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Law's Memories

Matt Howard



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1

Introduction

This book primarily seeks to explain the contribution memories make to the enactment of exclusions, and their role in producing senses of legitimacy in certain conduct and of legal and civic consciousness. It focuses on the co-ordination of commemorative narratives and how they play a role in drawing informal yet substantive boundaries of belonging/unbelonging or recognition/non-recognition. For the purposes of this book, the main focus of this work is the commemoration of Anzac Day, specifically in relation to Australia. The example chosen will exemplify the role memory can play in the creation of a *particular* sense of legal and political community.

Anzac Day is, as with many other important national holidays observed around the world, a commemoration rooted in militarism. This militarism inscribes a number of exclusions or marginalizations on the basis of gender (e.g., Damousi & Lake, 1995; Darian-Smith, 1990; Stańczak-Wiślicz, 2022) and sexuality (e.g., Baker, 2022; Riseman, 2017; Smaal, 2015). Beyond this, Anzac Day is also bound up in the racism and discrimination felt by Aboriginal and Torres Strait Islanders. This is on the basis of how the narrative: feeds into the historicization of First Peoples; buttresses the imagined youth of the Australian national identity; is, in many ways, a product of discriminatory policies during the time of World War One (WWI); and also presents a question about the conditional or elastic recognition of First Peoples for the contribution they made to the implicitly colonial presumption of this militarized “birth” of Australian national community. The notion of elasticity will also be considered in relation to an evaluation of how the Anzac Day

commemorative narrative props up a hegemonic masculinity and leads to conditional inclusion of the experiences of gay Australian men within the Anzac story and, as such, the conceptualization of Australian nationhood. It is these aspects of Anzac Day, and how the collective memory of Anzac reaffirms the normative standards of straightness and White-Europeanness in Australia, that forms the subject of this work.

Context: Anzac Day and Inequalities in Australia

Anzac Day is a military commemoration. It is named after the Australian and New Zealand Army Corps (Anzac). It is observed on 25 April every year, retaining enduring significance both in Australia and to Australians around the world (Sumartojo & Wellings, 2014). It commemorates the day that the Anzacs first engaged in conflict during WWI in 1915. The landing of troops at Gallipoli on 25 April during WWI is identifiable as the origin of the Anzac legend; the engagement of Anzac troops in conflict on an international stage demonstrated Australia's strength as a nation in its own right, and not just as a Dominion of the British Empire.

The question of how Anzac Day is defined and empowered as a key factor in the determination of the Australian national identity is one of the key considerations of this book. How, for instance, is Anzac Day implicated in the definition of a "community" that is supposedly progressive and egalitarian yet also deeply exclusionary? For instance, how are First Nations Australians and gay Australians regarded and included within the Anzac narrative? What is deployed to retain what often appears, at best, to be a begrudging accommodation of First Nations within Australian Anzac commemorative practices (e.g., Spillman, 1997)? How are particular stereotypes relating to homosexuality and masculinity underscored by the militarism inherent in the commemoration of Anzac Day?

The consideration given to the questions above can be set against, and challenge, broader and more formalistic ideas of recognition, inclusion, and belonging as provided for by state law. Such a question of recognition can certainly be criticized on the basis that "recognition" of Aboriginal and Torres Strait Islanders occurs within the colonizers' legal framework, which is evidently problematic and has been identified as so, not least in relation to land rights claims for the constitutive violence it both ignores and, through bureaucratic and legal techniques, perpetuates (see, e.g., Dorsett, 1998; Fitzpatrick, 2002; Keenan, 2017). Notwithstanding this, the core underlying point in this work is that any notion of recognition within a formalized legal

framework belies a much more pluralistic idea of law that can see memory identified as integral to certain ideas of law.

For instance, from a formalistic point of view, the recognition of First Peoples of Australia comes from piecemeal legislation and state-by-state policy from 1967. This is the year that Australians were solicited for their views on changes to the Australian constitution, with the legal status of First Peoples in question. The referendum question put to the Australian people was carried, resulting in the explicit inclusion (or, at least, officially no longer representative exclusion) of Aboriginal and Torres Strait Islanders within the Australian national community. There are, of course legislative and policy challenges to the idea that this suggests the unremitting inclusivity of the Australian people, and an end to pervasive inequalities faced by First Peoples. For instance, the 1967 referendum sits alongside troubling integration policies advanced in the 1960s, while the shortage of access to education opportunities (Demosthenous, 2012) and resources (e.g., MacPherson et al., 2016; O'Neill, 2016) entrenches socio-economic inequalities. This is underscored by economic policies which enhance the rhetoric of individualism and diminish social security as a tool for tackling ingrained inequalities (see, e.g., Altman & Sanders, 1995; Walter, 2016). Indeed formal “recognition” and “inclusion” only goes so far, and any suggestion that legislation offers, definitively, a resolution to social and political exclusions depends on a narrow, unduly optimistic, and singular understanding of law.

