged from complicity with to resistance against the then dominant regime of assimilation.

We can only understand this by listening to and analysing their stories. As researchers, this is our ethical responsibility.

In research on colonisation which is directed towards thorough de-colonisation and social justice we will not get far enough if we only listen to one side of the story, or as Riggs suggests, exclude certain voices from our research. Understanding is a necessary pre-condition for countering and dismantling the deep, persistent and, at times very subtle, cultural and political logic of colonialism and racism. We need to be highly attuned to and prepared to research, critically analyse and report all voices and all experiences as they bear on the past and present of Indigenous-settler relations in this country, and the myriad injustices which flow from the inequities structured into these relationships.

If we as scholars and researchers—even for a minute, even with the best intentions in the world—allow ourselves to subscribe to the vision of politically-engaged research posited by Riggs, in which some voices are silenced or excluded from scrutiny and analysis (and we might ask, excluded by whom?), we may well find ourselves in a place which is very different from that for which we are striving; and, perhaps, not all that different from the places, dark and fearful, to which we seek never to return.

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OUT OF CONTEXT: THE LIBERALISATION AND APPROPRIATION OF 'CUSTOMARY' LAW AS ASSIMILATORY PRACTICE

NAOMI FISHER

Abstract

When white people came, they brought a culture, set of values and ontology that deemed Country and her people as *terra nullius* and Aboriginal Law¹ non-existent. They used their reasoning to justify invasion, dispossession and genocide. Today, *terra nullius* continues, cloaked in 'post-colonial' rhetoric: that Australian society resides in an enlightened era, temporally distant from policies of protection-segregation and assimilation. Ironically, the liberal, democratic values that rooted government policies of the past continue to inform the policies of the present, securing a *contemporary enmeshment* of Aboriginal people and Law, at sites of bureaucratic and legislative intervention and control. The liberal discourse of equality is also employed to coerce Aboriginal people into seeking remedy/justice from the common law. Hegemony is furthered by the 'incorporation' of Aboriginal Law into common law legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and through bureaucratic protocols such as the Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (1986). However, 'recognition' or 'non-recognition' of Aboriginal People and Law in the discourse of equality amounts either to *incorporation* or *erasure* and grants legitimacy and power to common law jurisdictions. Whenever Aboriginal context and ontology is removed, our Law is *appropriated* and assimilated. Without Aboriginal knowing and seeing,

it is no longer Aboriginal Law. The claim that Aboriginal Law has informed or been 'recognised' in certain pieces of legislation is therefore erroneous. Dialogue between Aboriginal Law and the common law is prevented and white hegemony is reiterated: it is therefore a 'conversation' white, democratic liberalism has with itself.

Introduction

To begin this article, I observe the Aboriginal cultural protocol of identification (Moreton-Robinson 2000). I live on Turrbal ancestral homelands, Meeanjiin, now known as Brisbane, and I acknowledge the Turrbal people for allowing me to call this place home. I do not know to which Country my people belong and this is a source of sadness. Not much is known of my grandfather's ancestry; my lightness of skin has allowed me to escape reasonably undetected from white's apprehending stare. Yet, I 'go proper way' on Country and I thank the Elders I have met over the years, who have taken the time to share and teach Law, including Elders and Aboriginal academics who teach through their written stories. It is within this standpoint—as an Aboriginal woman learning and journeying back to her culture, place and identity—that I write: I feel I have to talk up and talk strong to counter the dominant ideology and the daily outrages it perpetuates. It is, as it has always been, through our culture and knowing, that we remain strong and grounded.

When they come here, they come the wrong way (Uncle Kevin Buzzacott 1988 in Watson 1998: 36).

Since invasion, Aboriginal Law has been disregarded through murder, vilification and defilement of People and Land. The coloniser's doctrine of *terra nullius* meant that the Land not only *belonged* to no-one but had no law, no presence, no being. This assessment of Land was/is based in the *values* of the incoming 'culture': Land was/is an economic possession, to be taken or lost according to military might, but was/is without spirit or intrinsic value of its own. Under the gaze of white people, the Land became what they wanted it to be: vacant, exploitable, alien, harsh, yet vulnerable to their dominance. Its people were hunted and almost destroyed—this land was 'made' 'terra nullius', its 'blank' canvas to be painted in the hues of white people's 'values'.

The colonisers' social practice and common law also brought and imposed 'self-evident' and 'natural' liberal values (Leach 1988: 81): the ideals of *individualism*, 'the moral, political and legal claims of the individual over and against those of the collective'; *equality* as 'the recognition of a common moral standing, no matter individual differences' and the *universality* of these principles in their application to humanity, transcending history, society and culture, but located primarily in the capacity to exercise *reason* (Goldberg 1993: 5). The 'universal subject' of these values, however, denied/denies that *race* is a fundamental cultural motivator of human beings, while simultaneously declaring *race* as something that impaired/impairs people's capacity to exercise reason and therefore their common humanity and 'right' to equality (Goldberg 1993: 4). Paradoxically, while declaring a *tolerance* of others and the 'irrelevance of race', liberal notions of universality

presumed/presume a *sameness of identity*: to be equal, one needs to be *white* (Goldberg 1993: 6-7). Thus the common law practices of assimilation–integration, *rid* individuals of their differences, so that citizens could/can be governed equally by the *state* (Goldberg 1993: 7; Leach 1988: 82). In effect, then, liberalism targets Aboriginal Law through enmeshment, incorporation and 'recognition' while attempting to extinguish its jurisdiction, ontology and legitimacy.

Yet, a core ideal of *Aboriginal* culture is that this is an Aboriginal continent, even if our people no longer exist, and the Law *cannot* be extinguished, regardless of the claims of white law to do so (Lila Watson 2006; Irene Watson 2000).

[Our Laws] were not created by humans and they cannot be extinguished by them, through whatever processes they devise ... The old people know the law and its onerous obligations. Obligations which hundreds of Aboriginal peoples still carry today (Watson 2000: 1).

This article aims to show how current debates, legislation and case law attempt to appropriate and assimilate Aboriginal Law. This has been done, first, by transplanting liberal Western, democratic values and *creating* white jurisdictions 'over the top' of Aboriginal ones. Secondly, liberalism has *created* historical, 'inferior' and 'deviant' Aboriginal subjects, through racialised science and government policy, to legitimise white jurisdictions, establishing a *contemporary* template of enmeshment of Aboriginal people within the criminal justice system, state bureaucracies and legislation. Thirdly, the claim that we live in 'post-colonial' Australia implies that the time of racism, dispossession, genocide and assimilation has ended and enlightenment has

prevailed due to the 'triumph' of white, liberal democratic values.

To demonstrate the effect of these liberal discourses of equality and the 'recognition' of Law and Aboriginality, I examine the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('Land Rights Act') and *Mabo v Queensland [No 2] (1992)* ('Mabo decision'), which both rest on the presumption that the common law is settled and 'legitimised' in its power structures and that Aboriginal people are 'citizens' of the 'common-wealth'. We must now turn to the common law instead of our own law to 'supply' us with our Land, our 'rights', our business, even *who we are*. However, as I further demonstrate through my analysis of the Hindmarsh Island affair, 'non-recognition' of Aboriginal Law is in 'false opposition' to recognition: *both* terms demonstrate incorporation/assimilation, or the disregard of Aboriginal Law, and ultimately, both end in *erasure* (Murphy 2000).

The underlying theme of this discussion is that liberal terms and values are *imposed*, even if incorporated by Aboriginal people, and that this discourse is a monologue. It is a monologue because it is a 'conversation' that white, democratic liberalism has with itself, without Aboriginal input. We are talked about, talked at, talked to but never *spoken with*. As I explain, reports such as *The Recognition of Aboriginal Customary Laws* (Australian Law Reform Commission 1986), try to address the recognition of Aboriginal Law within a common law context but always within white terms of reference, white frameworks and ontology: the ways that *they* 'know' us, not the ways we know/knew ourselves.

Ultimately, the narratives operating within these common law discourses

demonstrate that whenever we sit at a table of 'negotiation' or seek 'remedy', we have to leave our Aboriginality, our values, at the door (Harris 1996; Murphy 2000; Alfred 1999). We must always journey into their liberal world, using their language, their rules and mores, their ways of thinking and being. The central tenet of my argument is that without our knowing and cultural grounding, *our* stories and perspectives, dialogue is prevented and white hegemony is reiterated and anchored. *Whenever* Aboriginal context and ontology is removed, our Law without that which makes it what it is, is *liberalised, appropriated and assimilated*.

Creating Aborigine

The liberalisation of Aboriginal Law began with the creation of *Aborigine*. *Terra nullius* survives as colonising principle because *Aborigine* bore/bears value-laden cultural judgement, applied by white people to justify the colonial project of 'civilising' erasure. Goldberg (1993: 149) argues that white people saw and 'knew' Aboriginal people—by applying the racial knowledge of their sciences, they furnished themselves with a definition of what was Aboriginal. This *monologue* of the coloniser's own cultural understanding in effect *produced* an Aboriginal subject.

Once produced, the terms of articulation set their users' outlooks. The categories that now fashion content of the known constrain how people in the social order at hand think about things. Epistemological 'foundations', then, are at the heart of the constitution of social power (Goldberg 1993: 149).

Goldberg (1993: 149) argues further that these foundations to anthropology and biology, criminology and sociology provide/d the basis for the white gaze, in turn assuming and theorising not just the

inferiority of *Aborigine*, but more importantly, the *superiority of whiteness*. The Other is named, brought into very existence; not only is this a denial of the Other's right to *know itself*, but a pronouncement of whiteness to *know what is best*, to ascertain the limits of knowledge, and extend 'power, control, authority and domination over them [the other]'" (Goldberg 1993: 150). This knowing is predicated on the apparent neutrality of whiteness: the neutrality of its patriarchal, liberal, democratic values (Moreton-Robinson 2004; Murphy 2000). White man is 'everyman': he claims universality and commonality of existence and experience, while ironically erasing difference in the declaration of human unity and equality (Goldberg 1993: 5).

The universal claims of Western knowledge, then, colonial or postcolonial, turn necessarily upon the deafening suppression of its various racialized Others into silence (Goldberg 1993: 151).

In the silence created by *terra nullius*, *Aborigine* is created as uncivilised, lawless and deviant, incapable of governing or controlling itself. Broadhurst (2002: 263) calls this 'Aboriginalism': the reduction of Aboriginal culture and constitution into simplified biological generalisations or myths that persist in the sciences and that are 'embodied in all the discourses and practices ... between Aborigines and the dominant non-Aborigines'; of course, this includes Aboriginal Law. To govern such a subject requires intensive information, surveillance and control: the enmeshment of *Aborigine* into white jurisdiction.

Government policies of protection-segregation and assimilation, while serving genocidal intents, instead claimed intervention was 'liberation'.² However, after these policies were

'abandoned' because of international obligations and pressure, their effect was continued by *criminalising Aborigine*.

Criminal definitions [laws] describe behaviour that conflicts with the interests of the segment of society that have the power to shape public policy ... [and] are applied by ... [those] that have the power to shape the enforcement and administration of criminal law (Quinney 1970 in Akers 2000: 170).

Accordingly, the institutionalisation of Aboriginal people was/is maintained through the criminal justice system. The common law has traded one institution for the next, one genocidal policy for another. What was once the mission is now the prison, foster care or juvenile remand; what was assimilation policy is the Native Title Act; the Protection Acts—though officially abolished—continue to reappear in contemporary forms (Haebich 1988; Broadhurst 2002: 268), most recently the Northern Territory intervention). Informed by their liberal, democratic 'values', white society has imposed its cultural rules and mores on Aboriginal people. The institutions of common law, the police and courts, reinforce these mono-cultural values, criminalising behaviours such as public drunkenness and offensive language, which 'intensifies the criminalisation of the Aboriginal domain' (Broadhurst 2002: 276). The infraction of rules constitutes deviance and renders Aboriginal people criminal outsiders. This serves to cement the identity and unity of liberal democratic society, while creating an imagining of Aboriginality that has become a self-fulfilling prophecy (Akers 2000: 124-5; Moreton-Robinson 1999). The system of law that perpetrated/perpetrates acts of violence, dispossession and murder sits in 'judgement' of *our* people, while disregarding its own legacy of

dispossession (Atkinson 1996). Its template of enforced institutionalisation and removal from Land *results* in the deprivation of social control *perpetuating* what liberalism perceives to be 'lawlessness' which justifies interventions and criminalisation. In this way, Aboriginal people and their Law are enmeshed into common law 'jurisdiction'. 'Family responsibility commissions', increasing Aboriginal arrest rates and deaths in custody, compulsory quarantining of welfare payments and 'shared responsibility agreements', all point to the continuance of racially-based perceptions and the psychological *terra nullius* rooted in liberal doctrine. All these policies aim to break resistance by coercing Aboriginal people into surrendering their Law, culture and ontology, to assimilate to homogenous, 'free', Australian citizenry.

However, these racialised assumptions of lawlessness are a denial of the Law of the Land, in operation since time immemorial, and of a people autonomous and inherently morally responsible (Graham 2006). Aboriginal 'jurisdiction' encompasses land, sea, sky, animal, human, mineral, rock and tree and is complex, inter-related and *in existence*: if the Land is here, the Law is here (Watson 1998; Kwaymullina 2005). Aboriginal Law is the Law that governs all human relations through mutual responsibility, love and respect, not only to each other but to Country, the spirits and the Ancestors. This shapes how Aboriginal people see their world and their position in it, as well as the ordering of that world: if we are a part of Country as all other creatures, then the responsibility to conduct and maintain those interrelationships is powerful and organic. Unlike common law, which is derived from white cultural mores and customs and the *perceptions* of morality of the day, Aboriginal customs,

traditions, ceremonies and moral behaviour *come from* Law, which derives its power from Country and Time itself.³ To say that Aboriginal Law is customary (like the common law), negates not only its source, Creation, but relegates the Law into something that can be discounted, and its keepers 'stone-age primitives' acting in irrelevant, archaic superstition. Non-Aboriginal Australians fail to realise however that to live on this land means that they too are subject to its Laws, regardless of the imported law.

When Aboriginal Law is included/integrated into common law, liberal common law bases its presumption of understanding within the limits of its own law. This begs the question: how can there even be a *comparison* between these bodies of law? They are incomparable as to their power, strength and longevity. The discussion therefore, is *entirely* located in liberal notions of primacy, 'relevance' and hegemony.

Of course, we as a people do not have to accept the terms of definition.

The task remains for the other to refuse to position itself in the subject's dialectical and discourse of difference and to reposition itself outside this discourse and to define itself as subject (Murphy 2000: 35).

This talking back and *taking* back of our authority is intrinsic to asserting ourselves on our own Country, and to practising our Law. As Uncle Kevin Buzzacott (2001) says, 'they have no jurisdiction': when we take on the primacy (and legitimacy) of the common law, we participate in our own colonisation and assimilate *ourselves*. Yet, it is not surprising that we give credence to the common law considering its systematic control and violation of our people and Law, since invasion. However, our Law's

longevity and survival demonstrates its quality and strength: its existence cannot be denied, either by Aboriginal peoples or non-Aboriginal peoples. But in many ways we have become distanced from our Law via hegemonic reiteration and genocidal government policy and we have been excluded from the common law through the 'denial of ... political rights' (Murphy 2000: 28). Why then engage with the liberal, democratic articulations of equality espoused in case law and legislation to 'gain' our rights? Have things really changed for our people since we 'got the vote' in 1962, or since the referendum of 1967 when we were counted, in a numerical sense, as human beings?

Common Law 'Recognition'

White political discourse counts the Land Rights Act, the *Mabo* decision and the Australian Law Reform Commission's report on customary law, as milestones in the *recognition* or partial recognition of our Law and 'rights' to Country. Yet this is misleading, as liberal democracy will only 'include' elements of our Law to *the extent that they can be made similar to itself*. To claim the 'rights' that liberal democracy offers, we have to be like whites and we have to 'sell out' our Law.

Only through the *scientific and Western gaze of the experts* could customs and traditions be fathomed by the *legal discourses of the state*. Indigenous self-governance was vulgarised and de-legitimised by reference to oriental and exotic forms of despotism (Broadhurst 2002: 263; emphasis added).

In the Land Rights Act and the *Mabo* decision, Aboriginal Law—particularly that regarding 'rights to Land' and 'ownership' of Country—is studied, reinterpreted and regurgitated in an

appropriated form and, so, robbed of its *context* and *meaning*. The following is not an intensive legal analysis of legislation or judicial decisions. I do not need to add to what has been done many times before and further legitimise the monologue of the coloniser.⁴ What is examined is the cultural values and discourses that underpin these Acts and decisions; the ontology and reasoning that furnishes and therefore perpetuates what Watson describes as the '*muldarbi*' (1998).

This illusion of the recognition of indigenous rights has created a potency that allows victims to be more easily drained of their lifeblood as they are caught unaware ... it is a deception (Watson 1998: 42).

The Woodward Commission, established in 1973, was to investigate the:

appropriate means to recognise and establish the traditional rights and interests of the Aborigines in relation to land, and to satisfy ... the reasonable aspirations of the Aborigines to rights in or in relation to land (in Neate 1989: 8; emphasis added).

It was set up to investigate how to 'further' the land claims of Aboriginal people particularly as a result of the Federal Court's failure to recognise any 'land rights' in *Millirrpum v Nabalco Pty Ltd* (1971). In this regard the aim was to vest title in land to Aboriginal people in the Northern Territory through changes in legislation and via 'suitable procedures for the examination of claims to Aboriginal traditional rights and interests' while honouring existing 'Government contracts, mining rights or otherwise' (Letters Patent in Neate 1989: 8-9). According to Commissioner Woodward, the motivation to produce legislative change was 'the doing of simple justice to a people who have been deprived of the land without their consent and

without compensation', the provision of land as an economic base to achieve 'a normal Australian standard of living', the 'preservation ... of the spiritual link with his [sic] own land' and the 'improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority' (Woodward, in Neate 1989: 9). But, could the same system and culture that dispossessed us for its economic gain now *preserve* our spirituality and do us *justice*? How far would the Commission, and therefore the Act it recommended, go in enabling this process?

The clues are in the mechanisms Justice Woodward proposed to achieve these aims and it is important to note that these were the basis of the legislative framework later implemented by the Fraser government. These 'rights in land' were not to be eroded, unless 'the national interest positively demands it' (Woodward, in Neate 1989: 9). If the 'Traditional Owners' vetoed a mining lease on Country, the government could override this decision for the nation's economy. This is called 'balancing competing interest' (Neate 1989: 14). It is evident that title grants were 'given' within a liberal value-set of land as possession, as land provision was to remain limited by that 'which the wider community can afford ... where it will do most good, particularly in economic terms, to the largest number of Aborigines' (Woodward, in Neate 1989: 10).

Land as interpreted by white, liberal, democratic values was/is a tool of reward, belonging to no-one, to be given and taken away at whim, for the greater good, defined by white law. There was to be 'as much autonomy as possible ... but there must be some accountability by Aborigines [sic] for their use of lands, natural resources and

public monies' (Woodward, in Neate 1989: 10). This demonstrates that, to 'get Land back' the old people must trade their independence as bosses on Country, for white man's system of accountability: enmeshment and bureaucratic dependence. How different is this from policies of protection and assimilation? How can Aboriginal people be 'fully consulted' and 'negotiate with government for changes' when they are forced to operate within frameworks that historically rendered them politically powerless? How is land, or even autonomy, 'given back', when you still must answer to someone?

To 'negotiate' we have to trade/abandon the values and ontology that make us Aboriginal. In this way the Commission's fundamental purpose to 'remedy' the decision handed down in *Millirrpum v Nabalco Pty Ltd* (1971) was merely its reiteration.

According to Neate (1989), the Land Rights Act introduced to the common law notions 'drawn and interpreted from traditional Aboriginal law', such as 'traditional owners'.⁵ Yet 'Traditional Owners' in Aboriginal Law (whilst acknowledging my limits in cultural knowledge), are those who speak for Country, who have a duty of care and responsibility for the observance of Law for that Country. They are the supreme authority in human embodiment on Country, deriving their 'power'/ 'legitimacy' from the Law/Land and their Ancestors. The idea that 'Traditional Owners' would claim their land from an 'Aboriginal Land Commissioner' who 'considers Aboriginal tradition' and then grants it to an Aboriginal Land Trust (Neate 1989: 16) not only disrespects Aboriginal Law but actively *undermines* it. The assumption that white governments can interpret and adapt a miniscule portion of Law and somehow

claim to be boss of Country would be laughable, if it were not for the serious ramifications on Aboriginal Law and Country (Watson 1998: 41). It demonstrates that the legislated delivery of 'justice' further ensnares Aboriginal people in colonising processes despite declaring adherence to Aboriginal cultural values.

An illustration of the subtleties of this 'recognition' monologue, re-inscribing and appropriating Aboriginal Law, is evident in the Bird-Rose article 'Land rights and deep-colonising: the erasure of women' (1996). Bird-Rose's central argument is that:

Land claim legislation ... on the one hand *reverses conquest* by returning land to indigenous people. On the other hand, the marginalisation of women ... perpetuates the colonising practices of conquest and appropriation ... Deep colonising is ... conquest embedded within *institutions and practices which are aimed toward reversing the effects of colonisation* (1996: 6; emphasis added).

Bird-Rose argues that land claims are biased toward Aboriginal men, due to the patriarchal nature of common law and court processes, and that within these processes are embedded the erasure of Aboriginal women (1996: 7). But Bird-Rose is mistaken in her belief that land claim legislation, in this case the Land Rights Act, returns land to Aboriginal people. As demonstrated, land rights legislation perpetuates colonising practice *because* it comes from a liberal, democratic institution. The legislation cannot reverse these practices because its *foundation* is set within colonising values. *Therefore*, Aboriginal women are negated and their secret/sacred business/Law is not recognised because the land grant process does not have its origin or content in Aboriginal Law. Simply put,

Aboriginal Law is delineated/balanced between Men's and Women's Law: Land/Law depends on the complementarities and embodiment of masculine and feminine energies. If the common law could truly see Aboriginal Law, it would understand that there cannot be *just* Men's Law, because how can there be Men's Law without Women's Law?

By claiming the common law is a vehicle for 'reversing conquest', Bird-Rose (1996: 6) assumes it has neutrality, both of agenda and historical culpability. She mistakes 'recognition' for the project of liberalisation. 'Granting' land within the framework constraints of common law enmeshes Aboriginal men and women in a value process that undermines the Laws of Land custodianship.

Unfortunately Bird-Rose reinforces that which she tries to dismantle by granting *legitimacy* to common law processes. By claiming that 'institutions and practices' attempt to 'reverse the effects of colonisation', Bird-Rose reiterates liberalism's claim of equality and remedy under all-encompassing white law. 'Deep colonising' is the perpetuation of the idea that we can find remedy to colonisation even as the common law co-opts, appropriates and conceptualises our Law—*while claiming otherwise* (Albert 1999: 73; Murphy 2000: 6).

Recognition—Jurisprudence

The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state (Justice Gibbs, cited in *Mabo v Queensland [No 2]* 1992: [31]).

The *Mabo* decision is a further example of the liberalising effect of common law, this time through the form of

jurisprudence incorporating Aboriginal people into common law jurisdiction. The lie of *Mabo* is that it proclaimed 'recognition' of rights to Land by the common law.⁶ In reality, it was a declaration of an act of state and a reiteration of common law supremacy, *not* an abandonment of *terra nullius*, or 'recognition' of 'native title', itself a white term (Watson 1998: 41).

