

Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation

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...the literary critic engaged with law must read the literature of law through the evidence of its absence, through its repetitions and through the failures which indicate the return of that which is repressed by law (Goodrich 1996: 113).

'The memory of Law - as custom and tradition, as precedent and antiquity - is held and 'sealed' in images, imprinted through visual depiction or textual figures that bind, work and persist precisely through the power of the image...' (Goodrich 1996: 96).

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon those of nations (Blackstone 1874: 106).

... how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind (Blackstone 1874: 7).

In the Beginning

This essay is centred around what is arguably the most potentially constitutionally radical, and almost certainly the most politically contentious decision of the Australian High Court in its history.⁰ This is the 1992 Native Title Decision - *Mabo v Queensland (No. 2)*. My assessment of the potentially radical quality of the *Mabo* decision, constitutionally speaking, rests on what the judgment refuses to do and thus, paradoxically, makes imaginable, as much as on what it achieves. I will rehearse the decision briefly in order to suggest to readers the perspective from which this essay approaches it.

The (legal) history of Australian constitutional accounting for the indigenous peoples who inhabited what became known as the continent of Australia has been written and rewritten, most notably by the *Mabo* decision itself. The project of unpicking those rewritings is in a real sense that which is proposed by the work of which this essay forms part. Thus this account is both radically provisional, and to a significant extent compelled initially to take on trust its predecessor texts.

There were of course legal challenges to the doctrine of terra nullius, and the texts of those cases are replete with evidence of the law's self-constituting authority (disguised as precedent) and unselfconscious acknowledgment of its fictionality. This said, the position adopted by the colonial courts, and by Australian courts until the *Mabo* decision,¹ was that when the British Crown colonised the continent it obtained absolute beneficial ownership of the lands of the continent together with its assertion of sovereignty. This latter was authorised by contemporary theories of international law, themselves the self-serving creatures of Western European colonial powers in the eighteenth and nineteenth

centuries. Those theories provided three ways of obtaining sovereignty over colonised lands: conquest, cession, or settlement.

The colonial taking of Australia was accounted for as settlement of lands 'terrae nullius'; that is, either belonging to no-one, or belonging to no-one 'civilised', or not cultivated in a way recognisable to contemporary Western Europeans, depending on the account of the theory preferred or developed at any given time. A corollary of this was that no system of law (and thus no system of land law) was recognised as existing in lands *terrae nullius*. It flowed from this that as much of English common and statute law as was applicable to the colony at the time of settlement became the law of the colony. That law could not, theoretically, be amended by Crown prerogative, but only by the local (colonial) legislature or the Imperial Parliament. Thus one aspect of its national or constitutional character, its partaking in a legitimising legal discourse of nationmaking as against the articulation of mere executive power.

The majority of the High Court in the *Mabo* decision found that contemporary developments in international law, the emergent historical record which rewrote colonial stories of 'civilisation', and the claims of contemporary conscience necessitated a rewriting of that legal history. They found that the establishment of British colonial sovereignty in Australia only brought with it radical title to the lands of the colony; that some further disposition had to take place before an absolute beneficial ownership of such lands was disposed of/ brought into existence; that a system of indigenous land title would henceforth be recognised by Australian common law; that indigenous land title, if proven to predate settlement, could also be proven to persist into the present if it had not been extinguished by some dealing with the land inconsistent with the existence of native title - the crystallisation of an absolute beneficial ownership of the land in question.

Thus, paradoxically, the common law was rewritten to recognise a law predating it and persisting alongside it, but always subject to subordination and indeed extinguishment by it. For all that the majority held that '[n]ative

title to particular land..., its incidents and the persons entitled to it are ascertained according to [indigenous laws and customs]' (*Mabo* 1992: 3), the common law defined the incidents of that pre-existing law, which was in effect its creature. It is the common law which does the ascertaining. Yet the common law at the same time refused to question the sovereign taking of the Australian continent which depended on the same discredited doctrine - that of terra nullius - which it had subjected to such a revisionary scrutiny in the context of land law.

It is a commonplace of accounts of indigenous culture in Australia that connection with the land is at its heart in a way radically incommensurable with the non-indigenous Australian legal consciousness (which on poststructuralist accounts of subject formation shapes and is shaped by non-indigenous Australians' understanding of land). Standing behind my critique of the discourses on national identity in the Australian native title jurisprudence in this essay is the Australian Constitutional Law which might be reimagined if the High Court were to adopt an Irigarayan 'ethics of alterity': an ethics of recognition not dependant on displacing or metamorphosing the other or imagining the other solely in terms of the self.

