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Dealing with the 'Wicked' Problem of Race and the Law: A Critical Journey for Students (and Academics)

Marcelle Burns
University of New England

Jennifer Nielsen
Southern Cross University

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MARCELLE BURNS* AND JENNIFER NIELSEN**

I INTRODUCTION

Legal education in Australia is traditionally focused on teaching the 'Priestley 11' core areas of legal knowledge and the skills necessary for legal practice. More recently, a range of factors have prompted a shift in legal education towards exploring the 'broader context' in which legal issues arise, which may include a range of socio-legal considerations, such as race, culture, gender and Indigenous perspectives.[1] Yet to do so, legal educators need to move beyond doctrinal methods of teaching law, so that they can engage law students in a meaningful way, as well as in a way that can work with and through 'wicked' problems.

A 'wicked' problem is defined as one that is difficult or impossible to solve because it is incomplete, contradictory and involves changing requirements that are often difficult to recognise.[2] We contend that

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* School of Law, University of New England.
** School of Law and Justice, Southern Cross University.

1   As Steel puts it (citing the Pearce Committee report: 1987), legal education is 'concerned with the development of perspectives on the range of considerations to be taken into account in reaching a judgment and with devising a needed answer or program of action' Alex Steel, *Good Practice Guide (Bachelor of Laws) Law in Broader Contexts* (Australian Learning and Teaching Council Threshold Learning Outcomes Good Practice Guides, 2013). Steel goes on to say that 'Placing legal content into broader contexts allows students to see the impact of law on various sections of society, and this can enhance their growth as professionals and their sense of justice. It can overcome the narrowing effects of training to think like a lawyer, and remind students that application of legal rules have broader effects and reflect the operation of certain values. Seeing law in broader contexts both aids the development of critical thinking skills of students and their professional development': at 5.

2   Australian Public Service Commission, 'Tackling Wicked Problems: A Public Policy Perspective' (Archived Publication, 25 October 2007) <https://www.apsc.gov.au/tackling-wicked-problems-public-policy-perspective>. 'The term "wicked" in this context is used, not in the sense of evil, but rather as an issue highly resistant to resolution. Successfully solving or at least managing these wicked policy problems requires a reassessment of some of the traditional ways of

racism is a 'wicked' problem because, despite the apparent rejection of race as a biological construct, race remains significant in that it shapes the way power and resources are distributed in our society.[3] That is, racism is not only an individual practice but may also be 'systemic' or 'institutional', operating within systems and organisations through structures and processes, or the 'normal' way of doing things, which maintain and reproduce unfair and avoidable inequalities in power, resources or opportunities between groups based on race, ethnicity or culture.[4] At a societal level, racism may also be evident in the cultural and ideological expressions that give voice to dominant values and beliefs – which are communicated and reproduced through social and cultural agencies – such as schools, universities and the media.[5] Legal education therefore has the potential to reproduce existing hierarchies of race if they are left un-named and unchallenged.

In 2017, the United Nations Special Rapporteur on the Rights of Indigenous Peoples found the 'prevalence' of racism towards Indigenous Australians 'deeply disturbing', including incidents of discrimination in the administration of justice.[6] The Special Rapporteur also identified more 'subtle' elements of racism 'stemming from the failure to recognise the legacy of two centuries of systemic marginalization', concluding that mainstream education systems were 'inadequate' in their exploration of Aboriginal and Torres Strait Islander history and the impact of colonisation.[7]

The continued omission from curriculum of Aboriginal peoples' sovereign and cultural histories has enabled a colonialist historiography to permeate the educational system in 'Australia' at its most rudimentary levels such that Australia's education systems are powerful institutional mechanisms in constructing and maintaining white-dominated social hegemony. The contemporary form of legal education demonstrates this as the study of race and the law is not a standard component of legal education, and where reference to race related issues is made in legal curriculum, it typically focuses on Indigenous peoples or non-white migrants so as to attribute race largely to the 'other', with the consequence that whiteness as a position of power and privilege remains unexplored. This is despite the high levels of over-representation in both the criminal justice [8] and child protection

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working and solving problems … They challenge our governance structures, our skills base and our organisational capacity'.

[3]   David Hollinsworth, *Race and Racism in Australia* (Cengage Learning Australia, 3rd ed, 2006) 24–28.

[4]   Yin Paradies et al, *Building on our strengths: A framework to reduce race-based discrimination and support diversity in Victoria: Full Report* (Victorian Health Promotion Foundation, 2009) 26.

[5]   Ibid 26.

[6]   *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 6 [30].

[7]   Ibid 7 [31].

[8]   See generally, Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No 133, December 2017).

systems[9] experienced by First Peoples and the persistence of race as an influence on relations of power, the legacies of the 'white' Australia policy,[10] and the (obvious) implications that follow the Australian legal system's overriding of Indigenous sovereignty.[11]

To respond to these omissions in the legal curriculum and to teach laws in their 'broader context', in 2014 we (the co-authors) co-facilitated the specialist elective 'Race and the Law',[12] delivered as an intensive summer school program for LLB students. Our aim was to make race visible within legal curriculum and to do so in a way that opened examination of race as a social construct which is both a source of privilege as well as a source of marginalisation and disadvantage. Accordingly the unit's pedagogical design was informed by critical race and whiteness theory,[13] standpoint theory,[14] and Indigenous philosophy and knowledges.[15]

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[9]   The Australian Institute of Family Studies reports that Indigenous children are almost seven more times likely than non-Indigenous children to subject of substantiated reports of risk or harm: see Australian Institute of Family Studies 'Child Protection and Aboriginal and Torres Strait Islander children' (CFCA Resource Sheet, March 2019) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>.

[10]   Hollinsworth (n 3); see especially chs 3 & 4.

[11]   Fiona Nicoll, '"Are you calling me racist?", Teaching critical whiteness theory in Indigenous sovereignty' in Damien Riggs (ed), *Taking up the challenge: critical race and whiteness studies in a post-colonising nation* (Crawford House, 2007) 30.

[12]   The unit was first designed and taught by African American legal scholar, Professor Reginald L Robinson, and had a prime focus on race in the American context, and was taught through a critical race theory lens. Professor Irene Watson, Tangenakeld Meintangk scholar, also led several classes which brought attention to race in the Australian context from a First Nations Peoples' perspective. The unit was again offered in 2007, when Jennifer worked with her colleague, Professor Greta Bird. Both Marcelle and Jennifer acknowledge Professors Watson and Bird for their significant scholarship and as our teachers.

[13]   Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 2001); Kimberlé Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' in K Crenshaw, N Gotanda, G Peller and K Thomas (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (New York Press, 1995) 103; Peggy McIntosh, 'White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women's Studies' in Richard Delgado and Jean Stefancic (eds), *Critical White Studies: Looking Behind the Mirror*, (Temple University Press, 1997) 291; Barbara Flagg, *Was Blind But Now I See: White Race Consciousness and the Law* (New York University Press, 1998); Ruth Frankenberg, *The social construction of white women: whiteness race matters* (University of Minnesota Press, 1993); David Theo Goldberg, 'Modernity, Race and Morality' in Philomena Essed and David Theo Goldberg (eds), *Race Critical Theories* (Blackwell Publishing, 2001) 283; Aileen Moreton-Robinson, 'Unmasking Whiteness: A Goori Jondal's Look at Some Duggai Business' in Belinda McKay (ed), *Unmasking Whiteness: Race Relations and Reconciliation*, (The Queensland Studies Centre, Griffith University, 1999) 28; Terrance McMullen, *Habits of Whiteness: A Pragmatist Reconstruction*, (Indiana University Press, 2009); George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (Temple University Press, 2006).

[14]   Eg, see Sandra Harding (ed) *The Feminist Standpoint Theory Reader* (Routledge, 2004).

[15]   Karen Martin, *Please Knock Before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers* (Post Pressed, 2008); Irene Watson, 'Kaldowinyeri – Munaintya In the Beginning' (2000) 4(1) *Flinders Journal of Law*

Our aim in teaching this unit was to prompt students to think critically about the ongoing significance of race to law, and law to race. While we acknowledge that other forms of oppression are produced by law (for example, through gender, class, sexuality), the focus on race was deliberate because we wanted students to analyse how the social construction of race structures both social relations and the capacity of mainstream law to operate as a racialised system of power, and whiteness as a position of privilege. In addition it was particularly important because our students in this class were predominantly white. We sought to empower students by engaging them in a reflexive praxis through which they could develop self-awareness of the significance of race and respond to its influence in their personal and professional lives.

We presented as a 'mixed' teaching team – one Indigenous legal academic and the other white – and thereby modelled and demonstrated the embodied significance of our respective standpoints. We thought (on reflection, naively) that a logical exposition of critical race and whiteness theory, applied to both historical and contemporary examples of discrimination and racism in law, would lead students to an understanding of how concepts of race continue to shape social and legal relations in the Australian context. We found, however that while our students were comfortable talking about historical and contemporary forms of racism, when we shifted discussion to whiteness, white privilege, affirmative action and other measures designed to alleviate racial inequality, [16] we began to encounter 'resistance'.[17] That is, we found ourselves facing the 'wicked' problem of racism in our classroom. To understand and confront this resistance we found that we had to dig deeper into critical race and whiteness theory and to do so through the lens of Indigenous knowledges, to understand this phenomena and inform our responses. We also had to engage deeply with our standpoints to demonstrate how we are all affected and implicated in systems of race. That is, our theory became our praxis.