[T]his court is not free to adopt rules that accord with contemporary notions of justice ... if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency ... Although this court is free to depart from English precedent ... it cannot do so where the departure would fracture what I have called the skeleton of principle (*Mabo v Queensland [No 2]* (1992), in Bartlett 1993: 18-19).

In the 'courts of the conqueror' (Strelein 2000: 1) the common law is based in notions of *terra nullius* that justify dispossession and legitimise its existence and claims of sovereignty. The common law's 'skeletal foundation' is an ongoing act of dispossession of Land, Law and culture. While 'recognising' that the continent belonged to Aboriginal people, the common law has no 'shape' or 'consistency' *without* the *terra nullius* principle: extinguishment is its only goal (Bartlett 1993: xviii):

Native title is subject to extinguishment ... without the consent of the Aboriginal people or the payment of compensation ... [it] is a fundamental aspect of the compromise of the Aboriginal interest ... to give paramountcy and validity to the interests of the settler society (Bartlett 1993: xx).

In 'recognising' Aboriginal Law, the common law concept of 'native title' enunciated in the *Mabo* decision makes Aboriginal Law *its* business, re-defining in

the process Aboriginal Law's context, its application and parameters and its ontology. This negates and ignores that which gives content and form, authority and power to Aboriginal Law: the Land and its People. This is the assimilatory practice of the common law: to appropriate Aboriginal Law within its 'jurisdiction'. This appropriation is done in the name of 'equality', so that Aboriginal people may have 'land tenure'. However, our 'land tenure' is not the same. Liberal principle demands us all to be the same before the law and therefore 'served' by this one law, the common law. It is Murphy's (1999: 12; 2000: 6) 'all Australian context': the law fails to see 'Aboriginal people as Aboriginal people'.

According to Watson (1998: 29), we and our Law are threatened by the *muldarbi*, which in the language of her grandmothers, is a demon spirit of dominance and power that rapes and murders 'law, land and people'. It is the coloniser and his values that threaten the very existence of the Mother by destroying the ability of the people to practice their Law and therefore counter the *muldarbi*'s impact. Watson sees the *muldarbi* in its positioning of Aboriginal people as inferior, lawless and deviant—in case law, statute book and by-law, via institutions such as schools, the judiciary, police and government departments. The *muldarbi* has forgotten its own law of care, love and responsibility to the Mother and when we engage with, or leave our Aboriginal centre or Law, we:

participate in a process that works to erase or extinguish who we are ... and lead[s] us along a path to become one of them. A path we know leads to the death of all things (Watson 1998: 39).

Land 'rights' Acts and 'native title' Acts and their amendments, centre the

discourse in that of the *muldarbi*: Land as property, Land as economic entity. As Watson (1998: 39) says, the:

construction of Native Title by the Australian state is a *muldarbi*, it is a smokescreen that has taken us away from the important business of taking care of country.

Its narrative is furthered by Aboriginal engagement and acquiescence to its ontology and value system. Murphy (2000: 26) describes this as the 'discourse of authenticity'. When 'Aboriginal leadership' negotiated the Native Title Act, they did Law business the *muldarbi* way without the Land custodians (Watson 1998). This granted authenticity to liberal common law 'business' while undermining the way we do ours. Our subsequent support of the *Mabo* decision and the Native Title Act as a way to 'regain' our lands was the legitimising of our extinguishment.⁷ We will always be co-opted when we practise 'pragmatic expediency': when we make choices based in the value system of the coloniser because there are no other 'Aboriginal choices' valued or offered (Murphy 2000: 39). How else could this transported law ever attain jurisdiction over the 'very law of creation ... and our relationship to it' (Watson 1998: 41)?

The 'Terms of Reference' of Recognition

The Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (1986), the Northern Territory Law Reform Committee's *International Law, Human Rights and Aboriginal Customary Law: Background Paper 4* (2003) and the Law Reform Commission of Western Australia's *Aboriginal Customary Laws: Discussion Paper* (2005), are reports that attempted to address the 'recognition' of

Aboriginal Law, within common law jurisdiction. However all share the same 'terms of reference': the need for uniformity of laws between states; the need to ensure basic human rights; the problematic application of the criminal justice system to Aboriginal people; 'the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community' and, in later documents, (such as the Northern Territory's Law Reform Committee's *Background Paper 4* (2003)), international law.

Although extensive, 'comprehensive multifaceted [studies] proposing changes to laws, policies, programs and processes in many policy areas' (Hands 2006: 12), they are *fundamentally flawed*. Following the discussion above, it is clear that these liberal, democratic terms of reference assimilate Aboriginal Law because of their frameworks, context and ontology. Indeed, all these reports (and the tax dollars they represent) use liberal terms of reference in their consideration of Aboriginal Law, thereby removing Aboriginal context; they aim only to take 'customary law into 'account' (Clark 2002: 9) or to 'recognise' Aboriginal people's 'views, aspirations and welfare' (; Blagg et al 2002: 13), and thus assume the epistemological legitimacy of the common law in the decision making process. As Murphy (2000: 12) explains:

Current evaluation and problem identification practices consider Australian political culture an irrelevant influence in the methods used to identify problems, propose solutions and evaluate policy outcomes in Aboriginal Affairs.

If the *common law*, not Aboriginal Law, is the cause of poor life/health outcomes, the breakdown of Aboriginal communities, high incarceration rates etc, how will incorporation, and

therefore enmeshment, of Aboriginal Law bring solution?

Non-Recognition

If we examine the Hindmarsh Island affair, it demonstrates that the common law also practices *non-recognition*. The principles of psychological *terra nullius*, shown above to operate in the Land Rights Act and the *Mabo* decision, are also evident in this much-publicised tragedy. Non-indigenous authority, lawyers and anthropologists ran the case, while Aboriginal people were obliged to prove their current and ongoing links to Land, and were obliged to do so via common law concepts that violated Aboriginal Law (Harris 1996: 119). However, Harris (1996) argues that there are deeper narratives embedded in the Hindmarsh Island affair; factors already mentioned in this article. These are: 'Aboriginalism', the way the majority culture has constructed and known us; the assimilation and incorporation of Aboriginal Law into liberal discourse, particularly Women's Business of a secret/sacred nature; and the erasure and exclusion of Aboriginal Law due to it being outside common law conceptualisation, and political expediency.

The treatment of the Ngarrindjeri women ... is illustrative of the manner in which a narrative of community and society seeks either to incorporate Aboriginal people within the framework of Australian society or to deny their existence completely (Harris 1996: 118).

As Harris points out, Aboriginal Women's Law was taken out of context. Due to racist beliefs, Ngarrindjeri Women's Business to protect Kumarangk was 'transformed' by cultural heritage legislation, lawyers, 'experts' and the media, into discourses of the veracity and disclosure of knowledge, 'truth' and

ultimately, hegemonic *control* (Harris 1996: 119, 121):

It is the legal processes, moreover, that shape the testimony of the 'experts' to produce a narrative, which is validated by the courts as 'true' (Harris 1996: 121).

Aboriginal women who were paid to support the bridge development were portrayed by the white media as the 'genuine' Ngarrindjeri, because they contradicted those women who were entitled under Aboriginal Law to speak for Country, and who opposed the development (Harris 1996: 126-7). Media opinion 'recognised' these women as 'genuine' because 'those who have been assimilated to white values and standards of behaviour ... are also worthy of being treated as "equals"' (Harris 1996: 127). These women were expedient to 'the discourse of authenticity' (Murphy 2000: 26). They upheld values and beliefs that were not Aboriginal, and undermined the validity of Women's Law.

In the Hindmarsh Island case, we can see liberal democracy's desire for 'popularity' through creating 'for the mainstream an illusion that there is general well being in the lands of the colonised, all is equal and fair' (Watson 1998: 41). Four inquiries, a royal commission and a report came out of the Hindmarsh Island case (*Indigenous Law Bulletin*, 1999: 1). Liberal democratic values can always be marshalled in the form of an inquiry or royal commission to exemplify neutrality and the ability of the common law to rectify its 'errors', the 'essentially just nature' 'of the state legal structures and practices' (Burton & Carlen 1979, in Harris 1996: 209). This 'reiterative practice' bolsters the legitimacy of the common law by re-inscribing and re-fortifying its monologue, and as in the Hindmarsh Island affair, undermines the veracity

and jurisdiction of Aboriginal Law. It invalidates and vilifies Aboriginal people while claiming that everything is being done in the name of justice—yet justice is not being done.

The 'Gifting' Of Justice and Equality

Derrida's socio-ethical treatment of justice, law, hospitality and community suggests that the majority bestows a gift (ostensible socio-political empowerment); however, the ruse of this gift is that the giver affirms an economy of narcissism and reifies the hegemony and power of the majority (Arrigo & Williams 2000: 321).

Rights discourse positions Aboriginal people as passive recipients of the 'gifts' of equality and democracy 'operating through processes that reduce the right to a right that is bestowed to Aboriginal people' (Murphy 2000: 31). The 'rights' that were destroyed/taken are not the 'rights' that we receive now. We are given 'empowerment', we are given 'choices'; we are given the 'gift' of an apology. But these are only the gifts that *they* want for us, in their 'currency' and only what they are *prepared* to give (Murphy 2000: 39). These 'gifts' are legislated title grants in land, 'equality', 'recognition' or validity, *bestowed* on Aboriginal people to demonstrate common law/liberalism's power and to keep us indebted. Whatever the gifts proffered, however, they do not challenge white, liberal ideas or frameworks of power, cannot interrupt their prosperity—the prosperity that was secured and obtained by our dispossession. And so they cease to be gifts and are instead, a Trojan horse—they are a demonstration and re-inscription of hegemonic power.

As I have shown, there is remarkable consistency between the Land Rights Act, the *Mabo* decision, the terms of

reference of inquiries into the 'recognition' of Aboriginal Law, and the Hindmarsh Island affair, although the latter exemplifies *non-recognition* rather than recognition by the common law. What then is the difference between recognition and non-recognition by the common law if Aboriginal Law is taken out of context, liberalised and appropriated, *by both*? How can Aboriginal people/culture/land be 'recognised' if it is liberal, democratic principles that discern what form recognition will take? The maintenance of the common law's jurisdiction validates the ongoing colonising project of dispossession and genocide, thereby undermining Aboriginal Law. The discourse that underscores these projects is a monologue, 'predicated on assumptions and fictions of an Aboriginal subject' (Murphy 2000: 6) and our absorption and incorporation into liberal/common law frameworks—institutional and internal assimilation. When we look to white law to provide values, justice and our understanding of our own Law, our Law is taken 'out of context' because it is 'judged' against notions of liberalism and democracy.

There is a climate of racism, blinkered vision and incessant monologue that tries to make us strangers in our own land. There can be no freedom, no justice or equality if these values are terms of imposition that do not bear the weight of historical truth. However, what is needed is not just to be 'included' in 'your' world, but, simply, to be unimpeded in the expression of ours. Until then, liberalism, the common law and the state will remain tools of oppression.

Author Note

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Notes

¹ References to 'Aboriginal Law' refer also to the Law held by the Torres Strait Mob: their Law was in fact used as the 'test' case in the *Mabo* (No 2) decision. However, out of respect, I only claim to speak as an Aboriginal person and not as a person of Torres Strait Island descent.

² I acknowledge that the common law and international genocide covenants fail to consider the invasion and subsequent settlement of Australia as genocidal (and ongoing genocide at that) (see Watson 2000). Liberal principles of governance and bureaucracy have significance within the functioning of the domestic state as well as the United Nations, demonstrating an alliance that reinforces the arguments of this essay. Historical records and our Old People, tell of systematic extermination, government policies of biological absorption and cultural disruption (see Kidd 1997; Reynolds 1999; Haebich 2000; and Richards 2008). There is an inability to accept 'genocidal' as a description of government policy toward Aboriginal people and a refusal to acknowledge it as a founding principle of Australian society. However this denial betrays a guilt and complicity that maintains

the trauma for our people, burdens society as a whole and prevents its healing.

³ I acknowledge here that my understanding of Aboriginal Law barely scratches its surface: there is much I have not been taught about this multi-dimensional, non-linear and spiritually all encompassing, sacred Law. I am also constrained by expressing its concepts in a language that I am sure has little capacity to communicate them adequately, deprived as it is by the benefits of Aboriginal ontological and emotional experience.

⁴ By using the terms of reference of the coloniser—their law, language and viewpoint—it is easy to become incorporated into an argument that legitimises the coloniser's law. However, *dismantling* the ontology of the common law reveals the discourses and narratives of liberalism—equality, universalism and individuality—that continue to be employed to oppress our people.

⁵ 'Traditional owners' is a bureaucratic/legal term that has permeated the Australian lexicon. It is a short-hand, non-Aboriginal term, that implies a Mob's connection, love of and responsibility to Country, but fails woefully to convey the Aboriginal context of this relationship. W.E. Stanner wrote: 'No English words are good enough to give a sense of the links between an Aboriginal group and its homeland ... A different tradition leaves us tongueless and earless towards this other world of meaning and experience' (Stanner 1979, in Harkins 1994: 153).

⁶ I mean no disrespect to that Old Man who lived and died for his Country. The *Mabo* case demonstrates the duplicity of the state and the courts and how 'land rights' and the 'abolition' of the *terra nullius* principle can be harnessed to support liberal ideology.

⁷ Although this is my belief, I mean no disrespect to Mobs who have engaged with the 'native title' process. I have observed however, the heartbreak, impossible financial demands and physical and familial toll that this process exacts on our people and I question it.

IT'S CAPTAIN COOK ALL OVER AGAIN ...

EDWINA HOWELL

It's Captain Cook All Over Again

'Hey unc! Meet my friend here. Unc, Andy, this is Liz.'

'Good to meet ya Liz.'

'You too', she shakes his hand as he pulls his ciggy out of his mouth, with a grin.

'You know who her old man is eh?'

Danny's pointing across the road at the cake shop with graffiti on its wall. The empire of Yarra needs some common sense.

'That one, eh, Unc. But no problem', he's chuckling 'they don't see eye to eye, you know'.

God damn it Danny, I've asked you not to do that, embarrassed, and she's lost the conversation to another one now. Amy and Jess have come down from Dubbo and they're hassling Andy about where his son Bill could be. Bill's got the tickets to Tjimba and the Yung Warriors and they've still got to make it to see Nan before they leave.

She'd met Danny out here on the corner one day going for a coffee with her biological father. They'd liked each other and just started hanging out a bit, you know as friends do. The second time they'd met she'd jumped in the back of the car with him and his mate and taken off on a mission down to Toorak. It was hard rubbish day and they were parousin' for bunk beds for a couple of kids in the flats. She loved that kind of thing, scouring through the bits and

pieces people would leave on their front laws, and had loved it since she was a kid.

Liz turns back to Danny, here on the corner outside Safeway on Smith St.

'So how've you been bub? Sorry about that before hey, it's just this young one she's come from out of town and she's causing some trouble. Yeah, sorry, bub. So yeah, how've you been, eh?'

'Alright ... yeah, pretty good really. Just doing my thing, bit of recording and stuff.'

'You found a job yet?'

'Na ... kind of thinking I'll just wait till I finish this session and then I'll start looking again.'

'You're not back with that lawyer mob?'

'Na ... na ... still not sure about all that stuff hey. Probably go back to waitressing or the pub. Enough about me though, hey what happened with your case?'

'You mean the one with them undercover jungkai? You know what they said hey bub, they said 'You stinkin' Abo'. I've got witnesses. Witnesses who can back me up that it was 'Abo' you know, not 'ho-bo'.'

'Yeah that one. With the Legal Service down here?'

'Na, I went to the other one over at Fitzroy, hey. The coppers said they'd

drop three charges if I pleaded guilty to two.'

'What! But you're not.'

'Na ...'

'Hey, Danny, is it true that they get people to plead guilty at the other one 'cos it's easier?'

'Yeah bub ... But they're a good mob down at the Fitzroy one.'

She takes a swig of her coffee, and starts rolling up a cigarette.

'So, tell me what you've been up to bub?'

'Ah just the same old stuff, you know, bit of guitar, bit of recording. Ah ... and I've joined this choir which is awesome.'

'You seen that show on the 7.30 Report last week?'

'Na. You told me about it on the phone though. Should be able to get it off the net hey?'

'You know what they were doing bub? They were standing just over here, right, with their big film cameras and everything, outside Safeway there and were sticking it right on us. It's Captain Cook all over again. Sticking their cameras at us and not even asking us what we think. So I went over there eh, and went right up to the woman speaking and told them to stop bloody filming or I'd shove the camera in her face. If they wanted a story they could come over and ask. Yeah, oh sorry, bub, so yeah they did, come over and that. And we said our bit you know about the drinking here and the bus and the council and all.'

She watches his emotion as he recreates the scene.

'I'll check out the program. Hey, good on ya for telling them where to stick it.'

'So your old man over there, he's been stirring up trouble again.'

'Yeah, with that graffiti and he said something about an article in the Age. ... Hey Danny?'

'Yeah bub?'

'You know that it's not fair to introduce me like that. It's not because of all this stuff, it's just that it's kinda disrespectful to the parents I grew up with. It just grates on me, ok?'

'Ah bub, it gives 'em a bit of a rise, that's all, eh?'

'Yeah, I know, but ...'

'He really does care, you know. He just comes at things from a weird kind of angle.'

'Sure does.'

'He just reckons Yarra and the State government will never cough up the cash if someone doesn't complain loudly enough about the past. And that's what he thinks he's doing, although I know he can be full on. You know he's been arguing for this community centre down here for years? As a base with the right equipment for people to record their stories. He's had his eye on Collingwood Tech for ages.'

'Where the justice centre is?'

'Yeah, down there. But that was before it was turned into a court house.'

HOWELL: IT'S CAPTAIN COOK ALL OVER AGAIN ...

'Sure bub. I know what ya old man's like.
I'll 'ave a talk with him, eh ... Bub, have I
played you this one?'

He reaches for his mandolin case and
pulls the strap over his head, starting the
rhythm, in his body and out across the
strings of his voice.

'You've gotta listen to the words, eh
bub, not many fellas really listen you
know.'

You can't always get what you want
You can't always get what you want
You can't always get what you want
But if you try sometimes well you might
find
You get what you need
*(lyrics from 'You Can't Always Get
What You Want' The Rolling Stones)*

The Store at Pine Creek

Betty's son, Jimmy, had come up the morning after we'd stayed at their joint and told us about the Buranga festival, east of here towards the Gulf. Jimmy was playing guitar in a band that night and wondered if we had the space to give him a ride. In the end we went but we never saw Jimmy again. I remember how he'd given his last cigarette to you, how his laughter bolted out from beneath his face burnt by oil from a car engine he was fixing when he was young, and how, on our way out of Buranga, about 200kms south east, I'd held your head as we lay amongst the bloated dead cows in a gravel pit on the side of the road, your stomach cramming with blades. I'd never used the radio phone before and I was shit scared by who I was and where we were and the smell of dead ringing in my ears.

We'd met Betty, and her partner Martin, out the front of the general store in Pine Creek, and we stayed up at their camp for just one night after we'd bought them some beer because, in Pine Creek in 2003 only whites could get beer before midday.

We were a good hour and a half south of Katherine and it was another nine hours or so to Tennant Creek so this was it for groceries and beer for the next little while. A bench in the centre of the dusty general store presented us with the possibilities: brown skin bananas \$8.99kg, tomatoes caved and wrinkly \$9.49kg, onion and potatoes \$5.50kg and a wilted lettuce for \$4.99kg. So we'd picked up tinned beans, canned corn, peas and some more rice. A local looking fella, wearing an akubra, bought four pies and a two litre bottle of coke.

We'd been up round Darwin for a couple of months by that time, and were finally heading out south, it was a mid point, perhaps a turning point in two ways. On our way out of Pine Creek we'd parked on the side of the road so you could peel the bark from a Banyan tree to make string. I was sitting in the drivers seat and a woman came up, she was talking to me and she wanted some money or something and she started stroking my hair, and then my face. But it wasn't the stroking of a mothering touch. I could feel her bitterness, her grief running its fingers across my cheeks, her anger at the ease of my open smile, my traveling by, my moving through and leaving, leaving without having listened to her. But I couldn't really understand what it was that she wanted to say, but was I ever really listening?

And us? The 'turning point'? I had decided to put a flag in the sand, a marker of time, September. I would be returning home with or without you in September.

....

I'm diving for lily bulbs and Brett is sitting on the bank, having a stubby in the afternoon light with Martin, 'Show you fishing tomorrow, hey? Take you out, good country my country'.

Betty points, 'Over there. Get 'em that big one' and I dive into the tangled web of lily roots, trying to get to the bottom but I'm frightened of getting stuck. I come up gasping for air, and Betty's laughing. Down again, even more determined, grabbing a hold of the slippery stems, pulling myself to the bottom. I'm diving for the root as Betty told me to. This is the part that gives the brightest colour for dying string, but I'm out of breath again and struggling up through the thick brown-green webs of lily to breach at the surface, stripping

the hair back from across my face. Betty is almost rolling on the grass at the sight,

'Hey sister, I been getting 'em this one.'

....

Brett's pissed off at me for bringing him here. Betty was so excited about having us as guests but you can tell that she doesn't come much either. In this place you're either a Christian or you drink – black and white, like that.

The tin roof is shifting with the falling of the coolness of night. And the singing is gorgeous. It's in language this one. And this is what Betty wanted us to hear. It's almost all women, and young kids, and then the preacher, his assistant, and three teenage boys setting up the gear for their band. I feel Brett shifting awkwardly next to me on the wooden bench that we're sharing up the back in the dim light and the preacher's assistant takes up the microphone. The sound is hard against the tin walls as the end of the wire runs on the concrete floor, but this isn't why I feel Brett's body become sharp. The young preacher is pacing as he speaks, the rhythm and tone builds to storms of fervor and then lulls in the calm between waves:

The time has come my brother's and sister's. The signs are here. Praise the lord. You see dead animals on the side

of the road. It's time, Amen, to let our black brother's and sister's know that Armageddon is near.

We need to search for our brothers and sisters out bush and gather them in. We need to let them know, Amen, that the signs are here and they are welcomed by God to join us on our journey to heaven. Praise the Lord.

Brett can't stand it. He gets up and walks off. And I'm left here, not wanting to be here anymore either, waiting for the band, movement enough for me to make a subtle escape.

Later Martin tells us how the church group comes up from the town once every month to put on the show. He'd gone to live down there for a bit but 'they don't listen to Aboriginal way' he'd said. So he came back up here where it's harder to stay off the grog, where it's harder to live. We've been talking for hours. It must be near midnight and he needs to be up to go out with the CDEP crew in the morning to fix the fences that keep the ferals out. But he'll be back to take us fishing in the afternoon he promises. I pull out our swag from out the back of the truck and lay it down by the softening red coals. I'm in love with this amphitheater of stars as I hold Brett's body close and fall into sleep.

Port Hedland

They'd been traveling north of Port Hedland for hours, but she's been somewhere else out the window as the red dirt and grey-green scrub washes her by. On the seat with its grease marks, sweat marks, was the list of names, twenty-one contacts and their ID numbers. You had to have both, a full name and their immigration detention number to get in. She'd been given the list through a web of people - from Melbourne, to Sydney, to Port Hedland the list had been siphoned to end up in her inbox just a week ago.

She'd called a local contact number given to her from a Refugee and Immigration Legal Service in Melbourne. It was the local minister.

Hello. I was wondering if I could speak with Patricia, please?
Can I ask whose calling?

Sorry, I'm Liz. I've been trying to contact Patricia about visiting the detention centre.

