

## ***'Untitled'***

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These paintings make the claim that the landscape does speak and that it speaks directly to the initiated, and explains not only its own occurrence, but the order of the world. (Michaels 1987)

When an artist offers a work as 'untitled', it prevents a certain kind of knowledge; the knowledge given in advance of the effects of the work, and apart from the affects that it gives rise to. The artwork which withholds being known in this *a priori* way forces instead an interpretation without benefit of the artist's legislation as to its meaning. An interpretation without the force of law.

The untitled work, in this way, brings us into the vicinity of the creation of fact and value. It foregrounds the making of understanding, and therefore of knowledge, as an *aesthetic* event.

This paper connects the questions of land, law and art through the double sense of a 'title'; a claim to ownership of land, a claim to know the meaning of the work of art.

A notable adaptation of Aboriginal art to meet the European world view has been the transposition of Western Desert sand painting from the ground of ceremony to the picture plane of canvas and acrylic paint.

In Eric Michaels' discussion of the Yuendumu doors, a series of paintings of Dreamings done on the doors of the local school by Warlpiri elders and subsequently published by the Australian Institute of Aboriginal Studies, we are reminded that the nomadic Aborigines' graphic displays are 'embedded in ritual and ceremonial activities which are in many senses economic exchanges'.

'Designs signify, among other things, rights: to songs; to myths; and to the land and its resources that they depict and celebrate. To display a design is to articulate one's rights not only to the design, but to all things associated with it.' Further, "To see such a design, to learn about its meanings, and finally to be permitted to paint and then to display it, means to be involved in an exchange in which one must reciprocate.'

This is knowledge as propinquity and familiarity rather than objectivity and generality. Its performative value is part of what it means for this aesthetic to be also epistemic: 'Indeed in many oral cultures, such knowledge may function like currency, and this knowledge is not 'free'' (Michaels 1987: 138).

The knowledge is not free because it generates value. All knowledge shares this property of ordering, even when it becomes part of a 'free market' or a part of 'academic' exchange. A clear example of this is the sinister knowledge the common law until recently claimed to have that Australia was terra nullius at time of settlement. In 'knowing' the land's emptiness, the law also represented its own interest and produced the condition of its provenance.

The 'appropriate return' on the Aboriginal artists' labour at Yuendumu was ingeniously cashed out in the currency of a literal vehicle of knowledge: 'The ultimate price for the collection would be two Toyotas', Michaels tells us,

explaining: 'The men who paint these pictures are, by that very act, describing their responsibility to 'care for' these places. Long ago (but within the lifetime of these painters), this caring would have included travelling to these sites to perform recurrent ritual and other actions to assure the continuity of the land and of its Dreamings. When the Warlpiri were relocated to Yuendumu, they were cut off from many of these lands, which are as far as 400 kilometres distant, and which are not necessarily accessible by road. Only Toyotas can get you there' (Michaels 1987: 139).

In his own Toyota, Michaels comes to learn his own epistemic claim to the land:

'When I first came to Central Australia and used to drive those desert tracks by myself (before I had established relations and obligations which fill the Toyota up on any journey), the desert distances were to me unfamiliar and unmarked.' Michaels find himself in terra nullius precisely because of a lack of entitlement, but his empty land was in time 'filled up' with obligations and relations which simultaneously eroded the terra nullius and became the ground of his knowledge. It was a knowledge earned by acquaintance:

'Now of course, they are a landscape full of significance - where we broke down last time, where we found Jupurrurla walking at night, where Japanganka jumped off the truck, the back way to Mt Allen, and occasionally, the place where the ancestors came, or where water is, or bush tomatoes.' (Michaels 1987: 142)

'But in those early days, my reflections were almost wholly abstracted ...' And, significantly, the abstraction he records his thoughts as dwelling on is the one which most disturbs the European epistemology in the face of an Aboriginal propinquity later forced on him by experience. He worries about whether the land is old, or whether *it only looks old to him*. He worries that he cannot

separate himself from all that he has read and heard about central Australia, as the oldest continent etc, so as to know what is 'really' there.