In this paper, we share our reflections on the 'success' of this unit, its pedagogy and the significance of theory to its design, as well as our reflections on turning our theory into praxis. We employed standpoint theory because, as Ardill describes it, standpoint can shed 'light on the maintenance of power relations, and aims to transform those relations

Reform 6; Martin Nakata, 'Indigenous knowledge and the cultural interface: underlying issues at the intersection of knowledge and information systems' (2002) 28(5/6) *IFLA Journal* 281; Monica Morgan, 'What has native title done for me lately' (2009) 93 *ALRC Reform Journal* 24; Moreton-Robinson (n 13).

[16]   It also explains the aversion to discussions of Indigenous sovereignty, which is perceived as antithetical to the imposed white legal system: Irene Watson, 'Settled and Unsettled Spaces: Are We Free to Roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen and Unwin, 2007) 21, 33–46; Megan Davis, 'The "S" Word and Indigenous Australia: A New Variation of an Old Theme' (2006) 31 *Australian Journal of Legal Philosophy* 127, 127–141.

[17]   David Hollinsworth, 'Unsettling Australian settler supremacy: combating resistance in university Aboriginal studies' (2016) 19(2) *Race Ethnicity and Education* 412, 412.

through the production of knowledge'. [18] We also posit that our respective standpoints as an Indigenous and as a white legal academic were reflected in our pedagogical approaches to teaching the unit, and importantly were also significant to the way students engaged with us as individuals throughout the unit. Accordingly, here we write in the first person and include our individual and our shared reflections on teaching race and the law.

We begin by discussing the significance to legal institutions and the profession of engaging law students in critical learning on race and whiteness. We then discuss our pedagogical design, which was built upon the tenets of Critical Race Theory (CRT) and Critical Whiteness studies as read through the lens of Indigenous knowledges and perspectives. Then we reflect upon how these different theoretical perspectives informed our teaching to explain how theory became our praxis to enable us to challenge students and to meet their resistance. We conclude by reflecting on what we learned from this experience including the value of team teaching in this complex and dynamic teaching space.

We recognise that this subject – as an elective unit – was a modest intervention into the law curriculum. Nonetheless, we think our experience offers important lessons that can encourage and benefit others to intervene in this space and throughout the law curriculum.

II TEACHING RACE AND THE LAW

A *Why Do We Need to Study Race and the Law?*

As a central feature of our political and social structure, the legal system reflects Australia's colonial impositions and is generally mono-cultural in its praxis and values. The pedagogy of the legal academy tends to reflect the law's liberal agenda, one that is secured by the hierarchy of knowledge contained in legal texts, the power of judicial authority, and the ability to define and control identities and behaviour. The agenda reflected by legal education is significant, as captured by Professor Jane E Schukoske in the following:

> Law school education sends many implied messages to students about the law. Some messages reinforce the status quo and existing power structures in society, the primacy of legal reasoning, and the exclusion of certain groups from full societal and professional participation. Appellate cases, which often are powerful stories about how corporations and/or governments operate, legitimate in the minds of readers the existing power structures in society. Messages about respect for hierarchy are also present in earlier education and in society at large. Legal educators, however, have an obligation to examine assumptions and to select our messages to students thoughtfully, with a pedagogical purpose. [19]

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[18]   Allan Ardill, 'Australian Sovereignty, Indigenous Standpoint Theory and Feminist Standpoint Theory' (2013) 22(2) *Griffith Law Review* 315, 325.

[19]   Jane E Schukoske, 'Teaching Law Reform in the 1990s' (1992) 3(2) *Hastings Women's Law Journal* 177, 183–184. She also says: 'The study of lawyering for

Over past decades, there have been important shifts away from pure 'doctrinal' legal scholarship, achieved by borrowing from other disciplinary knowledges to generate new ways of thinking and teaching critically about law. Nonetheless, and perhaps as one consequence of the rise of the neo-liberal university,[20] legal scholarship generally has failed to grapple with issues of race and the study of 'race and the law' has not conventionally held significant and sustained attention within legal curriculum. Standard law texts do not tend to engage in a systematic analysis of race and evade issues related to white privilege and systemic racism. Instead, race tends only to be discussed in context of issues related to Aboriginal and Torres Strait Islander peoples, 'multiculturalism', and/or issues affecting migrants or other non-white groups in Australia.[21]

This is despite critical work undertaken since the 1990s that revealed the prevalence of institutionalised and other forms of racism in the operation of the Anglo-Australian legal system.[22] For example, Chris Cuneen identified 'judicial racism' as a factor contributing to Indigenous over-representation in the criminal justice system.[23] Yet, the significance of institutional racism is rarely accounted for in law curriculum – even though contemporary reviews of the legal system continue to identify it as a factor in law and justice systems. In 2014, the NSW Legislative Council's Standing Committee on Law and Justice Inquiry - *The family responses to the murders in Bowraville* noted that racism was perceived as a factor in the failure to adequately investigate and prosecute the suspected murder of three children from the Bowraville Aboriginal community in New South Wales.[24] And in 2017, the Australian Law Reform Commission's Report *Pathways to Justice* found that Indigenous peoples' experiences of racism are also a

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social change offers law students an angle other than that of traditional legal education on what they are learning in law school and on lawyering choices. How lawyers design strategies to attempt to bring about social change, how they determine what is good policy, how they develop theories about the appropriate relationship between lawyers and their communities, and how the legal system resists effective social change are important and intriguing inquiries': at 178–179.

[20]   Margaret Thornton, *Privatising the Public University: The Case of Law* (Taylor and Francis, 2011).

[21]   Notable exceptions include Greta Bird, *The process of law in Australia: intercultural perspectives* (Butterworths, 1988); Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) ch 4.

[22]   See, eg, Trish Luker and Jennifer Nielsen (eds) 'Law, Race and Whiteness' (2008) 4(2) Special Edition *Critical Race and Whiteness Studies* available at <https://acrawsa.org.au/wp-content/uploads/2017/12/CRAWS-Vol-4-No-2-2008.pdf>.

[23]   Chris Cuneen, 'Judicial Racism' in Sanda McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference Held 23–24 June 1992* (Australian Institute of Criminology,   1992) <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/21-cunneen.pdf>.

[24]   NSW Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *The family responses to the murders in Bowraville* (Report 55, November 2014)   viii, <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/Report Acrobat/5659/Bowraville%20-%20Final%20report.pdf>.

contributing factor to high levels of Indigenous incarceration,[25] and reluctance to use mainstream legal services.[26]

Looking at these findings as part of the persistence of a 'wicked problem', CRT tells us that 'racism is ordinary' through being embedded and inuring in the usual way society does business. It also tells us that because racism supports the interests of the majority in our society – there is little incentive to eradicate it.[27] That is, white hegemony serves important purposes, both psychic and material, with sometimes deadly consequences. And critical race theorists also tell us that racism endures because of the contradictions between 'colour-blind' liberal philosophy and the outcomes produced by law.[28]

In the Australian context Janet Ransley and Elena Marchetti have argued that '[d]espite the liberal ideal of a neutral and culturally unbiased legal system, concepts of race have shaped the law and its interpretation in Australian courts'.[29] Many argue likewise that the Australian legal system overwhelmingly assumes a white Anglo-Saxon, English speaking subject and is blind to the experiences of other cultures, highlighting the adverse impacts of colonialism on Indigenous societies. These commentators and scholars argue in favour of revealing the racist assumptions of Australia's legal history, and the implicit racism within current approaches to law. They argue that the Australian legal system must accommodate other approaches to law[30] to recognise that despite Australia's multicultural society, it is governed by a mono-cultural framework.[31] A number argue for explicit recognition of Indigenous perspectives because:[32]

> [L]imited critical analysis has been given to the relationship between colonised peoples and Western values, beliefs, laws and institutions. Notions of legal neutrality, legal positivism, formal equality, and legal objectivity have failed to reflect Indigenous peoples' conditions of substantive social, political, and economic inequality and marginality.

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[25]   Australian Law Reform Commission (n 8) 1.32, 2.23, 2.26, 6.16.
[26]   Ibid 10.23.
[27]   Delgado and Stefancic (n 13) 7.
[28]   Ibid.
[29]   Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 10(1) *Griffith Law Review* 139, 139.
[30]   'As the commentary to the Threshold Learning Outcomes notes, possible perspectives include those of: social justice; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability. Others include historical and political perspectives. All of these perspectives can be found in academic legal writing and can be used in teaching. … Cultural and linguistic Australia is not a mono-cultural society, and many people have English as a second language or have difficulties understanding complex legal language. Students can be asked to try to see law from the perspectives of those with different cultural and linguistic backgrounds to their own, to analyse how different cultural traditions interpret and use law. The cultural assumptions of law can be examined and any disconnects with lived experience exposed. Students can be asked to consider how to advise clients from different cultural backgrounds': Steel (n 1) 11–12, 14.
[31]   Moreton-Robinson (n 13) 35.
[32]   Chris Cunneen and Simone Rowe 'Changing narratives: colonised peoples, criminology and social work' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 49, 50–51.