She heard his footsteps down a hallway, an open wire door, and a softer paced step returns to the phone. They speak and Patricia explained:

You might have to wait a bit. This can be a very difficult thing for those inside. Just seeing someone from outside can bring up a lot of pain. Some days they'll be OK, some days they just can't face it. Do you understand?

Yes, of course. Thank you. I really don't want to make it harder for any one. I just thought if there was a chance to let people know back in the city what it was really like, well you know, that it could maybe make some kind of difference.

'Do you want to go back?' Brett asks for the second time but his voice has raised in pitch and volume, just a little, enough for her to hear his thoughts. Yes, I think I do. But she sits there eyes still her eyes out the window. 'I really don't mind you know. You want to don't you?' Sometimes she finds it so hard to say what she wants if she thinks it's not what he wants to hear, but she turns to him, 'Yes I think I do'. She watches his breath deepen, his bare chest opening the skin across his ribs. He pulls the car to the side of the road, turns to her, knows her, and swings the car around.

...

Three days in a town marked by the arch of salt mountains at its entrance. Each day they go to the pool. In the city, two years later she is taken here to her memories through the footage of the Freedom Rides protesting at the apartheid in rural towns in northern New South Wales. The scenes of the protests at Moree pools in the 1960s remind her of the local Aboriginal kids who came back each day to beat her and Brett at bombing competitions and underwater races and how the time passed so quickly with their games.

...

'Sit down please', the lady in a white and blue security guard suit says from behind the glass window of the reception desk. Finally they are here sitting, waiting, nervously on squat padded chairs in the reception of the detention centre. She feels the sweat drip down her side body and the air conditioning makes her queasy. There's a glass cabinet in front of them that they move to during the hours that they wait, with a woven boat of dried grass, a papier-mâché family propped up in the corner and an ocean of blue and green beads spilling towards them. A sand

mosaic bends the edges of a glass bottle. And they wait.

She's worried they're intruding, that she got Brett to turn the car around and spend three days in this shit-hole of a town for nothing, that the men they've come to see can't even get out of bed to see them, and that she's making things so uncomfortable just because she thinks it's important to know. She remembers in a place of river red gums, washing charcoal and paint from the children's clothes, that this process of opening can hurt and it carries the responsibility of return. For once you've been given the gift of a story, someone's faith in you, you must return.

After two hours the manager comes with his boots and calves the size of a decent thigh. Stand over tactics - they don't understand why.

In the court yard, the visitors' area, they stumble past stories, through stories, tentative with their words, careful not to prick the skin of deeper suffering. Remeir and Azim had learnt English so they could understand what was being said on the news, how likely it was that Howard could be knocked out in the November election. Their lives depended on it. You could see it in the shift of their eyes as they spoke - the way a person disappears through their pupils when hope begins to disappear. But together they do share some laughter and a kick of a hacky sack around a dusty dirt floor.

Later that afternoon they find out how Remeir and Azim had been eager to meet them early that morning, but they had been told their visitors had failed to arrive.

...

Back in Melbourne, two years later, Liz reads Azim's files. She's thought about marrying him, yes just for the visa. To her it makes more sense to get married for a life than for 'love'. They said you were lying because your scar is straight and being beaten by police doesn't make straight scars, they know this. For the shifting pages of the Immigration Review Tribunal, this is fact. They beat you in a cell until you became unconscious, falling onto the side of a table and you now have a sharp line that speaks your story across your back.

Author Note

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WITNESSING WHITENESS: LAW AND NARRATIVE KNOWLEDGE

TRISH LUKER

Abstract

In this article, I interrogate the reception of testimonial evidence given by Lorna Cubillo in the trial of *Cubillo v Commonwealth* (2000) ('*Cubillo*'), the landmark action taken by members of the Stolen Generations. Drawing on Lyotard's account of the distinction between narrative knowledge and scientific knowledge, I argue that while law makes its claim to legitimacy through demonstrable proof, it must ultimately seek an appeal to narrative forms of knowledge. The relationship between law and narrative is key to a critical reading of the *Cubillo* decision, which provides an important site for an analysis of the function of whiteness in the treatment of evidence in Anglo-Australian law. I argue that through reliance on legal positivism as the method of judicial interpretation, the decision privileges forms of 'scientific' knowledge which most readily support dominant paradigms of historical truth. At the same time, the significance of 'narrative' knowledge to the arguments presented in the case, particularly that which does not support notions of white cultural memory, is discredited.

Introduction

When the newly-elected Prime Minister, Kevin Rudd, delivered the National Apology to the Stolen Generations on 13 February 2008 (Commonwealth of Australia 2008), thousands of people were present at Parliament House and gathered across the country to bear witness to the event. Members of the Stolen Generations and their families had travelled long distances to be in Canberra for the occasion. It was a day

characterised by strong emotion and there was a lot of crying. In his speech, Rudd re-told the story he had heard from Lorna Nanna Nungala Fejo, a member of the Stolen Generations whom he had met a few days earlier. Rudd acknowledged that Nanna Fejo's was just one story: 'There are thousands, tens of thousands of ... stories of forced separation of Aboriginal and Torres Strait Islander children from their mums and dads over the better part of a century'. Rudd said that these stories 'cry out to be heard', but that '[i]nstead, from the nation's parliament there has been a stony and stubborn and deafening silence for more than a decade'.

Lorna Cubillo was there in Parliament House, finally receiving the acknowledgement that she and Kwentenyay¹ Gunner had sought from the Commonwealth Government less than a decade earlier.² Cubillo and Gunner had told their stories in the Federal Court in the landmark case taken by members of the Stolen Generations.³ In the trial, Justice O'Loughlin bore witness to Cubillo's traumatic testimonial account of having been stolen from her family and community when she was only six years old. However, when O'Loughlin heard Cubillo's account of her forced removal and incarceration, he did not declare that it was crying out to be heard. Rather, O'Loughlin found Cubillo's story at times to be irrational, and described some of her testimony to be the product of 'subconscious reconstruction', having escalated into 'vitriol' (*Cubillo* [593]). He determined that she had not met the burden of proof.

In his decision, Justice O'Loughlin found that there was neither enough evidence to support a finding of a general policy of removal of 'part-Aboriginal' children, stating that 'if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants' (*Cubillo* [1160]). Determining that there was a prima facie case of wrongful imprisonment of Lorna Cubillo, he nevertheless decided that the Commonwealth was not liable because the burden of proof had not been satisfied, highlighting what he regarded as the incompleteness of the history and the lack of documentary evidence, referring to it as a 'huge void' (*Cubillo* [9]).

There is a substantial body of literature concerning the use of narrative analysis in legal theoretical scholarship,⁴ but as Kennedy (2002: 70) points out, contemporary attention to narrative in the field of law and literature tends to focus on what she refers to as the 'high culture' end of appellate courts, at the expense of the 'low culture' end of trials, where evidence is actually presented and assessed. In a trial, judicial assessment of the veracity of witnesses' statements is performed on the basis of observance of their demeanour, manner of responding to questions, and the perceived congruence and credibility of accounts. Techniques of cross-examination are intended to elicit the truthful, or most convincingly infallible, account of events. The significance of visual perception—that is, witnessing—is itself the basis on which the witness is most commonly accorded the authority to testify in the trial. Witnesses are expected to testify to what they have seen or heard and to be able to separate such observation from other forms of perception and sensation.

In this article, I interrogate the reception of key sites of testimonial evidence given by Lorna Cubillo and other witnesses in the trial, focussing on the role of race and gender in the construction of knowledge. I draw on Lyotard's (1979) distinction between two forms of knowledge, scientific knowledge and narrative knowledge,⁵ arguing that the relationship between law and narrative is crucial to a critical reading of the trial and judgment. In particular, I will argue that Cubillo's testimony reveals the significance of whiteness to the common knowledge she recounts, the truth of which she claims is verified by an oral tradition. However, this truth is effaced in the judgment, which I argue reveals white race blindness within the law.

Legal positivism, the dominant jurisprudential discourse of Anglo-Australian law, asserts that law is a system of pre-existing rules and conventions which are derived from observable facts and empirical sources—an autonomous phenomenon, exclusive of other areas of knowledge. Fundamental to the perspective of legal positivism is the belief that the social validity of a law must be strictly separated from questions of ethics and morality. Legal positivism also resists knowledge affirmed affectively, relegating it to the sphere of the irrational and deceptive. However, affectivity is a dominant feature of Stolen Generations narratives and should not be readily dismissed. I examine the reception of Cubillo's testimony concerning her loss of language, focussing on the court's rejection of her evidence on the grounds that it was irrational.

Knowing Law

The principles of evidence law operate on the basis of a series of rules which are said to guide the trial judge when

making decisions as to the admissibility of information presented by either party to a dispute. Evidentiary rules, which courts have both discretionary and mandatory powers to apply, are largely formulated around the principles of relevance and exclusion. One of the key paradigms for the evaluation of evidence is narrative coherence where an assessment is made on the basis of the formulation of a story which best concords with the evidence presented. Twining (1994: 71–4) points out that the rationalist model underlying the legal theory of evidence is characteristic of post-Enlightenment Western thought, where truth is seen to stand in direct relationship with reality and human subjects are able to acquire objective knowledge through processes of reason and empirical observation. Twining refers to this as the rationalist tradition of evidence scholarship. Feminist approaches to epistemology have revealed that the normative subject who is able to take this objective stance is inscribed as masculine—‘the all-perceiving, self-purposive subject of Cartesian logic’, a subject posited ‘*a priori* to the world, privileging *sight* as the yardstick to measure practico-empirical claims to truth’ (Williams 1994: 165).

While it has long been recognised that evidence law functions as an epistemology, and therefore as a site for theoretical investigation, it has received relatively little critical attention.⁶ Like other forms of post-Enlightenment Western knowledge, the legal conceptualisation of evidence and proof is based on an empiricist, scientific model (Davies 2008: 127). In one of the few deconstructive readings of the epistemology of evidence, Haldar argues that proof is the performance of the revelation of truth through ‘the perceptual capacity of sight’ (1991: 172). He points to the function of vision not only to documentary evidence, but also to the assessment of the veracity of

oral testimony, the preferred form for the delivery of evidence in trials (1999: 90).

In law, truth is accessed through language and evidence is seen as a way of mediating the relationship between words and truth. In a common law trial, it is oral testimony which provides the primary basis on which truth claims are verified. The assessment of evidence and its claim to truth is based on notions of narrative coherence and rationality. Evidence which is most readily regarded as veracious is that which is articulated by a sovereign subject. Such a subject is seen to speak the truth, producing truth as an effect of discourse. Yet it is truth which is regarded as the cause of the production of knowledge. If truth is produced in language, then it cannot pre-exist its own articulation; this substitution of effect for cause is therefore a *metalepsis* (Spivak 1987: 204).

In legal proceedings, the veracity of testimony is determined on the basis of an assessment of the demeanour of witnesses and the plausibility of their narration. As feminist and critical race theorists have argued, this assumes a normative model for the ideal testifying witness, namely the white, able-bodied, heterosexual, middle-class man (eg. Thornton 1990: 1). However, there is no universal standard for knowledge or truth. Our understandings of truth are complex constructions emanating from our subjective experiences; they are inevitably contextual and are produced in language. Nowhere is this more apparent than in the examination of testimony delivered in legal proceedings.

Interest in multidisciplinary studies of the testimonial form, in processes of witnessing and in the production of life writing has largely been generated in the wake of the Holocaust and other genocides, historical injustices,

colonialism and forced migrations.⁷ In Australia, the recent production of and interest in testimony studies, oral histories and life writing has overwhelmingly been propelled by the testimonial stories of members of the Stolen Generations. Overall, however, accounts of the testimonial form have focussed on textual representations and there has been minimal attention to the production of oral testimony in the courtroom. While in law, testimony is the preferred form for the delivery of evidence, I would argue that the testimonial voice serves as a challenge to legal positivism, by virtue of its subjective character; in legal proceedings, the tenor of the testimonial voice is highly constrained.

The Epistemology of Proof

In his influential work, *The Postmodern Condition*, Lyotard uses the term 'modern' to designate any science that legitimises itself with reference to a metadiscourse, and seeks truth through 'an explicit appeal to some grand narrative' (1979: xxiii). Pointing out that 'scientific knowledge does not represent the totality of knowledge', Lyotard argues that 'it has always existed in addition to, and in competition and conflict with, another kind of knowledge' (1979: 7) which he refers to as narrative knowledge.

Within Lyotard's framework, law can be seen as a form of scientific knowledge. As Davies (2008: 332) points out, Lyotard's central concern with the legitimisation of knowledge, with the question 'who proves the proof?', is clearly a legal question because it concerns the justificatory foundations for knowledge and points to its inextricable interconnection with power. Such issues are fundamental to postmodern interrogations, which as Lyotard elaborates, can be characterised as providing a challenge to the

dominance of metanarratives, proposing a more fragmentary and interconnected conceptualisation of knowledge.

Law legitimises its claims to knowledge through the use of evidentiary techniques which require propositions to be susceptible to proof. In particular, in positivist jurisprudence, laws are derived from facts and other observable phenomena. Within law, the principle of adversarialism, involving contestation between competing claims, is believed to *produce* a verifiable 'truth'. Rules governing legal procedure are designed to ensure that truth will emerge at the end of the day. Lyotard's analysis of claims to legitimacy highlights the correspondence between science and law and the interrelatedness of these discourses with power and knowledge in western discourse. In particular, he points to the 'strict interlinkage between the kind of language called science and the kind called ethics and politics', pointing out that they both stem from the perspective of the Occident (1979: 8).

Lyotard's 'Occidental perspective' can be interrogated as the site of whiteness, which, while universalising certain forms of knowledge and truth, disguises the racialised position from which it is produced. The invisibility of the whiteness of dominant epistemologies produced in post-Enlightenment thought is effectively achieved through the racialisation of its object. As Moreton-Robinson elaborates, whiteness functions as an 'ontological and epistemological *a priori*', constitutive of what can be known and who can know, 'producing the assumption of a racially neutral mind and an invisible detached white body' (2004: 81).

While law, like science, makes its claims to legitimacy through demonstrable proof, I would argue that it must

ultimately seek an appeal to narrative forms of knowledge. Law is a discourse in which the world is presented in a narrativised form, emerging from a desire for order and coherence (Douzinas et al 1991: 107). Chronology is central to legal evaluation, as is concordance between different witnesses' accounts of the sequence of events. Adjudication specifically entails the choice of one party's story over another, delivered by legal advocates using rhetorical strategies. One of the key paradigms for the evaluation of evidence is narrative coherence where an assessment is made on the basis of the formulation of a story which best concords with all of the evidence presented. In the discourse of law, there is the belief in the possibility of the reconstruction of the past through testimony and documents, as if these somehow exist outside language and signification.

Common Knowledge and Whiteness

An analysis of the treatment of evidence in the *Cubillo* trial highlights how law's regard for truth is seen to authorise its claim to knowledge. One of the ways the desire for narrative coherence is pursued in the trial is through well-established techniques of cross-examination, whereby a witness' memory of events is 'tested'. During the *Cubillo* trial, the veracity of the applicants' evidence was repeatedly challenged on the basis of its consistency. This involved intense cross-examination in relation to the specific details of witnesses' memories of events which occurred up to 50 years ago—events which often bore little direct relationship to the issues raised in the trial and were *not actually contested* by the Commonwealth. Clearly, the purpose of this questioning was to point to the possibility that the witnesses' evidence was unreliable; but it also highlights the way certain narratives are considered

acceptable in legal discourse because they conform to notions of pre-existent truth.

During cross-examination, Cubillo was questioned in relation to her removal from Banka Banka station to Seven Mile Creek. This was the first of a number of occasions on which Cubillo claimed she was removed from her family and community without warning or permission. On this occasion, Cubillo remembered that she was with her grandmother, who hid her when two men approached. She said that the men took her from the care of her grandmother on a horse to Seven Mile Creek. During cross-examination, Cubillo was asked detailed questions about the appearance of the two men, specifically in relation to their height and hair, and also about how she knew who they were. I have reproduced a detailed extract from the transcript of trial in order to demonstrate my argument.

Mrs Cubillo, I want to ask you some questions about what you say about your removal from Banka Banka. You've identified two people who you say were involved in your removal, Barney McGuinness and Bill Harney; is that right? --- That's right.

What did Bill Harney look like? --- He was a European man.

Was he tall, was he short? --- He wasn't tall.

Sorry, he wasn't tall? --- He didn't appear to be tall.

Would you say he was taller or shorter than I am? --- He was a medium sized person. Now, I wasn't going to take a - a tape and measure him. I'm just trying to tell you my visions from my childhood.

I'm not asking you to tell me how many inches? --- Well, you're asking me to ---

I'm just trying to get a sense of what the man looked like, Mrs Cubillo? --- He was a European man.

What was his hair colour? --- As far as I know, he wore a hat.

So you don't know what his hair colour is, is that what you're saying? --- He would be a normal Australian, but he didn't have blonde hair.

Did he have black hair, brown hair? --- Not black hair, probably in between.

In between what? --- Well, it wasn't blonde and wasn't black - in between.

Is it what you've previously described as sandy hair? --- That's a possibility.

You didn't really get a good look at Mr Harney's hair, is that really what you're saying, because he wore this hat? --- I would have had to be very close to the person to really know what he was - he was just a person who removed me and I will just remember him as such.

Did he have a moustache? --- He was a European man.

Do you remember whether he had a moustache or not? --- I remember him from the day he removed me.

Do I take it that that's a no, you don't remember whether he had a moustache or not? --- I didn't look at his face; I just knew that he was a white man and that he drove around the community where I lived and I recognised the car.

What do you say he was wearing on the day he came to Banka Banka? --- He wore the same clothes like everybody else - trousers and shirt and a hat.

There was nothing unusual about his clothing? --- I don't think he was in uniform but he wasn't a policeman.

Do you say that you have always known that it was Mr Harney and Mr McGuinness who were involved in your

removal? --- My grandmother told me who those people were.

So she was the person who told you it was Harney and McGuinness? --- I mean, she was the adult and I was the child.

You got their names from your grandmother? --- That's a common knowledge in the community.

So it's both your grandmother and common knowledge? --- Everybody in the community knew who these people were.

But there was nobody else present apart from your grandmother and the two men who you've described as Harney and McGuinness on the occasion of your alleged removal from Banka Banka? --- Barney McGuinness was the only half-caste male, when he removed me and I saw him in Phillip Creek, there was nobody else during that time.

Yes. I just want to be certain. This incident you've described, when you and your grandmother were sitting down in the creek, there were no other members of your family with you at that time of your removal, were there? --- We were hiding out away from the main station but still within the bounds.

Yes. But when you say 'we were hiding out', you're just talking about you and your grandmother, is that right? --- That's right.

Yes. And your grandmother, you agree, died before you left Phillip Creek. So you've known for more than 50 years that Mr McGuinness is the man, you say, who was involved in your removal. Is that your evidence? -- - I will always remember that, Ms Hollingsworth.

Mm mm. And Mr Harney was involved; you've known that for the last 50 years,

haven't you? --- Yes, I do (Transcript 13 August 1999: 1324–6).

During cross-examination, Cubillo was asked questions about an event which occurred more than 50 years ago, when she was about six years old. By focussing on the detail of Cubillo's memory of the event, specifically the identity of the individuals in question, the cross-examiner, Ms Hollingworth, attempted to elicit evidence which conforms to a model of scientific knowledge where, in order for something to be true, it must be susceptible to proof. The use of a scientific model for proof serves to efface the significance of the effluxion of time to the substance of memory and also fails to take account of the complexities, and significance, of childhood memories. The assumption underpinning cross-examination is that the failure to provide a comprehensive account of an event or a description that identified an individual provided the basis to render the evidence unconvincing; that is, any inconsistency or contradiction in the information recalled by the witness brings into question the reliability of the witness' memory.

While asking questions about the visible appearance of individuals is standard practice in cross-examination in attempting to establish identity, such forms of interrogation belie the complexities and specificities attendant on the way in which subjects remember events and people. To take one simple but fairly obvious point, for example, by asking: 'What did Bill Harney look like? ... Was he tall or short?', Hollingworth failed to acknowledge that a six-year old child is unlikely to make an assessment of adults on the basis of their height, invariably a relative phenomena. As she attempted to answer the question by explaining her dilemma, 'He didn't appear to be tall ... I'm just trying to tell you my visions from my childhood', the

cross-examiner characterised Cubillo as an evasive witness, because it was assumed that height is an objective fact—a form of scientific knowledge—and that Cubillo's inability to identify Harney on the basis of height indicates her unreliable memory.

However, what the cross-examination does elicit is of far greater relevance to the claim than Harney's height, because significantly, what Cubillo does remember is that Harney was a white man. While she is unable to identify the colour of his hair and whether or not he had a moustache, Cubillo poignantly responds to Hollingworth's questions by pointing out that her memory is founded in the occasion being that of her removal from her grandmother. She said she could remember Harney because he was a white man, later pointing out that he was the *only* white man who drove the car in which she was removed. By pointing to the way in which she is able to recall the identity of Harney, Cubillo highlights a key characteristic about which she was not questioned, but which identifies him most effectively. Harney's racial identity would appear to be his distinguishing feature, as the only white man known in the community to drive the car in which Cubillo was taken. Hollingworth's failure to question Cubillo on racial identity is characteristic of the pervasiveness of white race blindness within the law, and hegemonic white culture more generally.

But Cubillo's evidence points to more than Harney's racial identity, for what she highlights is the importance of the racialisation of the context of her removal—the colonialist and assimilationist regimes of power which facilitated her kidnapping. An examination of the testimonial process reveals the way these racialised regimes of power and discourse are replicated in the courtroom when Cubillo is cross-

examined. When questioned about how she knew it was Harney, Cubillo said that her grandmother had told her, that it was 'common knowledge' and that '[e]verybody in the community knew who these people were' (Transcript 13 August 1999: 1324–6). However, during cross-examination, there is a clear attempt to highlight an absence of verification for Cubillo's evidence in the form of 'proof', such as the presence of other witnesses.

Cubillo's evidence, however, clearly identified the existence of a well-established narrative of Indigenous child removal by white men in her community. Such knowledge does not require recourse to methods of proof; indeed, as 'common knowledge' it cannot be verified in this way. How many witnesses would be required to testify to the existence of 'common knowledge' for the claim to fulfill the requirement of legal proof? Would the presence of another family member at the time of the removal have provided the verification necessary? Significantly, the eye-witness accounts of other witnesses did not result in evidence sufficient to convince O'Loughlin of the veracity of her claim. Jimmy Anderson, who lived at Banka Banka as a child and was also removed to Six Mile Creek, gave evidence that it was 'welfare', specifically naming Mr Sweeney and 'old Bill Harney' as the men who removed him (Transcript 16 August 1999: 1420–1). Kathleen Napananka, who lived at Banka Banka, also gave evidence that her mother had three children with white fathers, all of whom were removed (Transcript 26 August 1999: 1864–5).

The question of Cubillo's memory of Harney was discussed by Justice O'Loughlin in his decision. He highlighted the fact that amendments were made to her statement of claim which called into question whether or not she was

able to reliably identify Harney as one of the two men who removed her on this occasion. While O'Loughlin did not consider there to be anything 'sinister' in the occasion of errors, he did see such inconsistency as evidence of the difficulties experienced by witnesses in attempting to remember events which occurred so long ago (*Cubillo* [405]). However, the unscientific nature of Cubillo's memory was used against her and O'Loughlin rejected her evidence, describing it as an 'exercise of reconstruction' (*Cubillo* [406]).

