THE RACIAL (RE)TURN
Colouring Human Rights in Australia

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The conservative nation story of Australia is heavily gendered. For its image of the state, it borrows the traditional metaphor of the male body. A number of implications are made to flow from this. External agents who seek to penetrate the boundaries — whether refugees or international human rights committees — provoke deep anxiety about its potency (sovereignty). The existence of potentially autonomous internal agencies is an equally threatening possibility. As to its own possible violations, since it always speaks *for*, its silence about them always implies consent.

The Gender of the Body Politic

In Benedict Anderson's now familiar description, the nation is a 'cultural artifact', a 'fraternal' community which, to exist, must be imagined, and in which both leadership and subjective identification figure importantly, along with *exclusionary* boundaries: 'The most messianic nationalists do not dream of the day when all the members of the human race will join their nation.'[1]. Indeed, the reality is quite the reverse. National imaginings are a form of social knowledge — 'how to go on' in the contemporary world: 'If knowledge differentiates itself from what it is not, and separates the true from the false and the absent from the present, it also differentiates between ethical identities: who is Same and who is Other'.[2]

Nation stories, then, generate metaphysics of difference. Each produces and reproduces an internally, more or less homogenised same by reference to an other — the 'ordinary Australian' of conservative discourse, for example, as against the possibly terrorist outsider who threatens Australia's safety, or the un-Australian insider who threatens the country's unity. There is also a gender dimension that may explain the schoolyard assertions of sovereignty which have characterised very recent imaginings of Australia — echoing, perhaps, the patriarchal xenophobia that characterised Federation and gave us the *Immigration Restriction Act 1901* and the *Refugee Removal Act 1949*, targeting non-white people; the same sentiment also gave us *Breaker Morant* and *Gallipoli* — for some, cultural signifiers of Australian nationhood. In the lead-

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1 Anderson (1983), p 16. Dworkin (1986), p 166 writes of communities in which rights may be inferred from its political and legal traditions as 'fraternal'.

2 Bartelson (1995), p 243.

up to the 10 November 2001 federal election in Australia, the aggressive playground bully finally tore up any compassionate scripts concerning asylum seekers sailing in leaky boats off the continent's northwest coast.[3]

In the deafening election script, these people — hardly, indeed, portrayed as people — did not figure as escapees from oppression, or as wives and children risking their lives (and sometimes actually drowning) in order to join husbands granted residence here, as some media commentators and those who work with refugees tell the story.[4] They were fat-cat economic refugees who (conservative spokespeople and columnists just know) flew first class to Jakarta and burned their papers before employing 'people smugglers'.[5] They were, in the conservative script, bad parents who abused their children[6] — or, worse, threw them into the sea to blackmail Australia into granting the family refugee visas.[7] Declaring at a press briefing reproduced as full-page campaign ads: 'I am determined to see this through, I've got to defend the national interest ... We have an absolute right to decide who comes into this country and the manner of their coming',[8] the prime minister in August 2001 ordered armed combat troops on to a foreign container ship to 'secure' it to prevent it from landing the asylum seekers it had rescued from a sinking boat on Christmas Island. This was, according to a right-wing radio talkback host in Adelaide, 'a defining moment in Australia's history'. One is reluctantly compelled to agree.

For a long time in Western culture, anxiety about the integrity of the nation-state has been expressed in terms of a particular imagination of the body. Stefan Dudink suggests that the body politic — the political body represented in Europe at least since the Middle Ages in male figures like that of the famous *Leviathan* engraving — became the self-contained and stoical citizen-soldier of neo-classical iconography. A proper state, like a proper man — and unlike a woman or a feminised man — is self-contained and controls egress from and access to itself. Its completeness, 'its perfection, resided partly in its impermeability',[9] its closed impenetrability.[10]

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3 The federal Coalition government had invested in a long campaign to arouse anxiety about asylum seekers: see Mares (2001).

4 Currently, successful asylum seekers are entitled to a three-year 'temporary protection' visa, which may be renewed, but never a status that would lead to citizenship. If they leave the country, they will not be allowed to re-enter. Their families are not legally permitted to join them, hence the recourse to 'people smuggling'.

5 *Australian* (2001a); *Age* (2001a).

6 *Age* (2001b).

7 *Age* (2001c); *Australian* (2001b); *Australian* (2001c). Anonymous Navy personnel remarked that the boat containing the asylum seekers was being circled by a military aircraft, and warning shots had been fired from the Navy ship.

8 *Australian*, 1 September 2001.

9 Dudink (2001), p 158: 'Historians have stressed the highly individuated nature of (neo-classical) male bodies, an individuation that resulted ... from their being rigidly enclosed within strict boundaries,'

In the scene of national imaging/imagining, women can also be male in contrast to a threatening other. On a seal widely distributed in revolutionary France, two contrasting women's bodies:

> two Liberties, competing in body as well as politics, appear at the margins: the tousled, precipitate, naked radical carrying the flame of revenge and the seated woman of the notables, presiding over the tablets of a perfected law, helmeted to defend a society closed to all movement.[11]

The woman notable, presiding over the law, is masculinised, enclosed and safe. The challenge to pacification, closure and the capacity to be separate from the outside, symbolically represented in Delacroix's bare-breasted Liberty, breaching the defences of *anciens regimes* everywhere, becomes the threat to order, the 'feminine lack of control'.[12] Desecrated — specifically, opened, displayed, hence feminised — male bodies could also represent disorder and loss of control. Dudink associates the sudden popularity in 1780s Holland of a gruesome seventeenth century painting of two disembowelled men, suspended upside down and naked, with a widely shared frisson of misgivings about the danger to propriety represented by contemporary agitations for liberty and democracy, especially insofar as these originated beyond and reached through Dutch boundaries, from Britain, the Americas and subsequently France.