> Western claims to absolute sovereignty have undermined the legitimacy of the laws of colonized peoples — which are often characterized as partial, incomplete, and customary ... The imposition of Western values and beliefs ... have largely ignored differences due to race, culture and gender, and further undermined Indigenous approaches to healing, health and wellbeing ... Indeed transplanting and applying Western laws, values, and beliefs to colonial peoples were a key part of the process of empire building, a process that continues to have exploitative consequences today.

Returning then to the academy, First Nations scholars apply a similar critique to challenge the western-oriented pedagogy that underscores the university[33] and its potential to perpetuate a form of 'colonial violence'. [34] This challenge demands that the academy examine and reassess its own culture and assumptions – that is, the academy needs to engage with its own 'whiteness' – to question the normative assumptions which uphold White Australian culture as the standard against which the racialised 'other' is judged.[35] As we argue, it follows that traditional legal pedagogy is not well suited to challenging this wicked problem and that new approaches are required.

Our opportunity to engage with this challenge and realise a new pedagogical approach was when we co-facilitated the specialist elective 'Race and the Law' as a summer school intensive program for a group of 34 LLB students. However, before we discuss that, we would like to note that a significant barrier to meeting this challenge is the lack of confidence expressed by (predominantly non-Indigenous) legal academics in dealing with racism in the classroom.[36] In writing this paper our aim is to share our experiences and learning gained by reflection so as to encourage more teaching about race and the law within the legal academy, and open greater dialogue on the strategies that can and should be applied to meet the 'wicked problem' of racism as it arises in our classrooms. In doing so we will show how our respective standpoints were crucial to developing a range of responses to racism, and how importantly our standpoints affected how students engaged with the unit content, and how they related to us as teachers.

To give context to the remaining discussion and reflections shared it this article, next we describe the unit that we delivered and some general comments about what we achieved.

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[33]   Jeremy Garcia and Valerie Shirley, 'Performing Decolonization: Lessons Learned From Indigenous Youth, Teaching and Learners' Engagement with Critical Indigenous Pedagogy' (2012) 28(2) *Journal of Curriculum Theorizing* 76, 77; Veronica Goerke and Marion Kickett, 'Working towards the assurance of graduate attributes for Indigenous cultural competency: the case for alignment between policy, professional development and curriculum processes' (2013) 12(1) *International Education Journal: Comparative Perspectives* 61, 67.

[34]   Jean Phillips et al, 'Decolonising University Curricula – reforming the colonised spaces within which we operate' (Conference Paper, Indigenous Knowledge Conference – Reconciling Academic Priorities with Indigenous Realities, Victoria University, 2005) 3.

[35]   Moreton-Robinson (n 13) 35.

[36]   Marcelle Burns, 'Towards growing Indigenous culturally competent legal professionals in Australia' (2013) 12(1) *International Education Journal: Comparative Perspectives* 228.

B *LAW10170 Race and the Law*

1 *Outline of the Unit*

The School of Law and Justice at Southern Cross University first offered the elective unit, *Race and the Law*, as part of its Byron Bay Summer School program in about 2000, and ours was the third offering of the subject, scheduled in the summer of 2014. It was presented in a 'hybrid' intensive model – with a compulsory intensive workshop which was supported by an active online learning space.

In the first week of the teaching period, students were required to participate in a compulsory online tutorial/webinar to introduce them to the subject's aims and expectations. Prior to attending the workshop, students were also required to engage with a set of eight selected readings.[37] On the basis of these readings and their own knowledge, they were required to prepare the first part of a Reflective Journal – a 1000 word reflective piece that discussed how race had influenced the development of Anglo-Australian law and policy, identify the gaps in their current knowledge of race issues, and what strategies they could pursue to improve their understanding.[38] To support students with the reflective writing exercise, we conducted a second, optional online tutorial/webinar that discussed the purpose and characteristics of reflective practice and writing. We designed the remaining two assessment tasks to be completed following the workshop. These assessments were a research essay on set topics (that were designed by us to reflect the themes we had explored together in the workshop), and a longer reflective piece that discussed how their understandings of race developed in response to the workshop program and unit materials. After the workshop, students were able to make personal contact with us for further support and advice (and several did).

The workshop was scheduled as a four-day intensive, and each day had a theme and main objective. The objectives of the first day, titled 'Race and Racism', were to introduce and orient students to the workshop plan and set the context for the learning activities, develop rapport within the group (including ground rules for conduct at the

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[37]   See the Appendix at the end of this Article.

[38]   'Part A - The objective of this instalment [of the journal] is for you to reflect upon your current understanding of race and the ways in which it has influenced the development of mainstream Australian law and policy. You should also acknowledge any gaps in your current knowledge of race issues and suggest strategies you could pursue to improve your understanding of these issues. Some guiding questions:

•   How did concepts of 'race' influence the development of colonial policy towards Indigenous Australians and those from non-white backgrounds? What role did law play to support and implement these policies?

•   Think about what you know about policy and social conditions today as applied to Indigenous Australians and those from culturally and linguistically diverse backgrounds. In what ways are these policies and social conditions similar or different to colonial policies? How do you know this? What do you need to know to understand more about these issues?

•   How would you describe your current understanding of race and its influence upon the development of mainstream Australian law and policy?': LAW10170 Race and the Law Assessment Details (Southern Cross University, 2014).

workshop), and introduce and establish the theoretical context within which we were working.

The second day was titled 'Imperialism and the Colonial Project' and began with the historical context of colonisation, the doctrine of *terra nullius*, the stolen generations, and native title. The objectives of this day were to expose and challenge the dominant/universal paradigms demonstrated within law, and how the colonial project endures in the legal conceptions of property, law and sovereignty, through a case study on native title (and key legal sources including *Mabo v Queensland (No 2)*, *Yorta Yorta Aboriginal Community v Victoria*,[39] and the *Native Title Act 1993* (Cth)).

On the third day, titled 'Building Australia', our aim was to expose and challenge dominant/universal paradigms within 'our' history to show how race was an ever present theme in 'Australian' nation building through both the white Australia policy and labour and employment practices to demonstrate theory in action. Through group work students were asked to examine and critique a set of 'legal artefacts' to support broader conversations aimed at deconstructing the theories of formal and substantive equality, special measures, and to provoke students to explore how they are personally implicated in systems of white privilege. Building up on these historical examples of systemic racism, this day also focused on Jennifer's research on whiteness in the workplace to promote a dialogue that challenged the normativity of whiteness and its influence on employment, and how that shaped the discrimination experienced by Aboriginal peoples in the contemporary Australian workplace.

Our original plan for the final half-day was to be 'Anti-Racism', with the intention of offering students some informed anti-racist strategies and praxis to enable them to engage in 'bystander action'[40] to support those experiencing racism.

However, as is detailed in our reflections that follow, neither day three nor day four went quite according to plan, and we needed to work reflexively to modify our approach to respond to the student's learning journey. As we will discuss, we made a significant modification to the final day of our program on account of the resistance being demonstrated by the students. And as a consequence of that experience, after we completed the unit we began to reflect on whether or not the unit was a 'success'.

We acknowledge that this very question is shrouded in cultural baggage, particularly when asked in the contemporary university context where financial viability and student evaluations are valorised as measures of 'success'. But starting with these institutional measures,

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[39]   *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[40]   Western Sydney University, 'Bystander Anti-Racism Information Sheet', *Challenging Racism Project (Web Page)* <https://www.westernsydney.edu.au/challengingracism/challenging_racism_project/our_research/bystander_anti-racism>; Jacqueline Nelson et al, *Review of bystander approaches in support of preventing race-based discrimination* (Victorian Heath Promotion, VicHealth, 2010).

the unit appeared to be successful through being a viable offering, achieving 34 enrolments (including cross-institutional enrolments). In addition, student feedback data suggested it was successful as in response to *all* of the pre-defined measures used by Southern Cross University to assess student experience, we gained 'scores' that were significantly above the School's and the University's averages – ranging from 4.14/5 (for satisfaction with the delivery model) to 5/5 (for the level of respect for cultural diversity embedded in the unit), with an overall satisfaction rating of 4.87/5.[41] The high score for respect for cultural diversity was reassuring in that it affirmed our pedagogical approach. In context of this article, the greatest importance of these metrics is that they will support our efforts to present this subject within our respective institutions in future.

According to the qualitative student feedback the subject was successful in that, generally: the students thought we 'knew our stuff'; we delivered challenging material sensitively; we created a supportive learning environment; and they found the learning useful as they were 'hungry' for this knowledge. But for us the more meaningful pointers of success was that anecdotally some students described completing the unit as 'life changing' and that it had impact on their career direction and aspirations.

