

Cannibals and Colonialism

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On 23 December 1826 on the New South Wales frontier, a white shepherd named Henry Preston went to his employer, John Jamieson, to collect his weekly rations. Neither Preston nor his dog returned home, and another shepherd raised the alarm. A brief search yielded nothing. Foul play was feared and suspicion fell upon a group of local Aborigines. The Magistrate was not at home and the district constable, although summoned, did not arrive. A rumour circulated that the Aborigines had been seen with sugar rations. Jamieson decided to take the matter into his own hands.

He left home with two armed men, rode to Wollondilly, and rounded up ten Aborigines: two men, three women, a girl and four boys. He charged them with killing his servant and took them prisoner. He claimed that four of the children admitted that Preston had been murdered, but that the murderer had gone to Bong Bong after cutting up his victim and burying the dog.

Jamieson and his men headed for Bong Bong. On seeing them, the suspect, known as Hole-in-the-book, and his 'gin' attempted to flee. Hole-in-the-book was captured and, when the charges were laid upon him and a rope was produced, he ran. Jamieson fired two shots and Hole-in-the-book fell dead.

Returning home, Jamieson interrogated his Aboriginal prisoners as to the whereabouts of Preston's body. He was told that Preston had been cut into pieces, roasted and eaten. So was his dog. Bones and entrails were produced, and Jamieson was shown where the fire was built. Later, a surgeon would testify that the bones were a shin bone, a left collar bone, and the lower bone of an arm, all human.

On 3 January 1827 John Jamieson wrote to Governor Darling detailing these events.

Several days later, Henry Preston walked out of the bush, unharmed. He had been lost in the bush, wandering 80 miles from the station.

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In May Jamieson was tried for the manslaughter of Hole-in-the-Book. The trial aroused public interest, partly because of the allegations of cannibalism, and partly out of surprise that Jamieson had been charged at all. Justice Stephen, in directions to the jury, said, ‘It should never be understood for a moment, that the natives [are] not equally under the protection of the laws with any of His Majesty’s subjects in the Colony’.¹ The jury returned an immediate verdict of Not Guilty by reason of justifiable homicide.

Jamieson’s trial accorded with contemporaneous judicial sentiment that the English common law must offer the same protections to both settlers and natives. His acquittal accorded with public sentiment that the killing of an Aborigine did not attract criminal sanction.

Two days later in a separate matter, the Supreme Court of NSW — Justice Stephen together with Chief Justice Forbes — held that Aborigines were under the protection of His Majesty and entitled to the protection of English law. As a result, charges proceeded against Nathaniel Lowe, a soldier accused of murdering an Aborigine. The jury took five minutes to acquit him, and loud applause accompanied the verdict.²

This article examines the published accounts of the circumstances that led to Jamieson’s trial for the purpose of exploring the allegations of cannibalism amongst the colony’s indigenous inhabitants. The discourse of cannibalism is a repeated and powerful trope in colonial contact and conflict. Fascination with — and accusations of — anthropophagy, ritual sacrifice and survival cannibalism disclose the fear of the native ‘Other’. Also, this article asserts that law and cannibalism produce each other. In 1884, a landmark English decision saw survival cannibalism produce a new legal doctrine — the criminal defence of necessity.³ In 2002, in South Australia, evidence was adduced in which the so-called ‘bodies in barrels’ murders in Snowtown occurred in the context of allegations of cannibalism, the allegations suppressed until 2005 because of the likelihood of unfair prejudice upon trials that had not concluded.⁴ And in 2004, readers across the world were astonished and gripped by the trial in Germany of Armin Meiwes, whose cannibalistic transaction with Bernd Jürgen Brandes, facilitated by the internet, interfered with established notions of ‘consent’.⁵ So cannibalism produces law, just as law — in the case of John Jamieson — produced a cannibalism that had hitherto not been there. Henry Preston turned out *not* to have been eaten. But this did not prevent law from imagining that he *might* have been.

1 *R v Jamieson* [1827] NSWSC 31 (accessible on Austlii).

2 *R v Lowe* [1827] NSWSC 32 (accessible on Austlii).

3 *R v Dudley and Stephens* (1884) 14 QBD 273.

4 See ‘Snowtown Cannibal Claim’ aired *News.com.au* (19 Sept 2005): <<http://www.news.com.au/story/0,10117,16649032-1246,00.html>> (4 Oct 2005); ‘Snowtown Killers “cooked victim’s flesh”’ *ABC News Online* (19 Sept 2005): <<http://www.abc.net.au/news/newsitems/200509/s1463414.htm>> (4 Oct 2005).

5 Widely reported, but see, for example, Luke Harding, ‘Cannibal who Fried Victim in Garlic is Cleared of Murder’ *Guardian Unlimited* (31 January 2004): <<http://www.guardian.co.uk/germany/article/0,2763,1135725,00.html>> (4 Oct 2005).

Law always constructs an Other. It draws boundaries around itself. Everything within the boundary is within law's jurisdiction. Everything outside the boundary is lawless. It is the intention of law to bring everything within its own boundaries; there should be nothing that is outside. Microscopic life forms in the hydrothermal vents of the deepest oceans are now being brought within law's jurisdiction.⁶ Celestial and lunar resources are the subject of property claims.⁷ These places were once law's outsiders. Once they can be classified, once legal names or categories can be appended to them, they become law's subjects.