My account of the Australian government's draconian responses to the arrival of relatively few uninvited migrants suggests a high level of machismo in conservative politics, as well as anxiety about the country's status and a scarcely concealed cynicism about the political advantages to be gained from generating fear about dark-skinned outsiders. September 11 was an additional resource for an adroit opportunist.[13] 'Modern patriarchy', Carole Pateman argues, 'is fraternal in form and the original contract is a fraternal one.'[14] The outcome of the contract is also fractured by class, ethnicity and sexuality — categories which have operated with surprising fungibility.[15] In the conservative rhetoric that currently prevails in Australia, the contracting parties are 'ordinary Australians' as against 'elites' (which means 'intellectuals' who criticise, rather than the rich and powerful), Aboriginal and

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10 The masculine here, as much as the state, is imagined; or, perhaps, it is as much a sign in a system of signification. As Siverman (1983) reminds us, we must not confuse the penis with the phallus.

11 de Baecque (1997), p 323.

12 Properly constrained on display as the nude, of course, she became the property of the owner and the onlooker and the sign of the cultural and political stability that makes property possible.

13 See Rundle (2001).

14 Pateman (1988), p 77. The inequality that constitutes patriarchy is, she says, concealed by its assignment in social contract writing to the private sphere of marriage, prostitution and employment.

15 Duncanson (2000).

other activists who criticise Australia in overseas meetings, radical feminists and lesbians who wish to become mothers, those suspected of being work-shy, and many other categories.[16] To be ordinary is to be admitted to the category of 'all Australians' whom conservative government claims to serve. Not to be sufficiently ordinary is not to be fully Australian, not to be someone for whom government exists, not to have a voice to which it need pay heed on behalf of ordinary Australia.

Colouring the Citizen White

Australia is far from unique as a political organisation in which leaderships have established and maintained themselves by the identification of a dangerous outsider from whom they offer protection. Sometimes, as the British were urged to think during their coalminers' strike, the outsider is 'the enemy within'. Sometimes, as Zizek has pointed out, the greater the similarity of the outsider to the same, the more sinister the threat: the Jewish family next door who always seemed like ordinary Germans could be represented as a more insidious danger for that reason. Zizek offers Don Siegel's movie *The Invasion of the Bodysnatchers* as a metaphor for US Cold War paranoia about communists posing as reasonable folk who just wanted some reforms, not a Russian takeover: once an alien had taken over a human, it was difficult to tell but vital to suspect the worst.[17]

Sometimes visible characteristics of the other which seem especially admirable become threatening when vitiated by an unseen but imagined dark side. Thus it was widely acknowledged that the behaviour of the Chinese who worked in the goldfields and market gardens in colonial southeastern Australia perfectly fitted what we might call the Protestant ethic: they were recognised as self-effacing, honest, independent, frugal, thrifty and hard-working. Their contradictory dark side was the dirty, effete, opium-smoking Chinese man with a lust and an irresistible allure for Euro-Australian girls — all of which made it impossible to include Chinese workers in the minimum wage system and hence made them an occasionally convenient source of cheap or blackleg labour for employers who wanted to force down wages or break strikes.[18] Opium use was, however, by no means confined to the Chinese in early twentieth century Australia, and there was no evidence that Chinese men seduced or held special allure for Euro-Australian girls, hence no empirical restraint on prurient speculation, which could multiply as far as the anxiety of which it was a symptom demanded.

Finally, the construction of the other as entirely alien was at work in the white representation of Aboriginal people as a primitive race whose extinction

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16 The position of the government and its allies among the think-tanks and the columnists who amplify their views has been in preparation for some time in relation to possible foreign criticism of its human rights record: *Age* (2000a); *Age* (2000b); *Age* (2000c).

17 Zizek (1989), p 89.

18 Scates (1997), p 160 et seq.

might be encouraged or, in its more 'humane' version, rendered painless.[19] In the nineteenth century, wealthy sheep and cattle owners extended their grazing into areas of Crown land over which they held no title. Unable to prevent this, the Colonial Office conceded to them 'pastoral' leases with rights limited to grazing, and often specifically requiring respect for traditional 'native' usages of the land. Often grazing and the Aborigines' traditional economies (which whites did not understand) were incompatible,[20] but even where there was no incompatibility, there was resentment and friction. The paradox here is of the 'savage' who uses the land, but who is not really there — the British claim to property as well as sovereignty over Aboriginal land was based on the doctrine of *terra nullius*;[21] Aborigines were literally not 'counted' in post-Federation censuses until after the 1967 referendum — something which still haunts the non-indigenous Australian imagination. The primitive black impeding white progress — vetoing mineral exploration, threatening agriculture in recent mobilisations of the specter, for example — is a construction that can still be made to resonate among the non-Aboriginal population. In a recent backlash against land rights by wealthy pastoral leaseholders masquerading as 'ordinary Australians' demanding to upgrade their pastoral tenure to freehold and thereby extinguish Aboriginal claims, the deputy prime minister promised 'bucketloads of extinguishment', and a capital C conservative judiciary to uphold it was supported by Prime Minister Howard's appearance on television with a map purporting to prove that most of the continent 'could be' affected by land rights claims.[22]

But if one were to make a large exception of the tensions with indigenous people (kept from reconciliation and compromise by the power, hence influence over government, of mining and pastoral wealth),[23] *internal* social tensions constructed around notions of race have by European standards not been large in Australia since World War II. No migrant hostels have been attacked. No race riots have occurred. On the other hand, there is no entrenched bill of rights,[24] and the only checks to authoritarian executive government — the 'strong state' associated with neo-classical economics, for example — are the existence of the states and the acuity of the electorate in keeping the Senate out of the federal governing party's hands. Respect for minorities and difference — for the extra-ordinary, if we borrow the conservative trope — has only fragile institutional protection.