O'Loughlin's appraisal of Cubillo's evidence failed to recognise the significance of the common knowledge of which she spoke so clearly. Contrary to his conclusion, the importance of Cubillo's evidence lay not so much in a claim that she, individually, had 'known for the last fifty years or more' of the identity of the men who removed her—this was, in fact, not her expression, but that of the cross-examiner. The significance of her evidence lay in the importance of racial identity as an aspect of common knowledge, and particularly of white male racial identity as a signifier for the potential danger of theft of children. It is the racialised regime of colonial power and the economy of assimilation which was crucial to her claim, not her individual memory of an event which occurred half a century previously—an event which was not actually contested by the Commonwealth.

While O'Loughlin acknowledged the tenuous nature of memory as knowledge, in requiring evidence to support an 'important finding of fact' (*Cubillo* [405]), he sought a form of scientific knowledge—knowledge which lacked contradiction and was supported by empirical verification. In requiring evidence which complied with a positivist framework of jurisprudence, O'Loughlin attempted to submit

Cubillo's evidence to the rules required to legitimate scientific knowledge. However, as Lyotard points out, it is not possible to 'judge the existence or validity of narrative knowledge on the basis of scientific knowledge' or *visa versa*, because the relevant criteria are different (1979: 26).

When Cubillo was cross-examined in relation to the occasion of her removal from Banka Banka station, a traumatic event which occurred over 50 years ago when she was a small child, she attempted to answer the questions on the basis of her memory and what she had been told. However, O'Loughlin was unconvinced that Cubillo remembers this occasion accurately, that 'perhaps, over the years, what Mrs Cubillo remembers has become mixed with what she has been told', concluding that she had 'engaged in an exercise of reconstruction', possibly 'subconsciously' (Cubillo [405–6]).

Speaking of the Mother Tongue

According to Lyotard's framework, notions of truth and rationality function, within post-Enlightenment conceptual paradigms, as metadiscourses. Such paradigms rely principally upon binary constructions, where, as one in a series of oppositions, rationality is posited *contra* affectivity. Rationality is seen to provide objective and incontestable truth, whereas affectivity is regarded as irrational, tenuous, unstable and impossible to quantify. Feminist epistemologies provide critiques of the juxtaposition of rationality and affectivity, revealing how rationality is equated with knowledge, cognition, authority, masculinity and the public realm, whereas affectivity is aligned with irrationality, feelings, corporeality, femininity and the private world of the individual (eg. See Alcoff & Potter (eds) 1993). Constructions of rationality and affectivity are also historically and

culturally specific, for the distinction between reason and emotion emerged in European philosophy in the context of the rise of modern science and positivism, coinciding with the expansion of colonialism and of the dominance of Western European colonial power throughout the world. The racialised, non-white subject—the 'other' of western discourse—is also aligned within this paradigm to the realm of affectivity and irrationality.

The evidence given by Cubillo in relation to her loss of language and its discussion by O'Loughlin provide interesting sites for an examination of the law's resistance to affectivity. Loss of language was one of the key issues in the case. Cubillo and Gunner both gave evidence that they were forcibly prohibited from speaking their own languages in the institutions in which they were placed and that this resulted not only in the children's difficulties communicating with each other in the homes, but also meant that they were unable to communicate with their families when they later had contact with them. This experience was most poignantly described in relation to their reunions with their mothers—occasions, which for each of them, occurred only once. Loss of language was also highly significant to their claims of loss of cultural, social and spiritual life and was particularly relevant to decisions they each made about ongoing contact with their families and communities.

Cubillo's language groups are Walpiri and Warumunga. She gave evidence that these were the languages she spoke as a child before she was removed. While it is unclear how old she was when she was taken to the Retta Dixon Home, she was possibly only eight years old. When giving evidence in relation to her loss of language and in response to a series of questions in cross-examination, Cubillo clearly became

frustrated and angry. While this did not prevent her from answering the questions articulately, her evidence was not accepted by O'Loughlin because it displayed emotion.

During cross-examination, Cubillo was questioned in detail as to whether she had previously learned any English at the mission school at Phillip Creek before being taken to the Retta Dixon Home and whether she used English as the primary form of communication with the other children and the missionaries. Cubillo gave evidence that the children attended school only for about one hour per day, and that their lessons consisted of recitals of simple words and songs; she said that she spoke a little pidgin English (Transcript 13 August 1999: 1301–2). At the Retta Dixon Home, Cubillo gave evidence that the children were forced to stop using their languages and that they were 'flogged' when they did so. Counsel for the respondent challenged Cubillo's claim:

And I put it to you that you did not cease to use your traditional language at Retta Dixon because you were flogged; rather you ceased to use your traditional language out of necessity of learning English—you understand the question? --- Miss Hollingsworth, I was flogged. I was flogged. Our language was flogged out of us. I know what happened to me (Transcript 13 August 1999: 1301–2).

When citing this exchange in his judgment, O'Loughlin again identifies Cubillo's testimony as an 'example of subconscious reconstruction', this time, describing it as having escalated into 'vitriol' (Cubillo [593]).

It is difficult to establish the grounds upon which O'Loughlin refused to accept Cubillo's claim that the children were flogged for speaking their languages. When giving evidence

about his treatment at St Mary's Hostel, Gunner also used the term 'flogged' to describe the punishment he received when he spoke his own language, in addition to other occasions, for example when he ate food with his fingers (Transcript 16 August 1999: 1510). Other witnesses, including Jimmy Anderson, who had also been an inmate at the Retta Dixon Home, said the children got strapped around their legs if they spoke in their own languages (Transcript 16 August 1999: 1426). The implementation of the policy of assimilation through the refusal of language and culture has been well documented (eg. Human Rights and Equal Opportunity Commission 1997: 202).

However, in his decision O'Loughlin posited 'practicality' as the reason for the missionaries' discouragement of 'the children speaking their native tongue' (Cubillo [593])—the practical necessity of communication by means of a common language. Practicality accords more with the discourse of rationality than the 'vitriolic' anger and trauma of a person who is asked to recall and describe the experience, as a child, of being punished simply for speaking. It suggests an understanding of a choice to speak English as a second language, for example spoken outside the home environment, but where the first language is used with family and community. However, this is not the context described by Cubillo of the loss of her language; rather, she is describing the trauma experienced as a result of the theft of her mother tongue. Cubillo did not give evidence that the children were punished for speaking on the grounds of practicality, she said that the children's language was flogged out of them. It is O'Loughlin's interpretation of Cubillo's evidence which assumed the notion of practicality. In superimposing the rational discourse of practicality, O'Loughlin effectively erased and

dismissed the powerful evidence of anger and resentment.

Loss of language was fundamental to the plaintiffs' evidence in relation to their reunions with their families. Cubillo's testimony about the experience of seeing her mother was a moving description of the extraordinary pain and frustration she experienced when unable to communicate with her mother:

Were you able to speak with her when you got to Phillip Creek? --- *It was very difficult because mum only spoke limited English and I spoke to her through other relatives like an interpreter and it was very difficult to let her know how I felt and to understand what she was saying to me. We just cried and hugged.*

...

What did you think, Mrs Cubillo, about seeing your mother again?---I was confused. I wanted to be with her, but I felt that my life had been severed from the time I was removed from Phillip Creek and I could not communicate adequately with my mother.

Did you see your mother again after that visit?---No, I didn't (Transcript 11 August 1999: 1137).

Cubillo said that while she wanted to be with her mother, she felt that the way she had been dissociated from her family and the impossibility of speaking with her made contact painful. In evaluating this evidence in his judgment, however, O'Loughlin points out that while Cubillo knew where to find her mother, Maisie, she did not visit her again. He saw this as inconsistent with her claim of forced separation.

Cubillo was completely separated from her family and community when she was

about eight years old; she is now unable to speak her own language; she is unfamiliar with many aspects of her traditional culture; she did not see her family or community for the remainder of her childhood; and when she did see her mother, she could not speak to her. In the trial she expressed feelings of loss, loneliness, alienation, anxiety and depression—all of which she has continued to experience throughout her adult life. Nevertheless, O'Loughlin determined that this was inconsistent with her decision not to return to her community. In doing so, he elevated the discourse of 'rational' behaviour, suggesting that she was not motivated sufficiently to have contact with her mother—a woman she had not seen since she was a small child and with whom she could not speak.

Over-writing Cubillo's narrative of loss and alienation, O'Loughlin diminished her evidence of pain and trauma and replaced it with an alternative story of resentment, bitterness and vengeance which, he suggested, she has mistakenly directed against the Commonwealth. He determined that she was unhappy because she could not 'adapt' at the Retta Dixon Home and that she has subsequently had a very difficult life (Cubillo [730]). O'Loughlin expressed empathy for Cubillo, and went on to highlight specific details of the suffering and hardship she has experienced throughout her life. In doing so, he contradicts the assertion that his judgment by necessity be 'devoid of emotion' ([79]). However, this expression of affectivity is accorded rational status, whereas Cubillo was said to have 'lashed out', having an irrational sense of grievance towards the Commonwealth ([730]). What O'Loughlin failed to recognise is the significance of Cubillo's experience of the loss of her language and of her inability to speak to her mother. He also failed to hear the voice in which she

now speaks. As Cubillo had previously pointed out, as a child she lived in an oral culture, a culture in which knowledge would have been communicated verbally, in conversation and other narrative forms. Her inability to speak to her mother, and to other people in her community, indicates much more than linguistic frustration, it points to the unspeakability of the pain she has suffered and its unrepresentability in Western legal discourse.

Conclusion

It has been argued (Evans 2002: 131) that in Australian courts, Indigenous narrative knowledge is regarded as a form of 'writing', on the basis that it does not privilege the presence of the speaking subject and '[t]he original subject who handed down the laws or rules or narratives that are recited (as much as they can be) in the courts is regarded *in absentia*'. Evans argues that this produces a 'schism'—that is, what Lyotard might include within the *differend* (Lyotard 1988: 9): 'when the "regulation" of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom'. Indeed, Lyotard (1988: 9) uses the juridical context to discuss his concept of the *differend*, where he highlights the paradox produced in law when a victim of a wrong:

is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages.⁸

When I interviewed Cubillo about her experience of giving evidence in the trial, she highlighted the paradoxical position of the witness giving testimonial evidence. She expressed her frustrated

desire to reverse the speaking position, to ask the questions of counsel for the Commonwealth, the institutional representative responsible for her removal. Cubillo proposes an inversion of the interrogative model of cross-examination which reveals the relationship between subjectivity and underlying structure of the testimonial form:

When I was being questioned by the Commonwealth lawyer, I didn't know if I could reply in the way I wanted to. I just sort of said 'yes' and 'no' about a few things, but I would've liked to ask questions myself, and ask the reason why I was taken. I would have liked some answers from the Commonwealth and to say: 'Have you got any proof that my mother and my family neglected me?' I was taken because of the colour of my skin—the fact that my mother was an Indigenous woman and my father was an Anglo-Saxon—for no other reason but that.⁹

Author Note

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Notes

¹ Sadly, in April 2005, Mr Gunner passed away. He was a man of courage and dignity, whose struggle, along with Lorna Cubillo, in seeking justice for members of the Stolen Generations was of great significance. In accordance with Central Australian Aboriginal law, I have used Kwementyay as the substitute for his first name in this article.

² *Cubillo v Commonwealth* (2000) (hereafter *Cubillo*). This decision has attracted critical attention from a range of perspectives. For a detailed case note, see Clark (2001).

³ The other cases were *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997); and *Williams v Minister, Aboriginal Land Rights Act 1983* (1999). All claims were unsuccessful. Significantly, in August 2007, in the first, and to date, only successful action by a member of the Stolen Generations, Bruce Trevorrow succeeded in his claim against the South Australian government, winning \$525,000 in compensation for having been removed from his mother's care in 1957 when he was 13 months old: *Trevorrow v State of South Australia (No. 5)* (2007). Tragically, Trevorrow died in June 2008, aged 51.

⁴ See, for example, contributions to Brooks and Gewirtz (eds) (1996) and Thornton (ed) (2002). In Australia, the emergence of

evidence of the Stolen Generations within white Australian popular discourse generally has contributed to a renewed interest in narrative analyses of testimonial forms. See, for example, Schaffer and Smith (2004). There has also been attention to the reception of historical evidence, including oral history, in the courtroom, largely as a result of claims brought by Indigenous people in relation to native title, heritage and Stolen Generations: Curthoys, Genovese & Reilly (2008).

⁵ This distinction, Davies (2008: 331) suggests, reflects the two main approaches to the evaluation of evidence, according either to the probability of events or to narrative coherence.

⁶ However, see Pardo (2005); Haldar (1991; 1999).

⁷ Eg., see, Sanders (2007).

⁸ Neville (2005) draws on Lyotard's notion of the *differend* in her fine reading of the *Cubillo* decision to reveal underlying classificatory hierarchies within genres of legal discourse.

⁹ Interview with Lorna Cubillo, Darwin, 25 September 2004.

A CRITICAL DISCOURSE ANALYSIS OF THE LANGUAGE QUESTION IN AUSTRALIA'S IMMIGRATION POLICIES: 1901–1957

FINEX NDHLOVU

Abstract

Australia's immigration policies have remained an unsettled area subject to political disputation since the promulgation of the *Immigration Restriction Act 1901* (Cth). Section 3(a) of this Act required that all prospective immigrants from non-European countries had to pass a dictation test in any European language selected by the immigration officer. Asian racial groups were the main target of this legislation, which was embraced as part of the 'White Australia' policy. Far from being an objective assessment of language proficiency skills, the dictation test was a discursive construct ostensibly designed to be failed and to exclude people whose political and racial affiliations were considered undesirable. Drawing on insights from the conceptual framework of critical discourse analysis, this article traces and examines the use and abuse of language testing as a tool for racial and political exclusion in Australia from 1901 to 1957. Because it was during these years that successive Australian governments embraced explicit formal policies on testing language skills of intending immigrants, this period marks an important chapter in the history of Australia's immigration policies. Since then, the language question has continued to feature prominently in public debates on Australia's citizenship and immigration laws.

Introduction

The history of the evolution of Australia's immigration policies is well documented. York (1992; 1993), Tavan (2005), Hollinsworth (1998) and Willard (1967) detail the history of Australian immigration, tracing the gradual policy transformations initiated by successive governments from the late 18th century to the late 20th century. When Australia became a federation in 1901, Australian citizens were still uncertain as to what made them a nation. However, one thing upon which most of them agreed was who to exclude from their midst (Sherington 1980). This general consensus was premised on the idea of a 'White Australia' policy formalised through the *Immigration Restriction Act 1901* (Cth). Under this legislative measure (mainly aimed at restricting the entry of Chinese, Indians, Japanese and other Asians), non-whites could only enter Australia on a temporary basis under a permit. The desire to guard Australian society against the perceived dangers of Asian immigration was one of the major factors that necessitated the promulgation of the *Immigration Restriction Act*. Parliamentary members of the federal government 'hailed the IRA as a legitimate attempt to preserve Australia's white racial purity, to shield Australian workers from the vagaries of cheap Asiatic labour, and to protect national sovereignty against a potential "'Asiatic" invasion' (Tavan 2005: 8). This fear was well articulated by Alfred Deakin, Attorney-General of the first federal government, in the House of Representatives:

No motive power operated more universally on this continent ... and certainly no motive power operated more powerfully in dissolving the technical and arbitrary political divisions which previously separated us than the desire that we should be one people, and remain one people, without the admixture of other races. It is only necessary to say that they do not and cannot blend with us, that we do not, cannot and ought not to blend with them (reproduced in Willard 1967: 119).

The determination of the federal government to pursue racist policies was backed by legislation such as the *Pacific Islanders Labourers Act 1901* (Cth), which was designed to facilitate the mass deportation of nearly all Pacific Islanders working mostly as indentured labourers in the sugar cane plantations of Australia. The Act specifically prohibited any Pacific Islanders from entering Australia after 31 March 1904, and required all those entering before then to have a license. It further stipulated that any Pacific Islander found in Australia, who had not been employed under an indentured labour agreement at any time in the preceding month, could be deported immediately. Under this Act it became an offence to employ a Pacific Islander in any other way than through an indentured labour agreement.

Together with these explicitly racist political and economic measures, a dictation test in any European language chosen by the immigration officer was adopted to enhance the exclusion of unwanted immigrants. The dictation test sought to ensure Australian immigration was restricted to selected people from Europe. As insurance against possible circumvention of the test by non-Europeans, it was agreed by members of parliament that customs officers would select a language with which the intending undesired immigrant was unfamiliar (Tavan 2005: 10). It is important

to note that although the dictation test was formally withdrawn in 1958, the abuse of language tests for political purposes of exclusion and inclusion continues to punctuate Australia's immigration policies.

Drawing on insights from the conceptual framework of critical discourse analysis ('CDA') (Fairclough 1992; 1995; van Dijk 1996; van Dijk and Wodak 1993; Chilton 2005), this article explores the history of Australia's immigration policies, focussing on the appropriation of language tests 'as mechanisms of exclusion in the name of national inclusiveness' (McNamara and Roever 2006: 182). In this article, aspects of language testing for Australian immigration are interrogated as part of the discursive construct used to camouflage racist political processes of excluding 'unwanted' prospective immigrants. Three distinct phases can be identified in the history of Australian immigration policies, namely (i) the period of outright exclusion of unwanted races (1901–57); (ii) the period of assimilation (1958–78); and (iii) the period of assimilation–tolerance (often misconstrued as integration by politicians and policy people) (1978 to the present).

The discussion specifically focuses on the period from 1901 to 1957. This period is worth considering because, in one way or another, the legacy of events that happened during the formative years of a federated Australia continues to inform public and political opinion on issues of language diversity, multiculturalism and inclusion. Under the citizenship test introduced in 2007, Australian citizenship applicants have to successfully complete a citizenship test in English before lodging an application (Commonwealth of Australia 2007). In other words, the test is an eligibility criterion to be met and the application cannot go ahead until one has passed it. This betrays the monolingual ideology

that has characterised Australian immigration policy since the early 1900s.

The central argument of this article is that there is a clear pattern in the history of Australian migration that demonstrates the significance of language and language testing in determining who is included in or excluded from Australia. In pursuing this argument, I examine the 'White Australia' policy and the dictation test, demonstrating how the latter was used as a tool for achieving the explicitly racist intentions of this policy. In the final sections, I illuminate some of the linkages between the historical events and present day Australian migration policy.

Conceptual Framework: Critical Discourse Analysis

Critical discourse analysis (CDA) primarily studies the way social power, dominance and inequality are enacted, reproduced and inscribed in clearly defined socio-political contexts (van Dijk 1998). Put another way, CDA is concerned with the ways in which structures of discourse enact, confirm, legitimate, reproduce or challenge notions of power, hegemony and domination in society. The framework of CDA seeks to demonstrate that 'the [languages] we use help shape or constrain our identities, relationships, and systems of knowledge and beliefs' (McGregor 2003: 3).

Although CDA is a relatively recent conceptual framework that emerged out of Europe in the 1990s, its theoretical propositions are useful to a more nuanced understanding of issues that happened in early to mid 20th century Australia. The salience of CDA as an analytical framework for the language question in Australia's migration policies is that it is transcendental, enabling us to interrogate and engage historical issues in relation to our present circumstances.

For many CDA scholars, the toolkit for deconstructing the socially-constructed (thus linguistically-constructed) machinery of power lies in the work of social theorists such as Bourdieu, Foucault, Gramsci and Habermas. Additional influences on the methodology of CDA can be traced to the postmodernist ideas of Barthes and Derrida, among others. Although the postmodernist school of thought focuses mainly on ideas from philosophy, literary studies and sociology, it is also evident in linguistics through the ideas of de Saussure. CDA attempts to go beyond merely describing discourses by adopting an interdisciplinary approach that seeks to unpack power relationships and their effects in society.

To this effect, Fairclough and Wodak (1997: 271) summarise the main tenets of CDA as follows: CDA addresses social problems; power relations are seen as discursive; discourse constitutes society and culture; discourse does ideological work; discourse is historical; the link between text and society is mediated by discourse; discourse analysis is interpretative and explanatory; and discourse is a form of social action. In broad terms, the major focus of CDA is discursive practice, which basically refers to 'rules, norms, and mental models of socially acceptable behaviour in specific roles or relationships used to produce, receive, and interpret messages' (McGregor 2005: 3). Of major concern to the CDA approach is the desire to unmask the spoken and unspoken rules and conventions that govern how individuals learn to think, act, and speak in all the social positions they occupy in life (Blommaert and Bulcaen 2000).

CDA is also linked to Foucault's analysis of power/knowledge. In his extension of Gramsci's (1971) ideas on hegemony, Foucault (1972) posits that power is constructed and configured through a

delicate balancing of consent and coercion, making the whole gamut of governance and policy making revolve around the politics of coercion. Foucault's theorisation of power and governmentality emphasises the relationship between the subject and power, the relationship between the modern state and the self-governing individual, the role of language in constructing discourses of dominance and subjugation, and the role of the professional expert in constructing new social realities amenable to governance (Gane and Johnson 1994).

In his analysis of the power/knowledge nexus, Foucault considers power to be at a level that is beyond repressive, materialist and institutional terms. Power is, therefore, a fluid and elusive notion, which manifests itself in various forms. This means that power is everywhere and wherever there is power, there are power differentials. Foucault (1972) suggests that power must be understood as 'power/knowledge' because knowledge is what power relations produce in order to spread and disseminate 'legions of adapted, ambient individuals'. This multi-formed and multiplied nature of the notion of power shows that power relations are not always underpinned by force and violence. Rather, the exercise of power is embedded in more subtle modes that lie hidden below the tightly knit grid of material realities.

For Foucault then, our understanding of any particular aspect of human life is historically contingent and dependent upon power relations. The powerful will always seek to construct power discourses that entrench their positions and/or sources of power. In this study, Foucault's ideas are useful in teasing new meanings out of the factors that motivated racist and discriminatory legislation in the formative years of a

federated Australia. I utilise Foucault's ideas to identify and critique the material and institutional effects of power-constructed discourses on 'undesirable' immigrants to Australia.

What emerges from the foregoing is that from a CDA perspective, discourse is viewed as inherently part of, and influenced by social structure and produced in social interaction. Therefore, in CDA, theory formation, theory testing, description and explanation are pre-eminently socio-politically situated. In the words of Gee (1990: xix) discourses are 'ways of behaving, interacting, valuing, thinking, believing, speaking, and often reading and writing that are accepted as instantiations of particular roles by specific groups'. This nature of discourse is further emphasised by Fairclough (1992: 87) where he observes that 'discourse constitutes the social, including "subjects" and language is far more than a representational tool [because] it is a form of action and contains within it ideological elements'. This means that language is a central vehicle in the process whereby people are constituted as individuals and social subjects. Therefore, because language and ideology are closely intertwined, a critical analysis of the language question in Australia's immigration policies has the capacity to expose some of the pervasive ways in which use of the dictation test for migration purposes unfairly excluded some people.

The linkages between language, power and ideology articulated in the preceding paragraphs constitute a solid foundation for analysing the language question in Australia's immigration policies. Using the insights of CDA, I argue that language testing in Australia has always been a site of power struggles where hegemonic ideologies continuously strive to reinscribe and legitimise their power over the socio-

politically weaker immigrant groups. In attempting to come up with a conceptually well grounded archaeology of the history of the language question in Australian immigration policy, the article makes recourse to a number of CDA tenets that include the dichotomous link between social relations and discourse, ideology and discourse, power and discourse as well as language, power and social achievement. These notions of CDA are germane to this study insofar as they serve as analytical categories in exposing the unequal socio-political and economic relations that were propagated and sustained by insisting on certain levels of English language proficiency for prospective Australian immigrants.