This article has — in its background — the narrative in which indigenous Australians became the subjects of the British common law. Of course, that narrative continues to unfold today, where indigenous people are told that their stolen children, their stolen land, and their stolen wages cannot be lawfully returned, nor can their theft be compensated. This article notes that indigenous Australians are said to be law's outsiders only so that law can consume them. Whilst most of this article concerns culturally and legally-constructed fears about people being eaten, it remembers that law consumes people all the time.

Joseph Banks, the botanist on Cook's first voyage on the Endeavour in 1769, anticipated the first British confrontation with the Maori: 'I suppose they live intirely upon fish dogs and enemies'.⁸ His statement was facetious, intending to illustrate his hypothesis that, apart from their shared consumption of fish, the natives of New Zealand were *nothing like* the British. This article will examine how 'cannibalism' was wielded discursively to differentiate the colonial citizen from savagery, atavism and abjection, all of the things that are *outside* law. The word 'citizen' is deployed deliberately, in order to differentiate the colonial citizen from the colonial prisoner, or convict, whose savagery will be considered later, as someone who is simultaneously inside and outside the law.

It is important to establish from the outset that there is no credible historical evidence to support allegations that indigenous Australians practised the forms of cannibalism sought by the colonists. It was dismissed in the earliest accounts of Watkin Tench, a mariner on the First Fleet: 'From their manner of disposing of those who die [...] as well as from every other observation, there seems no reason to suppose these people cannibals'.⁹ Whilst many historians and anthropologists urge great caution in applying European labels to pre-contact and early-contact indigenous practices, it is generally accepted that Aborigines and Torres Strait

6 See, for example, David Leary, 'Bioprospecting and the Genetic Resources of Hydrothermal Vents on the High Seas: What is the Existing Legal Position, Where are we Heading and What are our Options?' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 137.

7 See, for example, Patricia Sterns & Leslie Tennen, 'Privateering and Profiteering on the Moon and Other Celestial Bodies: Debunking the Myth of Property Rights in Space' (2003) 31 *Advances in Space Research* at 2433.

8 Cited in Gananath Obeyesekere, "'British Cannibals": Contemplation of an Event in the Death and Resurrection of James Cook, Explorer' (1992) 18 *Critical Inquiry* 641.

9 Watkin Tench, comprising "A Narrative of the Expedition to Botany Bay" and "A Complete Account of the Settlement of Port Jackson" in Tim Flannery (ed), *Watkin Tench 1788* (1996) at 53–54.

Islanders — in some areas, in rare circumstances, and in the conduct of rituals — practised some forms of anthropophagy, notably mortuary cannibalism.¹⁰ From an anthropological perspective, these practices had meanings to their practitioners that are not readily translated into colonial categories; anthropologists resist reading anthropophagous practices through the squeamish lens of Western cannibal myths, particularly where those myths are mobilised into debates about race-based hierarchies.

For these reasons, historians and anthropologists rejected allegations of Aboriginal cannibalism when they were re-articulated in 1997, when the publication of *The Truth*, attributed to (although not written by) Pauline Hanson, stated that Aborigines practised cannibalism and, especially, baby-eating. These cannibal claims were derived from works by Hector Holthouse, Henry Mayhew, various travellers and explorers and, especially, Daisy Bates who was cited in *The Truth* as stating: ‘In one group every woman who had had a baby had killed and eaten it, dividing it with her sisters, who, in turn, killed their children at birth and returned the gift of food’.¹¹ *The Truth* repeated these claims to ‘refute the romantic view of the Aborigines held by the new class’, and to deflect the ‘guilt’ of invasion and genocide.¹²

Cannibalism operated in this race-based political discourse in order to retrieve the power or control perceived by Hanson’s supporters to have been misappropriated by Aborigines. Similarly, cannibal allegations, when made in legal discourse, attempted to correct the excesses of atavism by applying the restraint of law. Within the discipline of anthropology, cannibalism functions in the wider debates about the nature of ethnography. Most significantly, this occurred in the protracted argument between two of anthropology’s most eminent scholars, Gananath Obeyesekere and Marshall Sahlins.¹³

10 Kay Schaffer also wrote that infanticide may have been practised ‘In times of extreme hunger, or in particularly dry seasons, [...] especially after the birth of twins. This was necessary to protect the health of the mother and the survival of the group as a whole’: *In the Wake of First Contact: The Eliza Fraser Stories* (1995) at 114. See Schaffer at 106–126 on the role of ‘cannibal’ discourse in the Western imagination of indigenous Australians. See also Lynette Russell, ‘“Mere Trifles and Faint Representations”: The Representations of Savage Life Offered by Eliza Fraser’ in Ian McNiven, Lynette Russell & Kay Schaffer (eds), *Constructions of Colonialism: Perspectives on Eliza Fraser’s Shipwreck* (1998) at 56–57.

11 Cited in Pauline Hanson, *Pauline Hanson: The Truth* (1997) at 134, cited in David Bernstein, ‘The Protocols of the Elders of Hanson’, *Australian Jewish News* (2 May 1997): <<http://www.ajn.com.au/pages/archives/one-nation/one-nation-20.html>>.

12 Cited in Hanson, *id* at 137.

13 This debate unfolds across the following works: Marshall Sahlins, *Historical Metaphors and Mythical Realities: Structures in the Early History of the Sandwich Islands Kingdom* (1981); Marshall Sahlins, *Islands of History* (1985); Gananath Obeyesekere, *The Apotheosis of Captain Cook: European Mythmaking in the Pacific* (1992), with a new edition published in 1997 containing a new preface and lengthy afterword responding to Marshall Sahlins’ *How ‘Natives’ Think: About Captain Cook, for Example* (1995); Sahlins responded directly to questions about cannibalism in Marshall Sahlins, ‘Artificially Maintained Controversies: Global Warming and Fijian Cannibalism’ (2003) 19 *Anthropology Today* 3.