We also found that the reflective qualities of the final reflective journals were more developed, and in this work we could track significant changes in student attitudes, including shifts from 'liberal protestations' [42] about formal equality and meritocracy towards demonstrating more awareness of the impact of race on their personal and professional lives. Many also expressed the view that they 'didn't know' and were angry or confused about why their socialization and prior education had not exposed them to this knowledge. That is, they valued the ability to make race visible in the law curriculum and to expose the ideology of racial privilege rarely heard over discourses of racial marginalisation and disadvantage.

More particularly, over time and based upon deeper dialogue and reflection – individually and together – we have both gained greater insight into the significance and value of the theories we applied as forms of pedagogy and of praxis. We turn now to those reflections to share the learning we gained from our experience.

III REFLECTIONS ON THEORY AS PEDAGOGY

A *Our Choice of Theory*

Clearly, the unit Race and the Law deals with the wicked problem of race and racism. As part of our collaboration in this unit, we both agreed it was essential to talk about race in the law curriculum. To do so, we were able to draw upon the work on multiculturalism and cross-

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[41] 15 of the 34 enrolled students responded to the Student Experience Survey.
[42] Hollinsworth (n 17) 420, 426.

cultural issues in legal and broader university education that had emerged and that was emerging in the field, notably the work by Universities Australia on Indigenous Cultural Competency.[43] Our unit was not designed to facilitate the specific development of Indigenous Cultural Competency – though what we sought to achieve was certainly complementary to that important goal.[44] Instead, its aim was somewhat broader – that is to make race visible within legal curriculum and to do so in a way that opened examination of race as both a source of privilege and a source of marginalisation and disadvantage.

To do that, we both agreed that the central principles and tenets of CRT and Whiteness Theory offered a strong foundation.[45] In broad terms CRT provided the platform to challenge the dominant liberal philosophical framework of the Anglo-Australian legal system, and the failure of formal equality to bring about substantive equality for racialised groups in the Australian context. Whiteness theory also provided a language to speak about the continuing dominance of Anglo-Australian law, as opposed to First Nations law, and to challenge the dominant construction of race as a 'problem' that affects only the non-white 'other'.

However, we both also agreed that to talk in a meaningful way about race and the law in Australia, the pedagogical design we crafted and delivered had to be primarily informed by Indigenous philosophy and knowledge.[46] This was critical because these methods enable a de-centring of the dominance of Eurocentric knowledges and law, making it clear how race has shaped and continues to shape the Anglo-Australian legal system and its relationship with First Nations peoples.[47] Looking at the problems of race and the law through the lens of Indigenous knowledges also responded to the strong critique by Indigenous scholars of the tendency/failure within Australian whiteness

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[43]   Universities Australia, *Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities* (Universities Australia, 2011); Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (Universities Australia, 2011). Both reports are available at <https://www.universitiesaustralia.edu.au/uni-participation-quality/Indigenous-Higher-Education/Indigenous-Cultural-Compet#.XHJISSBS_IU>.

[44]   Eg, Silver argues that amongst the considerations that will help a person to work towards building cultural competency skills are: '(1) critical self-reflection – to uncover unconscious stereotypes and biases, and to examine how race occurs to and for self; (2) learning about the history and context of other's racial experience; (3) understanding other cultures' worldviews and how those of that culture might see things differently; and (4) recognising the strengths of other communities, as well as the disadvantages they face': Majorie A Silver, 'The professional responsibility of lawyers: emotional competence, multiculturalism and ethics' (2006) 13(4) *Journal of Law and Medicine* 431, 435–38.

[45]   See, eg, Delgado & Stefanic (n 13); Goldberg (n 13); Moreton-Robinson (n 13).

[46]   See, eg, Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508; Morgan (n 15); Moreton-Robinson (n 13).

[47]   Watson (n 46).

studies to engage adequately with Indigenous sovereignty and self-determination.[48]

Importantly, the theoretical foundations that we adopted enabled us to open questions about race from very different perspectives – those of the marginalised and of the privileged – and to explore the complexities of racialised systems of power, and in particular, the way race has shaped dominant understandings of what constitutes 'law' in the Australian context.

1   Critical Race Theory

Critical race theory was a foundational element of our pedagogy as it seeks to explore the relationship between 'race, racism and power'[49] and to draw attention to the failure by liberal forms of equality to produce substantive equality to non-white groups. While it does not present race as a 'real' biological marker of difference, CRT exposes the way race shapes lives by operating as a social and cultural construct and the 'means by which society allocates privilege and status'.[50] It also exposes how 'racialised' subjects are marked in ways that are not inherent or fixed but rather by ways invented to suit majority group interests.[51] These insights from CRT grounds the understanding that racism is 'ordinary' rather than an 'aberration' and manifests itself at specific historical moments in response to the 'shifting needs' of the dominant society.[52]

CRT also interrogates why civil rights laws have failed to bring about significant change to the material conditions of non-white groups by questioning what Richard Delgado and Jean Stefancic call the 'universalising tendencies of liberalism'[53] by which formally equal treatment is the measure of equality before the law. Therefore, CRT challenges the 'very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and [in the US context] the neutral principles of constitutional law'.[54] Critical race scholars are also sceptical of 'colour-blind' or 'race-neutral' conceptions of equality, which they argue can only alleviate the most blatant forms of discrimination, and instead promote a 'race-conscious' jurisprudence as a necessary theoretical perspective to unmask the 'way law constructs knowledge about race'.[55]

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[48]   Aileen Moreton-Robinson, 'Preface' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) viii; Watson (n 16) 21.

[49]   Delgado and Stefancic (n 13) 2.

[50]   Ibid 17.

[51]   Ibid 7.

[52]   Ibid.

[53]   Ibid.

[54]   Ibid.

[55]   Crenshaw (n 13) 113–114.

2 *Whiteness*

Whiteness theory was necessary to our pedagogy because its central tenets are critical to understandings of how race functions across the social spectrum, and importantly, it dispels the common misconception that race (and racism) is something that only affects non-white peoples.[56] Whiteness theory does so by drawing attention to the social construction of whiteness as a position of dominance that continues to wield considerable power and privilege despite the liberal commitment to (colour-blind) racial equality, and by providing a counter-hegemonic discourse to disrupt the Western intellectual tradition's tendency to focus discussions about race on the non-white 'other'.[57] In her influential work Ruth Frankenberg argues that, because race has been constructed as belonging to the 'other', whiteness is invisible,[58] operating as a 'set of cultural practices that are usually unmarked and unnamed',[59] which gives it normative power.[60] Thus, Frankenberg argues, there is a need to name whiteness in order to 'assign everyone a place in the relations of racism'.[61] Richard Dyer also argues that white power reproduces itself because whiteness is seen as 'normal',[62] or just 'the way it is'. Therefore 'white people need to learn to see themselves as white, to see their particularity. In other words, whiteness needs to be made strange'.[63]

Whiteness has been variously described as a standpoint,[64] an epistemology,[65] a location of privilege,[66] and a form of property.[67] At first glance such descriptions suggest that whiteness is monolithic, a fixed and static entity, however whiteness is also noted for its fluidity as an identity shaped through exclusionary practices that have changed over time to confer privileges on those deemed to be white and to deny rights to non-white peoples.[68]

3 *Indigenous Knowledges*

Critical race and whiteness theory have been criticised in the Australian context for their failure to adequately engage with the situation of First Nations peoples, and to address their specific concerns due to a tendency to shy away from issues of Indigenous sovereignty and self-determination.[69] Therefore we felt, particularly as a team of

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[56] Frankenberg (n 13) 3.
[57] Richard Dyer, *White* (Routledge, 1997) 2.
[58] What Flagg refers to as the 'transparency phenomenon': Flagg (n 13) 1.
[59] Frankenberg (n 13) 1.
[60] Dyer (n 57) 3.
[61] Frankenberg (n 13) 3.
[62] Dyer (n 57) 10.
[63] Ibid 3.
[64] Ibid 1.
[65] Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75.
[66] McIntosh (n 13) 291.
[67] Cheryl I Harris, 'Whiteness as Property' (1993) 106(8) *Harvard Law Review* 1707.
[68] McMullen (n 13) 25.
[69] Moreton-Robinson (n 48) viii; Watson (n 16) 24.

First Peoples and white academics, that Indigenous knowledges and pedagogical approaches[70] were also essential to our teaching of Race and the Law because they enabled us to generate more complex understandings of race.

To explain, initially, it is important to acknowledge that Indigenous knowledges directly challenge the invisibility and normativity of whiteness. For Indigenous Australians 'white people are visible and perceived by Indigenous people as having a collective racial identity'.[71] As Lillian Holt explains, the normativity of whiteness is felt in being positioned as 'the other' and in Indigenous people being seen as 'not quite right'.[72] For Moreton-Robinson, living 'with whiteness means experiencing being treated as less than or not white, or for some Indigenous people with white skin, being positioned as white.'[73] The default position of assigning race to the 'other' – that is, the 'racialised' positioning of Indigenous peoples – has the consequence that Indigenous subjectivity is never seen as 'neutral',[74] but instead counter to the 'normality' of whiteness so that Indigenous claims are often dismissed as unreasonable and 'irrational'.[75] By contrast, Indigenous knowledges of whiteness challenge its invisibility and unmask its power as the silent norm that controls Australian social, political and legal institutions.[76] These insights from Indigenous knowledges reinforced the importance of making whiteness visible within the unit content and pedagogy.

