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Abstract

Introduction to special issue of collected papers from symposium 'Mapping Law at the Margins', Brisbane, December 2004 - covering operation of the law at the intersections of race, class and gender from colonial times to the present through the lens of postcolonial theory. This Special Issue of the Australian Feminist Law journal collects papers largely from the second Symposium 'Mapping Law at the Margins' Brisbane, December 2004, organized to make visible the operation of the law at the intersections of race, class and gender from colonial times to the present through the lenses of postcolonial theory. Practices of map drawing were integral to processes of colonization, and feminists, critical theorists and others have used the metaphors of mapping and topographies in attempts to convey the complexities of shifting, intersecting, multidimensional individual, communal and national identities. Postcolonial theory provides lenses for analyses of the 'raced' and gendered dynamics of colonial imperialism, and for analyses of the shapes, limits, and potentials for currently emerging multidimensional identities at all three of these levels. An emphasis on praxis requires us to consider the politics of our theorizing. In this paper we explore the interconnection of these ideas and their expression in the articles collected in this special issue of the Australian Feminist Law journal.

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MAPPING CONNECTIONS: POSTCOLONIAL, FEMINIST AND LEGAL THEORY

Ian Duncanson and Nan Seuffert***

This Special Issue of the *Australian Feminist Law Journal* collects papers largely from the second Symposium 'Mapping Law at the Margins' Brisbane, December 2004, organized to make visible the operation of the law at the intersections of race, class and gender from colonial times to the present through the lenses of postcolonial theory. Practices of map drawing were integral to processes of colonization, and feminists, critical theorists and others have used the metaphors of mapping and topographies in attempts to convey the complexities of shifting, intersecting, multidimensional individual, communal and national identities. Postcolonial theory provides lenses for analyses of the 'raced' and gendered dynamics of colonial imperialism, and for analyses of the shapes, limits, and potentials for currently emerging multidimensional identities at all three of these levels. An emphasis on praxis requires us to consider the politics of our theorizing. In this paper we explore the interconnection of these ideas and their expression in the articles collected in this special issue of the *Australian Feminist Law Journal*.

1. LOCUS STANDI

A perspective from which to view this paper, and perhaps this special issue of *The Australian Feminist Law Journal*, may be one that suggested itself at a recent conference in Brisbane. One speaker made the provocative comment that there was nothing either contrary to the spirit of liberal democracy, or morally reprehensible, in the commercial selling and buying of babies, provided appropriate regulatory mechanisms were in place, as in the case of adoption. An obvious scenario is where a single or poor mother cannot afford reasonable conditions for raising a child in the post-Clinton United States, where she may have exhausted her welfare entitlements. An affluent woman or couple may be unable or not want to conceive a child. Are freedom and the interests of the child not maximized if a regulated market permits the transaction in this kind of case? If not babies, then why may not adults sell themselves, with appropriately regulated slave markets and effective inspections of working conditions that might require working environments superior to those of 'free' market sweatshops? Certainly, the work of social contract theorists, some of which provided justifications for liberal democracies, also supports the proposition that a 'civil' slave contract is merely an extended employment contract.¹

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Is there not a foundational humanist case to be made against both baby-sales and slavery? The shocking answer is that there is not. If we accept that, for example, the various political progressivisms — liberal theories, Marxism, western feminisms — and, at a more abstract level, positivism, have neither described the world adequately nor mapped an adequate route to their various promised lands, we are not, as is sometimes suggested, committed to a paradox: a foundational position to deny the possibility of foundational positions from which to ground the immorality of exploitation or guarantees of truth. The proposition that grand theories have failed is simply the observation that, in the above example, if some humans have treated other human beings very badly, as they have through recorded history, there is no ultimate, unanswerable or 'objective' logic that proves its unacceptability.

As middle class authors living in first world countries, we believe that the development of our intellectual capacities, and our comfortable life-style, are dependent on the exploitation of those at *our* margin, inhabitants of the third world, our indigenous people whose land we stole, our working poor and unemployed — and, of course, the slow depletion of planetary resources. Rich CEOs or law firm partners who justify the generous size of their remuneration in terms, *inter alia*, of their long hours of productive activity, depend on the unpaid labor of wives, or the low-paid labor of domestic servants, as well as the exploitation of profit from the physical, manual and intellectual labor of those further down the corporate hierarchy. But there is no Real, the opponents of grand theory tell us, in which the apodictic wrongness of these conditions can be *finally* demonstrated, as some forms of liberalism suggest, and no Real in which the impending collapse of terrible injustice can be predicted, as Marxism once did.

After the initial disappointment engendered by this observation has dissipated, there is a certain sense of liberation, one that has inspired this journal and numerous others, and generated many fruitful lines of research — fruitful in one sense, for example, in that one might be freed from the fierce schisms over what Marx Really meant, that this is what liberalism Really implies, and those other purported liberalisms are simply mistakes or masquerades, or that this is Real feminism, and that events over there are just women colluding with the boys. New knowledges blossomed from this scene of liberation, exploring contradictions, interstices and margins revealed as sites of knowledge rather than irrelevant wastelands by the decentering of the Real. The production of queer theories and the idea of intersexed bodies of knowledge became possible.