For Obeyesekere, many of the conclusions drawn by Sahlins about native Hawai'ians (of which cannibalism was only one aspect) did not ring true and, upon examination, he found them to be part of a protracted process of European myth-making about native peoples. Obeyesekere argued that 'statements about cannibalism reveal more about the relations between Europeans and Savages during the early and late contact than, as ethnographic statements, about the nature of Savage anthropophagy'.¹⁴ For Obeyesekere, cannibalism was the preoccupation of the British and, wherever the British visited, the natives were questioned, studied and challenged in pursuit of 'scientific' queries, with the British conveying their answers back to the Royal Society in London.

Sahlins insisted that there was strong evidence, which he produced, to support his claims, primarily that when Captain Cook arrived in Hawai'i, he was regarded by the natives as their returning god, Lono. When Obeyesekere argued that it was Eurocentric for white scholars — and white explorers — to believe that natives regarded them as gods, he did so as a Sri Lankan, citing his own status as a colonised native.¹⁵ Sahlins responded: 'The underlying thesis is crudely unhistorical, a not-too-implicit notion that all natives so-called (by Europeans) are alike, most notably in their common cause for resentment'.¹⁶ Sahlins was astonished by the 'intellectual chutzpah' by which Obeyesekere transformed himself from an 'anthropologist' into a 'real-life native'.¹⁷

Obeyesekere countered: 'Sahlins treats this as if it is about Hawai'i, whereas it is about Europe',¹⁸ specifically a 'European myth of imperialism, civilization, and conquest'.¹⁹ Yet for Sahlins, the fact that Europeans constructed myths about native people did not necessarily prove that native people did not act in the way Europeans said they did. He wrote that 'good empirical evidence' (here he was referring to Fijian cannibalism) could not be transformed through 'deconstructive strategy' into 'bad prejudices of European imperialists'.²⁰ In his critique of much contemporary social science, Sahlins said that there is less interest in debating the historical record than there is in establishing *doubt* about it; referring to Obeyesekere's work on Fijian cannibalism, he wrote, 'Not that there was no cannibalism, then, only that the European reports of it are fabrications'.²¹ Sahlins reminds us that the condemnation of cannibalism is motivated by European values, and no justice is done by seeking to acquit native people of 'an offence against *our* morality'.²² To do so is 'intellectual subversion of the peoples' own traditional cultural practices. Talk about imperialism!²³

14 Obeyesekere, 'British Cannibals', above n8 at 630–631.

15 Obeyesekere, *Apotheosis*, above n13 at 8.

16 Sahlins, *How 'Natives' Think*, above n13 at 5.

17 *Id* at 195.

18 Obeyesekere, *Apotheosis* (2nd edn), above n13 at 193.

19 *Id* at 194.

20 Sahlins, 'Artificially Maintained Controversies', above n13 at 3.

21 *Ibid*.

22 *Ibid*. Emphasis in original.

Whilst, in many respects, Sahlins' critique of Obeyesekere is compelling, this article takes as its point of departure a case in which there was *no* cannibalism (or, at least, not the cannibalism that was alleged by Jamieson), and in which the European reports of it *were* fabricated. For these reasons, the contribution made by Obeyesekere to cannibal *discourse* in colonial encounters remains seductive. Obeyesekere argued that the British were fascinated by accounts of native atavism, savagery and violence, and he located the source of this fascination in the demands of the English reading public whose preconceptions about native peoples included cannibalism.²⁴ For this reason, expeditions led by Captain James Cook were in part motivated by the British desire to inform themselves about the extent to which anthropophagy was practised at the fringes of the Empire. In forming his hypothesis about Hawai'ian cannibalism, Cook described an encounter in which an Islander visited his ship and where the British inquiries were performed through gesticulation:

He [the Islander] spoke with so little emotion, that it appeared plainly to be his meaning, that they would not destroy us for that purpose; but that their eating us would be the consequence of our being at enmity with them. I [...] am sorry to say, that I cannot see the least reason to hesitate in pronouncing it to be certain, that the horrid banquet of human flesh, is as much relished here, amidst plenty, as it is in New Zealand.²⁵

That Cook was himself later killed and dismembered by Hawai'ian natives adds another layer of meaning to his cannibal-curiosity. Pieces of his body were distributed among the kings and chiefs — 'a mode by which Cook was appropriated into the Hawai'ian aristocracy'²⁶ — and one piece was presented to his Lieutenant, James King, whose account of this episode contains fascinating detail. In the first instance, Obeyesekere described the British as 'appalled at the sight of the grisly object', but soon tempered their revulsion with 'scientific curiosity'.²⁷ King reported:

This [meeting] afforded an opportunity of informing ourselves, whether they were cannibals; and we did not neglect it. We first tried, by many indirect questions, put to each of them apart, to learn in what manner the rest of the bodies had been disposed of; and finding them very constant in one story, that, after the flesh had been cut off, it was all burnt; we at last put the direct question, Whether

23 Ibid. It is worth noting here that Sahlins had previously debated this point with William Arens, author of *The Man-eating Myth: Anthropology and Anthropophagy* (1979). Arens' book argued that cannibalism was a 'myth' subscribed to, and transacted between, both natives and their anthropologist observers. Sahlins argued that this was a form of historical revisionism in 'Cannibalism: An Exchange', *New York Review of Books* (22 March 1979) at 46–47.