'White Australia' Policy: The Doctrine of Outright Exclusion

Following the formation of the Australian federation in 1901, one of the first pieces of legislation passed by the new parliament was the *Immigration Restriction Act 1901*. This Act, which received royal assent on 23 December 1901, was designed to place certain restrictions on intending immigrants perceived to be a threat to Australian interests. From 1901 up to the late 1950s, Australia's approach to immigration was conceived in terms of the 'White Australia' policy, which imposed limited acceptance of immigrants from other parts of the world and favoured applicants from selected European countries. Although it was amended 14 times before its abolition in 1958, the Immigration Restriction Act remained the guiding principle for Australian immigration policy for the period 1901 to 1958. Section 3(a) of the Act prohibited immigration into Australia by any persons who failed to write out a dictation test of 50 words in any European language prescribed by an immigration officer.

These measures for implementing the 'White Australia' policy were warmly received by both the general public and the political leadership of the time. For instance, in 1919, the policy was hailed by Prime Minister, William Morris Hughes, as the greatest thing that Australia had achieved (Tavan 2005). Similarly, the federal parliamentary caucus of the Labor Party passed the following two crucial motions in support of the Immigration Restriction Act: (i) that the party work for the total exclusion of coloured people whether British subjects or not, and (ii) that the party approves of the educational test as to coloured British subjects, with such amendments as may seem necessary; but opposes absolutely the admission of all coloured aliens (Head 1999).

There is no doubt that from 1901, Australia embraced a purely racist and discriminatory immigration policy. The foregoing political positions articulated at the highest levels of decision making had a profound influence on the treatment of immigration applications other than those from the United Kingdom. The position of the conservative Liberal Party was no different to that of the Labor Party as they maintained a 'White Australia' policy, extending it to the exclusion of people from southern Europe (eg. Italy, Greece and Spain), whose skins were regarded as 'swarthy'. The dictation test was actually brought in to camouflage the racist political goals of the 'White Australia' policy. Of the 3290 persons refused admission into Australia between 1901 and 1957 under the Immigration Restriction Act, two-thirds were excluded by the dictation test (York 1992: 4).

Reasons for the 'White Australia' Policy

A variety of interrelated reasons prompted the Australian political leadership to come up with the 'White Australia' policy. The preservation of a British-Australian nationality was the first fundamental motive. Interpreted through the prism of race, the Australian community of British descent was imagined as a superior organic community, which required protection from the possible influx of 'alien' races. Permitting uncontrolled immigration of non-European racial groups 'would be a calamity, for it would [lead to the] death of British-Australian nationality' (Willard 1967: 192). At the time, the Australian community was conceived as founded upon three components, namely: being racially white, being of British descent and being Australian. This was basically about values, ideas, concerns and way of life, issues that are still at the core of current debates on Australian citizenship and immigration policies (Hollinsworth 1998; Tavan 2005).

Secondly, perceptions about the possibility of the emergence of ethnic enclaves and ghettos turned out to be another sustained argument in favour of adopting the 'White Australia' policy. Non-European immigrants were to be restricted because they were perceived as unwilling to integrate, choosing to form their own communities instead (Willard 1967; Tavan 2005). But the question is this: what does integration or amalgamation entail? Integration is a two way process, whereby both the immigrants and the host community have to negotiate and accommodate each other's cultural identities. However, because the 'White Australia' policy was, by definition and design, purely discriminatory legislation, it had no provision for this ideal view about integration. Tensions and controversies

around immigrant integration 'problems' still persist in present-day Australia with Sudanese refugees being the latest wave of migrants accused of failing to measure up and integrate into mainstream Australian society.

Thirdly, the Immigration Restriction Act was supported by Australian workers due to fears of losing their jobs to Asian migrants and concerns over a culture of unfair labour practices that could ensue. The policy was thus viewed as a justifiable measure to subvert the type of economic and social problems that could come with uncontrolled immigration. Australian people believed that ill-paid labour was inconsistent with a system of national economy in which the industrial life of the community is systematically regulated to ensure that workers have a reasonably high standard of living. This was indeed a prudent concern, but also one inspired by racist thinking based on a set of perceived negative cultural traits thought to be inherent characteristic features of Asian immigrants (Hollinsworth 1998: 3).

By way of summary, the reasons that led to the adoption of the 'White Australia' policy typify the ambivalences, ambiguities and contradictions of British colonial policy. While immigration restriction was explicitly aimed at reducing numbers of non-European immigrants, the same people were needed in building Australia through their services as migrant labourers in mining and plantation industries. Concerns over possible international condemnation of Britain's democratic and human rights record in its colonial empire created tensions between the doctrine of 'White Australia' and the ideals of social liberalism. As York (1992: 8) clearly observes:

A paradox existed: We [the people of Australia] wanted to exclude coloured races, but not offend our coloured brothers and sisters in the Empire ... We believed that the British Fleet was our ultimate protection against the Asiatic hordes, the best military defence of our racial 'purity', yet we had to go against the wishes of the Imperial Government if we were to honestly and openly express our desire for a white Australia through our own immigration laws.

Therefore, while the restriction of non-European immigration was considered a necessary step towards the preservation of a British-Australian national identity, it was at the same time clearly antithetical to the ideals of a liberal democratic and free capitalist society that Australia was intended to be. Such were the internal contradictions of British colonial policy that continuously forced the doctrine of 'White Australia' to swing unsteadily between the poles of outright racial exclusion and social liberalism.

Use and Abuse of the Dictation Test

One of the key means for implementing the 'White Australia' policy was the infamous dictation test in which those wishing to immigrate, or even enter the country, had to pass a language examination in English or any other European language with which they were not necessarily familiar. The dictation test was used as the means to exclude 'undesirable' intending immigrants, that is, those people whom governments of the day regarded as politically or morally undesirable (York 1992: 4). Thus, potential immigrants who were 'undesirable' by virtue of their nationality or race for example, were not directly ousted on the grounds of their race; officially, it was only because of their language skills that they were not permitted entry. From a CDA point of view, this means some people were

linguistically and socially constructed for purposes of exclusion. As pointed out by McNamara and Roever (2006: 160), care was taken to ascertain which languages the person in question *did know*, and then the test was given in a language that the person *did not know*. Predictably, the person would fail the test and then be excluded on that basis.

But the question is: why would the language skills of prospective immigrants from Asia be tested in European languages? What is the point of testing someone's knowledge of something that you are fully aware the person is not competent in? Clearly, this does not make any sense at all because if you want to find out someone's language skills, then you should choose a language that the person is competent in. The rigour and effort exerted in establishing the linguistic identities of prospective immigrants was not motivated by the principle of fairness, by ensuring the person is tested in the language he/she knows best, but rather the contrary. This clearly shows the dictation test was a political tool for advancing the cause of the 'White Australia' policy, which was ostensibly designed to exclude unwanted people. Shohamy (McNamara and Shohamy 2008: 93) has advanced three reasons against the use of language testing for immigration purposes. The first is the right of people to use their own language and the violation of this right when governments impose language on people. Second, for many immigrants it is not possible to acquire a new language, especially as adults, and even more so when there is no access to, or time for, opportunities to learn. Third, immigrants are of course capable of acquiring aspects of the host language as and when the need arises, and of using other languages to fulfil all the duties and obligations of societal participation

(voting, expressing opinions, managing tasks in the workplace and so on).

In Australia, cases involving the abuse of language tests for political purposes are well documented (see Davies 1997; McNamara 2005; McNamara and Roever 2006). York's (1992; 1993) detailed analysis of data from annual returns on persons admitted and refused entry into Australia for the period 1901 to 1957 shows that the dictation test was used to exclude both individuals and groups of unwanted people. The list of nationalities from which individuals or groups were excluded includes Chinese (who accounted for more than half of all those kept out by the dictation test), Filipinos, Syrians, Afghans, Indians, Armenians, Austrians, Cape Verde Islanders, Chileans, Danes, Hungarians, Hawaiians, Egyptians, French, Fijians, Germans, Greeks, Kurds, Indonesians, Papuans, Russians, Portuguese, Romanians, Seychelle Islanders, Spaniards, Mauritians, Burmese, Maoris, Latvians, Poles, and Swiss, among others (York 1992: 1).

The largest groups refused entry into Australia in any single year were Chinese (459 persons excluded in 1902); Maltese (214 persons excluded in 1916) and Italians (132 persons excluded in 1930) (York 1992: 16, 33, 51). In all these cases, admission was refused on grounds of failing the dictation test. The hidden political and racial agenda of the dictation test was clearly articulated by Prime Minister Edmund Barton:

The moment we begin to define, the moment we begin to say that everyone of a certain nationality or colour shall be restricted, while other persons are not, then as between civilised powers, amongst whom now must be counted Japan, we are liable to trouble and objection ... I see no other way except to give a large discretionary power to the authorities in charge of such a

measure [the dictation test] (Commonwealth Parliamentary Debates 1901: 3500).

The idea of giving the dictation test in a way that would appease Australia's and Britain's allies, while at the same time achieving the intended goal of excluding 'undesirable' people, received majority support in federal parliament. From the beginning of 1901, the dictation test was administered to targeted individuals, particularly those with political views contrary to the British-Australian values espoused by the 'White Australia' policy.

For example, Gerald Griffin, an Irish-born communist New Zealander, was excluded in 1934 on the basis of a dictation test which was used to achieve preconceived political goals. Because of his communist ideological inclination, Griffin was not welcome in Australia. Although he was fluent in Irish and English, the authorities chose to administer the dictation test in Dutch, a language that Griffin was not familiar with (McNamara and Roever 2006). Naturally, he failed the test and was subsequently deported.

The most celebrated case in which political exclusion was camouflaged by the dictation test is that of Egon Kisch, a Czech Jewish communist writer refused entry into Australia by the Lyons government to attend an anti-war congress in 1934. The government first sought to exclude and deport Kisch on the grounds of his communist political beliefs. However, when he jumped ashore from a ship attempting to avoid deportation, the authorities arrested him and administered a dictation test. But because Kisch was fluent in many European languages, including English, the authorities chose to administer the test in Scottish Gaelic, a language with which he was not familiar. Kisch failed the test, the reasonableness of which

was successfully challenged in the High Court (McNamara and Roever 2006: 160). However, because the dictation test was simply a smokescreen and the government was intent on excluding him, Kisch was eventually refused entry on other grounds.

Egon Kisch's case marked an important turning point in the use of the dictation test for immigration purposes in Australia. During the 1930s and early 1940s, the dictation test was rarely used because of the negative publicity received by the Kisch saga. Consequently, annual returns for the years 1931–39 recorded some of the lowest numbers of persons refused admission, with as few as nine people being excluded in 1938, all of them on other grounds, aside for one Chinese person who failed the dictation test. Although the yearly figures of people refused admission rose to 41 in 1940, there was a dramatic fall again in 1942, 1943 and 1944 as there were no people refused admission in the three successive years (York 1992). This decline in numbers of people refused admission can be attributed to limited use of the dictation test as a major criterion for vetting prospective immigrants. These statistics and the cases of Gerald Griffin and Egon Kisch clearly show that the dictation test was a huge barrier to successful immigration into Australia.

The above examples amply demonstrate the extent to which the dictation test was an integral part of the political discourse on racial, ethnic and political exclusion during the formative years of hegemonic white Australia. Both cited cases highlight 'the dishonest nature of the test, which was a test designed to be failed' (York 1992: 5). As McNamara and Roever (2006: 161) clearly state, the dictation test was 'a ritual of the exclusion of individuals whose identity was already known and deemed to be unacceptable on a priori grounds'. With

specific reference to the crucial role of language tests in determining individuals' access to rights and privileges that come with citizenship, McNamara and Shohamy (2008: 89) observe that:

In most societies tests have been constructed as symbols of success, achievement and mobility, and reinforced by dominant social and educational institutions as major criteria of worth, quality and value. The granting of citizenship is thus dependant on passing a language test ... This policy determines continued residence in the state, and access to rights and benefits such as health, education and welfare.

An analysis which draws on CDA reveals that during the heyday of the 'White Australia' policy, the political intent of language tests was often deliberately masked by using what appeared to be an objective mechanism—a test. An analysis of the Immigration Restriction Act brings into light the non-transparent political issues that were a factor in securing the power and hegemony of 'White Australia'. It also draws attention to the 'power imbalances, social inequities, non-democratic practices, and other injustices' (Fairclough 1992: 154) that lay hidden beneath the fissures and fault lines of Australia's earliest immigration policies. Therefore, in addition to the explicit exclusionary and racist discourses of Australia's governing authorities, the period 1901–57 witnessed the abuse of the language skills test as a tool of 'guaranteeing racial exclusion in a non-racial way' (York 1992: 8).

For all its transparent dishonesty, the dictation test proved to be highly effective as a way of keeping out undesirable racial groups because by 1947 the target groups had diminished greatly as a proportion of the total Australian population: 'Whereas in 1901 every seventy-seventh person in Australia

was "coloured", by 1947 the ratio was one "coloured" to every five hundred whites' (York 1992: 10). The question then is: why was the dictation test eventually abolished in 1957 when it had in fact proven to be such an effective tool for exclusion? I deal with this question in the next section.

Reasons for Abolition of the Dictation Test

The reasons that necessitated the abolition of the dictation test have to be understood within the context of gradual policy transformations that culminated in the demise (at least at the official level) of the 'White Australia' policy. A combination of changing circumstances in post-World War II Australia led to the softening of the 'White Australia' policy, so that the hard-line approach of the dictation test was no longer tenable. Chief among these were deterioration of Australia's military security following the reduction in size of the British armed forces in Asia and the South Pacific; pressure from newly independent Asian countries; economic and political links with Asian countries; influence from the liberal-internationalist younger generation; as well as the emergence of community leaders with a pro-Asian outlook (Anderson 1998). The 'White Australia' policy was increasingly becoming unfavourable as a guiding philosophy of Australia's diplomatic and foreign policy relations with Asia and the South Pacific. Similarly, because the dictation test had been primarily adopted for the purpose of excluding people from the Asian region, the new socio-economic and political dispensation meant that the test had fallen out of sync with post-war Australian interests. As Smith (1979: 41) observes, 'the "White Australia Policy" became an increasing embarrassment as Australia's relations with Asia developed', an issue that necessitated

policy modifications with an eye to foreign affairs. If the Immigration Restriction Act and the 'White Australia' policy had become such an embarrassment, the dictation test was even worse. The dictation test had become a continuing source of ire in Asian countries (Tavan 2005).

Acutely aware of the need for a firm commitment to a good neighbour policy with Asia, Australia took bold measures to revise those facets of immigration policy that were morally objectionable to Asians. Thus, in 1947, under Chifley's Labor government, it was announced that 'non-Europeans admitted temporarily for business reasons and who had lived in Australia continuously for 15 years could remain without the need to renew their permits periodically' (Smith 1979: 40). This was, in fact, a de facto arrangement for permanent residency without having to go through the arduous process of a dictation test. Under the previous policy arrangements:

a migrant could happily disembark, find work, buy a house, marry, have a family and adopt Australia as his homeland, only to find that four years and eleven months later he could be kicked out of the country as a prohibited immigrant because he failed a dictation test in a European language (York 1992: 5).

The initiatives of the Chifley Labor government were to be followed by more comprehensive reforms under the Menzies Liberal government from 1949 to 1966. In 1952, Japanese wives of Australian servicemen were allowed to be admitted, under permits initially valid for five years, without undertaking the dictation test. Four modifications of rules regarding non-Europeans were instituted in 1956 as follows: (i) those allowed to remain without getting periodic extensions of their permits became eligible for citizenship; (ii) distinguished

and highly qualified non-Europeans were permitted to come to Australia and remain indefinitely; (iii) easier conditions applied to the admission of people of mixed descent; and (iv) certain non-Europeans already in Australia on a temporary basis, who normally would have been expected to leave, were allowed to remain for humanitarian reasons (Anderson 1998).

For all the above categories of immigrants, the dictation test was no longer a prerequisite. In pursuit of the need to promote friendly relations with Asian countries, the controversial dictation test was finally abandoned in 1958 following the replacement of the Immigration Restriction Act with the more moderate *Migration Act 1958* (Cth). Abolition of the dictation test in order to make migration control more palatable is one issue that was unanimously agreed upon during the reading phase of the Migration Bill. Among other things, this new immigration policy unequivocally removed the dictation test and replaced it with a permit system and also expanded provisions for appealing decisions on forced deportations. It is notable here that the abolition of the dictation test may be seen as symbolic of Australia's awareness that the post-war world was a very different one to that which it had inhabited prior to World War II. A central feature of the gradually emerging domestic and international outlook was 'the recognition that Australia could no longer ignore its place in Asia and that our future was, and is, intricately tied to the future of our region' (York 1992: 10). The revamping of Australia's racist immigration policy and the eventual abolition of the dictation test was in recognition of the bigger socio-economic issues at stake in post-war Australia, which could not be easily sacrificed at the altar of supremacist interests of 'White Australia'.

It is also important to observe that the long and arduous journey leading to the demise of the dictation test constitutes a form of discourse that was mediated by concerns over Asian appeasement and Australia's socio-economic and political interests. Political debates over the abolition of the dictation test and the 'White Australia' policy were punctuated with discursive practices that gave the impression of a liberal veneer of seemingly tolerant pronouncements, under which lay deep-seated anti-Asian sentiments. This is evidenced by the existence of more recent web-based organisations such as the Australian Nationalism Information Database that was established in the 1990s 'as an educational resource to promote Australia's national identity and culture, and to offer criticism of mass immigration, multiculturalism, and Asianisation as major threats to our environment, our people, and our way of life' (Australian Nationalism Information Database). In other words, reviews of migration policies that culminated in the scrapping of the dictation test from Australia's statutes were not entirely motivated by the desire to see an improvement in the treatment of non-European racial groups. Rather, it was the economic and strategic interests of Australia that were at the forefront.

The 1950s decline in trade and economic relations with the United Kingdom forced Australian business people to look to other foreign markets to sell their export goods. Owing to its large population, increasing economic importance, and close proximity, Asia began to look more and more attractive to Australian business and political interests than ever before. Therefore, the principles of economic rationalism and political diplomacy overrode the doctrine of social liberalism and equality in influencing the abolition of the dictation test and the softening of the

'White Australia' policy. It was, indeed in this context that in 1957 the immigration of highly skilled and distinguished Asians, who could easily become permanent residents and citizens after five years, was encouraged (Tavan 2005). Preference for highly skilled migrants and business people continues to be emphasised in Australia's immigration policies to this day.

Conclusion

Drawing on insights from the framework of CDA, this article has discussed and reflected on the role and place of language in the politics of Australian immigration policies from 1901 to 1957. The conceptual framework of CDA enabled this article to bring into light the latent connections between the 'White Australia' policy and the enduring insistence on English as the sole official language of widest communication in Australia. It has been argued that far from being designed to assess intending immigrants' ability to 'integrate' into mainstream Australian society, the dictation test was, in the main, a tool for excluding unwanted people. Because the dictation test was an integral part of the racist 'White Australia' policy, it could serve no other purpose than that of camouflaging the restriction of non-European immigration into Australia.

The application of the test and the 'White Australia' policy was, at least initially, softened in line with the country's new socio-economic and political interests in Asia and the South Pacific. The dictation test was finally abandoned in 1958 because it contradicted the spirit of multiculturalism that was a platform of successive Australian governments during the post-war period. In these circumstances, insisting on the dictation test was no longer viable for it would be pointless for the government to embrace multiculturalism while at the same time

undermining language diversity. The two (multiculturalism and language diversity) are inextricably intertwined, so much so that talking of one outside the other would be too academic and superficial.

In conclusion, it is important to point out that although the dictation test was officially abolished in the 1950s, it did not die out completely. Rather, the principal features of the dictation test simply went into hibernation and have recently been reinvented and re-written into Australia's migration policy. The Australian 'values' test for citizenship applicants introduced in 2007, which is exclusively conducted in English, is a de facto English language proficiency test brought in via the back door. Because Australian national values and national history are not necessarily coded in a particular language, one is left wondering why the citizenship test cannot be in any language other than English. Introduced in the implicit context of safeguarding Australian society against outside threats such as terrorism and the spread of 'undesirable' cultures, the Australian citizenship test clearly reflects the history of Australian attitudes towards non-European immigrants discussed here.

Under the new arrangement, Australian citizenship applicants have to successfully complete a citizenship test before lodging an application. In other words, the test is an eligibility criterion to be met as the application cannot go ahead unless and until one has passed it. The new citizenship testing regime constitutes another site of exclusion as English language proficiency becomes the first barrier that closes out prospective Australian citizenship applicants competent in languages other than English. The results of the Australian citizenship tests undertaken between October 2007 and March 2008 indicate that the success rate is lowest in the refugee stream (Commonwealth of

Australia, 2008). Given the low levels of English language literacy among most refugee citizenship applicants, it is possible that language, not lack of understanding of the Australian way of life, could be a major barrier. This means Australian citizenship is a preserve and a privilege for only those who have a command of the language of access, which is English. Because the citizenship test is written exclusively in English, it would be inconceivable for anyone who is not proficient in the English language (but nevertheless understands the nature of the application and Australian way of life in another language) to pass the test.

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WHITENESS AND ANTI-DISCRIMINATION LAW—IT'S IN THE DESIGN

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Abstract

Although anti-discrimination laws have supported much social change, they have been subjected to sustained critique by legal scholars. A significant concern is that the formal 'same treatment' standard promoted by the design of anti-discrimination law is inherently problematic (Graycar & Morgan 2004) because it gives 'apparent legitimacy to outcomes which ... in effect embed inequality' (Kerruish & Purdy 1998: 150). In this article, I critique the laws' standard of formal equality, first to demonstrate the capacity of its 'neutral' response to reproduce and stabilise dominant privilege. Next, using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the Act's 'race-neutral' and 'colour-blind' practice of formal equality holds capacity to stabilise and reproduce whiteness. I then argue that substantive equality—advocated by most legal critics as promoting 'better' forms of equality—also holds the capacity to reiterate whiteness as it can be defined through terms and conditions 'designed for and skewed' in favour of 'the white majority' (Davies 2008: 317). I conclude that this holds great implications for legal scholarship that remains selectively 'colour-blind' to the significance of racial 'difference', and call on mainstream legal scholars to open spaces to interrogate the implications of our *raced position as whites* (Moreton-Robinson 2007: 85).

Introduction

Australian common law recognises the fundamental right to equality before the law, but has never protected citizens from discrimination in their day-to-day affairs; instead, this protection is made available in Anglo-Australian law only through federal anti-discrimination Acts and those enacted in each state and territory jurisdiction (Rees et al 2008: 16-9). These Acts are based upon international covenants to which Australia has become signatory, providing a constitutional basis for the federal laws, and arguably at least, the inspiration for state and territory enactments. For instance, all of these laws prohibit race discrimination, which corresponds to the principle of racial non-discrimination established in Article 4 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1969).

Despite their achievements, these laws have attracted sustained criticism (eg. Partlett 1977; Thornton 1990; Pace 2003) and are desperately in 'need of renewal' (Rees et al 2008: 3). However, much of this critical attention has been directed to rights associated with gender, sexuality and disability, so that—with notable exceptions (eg. Thornton 1995; de Plevitz 2000; Gaze 2005; Moreton-Robinson 2007)—discrimination and equality rights associated with race have attracted less sustained analysis. I make this point because, despite parallels, there are important differences between these points of analysis.