Challenges accompany this sense of liberation. We live in a universe where meaning is made from chaos using the symbols of language; meaning remains inherently unstable. Mapping ceases to be the formation of a singular authoritative knowledge connecting geography and the subject and subject-ing them simultaneously into places to be dis-covered, hierarchized and fixed.² The 'Great Survey' in which Rudyard Kipling's Kimball O'Hara was involved was an

The authors wish to thank the anonymous referees for their comments.

¹ Pateman Carole *The Social Contract* Stanford University Press Stanford 1988 pp 60–76.

² See the astonishing analysis of gender and geography in exploratory narratives in Phillips Richard *Mapping Men and Empire: a Geography of Adventure* London Routledge 1997; Steve Pile and Thrift Nigel 'Mapping the Subject' in Pile and Thrift eds, *Mapping the Subject* Routledge London 1995; Gikandi Simon *Maps of Englishness: Writing Identity in the Culture of Colonialism* Columbia University Press New York 1996 esp ch 1.

imperialily-inspired project designed to turn the many dimensions of the colony into the flattened social technology of British rule.³ It would provide an 'Empire of Knowledge', which reminds us that the scientific mapping of the body through fingerprinting began, not as an instrument of forensic science, but as one through which the British government of India sought to know and categorize their subjects because 'British survival and British profits depended upon knowledge of this alien domain and its inhabitants'⁴.

In her paper in this issue, Sandra Rudland analyzes the assumptions that informed the colonial appropriation of Australia, the incorporation of the cartographic narratives of 'Latin Christendom, which provided a visual representation of the influence of Christianity over the territories known to medieval Europe'. Planting seeds where the indigenous population did not, reducing the 'trackless wastes' to the atlas of the known introduces a new law, the law of the English white man, underpinned by writing and justified by a written nostalgia that knows the passing of the native in a way that the native him/herself, from the margins of the new civilization, cannot.

There seem to have been two responses, once marginality — who is in the center and who is in the margin — became a problematic and challengeable political category, once the certainties of imperial culture were clearly endangered. One response that is currently being explored in the work of Joseph Pugliese is denial, the simple but violent re-assertion of imperial knowing. In Australia we have seen this in the treatment of asylum-seekers, known, in government parlance as 'illegals' and 'queue-jumpers' if they arrive by boat.⁵ In the US, biometrics, the acquisition of digital information about the face, irises or fingerprints, helps sort the Caucasian standard from the non-Caucasian other, from the latter of whom, perhaps, trouble might be anticipated. In a double irony, Pugliese notes, black faces are harder to identify precisely, and the finger-tips of the very people associated with the manufacture of the electronic components necessary for the data-collection — southeast Asian women — are difficult to calibrate and distinguish.⁶ The scientific nature of biometric measurement returns us, in other words, to the era of phrenology, cranial measurements and the Lombrosian vocabulary of higher and lower races used by Cope and Brinton in the nineteenth century US, and rendered so infamous by the recent criticisms of SJ Gould.⁷

A second, quite different response is evident in films like Frear's *My Beautiful Laundrette*, in 1985, or Gurinda Chada's more recent *Bend It Like Beckham*, which experiment with difference and transgression and which question the fixity of place and status. In *Laundrette*, ethnicity and sexual orientation, as well as class, are investigated. *Beckham's* plot is uncomplicated, and perhaps,

³ Kipling Rudyard *Kim* London Macmillan 1901 esp ch 7.

⁴ Sengoopta Chandak *The Imprint of the Raj: How fingerprinting was born in colonial India* Macmillan London 2003 p 38. We have taken the phrase, 'the empire of knowledge' from the title of the second chapter.

⁵ Pugliese Joseph 'Penal Asylum: Refugees, Ethics, Hospitality' in (2002) 1:1 *Borderlands E-Journal* <www.borderlands ejournal.adelaide.edu.au > esp paras 40 et seq.; Marr David and Wilkinson Marion *Dark Victory* Allen and Unwin Sydney 2003.

⁶ Pugliese Joseph 'New Technologies of Capture: Biometrics and its Imperial Archive', seminar at the Institute of Postcolonial Studies, Melbourne, Vic 11.5.2005.

⁷ Gould Stephen Jay *The Mismeasure of Man* Penguin London revised ed 1992 ch 4.

aiming at comedy as well as pathos, less courageous. A young woman is a talented soccer player, who is chosen to play for the English women's team. Already we have two transgressions: soccer is typically a boy's sport, and 'England' is to be represented by someone not of Anglo extraction. In order to play the vital match in Europe, she is forced to contemplate missing the wedding of her sister, even the thought of which suggests a balancing of loyalties and traditions in a way that is difficult to understand as straightforwardly either 'ethnic' or domestic. The possessions of the Indian family suggest an affluence that contrasts with the vulgarity of the mother of the young woman's Anglo friend, who is clearly recognizable through English eyes as 'lower middle class' in the taxonomy in which Orwell long ago placed himself as 'lower upper middle class'. Chada is speaking to the English knowingly if unaggressively, but without the uneasy affection of some recent critical accounts of Englishness by the English themselves.⁸ Finally, when the ethnically Indian soccer player visits, uninvited, the home of the Irish soccer coach who has so inspired her, through the house's seedy contrast with her home, the film gives us both the class — it is a working class home — and colonizing dimension — he is Irish. We are reminded that colonialism continues in a society through its class and gender structures. We are also reminded, when we are in this environment, that the production of both subject and society is a more subtle process than the one invoked by the biometric environment with its atavistic reliance on the neutral, objective and certain qualities of electronic and other social technologies.