24 In some circumstances, indigenous people were required to perform their Aboriginality, with all of the 'barbarism' that entailed, for Western audiences; see Roslyn Poignant, *Professional Savages: Captive Lives and Western Spectacle* (2004), and Lynette Russell, *Savage Imaginings: Historical and Contemporary Constructions of Australian Aboriginalities* (2001).

25 Cited in Obeyesekere, 'British Cannibals', above n8 at 633.

26 Id at 631.

27 Ibid.

they had not eat some of it? They immediately shewed as much horror at the idea, as any European would have done; and asked, very naturally, if that was the custom amongst us?²⁸

Despite the scientific and ethnographic failings of methodology and communication in the British inquiries, Obeyesekere proposed that a Hawai'ian counter-hypothesis of British cannibalism developed out of these encounters: 'Here were a ragged, filthy, half-starved bunch of people arriving on their island, gorging themselves on food, and asking questions about cannibalism'.²⁹

Cannibal discourse is the product of colonial anxiety, what Obeyesekere terms a 'dark fantasy' and a 'paranoid ethos' shared by the British and the natives derived from the shared fear that the Other is going to eat us.³⁰ For the British, the origins of the anxiety lay in childhood fantasies of cannibalistic savages roaming the darkest corners of the Empire. For the Hawai'ians encountered by Captain Cook's crew, 'British cannibalism was a rational inference based on British cannibalistic queries and on the Britishers' physical appearance of food deprivation'.³¹ For Robert Dixon, a scholar of colonial literature, the 'cannibal complex', the British obsession with head-hunting, cannibalism and captivity, was produced from a combination of pseudo-sciences such as phrenology and anthropometric measurements, and the insatiable British literary appetite for travel writing, ethnography and adventure novels.³²

In his analysis of Maori cannibalism, Obeyesekere described the 'scientific curiosity' of the British as actually producing the desired conclusion of Maori atavism: 'twice a piece of flesh from a Maori head was cut up and roasted by the British officers and then given to a Maori to eat. The latter then consumes it with great relish (or so it seems) as many assembled Maoris and British crew witness the event'.³³ For Obeyesekere, these incidents revealed that both the British and the Maori were 'fascinated' by the same practice.³⁴ Later he stated that whilst Polynesian anthropophagy existed, associated with human sacrifice, 'cannibalism' was a British discourse, and its practice was introduced to the natives by the British.³⁵ After all, there was no native *practice* of eating Europeans prior to contact with the Dutch, French and British.³⁶

Nevertheless, the native practice, in some places, of eating Europeans ran parallel to European colonial expansionism, wherein distant lands were consumed within the body of the Empire, and brought within the jurisdiction of imperial laws.

28 Cited in id at 632.

29 Id at 634.

30 Id at 635, 636.

31 Id at 636.

32 Robert Dixon, 'Cannibalising Indigenous Texts: Headhunting and Fantasy in Ion Idriess's *Coral Sea Adventures*' in Barbara Creed & Jeanette Hoorn (eds), *Body Trade: Captivity, Cannibalism and Colonialism in the Pacific* (2001) at 115.

33 Obeyesekere, 'British Cannibals', above n8 at 638.

34 Ibid.

35 Id at 653.

36 Id at 643.

What is significant about the trial of John Jamieson, with which this article opened, is that it was one of the first times in the colony of NSW that indigenous people were thought to be within the body of law, and therefore subject to law's protection.³⁷ Of course, in the act of 'protection', colonial law nevertheless did not hesitate to acquit the white killer of a black man, nor to give continued credibility to allegations of cannibalism. In the very moment at which the common law consumed its first indigenous subjects, it also spat them out.

Contemporary chroniclers documented instances where British 'scientific' inquiries were made by seamen performing gestures of flesh eating, which the natives then parodied. This illustrates the arguments made by postcolonial scholars such as Frantz Fanon and Homi K. Bhabha for whom the practice of mimicry produces colonial domination, and where indigenous people are transformed into hybrid identities, 'natives', 'savages', always in opposition, the dark doppelgänger of their new imperial masters.³⁸ When the white sailor made signs of eating human flesh, he practised scientific inquiry. When the indigenous subject copied the sign, he adduced evidence of his own atavism, and of the utterly abject practices that rendered the native the moral opposite of civility. Paul Lyons, in his work on cannibal fiction, linked mimicry with fear: 'The more fear saturates the scene of contact, the more dramatic becomes the performative qualities of action, including a range of mimics and staged deterrences'. For Lyons, the 'economy of fear' transformed perception into a transaction of conflict.³⁹

Greg Denning, Australia's leading historian of colonial contact in the Pacific, interpreted mimicry as an assimilable mode of differentiation — 'The Other is the Same, only worse, and inept, ugly or evil' — rather than totally unknowable. For Denning, 'The laughter in the theatre of the grotesque is the laughter of relief at discovering that the Other is not Other after all'.⁴⁰ The same tension — between the strange and the familiar — was explored in the psychoanalytical writing of Julia Kristeva. In her work on abjection, *Powers of Horror*, she described the comprehensive revulsion that we experience when we confront something unassimilable:

There looms, within abjection, one of those violent, dark revolts of being, directed against a threat that seems to emanate from an exorbitant outside or inside, ejected beyond the scope of the possible, the tolerable, the thinkable. It lies there, quite close, but it cannot be assimilated. It beseeches, worries, and fascinates desire, which, nevertheless, does not let itself be seduced. Apprehensive, desire turns aside; sickened, it rejects.⁴¹

In Paul Lyons' reading of Kristeva, the abject is a 'non-thing', something unknowable that nevertheless has an 'indexing value' pointing to something

37 See Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995).

38 Frantz Fanon, *Black Skin, White Masks* (1967); Homi Bhabha, *The Location of Culture* (1994).

39 Paul Lyons, 'Lines of Fright: Fear, Perception, and the "seen" of Cannibalism in Charles Wilkes's *Narrative* and Herman Melville's, *Typee* in Creed & Hoorn, above n32 at 127.