However, applying Indigenous knowledges and methods in our work was also essential because it brought different and important concepts into our conversations and dialogues that could emphasise the 'inter-connectedness'[77], 'relationality'[78] or 'relatedness'[79] of all living things – and the significance of reciprocity and responsibility. 'Relatedness' is central to Indigenous ontologies (world views), epistemology (ways of knowing) and methodology (ways of doing).[80] Importantly relatedness also invites examination of the intersubjectivity

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[70] In this context we adopt Nakata's definition of Indigenous knowledges as including not just 'traditional knowledge', but also knowledge that is generated at the 'cultural interface' between Indigenous and Western knowledge systems, including knowledge of colonialism and racism: Nakata (n 15).

[71] Moreton-Robinson (n 13) 31.

[72] Lillian Holt, 'History, Honesty, Whiteness and Blackness' (Keynote address presented to the Historicising Whiteness: Transnational Perspectives on the Construction of Identity, Melbourne, 22–24 November 2006) 1–3.

[73] Moreton-Robinson (n 13) 35.

[74] Ibid 32.

[75] Ibid 33.

[76] Ibid 35.

[77] Watson (n 15); Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 13–14.

[78] Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a White Post Colonizing Society' in Sara Ahmed et al (eds) *Uprootings/Regroundings: Questions of Home and Migration* (Oxford University Press, 2003) 23.

[79] Martin (n 15) 75–78.

[80] Ibid 65; Martin stresses that her theory is not exclusive to or representative of all Aboriginal peoples.

implicit in the relationship between coloniser and colonised. [81] Reciprocity is also an important aspect of Indigenous philosophies which emphasise mutual exchange [82] as essential to maintaining peaceful relationships and non-hierarchical arrangements for co-existence and the sharing of power between the diverse cultures and language groups that constitute First Nations peoples in both contemporary and pre-colonial times. [83] Both relatedness and reciprocity impart notions of obligation and responsibility.

4 *Standpoint: Where Do We Stand?*

The final point we would like to explain about our pedagogical approach is the significance of standpoint theory. As a team comprised of one First Nations scholar and one white scholar, we remain acutely conscious of how our different social positions and life experiences inform the way we understand both race and racism. For that reason, standpoint theory was significant to us because it acknowledges 'what we know is structured by the social and material conditions of our lives' and that all knowledge is historically, socially and culturally contingent. [84]

Legal knowledge and doctrine typically assume that the teacher/lecturer can adopt a neutral, objective position and remain detached from the subject matter. Standpoint theory not only challenges presumed objectivity and neutrality of Western (legal) knowledge, but also sheds light on how knowledge is 'produced'. [85] Thus, the 'standpoint' of the legal actor is significant as it frames our way of looking at the world, what we regard as important and significant, and in fact informs what we do, and how we do it. [86] Therefore, as critical legal scholars – and legal actors – we argue that *we* are not neutral, objective and impartial, but rather that who we are, our history, cultural and social context, and our lived experiences are significant to what and how we teach. Applying this to our collaboration as First Nations and white scholars, standpoint theory was significant to us because it acknowledges that our respective standpoints are informed by the 'cognitive component of experience and identity and begins from the premise that all knowledge is socially situated and therefore partial'. [87] That is, we were acutely conscious that our ontologies are shaped very differently, that our different social positions and life experiences informed the way we understood both race and racism, and thus that our knowledge and experiences of 'law', quite simply cannot be, and in fact are not the same. Indeed, the different positions we occupy as socially

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[81] Phillips et al (n 34) 4–5.
[82] *Macquarie Concise Dictionary* (6th ed, 2013) 'reciprocity' (def 2); Martin (n 15) 78.
[83] Watson (n 15) 6.
[84] Alison Wylie, 'Why Standpoint Matters' in Sandra Harding (ed) *The Feminist Standpoint Theory Reader* (Routledge, 2004), 339, 341.
[85] Ibid 341.
[86] Marrett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices* (Lawbook Co, 2009) 516.
[87] Moreton-Robinson (n 13) 29.

constructed 'racialised' subjects are significant to and indelibly mark the way in which we experience race and law in our daily lives.

Moreover, standpoint enabled us to expose the way in which doctrinal legal knowledge operates to control and silence by privileging certain forms of knowledge as 'truth'. Margaret Davies captures it this way:

> [K]nowledge has been seen as power: to have knowledge is to have access to a form of power. Those who know can use their knowledge to their own ends. More recent thought on this matter, often inspired by the works of Michel Foucault, suggests that the inverse is also the case: that the conditions of what counts as 'knowledge' are in fact determined by relations of power. The structures and institutions which control society determine what is 'true' and what is not.[88]

We are not ignorant that our own position, as legal academics, afforded us significant power and control within the classroom space. But as we discuss further below, our application of Indigenous principles of relationality and reciprocity allowed us to work more consciously of that power dynamic to create a culturally safe[89] learning space.

It is also for these reasons that we have knowingly and deliberately abandoned the convention of writing in the third person within this work, embracing CRT's use of narrative as a counter-hegemonic strategy to disrupt conventional ways of talking about law and legal education.[90] We see it as important that both the socially, culturally and historically contingent nature of our knowledge and our different positions as socially constructed 'racialised' subjects, should be made visible in our work, as it has an important influence on how we deal with issues of race respectively. Based on our reflections, we believe it is also relevant here because our identities as racialised subjects were significant to our students and influenced the way they responded to some aspects of the unit's content. Thus, here we set out our individual standpoints and experiences.

(a) Marcelle

First Peoples occupy multiple subjective positions shaped by our experiences of colonisation.[91] As a *Kamilaroi* woman and descendant of the stolen generations my standpoint is indelibly marked by my family's experiences of colonisation and our encounters with whiteness as they impact on our identity and our ways of knowing and understanding the world. However as Irene Watson has observed First Peoples oral stories are sometimes perceived

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[88]   Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017) 237.
[89]   Cultural safety has been defined by Williams as 'an environment that is spiritually, socially and emotionally safe, as well as physically safe for people; where there is no assault challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience of learning together': see R Williams, 'Cultural safety – what does it mean for our work practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213.
[90]   Delgado and Stefancic (n 13) 7–8.
[91]   Moreton-Robinson (n 78) 33.

as 'too much "inside the story"', to be sufficiently reliable or 'objective'. [92] And as Moreton-Robinson explains First Peoples subjectivity is never seen as 'neutral' because of our 'racialised' position as Indigenous peoples.[93] However as critical scholars have long argued, minority group 'narratives' provides strong counter-stories that disrupt hegemonic discourses and reveal how those positioned as 'other' experience living on the margins of society. [94] So by 'talkin' up' Indigenous women are able to provide a counter-hegemonic discourse that seeks to destabilise the centrality of whiteness and its position of dominance in Australian society.[95]

First Peoples subjectivities are not only shaped by our experiences of colonisation but also by our 'ontological relationship to land'. [96] For Karen Martin this 'relatedness' is to 'know who you are, where you are from and how you are related'. [97] For descendants of the stolen generations however such questions are often difficult if not impossible to answer due to removal from country, family and community. Our apparent 'dis-connection' from country however does not nullify our ontological relationship to land, because this relationship may be experienced in different ways. Indigenous 'relationality' is underpinned by both 'connections with one's country and the spirit world',[98] and a belief that the land is alive,[99] it talks to us, and that our ancestors always travel with us. My ontological relationship to land as a descendant of the stolen generations gives me a different lens through which to view mainstream legal doctrines and their methods of denying First Peoples sovereign being. Our spiritual connection to country and kin provide the foundation for identity that does not fit neatly into positivistic legal doctrinal categories. These insights shape my understanding of the dominant legal system and inevitably inform what I do as a legal scholar and teacher.

(b) Jennifer

Though so obvious to 'non-whites', those of us who can claim a white racial identity often live without being conscious of it, failing to appreciate the privilege and potential that it holds. [100] And typically, it is only through challenges to our privilege by non-white peoples, that consciousness of our whiteness is stimulated to grow. That, at least, is my story. Indeed, I think it is significant to the shape of my 'white Australian' identity that – until I went to university, my 'known' encounters with 'non-whites' occurred predominantly while my family was living in the United States during the rise of the civil rights movement in the 1960s. When we returned, I grew up in the middle-class, white bayside Melbourne suburbs, where blue eyes and bleach blond hair were valorised and where even the 'others' had white skin. It didn't even occur to me that I may not belong to this place.