Feminism ceases, in the space in which gender, ethnicity and class mingle in an endless coming-to-be of the subject, to be simply about women. Instead it is about a process of feminization that does not map directly on to a Real category of Woman.⁹ In an era of corporatization, we are led, not to the abandonment of class as an analytical category, but to the realization that the exploitation of the proletariat that Marx identified now extends well beyond the traditional factory. In the wake of an era of intense population movement, class, as in the film, may supersede ethnicity — an Indian may drive a Mercedes and live in an expensive West London suburb — or it may intensify it, as with the Irish coach, whose skills failed to raise him from his shabby residence.

If we think of the feminine as the subordinated and exploited part of a relationship of domination, it makes perfect sense to think of feminized men. The colonized were sometimes explicitly characterized by colonizers as 'effeminate', but when the word itself is not used, the qualities that imply it certainly are. In relation to humans perceived as biologically female, a normal male response is, if we can borrow a turn of phrase that recurs in the work of Slavoj Žižek, 'I know that this person is equal to a man, but nevertheless..' The 'nevertheless', of course, includes the need for guidance and support in difficult circumstances where this would not be necessary in the case of a proper man. It includes irrationality of thought and behavior, frequent irresolution (bad) and a surfeit of sentimentality, affection and selflessness (good). A woman who fails to exhibit these latter forms of behavior is not properly feminine in the common discourse

⁸ See, for example, Fox Kate *Watching the English: The Hidden Rules of English Behavior* Hodder and Stoughton London 2004.

⁹ See McClintock Anne *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* Routledge New York 1995; Lorde Audre 'Age, Race, Class and Sex: Women Redefining Difference' in McClintock Anne, Mufti Aamir and Shoat Ella (eds), *Dangerous Liaisons: Gender, Nation and Postcolonial Perspectives* Minneapolis University of Minnesota Press 1997.

of our society.¹⁰ But natives and working class people, too, exhibit these traits. Hence the importance, for the corporate power that emerged after the 1970s oil crisis, guided ideologically by right-wing think-tanks,¹¹ for governments that put the welfare of their people before corporate profit,¹² or trade unions that urge collective bargaining about pay, security and conditions of work before shareholder dividends and CEO remuneration, to be restrained. And this is the reason for the vehemence with which the right has entered the 'culture wars'.¹³ From the standpoint of the new right there is a correct way, a way, capable of signification by a proper road-map, to use a term popular in relation to middle east negotiations.

Thus, Australian social policy has, especially in recent years, followed a new normative demo-graphic, a plan with clear patterns of 'normality', deviation from which carries penalties. The infamous White Australia policy has gone; the 'fictions' of which Fiona Campbell writes, in her account in this issue of the ethnic mapping of racial identities in colonial Sri Lanka, and which, once transmuted into law in the 'Otterly test', enabled Australia to identify racial authenticity so as both to restrict the entry of non-Europeans and sanction discrimination against those 'inferior races' who subsisted within, are discredited. But a new category has emerged, that of 'the ordinary Australian'. This person is contrasted with 'illegals' and 'queue jumpers', who are put in camps, or released on temporary visas without the citizenship entitlements of the ordinary Australian. It is contrasted, too, with troublemakers who would challenge their employers by striking, or make 'special' claims against normality, as Aborigines, gays, lesbians, single parents, all of whom must assimilate or pay the price for refusing ordinariness. If we are ordinary, we can share the ANZAC heritage of World War I, and the heroism of Kokoda, and the resistance to the Japanese in World War II. But we assume no responsibility for the European treatment of Aborigines, or for the state-based racism of Australian Federation. New right geography, in other words, is three-dimensional: it plots a course along the plane of the contemporary, and a particular trajectory into the past.

Three questions perhaps emerge at this point. Since the Enlightenment, social thought has seemed to challenge the fixed positioning of people that characterized old regime traditions. The first question is, then, if the liberalisms that evolved from the French Revolution, and the Marxisms of the original texts and subsequent Internationals – Enlightenment projects all — were genuine attempts to broaden the scope of human freedom, which they undoubtedly aspired to be, how is it that they comported so easily with the new fixities of 19th century positivism? The answer may be the enormous prestige of the physical sciences and the micro- and macro-

¹⁰ This theme is explored in an unsatisfyingly unreflective way in Mike Nichols' film *Working Girls* where the ambition of the working class girl played by Melanie Griffith is none other than to become like the upper class senior manager represented by Sigourney Weaver, who (as portrayed in the film) can use her feminine charms for macho ends.

¹¹ Cockett Richard *Thinking the Unthinkable: Think-Tanks and the Economic Counter-Revolution 1931–1983* Harper Collins London 1995.

¹² Orford Anne and Beard Jennifer 'Making the World Safer for the Market: the World Bank's "World Development Report 1997"' (1998) 22 *Melbourne University Law Review* 196; Orford Anne 'Contesting Globalization: a Feminist Perspective on the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 171.