But this attempt to separate the land from how one knows it actually divests one of entitlement and destroys any claim to it - and this applies to art, as well. As the art theorist, Mitchell, says, 'the innocent eye is blind'. This is precisely the sense in which terra nullius is not a claim to know anything, but rather ought to have been recognised as an admission of ignorance and as such ought to have *disqualified* from title.

For all his experience of that other knowing, Michaels cannot find the epistemology that warrants 'any such ability of phenomena to communicate directly, unmediated, their history and meaning'. 'Rationally,' he concludes - that is, *despite his contact with it* - 'I have to reject the possibility'. This is the classical impasse which arises from the separating out of epistemology from aesthetics, and incidentally of the mind from the body.

But I recognised that the epistemic problem raised here is precisely the one of such interest to Aboriginal philosophy, and the one which the paintings themselves attempt to bridge. These paintings make the claim that the landscape does speak and that it speaks directly to the initiated, and explains not only its own occurrence, but the order of the world. (Michaels 1987: 143)

The common law also reveals itself epistemically to the initiated. In the scheme of *Mabo No. 2* (1992), the High Court, the initiated, know the law and declare it as it materialises in its historical light. The problem set by *Mabo* is the profound one of the entitlement of the common law to declare itself as 'the law of the land'. In this case, then, the court is drawn to reflect on the process of its own warrant.

Writes Brennan:

In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights, if their adoption would fracture *the skeleton of principle which gives the body of our law its shape* and internal consistency (1992: 30, my italics).

Is the Aboriginal Dreaming, which is an understanding of the land, commensurate with the skeleton-body Brennan cherishes as the law?

We could imagine a likeness between the Aboriginal law, transposed from traditional sand to the postmodern commodity of canvas, and the translation of European law from the imperialist short-sightedness to the fish-eye lens of global government and human rights. Whether this is felt as loss or as enlightenment, in both cases the law is called upon to effect a change in the landscape, to redraw the map, to make effective the now-known, to make it liveable.

In so doing, the law addresses the conceptual underpinnings whereby the problems of continuity with the past and the contingency of the future are held in tension through *acts* of interpretation. Thus, '... the court is even more reluctant to depart from earlier decisions of its own', and Australian law 'can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed' (1992: 30).

Michael Detmold argues that difference, not similarity, is the ground of community for the conceptual uptake of law:

To take the issue of *Mabo (No 2)* itself, the indigenous inhabitants desired land and the European settlers did as well ... Suppose you and I desire the same apple. Is this not sameness of desire? No, it is a difference. I desire that I eat the apple and you desire that you do - a difference so great that it has often led humans to war. It is only when I recognise your difference (in this case your desire for the apple) and you reciprocate that there is the possibility of community between us (1993: 40).

He goes on to conclude that '... the lawful essence of [the] case is the equal recognition of difference. The High Court in *Mabo (No 2)* failed in this regard. Whilst they recognised Aboriginal difference in the matter of a different conception of title, they imposed the European valuation of it in the matter of the conditions of its extinguishment' (1992: 46). In its refusal to question the sovereignty of a crown which was also its own source of authority, the High Court tacitly accepts that the greater force of the conquering power gave it an overriding entitlement, and that Detmold will not allow in his concept of lawful.

Something more than our own desires and the self-justifying perceptions they give rise to, must construct the political community and its entitlement to judgment at all. It is nevertheless hard to imagine Detmold's view, attractive and idealistic as it is, ever answering the real position of sovereignty and contest in the postcolonial world. The law has an interest which it acts to uphold (at the very least, the sovereignty that empowers it) and it is not clear to see where 'recognition' of difference, and legal recognition can meet on that ground.

