

BOOK REVIEW

RACISM AND THE LAW:

THE UNION ON TRIAL: THE POLITICAL JOURNALS OF JUDGE WILLIAM BARCLAY NAPTON 1829-1883 EDITED BY CHRISTOPHER PHILLIPS AND JASON L. PENDLETON (UNIVERSITY OF MISSOURI PRESS: COLUMBIA, MO., 2005) ISBN 0-8262-1571-8;

HUMAN REMAINS: EPISODES IN HUMAN DISSECTION BY HELEN MACDONALD (MELBOURNE UNIVERSITY PRESS: CARLTON, VICTORIA, 2005) ISBN 0-522851-57-6;

BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE AMERICA'S FIRST CIVIL RIGHTS MARTYR BY BEN GREEN (UNIVERSITY PRESS OF FLORIDA: GAINESVILLE, FL., 2005) ISBN 0-8130-2837-X;

GATEWAY TO JUSTICE: THE JUVENILE COURT AND PROGRESSIVE CHILD WELFARE IN A SOUTHERN CITY BY JENNIFER TROST (THE UNIVERSITY OF GEORGIA PRESS: ATHENS, GA. 2005) ISBN 0-8203-2671-2J;

HORACE T. WARD: *DESEGREGATION OF THE UNIVERSITY OF GEORGIA, CIVIL RIGHTS ADVOCACY, AND JURISPRUDENCE* BY MAURICE C. DANIELS (HOWARD UNIVERSITY PRESS: WASHINGTON, D.C., 2004) ISBN 0-88258-249-6.

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In a recent book review respecting the third volume of the celebrated biography of former American President Lyndon Baines Johnson, *Master of the Senate The Years of Lyndon Johnson*, by Pulitzer Prize winner Robert A Caro,¹ I was afforded an opportunity to consider the insidious nature of racism and how the law might be seen as an agent for the elimination of racism and of racial discrimination. In the same vein, in my review of *Separated: Aboriginal Childhood Separations and Guardianship Law*, by Dr A D. Buti,² I was able to consider, albeit in brief compass, the question of racialized thinking in Australian child welfare legislation and jurisprudence together with the related concepts as applied in other Western legal systems. I have also discussed briefly the question of racism, specifically respecting the Holocaust, in my review of *From Buchenwald to Carnegie Hall*,³ by M Filar and C Patterson, and of racial discrimination in reviewing *A Right to Read: Segregation and Civil Rights in Alabama's Public Libraries, 1900-1965*, by P T Graham.⁴ Finally, I had occasion to advert to the issue of racially biased laws in my review of *Reflections in Prison: Voices from the South African Liberation Movement*,⁵ edited by M Maharaj. Accordingly, I concluded that it might be of interest to address this issue in a systematic series of reviews of five representative books touching upon a variety of spheres of human activity related to law and in which I would analyze how racial bias may translate into legal consequences and transform (or prevent the transformation of) the existing legal regime.

The publication of late of a number of books having as their main focus the question of racism, but each from a different perspective having a profound impact on the lives of any individual, that is to say constitutional law, medicine, policing, higher education and child welfare proceeding provided a signal opportunity to evaluate the evolution of what may be described as 'legal' racism and to advance a number of insights respecting the means of eradicating this malignancy from our judicial institutions and, ultimately, from society at large.

¹ (2003) 8 *Deakin Law Review* 399-400.

² (2005) 43 *Law Society Journal* 90.

³ (2005) 47 611 *Canadian Journal of Criminology and Criminal Justice* [www.ccja-acjp.ca/en/cjcr.html].

⁴ (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 527 [www.ccja-acjp.ca/en/cjcr.html].

⁵ (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 639 [www.ccja-acjp.ca/en/cjcr.html].

The first of the five books selected for inclusion in this thematic review addresses the judicial foundation for racism as it was once practised in the antebellum United States of America. Indeed, it is suggested in the strongest terms that in order to understand how vestiges of racism continue to influence both legal reasoning and our judicial institutions, it is necessary to understand fully the pre-eminent status once enjoyed by the 'peculiar institution' that was the slavery code. In this respect, I can think of no better starting point than the recent publication of *The Union on Trial: The Political Journals of Judge William Barclay Napton 1829-1883*, edited by Christopher Phillips and Jason L Pendleton. This massive and superbly edited tome lays bare the thoughts of a Northern-born but Southern-educated lawyer, who later became a Missouri state judge and who came to espouse fully the so-called constitutional, judicial and moral defences and foundations of slavery. I have commented elsewhere that legal scholars neglect to their peril the wonderful stores of information found in diaries in general, and in particular in the diaries of eminent jurists.⁶ This text contains a wealth of information and insights respecting the philosophy according to which blacks were inferior to whites and could not be heard to complain if they were subjugated within a system that denied them fundamental freedoms in that the over-arching legal regime would eventually elevate them in terms of academic and moral achievements well beyond anything they might have achieved otherwise. As noted at page 108, 'the extension and diffusion of slavery – rather than being shut up in narrow limits' is what is required in order to 'ameliorate the condition of the slave as well as the master.' Judge Napton was even of the view, as discussed at page 217 and page 229, that black slaves might be convinced to fight on the side of the South in the Civil War.