Moreton-Robinson (2007: 85) is, however, more particular in her concern about the (general) lack of attention by mainstream¹ Australian legal scholars to issues related to race: it is, she says, indicative of their 'agency' in the 'reproduction and maintenance of racial hierarchies'. This demands that white legal scholars, like me, pay more attention to race, but by doing more than simply 'dropping' race into our analyses. Instead, it demands that we interrogate the implications of our own *raced position as whites* who benefit from the racial hierarchies reproduced and maintained by our (white) law.

This same point became apparent in my doctoral research on discrimination law, in a statement made to me by an Aboriginal² man I consulted. When I asked him why he thought discrimination laws do not work, he replied:

The laws are designed for them [white people]. It's not for us ... It's not. It's just taking things away (Uncle N, in Nielsen 2007: 123).

While obviously 'white'³ refers to colour and biological identity, like any 'racial identity', whiteness is connected to the social meanings attributed to 'race' by virtue of processes of 'affiliation and external ascription' (Doane, 2003: 9). But as Frankenberg (1993: 236–7) has pointed out, this process of social construction operates to produce very different meanings for whites than for those constructed within non-white races, as whiteness 'signals the production and reproduction of dominance rather than subordination, normativity rather than marginality, and privilege rather than disadvantage'. This is not to say that all whites gain full access to the privileges of whiteness, but that all whites can more readily claim its privileges than can those constructed as 'other' and 'non-white'. Indeed, Uncle pointed out the

great significance of whiteness in that white people might expect to experience law differently to those constructed as 'non-white'. However, this runs counter to the pervasive Western liberal philosophy that Anglo-Australian law produces justice through its commitment to the formally equal treatment of all who come before it (Thornton 1990: 9); that is, in racial terms, law practices equality through being 'colour-blind' to racial difference (Davies 2008: 317). However, instead of this 'colour-blind' practice, Uncle's lived knowledge of white law is of a practice 'skewed towards the white majority' because it offers a '*protected and exclusive place of privilege*', to which non-whites gain entry only on white terms and conditions (Davies 2008: 315). And fundamentally, the whiteness of Anglo-Australian law relates to 'a colonial cultural condition' (Anderson, 1996: 35) that involves a claim of the right to 'settle' territory and to receive the privileges attendant upon occupation—including the expectation of laws' protection—a claim based upon the violence of invasion and the falsehood of white sovereignty (Watson 1997).

The purpose of this article is to follow Uncle's concern about the function of whiteness in anti-discrimination law as indicated in its response to race discrimination against Aboriginal peoples. 'Whiteness' is applied throughout as its prime point of analysis to signify it as a 'colonial cultural condition' that founds and reinforces the 'cumulative privilege' that has been 'quietly loaded up on whites' (Fine et al, 1997: 57). My central argument is that the 'neutrality' in the design of anti-discrimination law is actually a practice of racial differentiation achieved through a selective 'colour-blindness' that presents whiteness and white privilege as normative (Moreton-

Robinson 2007: 84). First, I explain the capacity of the prevailing formal standard of equality promoted by Australian anti-discrimination law to stabilise, endorse and reproduce dominant privilege. Next, using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the specific effect of formal equality is to entrench—rather than challenge—the dominance of whiteness and white privilege. In the third part, I analyse substantive equality measures to suggest that they retain the potential to reiterate whiteness and white privilege. To conclude, I call on mainstream legal scholars to open spaces in which we interrogate the implications and benefits of our *raced position as whites*, because otherwise—as Moreton-Robinson warns us—we will only sustain the racial hierarchies reproduced and maintained by our law.

A 'Formal' Model of Equality

There are 13 separate pieces of anti-discrimination legislation in Australia, four enacted by federal parliament,⁴ and one in each state⁵ and territory⁶ jurisdiction. These Acts 'follow a similar pattern and operate, legally, in the same way', and share a lack of clarity in their policy goals (Rees et al 2008: 3-4). Though none of them specifically defines 'equality', each Act requires non-discrimination to be achieved through treatment that is 'comparable to', thereby instilling 'a struggle for equality' into anti-discrimination law mechanisms. However, the point of this struggle remains unclear until we ask: 'equal to what?' (Watson 1998: 38).

In international law, the answer to this question is founded in the theory of substantive equality. This involves 'relative'—rather than 'absolute'—equality that treats 'equally what are equal and unequally what are unequal': it holds that treating 'unequal matters

differently according to their inequality is not only permitted but *required*' (Judge Tanaka in *South West Africa Case*, cited in Pritchard 1997: 44). In relation to the right of racial non-discrimination, Recommendation XIV of the United Nation's CERD Committee stated that the Convention's reference to 'discrimination', relates 'to invidious acts of discrimination, not acts which are aimed at achieving an equal enjoyment of rights' (Jonas and Donaldson 2001: 16). Consequently, in international law, the principle of racial non-discrimination does not demand 'identical treatment without regard to concrete circumstances' because 'positive' forms of differentiation are integral to it, provided they are designed objectively and reasonably to achieve 'a legitimate aim' or they support the 'distinct' rights of Indigenous peoples (Pritchard 1997: 45-6). Indeed, Pritchard argues this principle is so fundamental to the achievement of human dignity that it is one of the 'least controversial examples' of an international legal peremptory norm, that is, an 'overriding' principle of international law notable for its 'indelibility and non-derogability' (1997: 42-3). Therefore, one might expect CERD signatories—like Australia—to promote the standard of racial equality that international jurists espouse.

However, a fundamental concern shared by critics of Australian anti-discrimination legislation is that it has been consistently interpreted by the courts as promoting formal equality as the primary standard (eg. *Gerhardy v Brown* (1985); *Purvis v New South Wales* (2003)). Unlike substantive equality, formal equality is concerned only with form—not *outcome*—so that all types of differentiation are completely impermissible (Thornton 1990: 9). For example, in *Gerhardy v Brown* (1985), the High Court examined the type of equality protected by the prohibition of

direct race discrimination in s 9(1) of the *Racial Discrimination Act 1975* (Cth) (RDA). It concluded that the *Pitjantjatjara Lands Rights Act 1981* (SA) contravened s 9(1) because it enabled non-Pitjantjatjara people to be treated differently because of their race (by having to apply for entry permits to Pitjantjatjara lands). But how else could the Pitjantjatjara peoples manage their country? Don't other landowners have a legal right to limit entry? As these questions suggest, the Court's conclusion indicates why formal equality's environment of 'sameness' is inherently problematic (Graycar & Morgan 2004) and defeats 'the underlying philosophy of non-discrimination' because it gives 'apparent legitimacy to outcomes which ... in effect embed inequality' (Kerruish & Purdy 1998: 150).

In *Gehardy*, the Court did, however, go on to conclude that the Land Rights Act was valid on the basis that it was a 'special measure' permitted by s 8(1) of the RDA. Section 8(1) endorses 'special measures' as defined by CERD:

[Measures taken] for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, ... [these measures do not] ... lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved (1969: Art 4(1)).

That is, the Land Rights Act's different treatment of rights on the basis of race was valid at law because this treatment was applied in order to redress 'historical

disadvantage'. But, as Sadurski (1986a: 136) argued at the time, the Act's legitimacy could have been founded in the principle of racial non-discrimination itself, in that the effect of the Act on non-Pitjantjatjara people:

did not amount to the impairment of their dignity by exhibiting racial prejudice against them, by stigmatising them as inferior, [or] by perpetuating the existing patterns of disadvantages.

Likewise, most Australian critics advocate substantive equality as the 'better' legal standard because it fosters an environment that responds to difference when justice requires—to prohibit 'invidious' discrimination—while simultaneously enabling a response to historical disadvantage and to the contexts in which inequality operates (Graycar & Morgan 2004). Therefore, making 'appropriate' differentiations is an implicit—not a separate—process within the substantive equality standard.

However, the Court refused to apply this standard of racial equality in *Gerhardy* because it viewed Pitjantjatjara land rights as valid *only* on account of 'historical disadvantage', rather than on account of the Pitjantjatjara peoples' distinct rights based upon their enduring connection and relationship to their law and country—rights that could not be claimed by any other group. As Sadurski (1986b: 6–8) lamented shortly afterwards, the Court wasted an opportunity to establish 'standards for future legitimate "positive discrimination"', and ignored its 'duty to examine the substantial issues of the limits of legitimate racial distinctions and the indicia of discrimination' because it was unwilling:

to engage in a morally serious discussion that potentially could have serious consequences and

carry a threat to the stability of dominant community values and dominant patterns of privileges.

Indeed, Sadurski exposes what the Court really ignored, namely the capacity of formal equality to stabilise, endorse and reproduce dominant privilege. In the next section, I investigate the implications of this capacity. Using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the 'neutrality' claimed as the effect of the Act's formal equality design is instead a practice of selective racial differentiation that renders whiteness and its attendant privilege the Act's normative standard.

Formal Equality Entrenches Whiteness and White Privilege

The *Anti-Discrimination Act 1977* (NSW) (ADA) does not explicitly state its purpose (or objects), although its long title describes it as an Act to make various grounds⁷ of discrimination unlawful 'in certain circumstances' to promote 'equality of opportunity between all persons' (s 1). It defines two separate forms of racial discrimination⁸—direct race discrimination, the most commonly litigated form, which prohibits less favourable treatment of people because of their race (s 7(1)(a)), and indirect discrimination, which prohibits unreasonable conditions or requirements that have a disproportionately negative effect upon those of a particular racial group (s 7(1)(c)). Like the RDA, it also enables special measures to be taken in favour of certain groups, including Aboriginal peoples (ss 126 & 126A). It establishes the Anti-Discrimination Board (the Board) (s 71 & Part 8) as the statutory body with authority to handle discrimination complaints and perform a range of educative functions to promote the elimination of discrimination and develop human rights policy for the

state (s 119). Essentially, the ADA creates a jurisdiction that is 'about education', as it was founded in a 'general consensus that criminal sanctions are ineffective in carrying out' its purpose (Partlett 1977: 153).⁹ However, I argue that three main features of the Act's design demonstrate that it is not race-neutral but instead is structured to support whiteness and its attendant privilege.

First, the Act supports whiteness by placing the privileges it produces outside the scope of the definitions of what is race discrimination: the Act fails to prohibit class-based discrimination (Thornton 1990: 14), the definitions of direct and indirect race discrimination focus only upon 'disadvantage', and neither direct nor indirect race discrimination are unlawful *per se*¹⁰ as they are actionable only when they occur in specific areas of *public life*.¹¹ Not only does the Act's definition of race discrimination deflect attention from the 'ordinary' social 'advantages' enjoyed by whites (see McIntosh 1992; Davies 2008: 312–16), it also remains 'artificially and permanently' separated from the system of white privilege founded by and inherent within the prevailing capitalist system (Thornton 1990: 14–15).

The Act's definitional scope is further reduced because all forms of discrimination are defined as events that occur as a result of separable characteristics: race, gender, sexuality, and so on. Thornton (1990: 1) has long argued that the 'benchmark' for these characteristics is the 'white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy, who supports, at least nominally, mainstream Christian beliefs, and who fits within the middle-to-the-right of the political spectrum'. Although complaints can be

based on multiple grounds, each ground must be pleaded and proved separately, so that complainants are forced to 'pluck out' singular aspects of themselves by reference to the benchmark person and present it as 'the meaningful whole' that eclipses other parts of their being (Lorde, in Harris 1990: 586). Yet this 'meaningful whole' remains inherently limited in scope, because the definition of race discrimination is framed in 'race-neutral' language that conflates 'race' to a 'universal' experience. For instance, in the High Court's decision in *Purvis v New South Wales* (2003), Justices McHugh and Kirby commented that:

[d]isability discrimination is ... different from sex and race discrimination [because] ... its forms are various and personal to the individual while sex and race are attributes which do not vary' (at [86]; emphasis added).

This 'universal' approach indicates that the Act is designed to respond most effectively to what Duclos (1993: 42) describes as a 'paradigmatic victim' who 'conforms' to and is 'part of the "centre" except for his race'. For example, an Aboriginal woman complaining about sex discrimination would typically need to 'establish that she is just like' a white woman, even though 'it is very possible that the discrimination [she experienced] occurred precisely because she was not' a white woman (Duclos 1993: 43–4).¹² Thus, Duclos suggests that non-white experience will naturally be distorted by the Act's 'universally' defined racial scope and definitions, because it must be conveyed in accordance with the Act's white centre. Clearly, this 'universal' scope cannot acknowledge that disparities exist in the social, political and economic experience of different racial groups (Parashar 1994: 84–5), nor account for the variation in the social,

political and economic impact of race discrimination upon Aboriginal peoples as compared to those of other 'non-white' heritages (Gaze 2005: 174–5). And significantly, it gives no account to the different—and *privileged*—experience of race by whites. Rather, the Act founds whiteness as the invisible standard by which it measures the way raced 'others' 'should' be treated. The consequence is that complaints of racial discrimination by Aboriginal peoples may enable them to 'achieve' the 'same treatment' as white people, but *cannot involve any challenge* to the systemic privileges already enjoyed by whites (Nielsen 2007: 123–9).¹³

The second aspect of the Act's design that reinforces whiteness is its focus on the 'individual', which confines complaints to forms of race discrimination involving 'discrete' experiences. This is because complaints are limited to acts of discrimination that occur within the 12 months proceeding the date a complaint is lodged (s 89B(2)(b)), which confines the legislation's attention to racialised acts occurring in the 'present', not the 'past'. For example, an Aboriginal person may experience systemic race discrimination in the labour market, resulting in a résumé that implies a 'broken' and 'poor' work history. Any employer who refuses to employ them as a result remains immune from a complaint of race discrimination because the person's work history is placed outside of the employer's 'individual' responsibility—even though that employer's denial of employment perpetuates systemic racism (Nielsen 2007: 161–91).

Moreover, the Act fails to empower the Board to intervene, investigate, prosecute or punish acts of race discrimination or to investigate systemic racism (Partlett 1977: 156–8 & 171–3).

Although these are longstanding concerns, the Board remains empowered to act only when an *affected individual* lodges a complaint (ss 90–91A).¹⁴ This is significant, as the following example demonstrates, because the law struggles to respond even to 'individual' acts that compound to create a racist system overall. As part of the consultations for my doctoral thesis, the Board's complaints staff told me about the difficulty they faced when contacted about a recruitment agency that was 'discriminating against [Aboriginal] people constantly' because:

[all we can do is act on individual complaints, then in theory, every single person in this area who is discriminated against by [this agency] has to make a complaint, and we deal with each of them individually, without recognising that it might be coming from this one source. ... It would be much easier to just be able to address the source of the discrimination (in Nielsen 2007: 134).

The combined effect of the Act's temporal scope and the Board's inability to initiate action without a complaint is that systemic racism is structurally defined as an 'Aboriginal' problem—that is, one that does *not* implicate white people. Consequently, Aboriginal people not only bear full responsibility for challenging the effects of systemic racism, but may only challenge narrowly defined versions of problems that occur in the 'present'. This reiterates the normativity of the accumulated privileges of whiteness, as these privileges are immunised from challenge by being 'buried deep within the social psyche' where their 'longevity' accords them 'the status of a self-serving "truth"' (Thornton 1995: 84).

Finally, the Act's support of whiteness is firmly entrenched through the design of

the complaint system. Initially this is because the choice to pursue a complaint is a significant one: the law requires those who do so to be 'sufficiently informed, motivated ... empowered' and *resourced* to use its 'complex legal machinery' (Bertone & Leahy 2003: 113). Although this inevitably involves 'great personal cost' to Aboriginal people (Moreton-Robinson 2007: 93) as well as legal costs, the Act's formal equality makes them *equally* entitled to pursue their complaints as those people who enjoy the privileges of whiteness.

Whiteness is also supported as a result of the Act's emphasis on 'education' and 'persuasion', because conciliation—a process that rests primarily on *mutual* agreement—is the primary dispute resolution process used to resolve complaints.¹⁵ Even though the complexities of litigation might suggest that the focus on conciliation is a good thing,¹⁶ a successful conciliation does not 'prove' that the discrimination alleged occurred. Instead, it *might* result in an explanation, an apology, action to restore a person's rights, monetary or other forms of compensation or development and/or improvement of equal employment opportunity policies (NSW Anti-Discrimination Board 2008: 15). However, there are no guarantees because the Act is designed to use 'gentle persuasion' to convince respondents to change their practices or policies rather than penalties that would cause them 'pain' and thus deter them from repeating acts of race discrimination (Distaff 1994: 5, 9). Moreover, the Act does not define what action should—or at least could—constitute a 'successful' conciliation, and does not establish any criteria to vet the outcomes achieved at conciliation (Distaff Associates 1994: 41). Instead, all that is required is that the complainant accepts the respondent's proposals for

resolution (if any and whatever their form) and/or agrees to 'discontinue' the complaint.

Clearly, this ignores the likelihood of a 'structural inequality' between the complainant and respondent (Thornton 1995: 88), and that this inequality can be used to apply pressure on complainants to reduce their 'demands on the respondent wherever possible' (Distaff, 1994: 39). What this grants to white respondents, then, is a structurally superior position in conciliation because nothing can happen *without their consent*. For instance, some Aboriginal people have reported using the complaint system as a way of educating white people about racism (eg. Distaff Associates 1994: 74); but they can only achieve this if white people *want* to learn. According to the discrimination law practitioners I interviewed, this rarely happens. As one commented: 'I've never seen ... the lights go on and somebody go "oh yeah I'm a racist"', because more typically, respondents 'settle it on a "commercial" basis to get rid of it, on the basis of no admission of liability and confidentiality' (in Nielsen 2007: 136–38). Yet, again, the system's standard of formal equality positions Aboriginal complainants as formally equal to white respondents, all the while according those respondents a structural advantage that protects and reproduces their whiteness and their privilege. This suggests that the 'best' the Act can offer an Aboriginal person is the 'opportunity' to *persuade* white people to release their grip upon privilege through a process that actually *supports* white privilege because it imposes no demand that it *must* change.

Collectively, these features in the ADA's design reveal that, while formal equality dictates a 'neutral' response that ignores racial difference—that is, colour-blindness—the Act is only truly blind to

the racialised difference founded in the system of white privilege. Indeed, whiteness is the Act's (unstated) normative standard because ultimately, all that the Act requires is that Aboriginal people be treated *like white people* (Nielsen 2007: 192–210). However, I think it unlikely that Aboriginal peoples would recognise this as a form of equality. Instead, I think it more likely that, like Watson (2005), they would recognise this standard as a form of *more assimilation*.

Does Substantive Equality 'undo' Whiteness and Privilege?

The question unexplored so far is whether the formal standard inherent in anti-discrimination law is moderated by the inclusion of indirect discrimination and special measures provisions, because these types of provisions can promote substantive forms of equality.

As indicated above, indirect discrimination provisions prohibit conditions or policies that cause disproportionate disadvantage to members of a particular group. Thus, they may promote substantive equality because they enable scrutiny to be applied to the *effect* of facially neutral standards. However, the reach of the indirect discrimination provisions is inherently limited because a condition or requirement, despite causing disadvantage, is not unlawful if it is also *reasonable*.

In Anglo-Australian law, *reasonableness* is an 'objective' criterion, by which the courts 'weigh the nature and extent of the discriminatory effect' of the 'policy, requirement or condition against the reasons advanced' in its favour (*Secretary, Department of Foreign Affairs and Trade v Styles* (1989): 624). Not surprisingly, this criterion attracts significant criticism. For instance, Pace (2003: 3) argues it involves a

'questionable claim to universal objectivity':

The reasonable person standard applied by judicial decision-makers is assumed to provide a code of conduct that is commonly understood. The reasonable person is said to be neutral: devoid of gender, class, race, sexuality or other immutable characteristics. What this approach fails to recognise, however, is that there is in fact no self-evident, commonsense, consensus view about what is reasonable. The judgment as to what is reasonable is clearly going to depend upon the position and perspective from which the question is viewed.

Pace highlights where the fundamental difficulty in proving indirect discrimination complaints lies, in that what is reasonable tends to be viewed from the *respondent's* perspective. For example, Thornton (1993: 99) points out that the anti-discrimination tribunals' approach to judging whether or not employment decisions are 'reasonable' involves 'a presumption in favour' of an employers' 'prerogative' to manage and make decisions in their workplace. As I have argued elsewhere (Nielsen 2007: 252), mainstream workplace culture and practice is infused with white cultural values and assumptions, even though this white racial content is obscured by courts most often interpreting it as the 'ordinary', 'standard' way things are done—so much so that Aboriginal workers are simply expected to reconcile themselves to white workplace culture. Consequently, when employment conditions or decisions are scrutinised in an indirect race discrimination complaint, they are most likely to be blanded of their racial content through being read as 'ordinary' and/or 'commonsense', which judges consistently interpret as *reasonable*.

Therefore, I doubt that complaints of indirect race discrimination achieve the 'better' equality outcome asserted through substantive equality because the concept of 'reasonableness' represents a 'universalized order' (Watson 2007: 96) infused with white cultural values.

However, as noted above, 'special measures' work in another way in that they give legitimacy to *different* treatment where it is applied to (favour) a particular group so as to redress historical or other disadvantage. That is, they could promote substantive equality as they are said to be designed to achieve 'equal' outcomes. But even though this focus on outcome can promote substantive equality, the more important question is whether the outcomes it enables offer *enough*. Because the inherent difficulty in 'reasonableness' also lingers in special measures: *who* decides what form they take and what 'disadvantage' makes them necessary and legitimate? Monture (1986: 161–2) highlights this by explaining that describing Indigenous peoples as 'disadvantaged' is:

a nice, soft, comfortable word to describe dispossession, to describe a situation of force whereby our very existence, our histories, are erased continuously right before our eyes. Words like disadvantage conceal racism...

[Because Indigenous Peoples] are only disadvantaged if you are using a White middle class yardstick. I quite frequently find that White middle class yardstick is a yardstick of materialism. ... [For us it] is not what you are that counts, it is who you are. So when the world of the dominant culture hurts me and I cannot take it anymore, I have a place to go where things are different. I simply do not understand how that is disadvantaged.

Monture's point is exemplified by examining a feature of the Federal Government's 'emergency response' to violence and child abuse within certain Northern Territory Aboriginal communities—the 'Intervention' (see Martiniello 2007). The legislation underpinning the Intervention specifically reduces and/or negates Aboriginal rights, including by permitting the compulsory acquisition of and other reduction of certain land tenure rights.¹⁷ The irony in this approach is that the rights being taken are 'special measures': like Pitjantjatjara land rights, the rights affected are founded (in Anglo-Australian law) in Northern Territory land rights legislation.¹⁸

Nonetheless, the legislation would have us believe that the Intervention itself, functions as a 'special' measure¹⁹ because it redresses 'Aboriginal disadvantage'. Apparently, those who drafted this legislation were undeterred by its absurd logic: that is, the Intervention has the effect of *securing* for those within these Aboriginal communities 'equal enjoyment or exercise of [their] human rights and fundamental freedoms' (CERD 1969: art 1(4), emphasis added) by *reducing* Aboriginal property rights. And though it did not specifically interrogate the Intervention's status as a 'special measure', the High Court recently endorsed the logic that supports it, by deciding that there is nothing so 'distinct' or unique about these Aboriginal land tenure rights that precludes them from being compulsorily acquired by the Crown—*just like white property rights*.²⁰ Therefore, just as it reasoned in *Gerhardy*, the High Court refused to measure the property rights of these Aboriginal communities through their enduring connection and relationship to their law and country—the claim no other group can make—because it refused to understand

Aboriginal property rights as superior to or more 'special' than 'normal' property rights, that is, those rights defined by the white 'yardstick' of white sovereignty (Watson 1997). And the current government has also endorsed this logic by announcing its commitment to extending the Intervention;²¹ therefore, like its predecessor, this government is committed to measures defined through 'comfortable' words concealing normative white standards that perpetrate *assimilation* (Watson 2005). This is the exact problem Monture identifies.