The High Court's explicit refusal to address the sovereignty question is, then, I would suggest, both a critical ethical blindspot in the judgment and curiously symptomatic. The High Court's protection of the source of its own (illegitimate?) power as the judicial arm of Australia's national government and its act of containment masquerading as recognition are both symptoms of the covert yet insistent assertion of its own (colonial) power. That the 'Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court' (*Mabo* 1992: 2) was the one thing on which the entire court agreed.

The Commonwealth Attorney-General, Dr Gavan Griffith QC, suggested in a speech at St Paul's College at the University of Sydney on 22 September, 1997, that the High Court's decision in *Mabo* operated as a denial of

responsibility on the part of the common law for the colonisation of Australia. If this insider perspective is taken on trust, here again we see recognition of the occlusion by the Court of its own Constitutional status as an arm of Australian Government and its concomitant governmental power. Dr Griffiths' analysis also suggests the profoundly ethically problematic denial by the High Court that they make the common law; so too does the language of the refusal to address the sovereignty issue.

I want to suggest at this point the utility of a 'schizophrenic analysis'² of a body of legal texts which are critical to an understanding of the implications of 'native title' jurisprudence for the discursive constitution of Australian national identity. That analysis would seek in Goodrich's terms (Goodrich 1986) to read the genealogy³ of Australian native title jurisprudence constituted by *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971); *Mabo; North Ganalanja Aboriginal Corporation and Anor (for and on behalf of the Waanyi People) v State of Queensland and Ors* (1995-6); and *Wik Peoples v State of Queensland & Ors, Thayorre Peoples v Queensland & Ors* (1996), both hermeneutically and rhetorically, and to employ the work of Diana Eades on aboriginal English as well as Goodrich's own early work on legal language in generating protocols for a praxis of discourse analysis with the potential to transform what are at present the 'publically available ways of speaking' (Muecke 1992: 21) about Australian sovereignty.

Insofar as the hermeneutic aspect of the analysis is concerned, I want to suggest what might be gained by unpicking the histories of legal authority provided by Blackburn J in *Milirrpum* and the various members of the High Court in *Mabo*, *Wik* and *Waanyi*, and by other tribunals involved in the post-*Mabo* development of Native Title jurisprudence broadly considered. Such a hermeneutic analysis would proceed according to the law's own theories about its writing and interpretation.

B(l)acktracking

At this point it is worth sketching the significance of those legal events as background for readers who may not be familiar with the recent history of Australian native title jurisprudence and legislation. In *Milirrpum* Justice Blackburn was faced with a claim by indigenous people in the Northern Territory that they held a communal native title capable of recognition by the common law over areas on Arnhem Land and the Gove Peninsula where the Commonwealth had granted mineral leases to bauxite miners. The case was significant in that it held evidence by aborigines and by anthropologists about aboriginal customs, beliefs, social organisation and indigenous land law were admissible in Australian courts. However, in a species of Catch-22, Justice Blackburn refused to acknowledge the recognition of native title by Australian law, in part because of Australia's status as a settled colony and in part because the title claimed was not one recognisable as a property right by the (Anglo) Australian legal system.⁴

The next chapter in the revisionary story of Australia's native title jurisprudence occurred when in 1982 Eddie Mabo and others lodged a claim that the Crown's sovereignty over the Murray Islands in the Torres Strait was subject to their common law land rights. The Queensland government in 1985 took legislative action designed to defeat the claim. In the first High Court *Mabo* decision, (*Mabo v Queensland* 1988), the Court held that, assuming the plaintiffs could establish their common law native title land rights, the Queensland Act was inconsistent with the *Commonwealth Racial Discrimination Act* 1975.

Let us return briefly to the explanatory account of case and statute law on Native title in Australia post-*Mabo* (*No 2*). The Commonwealth parliament passed the *Native Title Act* 1993, which provided for a regime for establishing the existence of native title short of common law litigation, for determining conflicting claims about land alleged to be subject to Native

Title, for some avenues for compensation for the extinguishment of Native Title, and gave aboriginal people a right to negotiate where governments act in ways which affect Native Title. Some states, including Western Australia, also passed legislation in response to the *Mabo* decision. In *Western Australia v The Commonwealth* (the *Native Title Act Case*) (1995), the validity of the *Native Title Act* (with the exception of s12) was upheld and Western Australia's legislation invalidated.