Where majority goodwill or acceptance of minority groups is eroded, as it recently has been by the anxieties associated with economic liberalism — for instance, workplace insecurity, high unemployment, education and health care

19 McGregor (1997).

20 Reynolds (1987).

21 Under feudal law since the Norman Conquest of England in 1066, all land over which the Crown was sovereign belonged to the Crown, but was subject to any rights established by custom. Aborigines were deemed not to have any such rights.

22 Bachelard (1997).

23 Hawke and Gallagher (1989).

24 Williams (1999).

cuts and economic decline in the regions — there are few reliable institutional mechanisms to which minorities can turn. If insecurity turns into a resentment that condenses around the notion of racial difference, this in itself could become institutionalised, especially with a government sufficiently unscrupulous to turn race into a political issue. For, as Oxfam International has remarked,[25] Australia's is possibly the only constitution that specifically permits racially discriminatory legislation — a provision contained in section 51 (xxvi), the so-called 'race power', which the High Court has recently demonstrated a marked lack of interest in restraining, in a decision concerned with the partial repeal of some Aboriginal heritage legislation.[26]

The injured body of Sharaz Kayani, discussed below, is an introduction to the question of how far the divisiveness pursued by conservative administration has taken a racial turn.

Another National Story

On Monday, 2 April 2001, Sharaz Kayani doused his body with accelerant and set fire to himself in the visitors' gallery of the federal parliament in Canberra.[27] At the time of first writing, he was described as 'critically ill' with burns to more than 50 per cent of his body. He died a few weeks later without regaining consciousness. Initial radio reports focused on the necessity of counselling for parliament security staff and attendants and for the primary school children who had witnessed the events, as well as on the presence of mind of their accompanying teacher, who administered first aid to Kayani before medical help arrived. Broadsheet newspapers provided wider contexts as the week progressed. Readers learned that Kayani, who became an Australian citizen in 1999, entered Australia from Pakistan in 1995 as a visitor and sought — and was granted — asylum on the ground that his Islamic sect was prohibited in Pakistan and that he was persecuted for practising his religion there. His application to have his wife and three daughters join him was rejected in 1996, and then again in 1998, when the explanation given by the Immigration Department for the rejection was that his youngest daughter's cerebral palsy could burden the Australian health care system for upwards of $400 000 over her lifetime were she to immigrate. The intention of the extended family to continue paying for her care in Australia, as they were already doing in Pakistan, was not taken into account, and Immigration Department estimates of the potential health care costs seem to have inflated since 1998, suspiciously in excess of the consumer price index, to $750 000.

The Commonwealth Ombudsman found that the department's published record of its reasons for rejecting Kayani's application were inadequate, and Kayani was invited to make a third application, *de novo*, which he did in September 2000.[28] Despair at the prospect of further delay and more years of separation from his family are assumed to have prompted his suicide six

25 www.caa.org.au/oxfam/advocacy/indigenous_australia/discrimination.html

26 *Kartinyeri v Commonwealth* [1998] *Australian Indigenous Law Reporter* 180.

27 *Age*, 2 April 2001.

28 *Age*, 4 April 2001; *Age News Extra*, 7 April 2001.

months later. Immigration Minister Ruddock's response to the events after an interview with Kayani's brother, a Defence Department systems analyst, was that he and his department would not give in to pressure and expedite consideration of the Kayani family's case: "[Departmental] decisions are not going to be determined under duress.'[29]

Kayani's desperate despair is reversed in this new script, and becomes a coercive act, threatening the sovereign right of government to make decisions. As with many recent Australian refugee and asylum-seeker stories, this one thus features an Immigration and Aboriginal Affairs Minister given to impassive insensitivity to humanitarian appeals,[30] often even against public opinion.[31] Questioned about a six-year-old boy suffering severe distress after seventeen months in a detention centre, refusing to eat or drink and requiring repeated hospitalisation, Ruddock repeated his remarks about refusing to surrender to blackmail of this type, and insinuated — without being able to offer evidence — that the real cause of the child's malaise was parental abuse. To Ruddock on TV, the child was an 'it' that would probably be fostered out until the family was deported. Robert Manne writes of a 'merciless minister and a cowardly opposition' colluding 'to deport a dangerously ill, broken boy and a terrified family to the perils of Iran'.[32] Other stories reveal, by contrast, a minister full of passion and hyperbole about the 'crisis' and the 'national emergency' represented by refugee arrivals.[33] Ruddock's longevity as minister suggests that his views reflect those of the rest of the federal government —

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29 *Age* (2001d). In some of the reporting, the 'unusual' nature of someone's self-immolating distanced Kayani from 'us'. The question this kind of reporting seems to prompt is: 'Isn't it at the moment when we think we most understand and sympathise with this fellow human being — through his demonstrated devotion to his family — that we find in his action something exotic, *unheimlich*?'

30 For example, *Age* (2000d): 'While immigration officers were scouring Sydney and Hobart for absconding Kosovar refuges yesterday, KFOR peacekeeping troops were protecting three ethnic Albanians in the Kosovo town of Mitrovica.'; The *Australian* (2000) criticised the detention and forcible repatriation of Kosovars where their homes had been destroyed and where their safety was uncertain. Kosovars were housed near populated areas and, to the dismay of the government, generated much popular support for their disinclination to be repatriated.

31 In a televised interview in early May 2001, the minister described public discussion of the government's treatment of refugees as sending the 'wrong message' overseas. The 'right' message is presumably that we do not enjoy freedom of discussion in Australia.

32 *Age* (2001b).