Time and again, the author's diary entries, explained and situated within their proper historical and legal settings, illustrate how slavery was not only a right, it was right and not wrong to pursue its extension, as this would profit both the owner and the owned. In this respect, students of advocacy would do well to examine closely the many examples of sophistry and of what might be called 'reversing the proposition' offered by Judge Napton to justify the wholesale denial of liberty to an entire population of men, women and

⁶ See my review of Pitcock and Gurley (eds), *I Acted From Principle The Civil War Diary of Dr W M McPheeters, Confederate Surgeon* in (2003) 34 *Arkansas Review: A Journal of Delta Studies* 149 and also my review of Peter Oliver (ed), *The Conventional Man The Diaries of Ontario Chief Justice Robert A. Harrison 1856-1878* in (2004), 46 *Canadian Journal of Criminology and Criminal Justice* 391 [www.ccja-acjp.ca/en/cjcr.html].

children based on the colour of their skin, as justified upon a constitutional foundation. By way of limited example, I note at page 54 that the author was skilled in the use of debating tricks such as turning a hypothetical yet unlikely outcome against his opponents while page 87 offers an apology for the fact that lawyers of his time and region ‘who are first rate pleaders ... will take every advantage honourable or dishonourable as they might be considered elsewhere.’

Further, this text provides fascinating reading for constitutional scholars interested not only in the legal foundations for discriminatory or unequal treatment of citizens or residents, but also in the evolution of federations.⁷ One passage may be cited merely to illustrate the overall merits of this element of the various discussions respecting the rights of members to secede. As recorded at page 331: ‘The Constitution made no provision for a secession of any state, nor for a war on one, if she did secede. A provision is never made for the dissolution of governments. Constitutions avail nothing when this point is reached and it is therefore immaterial what you call it – resistance, secession or revolution.’

Finally, I wish to say a word about the book’s potential value to scholars of restorative justice, at least at the level of societies or communities at the very least. A number of passages demonstrate the learned diarist’s interest in mechanisms that might be called in aid to restore the unity that once characterized a host of social or political entities. As discussed perhaps most usefully at page 231 and following, it is often necessary for the stronger of the parties, or for the strongest, to refrain from resorting to its complete power or from taking full advantage of its prominent situation in order to effect reconciliation. This theme is also discussed quite ably in *Adenauer’s Germany and the Nazi Past The Politics of Amnesty and Integration*, by Norbert Frei [Columbia University Press: New York, 2002], especially at pages 235-250.

Having discussed briefly the formal nature of a system of constitutional government in which racial inequality could be not only justified and defended, but erected upon a constitutional footing, it will be opportune to draw attention to a legal system that made no apparent provision for the rights of a majority of the inhabitants, as it would be futile to speak of ‘citizens’ in the case of the aboriginal men, women and children of Tasmania in the nineteenth century. That the original inhabitants of Van Diemen’s Land were bereft of any rights based on racialized thinking is made manifest when one

⁷ See my review of Patrick Monahan, *Constitutional Law (Second Edition)* in (2003) 61 *The Advocate* 605-606.

considers that their bodies were disposed of after death as if they had been no more than household objects suitable for 'recycling', to resort to a modern expression. In this respect, although *Human Remains Episodes in Human Dissection* by Professor Helen MacDonald of the University of Melbourne, was meant to provide a scholarly treatise on the abuses and scandals associated with the medical profession, it serves the secondary purpose of marshaling the facts supporting an unanswerable indictment of racial discrimination.

This excellent and original title contains multiple references to medical practices wholly inconsistent with any legal regime having the slightest respect for fundamental notions of decency and integrity; stated otherwise, the practices described herein by disciples of Themis and of Hippocrates could hardly be less consonant with the teachings we associate with these two outstanding representations of these highly critical branches of human endeavour. By way of limited example, we read time and again of rationalisations by means of which the bodies of murderers are made available to men of science for supposedly rigorous experiments. Page 15 points out that England was described as having enlightened laws which provided murderers with an opportunity to atone for their crimes by the use and exploitation of their bodies after death.