40 Greg Denning, *Performances* (1996) at 123.

41 Julia Kristeva, *Powers of Horror: An Essay on Abjection* (1982) at 1.

knowable. Cannibalism, for Lyons, is the boundary scenario, where ‘scientific objectivity breaks down into disgust’.⁴² It becomes possible to include cannibal discourse into the expanding field of a ‘jurisprudence of disgust’, as theorists including Alison Young and William Ian Miller described legal attempts to wrangle, regulate and institutionalise visceral responses to horror.⁴³ The ‘jurisprudence of disgust’ is an emerging critique within legal theory and posits that, behind clear doctrinal rules and procedures, much of law’s work is a gut response to horrible things. Lawrence Douglas has written about this in the context of the Nuremberg trials, where evidentiary rules gave way, enabling evidence to be adduced that did not point to the complicity of the defendants, but which proved that the Holocaust was horrible.⁴⁴ Alison Young has written about ‘obscenity’ laws, where something — usually a work of art — is judged to be horrible and, for that reason, unlawful.⁴⁵ The point here is about abjection, and about how law treats the abject deed, the abject thing as *absolutely* assimilable, and fundamentally *within* law’s jurisdiction.

For Kristeva, ‘The abject has only one quality of the object — that of being opposed to *I*’.⁴⁶ In her later work, *Strangers to Ourselves*, the opposition between the assimilable and the abject is transformed into a dependency of one upon the other.⁴⁷ *Strangers to Ourselves* is a book about the citizen and the foreigner, and the reliance of each upon the other for their identity. ‘Citizen’ and ‘foreigner’, as concepts, can be exchanged for ‘colonist’ and ‘native’, and they can also be reversed, wherein the ‘colonist’ is a ‘foreigner’ who displaces the native host.

In the case of colonial discourses of cannibalism, the creation of the flesh-eating native, and the designation of that identity as an atavistic practitioner of abject horror, can be read as arising out of the need for the British to disavow their own anthropophagy. Obeyesekere examined British cannibalism as it was practised at sea, particularly after shipwrecks. Drawing upon the scholarship of A W Brian Simpson, who wrote the landmark legal history *Cannibalism and the Common Law*,⁴⁸ he describes a well-established tradition of maritime cannibalism starting in the seventeenth century, associated with European colonial expansion and discovery voyages.⁴⁹ This tradition included a range of known rules and conventions, where lots were drawn (and often manipulated to accord with a pre-ordained hierarchy of victimhood), blood was drunk, flesh was apportioned and

42 Lyons, above n39 at 128–9.

43 Alison Young, ‘Aesthetic Vertigo and the Jurisprudence of Disgust’ (2000) 11 *Law and Critique* 241; William Miller, *The Anatomy of Disgust* (1997).

44 Lawrence Douglas, ‘Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal’ (1995) 105 *Yale L J* 449; Lawrence Douglas, ‘The Shrunken Head of Buchenberg: Icons of Atrocity at Nuremberg’ in Barbie Zelizer (ed), *Visual Culture and the Holocaust* (2001).

45 Alison Young, ‘Aesthetic Vertigo’, above n43; Alison Young, *Judging the Image: Art, Value, Law* (2005).

46 Kristeva, *Powers of Horror*, above n 41 at 1.

47 Julia Kristeva, *Strangers to Ourselves* (1991).

48 A W Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which it Gave Rise* (1984).

49 Obeyesekere, ‘British Cannibals’, above n 8 at 639.

the bodily extremities (especially the head) were buried at sea.⁵⁰ Simpson's book took as its point of departure the exceptional case of the *Mignonette*, where two sailors were prosecuted following shipboard cannibalism, giving rise to the classic criminal law precedent on the defence of necessity.⁵¹ This is a clear instance of cannibalism producing law. The defence of necessity was created in the English common law in the case of *R v Dudley and Stephens* (1884) in the facts arising from the shipwreck of the *Mignonette*.⁵² (It is worth noting that the doctrine of necessity was first raised in the United States in a case called *US v Holmes* (1842),⁵³ prior to *Dudley and Stephens*, following another shipwreck. But that time, the survivors made it onto a lifeboat, from which they threw some passengers overboard, to save the lives of the rest of them. They were convicted by a jury after the judge told them that there should have been a 'more proper system' for the selection of victims, such as consultation, or the drawing of lots).⁵⁴