In early 1996 in *Waanyi* the High Court indirectly left open a door for the consideration of the question of whether pastoral leases would always extinguish native title, through a ruling that it was 'fairly arguable' whether the grant of a pastoral lease in this case had extinguished the native title claimed by the applicants. The case more directly turned on jurisdictional and procedural questions arising under the *Native Title Act* 1993 (Cth). In *Wik*, the High Court held, in a 4:3 majority decision, with the Chief Justice and Justices Dawson and McHugh dissenting, that pastoral leases did not necessarily extinguish Native Title. The violent and persistent conservative backlash against the decision found a focus in the 'Ten-point plan' to amend the *Native Title Act* to the detriment of aborigines proposed by the Howard Government. Draft legislation designed to give effect to the plan has passed the House of Representatives and awaits consideration by the Senate. There is considerable opinion to the effect that the legislation, if passed, may be held unconstitutional at least in part.

A concurrent matter has been the dispute between aborigines and developers over the proposed Hindmarsh Island Bridge in South Australia. One artefact of that dispute is *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) which marked a sea-change in the way the High Court majority viewed the *persona designata* exception to the doctrine of separation of Chapter III judicial power. *Wilson* suggests how acutely important a constitutional text *Mabo* is, for when 'native title' becomes an officially and undisputably constitutional issue, previous tendencies to stretch the *persona designata* doctrine beyond what might

be considered the rational bounds of interpretability founder in curiously revealing ways.⁵

The decision in *Mabo* has been described by Garth Nettheim in this way:

...the [High] Court, in its first ever opportunity to address the issue directly, decided by a 6: 1 majority that pre-existing land rights ('native title') survived the extension of British sovereignty over Australia and may still survive today provided

(a) that the relevant Aboriginal or Torres Strait Islander people still maintain sufficient traditional ties to the land in question; and

(b) that the title has not been extinguished as a consequence of valid governmental action (Nettheim 1993: 1).

I have given my own account of the *Mabo* decision above. That account differs from Nettheim's in its assessment of both the achievement and the radical potential of the decision, a potential which I am seeking to describe in this essay. Because of Nettheim's influential position in the legal debates surrounding native title jurisprudence in Australia, and because Nettheim's conservative legalist reading of the decision has more recently been joined by Noel Pearson's strategically conservative analysis of Native Title through the articulation of a recognition theory (Pearson 1997), it is worth digressing from my explanatory overview of contemporary Australian native title law to engage with his analysis.

Nettheim records the intensely critical contemporary responses to the decision of Aboriginal lawyers such as Pearson (1993: 89), Michael Mansell (1992: 4) and Mick Dodson:

The *Mabo* decision does not recognise equality of rights or equality of entitlement: it recognises the legal validity of Aboriginal title until the white man wants that land.... For the vast majority of indigenous Australians the *Mabo* decision is a belated act of sterile symbolism. It will not return the country of our ancestors, nor will it result in compensation for its loss (Dodson 1992: 35)

Nettheim's own reading - and agenda - is rather different. Explicitly engaging with the conservative backlash against the decision, Nettheim seeks to account for the decision as consistent with a broad view of the common law, which he presents as capable of recuperating 'local anomaly' by 'correction' (Nettheim 1993: 18). His analysis of the Court's treatment of the sovereignty issue also differs markedly from mine. Nettheim introduces discussion of the Court's various statements that the validity of the acquisition of sovereignty is not justiciable in the municipal courts established pursuant to that foundational act, and then dismisses it, noting firstly that the court did not need to make the point, as the '*Mabo* plaintiffs did not contest sovereignty', and then that:

The restatements of the proposition that Australian sovereignty is not justiciable in Australian courts may have been simply a part of the overall review of the legal consequences of 1788⁶ (and the relevant later dates for South Australia, Western Australia and the outlying Torres Strait Islands). They may also have been included for reassurance (Nettheim 1993: 20).

This last is a curious and suggestive remark, casting the High Court in Nettheim's own role here as apologist for and therapeutic champion of the law. While Nettheim's reading points to the same ethical failure with which I am concerned, it does not adequately register the magisterial tone of the Court's monologic rhetoric, nor the narcissistic anxiety which fractures that rhetoric, an anxiety expressed in the traces of its own consciousness of the fragility of the authorities on which its self-denial of power rests.

There is perhaps an indication in R A Sundberg QC's introductory summary of the litigation in the authorised report of the *Mabo* judgment (*Mabo* 1992: 5) that at some point the question of sovereignty was contemplated as an issue by the plaintiffs, but the principal relief sought by the plaintiffs as eventually amended did not contest sovereignty, nor yet did the submissions by their counsel (*Mabo* 1992: 7-13). It might be hazarded that to have done so would have courted a rebuff. It is worth noting here, however, that failure of a party to raise an issue has not stopped courts

ruling on the issue in question in a way central to reaching their decision in the case in question.