The same can be said of how law is mobilized as a sign of social progress in relation to greater recognition and reinforcement of equalities on the basis of sexuality, again an issue arising out of public discourse emerging in the 1960s (Willett, 1997). Again, here, piecemeal legislation in Australia on both a state-by-state and federal basis from the 1970s, has seen progress made in relation to decriminalization and recognition of historical injustices, and also in relation to employment, succession, adoption and family planning, and marriage rights. Of course, many of these rights underscore (hetero)normative ideas of what a “good” relationship looks like, which can be considered problematic in its own right. Beyond this, though, wellbeing challenges (Thepsourinthone et al., 2020) and sexuality pay gaps affecting gay men in particular (Sabia et al., 2017), as well as abuse suffered by and poor mental health of LGBTQ+ young Australians in out-of-home care (see, e.g., Gatwiri et al., 2022), indicates an enduring environment of homophobia and lack of understanding and inclusion in Australia. This is in spite of ostensibly progressive legislative steps being taken with regard to sexualities equalities.

As Maggie Walter (2016) has pointed out, there is a dynamism that one must acknowledge in the creation and reproduction of exclusions, and the

dynamism and distributedness of law is bound up in this. This leads onto the question being asked here: what “extra”-legal resources are bound up in the process of conceptualizing notions of legal and political community, and shaping belonging and unbelonging within them? The notion of “community” itself is worth briefly engaging with here, as it is something that is both widely and popularly, yet, nebulously conceived. Community is a term that can be overused, often imprecisely, and often considered in uncritically positive terms. We recognize definitions of community as, variously, ‘remarkable... transcendent... wholesome... a warm summer’s day... gentle tranquillity itself... morally improving... the family... home... bigger than individuals’ (Blackshaw, 2010, p. 21). A sense of community, then, can be thought of as equivalent to belonging and warmth. But it is also compatible with notions of superiority and the bounded community can be identified as the foundation for bigotry, violence, and fear (e.g., Esposito, 2013; Ojakangas, 2003). Even the notion of community as a way of learning (Di Nardi, 2020) presents the need to question what is being learned and how this learning takes place.

The Significance of Anzac Day

Commemorative rituals ‘regularly reinforce [official narratives], with texts, ritual actions and material environments that invite participants to understand themselves and their fellow Australians in particular ways’ (Sumar-tojo & Stevens, 2016, p. 189). As such, the commemoration of Anzac Day can be implicated for its role in the dynamic creation and reproduction that Walter (2016) identifies, and as identifying concrete boundaries of the otherwise nebulous idea of (the Australia national) community. Indeed, collective memories can be thought of as a medium for the accentuation of particular values and qualities over others; the distinction between those who are identifiably part of a group and those who are not (Arnold-de Simine 2013; Assmann, 2011; Litvak-Hirsch et al., 2008). Equally, memory-rich institutions and heritage experiences can be identified as ‘affectual foci of community learning’ (Di Nardi, 2020, p. 11). The regularity of collective memory events, particularly those marking significant moments in a nation’s military past, offers at the very least an annual reorientation towards or learning about a particular narrative of national exceptionalism. This calendrical reassertion of a particular idealized personification of national characteristics is also the basis for an expectation of shared experience and deference which buttresses an imagined community (Anderson, 2006) and a sense of who can or cannot be recognized as part of it (Butler, 2009).

For instance, one significant aspect of the Anzac Day commemorative programme is the dawn service, which marks the time shortly after the first landings at Gallipoli occurred on 25 April 1915, when the first engagement with Ottoman troops occurred, as well as the dawn being a customary time for attacks to occur in battle. Dawn services serve to generate a significant moment of shared national consciousness; the interplay of darkness and emerging light as a means of enacting a sense of imagined community (Sumartojo, 2015) demonstrates the significance of the choreographing of the Anzac commemorative narrative around the dawn. They are heavily and consistently attended events across Australia. Dawn services are held across the world, too, including at the Anzac commemorative site at Gallipoli itself, in Turkey, for expatriate Australians and those who may wish to conduct a pilgrimage, respectively. The dawn smooths differences in time zones and upholds a sense of shared experience of a significant national moment.

The symbolism of the dawn, in addition to its representation of military strategy and its practical function within a globally observed event, is particularly significant given the efforts to link the Anzac legend with the birth of the Australian nation through war in Europe (Drozdowski, 2016). This is as opposed to being grounded in the land's history before European colonization and the massacres of First Peoples in the institutionally forgotten Frontier Wars. The dawn usefully symbolizes the determination between the past and the future, with the Anzac legend being constitutive, for Australia, of a forward-looking 'national time' (see Enright, 2019). How both this overtone and the significance attributed to dawn observance are implicated in the exclusionary capacity of the Anzac commemorative narrative, notwithstanding the 'self-conscious myth-making' of the idea that Anzac Day is rooted in egalitarianism (Oppenheimer & Scates, 2005, p. 137), is considered in Chapter 5.

Mnemonic Legality

Examining the exclusionary capacity of the Anzac commemorative narrative is one aspect of this work. Overall, the function of this book is to demonstrate memory and law's relationship as one of law's reliance or contingency on memory. The tendency in law and memory research is to focus on how law sanctions interpretations of past events through the enactment of memory laws (e.g., Kuposov, 2018), or the function of memory within legal processes and institutions (e.g., Howe & Knott, 2015; Karstedt, 2009). The latter is inclusive of considering how apology as a gesture towards responsibility for past actions relates to legal processes of redress (McAlinden, 2022).