33 Whole Iraqi villages are, in his view, 'packing up to come to Australia': Ruddock, quoted in Manne (1999) and see also Valentine (2000). Ruddock's vigorous pursuit of appeals against Refugee Tribunal determinations of refugee status for women on grounds of rape and domestic violence, and the threats by the current federal government not to renew Tribunal members' contracts if they began to recognise gender-based violence in patriarchal cultures as creating refugee status are well known: See Crock (1998), p 148. The doctrine of the separation of powers is often not an obstacle to the achievement of conservative goals in Australia: see Duncanson (1997), pp 14–15.

whose general appearance of parochialism and xenophobia may well be genuine — as well as an attempt to occupy the political terrain claimed by One Nation, the party of the extreme right.[34]

Media coverage of the Kayani case overlapped the much longer coverage given to the then prevailing practice of automatically detaining people who arrive in Australia without visas — usually in remote, often very hot, detention centres, whose management is contracted out by the Immigration Department to a subsidiary of the US corporation Wackenhut. The periods of detention, sometimes of up to five years, were condemned as 'arbitrary' and unnecessary for the purposes of confirming a person's identity by a UN Human Rights Committee, in a case argued under the First Optional protocol of the International Convention on Civil and Political Rights.[35] But, although the Committee's views and Australia's overseas image were of concern to the previous federal Labor government, the leading legal text on the subject doubts the interest of either to the current government.[36]

Events since then merely confirm this. Following the boarding by SAS troops of the Norwegian container ship *Tampa* off Christmas Island in August 2001, the asylum seekers whom Tampa had rescued were transferred, with a subsequent boatload of uninvited arrivals, to a Navy vessel. Nauru, a small island of 11 000 people, and an Australian aid recipient, was persuaded to house them, and up to 1000 other potential refugees, until their status had been determined. Similar arrangements were made with Tuvalu, Fiji, Papua New Guinea and Vanuatu, all poor countries indebted to Australia, some with surface areas a fraction of the size of Melbourne. Use of the Navy to transport numbers of unhappy civilians to countries reluctant to receive them and the Navy's duty under new border protection legislation to repel asylum seeker boats has, both in and out of the military, aroused fears of unintended casualties. Defence personnel are an even less satisfactory means of policing asylum seekers than the poorly skilled and often racially bigoted Wackenhut security guards used in the detention camps in Australia,[37] whose conduct has raised questions about torture.[38]

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34 See Manne (2001).

35 Crock (1998), pp 29–31.

36 Crock (1998); *Age* (2000b).

37 In a 'well-conducted' protest at the detention centre in Curtin, WA, 'there was a large professionally-drawn banner that depicted Saddam Hussein expressing gratitude to the [Immigration] Department for its cooperation in locking up his critics': *Age* (2001e). The *Age* (2001f) quotes witnesses to camp guards beating women and children with batons when they tried to escape tear gas; and to petty humiliations such as the woman released, with the necessity of a 20-hour bus ride from Derby, WA to Perth with no underwear, no nappies for her baby and no money.

38 Half-hourly night-time 'observation' by shining torches in detainees' faces appears to some rather like sleep deprivation. Under proposed new legislation, persons of ten years and above may be strip-searched, and escape will be punished by up to five years' imprisonment. Amnesty International points out that many detainees will have already suffered torture or trauma: 'How do you convince a

Bodies in Danger

The danger posed by Australia to asylum seekers is demonstrated in the regimes of the camps and the brutal distribution of 'boat people' to often desolate locations around the Pacific. The 'message' that this treatment is meant to send overseas is that Australia is not an 'easy target',[39] reinforcing the obviously less successful message contained in the videos that the Immigration Department distributes in Middle Eastern countries, of the zoological and geographical hazards likely to be encountered by illegal entrants to Australia — sharks, crocodiles and poisonous snakes, as well as swamps, deserts and excessive heat.

The dangers posed by the refugees to Australia on the other hand are said to be threefold. These are the 'flood' danger — that, if rigid controls are not maintained, the country will be overwhelmed; the national security danger — in the Immigration Department's view, 'at least 10 per cent (of refugees) could interest anti-terrorist bodies';[40] and the disorder danger. The immigration quota for humanitarian settlement has been fixed by the federal government at 12 000 per year, and in the Immigration Department's mind there is a Queue for those places which is Jumped when people inconsiderately arrive without having previously applied for humanitarian visas. The refugee is here figured as the kind of person who fails the test of politeness at the supermarket checkout.

The flood argument — although effective in conjuring the threat of multiple non-consensual penetrations of the body politic — is unconvincing in two ways. The Australian continent has an enormous coastline but no dedicated coastguard service, since illegal landings are — except on the campaign trail — considered to be exceedingly rare. Of the 5300 non-visa holders who were recorded as being in the country in mid-2000, some 3900 arrived by boat[41] and Navy patrols — which are not as coast-oriented as a coastguard would be — sufficed to intercept them. There is the possibility, of course, that many thousands more have covertly landed, but in that case the failure of civilisation to collapse in consequence implies that there is little to worry about. Second, of course, a total number of 5300 in a country of

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ten-year old child who has fled Afghanistan or Iraq and is then strip-searched that the country he has arrived in is any different to the country he or she has fled?': *Age,* April 2001. By contrast, the detention of a white Australian couple, Kay and Kerry Danes, in Laos whilst fraud charges against them were being considered, drew appeals and protests from the governor general, the prime minister and the Foreign Minister because of the impact on their children, who were in Brisbane, and on the grounds that they had not been charged with an offence: *Age* (2001g). Many seem to have missed the irony.

39 *Age* (2001h).

40 Ruddock, quoted in the *Age*, 16 June 2000.

41 *Sydney Morning Herald*, 10 May 2000.