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[92] Watson (n 16) 27.
[93] Moreton-Robinson (n 65) 32.
[94] Wylie (n 84) 339.
[95] Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000), see especially Ch 7; Aileen Moreton-Robinson, 'Researching whiteness: some reflections from an Indigenous Woman's Standpoint' (2003) 29(2) *Hecate* 72.
[96] Moreton-Robinson (n 78) 33.
[97] Martin (n 15) 69–71.
[98] Moreton-Robinson (n 78) 34.
[99] Central Land Council, *The Land is Always Alive* (Central Land Council, 1994) 4.
[100] Eg, see Peggy McIntosh, 'White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies' in Margaret L Andersen and Patricia Hill Collins (eds), *Race, class and gender: an anthology* (Wadsworth Publishing Co, 1992) 70.

I did not 'know' I had met an Aboriginal person until I was at Monash University in the 1980s, and though the Aboriginal peoples I met there opened my eyes to the hegemonic white culture that prevailed at law school. I did not begin to appreciate my *own* white privilege until a Yolgnu scholar and friend encouraged me to read the then recent Cheryl I Harris article – 'Whiteness as Property'.[101] Professor Harris' article shook my racial complacency and brought home the hard reality that whiteness *was about me*.

These days I understand that I was born on Boon Wurrung lands within the Kulin Nation, and live on Widjabul Weibel lands within Bundjalung country. These days, in my work as a white teacher and researcher, I acknowledge my standpoint because there are important limitations on my knowing and my subject position. In my research, I seek to effect anti-racist and anti-colonial strategies by exposing the tendency of mainstream Australian law to privilege 'white' interests through contemporary colonial forms. I am also part of a team that delivers staff training on race and racism – *Courageous Conversations About Race* – to the Southern Cross University community, through which I continue to engage reflexively on my whiteness and how to unsettle my own privileged position within (and outside) academic spaces.[102]

We both felt that our standpoints were significant to our approach to teaching the unit and were essential to modelling co-operation between Indigenous and other Australians. Most importantly, and as we discuss more later, enacting our standpoints in the teaching of this unit also engendered a shared sense of responsibility to combat racism.

IV ENACTING PEDAGOGY: USING THEORY AND STORYTELLING TO MEET RESISTANCE

A *Resistance and a Possessive Investment in Whiteness*

The intensive school was going well and according to plan. On day one – 'Race and Racism' - students engaged with theory and were able to relate to relevant examples. On day two – 'Imperialism and the Colonial Project' students expressed genuine surprise and shock at the legal rationalisations for colonisation and the forced removal of Aboriginal children from their families, and were able to grapple with critiques of property and native title law.

On day three – 'Building Australia' – students were able to apply the theory to historical examples of labour discrimination. By engaging students through CRT's vision of race, we were able to open conversations about the social construction of race, and how it continues to shape our lives, with both material and psychic effects. Its critique of liberalism's formal and neutral vision of equality allowed us to pose questions about why, despite the liberal promise, equality remains so elusive in society for some groups.[103]

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[101] Harris (n 67).

[102] See Jennifer Nielsen, 'The Problem with Research' in Dorota Gozdecka and Anne MacDuff (eds), *Feminism, Postfeminism and Legal Theory: Beyond the Gendered Subject* (Routledge, 2019) 117.

[103] Margaret Thornton, *The liberal promise: anti-discrimination legislation in Australia,* (Oxford University Press, 1990) ch 1 – The Elusiveness of Equality, 9–23.

However, in the afternoon of day three, when the topic of whiteness in the contemporary workplace was presented, we noticed that students began to assert the liberal vision of formal equality. In response to the 'problem of Aboriginal discrimination at work', they actively reframed problems about the workplace to problems about Aboriginal 'merit' and the 'inequality' of special measures and affirmative action. They started to manifest what Hollinsworth calls 'liberalist protestations' that affirmative action programs are not special measures, but instead are a form of special treatment and even 'reverse racism'.[104] And just as Fredericks and Bargallie observed of participants in Indigenous cultural competency training, they began to show that they were discomforted by discussions about race and whiteness because they assumed the course would simply teach them more about the Indigenous other.[105]

We also noticed that although Jennifer was leading that session's discussion - students started directing questions to Marcelle. Both of us began to realise that the students were actively trying to steer the focus of the discussion back to the 'Aboriginal'/ the other – to an externalised vision of race – as a strategy to avoid engaging with the session's topic of whiteness. The students were clearly acting to re-direct the class to the more comfortable space of speaking about the raced 'other' – rather than topics that would implicate their own white selves. The 'politics of resentment' – and the 'wicked' problem of racism – had raised its ugly head.[106] And the approach we were taking through CRT and whiteness theory was not proving adequate to shift students from that space.

We left the class at the end of the day somewhat dumbfounded and struggling to work out where we had gone wrong. We realise now that we should have seen it coming, but at the time we were both surprised that despite our lucid exposition of critical race and whiteness theory, the students suddenly began to articulate precisely the kinds of views that we were attempting to disrupt. We recognised what Hollinsworth describes as denial or 'evasions and distancing strategies' – both in temporal and spatial terms;[107] because the contemporary (as opposed to historical) workplace is a space where all our students participated, and were therefore in/directly implicated and could no longer claim to be innocent. We realised that our students were acting out their socially constructed position of whiteness in ways that we had not expected they would. In short, they started to perform their 'possessive investment' in whiteness while at the same time denying their sense of white entitlement.

Lipsitz' work demonstrates how, in the US context, the 'possessive investment' in whiteness is evident in the backlash against affirmative action programs that were introduced to equalise opportunities and alleviate material inequities between black and white Americans. He characterises this back lash as a 'resistance, refusal, and re-negotiation'

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[104]   Hollinsworth (n 17) 420, 426.
[105]   Bronwyn Fredericks and Debbie Bargallie, 'Which way? Talking culture, talking race: Unpacking an Indigenous cultural competency course' (2016) 9 *International Journal of Critical Indigenous Studies* 3, 8–9.
[106]   Hollinsworth (n 17) 416.
[107]   Ibid 417.

of the hard won rights gained under US anti-discrimination legislation,[108] and that we all – 'white people most of all' – have the obligation to expose, analyse and eradicate 'this pathology.'[109] Lipsitz explains that the consequences of failing to acknowledge white privilege and the possessive investment in whiteness is that 'disadvantages that racial minorities face may seem unrelated to advantages given to whites', and therefore may be dismissed as arising from 'innate deficiencies, rather than from systemic disenfranchisement and discrimination'.[110] This phenomena is described by Bonilla-Silver as 'colour-blind racism' which he says is critical to the persistence of white racial supremacy and characterised by 'slipperiness, apparent nonracialism and ambivalence'.[111] Thus the theory helped us to understand what was happening in the classroom and also informed our strategies moving forward.

After much reflective discussion, we knew that to realise the unit (and our) objectives, we would need to apply sharp tactics to disrupt the students' white complacency and denial, and to re-focus and change the space.

To do that, we decided to go back to the basics of our theory to 'shock' them out of their intellectual indulgence (complacency) and to get them to acknowledge the consequences of maintaining what Lipsitz calls a 'possessive investment in whiteness'.[112] And as we explain, to achieve a shift in the classroom it was vital that our theory worked from an Indigenous knowledges foundation as that enabled us to name and understand what was happening in the classroom and to inform our strategies to move things forward.

B   *Shifting the Resistance*

In the remainder of this section, we explain the strategies we pursued to shift the space in our classroom as well as offering our reflections on the value of the strategies we deployed. As we discuss, the various theoretical tools enabled through our pedagogical design prompted students to transform their understandings of race and racism as an individualised practice of aberrant behavior to a deeper understanding of race and racism as an ideological and systemic practice to which we can respond by either confirming its power (ie. by passively accepting the status quo) – or we can shift to more productive locations where we take responsibility for naming and challenging racism whenever we see it.

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[108]   Lipsitz (n 13) 25.
[109]   Ibid xix. In a similar vein, McMullen names 'habits of entitlement' amongst the problematic aspects of whiteness that need to be challenged in order to dismantle white privilege and create a more democratic and pluralistic society: McMullen (n 13) 20–21.
[110]   Lipsitz (n 13) 24.
[111]   Eduard Bonilla-Silva, *Racism without Racists: Colour-blind Racism and the Persistence of Racial Inequality in the United States* (Rowman and Littlefield Publishers, 3rd ed, 2009), cited in Hollinsworth (n 17) 428.
[112]   Lipsitz (n 13).