Richard Bartlett's portrait of the common law has it that 'the 'genius', 'spirit' and worth of the common law is derived from its basis in human experience; its pragmatic nature; its reflection of social, economic and political considerations; its longevity and its concern with the long-term' (Detmold 1993: 61). To illustrate:

The common law did not adopt the presumption of innocence as an exercise of political or criminological theory. It did so because the functioning of society required that it should'. And, 'The common law is merely a reflection of the society. Commentators who would suggest that a decision is not consistent with the needs of the society must carefully evaluate their rationale. The common law only reaches a decision on the basis of those considerations. If the decision is founded upon a series of previous decisions it, of course, emphasises the regard *repeatedly* given to those considerations.

This view, unlike Detmold's, does not invent the lawful as intentional, let alone as just. It would be truer to say of this view of the virtue of common law that it hails it as a kind of mirror, and a society gets the law it deserves (to corrupt Nietzsche).

For Bartlett, the recognition of native title at common law is a 'triumph' because it proves that competition between interests (even between conqueror and conquered) will be represented in the law, along with the relative political-military strengths standing behind them. In this regard, perhaps Bartlett (who reaches the opposite conclusion about the justice of *Mabo* from Detmold) comforts himself with the reflection that the native title having shown up at all as an interest at common law proves that the law is not only serving the interest of the sovereign and the powerful.

But both these views, despite their differences, share an assumption which the Aboriginal case appears to challenge. Detmold and Bartlett both envisage the law as the neutral space in which interests or desires are negotiated. And yet, this takes no account of the epistemological task given to law which it is the object of this paper to illustrate, nor of the way in which forms of law must have already accomplished this task in order to make any judgment in any case at all.

Foucault notes that a court of law based on an adversarial contest has already, in its very procedure for revealing 'truth' and making knowledge, made the

adequation between interests that both Detmold and Bartlett imagine it will discover in its deliberations. To such a court, the trial by ordeal is barbarous and the opposite of just. But this is because the trial by ordeal tries *something other* than the adequation of interest. Something that we might assume is more real in that world - the value of an individual in the eyes of the Gods, perhaps.

The way in which European and Aboriginal views of law may be incommensurate in just this way is suggested in the observation Noni Sharpe makes on the 'legally cogent half-truth' - their cultivation of the land - that gave the Meriam people in Mabou a more sympathetic hearing than other more nomadic Aboriginal relations to land.

In the context of the Meriam land case that half may have had special instrumental value. The other half remained shrouded for Moynihan J in 'deep mystery'. Yet divested of its spiritual-religious core the depth and richness of Meriam cultural life evaporates. There is a certain poignancy in this reduction of the Meriam sense of existence for to blot out the spiritual connection with the land is to cut the Meriam off from what Stanner referred to among the Aboriginal people as the 'body of patent truth about the universe that no one in his right mind would have thought of bringing to the bar of proof'. This, he describes as the 'inherent and imperishable bonds' between the ancestors and the living through land and totems' (32)

Michaels cannot heal the rift between his feeling of being in the land, and his knowledge that this is an internal affair 'in the eye of the beholder' and not in the 'place itself'. For the Aboriginal aesthetic, it is not clear there is this 'place itself', or at least, that there is any other. While the common law must enunciate a 'common law', a common vision, and put some flesh on the bones of experience given by the land that is not sceptical, the dreaming knows itself as expressing a reality; not a copy of it, much less a purely subjective expression.



The conflict that Michaels experiences, literally 'on the ground', between his sense of the land as old and his very-modern belief that this is an interpretation made on an inscrutable noumenon, expresses the predicament for the common law, and perhaps provides a conceptual advantage to Aboriginal law. Expediency begins in the gap between reality and interpretation - the declaration of terra nullius has made the common law vulnerable to cynicism.

Terra nullius - the judgment that a land was empty - is an admission of ignorance that could paradoxically never have been a claim to land, or to the law of that land. This paper has argued that both the common law and the Dreamings of Aboriginal art work with another understanding of knowledge and of what knowledge entitles one to claim. Knowledge underpins the claim to title, since it is knowledge which brings to light the law, and in doing so reveals the condition of being in relation to the land.