19 million people who inhabit a land-mass fourteen times the size of France does not conjure an image which can be described as overwhelming.[42]

The terrorist argument is unconvincing. Members of a terrorist conspiracy of the September 11 kind are unlikely to risk the uncertainties to their enterprise of embarking in an unreliable boat in Indonesia, or the hazards of drawing attention to themselves by arriving without papers. If, as announced, processing the refugees' applications will involve information-sharing and intelligence cooperation between Australian national security agencies and those of the dictatorships from which the applicants seek asylum, no particularly reassuring or useful results may be anticipated. Dictatorships that generate refugees cannot be expected to paint them in favorable colours. The Czech scholar and critic of Fascism, Egon Kisch — a Czech resident in Germany — had famously to jump ship in Melbourne in 1934 in order to address a meeting of the Movement Against War and Fascism before the Lyons government could try formally (and unsuccessfully) to deny him access to Australia.[43] No doubt if the Gestapo had been consulted they would have confirmed Lyons' suspicions that Kisch was a danger to the public order.[44]

The disorder argument is as implausible as the others. If no potential 'flood' exists, the ceiling on humanitarian visas is unnecessary. And the concepts of orderly queues and of people urgently seeking to escape persecution, imprisonment, rape, torture and possibly death are strangely incongruent.[45] In many parts of the world, the centres to which application for asylum in Australia must be made are remote from where putative refugees live, but even where that is not the case, the image of the proper asylum seeker as one who patiently awaits the outcome of bureaucratic processes in a queue in a threatening environment is oddly counter-intuitive. If, as seems to be the case, the claims of the majority who arrive without visas to refugee status are accepted after the rituals of humiliation and stress have been inflicted on them, one has to ask why the rituals are deemed necessary. No such punishments are deemed necessary for the 53 000 visa over-stayers, who are overwhelmingly white.

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42 'the crisis that John Howard would have us believe exists simply isn't there. Australia received 6500 applications for asylum last year compared with 78 000 in Germany and 74 000 in Britain': *Australian* (2001b).

43 Kisch was a 'noted linguist' and challenged the immigration official imagination. Undesirables were usually excluded by administering to them a dictation test in a language which they would be certain not to know. But Kisch wrote in more languages than the official imagination could think of — except Scottish Gaelic. In an unusual act of courage, the use of Gaelic was disallowed by the judiciary and Kisch was permitted entry: Jupp (1998), p 75.

44 Kisch wrote a book about his Australian experiences. There is more information about him on www.google.com.

45 *Age* (2000e). Officials and tribunals confuse the use of rape as a political weapon against women with what they see as a matter for the criminal law of the country in which it occurs.

Race, Lawyers and the Subject of Aryan Purity

One kind of answer may be found in the founding myths of Australia — the idea of the nation and the delayed association of sovereignty with nationhood. In his account of early twentieth century western Canada, Wesley Pue argues that law and the legal profession in that part of the country were seen by Anglo-Canadian elites as a secular and gentlemanly missionary base for the assimilation of a visibly multi-ethnic population to a British civilisation that might transcend in its cultural and political achievements the *ancien regime* of the United Kingdom itself. Surrounded by non-English migrants, native Americans and radical claims fuelled by democracy, ethnic (and masculine) superiority might nevertheless be secured symbolically through adherence to, and embellishment of, the manly heritage of English law.[46]

In Australia, a more straightforward British — or at least Aryan — purity seemed achievable. Federation in 1901 represented, among other things, the triumph of one form of ethnic and labour relations over another. In the north, white graziers used the largely unpaid labour of Aboriginal stockmen to supervise their cattle herds, and white sugar planters used low-paid indentured Melanesian labour from the Pacific islands and New Guinea. As in the American Confederacy, the prevailing economies of race relations and production favoured the unimpeded flow of labour and goods to the Queensland colony. White men wanted cheap imported labour and cheap imported goods. In the south, Aborigines were perceived to be a dying race; cheap foreign — particularly Chinese — labour was seen as a threat to the living standards of white men; and cheap imports were understood to be undercutting local manufacturing. The southern view prevailed, and Federation ensured that strict controls were maintained on foreign goods and foreign labour until well after World War II.

There was, according to Stuart Macintyre, only muted popular enthusiasm for the federation of the colonies. 'The people' in the framers' discourse were largely an abstraction used to legitimate the deals struck by career politicians (and lawyers),[47] and elide the militant and suspicious working class, who were still smarting from their economic losses in the 1890s slump. George Williams characterises the constitution that emerged from the Convention discussions to be offered to the Colonial Office for ratification as ensuring that minorities and women would be excluded from social and economic power. 'Where the framers felt that there were rights worth protecting, these were not the rights of those in need, or of minorities, but the rights of those already with a share of power'.[48] How were the contents of the frame to be sold?

In the context of rising xenophobia, prompted by the apparent cheapness of Chinese labour, the rise of Japanese military power and the treaty obligations entered into by Britain, the colonial power, to permit the free movement of Chinese subjects in the British Empire, Federation could be offered as a way of avoiding 'the dangers for Australia of ... imperial policies

46 Pue (2000, 2001).

47 Macintyre (1999), pp 139–40.

48 Williams (1999), p 45.

of racial tolerance'.[49] Populist racism was easily mobilised by the spectre of cheap 'nigger' labour, where the fall in Euro-Australian birth rates, believed to be the consequence of economic hardship, seemed to render white ascendancy vulnerable.[50] By 1901, the weekly *Bulletin* (whose masthead slogan until the 1960s was 'Australia for the White Man') could editorialise: 'If Britain is shocked at Australia's desire to maintain its pure European descent, then Britain does not know the value of its own white status and is fit only to be a nigger and a very poor kind of nigger at that.'[51] Canadian elites might justify the preservation of their privileges, and even aspire to the leadership of Empire, with the celebration of their legal heritage. Australian superiority — paradoxically, here, over the British — was unreflectingly expressed in terms of ethnic purity and racial vilification. Yet at the same time there was no wish to create a separate Australian nationality: 'federation, when it came ... was driven as much by popular racism and xenophobia ... as by any burning desire for nationhood'.[52]

An early advocate of colonial federation, Henry Parkes, wrote to the New South Wales premier that reports of a huge migration of Chinese to Darwin led him to suspect the Chinese government of seeking to turn the Northern Territory into a colony of its own.[53] Samuel Griffith, later federal Chief Justice, argued for an end to Chinese immigration in 1888 because:

> owing to their habits ... the cost of subsistence is very much less to them than to Europeans living in accordance with European habits [and] the effect of their unrestricted competition would be to materially lower wages and reduce the standards of comfort of the European artisan. [But] the insuperable objection ... is the fact that they cannot be admitted to an equal share in the political and social institutions of the Colony.[54]

During the Convention Debates on Federation, Isaac Isaacs — later a member of the federal High Court:

> joined [Sir John] Forrest in emphasizing that Chinese residents should not be allowed to think of themselves as citizens, as had happened in

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49 Webb and Enstice (1998), p 143. In 1876, the Colonial Office had rejected Queensland legislation discriminating against the Chinese in the goldfields.