¹³ The literature here is enormous, but see, for example, Macintyre Stuart and Clarke Anna *The History Wars* Melbourne University Press Melbourne 2003; Moses A Dirk 'Revisionism and Denial' in Manne Robert (ed) *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* Black Ink Agenda Melbourne 2003.

discoveries that seemed possible only by means of the applications of certain methodologies which Victorian and later social scientists emulated with dreams of eventually equal success.¹⁴ The second question is, if the example of the physical sciences was so powerful, whence does the fluidity that we now associate with cultural studies or the various 'post'-disciplines derive? Third, if we dare leave the groundings of positivist methodology, does this have the implication that, ethically, anything goes? Must we abandon the idea of facticity, rendering it merely a matter of opinion whether, for example, the holocaust took place, or whether God planted the fossils from which evolutionary theory draws credibility in order to test Christians' faith in the teachings of the Old Testament? Both questions may seem absurd, but an opportunistic relativism among Christian evangelists in the United States stridently asserts that educational institutions that teach biological evolution have an obligation to teach creationism. Christian evangelists are often attracted by Social Darwinism, but not by its original, Scientific Darwinism; but in conditions of fluidity, what objection can be made to this performance of cherry-picking?

2. CONDITIONS OF FLUIDITY

An answer to the first and second questions is surely that both the natural and the human sciences have actually changed more or less in parallel. At the end of the nineteenth century, Freud famously systematized Hume's throwaway remark about the fragmentation of the subject.¹⁵ Dreams, jokes and parapraxes invoked, for Freud and the psychoanalytic movement, the existence of an unconscious self, influencing the conscious self by producing symptoms and communicating through a complex set of logics unavailable to intuition or to common sense investigation, and available only through painstaking archaeologies of the Unconscious. The work began, as everyone knows, with the studies of hysterical symptoms, paralyses, for example, with no physical cause.¹⁶ The analysis of dreams followed¹⁷, then of slips of the tongue¹⁸, then jokes.¹⁹ The implication is that an inquiring subject, such as a scientist, is not self-present during the course of any of its investigations. Not only is s/he at the whim of corporate sector funding policies, but s/he is the subject of an enigmatic unconscious.

Reason cannot, for the Viennese sage, any more than for the Scottish literati, Hume's contemporaries, provide an overarching support of objectivity, since its operations are themselves a subjective product, produced within the interstices of convention — hence the origin and the

¹⁴ See, for example, Weber Max 'Politics as a Vocation' in Gerth HH and Mills C Wright (eds) *From Max Weber: Essays in Sociology* RKP London 1970 ch 5, 'Science as a Vocation'. The scientist advises the politician that if he (of course) wants to achieve such and such ends, on the basis of scientific experience, these are the means. Whether the ends are virtuous or wicked is not a question for the scientist.

¹⁵ Hume David *A Treatise of Human Nature* (1739–40) ed Selby-Bigge and PH Nidditch Oxford University Press Oxford 1978 p 207.

¹⁶ Freud Sigmund and Breuer Joseph *Studies in Hysteria*, (1893–5) Vol 3 Penguin Freud Library Hammondsouth 1974.

¹⁷ Freud Sigmund *The Interpretation of Dreams* (1900) vol 4 Penguin Freud Library Hammondsouth 1975.

¹⁸ Freud Sigmund *The Psychopathology of Everyday Life* (1901) vol 5 Penguin Freud Library Hammondsouth 1975.

¹⁹ Freud Sigmund *Jokes and their Relation to the Unconscious* (1905) vol 6 Penguin Freud Library Hammondsouth 1975.

continuing need for sociability.²⁰ Reason cannot provide a guarantee that bread, which nourished me yesterday, will nourish me today.²¹ My belief that it will, originates in a subjective propensity to project the past into the present and then into the future in order to avoid melancholy (madness), a belief supported by experience and common sense and underwritten, especially in the case of the legitimacy of a particular form of social ordering, by social conventions that cannot be insulated from the need for change.²² They are, in Hume's sense, fictions (to be distinguished from falsehoods) which enable us to function. Hume famously forbade us to assume that we can move according to an unchallengeable logic of reason, from an 'is', that is, what seems to be the case, to an 'ought', that is, what should be done about it. Like Freud, he leads us into a doubt that we can know what 'is', beyond the social convention-based understandings of it.

A second blow to certainty, perhaps in confirmation of the preceding sentence, and overlapping with Freud's writings, occurred in the natural sciences with the work of Gaston Bachelard in the 1920s in the shadow of Relativity Theory and in the atmosphere of the yet more disorienting 'uncertainty' theories of Heisenberg. This work was made much more widely known to English-speaking readers by Thomas Kuhn.²³ The possibility of certainty had been rendered untenable in that most apparently rigorous of all scientific disciplines, physics. Physics, it seemed, could not function as a mirror gradually coming to reflect more and more of the truth about nature, but might even be gendered in the protocols used in the discipline.²⁴

The implications for the social sciences were significant. Given the direction of the natural sciences, the dream that a sociological Newton might soon transform that constellation of disciplines into a social analog of the natural sciences seemed to be mere fantasy. That sociology

as the science of institutions..or more specifically of institutional structure (might).. by authoritatively providing a definition of the necessary pattern of motivation effectively undercut the evaluative and cognitive claims made by ideologies

came itself to seem an ideological claim. That medico-social scientific views of

²⁰ See Dwyer John and Sher Richard (eds) *Sociability and Society in Eighteenth Century Scotland* Mercat Press Edinburgh 1993. See Adam Smith's posthumously published essay, in which he writes that he must express himself as if the laws governing the universe were intrinsic to the universe, whereas they are in actuality means by which the trained observer understands the universe. Smith Adam 'The History of Astronomy' in Wightman Wand and Bryce J (eds) *Adam Smith: Essays on Philosophical Subjects* Oxford University Press Oxford 1980. Hutcheson's esthetics, of course, makes the same assumption.