Perhaps the common law was not blind in the way the doctrine of terra nullius might first appear to make it. If it had been used to name the concept of an empty land, the land unpopulated, then it would be a seeming statement of pure racism against a dark landscape where human beings are not seen.

But the common law did not say that it saw *nobody*; only that did not see *law*. This was the burden of the distinction between settled and conquered territory, which was held to underwrite the acquisition of the land for England. What sort of blindness was this principle of settlement? It was aesthetically blind, in the most general sense, in that it didn't see what there was to see *as law, as order*.

If it could not see what was there as law-like, it was part of a general conceptual myopia which applied to its own cultural products as well. It did (and does) not see the aesthetic as law-like. Therefore, it could not interpret as legal the encounter with a group of nomadic, spiritual cultures. Their genres, and the

laws which governed them, were so far out of the artistic range of its own order, inflamed as it was by empiricism, materialism, and frankly, by avarice, that they were not recognisable as genres at all.

The blindness to the aesthetic was not a philistinism on the part of European artistic sensibility, so much as a functional part of its philosophy of empiricism, that is to say, its interpretation of what was real. European property values were propped up on the 'social contract', but this concept itself depended on the assumption of an objective world which appeared in the same way to everyone. This concept in turn could not recognise itself as a *convention*, as a way of ordering but on the contrary, functioned as a declaration of itself as real, in a world divided by the opposition of the real and representations of it (of which language was the typical case).

We are still subject to the empirical order, in which science and technology set up an order of 'fact' counterposed to the aesthetic-ethical orders of 'value'. But this distinction comes under acute pressure in conceptualising the title to land both of the native dispossessed, and of the sovereign usurper precisely because 'title' (like other legal concepts) is specifically intended *to make a fact of a value* in defiance of the empiricist's distinction. This is the epistemological action of law, which can only come about through the operation of aesthetic principles - interpretation, representation, ordering.

On reflection, it is a feature of great significance that this aspect of conflict of laws comes to a crisis through questions of land. Since land as a site of knowing is crucial to all jurisdiction, even those as conceptually incompatible as colonial law and Aboriginal Dreaming.

An Indigenous epistemology can only be understood through aesthetics, i.e. through the manner in which art brings order to life, as sense and feeling of event. The way of knowing of the common law is not dissimilar; that is, it brings a situation to life through its performance of an order, its *enactment*. Common

law therefore precedes from an aesthetic mode of epistemology, rather than an abstracted one. Aboriginal aesthetic demonstrates the more general epistemological point that knowledge is a spatially grounded and temporally realised phenomenon; and the claim to own is based on a claim to know.

However, this account does not lead naturally to 'reconciliation', since understanding does not necessarily produce new law, although it might. No doubt it leads to an appreciation of the difficulty of that. If terra nullius has shown anything, it is that the force of law prevails; the conqueror has in his law an instrument of installing a real, and this obliterates other ways of being governed by other laws.

We may understand ourselves better by appreciating the aesthetic mode of the law through the example of Aboriginal Dreaming. But this will not of itself preserve the ontic of that dreaming; it will only serve to explain its unassimilable quality and why it is in real danger of losing its epistemic force. It will take a more active interpretation to give title to the work of reconciliation.

### **References**

- Detmold, M. (1993). 'Law and Difference', in *Essays on the Mabo Decisio*, North Ryde, NSW: Law Book Co.
- Foucault, M. (1972). *The Archaeology of Knowledge*, New York: Pantheon Books.
- Mabo v The State of Queensland (No.2)*(1992) 175 CLR 1.
- Michaels, E. (1987). 'Western Desert Sandpainting and Post-Modernism' in *Kuruwarri: Yuendumu Doors*, Canberra: Australian Institute of Aboriginal Studies.
- Sutton, P. (1988). *Dreamings: the art of Aboriginal Australia*, Ringwood, Vic: Viking.