50 Grimshaw et al (1994), pp 190–91, quoting from the 1890s feminist magazine *Tocsin*: women were being 'unsexed' by the heavy work they had to do, and 'the joy of motherhood has turned to bitterness ... the struggle has become so great she just can't bear it'.

51 Quoted in Trainor (1994), p 162.

52 Webb and Enstice (1998), p 166.

53 Trainor (1994), p 87.

54 Joyce (1984), p 143.

> America, where in one case a Chinaman had successfully sued for the same right to hold a laundry license as a white man.[55]

When it was suggested during the debates that there should be some provision in the Constitution for equal rights along the lines of the US Constitution's 14th Amendment, Henry Higgins — later also a judge — responded that 'the 14th Amendment protects Chinamen, I suppose, as well as Negroes?' If so, he added, Victoria's discriminatory factory legislation would be void.[56] The consequence, as we have seen, was the only constitution in the world that specifically entrenches the power of government to discriminate against people on the ground of their race.[57] The first piece of federal legislation was the *Immigration Restriction Act 1901*, introduced by the first federal Attorney General, Alfred Deakin, as follows: 'The unity of Australia is nothing if that does not imply a united race ... [whose] members can intermix, intermarry and associate without degradation ... an aspiration towards the same ideals ... a people possessing the same general cast of character, tone of thought.'[58]

This federation story, Mary Kalantzis said in a recent Barton Lecture, 'is in its fundamental shape not dissimilar to the story of interwar Germany:

> The big picture ideas are no different to those of the German thirties and forties: of the necessity to create 'one people without admixture of races' (to use Deakin's words); of unbridgeable racial inferiority; of races destined to die out; and of the eugenics of progress. Nor were the technologies of race management so dissimilar: the enforced separation in concentration camps; the petty regulation of movement and association.[59]

Unity: 'All Australians ...'

The exclusion of the Kayani family by Australia — like the exclusion of displaced or persecuted people by the European Union, Canada and the United States — requires a different nation story than the one about ethnic purity, now that all those polities are ethnically heterogeneous, but does that heterogeneity imply the demise of the white man's privilege? Have we entered a new

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55 Irving (1997), p 159.

56 Irving (1997), p 162

57 Oxfam International: 'The investigation team is unaware of any other country that has a clause allowing discrimination against a race of people. The right to equity in gender and diversity could not be breached more clearly than by a racial discrimination provision in the constitution of a country': www.caa.org.au/oxfam/advocacy/indigenous_australia/discrimination.html

58 Quoted in Macintyre (1999), p 143. As chief secretary in the colony of Victoria in 1886, Deakin introduced a Bill into the colonial legislature excluding 'half-castes' from the definition of 'Aborigine' for Euro-Australian purposes: Attwood (1989), Ch 4.

59 Kalantzis (2001). See the similar comparison in Trainor (1994), p 90.

postmodern world in which the categories of ethnicity, gender, class and sexuality have lost their relation to subordination and domination?

The first Australian experiment with ethnic diversity was the carefully managed step of permitting entry to displaced persons from northern Europe. This should be seen in the context of the *Refugee Removal Act 1949*, which mandated the rounding up, detaining and deportation of non-white people who had fled from the Japanese occupation of Southeast Asia. Immediately after the war, short of (non-Asian) labour and chastened by the Japanese having reached within bombing range[60] of three northern towns during the war:

> Australia opened its arms to the Balts, fair-skinned northerners, and other 'Aryan' types (if government ministers were aware of the ironic similarities of this immigration program to Hitler's recent racial policies, they were not about to publicize the fact).[61]

In the 'populate or perish' trope that influenced postwar immigration policy,[62] what is discursively endangered governs the character of the 'populace' for the narrator: 'populate (with whom?) or (who will?) perish'? Even if the subjects who fulfil the prescription are Greek, Italian, Turkish, Jewish and Lebanese, they must be imagined as somehow assimilated to what is conceived to be the primordial population of 'all Australians', or the trope becomes 'populate *and* perish'. Even for the ultra-right One Nation Party, after a decade in which migration from Asia had approached half of the total intake, there were 'our Asians', for whom no (unlike the policies of many European rightist parties) repatriation policy was contemplated, and the Asians 'out there', who should remain so.[63]

But who is the unity, the 'all of us', the All Australians — all presumably equal — for whom the sovereign speaks? Aborigines *qua* Aborigines are clearly not part of this unity. If they wish to aspire to autonomy of the kind achieved by the Sami or the Inuit peoples, they are, by definition, not 'Australian' people: according to Prime Minister Howard: 'There's no way the Australian people will accept that in some way we are two nations in one — nor should they.'[64] When a senior judge needs to access 'the standards of the community at the time' regarding the treatment of Aborigines, he does so by excluding Aborigines from membership of the community whose views he is

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60 Ironically, it was the apparently unpopulated nature of northern Australia (and the reasons for that) which made a land invasion of Australia unlikely. All of the Immigration Department's zoological and climatic allies would have accompanied an either bogged or parched army in its 1500 kilometre trudge south in search of someone to invade. Downed World War II flyers returning perhaps damaged or low on fuel from missions to New Guinea were disoriented, then starved in areas described by the non-existent inhabitants as 'good country, plenty tucker'.