What this discussion indicates is that, while both indirect discrimination and special measures can support a substantive model of equality, each retains the capacity to reiterate whiteness. This is because the outcomes produced by both are typically measured through a 'comfortable'—yet selectively colour-blind—standard that conceals the yardsticks of whiteness and racism. This suggests that the inclusion of substantive equality provisions does not automatically absent whiteness from laws' equality, but may instead further entrench it as laws' (unstated) normative standard.

The 'Agency' of Legal Scholarship

I have argued that the formal equality that underscores Australian anti-discrimination law functions as a form of 'race-blindness' that views all forms of racial differentiation as inherently discriminatory. But as indicated by my analysis of the ADA, the effect is neither colour-blind nor race-neutral, because the Act fixes 'equality' as something 'symbiotic with the prevailing [racial] order of social relations, and the interests of those who are dominant within it' (Bakan 1991: 454). As a result, the design of the Act is only truly blind to the racialised difference founded in the

systemic privileges accrued through whiteness. Accordingly, the 'colonial cultural condition' of whiteness is not only the ADA's invisible measure, but its protection appears to be the Act's central concern. Moreover, as suggested by my analysis of indirect discrimination and special measures, whiteness is not necessarily absented from or even moderated within laws' 'equality' simply by including provisions designed to promote substantive equality. Both of these provisions may reiterate whiteness because the terms and conditions that define what is 'substantive' can be 'designed for and skewed' in favour of 'the white majority' (Davies 2008: 317).

But rather than giving the 'answers', I think my analysis opens other questions: who *is* our law designed for and do our mainstream legal analyses of equality work to reveal that? Uncle was very clear to me about who the law is designed for, and Moreton-Robinson is very clear that typically our work does *not* reveal that (2007: 85). Indeed, each time we omit 'race' from our discourse, we retain our agency with laws' 'reproduction and maintenance of racial hierarchies' (Moreton-Robinson 2007: 85) by remaining selectively 'colour-blind' to the significance of racial 'difference' and skewed in our understanding of the context of inequality consequent upon 'historical disadvantage'. Therefore, we (whether unwittingly or not) continue to re-assert and stake white claims through upholding the 'invisibility' and supposed 'neutrality' of the whiteness of law. Consequently it is important how we 'know' *when* and *why* and *whose* racial difference matters; while I agree that substantive equality theory offers a more capable model to enable responses to equality, to apply it accurately, we need to 'know' when justice requires a response to racial

difference, and we need to 'know' the full context both of racial inequality and of 'historical disadvantage'. None of these things are just about 'others'.

And, given the commitment of legal scholars to issues of justice and equality, why are mainstream legal analyses failing to engage with the implications of our whiteness? In part, I think this is the result of the voices to which we are and are not willing to give attention. As Watson (2007: 107) says:

The exclusion of other narratives works to silence other possibilities, one being the role of the grandmothers. When the frame remains limited, so too does our search for solutions.

For instance, many Indigenous scholars articulate theories of *difference* rather than ones simply of 'equality'. As I understand it, they do so because Aboriginal peoples 'have never wanted to be the same' because it is 'difference, and the right to be different, that is central to the idea of an Indigenous struggle, the sameness is killing' (Watson 2001: 35). This struggle cannot be achieved through sameness with white people, whether in form or outcome, because instead, it is a struggle to hold onto the core of Aboriginal difference—the 'freedom to be myself, to honour the mother, to honour the traditions and culture that we have carried since time immemorial ... without fear of recriminations' (Watson 1996: 108)—Aboriginal sovereignty and self-determination.

Clearly this is *not* a dialogue about formal equality—but neither is it a dialogue based simply in a theory of substantive equality. Instead, it is a conversation based on the premise that 'equality is better measured against ourselves' as Aboriginal peoples (Watson 1998: 38). But more particularly here, this

conversation is not heard often within mainstream legal discourse even though, as Moreton-Robinson (2007) warns, by remaining closed to 'other' conversations, we continue an agency that contradicts our calls for 'justice'.

What this should suggest to those of us who are members of the mainstream legal academy, is the need for us to develop greater reflexivity in our practice, to open ourselves to spaces in which different epistemologies can meet and disrupt our own (Moreton-Robinson 2000: xxv). But our purpose in opening these spaces must not simply be to enable us to understand 'others'. Instead, our purpose should be to better understand and interrogate our own race consciousness—that is, *ourselves* and the implications of our *raced position as whites*:

not to strengthen the concept of the white race, but rather to call it into question—to demystify white power, and to remove the certainty of the comfortable place white people occupy in the world [and in our law] (Davies 2008: 318).

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Conventions and Cases

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Baird v State of Queensland [2006] FCAFC 162.

Gerhardy v Brown (1985) 159 CLR 70.

Purvis v New South Wales (Department of Education and Training) [2003] HCA 62.

Secretary, Department of Foreign Affairs and Trade v Styles (1989) 88 ALR 621.

Western Australia v Commonwealth (1995) 183 CLR 373.

Wurridjal v The Commonwealth of Australia [2009] HCA 2.

Notes

¹ I use the term 'mainstream' to direct attention to the dominant group amongst the legal academy, that is, those of us who are white.

² Referring to the First Nations Peoples of Australia. 'Indigenous' is used to signify First Nations peoples, irrespective of geographic origin.

³ I use 'white' generally to refer to peoples with Anglo- and European-Australian racial identities.

⁴ *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Human Rights and Equal Opportunity Act 1986, Disability Discrimination Act 1992, and Age Discrimination Act 2004.*

⁵ *Anti-Discrimination Act 1977 (NSW), Equal Opportunity Act 1984 (SA), Equal Opportunity Act 1984 (WA), Anti-Discrimination Act 1991 (Qld), Equal Opportunity Act 1995 (Vic), and Anti-Discrimination Act 1998 (Tas).*

⁶ *Discrimination Act 1991 (ACT) and Anti-Discrimination Act 1992 (NT).*

⁷ The grounds are: race, sex, marital status, pregnancy, family responsibilities, sexuality, transexuality, disability, age and sexual harassment.

⁸ It also prohibits racial vilification, that is, public acts that incite hatred, serious contempt, or severe ridicule towards those of a particular racial group (s 20C), while those that involve or incite threats of personal harm or harm to

property are made a criminal offence (s 20D).

⁹ The Act creates few offences: eg. serious racial vilification, publishing discriminatory advertisements (s 51), and (since 2005) a number related to involvement in conciliation proceedings.

¹⁰ Compare this with s 9(1) RDA, which creates a cause of action in relation to 'any act involving a distinction, exclusion, restriction or preference' (see *Baird v State of Queensland* 2006).

¹¹ Paid work relationships (ss 8–13), education (s 17), the provision of goods, services, and facilities (s 19), housing/accommodation (s 20), registered clubs (s 20A), and in the activities of certain public bodies and government (ss 119–121; though each is qualified by 'exceptions' which *permit* racial differentiation (ss 8(3), 14–16, 54 & 56).

¹² See also Moreton-Robinson 2007.

¹³ See further, de Plevitz 2000.

¹⁴ Section 7 requires *an individual* to be affected *before* any contravention of the Act can be alleged.

¹⁵ See Nielsen (2007b: 129–32).

¹⁶ Race discrimination is criticised as extremely difficult to prove (Thornton 1995; Gaze 2005), and about two thirds of litigated complaints will fail (Nielsen 2007b: 138).

¹⁷ Part 4, *Northern Territory Emergency Response Act 2007* (Cth).

¹⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See *Western Australia v Commonwealth* (1995).

¹⁹ *Northern Territory Emergency Response Act 2007* (Cth): s 132(1). The Act also immunises the Intervention from challenge under the RDA: s 132(2).

²⁰ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2; but see Justice Kirby's discussion which gives an expanded notion of Aboriginal property rights, though he also contains them within the paradigm of white sovereignty ([307]–[308]).

²¹ Karvelas, P. 'Macklin extends intervention', *The Australian*, Friday 6 March 2007, 1.

PINNED LIKE A BUTTERFLY: WHITENESS AND RACIAL HATRED LAWS

KAREN O'CONNELL

Abstract

This article explores ideas of whiteness and racial harm by focusing on an area of law in which these themes are pivotal: the regulation of racial hatred. Racial hatred provisions in anti-discrimination laws were established to provide a public space protected from offensive or intimidating racist behaviour. However, based as they are in equality doctrines, they also allow whites to bring claims of racial hatred against blacks. How does law respond, and how should it, when white applicants present themselves as victims of racial harm? This article argues for a legal response that makes embodiment central to the resolution of these cases.

An embodied approach to racial hatred cases can bring justice for black respondents, but also allows whiteness, which is generally obscured in law, to be rendered visible. Exposing whiteness to examination can lead to a more coherent racial identity for whites and a richer and fairer system of law.

Preface

Samantha Power, an Aboriginal woman, has travelled to visit the father of her four youngest children, an inmate at Yatala Labour Prison in Adelaide. It's a hot day, and she is travelling by bus with the children. They have taken two buses to get to the gaol, a trip of more than two hours. Three of her four children—a three year old, a two year old and a baby—are used to being pushed in a stroller. Ms Power is stressed and angry because

she has recently found out that her children may be taken from her into care, partly because of information given by the children's father to government workers. As well as being tired, hot and stressed, Ms Power is on a methadone dosage that makes her feel 'spaced out' and 'out of it'.

What happened when she finally makes it to the gaol, in time for the 2:45 visiting hour, is contested. Mr O'Leary, a white prison officer, was the visits booking officer that day. To enter the gaol Ms Power usually showed her Medicare card and pension card, but this time, in her rush, she had forgotten them and the other documents she offered were not considered valid ID. Despite having made 20 previous visits without incident she was refused entry. When she protested, Mr O'Leary's supervisor, Mr McLeod, backed up his decision and she was turned away from the gaol.

As she was escorted away by Mr McLeod and another officer, Ms Power, 'wild' and 'cursin'', as she put it, allegedly said to Mr McLeod: 'you white piece of shit', 'you fucking piece of white shit' and 'fuck you whites you're all fucking shit'.

Mr McLeod brought an action against her for racial hatred under the Racial Discrimination Act 1975 (Cth) (McLeod v Power 2003).

Introduction

Being white is an experience of privilege, and yet whites, Baldwin (1998: 321–2) has written, 'are impaled on their history like a butterfly on a pin':

This is the place in which it seems to me most white Americans find themselves. Impaled. They are dimly, or vividly, aware that the history they have fed themselves is mainly a lie, but they do not know how to release themselves from it, and they suffer enormously from the resulting personal incoherence.

Baldwin's assertion that whites suffer the internalised 'incoherence' of race denial is linked directly to a particular view of the past. In Australia, it is not only in an obscurant view of history that black/white relations have been contested and racial suffering compounded: law has been a historical and contemporary forum for race issues to be selectively acknowledged or obscured.¹ Law, after all, was instrumental in establishing the conditions of early colonisation, reinforcing the social disadvantage that Indigenous Australians have experienced, and, later, providing a means by which Indigenous people could argue for land rights and social equality (Karpin and O'Connell 2005: 173). Anti-discrimination schemata represent one avenue for Indigenous and other Australians to argue for the recognition of their rights and seek redress when those rights are transgressed. Racial hatred laws, introduced across Australian states and territories since 1989,² and federally in 1995,³ are one facet of these laws which attempts to tackle racial disadvantage directly.

Despite attempts such as these to provide legal remedies for racial harm, race continues to be subterranean,

barely visible in Australian laws. Yet race is fundamental to white legal institutions, 'elusive' but 'pervasive' (Ravenscroft 2004: 3). In this article I argue that the invisibility of race within law results in harm to white as well as Indigenous Australians, and suggest an approach that would begin to illuminate the white as well as the Indigenous experience of race in Australian law.

It is central to my argument in this article to assert that white people suffer because of their own racism. This suffering takes various forms and is expressed in different, sometimes conflicting ways, from the nostalgic and nationalistic⁴ to the postmodern,⁵ but has common ground in the idea that only aridity and constraint can arise from fantasies of racial neutrality or exclusivity. This claim of white suffering is difficult to assert when it is suffering accompanied by privilege: a suffering that appears trivial compared to the material suffering of Indigenous Australians. Yet the two are intertwined: a failure to acknowledge the negative consequences of racism on whites encourages further denial of white racial identity and maintains the pretence of invisibility that feeds into Indigenous disadvantage.

White Invisibility: Unseen by Whom?

One of the most distinctive qualities of 'whiteness' as it manifests in contemporary life is its ability to elude examination. When I have written previously about white/Indigenous identity, in the context of emerging genetic technologies, I found that however I approached it there seemed to be some kind of erasure taking place (O'Connell 2007). If I wrote about Indigenous people, I felt that I reinforced the privilege of white invisibility. If I focused on whiteness I found I was ignoring the much more serious potential

losses experienced by Indigenous people coming into contact with genetic technologies. Further, to write about race as a white person, I felt, was to expose exactly those vulnerabilities of the white consciousness that Baldwin identifies: incoherence and a subconscious desire for exoneration. This raised for me the general question of whether it is possible to write meaningfully about whiteness as a white person, whether, as Pease (2004: 119) puts it: '[it is] possible for whites to talk about whiteness in ways that are not racist'.

In the end I decided to simply acknowledge the struggles I was having, as a white person, in addressing race issues. I wrote about the sense of shame I shared about Australia's white history and the white desire to find an ethical position that erases this shame. However, I did this without interrogating my own racial status. Then I gave it to a colleague to read.⁶ She pointed out that I was taking a position myself, as 'white', that purified and erased any question over my own racial identity. She also commented that taking on responsibility for colonisation was potentially another form of hypervisibility.⁷ Her comments have inspired the more tentative position I take in this article: that racial identity is fluid, contextual and impure, but at the same time being perceived as 'white' gives one concrete privileges that cannot be ignored. 'Whiteness' like 'blackness', is at once socially constructed and accepted as biological 'fact'.

How then, to untangle this mix of social construction, embodiment, power and privilege? Both whiteness and blackness are, at different times, invisible in law. Williams (1997: 17) writes that: '[h]ow, or whether, blacks are seen depends upon a dynamic of display that ricochets between hypervisibility and oblivion'. Whiteness is invisible in a powerful sense,

the sense in which something cannot be seen simply because it is the standard of neutrality and so draws no attention to itself (Haraway 1997: 23–4). Whiteness escapes examination when, as a consequence of privilege, whites are seen as autonomous individuals rather than being reducible to a racial category (Chambers 1997: 192).

In this view, race lives only 'in black bodies' (Williams 1997: 7), unacknowledged as part of the experience of white embodiment. However, the invisibility of whiteness is highly subjective, since it is only whites who cannot see their own race: a self-willed blindness (Gaze 2005: 6; hooks 1997: 168). As Perkins (2004: 174) asks:

If 'whiteness as power is maintained by being unseen' ... the question remains: Unseen by whom? Those on whom such power impacts do not fail to see it and people of colour generally do not fail to see whiteness around them.⁸

Visibility shifts between whiteness and blackness, according to undercurrents of power and powerlessness. White and black visibility is also interconnected: white people's racial identities are purified and rendered invisible when 'race' is synonymous with 'non-white' (Morawski 2007: 216).

Despite this, social activism since the 1960s and critical race studies in the past decade have meant that there has been a partial reform of law and politics, and enough scholarship to irrevocably challenge the idea that whiteness can be monolithic or 'pure'. While white invisibility and white privilege endure, 'white identities have been displaced and refigured: they are now contradictory, as well as confused and anxiety-ridden' (Winant 2007: 4). The tension inherent in this state promises further political and academic action towards making whiteness visible.

In law, there are particular challenges in making white embodiment visible. At the heart of law are abstractions which represent the ideals to be constantly strived for: neutrality, equality, objectivity, justice. Inherent in this set of abstractions is the idea that if we are all equal before the law, and if law is neutral enough, objective enough, that this will translate into justice and social equality. And yet it is the very insistence upon abstraction that can make law unable to see the specific, embodied harm that exists before it. Thornton (1999: 756) puts this beautifully when she writes in relation to constitutional law:

While the representation of constitutional law as abstract, decorporealised and neutral accords with the idealised and universal norms of justice, such rhetoric serves to disguise the injustice at the root of the case—that is, the particularity of the harm that led to the search for a remedy. Constitutionalisation legitimises the recounting of narratives that are likely to be unrecognisable to the complainants. The sorrow of the Aboriginal 'Stolen Children' evaporates in the face of a legalistic excursus on the legislative scope of the Territories power (s 122 of the Constitution) (footnotes omitted).⁹

Racial hatred laws provide a unique means of interrogating whiteness and challenging this abstraction, because they deal directly with the emotional impact of racial harm.

Regulating Racial Hatred

Racial hatred or vilification laws exist in all states and territories of Australia, other than the Northern Territory, as part of a broader regulation of hate speech that Rice (2005) has described as a 'hotch-potch'.¹⁰ Some racial hatred provisions are criminal, some civil; almost all are inserted in anti-discrimination legislation.¹¹ Alongside state and territory

laws the *Racial Discrimination Act 1975 (Cth)* was amended in 1995 to include protections against racial hatred.¹²

Like all anti-discrimination legislation in Australia, the federal law is based on principles of equality. While it may seem self-evident that racial hatred and other anti-discrimination laws are intended to protect minority or subordinated groups from further harm, equality-based legislation is silent on underlying privilege or disadvantage; the Racial Discrimination Act protects whites as well as blacks from discrimination.¹³ This neutral expression of protection allows those who enjoy a privileged social status because of their race or other aspect of their identity to adopt relatively easily the language of victimhood.

Even before the Racial Discrimination Act was amended to make racial hatred unlawful at the federal level, there were concerns amongst some commentators about the potential use of the provisions to attack those they were intended to support. One commentator (Twomey 1994: 248), offering comparison with the experience of the United Kingdom, wrote:

If the aim of racial vilification legislation is to punish racists and racist organisations, we may also be disappointed. Experience in the United Kingdom has ... shown that many of the most notorious racists are capable of avoiding conviction under such legislation, and that it is often members of minority groups, who do not have the same access to legal advice, who are caught by the legislation.¹⁴

A stark example of this was provided when the first person charged under Western Australian racial vilification laws was a 15-year-old Aboriginal girl, who called another young woman a 'white cunt' (Taylor 2006).¹⁵ It is also, of course,

what happened to Samantha Power after swearing at a white prison guard. However, while whites do have equal access to racial hatred provision, the way that whiteness plays out in racial hatred cases is rarely straightforward.

Racial Hatred Cases and Whiteness

Cases brought under the racial hatred sections of the federal legislation have been, in general, more likely to succeed than other race discrimination cases (Gaze 2005). This probably demonstrates a more pervasive difficulty with proving racial discrimination, particularly in the most common area of complaint, discrimination in employment, where the seeming neutrality of the idea of 'merit' can mask racial bias, rather than the ease of bringing a successful action against acts of racial hatred (Hunyor 2003).

In cases that have involved white complainants, racial hatred claims have not succeeded.¹⁶ This is also the case with the claims against Ms Power. But the story of the day that she visits the prison to see her ex-partner, and ends up in court accused of racial vilification, starts with an earlier story: the case of *Gibbs v Wanganeen* (2001) ('*Gibbs*').

Gibbs v Wanganeen is also set in Yatala Labour Prison. We are told less about the details of this case, just that it involved an inmate of the prison, Mr Wanganeen, was required to submit to a urine test and strip search to check for drugs. Following this, he had a 'discussion' with a prison guard, Mr Gibbs. As part of the dispute, Mr Wanganeen called Mr Gibbs a 'fucking white cunt', a 'fucking dog' and 'white trash' (*Gibbs* [2]).

Although it is an interlocutory matter, confined to considering the meaning of the legislation when it states that a

vilifying act must be done 'otherwise than in private',¹⁷ Federal Magistrate Driver discussed whether he would have granted relief if the incident were covered by the legislation.¹⁸ Driver FM was clearly of the view that the matter did not warrant compensation, and gave as his reasons that '[t]he prison officer had control over the prisoner' and that '[t]here was [already] a procedure within the prison for dealing with racial abuse, or any other abuse, of a prison officer by a prisoner' (*Gibbs* [20]). There is not enough detail to determine whether the racial aspects of the case held any significance for the magistrate: race is essentially absent in this case, although it is fundamentally about race. We are not told the race of the abusive respondent and we only know that the object of abuse is white because of the respondent's insults.

Federal Magistrate Driver, however, does acknowledge, very briefly, the unique attributes of a prison and the prisoner/guard relationship. A prison, after all, is a site of immense power differentials, in which freedom of movement and choice is intensely regulated, and the people with the immediate power to exercise that regulation are the prison officers. However, while this power differential exists independently of race—white as well as black inmates are subjected to it—race also overlaps with and exacerbates the differential, given the over representation of Indigenous people in Australia's prisons (Australian Bureau of Statistics 2008),¹⁹ the history of Indigenous incarceration (Royal Commission into Aboriginal Deaths in Custody 1991) and the potential of prior experiences of racism to intensify an Indigenous person's experience of incarceration.

This, however, is not the end of the story. Following *Gibbs v Wanganeen*, the correctional officers' professional

association sent their members a pamphlet telling them that the *Gibbs* case had failed because it was in a private area of a gaol, promising to prosecute on behalf of any prison officer who was vilified in a visiting area or other public place.²⁰ Mr McLeod clearly relied on the pamphlet in taking action against Ms Power, who had abused him in an area of the prison that, following *Gibbs*, would be likely to be considered 'public'.

Federal Magistrate Brown refers to this incentive in his judgment, just as he acknowledges many of the practical or concrete factors that underpin *McLeod v Power* (2003) ('*McLeod*'). The case, in a way that is rich for law, sketches a picture of Power's day, demonstrating her state of mind, her emotions and her bodily state in the lead up to her verbal abuse of Mr McLeod. We know about her, can think about how she might have felt, and potentially empathise, because the magistrate does. He is the conduit for the reader of the case to imagine what it might feel like to be Ms Power, standing at the gatehouse in the heat, feeling angry, tired and sick.

The *McLeod* case also takes into consideration gender issues. It is rare in law—where stress factors are sometimes acknowledged and used as mitigating factors²¹—for domestic or caring pressures to be accepted as mitigating factors against potentially actionable behaviour. In *McLeod*, the magistrate acknowledges, as one of the stressors affecting Ms Power, the strain of caring for four small children in a stressful environment on a tiring trip, as well as her distress over whether she would lose the care of those children.

These points are not just background detail; they are treated as significant by the magistrate who, after outlining all of Ms Power's physical and emotional stresses, concludes:

In those circumstances, I can well understand that Ms Power would have become angry when she was refused admission to the prison, particularly when she had been admitted to it without incident in the past. I accept that she was frustrated and upset at the refusal by figures in authority in the form of the applicant and Mr O'Leary to allow her entry into the prison. I have no doubt that she reacted badly to this refusal. It was hot. She had come a long way. The purpose of her visit was frustrated. There was no other person to whom she could turn to seek a review of the decision. She reacted with vulgarity, rudeness and insult in the face of what she perceived to be heartless and inflexible bureaucracy (*McLeod* [23]).

