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LAW, RACE AND WHITENESS

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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'....