61 Webb and Enstice (1998), p 257.

62 Reiger and James (1988).

63 Markus, (2001), p 190 et seq.

64 Quoted in Marr (1999), p 35.

gauging.[65] Aborigines are 'special' in that particular local inflection of the word enshrined in section 51 (xxvi) of the Constitution: 'parliament shall have power to make law ... with respect to the people of any race for whom it is deemed necessary to make special laws'. Two federal statutes have recognised the special character of Aboriginal people by restricting their title to land and access to heritage protection legislation.[66]

The special nature of Aborigines is clear, too, from the federal government's responses to the Human Rights and Equal Opportunity Commission inquiry,[67] which drew attention to the practice, between 1910 and 1970, of removing Aboriginal children from their families and either institutionalising them or placing them with white families. The precise number of removals is unclear, but the Australian Bureau of Statistics estimated the proportion as 10 per cent,[68] and the report concluded that the fifth head of the Genocide Convention — the attempt to extinguish a culture by transferring its children to families of another culture — was applicable to the practice. The federal government, by contrast, denied that the six decades-long practice had violated any human rights, refused to make a widely supported apology to Aboriginal people,[69] and devoted $8 million to the defence of actions against it by two Northern Territory Aboriginals claiming compensation for wrongful removal.[70] The actions failed — in one case because the official who had removed the plaintiff was dead and no record existed about his motives, and in the other because a consent form bore the imprint of the plaintiff's late mother's thumb which, unlike the opacity of the dead official's motive, communicated to the court proof of an informed and voluntary consent to the loss of her child. Here, the Death of the Author is revisited in the Federal Court.[71]

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65 Duncanson (2000), p 295.

66 *Native Title Act 1998*; *Kartinyeri v Commonwealth* (1998) 152 ALR 540: See Bartlett (2000), Ch 6; Bachelard (1997); Oxfam Community Aid Abroad (2000): 'Legislation which directly or indirectly extinguishes the property rights of only one race, namely Aboriginal and Torres Strait Islander people, is racially discriminatory legislation.'

67 HREOC (1997).

68 Manne (2001), pp 74–86. Some estimates are higher: Read (1999).

69 See Amnesty International (1998).

70 *Cubillo v Commonwealth*, www.austlii.edu.au/cgi-bin.../2000

71 In *Kruger v Commonwealth* (1997) 146 ALR 126, an earlier case brought by Aboriginal plaintiffs on similar grounds, federal Chief Justice Brennan considered the 'reasonableness' of a particular exercise of a discretion given to an official to remove Aboriginal children from their families. Reasonableness, he argued (at 135), is to be gauged according to 'the community standards of the time'. The removal policy, whatever later opinion held, was approved by the community at the time of the removal, in the view of Brennan, CJ. It is clear from the Human Rights and Equal Opportunity Commission Report (HREOC 1997) that the Aboriginal community has never considered the policy reasonable, but Brennan's community means the white community. Any other is written out of his script. See Kerruish (1998).

Manne remarks on the brutal cross-examination tactics employed by counsel for the Commonwealth, with its dwelling on an unsupported assertion that Gunner's mother had attempted to bury him in a rabbit hole, and its accusation that witnesses to the sexual abuse of Gunner were being paid to tell lies.[72] Children were removed, counsel for the Commonwealth told the court, from conditions of degradation, for their own good, and because their parents rejected children not of 'full blood'. At no time, he argued, did the federal government adopt a policy of what has been called 'breeding out the black' by forcing pale-skinned Aborigines to marry Euro-Australians. '*Meagher's case*,' Robert Manne commented, 'seems genuinely innocent of anything that has been argued about indigenous matters over the past 35 years'.[73] Aboriginal children were moved *into* degraded conditions — overcrowded tin sheds in the tropics, abusive foster homes and church institutions. There is no record of any children being removed because of family rejection, but Manne did find written evidence of the eugenics motive in a federal government minute of 22 February 1933, a year of some significance for eugenics.

Irene Watson writes that non-indigenous culture is seen by Aboriginal people as a culture of rape: 'From an Aboriginal perspective we are all of the mother. She nurtures us, and we in return carry the obligation to ensure the nurturing is sustained for future generations.' Like the sexual attacks by white men on Aboriginal women, the perhaps genocidal violation of Aboriginal families and culture, and whites' unfeeling exploitation of the natural world and of the land-mother in particular were rape: 'The *muldarbi* referred to our *ruwe* (land-mother) when they first saw her as virgin lands. A virgin awaiting penetration.'[74]

The defence of the Commonwealth is, from Watson's perspective, the defence of a rapist, and we are familiar with the vicious quality of questioning that can emerge during the cross-examination of women who allege rape[75] — in particular, when the purpose is to construct doubt that the act was non-consensual. Force, which as Pheng Cheah writes, re-enacts the rape; it is necessary in reaching the truth through a woman's body because such a body may well not know its own mind: 'no' may be 'coquetry' or it may be entirely subverted, for example, by her signalling 'yes' by means of where she is and what she is wearing.[76] Ultimately, the man is the guardian of the truth. His honest belief that there was consent is sufficient, according to an English

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72 Manne (2001), p 81.

73 *Age* (1999).

74 Watson (1998). Watson, a Nunga woman, uses *muldarbi*, a Nunga word for the demon spirit, to stand for the embodiments of white law and culture, which she says result from and enact the loss and disconnection of white people from the world.

75 Puren (1995); Young (1998).

76 Pheng (1991), p 7. This not-knowing was celebrated in the famous defence of a sexually harassing academic in Garner (1995). Female beauty overcomes a man's will. She didn't know, but she was forcing him to fondle her breast, confess his sexual fantasies ...

judgment in which a husband had told his friends that his wife enjoyed an orgy and liked to heighten the enjoyment by pretending not to. His speaking for her negatived the charge of their having pack-raped her.