Vulgarity and rudeness alone do not make a successful racial hatred case. The fact that Mr McLeod is white, and was abused using the term 'white', is not enough to make it a racial incident for the magistrate. 'White,' he says 'is of course a colour', and so seemingly falls within the protective scope of the legislation,²² but the term 'does not itself encompass a specific race or national or ethnic group. It is too wide a term for that' ([55]). White Australians, Brown FM states, are also not a homogenous group, since they have 'different languages, religious beliefs, countries of origin and cultural practices' (*McLeod* [59]). He concludes:

[B]eing 'white' per se is not in my view descriptive of any particular ethnic, national or racial group. Nor is it of itself a term of abuse. White people are the dominant people historically and culturally within Australia. They are not in any sense an oppressed group, whose political and civil rights are under threat (*McLeod* [59]).

The word 'white' itself, rather than adding an exacerbating racial element to the insults, is described by the magistrate as inoffensive, 'anodyne':

In my view [Mr McLeod] was shocked and offended by the strength and vehemence of the swearing that was directed against him. I do not believe that his shock and offence were necessarily transformed or intensified by the addition of the anodyne words 'white' or 'whites' into the melange of invective that had been directed against him (McLeod [28]).

In brief, Brown FM decided that Ms Power's insults were not racial vilification because they were made not because of Mr McLeod's race, but to express frustration at the power differential between them; because a 'reasonable correctional services officer with a pale skin' (McLeod [69]) would not have been offended by them; and because—despite the decision in *Gibbs*—the conversation between Ms Power and Mr McLeod was private in nature even though it occurred in a public place.

In reaching this conclusion Brown FM repeatedly refers to the power disparity between Mr McLeod and Ms Power. The benefit of the body and its material conditions being acknowledged in this case is that they help illuminate the power differential between the Aboriginal woman visitor and the white prison guard, who was 'to a large extent in control of the situation' (McLeod [75]); the kind of power differential that can so easily be obscured or obliterated by the abstractions of legal principle. *McLeod* is one of those exceptional cases in which embodiment is made visible, and in doing so justice has been done.

Wearing Racial Embodiment

Or has it? What is interesting in *McLeod* is that while we are told enough about Ms Power to imagine empathetically what it might be like to be experiencing her particular tensions in the moment of alleged vilification, Mr McLeod's bodily

state remains unexplored. We know almost nothing about his emotions, or the physical and mental context in which he operates. His racial identity, minimally explored, is also rendered insignificant. Brown FM effectively erases his whiteness, describing it in various contexts as non-homogenous ([59]), non-specific ([59]), insignificant ([66]) and 'anodyne' ([28]). The significance of whiteness is further undermined in other sections of the judgment by Brown FM pointing out the social dominance of whites in Australia, making white Australians a group that does not require legal definition since they are not in need of legal protection ([55], [59]).

For their social dominance, ill-defined boundaries and internal diversity as a group, Brown FM finds that whites should not be able to invoke the racial hatred provisions of the Racial Discrimination Act. It is not unusual for complaints of vilification against whites to fail: the actions in *Gibbs v Wanganeen*, *De la Mare v Special Broadcasting Service* (1998) and *Bryant v Queensland Newspaper Pty Ltd* (1997) were all unsuccessful (or in the case of *Gibbs* would likely have failed if it had proceeded) because of the decision maker's conclusion that the alleged vilification was not serious or offensive enough to warrant legal remedy. However, each of these cases was concluded with minimal discussion of racial embodiment. What *McLeod* demonstrates is that where racial embodiment is directly addressed, despite the possibilities for a just outcome to the case, there are further potential problems for the Indigenous legal actor.

In *McLeod*, Brown FM strives against legal neutrality and abstraction to acknowledge the material conditions of embodiment that will make the racial and other inequalities of the case legally visible. He draws an abject picture of Ms

Power that illustrates her vulnerabilities and establishes Mr McLeod's relative power and status. In doing so, he expresses and evokes compassion for Ms Power, and sets her up as a person to be pitied rather than prosecuted. However, in his focus on Ms Power's embodiment, Brown FM locates in her qualities that may as easily be reviled as pitied: her drug taking, the inadequacy of her parenting, her sexual history and poverty are all on display. Whether Mr McLeod shares any of these characteristics or has potentially abject qualities of his own is not discussed: since all we know about him are the bare facts of his gender, race and profession he remains simply an 'ordinary' white man, doing his job.

So, as well as allowing white privilege to remain undisturbed, this approach also highlights a danger for the Indigenous participant in discrimination cases: that he or she will remain vulnerable to the way that a given decision maker will describe, and then respond to, the very qualities that he or she must establish in order to attract protection. Should the decision maker adopt a different affective stance, such as contempt or disgust, in place of compassion, the outcome of the case may well be different.

Anti-discrimination laws are unique within the legal portfolio for their concern with embodiment in its various forms; from skin colour to physical ability, pregnancy or sex. However, while the body can be the focus of discrimination cases it is the physical and emotional state of the socially *disadvantaged* actor that is usually relevant:

It is the stigmatised body that is made to 'wear' embodiment: the normalised body remains clean of bodily flaws and vulnerabilities. While acknowledging embodiment means that discrimination law is grounded in the reality of daily life, the one-sidedness of the acknowledgement

reinscribes the relative privilege and disadvantage of the parties (O'Connell 2009).

These laws can sometimes have the unintended effect of making subordinated bodies hypervisible, making them wear the consequences of embodiment, so that black bodies are more situated, biased, affected by materiality, while white bodies remain neutral and unaffected by their embodiment. In other words, the white actor in anti-discrimination law is left with the power of his or her invisible whiteness intact, while the black actor's embodiment is on display.

Conclusion: Resisting Embodiment— What Remains Invisible?

Discrimination laws are useful and powerful in part because they acknowledge embodiment; yet they can also reinscribe powerlessness because they tend to see racial embodiment only in those who are already bearing the weight of a hypervisible racial identity. One response to this is to question the gaps in bodily representation in law: whose embodiment has eluded legal attention? What are the bodily 'remains' of a case; what remains invisible?

In considering which actors in this story have eluded embodiment, it is not only Mr McLeod and his colleagues who have escaped attention. In law, decision-makers are almost invariably disembodied, and the decision-makers in racial hatred cases are no exceptions. Their perceptions of race, their own race and their bodily states exist behind a seemingly impenetrable neutrality, albeit one that sometimes grows thin when the decision-maker is black or female or is otherwise visibly embodied. That, however, is another part of the story, told in other contexts by other theorists

(see Graycar 1998; 2008). Also invisible are you and I, the readers.

Telling all the parts of the embodiment story promises rewards for white as well as Indigenous Australians. Avoiding the reality of racial embodiment leads, as Baldwin suggests, to both 'personal incoherence' and to renunciatory versions of racial history that permeate social and legal institutions until they are finally and painfully acknowledged. It is through embracing the reality of embodiment that whites may gain a language, including a legal language, in which to speak about their own race. Attention to what whiteness may mean in any specific context—in Australia, in relation to Indigenous peoples, where there are allegations of racial hatred—promises whites some respite from the stifling neutrality of racial invisibility, an opportunity to consider how whiteness has shaped their identity and history, and the possibility of a more coherent self description.

When Baldwin wrote that whites were pinned like butterflies there was clearly a sense of oppressive constraint in that image. Yet a pinned butterfly is not only a negative symbol; as well as a metaphor of capture it is also a metaphor of taxonomy and display. There is something to be gained by putting whiteness under scrutiny and on show. This is not to suggest that attention to all forms of embodiment is a way of untangling the resilient and mutually constitutive relationship of racial privilege and disadvantage, embedded as it is in so many other powerful social structures (Levine-Rasky 2002: 341). But in discrimination law there is the possibility of remedying the one-sidedness of considerations of embodiment, to illuminate racial privilege as well as disadvantage, and to undermine the tendency of laws—even beneficial laws—to entrench the disadvantage they set out to redress.

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Notes

¹ All racial terminology is fraught with shifting meanings and implied positions. Here I am using the terms 'black' and 'white' which are unsatisfactory because they suggest a homogenous individual and group racial identity that is exactly what I set out to challenge. However, I prefer the terms to other possibilities such as 'non-white others' that leave 'whiteness' intact, while underscoring the fragmented and contingent identity of the racial other. The lack of adequate racial descriptors is itself an eloquent critique of the irrationality of racial categorisations in contemporary Australia.

² In several states as well as the ACT, anti-discrimination legislation provides both civil and criminal offences. The *Anti-Discrimination Act 1977* (NSW) provides a civil remedy for racial vilification (s 20C) as well as making it a criminal offence in serious cases (s 20D). Racial vilification is prohibited under the *Racial and Religious Tolerance Act 2001* (Vic) s 7 (civil), s 24 (criminal). In Queensland, s 124A of the *Anti-Discrimination Act 1991* makes vilification unlawful; serious incidents may be a criminal offence under s 131A. The *Discrimination Act 1991* (ACT) s 66 makes racial vilification unlawful, and s 67 creates a criminal offence for serious incidents of racial vilification. In South Australia, criminal and civil offences for racial vilification are in two separate Acts: the *Racial Vilification Act 1996* s 4, (criminal) and the *Wrongs Act 1936* s 37 (civil). In Western Australia, racial vilification is

a criminal offence: *Criminal Code 1913* ss 76–80, and in Tasmania, a civil offence: *Anti-Discrimination Act 1998* s 19.

³ Sections 18B–18F *Racial Discrimination Act 1975* (Cth), as amended by the *Racial Hatred Act 1995* (Cth).

⁴ The 'New Abolitionists' of the American 'Race Traitor' movement claim that being white means not being fully 'American': (Ignatiev and Garvey 1996: 21).

⁵ See for example, the work of Haraway (1997), who champions the rich theoretical and material possibilities of acknowledging the ambiguous, contested meanings of race, in contrast to the trauma of a pretence to racial purity.

⁶ Professor Isabel Karpin, University of Technology Sydney, Faculty of Law.

⁷ See also Frankenberg (1997: 1).

⁸ See also Moreton-Robinson (2004: 81): 'In academia it is rarely considered that Indigenous people are extremely knowledgeable about whites and whiteness.'

⁹ Thornton is referring to the Stolen Generations case of *Kruger v Commonwealth* (1997) 190 CLR 1.

¹⁰ As well as the overlapping Commonwealth/state jurisdiction, there are also jurisdictional variations in the type of offence; civil or criminal, and differing grounds of hate speech (as well as race, some states protect against other kinds of vilification, such as religion or sexuality-based vilification).

¹¹ See n 1 above.

¹² See n 2 above.

¹³ See, for example, *Carr v Boree Aboriginal Corp & Ors* [2003] FMCA 408. Another older example of a case in which a white complainant argued discrimination in employment by an Indigenous respondent is *Bell v ATSIC & Gray & Brandy* [1993] HREOCA 25 (22 December 1993). This case was appealed to the High Court on the issue of the then Human Rights and Equal Opportunity Commission's 'judicial' powers, as *Brandy v HREOC and Ors* (1995) 127 ALR 1.

¹⁴ See also Poynder (1994: 57) who makes the same observation specifically about Aboriginal Australians.

¹⁵ The case was heard in Kalgoorlie Children's Court and the racist harassment charge was dismissed as the abuse was not serious, substantial or severe enough (*Criminal Code*

1913 (WA) s 76), to meet the legal requirement for prosecution.

¹⁶ In addition to the vilification cases of *Gibbs v Wanganeen* (2001) and *McLeod v Power* (2003), discussed here, see also *Bryant v Queensland Newspaper Pty Ltd* (1997) (an English man complained about the use of the term 'pom' in newspaper articles) and *De La Mare v Special Broadcasting Service* (1998) (a white person complained about the broadcast of a satirical 'mockumentary' called 'Darkest Austria' which he claimed vilified white people and Western countries).

¹⁷ Section 18C(1) of the *Racial Discrimination Act 1975* (Cth) states: 'It is unlawful for a person to do an act, otherwise than in private, if

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.'

Sections 18C (2) and (3) give further detail on when an act will be considered not to be done in private.

¹⁸ The magistrate found that it was not an act done 'otherwise than in private' because there was no direct public right of access to this section of the gaol, unlike, he states, the gatehouse and visits centre: (*Gibbs v Wanganeen* [16]) Further, there were no members of the public present, nor any reason to find that the conversation was not intended to be private: ([17–18]).

¹⁹ Twenty four per cent of all Australian prisoners are Indigenous.

²⁰ The pamphlet stated that, following *Gibbs v Wanganeen*, 'it is clear that if an officer is racially vilified in a "public area" of the prison (such as the visits area) then the matter would be actionable' and invited its members to report any racial vilification that occurred in 'public' areas, promising legal support. Cited in *McLeod v Power* (2003) [5].

²¹ For example, in the law of provocation, triggers such as 'grossly insulting words or gestures' can reduce a sentence from murder to manslaughter under the various state criminal Acts, such as s 23 of the *Crimes Act 1900* (NSW).

²² Under s18C(1)(b) the act complained of must be done because of the complainant's 'race, colour or national or ethnic origin'.

BOOK REVIEW

KATHLEEN CONNELLAN

Basia Spalek and Alia Imtoul. (Eds.) 2008. Religion, Spirituality and the Social Sciences: Challenging Marginalisation. Bristol: Policy Press. pp. 208. ISBN 978-1-84742-041-1.

'A Sparkling Mosaic'

Judging a book by its cover is not something one is encouraged to do. However, the cover image on *Religion, Spirituality and the Social Sciences*—emanating blue mosaic fragments that spiral out from an indefinite centre—aptly reflects the direction and cohesion of the many voices in this fourteen-chaptered book.

Mere utterances of the word 'religion', let alone attempts to incorporate understandings of it into the social sciences in the early 21st century Western university, have been enough to cast suspicion. It is therefore timely, necessary and brave of Spalek and Imtoul to bring together this collection of opinions and research on both religion and spirituality. In my own field of visual art and design history and theory, these issues are simultaneously hidden and visible. The 'accepted' visibility of religion is where it is conveniently a part of art history and consequently neatly dealt with in retrospect. But the re-emergence of the spirit and its spirituality within an articulated world of creativity is no longer possible to ignore. There is obviously a need for something more than objective intellectual engagement and this is nowhere more pertinent than in critical race and whiteness studies,

which touch upon all disciplines and practices.

Religion, Spirituality and the Social Sciences: Challenging Marginalisation challenges the way in which established religions, in the UK and Australia for example, retain hegemonic status. This is done under a cloak of secularism which is used to disguise dominant politico-religious practice. As such, what transpires from this book is that power relations are constantly at work. The selection of chapters comes together in a way that resonates with Michel Foucault's genealogical approach. This approach draws upon different historical and methodological examples and can be used to cast perspective on the way in which religion, state, politics and education operate in conjunctions of power (2007). Despite the ironies of a type of sanctimonious secularism in countries such as Australia and the UK, Spalek and Imtoul's book shows that it is not possible to quash the human soul and its thirst for spiritual nourishment. Initiatives to provide insight into faith identities constitute a counter freedom movement, which this volume contributes towards now. Secularism has been a convenient disguise for the 'disciplinisation' and separation of knowledges that the university tried to achieve in the past (Foucault, 2004, 183).

The book sparkles with the hope of voices that speak out for belief and against suppression. In this vein, discussions of spiritualit(ies) is especially

positive in the light of institutionalised religions and the colonising process. For example, Ursula King's chapter: 'Spirituality and gender viewed through a global lens' contributes to a redefinition of spirituality within re-emerging concepts of the goddess and feminist spirituality. Aspects of Ancestralism and ritual are similarly evoked as 'symbolic forms of resistance' in Maria Frahm-Arp's chapter when they come together with forms of Christianity in the African independent churches. Gordon Lynch writes a brilliant chapter entitled 'Dreams of the autonomous and reflexive self: the religious significance of contemporary and lifestyle media' in which he tackles the rapid changes in role models and comments on the notion of 'experts' in late modernity. The modernising processes of life, and beliefs beyond life, crop up often in the book. Changes wrought by modernity show that the need for another reality finds expression in many different observances. The re-emergence of faith is said to be 'shy' but resilient in Adam Possamai's chapter, who argues that religion is present but at times 'invisible'. Lynch shows how Thomas Luckman's notion of 'invisible religion' also helps to make sense of the limited 'horizons of this life', however Lynch is careful to note that simplifications will only result in an even more problematic and generic religious 'world-view'.

The precise clarity of each chapter's voice, whether or not some resonate with others, is what gives credence to this book. There is certainly no homogenous view of religion and spirituality put forward here. Instead, there is a careful interrogation into content and methods so that faith and spirituality can be incorporated into social science curricula with respect and ethics. Methodologies that combine

both qualitative and quantitative measures are brought to bear upon the research; this is especially evident in part three of the book. Miguel Farias and Elisabeth Hense produce a thorough investigation into ethno-categories and misconceptions regarding data on the terms 'religious' and 'spiritual'. This analysis is followed by Muzammil Quraishi's gripping account of his own research experience during months of full-time work amongst Muslim prisoners in the UK. Aspects of race, class and language reverberate around trust and suspicion in the confined environment of the prison, which provides the perfect micro-panoptic for the remainder of society. Consequently this chapter is well placed towards the end of the book where it casts light on other methods of surveillance operating against faith communities in seemingly innocuous ways.

I have called this review 'a sparkling mosaic' because the pieces of blue glazed ceramic tiles on the cover image glisten with individual shards of embedded and reflective tones. This is also true of the chapters and voices within them which constitute the compositional elements of what will hopefully stimulate more work of this nature. The inside/outside tensions of belief and faith in a world that is cautioned by scepticism and policed by secularism are shown in sensitive balance. At the heart of all societies are the individual people and their 'souls'. 'The soul, the breath, is something that can be disturbed and over which the outside can exercise a hold. One must avoid dispersal of the soul, the breath' (Foucault, 2005, 47). As such this edited volume confronts ideas on eschatology in a way that maintains its fragility but sustains its importance as a factor to be included in studies of society.

Religion, Spirituality and the Social Sciences is a book that can be read and used for many different degrees and courses in the social sciences. It is remarkably well structured. The excellent introductory and concluding chapters by the editors, careful commentaries between each section, in addition the bibliographies and index make it an extremely accessible and functional volume.

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BOOK REVIEW

DAMIEN W. RIGGS

Derek Hook. 2007. *Foucault, Psychology and the Analytics of Power*. Hampshire: Palgrave Macmillan. pp. 301. ISBN 978-0-230-00819-9.

This exciting new text by Derek Hook represents a much needed elaboration of the application of Foucault's analytics of power for use within the discipline of psychology and the social sciences more broadly. Hook provides the reader with a thorough working through of Foucault's account of power, his formulation of subjectivity, and applies this to the development of a broadly outlined research method which he uses to examine issues such as those relating to racism, paedophilia, psychological practice and gated communities. Importantly, Hook appears to write neither for nor against Foucault. Instead, he writes with and through Foucault to develop his own account of subjectivity that represents an important extension of Foucault's work through a critical engagement with psychoanalysis, and through a consideration of the affective elements of subjectivity.

Hook's work has long been central to my own formulations of the 'psychic life of colonial power', and in the remainder of this review I focus on engaging with Hook's outline of power and subjectivity to draw attention to the productive aspects of his book for those working in the field of critical race and whiteness studies. In so doing I emphasise two particular aspects of Hook's work: his references to what might be termed the 'metaleptic effects' of power (ie., the

substitution of cause for effect), and the production of subjectivities in particular racialised social contexts.

In regard to the first aspect, Hook emphasises (both implicitly and explicitly) Foucault's understanding of power, and the ways in which the operations of power necessitate a series of manoeuvres that often substitute cause for effect, or which obfuscate the temporal ordering of power, subjectification and subjectivisation. As Hook elaborates, Foucault's aim in so doing is to highlight how attempts at tracking routes of power 'back to their source', or attempts at finding 'base causes' for any given subject position fundamentally fail to comprehend the point, later made by Butler (1997), that neither power nor people are antecedents of one another: they are mutually constituted in ways that serve to further prop up both the seeming naturalness of power relations, and the seeming naturalness of subject positions.

Hook examines this substitution of cause for effect in at least two ways. First, and most explicitly, he outlines—in an excellent chapter on using Foucault's theory as a guideline for research methods in the field of discourse analysis—a notion of 'reversal' as the intentional act of analysis aimed at refuting assumptions about notions of 'origins'. Second, and as an implicit thread running throughout the book, he indicates moments in Foucault's theorising where he apprehends the metaleptic effects of power. For

example, and as Hook suggests when outlining disciplinarity, it 'may be said to engender its own deviance, thereby enabling and justifying its own recovery systems' (p. 39). Further on in the first chapter, Hook also highlights how power always produces metaleptic effects, where power projects itself backward to produce subjects that are seen as always already marked by power. In so doing, he suggests, power disguises the instability (and contingency) of its foundations by claiming foundationality within subjects. This circularity and contingency of power is something that Hook returns to throughout the early chapters of the book as he negotiates some of the limitations of Foucault's work (or more precisely the opacity of some of his thinking) in order to more fully develop an account of power that is opened up to a broad range of applications.

To this end, Hook's text is at its strongest if we (and indeed when he) apply his elaboration of Foucault's work to consider how subjects are produced as always already racialised in particular social contexts. In my reading, this appears most clearly in the formulation, following Foucault, that whilst there is no sovereign figure animating particular racialised power networks, such networks are nonetheless enacted through the bodies of subjects identified as occupying subject positions marked as privileged. In this sense, and whilst it is important to note how race circulates in ways that exceed the intentions of individuals actors, it is nonetheless also important to note how it functions as an *investment*, even if those invested in it are not fully aware of its operations. By making particular subject positions intelligible, race as an organising mode of power operates through bodies to reinforce its normative status despite

ongoing resistances to it as a legitimate category of differentiation.

Yet despite what may seem like a rather deterministic account of racialised power, Hook goes to considerable length, and in some ways writing against Foucault, to elaborate how resistance to hegemony functions. Rather than simply suggesting that resistance occurs at the points where power fails to assert itself as a *priori*, Hook outlines in later chapters how power is never one and the same thing: it functions in differing ways and to differing ends depending on the context and often despite the intentions of those who seek to wield power.

And this brings me to perhaps the only limitation of Hook's text. Whilst, as the book progresses, Hook clearly outlines how race and sexuality (amongst other points of difference) function to discursively produce particular intelligible subject positions, the book would have been stronger still had the functioning of race (in particular) as an organising principle (in all its varied forms and contexts) been applied to the theories of Foucault outlined in the first chapter. As Greg Thomas (2007) outlines in his cutting analysis of the field of sexuality studies, Foucault is always already talking about a *white* history of sexuality, using the tools of critique developed by *white* theorists. Whilst, as Thomas acknowledges, Foucault is in specific moments aware of this fact, in general he speaks as though the histories he recounts are universal. Hook's text thus would have been further strengthened by an engagement with the racialised power and forms of disciplinarity wielded in Foucault's writing. Importantly, and as I suggested at the beginning of this review, Hook doesn't simply write in support of Foucault — he often engages in critical

examination of Foucault's presumptions—yet this could have been pushed even further by examining the position from which Foucault wrote and thus the limitations that arise from this.

To conclude: this is an exciting text that extends Foucault's own work in important ways, and which offers new modes of analysing a range of social issues, most especially in relation to race and whiteness. Hook's close reading of Foucault's work demonstrates an in-depth knowledge of what is often a very dense body of work, and as a result he renders Foucault's key ideas in ways that are both highly readable and stimulating. The book will definitely be of interest to those working in the field of critical race and whiteness studies who are looking to draw upon the work of Foucault to conduct their own research, and will also provide a useful springboard for those wishing to further critique the functions of racialised power, both within Foucault's work and beyond.

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