²¹ Hume David *Enquiries concerning the human understanding and the principles of morals* (1777) Selby-Bigge ed Oxford University Press Oxford 1902 p 34.

²² Hume David *Treatise*, 269; Beier Annette *A Progress of Sentiments: Reflections on Hume's Treatise* Harvard University Press Cambridge MA 1991 ch 11.

²³ See Tiles Mary *Bachelard ; Science and Objectivity* Cambridge University Press Cambridge 1984; Kuhn Thomas *The Structure of Scientific Revolutions* Chicago University Press Chicago 1970. The earlier insights were taken to much greater extremes by Feyerabend Paul *Against Method* Verso London 1975. The debates are summarized in Chalmers A *What is this thing called science?* University of Queensland Press Brisbane 1982.

²⁴ Harding Sandra *The Science Question in Feminism* Open University Press Milton Keynes 1986; Longino Helen *Science as Social Knowledge: Values and Objectivity in Scientific Inquiry* Princeton University Press Princeton 1990.

the nature of the social order would.. come to constitute part of the cultural definition of reality (that) potential deviants, bowing to the authority of science.. recognize their own aberrations, internalize this interpretation and acquire the necessary motivation to obey the dictates of the system²⁵

came to seem part of a colonizing discourse, a not-very updated version of nineteenth century justifications for imperialism, exclusivist and authoritarian where it was not assimilationist.

Writing up some lectures following an essay that ‘appeared in the mid-century number of the New York periodical *Foreign Affairs*’, Isaiah Berlin tells his readers, ‘Everything is what it is: liberty is liberty, not equality or fairness or justice or culture or human happiness or a quiet conscience’. ‘Mere incapacity to attain a goal is not lack of political freedom’ — ‘poverty or weakness’ are the examples he gives, but the processes of subjectification that result in the various dominations, subordinations and exploitations, had he thought of them would be identically irrelevant to considerations of political freedom.²⁶ Hierarchy is ‘what it is’, in this naturalized formula. The impoverished sole parent in Christchurch is no less free than her/his counterpart who can afford to fly to a luxury hotel in the tropics than s/he is less free than the eagle who can fly, or the whale who can plunge deep into the ocean.²⁷

Of course, as in the paradoxically-named *The Just So Stories*²⁸ change may be accomplished, in the fabulized nature of colonizers, structural-functionalists, Berlin and others. The spinster is completed, enfranchised, by her husband in the pages of Jane Austin and the Brontes. The native might become just like a European. Anne McClintock illustrates her account of some aspects of this particular fantasy with illustrations from Pears Soap advertisements of the imperial era, in which rigorous hygiene with the correct English ingredients transforms the black child into white.²⁹

the native was entitled to certain rights and benefits to the extent that he could reinvent himself as an Englishman, otherwise ‘backwardness’ and lack of ‘civilizational maturity’ was regarded as a limitation.³⁰

But, as Kipling made clear in the subtitle to his 1902 text, ‘stories for little children’, the changes that took place in stories told beside ‘the great gray-green greasy Limpopo River, all set about with fever trees’, where the elephant got his trunk by having his nose stretched by a crocodile as he was drinking, were entertainments not to be seriously entertained by adults. ‘Everything is as it is’ in the world that Kipling wrote furiously to contain his real belief that stability and certainty

²⁵ Buxton William *Talcott Parsons and the Capitalist Nation-State* University of Toronto Press Toronto 1985 pp 124, 138.

²⁶ Berlin Isiah *Four Essays on Liberty* Oxford University Press Oxford 1969 pp ix,125, 122, 123.

²⁷ Berlin takes his examples from Beccaria, although Christchurch, NZ is our own supplement.

²⁸ Kipling Rudyard *The Just So Stories* Macmillan London 1902 ‘How the Elephant Got his Trunk’ etc

²⁹ McClintock above note 9.

³⁰ Kapur Ratna *Erotic Justice: Law and the New Politics of Postcolonialism* Glasshouse Press London 2005 p 140. John Honey tells us approvingly of just such a reinvention in his story about when into an Indian railway compartment occupied by a British Army officer stepped — an Indian. Demanding that ‘the object’ be removed, the officer, subsequently hearing the Indian’s Etonian speech became ‘effusive’. Honey John *Does Accent Matter: The Pygmalion Factor* Faber London 1989 p 163.

were unattainable. Everything is as it is, but with the eclipse of positivism, everything may not be as it seems. There may be other stories to tell.