As in *Kruger*, suffering is eclipsed by misunderstanding when the victim is excluded in an imperialist gesture from the narrative community that decides what is reasonable.[77] How were the orgiasts to know that the wife was not enjoying herself? How were the Protectors of Aborigines to know that taking children from their parents without consent would not benefit the children — was not, indeed, Protection? How, not knowing their own minds, could they know that they did not want or need Protection? There is another script, another set of facts. 'But,' as Pheng Cheah asks, 'according to whose rules is the game of fact-finding played?'[78]

Conclusion

As a matter of description, there is currently a global problem of refugees/asylum seekers from oppressive regimes that rivals the post-World War II crisis of 'displaced persons'. The difference between the 1940s and the present is that then there was a shortage of both capital and labour in many parts of the world, whereas now there is not; and the displaced persons were white. Refugees, unfortunately, are not but, conveniently for the 'West' (or the 'North'), they are contained for the most part in camps in poor countries like Iran, Pakistan and Indonesia — conveniently in the sense that they are not a significant burden for richer countries, but are nevertheless available to unscrupulous politicians, who are trailing in the polls and lack serious policies, to brandish as a threat from which they claim themselves capable of providing protection. It is a peacetime equivalent of waging a war to distract popular attention from domestic discontents.[79]

An explanation of how this is accomplished at a particular time and place requires some attention to the contexts in which meanings are constructed — from what materials lying around the bricolage of xenophobia is manufactured. In Australia, the post-World War II script in which people from the Baltic littoral — from Greece, Italy and Turkey among other places — could be welcomed as 'new Australians' was itself a narrative of race, even if the racial component was muted, since 'populate or perish' specifically evoked the idea

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77 In the case of *Green* (1997 FC 97/044), a brutal homicide could be re-described as manslaughter, where the victim had been making homosexual advances to the defendant, and where the defendant knew of or believed that his father had sexually abused his sisters in his youth. The advance and the recollection would amount to a provocation: per Brennan, J. See Marr (1999), pp 51–72. A woman physically and sexually abused for a decade, whose son killed the abusing father with her assistance, by contrast, was not provoked into assisting her son, but was held guilty of homicide: Howe (1994). One could go on — the symptoms are obvious, but there is no space.

78 Pheng (1991), p 124.

79 Of course, the 'war on terrorism', the 'crusade', in President Bush's words, the 'clash of civilisations' in the right wing op-ed columns endlessly recycled in the Australian press, did the conservative cause no harm.

of a 'yellow peril' to the north. This idea persists in popular novels: Eric Wilmott's 1991 thriller *Below the Line* links Aborigines and Indonesian conquerors of the northern part of the continent, opening with the rape of white Australian women by Indonesian soldiers. The violation of 'our' women by brown men is a common colonial trope. John Marsden's more recent series of best-selling young adult novels features teenage adventures in an Australia occupied by an unidentified people who could only be Indonesian.[80]

In order to attribute a meaning to a message, one has to position oneself or be positioned. In the above fictions, the reader is invited to see an Australia overly trusting, naïve or innocent about foreign powers who are, evidently, untrustworthy. For the hermeneuticist Hans-Georg Gadamer, according to Terry Eagleton, a message in the present 'is only ever understandable through the past, with which it forms a living continuity; and the past is always grasped from our own partial viewpoint within the present':[81]

> Gadamer can equably surrender himself and literature to the winds of history because these scattered leaves will always in the end come home — and they will do so because beneath all history, silently spanning past, present and future, runs a unifying essence known as tradition ... [to which] all valid texts belong.[82]

The full authoritarian implication of this thesis is developed by Ronald Dworkin.[83] In *Law's Empire*, the cultural traditions of the empire authorise a particular office-bearer — the judge — to say what those traditions are. True, he (the exemplifying judge is called Hercules) is constrained by various criteria of consistency, justice and so on, but since he is the one to apply the criteria to the entire cultural tradition of the jurisdiction, rendering it coherent, articulating its meaning and the proper interpretation of the canonical texts of the law, he is in important ways the author of the tradition. Eagleton's objection is to the 'enormous assumption that there is indeed a single "mainstream" tradition':

> That all 'valid' works participate in it; that history forms a continuum free of decisive rupture, conflict and contradiction; and that the prejudices which 'we' (who?) have inherited from that tradition are to be cherished.[84]

Australian conservatives did not assume that a single mainstream tradition existed according to which the refugee story could be interpreted, and worked hard to secure the predominance of their own by discrediting its rivals. It was able to draw on a long racist tradition by appeals to popular patriotism. Those

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80 Wilmott (1991); Marsden (1995).

81 Eagleton (1983), p 71.

82 Eagleton (1983), p 72.

83 Dworkin (1986).

84 Eagleton (1983).

who asserted that there was a long racist tradition were labelled 'black armband' historians who saw nothing to be proud of in *their* country's history, unlike 'ordinary Australians', who took a positive view of the achievements of the past. This either/or division permitted the strains of Gallipoli to drown the lament for genocide. To be ordinary, as opposed to wearing a black armband, or belonging to an elite — or a 'latte set'[85] — means asserting the right to determine who may enter the country. The un-ordinary, by implication, would open up the boundaries and lose control — practices provoking, as I suggested at the beginning, images of the body politic endangered by its effeminacy or effeteness: the naïve trust and innocence of the invasions scare stories, which also attach to those who recommend apologising to Aborigines as a way of advancing the cause of reconciliation.

Giving credence to the criticisms of UN outsiders who criticise Australia's human rights record is akin to being seduced, something the ordinary Australian — subliminally the body politic morphs into the laconic outback man — would find baffling. But ordinariness is transformed into the exclusive 'all Australians' who would reject the quasi-autonomous status achieved by indigenous people elsewhere. The dissentient here is not merely un-Australian, but not Australian at all — she or he cannot be heard.

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