Another instance of British colonial cannibalism was the notorious case of Alexander Pearce, an Irish convict in Van Diemen's Land.⁵⁵ Here is where the distinction between the colonial 'citizen' and the 'convict' becomes necessary. In 1824, Pearce was convicted of the murder of another convict, Thomas Cox, after they had both escaped from custody at Macquarie Harbour. Wandering in the bush for days, weak with hunger, Pearce killed Cox with an axe, then removed, roasted and ate portions of his flesh and organs. The *Hobart Town Gazette*, reporting Pearce's subsequent trial, described how he 'became so overwhelmed with the agonies of remorse' that he flagged down a passing boat and confessed his crime.⁵⁶ The *Gazette* revelled in recounting this 'thrilling tale of almost incredible barbarity', prompted to recall 'the vampire legends of modern Greece'. The report stated, 'our eyes glanced in fearfulness at the being who stood before a retributive Judge, laden with the weight of human blood, and believed to have banquetted on human flesh!'⁵⁷

Whilst clearly reliant on the widely-deployed language and style of cannibal discourse, the *Pearce* case took another visceral turn. Six weeks after reporting Pearce's trial, and two weeks after reporting his execution, the *Gazette* published the report of Reverend Conolly, who administered the final rites to Pearce, and who also received from him a confession moments before the hanging. In that confession, Pearce allegedly told Conolly that one year earlier, he had escaped from Macquarie Harbour with seven other men. Three of the men separated from the group, frightened by the discussion that 'lots must be cast for some one to be

50 Id at 640.

51 *R v Dudley and Stephens*, above n3.

52 Ibid.

53 *US v Holmes* 26 F Cas 360 (1842).

54 Discussed in David Brown, David Farrier, Sandra Egger & Luke McNamara, *Criminal Laws* (3rd ed, 2001) at 767.

55 *R v Pearce* [1824] TASSupC (21 June 1824) (available on Austlii).

56 *Hobart Town Gazette*, 25 June 1824, cited in *ibid*.

57 Ibid.

put to death, to save the whole from perishing'.⁵⁸ These three apparently returned to Macquarie Harbour where they subsequently died.

The remaining five, growing weak with hunger in the bush, agreed to kill one of them, named Bodnam, insisting that each of them should partake in eating his flesh to ensure that none would give evidence against the others. Several days later, growing hungry again, the men turned against Mathers, who was killed and eaten, described as a meal 'they were hardly able to taste'. Three or four days later, they killed Travers, living on his remains for several days. Only Pearce and Greenhill remained, 'each strove to catch the other off his guard, and kill him'.⁵⁹ Pearce eventually caught Greenhill asleep, killed him, and lived off his flesh for four days. Several days later, hungry again, but now 'more desirous to die than to live', Pearce came to a Native's camp. Here he found the remains of possums, which the indigenous people had been eating. He nevertheless believed they may be fearsome enough to kill him and 'put an end to his existence!' They didn't, and Pearce fell in with some bushrangers, and eventually returned to Macquarie Harbour, where he remained for another year until his fateful escape with Cox.⁶⁰ The *Gazette's* report, whilst it was beguiled by this terrible narrative of convict cannibalism, nevertheless reported at face value the fear that *the indigenous people* of Van Diemen's Land posed a fatal threat to white men.

Like Obeyesekere, Peter Hulme and Frank Lestringant, both literary scholars of colonial cannibal narratives, located cannibal discourse within a particular genre of colonial fantasy. Each of these scholars preferred to restrict the term 'cannibal' to the realm of fiction, reserving 'anthropophagy' for those rare instances when human flesh was consumed.⁶¹ The cannibal genre depends upon primitive archetypes and tropes, beginning when 'a witness stumbles across the remains of a cannibal feast'.⁶² The cannibal feast is 'the stock in trade of European anthropology and travel writing until very recent times'.⁶³ What follows the feast scene has implications: 'race, class, genealogy, species, gender, imperialism'.⁶⁴ The genre constructs difference: civilised/primitive, assimilable/object. That Alexander Pearce stumbles across a *possum* feast does not exempt his discovery from the discursive sleight-of-hand that turns indigenous people into cannibals, and cannibals into remorseful convicts.

A similar type of 'whitefella magic' occurred in the captivity narratives that surrounded Eliza Fraser.⁶⁵ Fraser, the wife of an English Captain, was shipwrecked off the Queensland coast in 1836. She survived in the care of local

58 Ibid.

59 Ibid.

60 Ibid.

61 See especially Francis Barker, Peter Hulme & Margaret Iversen (eds), *Cannibalism and the Colonial World* (1998); Frank Lestringant, *Cannibals: The Discovery and Representation of the Cannibal from Columbus to Jules Verne* (1997).

62 Peter Hulme, 'Introduction: The Cannibal Scene' in Barker, et al, id at 3.

63 Gananath Obeyesekere, 'Cannibal Feasts in Nineteenth-century Fiji' in Barker, et al, above n61 at 63.

64 Hulme, 'Introduction' in Barker, et al, above n61 at 3.

Aborigines. After her ‘rescue’ and return to England she related the story of her ‘capture’ by ‘cannibals’. From these stories Fraser manufactured her own celebrity, trading on the popular genre of the captivity narrative in which a civilised white woman is kidnapped and abused by savages; it is an identified trope of cannibal discourse. Despite contemporaneous doubts about Fraser’s veracity (supported by the corresponding counter-narrative stereotypes of the duplicitous woman and the mercenary widow), her captivity fantasy gained a kind of historical legitimacy in its perpetual re-telling. It was the subject of multiple historical chronicles,⁶⁶ a film,⁶⁷ and Patrick White’s novel *A Fringe of Leaves*.⁶⁸ The manipulation of native stereotypes of savagery and cannibalism has been interrogated by historians, anthropologists and legal scholars including Kay Schaffer,⁶⁹ Lynette Russell,⁷⁰ and Larissa Behrendt.⁷¹ Behrendt’s study of the Eliza Fraser story reveals how ‘[e]mbellished espousals of Aboriginal culture and character loaded with prejudices were taken as anthropological fact’.⁷²