Turning then to the heart of the book, Chapter Four, at pages 96-135, is aptly titled 'The Bone Collectors' (and it includes a section named 'Collecting Tasmanians') for it draws valuable light on the racist practices associated with obtaining and dissecting the remains of the first inhabitants of Tasmania. The author succeeds in demonstrating how reason ceased to operate and the depravity and insensitivity of those so-called scientific and educated men as they literally fought and connived to steal bodies of those dead and dying, and no body was more precious than those of Aboriginals. Professional standing and personal wealth were tributary to one's ability to rob hospital hospices and the wholesale crime described herein was made relatively easier as a result of the widespread belief that the First Nations were either akin to beasts or degenerates or not far removed from that state.

Of greater interest, Professor MacDonald is able to recount how this state of affairs was perpetuated for so long by demonstrating the racialized thinking that supported the dominant position of the Europeans, as manifested by such techniques as measuring the brain box of the Tasmanians. In short, *Human Remains Episodes in Human Dissection* has much to teach us about the reinforcing weight of racist medical philosophies on the development and evolution of a racist legal system. After all, if bodies 'have been cut and torn,

hammered and chiseled, snipped and sawn until they are no longer recognizable as individuals' by the colony's elite, as recorded at page 136, it is not surprising that the common European will be left with a belief that the Aboriginals are no better than cattle. In other words, if the medical world, and by extension the legal world to the limited extent that it oversaw the work of physicians at the time, consider natives to be close to animals, then little concern need be raised if they are treated as animals.⁸

The next book to be reviewed was written by Ben Green and bears the evocative title *Before His Time: The Untold Story of Harry T. Moore, America's First Civil Rights Martyr*. The author's objective was to make known the circumstances of the as yet unsolved murder of Mr Moore on Christmas night in 1951 (and of his wife who subsequently died of her wounds), a murderous act motivated by a desire to eliminate a committed civil rights worker whose diligence and organizational skills in registering voters and in promoting the objectives of the National Association for the Advancement of Coloured People was perceived as threatening by radical whites. My interest in discussing this book centres on the author's treatment of the perspective, inactions and misconduct of a number of high ranking police officials, including the local sheriff, in the original murder and in the subsequent killing of two young blacks accused of rape. The police's involvement in the death of these two young men appears by all objective accounts to have been an act of naked aggression, a legal lynching if you wish, by which it was sought to make plain who was in control of the life of blacks in the South. In this, the author breaks a new path in that many titles have considered the injustices visited upon blacks when charged with crimes; the ultimate contribution of *Before His Time* resides in its damning analysis of the whitewashing of any illegality visited upon the black minority by the white majority. In sum, how the 'Jim Crow' system of segregation served not just to oppress in general, but to ensure the legal salvation of any accused charged with a crime against a black.

In effect, Mr. Green's highly detailed and well written account of the life and times and death of Mr Moore and of his wife, together with the related episode surrounding the deaths of the two detainees, provides an official accusation, or indictment if you wish, of the quite widespread and popular

⁸ A noteworthy recent study of the potential impact of a 'racialized' way of thinking on the elimination of a whole group of insular aboriginals is found in *The Rule of the Admirals Law, Custom and Naval Government in Newfoundland, 1689-1832*, by Jerry Bannister, reviewed by the author in (2005) 47 *Canadian Journal of Criminology and Criminal Justice* 614 [www.ccja-acjp.ca/en/cjcr.html].

abuse of police powers in a land and at a time when the denial of equality was the spirit infusing the letter of the law. The book contains dozens of examples of perverse investigations and trumped-up defences that served to insulate whites from any adverse consequences for their violent actions directed at blacks or black sympathizers. As we read at page 110, '[i]n every way, [Mr Moore] was on the cutting edge of change in the South – pushing for political enfranchisement and educational equality, and openly confronting lynchings, police brutality, and racial injustice as fiercely as any other African American leader in the South.' Faced with such a challenge, the men who murdered him were no doubt confident that the existing police authorities, imbued with a racialized philosophy and biased power structure dependent on the absence of any effective black vote, would support their bloody deed and the fact that no murderer has ever been arrested appears to support fully this reasoning.

In the final analysis, the lessons to be drawn from this riveting biography of Mr Moore, the first martyr to the cause of black freedom in the sense of the first victim who was not murdered spontaneously but after careful planning, is that a legal system must be judged not by the words that constitute the actual legislative regime and not by the existence of a police apparatus apparently devoted to justice, but by the actual workings of the system as judged on a day-to-day basis from the perspective of the least powerful and most visibly powerless. As pointed out in many recent studies in the field of criminology, paradoxes and apparent contradictions are often seen as commonplace whenever the State seeks to resort to its criminal law power. In other words, as made plain in the introductory passage and many of the essays found in *Hard Lessons Reflections on Governance and Crime Control in Late Modernity* edited by Richard Hil and Gordon Tait [Ashgate: Burlington, Vt., 2004], as illustrated at p. 2: '[N]or should we be shocked when things “go wrong” in the domain of crime control since many unintended consequences are, more often than not, quite predictable.' In this respect, Professor Lucia Zedner has remarked: '[D]efinitions of crime are historically and politically contingent ... [scholarship] seeks to reveal the power relationships and political imperatives that underlie criminalization.'⁹