3. HISTORY

Just as nature provided us with the real in the present until the unwelcome onset of uncertainty, so did history. Glenn Burgess reminds his readers of the historian's Rankean duty 'to tell the story of the past as it actually was'.³¹ History being, as the cliché has it, in the possession of the victor, it is that character's story of how things were that most readily come to constitute history, while the stories of the colonized, women, disparate groups of workers and ethnic minorities, among others, become alternatives or, worse, special interests.³² The news that the 'as it actually was' may be somewhat naïve, destabilizes, hence challenges the status quo in very political ways because even if we accept the philosophical problem of moving from description to prescription, from an Is to an Ought, description retains a performative power that is hard to resist. Thus, revisionist histories of Aboriginal Australians that seek to return to the nineteenth century depictions of an evolutionarily stunted or culturally primitive series of communities at the time of the European arrival,³³ have political effects on, for example, the self-esteem of the subordinated and the policy choices which those who dominate can convince themselves are appropriate.

It is necessary to bear in mind that history *cannot* be 'what happened'.³⁴ History is always contained in a narrative which is itself historically and politically located:

..narrative is a discourse, the currency of which is power. That power may well be used to create a useable past for a nation. Narrative may, therefore, be viewed as a discursive formation that exists in the present and is not a simple and uncomplicated reference to the past.³⁵

History is, for Hayden White, a 'poetic act'. A 'historical thinker chooses conceptual strategies.. he *prefigures* the historical field as a domain on which to bring to bear the specific he will use to explain "what really happened"³⁶. EH Carr put the matter slightly differently, in common sense terms.³⁷ There is too much 'past' to recover it all. The historian must therefore select, and does so

³¹ Burgess Glenn *Absolute Monarchy and the Stuart Constitution* Yale University Press New Haven 1996 p 62.

³² Thus, of course, the 'history wars': Macintyre above note 14. To a federal government that prefers to focus on the forging of the nation through 'mateship', with its emphasis on the white bushman (see Ward Russell *The Australian Legend* OUP Melbourne 1958) and the white male soldiers of World War I battles, narratives of Aboriginal displacement and the theft of children are 'black armband history'.

³³ Windschuttle Keith *The Fabrication of Aboriginal History Volume One: Van Diemen's Land 1803-1847* Macleay Press Sydney 2002.

³⁴ See Collingwood RG *The Idea of History* OUP Oxford revised ed 1994.

³⁵ Munslow Alun *Deconstructing History* Routledge London 1997 p 66.

³⁶ White Hayden 'Preface' *Metahistory: The Historical Imagination in Nineteenth Century Europe* Johns Hopkins Press Baltimore 1975.

³⁷ Carr EH *What Is History?* Palgrave London revised ed, RJ Evans 2001.

in terms of implicit or explicit theories of salience, of the explanatory power of one construction, or set of constructions over others in expository importance. This means taking responsibility for the narrative, justifying one's preference for it and its implications, instead of innocently hiding behind an objective finding, as if one were handing into a lost property office an object found in the street. Thus as Robert Eaglestone remarks, although there are different types of evidence that justify different histories, stories, 'poetics', the possible interpretations are not infinite, and are limited by established research and verification methods, and thus a position denying that the Holocaust took place can only be one of anti-Semitism.³⁸

4. POSTCOLONIALITY

Postcolonial theory arises with the fall of grand theory and the destabilization of history 'as it actually was', both collapses of which create space for theorizing the complex constructions, dynamics and intersections of nations, modernism, the histories of colonization and 'race' and gender. The reference to linear time and the apparent presumption of a period after colonization in the term 'postcolonial', which have been critiqued, may be more productively conceptualized as engagement with the effects and imprints of colonization and with the 'modern' in the context of colonization, a concern to unpack the colonial circulating through, and repeating in, the current. We take the term to highlight engagement with the colonial that recognizes and theorizes its contradictions and multiplicity, as well as the agency of the colonized. 'Writing back' to the empire and against colonization, making visible, or mapping the persistence of the colonial, is integral to postcolonial theory.³⁹ Foregrounding the histories of colonization highlights shifting geographical centers and margins in the process of mapping; focusing on the agency of the colonized provides us with multiple histories to fill the terrain, challenging 'what actually was', the clichéd histories of the 'victors'.

Aotearoa New Zealand's recent, stunningly 19th century response to the issue of ownership of the foreshore and seabed illustrates the fallacy of assuming that we live in any period that might have progressed beyond the colonial. In *Attorney General v Ngati Apa* the Court of Appeal held that the radical title to land acquired by the Crown upon cession of sovereignty of the indigenous Maori people in the Treaty of Waitangi 1840 (Treaty) (if they did indeed cede sovereignty) was consistent with common law recognition of native property rights.⁴⁰ The Court concluded that the Maori Land Court had jurisdiction to determine whether native property rights still existed in particular areas of the foreshore and seabed.⁴¹ In response, the government immediately announced its intention to legislate to place the foreshore and seabed under Crown ownership, releasing a draft policy and initiating consultation *hui* with Maori within months of the decision. Despite unanimous rejection of the policy by every *hui*, six months after the decision the

³⁸ Eaglestone Robert *Postmodernism and Holocaust Denial* Icon Books London 2001.

³⁹ Scott David *Refashioning Futures: criticism after postcoloniality* Princeton University Press Princeton 1999 p 10–15.

⁴⁰ *Attorney General v Ngati Apa* [2003] 3 NZLR 643, 655–658.