(a) Whiteness, Standpoint and the Place of Discomfort

It was expected that the students would experience some discomfort with the learning the material in this unit. However, as Hollinsworth concludes, we found that this discomfort can be used pedagogically.[113] But it is also important to support students to make the intellectual shift necessary to become anti-racist advocates.[114] Bryant suggests students may be resistant to learning about content that may threaten their cultural identify, feel pain at hearing minority stories, or may feel that a focus on race is contrary to liberal ideals of (formal) equality.[115] In teaching this material such resistance needs to be challenged, however students also need to be supported in coming to terms with the basis of their angst, and as teachers we need to ensure that we do them no harm.[116]

Accordingly, to respond to the students' resistance we reframed Day 4 to include a case study on Aboriginal deaths in the custody, the then recent case of Ms Dhu, who had died in custody whilst incarcerated for fine default.[117] More detailed content addressing the possessive investment in whiteness was presented to stimulate deeper self-reflection and discussion. Students were also asked to analyse this case (presented via a short video), through the lens of Delgado's 'Six Puzzles of Critical Race Theory', namely:[118]

- Why do things never seem to get better?
- Why are the majority of people from the majority group not alarmed at the current disparities?
- Problem of black underclass.
- Why do members of the majority strongly prefer equality of opportunity over equality of result?
- Curious alignments – 'gains for people of colour come when a gain would advance the interests of society's control group and do not impose too great a cost on other whites in a position to resist them...'
- Persistence of a 'self-defeating' black underclass – as a 'perfectly rationale response' to a world where claims to equality are 'daily falsified'… a society that is 'perfectly prepared to see one suffer and be poor, and that believes this is fair neutral, and natural, and that will not remedy one's pain if it

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[113] Hollinsworth (n 17) 426.

[114] Ibid.

[115] Susan Bryant, 'The Five Habits: Building Cross-Cultural Competence in Lawyers' (2001) 8 *Clinical Law Review* 33, 58–59.

[116] Ibid.

[117] Australian Broadcasting Corporation, 'Aboriginal deaths in custody bring focus to disturbing rate of imprisonment', *ABC 7.30 Report*, (30 October 2014) <http://www.abc.net.au/7.30/content/2014/s4118422.htm>.

[118] Richard Delgado, 'Review Essay: Recasting the American Race Problem' (1991) 79(5) *California Law Review* 1389, cited in Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 458–460.

entails any costs to itself – and justifies the refusal on grounds of principle.

Marcelle led students through the deaths in custody video/material by applying Delgado's 'Six Puzzles', and asking them to consider the observations of Uncle Noel Nannup - that unless there is a fundamental change to the law's response to Indigenous disadvantage (and the normative position that there must be consequences for non-payment of fines, including incarceration) that deaths in custody will continue to happen. Thus through an Indigenous standpoint we were able to bring home the salient message that race and racism, often represented as the 'normal' way of doing things, have material (and sometimes deadly) consequences. Alongside this, Jennifer worked from her standpoint to share reflections about the way she enacted the habits of whiteness and how she had and was working through the implications of her whiteness. This was particularly important given, as already noted, most of the students were white. Her modelling offered a non-confrontational way to prompt the students to appreciate how the theory applied to them personally, and how systems of racial oppression are perpetuated by simply 'doing nothing', and accepting the status quo.

Discussion of Delgado's 'Six Puzzles' also engaged the students in a dialogue on the invisibility and normativity of whiteness in order to provoke the students to consider how systems of knowledge, and particular understandings of what constitutes law, are not objective or neutral, but rather are constructed through a particular racial or cultural lens and therefore operate to maintain white dominance, and marginalise those who sit outside the dominant group. We considered these understandings essential for students to grasp the complex dynamics of how race operates both to discriminate, but also to perpetuate existing power differentials between racialised groups in the Australian context.

We also believe that our team-teaching approach, as a team of white and First Nations academics, was vital to this, as we were able to model and demonstrate to students that race and racism are not just 'Aboriginal issues' or 'migrant issues' but rather that race and racism are everybody's business.

Our engagement with whiteness theory was essential, then, to raise awareness amongst the students about the significance of race to their own social positioning – that is, that they *are* raced subjects and they experience race very differently particularly those who are part of the dominant white group. But the other important aspect of this engagement was that it also alerted students to their entanglement with white privilege – that is, how *we are all implicated in systems of race*, and that for white people race is not about disadvantage or discrimination, but rather about power and privilege – what Peggy McIntosh has described as the 'invisible package of unearned assets' which white people can take for granted and to which they are 'meant to remain oblivious'.[119] As Lipsitz explains, the 'language of liberal

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[119]   McIntosh (n 13) 291.

individualism serves as a cover for co-ordinated collective group interests', which operate to reproduce and uphold white privilege.[120] Thus, by explicitly naming white privilege, we did not allow the students to maintain that the 'disadvantages that racial minorities face … seem unrelated to advantages given to whites', and therefore did not allow the students to dismiss racial disadvantage as arising from 'innate deficiencies, rather than from systemic disenfranchisement and discrimination'.[121]

Even if the student's starting point was 'I don't know' – the use of standpoint and reflective writing offered a platform for students to question why they felt that they were not touched by race. It also enabled them to question their lack of awareness of Indigenous peoples and perspectives (through their social stratification or the failure of their prior education), and to challenge the status quo, presumed levels of 'knowing' and how systems of power reproduce themselves simply through the 'invisibility' of Indigenous peoples in the students' prior education and life experience.

Our engagement with whiteness through our different standpoints provided an opening for discussion about representation and a critique of the way law constructs knowledge about race, or more precisely the knowledge used within law about groups identified by reference to race. It also enabled us to show how our respective knowledge of particular events was quite different and to demonstrate how that was connected to our different cultural and social experiences.

(b) Changing the 'Story': Storytelling and Narrative

Narratives or storytelling is recognised as a specific methodology of critical race theories which is used by minority peoples to challenge the master narratives of law and its impact on marginalised and non-white groups. CRT's methodology of 'legal storytelling' became a central feature of our pedagogical design as it helped us open the students to the perspectives of marginalised groups whose 'ignored or alternative realities'[122] and methods of 'speaking back'[123] challenge the failure of mainstream laws to address issues of racial inequality. Narratives and storytelling can also 'stimulate dissonance' – described by Wain as 'psychological discomfort from incompatibility between behaviours and beliefs', leading students to recognise their (unconscious) bias in a non-threatening environment – and providing triggers for self-reflection.[124] It also allowed us to engage them in reflective practice by prompting them to identify and discuss the different ways that race has shaped their own lives. As noted already, it also allowed us to model the significance of standpoint to our students.

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[120] Lipsitz (n 13) 22.

[121] Ibid 24.

[122] Delgado and Stefancic (n 13) 37–44.

[123] Victor Hart, 'Teaching Black and Teaching Back' (2003) 22(3) *Social Alternatives* 12; Moreton-Robinson (n 95).

[124] Toni Wain et al, *Creating cultural empathy and challenging attitudes through Indigenous narratives, Final Report 2013* (Australian Government, Office for Learning and Teaching, 2013) 10–11.

Story telling is also a central component of Indigenous oral traditions and pedagogical approaches, and has been used for millennia as a means of transmitting knowledge. [125] Storytelling and narrative were an integral part of our pedagogical approaches as we shared personal stories with students, and also incorporated storytelling in a reflective journal assessment in which students were asked to describe their personal experiences of race and racism – even if only to acknowledge (at least initially) they were not affected by it! Prescribed readings also included narrative pieces from First Nations and white scholars to highlight personal experiences to show both the injustice of native title as a legal remedy designed to address historical denial of Indigenous property rights, and the whiteness of the Australian constitution respectively. For instance, the article by Monica Morgan – 'What has native title done for me lately?' - was used as an example of narrative as a method to 'speak back' to the dominant legal system and give expression to the Yorta Yorta peoples' experience of an unsuccessful native title claim.[126] The article by Anna Barton, 'Going White: Claiming a Racialised Identity through the White Australia Policy' articulated an engagement with white privilege.[127] Narratives also challenge dominant legal processes and how remedies designed to promote equality can fail due to the underlying assumptions of the mainstream legal system, and the power imbalance implicit in legal remedies designed to redress injustices arising from colonisation. Therefore storytelling informed both the pedagogy and teaching methods in ways that challenged convention doctrinal methods of legal education and assessment practices.

The process of reflective writing and storytelling was also intended as an indirect challenge to the liberal ethos of legal education – the student as 'empty vessel' – and instead recognised students as situated knowers, adopting a student-centred approach to their learning from prior knowledge and past experience, and through critical engagement with the unit content. In this context the use of narrative/standpoint also calls into question the purported objectivity and neutrality of knowledge, challenges liberal discourses of 'universality', and reinforced the importance of standpoint to students as embodying different social positions based on their racial, ethnic or cultural background.

(c) Relationality, Reciprocity and Modelling Co-operation

As noted already, by applying Indigenous knowledges and methods in our work we were able to bring different and important concepts into our dialogue to emphasise the inter-connectedness of all living things –

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[125] Tyson Yunkaporta, *Aboriginal pedagogies at the cultural interface* (PhD Thesis, James Cook University, 2009) 35.

[126] Morgan (n 15).

[127] Anna Barton, 'Going White: Claiming A Racialised Identity through the White Australia Policy' (2011) 7(23) *Indigenous Law Bulletin* 16.