Gateway to Justice: The Juvenile Court and Progressive Child Welfare in a Southern City by Professor Jennifer Trost of Saint Leo University is of assistance in discussing the establishment and development of a child protection system along racial lines in Memphis, Tennessee during the first half of the last century. In other words, unlike the legal system in evidence in Judge Napton's times which constitutionalized racial inequality, and the legal

⁹ Refer to *Criminal Justice*, [Oxford University Press: Oxford, 2004], at p. 38.

system in Mr. Moore's time which enshrined equality *de jure* so long as you were not black, the system reviewed in *Gateway to Justice* actually mandated racial inequality, openly and unashamedly. As we read at page 48:

The Memphis Juvenile Court reflected contemporary southern race relations in its operation and adhered to the principle of public racial separation. Memphis municipal code mandated that detention facilities and officer duties be segregated by race. ... The Court had 'white' days and 'colored' days for hearing cases. The ideology of segregation even influenced the court's record keeping: social files were color coded on the outside to enable easy identification of the client's race.

Even though the establishment of a juvenile court in Memphis was part of a national movement, child welfare advocates both inside and outside the South acknowledged that racial considerations structured its day-to-day operations.

Not surprisingly, the author concluded at page 48: '[A]lthough black children were not excluded from the new system of juvenile justice, they clearly received inferior treatment because the court segregated its facilities by race.' Indeed, the need for racial separation (and black adherence to this system) was so ingrained that the presiding judge would use 'the juvenile court to enforce deferential behavior of black children toward whites' (page 55).

A review of the entire text leads to the inevitable conclusion that race permeated all of the work of the Court and no degree of commendation for the positive contributions made by the juvenile authorities, and they were numerous, can offset the fundamental fact that black inferiority was the hallmark value of this particular system of child welfare and child protection. Racism was inherent in the legal system both *de jure* and *de facto* and no doubt left its mark in an indelible fashion.¹⁰

The last area of interest surrounds the question of denial of access to post-secondary education to qualified black applicants based wholly upon their race. In this respect, I found Maurice C Daniels' biography of Justice Horace T Ward, titled *Desegregation of the University of Georgia, Civil Rights Advocacy, and Jurisprudence*, to be illuminating with regard to the extent to which lawyers will embrace philosophical perversities and endorse obvious

¹⁰ In this respect, note the general suggesting the harm to children inherent in child protection proceedings in Roy Parker's contribution, 'Children and the Concept of Harm' in P Hillyard et al (eds) *Beyond Criminology Taking Harm Seriously* (2004) 236.

sophistries when motivated by racial imperatives to keep a part of their life free from 'contamination' by others they find to be inferior, in this case the presence of blacks as students in white post-secondary institutions. Indeed, what was remarkable in the Ward biography was the offer made by the officials of the State of Georgia to fund his post-secondary education, but only if he agreed to study 'up North'. Further, I cannot but proclaim my wonder at learning of the reaction of Southern politicians to Court decisions setting aside the refusal of offers of admission to black law students: the creation of a single student wholly segregated black law school! Refer to page 15. It is not surprising therefore that the White regents of the University of Georgia Law School were prepared to close down the Faculty lest one single black 'contaminate' the University.

By way of summary, I commend this book for the lessons it contains on advocacy. Multiple examples are offered of devastating cross-examinations and of equally persuasive trial strategies in the context of mendacious witnesses bent on denying that their motivation to deny access to each and every black applicant was based on race! In considering the extent to which the State lawyers had sought to obstruct the applicant's access to higher education, I am reminded of some of the language found at page 87 of *The Union on Trial*: '[F]irst rate pleaders ... will take every advantage honourable or dishonourable as they might be considered elsewhere.'

In summary, a review of these five books discloses that the history of the law respecting the advancement of minority groups has been marked by signal failures of vision and of humanity. Further, lawyers have attempted to promote racism throughout the period under study. Nevertheless, it seems evident that lawyers are the key to the eventual elimination of such obstacles to human progress and dignity. In the words of Sir Sydney Kentridge, Q.C., 'There may be times, fortunately rare, when one's own conscience rather than the general rule [that counsel must represent those who seek representation notwithstanding the nature of their legal claim] must govern one's conduct.'¹¹

¹¹ See 'The Boswell Question Revisited' in H P Krever and R P Armstrong (eds) *The Dubin Lectures on Advocacy 1998-2002* (2004) 70.