For Behrendt, captivity narratives, including visceral descriptions of cannibalism, were ‘retold to fill a certain imaginative space’, a space that contained ‘the colonial mindset and motives’, and from which indigenous voices and versions were excluded.⁷³ Robert Dixon’s study of captivity narratives addressed the role of these stories in shaping colonial attitudes towards Torres Strait Islanders and indigenous Australians leading up to the White Australia policy.⁷⁴ Focussing particularly upon the island fantasies of novelist Ion L Idriess, Dixon argued that ‘historical romances about white captives amount to nothing less than a grotesque inversion of the truth about race relations in colonial Queensland’, where the ‘real’ captives were the Melanesian men and women kidnapped and enslaved in colonial industries.⁷⁵

The danger of permitting these narratives to remain unexamined enables them to underpin the construction of colonial legal institutions, legitimising the oppression of indigenous people because of persistent fears that they pose a moral and corporeal threat to the colonists.⁷⁶ So long as it is possible and imaginable that

65 ‘Whitefella magic’ is a term identified by Michael McDaniel, a former member of the National Native Title Tribunal, as used by indigenous people to describe how colonial legal institutions act upon them: ‘Native Title and Memory’ Paper Presented at *Remembering/Forgetting: A Transforming Cultures Symposium* University of Technology Sydney (5 July 2001).

66 The chronicles studied by Larissa Behrendt are: [the text attributed to, but not written by] Eliza Fraser, *Narrative of the Capture, Sufferings, and Miraculous Escape of Mrs. Eliza Fraser* (1837); John Curtis, *Shipwreck of the Stirling Castle* (1837); Charles Barrett *White Blackfellows: The Strange Adventures of Europeans who Lived among Savages* (1948); Michael Alexander, *Mrs Fraser on the Fatal Shore* (1971).

67 *Eliza Fraser* (1976) directed by Tim Burstall.

68 Patrick White, *A Fringe of Leaves* (1976).

69 Schaffer, *In the Wake of First Contact*, above n10.

70 Russell, ‘Mere Trifles’, above n10.

71 Larissa Behrendt, ‘The Eliza Fraser Captivity Narrative: A Tale of the Frontier, Femininity, and the Legitimization of Colonial Law’ (2000) 63 *Saskatchewan L R* 145.

72 *Id* at 178.

73 *Id*, p 146.

74 Dixon, above n32 at 114.

75 *Ibid*.

Aborigines practice cannibalism, it remains necessary to control, correct and eliminate them, and it remains necessary that they be consumed by law. Behrendt writes that ‘narratives of native savagery became particularly important at moments on the frontier when tensions arose between coloniser and colonised. At these points, the narratives supplied the justification for force, violence, and dominance’.⁷⁷

Fraser’s own account of the story promised to describe ‘the horrible barbarity of the cannibals inflicted upon THE CAPTAIN’S WIDOW, whose unparalleled sufferings are stated by herself’.⁷⁸ One chronicler of Fraser’s story, John Curtis, wrote: ‘These demons in human form employed every method which they could devise, to torture and annoy their miserable captives. In common with all savages, revenge with them is never satiated till quenched in the blood of an adversary’.⁷⁹ Similarly provocative are portions of Patrick White’s fictional retelling of the story, where Eliza Fraser was re-named Ellen Roxburgh, the book replete with nauseating descriptions of atavism, with human grease dripping from the lips of the savages.⁸⁰ One fascinating development in White’s discursive production of the cannibal narrative was its panicked realisation that contact with cannibalistic savages would *infect* the captive white woman, transforming her into a practitioner of the abject deed:

Mrs Roxburgh followed, not so far behind that she would be likely to lose her way. As she went, she tried to disentangle her emotions, fear from amazement, disgust from a certain pity she felt for these starving and ignorant savages, her masters, when she looked down and caught sight of a thigh-bone which must have fallen from one of the overflowing dillies. Renewed disgust prepared her to kick the bone out of sight. Then, instead, she found herself stooping, to pick it up. There were one or two shreds of half-cooked flesh and gobbets of burnt fat still adhering to this monstrous object. Her stiffened body and almost audibly twangling nerves were warning her against what she was about to do, what she was in fact, already doing. She had raised the bone, and was tearing at it with her teeth, spasmodically chewing, swallowing by great gulps which her throat threatened to return. But did not. She flung the bone away only after it was cleaned, and followed slowly in the wake of her cannibal mentors. She was less disgusted in retrospect by what she had done, than awed by the fact that she had been moved to do it. The exquisite innocence of this forest morning, its quiet broken by a single flute-note endlessly repeated, tempted her to believe that she had partaken of a sacrament. But there remained what amounted to an abomination of human behaviour, a headache, and the first signs of indigestion. In the light of Christian morality she must never think of the incident again.⁸¹

Here, the captive white woman — in the very moment of consumption — was consumed by atavism, only for her to be immediately swallowed by colonial morality and its legal order.