'relatedness' and 'relationality', 'connectivity' and 'interconnecteness'.[128] Moreton-Robinson explains relationality as:

> [O]ne experiences the self as part of others and that others are part of the self; this is learnt through reciprocity, obligation, shared experiences, coexistence, cooperation and social memory.[129]

From this philosophical context, we could offer the provocation to the students that the relative disadvantage of non-white groups in Australia does not exist independently of white privilege and the social structures that perpetuate white hegemony (including law). This really shifted our conversations about racism from being about individual aberrant behaviour to being about racism as a systemic phenomenon and being about the way systems of power and privilege reproduce themselves.

Following the holistic world view of relationality was also central as it enabled us to expose the inextricable link between Indigenous disadvantage and white privilege, because it enabled a different understanding of how we are all positioned within systems of race and power. That is, initially most of the students, as members of the majority group, did not regard themselves as particularly affluent or 'privileged'. However, once they understood the concept of interconnectedness conveyed by the principles of relationality, they could see how by simply 'doing nothing' they were accepting the status quo and thus perpetuating unequal power relations with the consequence that non-white groups would continue to be disadvantaged.[130] Thus the principle of relationality enables us to change the dialogue from Indigenous rights being described as a form of 'reverse racism' to one that understood why 'white privilege' itself needs to be challenged to effect positive change and a redistribution of power and resources.

Relationality as pedagogy also promoted exchanges based on developing mutual understandings and respect, fostering a sense of shared understanding that 'we are all in this together'. This was key to creating a culturally safe space in which the students could dialogue in a non-threatening and supportive environment. For the Indigenous students and students of colour within the group, it ensured they could engage in dialogue without the burden that they were responsible for sharing knowledge or producing 'the answer'. It was equally important for the white students, as it enabled them to engage in constructive dialogue without the burden of blame or unproductive guilt. For students, the realisation that they were part of a system shaped by race and racism helped them to engage with the theory more constructively, without getting bogged-down by what Michael McMullen calls the 'habits of whiteness' which include 'habits of guilt', which are not

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[128]   Martin (n 15) 75–78; Moreton-Robinson (n 95) 1; Watson (n 16)*;* Watson (n 77) 13–14; Terri Janke, *Our Culture: Our Future* (Michael Frankel & Company, 1998) 2.

[129]   Moreton-Robinson '*Talkin' Up to the White Woman: Indigenous Women and Feminism*' (n 95) 16.

[130]   Dr Camara Jones, 'Allegories on race and racism', (Lecture, TEDxEmory, 10 July 2014) <https://www.youtube.com/watch?v=GNhcY6fTyBM>.

productive and may inhibit action to bring about positive change.[131] This approach helped students to accept a degree of personal responsibility in challenging racism in their daily lives, rather than feeling overwhelmed or that it was simply 'too hard', or that they were powerless to effect change. We also modelled relationality by providing personalised feedback on their first reflective journal, debriefing individual students at the workshop (where that was requested), offering ongoing dialogue with students after the workshop, and follow-up post workshop with a number who appeared to be particularly unsettled by the discussion.

In addition, we applied the concept of reciprocity, given its importance in Indigenous philosophies to emphasise mutual exchange.[132] Reciprocity is viewed within Indigenous knowledges as essential to maintaining peaceful relationships and non-hierarchical arrangements for sharing of power and co-existence, both between First Nations and also with the broader Australian society.[133] In Indigenous philosophical terms reciprocity means sharing, 'or that we cannot take without giving'.[134]

Reciprocity was enacted in our pedagogy by the mutual exchange of stories in class between staff and students, by providing individual feedback in response to the students' reflective writing to deepen their understanding, and by the teaching team modelling co-operation, as a First Nations and a white teacher, to reinforce the core message that we all have a responsibility to challenge racism, not just those who experience it most acutely.

By acknowledging and modelling the complexity of the terrain we opened the dialogue in a way that invited students to explore their own ideas about race in a non-threatening environment, without fear of being judged. Our aim was to create a culturally safe space for all students, so they could speak freely about their own experiences of ignorance, denial or awareness and thus, also encourage responsibility, reflection and self-critique. This non-confrontational approach created a safe space for students to explore their own feelings of shock, anger, shame and guilt and also experience many break-through or light-bulb moments without feeling they were being pushed or blamed.

This aspect of our pedagogy was important in conveying to students how we are all implicated in social systems constructed by reference to race, and therefore we also have the power and responsibility for combatting racism. That is, as noted above, through our respective standpoints, by modelling, and by practicing our theory, we were able to demonstrate that challenging racism is everybody's business.

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[131] McMullen (n 13).
[132] *Macquarie Concise Dictionary* (6th ed, 2013) 'reciprocity' (def 2); Martin (n 15) 78.
[133] Watson (n 15) 6.
[134] Martin (n 15) 78.

V CONCLUSION

Subjects dealing with race are more commonly taught as part of Indigenous studies, cultural studies, or social sciences – reinforcing the hegemonic 'othering' of race, and the centrality, normativity and invisibility of whiteness. It also reinforces the view that race is something that is experienced by non-white people, and thus something that does not necessarily implicate white people. Teaching this unit within the law curriculum – even as an elective – is an intervention which serves to challenge the dominance of whiteness in legal institutions.

Additionally, one of the problems that prevents law teachers from engaging issues on race and the law is a lack of confidence in managing and responding to racism in the classroom. We agree that specific skills are needed to engage in this challenging teaching space, and unfortunately they do not appear to be widespread within the Australian legal academy. Moreover, research on race tends to remain under-developed and under-theorised in the Australian legal literature, particularly core legal textbooks.

Though our intervention into the law curriculum was modest, nonetheless, we feel it made some significant gains. Through our team teaching practice, we modelled our theory by emphasising the systemic nature of racism and the way it constructs privilege and disadvantage respectively, and thereby consciously avoided apportioning guilt. By naming the differences in our standpoints, and therefore our positions as experts and 'knowers', we could demonstrate and reinforce the key message that we all have responsibility – and the power – to dismantle systems of race. We also modelled humility by acknowledging that we did not always 'get it right' and that discussions around race, racism and power are dynamic, and frequently challenge us to consider our own socially and culturally constructed pre-conceptions and biases.

Overall our experience reinforced central tenets of critical race and whiteness theory that racism is ordinary, but it also shifts over time. We also saw how the possessive investment in whiteness operates surreptitiously to maintain white dominance – even in the face of evidence that directly contests the limitations of colour-blind meritocracy and formal equality to achieving racial equality. Our experience teaching the unit both reinforced and alerted us to the need to be vigilant to how racism reasserts itself when white dominance is challenged, not because people are inherently racist, but because they have been socially conditioned to accept white dominance as the norm.

Our engagement with and understanding of theory was crucial to being able to meet the resistance we experienced in the classroom, as it informed all aspects of our work from the design phase, our daily debriefing and adaption as we delivered the class, and this, our analysis of the efficacy of our approach to achieve the unit objectives and to support students engage in this important dialogue.

We recognise the limitations of the interventions in the law curriculum made possible by teaching an elective unit. However, we share the lessons we have learned from teaching this content because

they have broader application to teaching about race and whiteness throughout the legal curriculum. There is no doubt that the persistence and prevalence of race and racism demands that legal academics develop strategies to combat this wicked problem in Australian society. We hope to encourage other legal academics to take up this challenge by sharing what we have learned to inform pedagogical strategies to disrupt the overwhelming silence on race and whiteness in legal education.

APPENDIX: READINGS LIST

List of Readings (for Reflective Journal Part 1)

1   David Hollinsworth, 'Chapter 4: The construction of Australian racism 1770-1920', *Race and Racism in Australia* (Thomson/Social Science Press, 3rd ed, 2006)

2   Margaret Thornton, 'Chapter 1: The Elusiveness of Equality', in *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990)

3   Richard Delgado and Jean Stefanic, 'Introduction', in Richard Delgado and Jean Stefanic, *Critical Race Theory: An Introduction* (NYU Press, 2nd ed, 2001), 1-18

4   Margaret Davies, 'Chapter 7: Race and colonialism: law as white mythology', in *Asking the law question* (Thomson LawBook Co, 3rd ed, 2008)

5   Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary & Materials* (Thomson Reuters/ LawBook Co, 4th ed, 2009), 458-460 (extract from Delgado R, 'Review Essay: Recasting the American Race Problem' (1991) 79 *California Law Review* 1389 (1393-1400)

6   David Theo Goldberg, 'Modernity, Race and Morality', in Philomena Essed and David Theo Goldberg (eds), *Race Critical Theories: Text and Context* (Wiley-Blackwell, 2001) 283-306

7   Irene Watson, 'Kaldowinyeri – Munaintya: In the Beginning' (2000) 4(1) *Flinders Journal of Law Reform* 3

8   Damien Riggs, '"We don't talk about race anymore": Power, privilege and critical whiteness studies' (2004) 3(2) *borderlands e-journal*, available at http://www.borderlands.net.au/vol3no2_2004/riggs_intro.htm

List of Additional Readings

1.   Monica Morgan, 'What has native title done for me lately' (2009) 93 *ALRC Reform Journal* 24

2.   Anna Barton, 'Going White: Claiming A Racialised Identity through the White Australia Policy' (2011) 7(23) *Indigenous Law Bulletin* 16-19