⁴¹ *Attorney General v Ngati Apa* [2003] 3 NZLR 643, 670.

government released a policy guaranteeing public ownership of the foreshore and seabed. The Foreshore and Seabed Bill allowed applications to the High Court for declarations that territorial customary rights existed at common law before the Act vested ownership in the Crown.⁴² The Court would not be permitted to order compensation for the extinguishment of such rights; the claimants would be given a right to negotiate with the government for compensation.⁴³ The Waitangi Tribunal's conclusion that Crown policy contained in the Bill expropriated Maori property rights without any guarantee of compensation seems undeniable.⁴⁴ The Bill was passed in November of 2004. This outright confiscation of property in the context of fifteen years of attempts to 'settle' Treaty breaches must call into question the 'progress' represented by those settlements for even the most optimistic, as well as any notion of living in a postcolonial era. Indeed, in the 1880s the government was investigating previous land confiscations and recommending the establishment of reserves in response to those confiscations,⁴⁵ and at the same time legislating to allow the continued retention in jail of Maori who had peacefully protested against the original confiscations.⁴⁶ The Waitangi Tribunal concluded in 1996 that these actions involved numerous Treaty breaches, including the return of less land of poorer quality than warranted, the denial of Maori authority to manage the land and the individualization of titles.⁴⁷ Now, with depressing irony, the Waitangi Tribunal reports on confiscation of the foreshore and seabed even before it happens, a kind of pre-colonial warning, and the government performs its colonial role impeccably. One 'looks forward' to a future where this most recent confiscation will be the subject of investigation and 'redress'.

Recognition of native property rights as set out in the *Ngati Apa* case, even without legislative interference, would only have deferred, rather than achieved, justice. In this issue Judith Grbich questions the judicial and legislative process of determining native title rights in Australia, noting that the process sets up a boundary between the traditional and the modern. When litigants fail to prove the uninterrupted observance of traditional laws and customs they are held not to be part of the ancient tribe; rather than recognizing evolution and adaptation of law and custom, the judgments operate as written records of a colonial trope of the last of an ancient tribe, or a dying race. In Aotearoa New Zealand the Foreshore and Seabed Act, with its requirement that customary practices have been carried on in a 'substantially uninterrupted manner since 1840', has the potential to produce the same trope.

Elizabeth Povinelli asks whether the rhetoric of 'new times' post September 11th is reworking contemporary settler imaginaries in the United States and Australia, from imaginaries of shame to belligerence. She begins by showing how history is located in the present, in

⁴² *Foreshore and Seabed Act 2004* (NZ) s 33.

⁴³ *Foreshore and Seabed Act 2004* (NZ) s 37, 38.

⁴⁴ Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Summary* (Wai 1071 Summary) (2004) Legislation Direct Wellington 3.

⁴⁵ See eg Fox William and Bell Frances Dillon *West Coast Commission: First Report* (15 March 1880). Appendix to the Journals of the House of Representatives Vol II Wellington 1880.

⁴⁶ *Confiscated Lands Inquiry and Maori Prisoners Trials Act 1879* (NZ).

⁴⁷ Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* Wellington (Wai 143)(1996) Legislation Direct Wellington p 245-257.

contemporary bodies, disrupting claims to history as in the past, and as the Real of the past. Health statistics for Aboriginal Australians, which indicate that their current life expectancy is equal to the expectancy of non-Aboriginals in the late nineteenth century, suggest that in this sense they inhabit a nineteenth century Australia; colonization is current in these statistics of death and disease. She argues that the liberal cultural recognition of multiculturalism integral to the politics and imaginaries of shame is based on the same closure of history, the relegation of colonization to the past, assumed in the demand for in stories of the 'past as it actually was.' The 'new' belligerence, with its shameless refusal of past injustices, and its insistence on movement into the blameless future, embraces the same dynamic.

The shift from shame to belligerence is also reflected in Irene Watson's analysis of the Australian government's call for a shift from 'ideological positions like self-determination' to mutual obligation agreements for welfare funding that will include incentives and sanctions aimed at changing behaviors. She asks whether the idea of aboriginal independence is to be rooted and hunted out; both the labeling of self-determination as ideological and the threat of sanctions repeat aggressive colonial policies that this same government refuses to acknowledge. The mutuality of 'mutual obligation' agreements might also be questioned; in Aotearoa New Zealand The Waitangi Tribunal commented on one of the early settlements of Treaty breaches, "What could have been a noble compact reads like a warranty to protect the manufacturer."⁴⁸ Will the Australian government commit itself to any obligations that it does not already have in these agreements? Watson chronicles further examples of belligerence in a discussion of modern forms of nigger hunting, questioning the common jargon of 'moving forward' in this context, where the past is erased and colonial aggression is now.

Both Povinelli and Watson question official histories and the past as a different continent that has been left behind. Australia's official discourses of reconciliation, in *Mabo and Others v The State of Queensland No. 2* and in the *Bringing Them Home* report published in 1997, promised the possibility of reconfiguration of the nation through recognition of alternative histories in the present. Indeed, aboriginal and critical historians have disinterred the histories of violence of colonization buried by canonical history. Yet, Trish Luker argues, the white nation has responded only with a collective amnesia, authorized by the Courts, using the law's rhetorical power to write official histories. These rhetorical moves allow repetition of colonial violence, reinscribing and repeating the past in the present.