76 Behrendt, above n71 at 147.

77 Id at 161.

78 Eliza Fraser, cited in id at 147.

79 John Curtis, cited in Behrendt, above n71 at 177.

80 White, above n68 at 243.

81 Id at 244.

Larissa Behrendt attempted to provide a corrective response to complicit accounts (although she does not discuss White's novel) by restoring counter-claims — and especially indigenous accounts — to the narrative.⁸² Firstly, she includes the testimony of other survivors of the shipwreck who contradicted Fraser's claims of indigenous cruelty: 'I cannot call them cruel people. [...] I don't think they would have killed me. [...] I do not believe that any of the tribes I was amongst ate human flesh. I never saw anything of the kind'.⁸³ Secondly, she introduces the oral testimony of indigenous people:

To have appeared at country fairs displaying the 'marks' put on her by 'the black cannibals' after such a long period of time branded her, to us, as an untruthful person. [...] To us Mrs Fraser was never a very important person because we knew she was a big waterhole, and that means you're a big fibber... They said she was 'brundy'. Brundy means 'not all there'. But she was affected by the sun, very sunburnt.⁸⁴

In reappraising the stock Fraser story, it is necessary to recall that Captain Fraser delayed so long in landing his boat because he feared native cannibalism, but Curtis' account tells how his crew eventually threatened to 'draw lots' if he did not pull ashore. The irony is not lost on Behrendt, wherein the fear of native cannibalism was weighed against the established practice of British maritime cannibalism: eat or be eaten. A W Brian Simpson's study of British cannibalism recounted the development of survival cannibalism amongst seamen, and the adoption and transformation of the practice on the expanding imperial frontier. Simpson described practices amongst convicts and free men in the colonies originating in survivalism, but developing into 'cannibalistic recidivism', where men ate each other by 'preference' and 'habit'.⁸⁵

Of course, narratives of frontier cannibalism were also colonial stock stories; Simpson acknowledged that very few documented cases existed. However, he did trace the influence of frontier cannibalism directly from its maritime practitioners. He noted with deliberate irony that Alexander Pearce, one of the few men successfully convicted, was sentenced to be hanged and his body anatomised.⁸⁶ Enduring fascination with bodily dismemberment became a legitimised judicial practice, whereby British colonists incorporated their cannibalistic fantasies into a penal regime. The English common law invents endlessly new ways of consuming its Others.

This brings us back to the case of John Jamieson, on trial for the manslaughter of Hole-in-the-Book, the indigenous man he assumed had killed, dismembered and eaten his shepherd, Henry Preston. At Jamieson's trial, each of the witnesses testified that Hole-in-the-Book would have escaped had he not been shot, that

82 An important indigenous account, cited by Behrendt, is Olga Miller, 'K'gari, Mrs Fraser and Butchulla Oral Traditions', in McNiven, et al, above n10 at 28–36.

83 Darge, cited in Behrendt, above n71 at 171–172.

84 Olga Miller, cited in Behrendt, above n71 at 173–174. Behrendt has conflated several different parts of Miller's account; in the original they appear at 36 and 34, respectively.

85 Simpson, above n 48 at 148–149.

86 Id at 149.

Hole-in-the-Book well understood what he had been accused of, and that each of them — including the Magistrates — would have acted exactly as Jamieson had acted at the time. Two surgeons testified that, in their opinion, the bones discovered were human bones. Those witnesses who had contact with the local Aboriginal group testified that the Aborigines had identified Hole-in-the-Book as Preston's murderer. One doctor testified that the Aborigines claimed that a black woman had eaten the murdered man's arm and that, even after Preston was found alive, they maintained that a 'flour-headed' man had been killed and eaten.

Notwithstanding the evidentiary problems relating to expert testimony, the rule against hearsay, rules against hypothetical questions, and the clear findings of fact, the entire report of Jamieson's trial was imbued with the assumption that cannibalism was practised by indigenous Australians. In the dispassionate language of law reporting, the cold-blooded and wrong-reasoned killing of a black man by a white man was dismissed smoothly and unconditionally by the shared belief that the natives ate white people.

Only months later, in November 1827, a newspaper report of the trial of an Aboriginal defendant, Tommy, accused of killing a white man named Connell, contained comparisons with another case:

We entirely agree with the Chief Justice in the sentiments he delivered in summing up the evidence on the trial of this Black [Tommy], seeing that the latter was accustomed to receive from the white people civil treatment, and a certain degree of hospitality. Thomas Taylor, of Lake Bathurst [...] was murdered by the Blacks, in manner differing somewhat to that of poor Geoffrey Connell; but under circumstances equally unprovoked, and fully as atrocious, save, that poor Connell was not cut up in junks, roasted, and eaten, by *Jackey Jackey* (or Tommy); whereas, all the fleshy parts of poor Taylor's body were cut [sic] off, part eaten then and there, and the rest carried away to be devoured another time.⁸⁷

The *Australian* reported that Tommy, who was also known as Jackey Jackey, was hanged and his body given for dissection.⁸⁸

Cannibal discourse discloses the enduring sensation of corporeal vulnerability that accompanied colonial encounters. The body of the British invader was permanently threatened by the native capacity for atavistic terror; the body of the native was punished and dismembered to satisfy imperial curiosity and pseudo-scientific objectives. In each instance, the accusation of anthropophagy by the colonists functioned as a thinly-veiled disguise for British anthropophagous practices that flourished as maritime culture developed in the age of imperial expansion. Cannibal discourse also operated as a metaphor for consumption, where everything that is outside law's empire is colonised, incorporated into the body of law, regulated, controlled and classified. Rejecting all accusations of its own cruelty, the common law consumes the atavism of its Others.

⁸⁷ *Monitor* (29 Nov 1827) cited in *R v Tommy* [1827] NSWSC 70 (available on Austlii).

⁸⁸ *The Australian* (31 Dec 1827) cited in id.