Stewart Motha questions the assumption of finite colonial sovereignty integral to the decision in *Mabo*; in the 'postcolonial' Australia created in *Mabo* colonial sovereignty shifts to allow for recognition of difference embodied in recognition of native title. Using the work of Jean-Luc Nancy, Motha contests the idea of a finite sovereignty as an event that took place in the past, arguing instead that any finitude can only be the condition for community, not one and an 'other' but rather one of two, or one among us all. The idea of a monolithic sovereignty as the only source of indigenous rights must therefore be radically wrong; postcoloniality as a shift in this singularity is a fantasy. Instead, perhaps movement beyond the colonial requires acknowledgement that imperial sovereignty can be at most one among us all, in community.

⁴⁸ Waitangi Tribunal *The Fisheries Settlement Report 1992* (Wai 307)(1992) Government Printers Wellington 3.

5. DOES 'ANYTHING GO'? OR, WHAT ABOUT BABY SELLING, CIVIL CONTRACTS FOR SLAVERY, AND THE HOLOCAUST?

We suggested that there is something shocking about the absence of a foundational principle against which to gauge the repeated massacres, acts of genocide and other forms of exploitation and degradation which, although not unknown before, acquired a new familiarity during the last century and a half. But perhaps we are shocked because we have learned to regard the state in a manner that is not constructive. We have learned that its cohesion relies on a political sovereign whose authority underlies the law. This law requires a high degree of adherence by citizens (or subjects), although how this is secured may vary. The first of Bush II's election victories in the US was the product of a US Supreme Court decision. Australian governments are increasingly elected on platforms which they subsequently abandon: in 2004, for example, a clear pledge was given not to send more troops to Iraq, and a 'cast iron guarantee' was given to maintain certain public health subsidies. Both promises were broken, the repetition of many broken election promises since 1996. Questions have been asked in the media about the implications for democracy but, of course, democracy is an elusive concept, and not really central to our concerns. For example, there is democratic support for the continual impoverishment of Aboriginal Australians and the possibly indefinite detention of asylum seekers in conditions reportedly worse than in Australian prisons.

If foundational political — thus legal — justification for action or inaction are so equivocal as such, why should we expect to find foundational moral justifications for condemning practices that range from discrimination to atrocity? Perpetrators of activities that we might want to call 'offenses against humanity' routinely argue the less than fully human status of their victims. Social "deviants" — reportedly difficult children, the 'promiscuous' woman of Martha Coolidge's 1991 film, *Rambling Rose*, the homeless and the poor and illiterate were the targets of eugenicists.⁴⁹ Jews, gypsies and others, including, of course, the richer peasants under the Bolsheviks, have been argued by their persecutors to have forfeited the claim to a full humanity. Ratna Kapur reminds us that the colonizing practices of those great upholders of tolerance, equality before the law and the rights of man, the Netherlands, the United Kingdom and France, could render subaltern more than three fifths of humanity in the belief that 'the.. universal rights of man could be denied to those not considered to be men or human' in the full, responsible, adult sense of the term.⁵⁰ They are not the best judges of their own best interests.

Is it possible to repudiate these justifications for action in terms of some essentialism, to point to a Reality in which Jews, Gypsies, Hutus, women, lesbians, gays etc are humans, too, *and thus* entitled to an equality of treatment? From what has preceded, our answer must be that this is not a possibility, and hence the urgency of the culture wars. We are here in the world of Lacan:

⁴⁹ Gould above note 7.

⁵⁰ Kapur above note 30 at 139–140. See Mill John Stuart 'Representative Government' ch XVIII *Utilitarianism, Liberty and Representative Government* Dent London 1910.

A language's world of meaning is born, in which the world of things will situate itself... It is the world of words that creates the world of things — things which first run together in the *hic et nunc* of the all in the process of becoming... Man thus speaks, but it is because the symbol has made him man.⁵¹

Man (sic) is thus spoken because of being born, *conceived*, even, in a world that can be framed/named, as s/he is, by a culture that precedes, names, and otherwise confers some sense on the alternative of potentially psychotic one-ness or chaos with which the infant is confronted, before the reassuring trauma of separation conferred in the eyes of the carer: pink for the female, blue for the male, Barbie for the girl, Tonka for the boy in the banality of Anglophone culture. The wholeness and the separateness that prepare us for a subject-ive responsibility have a price, but it seems that here we have to develop and negotiate our values.

The fluidity of the post-disciplines, including deconstruction, reminds us that judges are responsible for justice, cannot hide behind the rule of law, and that the past, what has been, cannot be conflated with justice.⁵² The assumption of a finite, monolithic sovereignty in the past, based on the rule of law, is one example. Now, Trish Luker highlights the failure of Australian judges in the native title cases in their “responsibility toward memory”, the responsibility for the production of justice, a failure that foreclosed the momentary possibility for a postcolonial future. Instead, as Irene Watson points out, the Australian state focuses on a new policy in which aboriginal peoples must ‘take responsibility’, in an amnesic attempt to shift responsibility for colonization. Our claims to of ‘new times’ must not re-enact amnesia that allows repetition without responsibility. Our responses to baby selling, civil slavery and holocaust denial must encompass justice as memory without forgetting, memory with responsibility, without the claim that history can be conflated with justice. ●

⁵¹ Lacan Jacques ‘The Function and Field of Speech and Language in Psychoanalysis’ in Lacan Jacques *Écrits: A Selection* Norton New York 2004 p 64–5.

⁵² Cornell Drucilla *The Philosophy of the Limit* Routledge New York 1992 p 118.