To take just one example, the recent controversial first instance decision of Newman J in *CES v Superclinics Australia Pty Ltd* (1994), a case in which a medical negligence claim for an egregious series of failures to diagnose a pregnancy almost became a test case for the legality of the sanctioned regime of 'legal' abortions that prevails in New South Wales and elsewhere, is a case in point. But the distinction between what Newman J did in *Superclinics* and what the High Court did in *Mabo* is signal. Newman J's conclusion that to decide in favour of the plaintiff would be to compensate for the deprivation of the opportunity to commit an unlawful act was necessary to his decision. The High Court's articulation of its position on the judicial reviewability of the British colonial claim to sovereignty of Australia was not; it was (symptomatically) excessive.

Not only is decision-making on issues not raised in litigation a phenomenon which itself complicates the law's assertion of the distinction between ratio decidendi and obiter dicta, a distinction which functions as a guarantee of law's unintelligibility to the layperson. In this instance we also see evidence of the law's characteristically hierarchical and monologic discourse of self-authorisation - there is no justiciable issue, and yet the court pronounces the law which is, if we proceed hermeneutically (in Goodrich's terms), no law at all, but rather a species of excess of its authority.

It might be suggested here that I am taking Nettheim's initial analysis of this issue on face value, but there is a more important point to make. With a project unlike Nettheim's, one that seeks to outrage the law rather than at once to defend it against its conservative and powerful detractors and to propose a process of reconciliation between those interests and its own creature, native title, one can read the High Court's refusal to address the vexed and persistent question of Australia's sovereignty quite differently.

What I am proposing here serves as an example of the utility of a hermeneutic reading of these judgments. First, it is at least arguable that the High Court majority's rejection of the notion that the colonisation of Australia brought with it as a necessary concomitant absolute beneficial crown ownership of the lands of the colony - because of its rejection of the doctrine of terra nullius - ethically and legally - necessitated a rejection of the other key legal effect of colonisation justified by the doctrine of terra nullius: that exclusive sovereignty over the lands in question was also acquired at colonisation. That is, that there is no logic other than a logic of power behind the High Court's selective 'reading down' of the effect of its revision of the common law, as Brennan J's remarks suggest:

If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning (*Mabo* 1992: 30).

Second, Nettheim goes to some lengths to emphasise that the view that absolute beneficial ownership of land in Australia rested in the Crown after settlement on the basis of the doctrine of terra nullius is either obiter dicta or 'bare assertion' (as Gaudron and Deane JJ had indeed acknowledged in *Mabo* 1992: 103-4), although at the same time he engages in an imitation of their Honours' slippage between regarding this as evidence of the contingency of the authority as well as evidence of its strength (Nettheim 1993: 6). He fails, however, to acknowledge that the same criticism could be made of the authority cited for the proposition that:

[t]he acquisition of territory by a sovereign state for the first time is an act of State which cannot be challenged, controlled or interfered with by the courts of that State (*New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* 1975: 388 per Gibbs J).

(Re)Reading the Law

My suggestion is, then, that to undertake this 'schizophrenic analysis' at key strategic sites, such as the various assertions by members of the majority in *Mabo* that 'no question of constitutional power is involved' in the case, (an assertion that I will go on to read in a rather different way than that apparently intended by its authors) and that 'the validity of the Act of State establishing a new colony cannot be challenged in the domestic courts' (Deane and Gaudron JJ, *Mabo* 1992: 78-9, 95), a task which in its entirety is beyond the scope of this present essay, would be to expose the heterogeneous, unprincipled, unstable, contemptuous and essentially violently hierarchical strategies for the authorised production of legal meaning which are the bedrock/shifting sands on which the 'common law of the land' rests.

Let us approach the Court's sole unanimous finding in *Mabo* from a rhetorical analytical standpoint, and then from a hermeneutic one. Justices Gaudron and Deane apparently intend their reference to constitutional power to mean the constitutional power of the British Crown in 1788 to annex Australia. I am proposing a different interpretation: one which draws on the appealingly democratic legitimating legal fiction that at some point between 1788 and 1986 the authority on which the Australian Constitution rested ceased to be that of the British Crown and became that of the Australian people (*Australian Capital Television Pty Ltd v Commonwealth* 1992: 138, per Mason CJ). And one which thus focusses on stories of the origins and domains of national power. If the High Court is the judicial arm of the national government established under a Constitution which draws its power from the assent of the Australian people who are subject to it, and if the High Court makes the Australian common law, and if it draws its authority for the proposition that it cannot rule on the legitimacy of the colonial annexation of Australia from the common law, gestures of largely wordless impotence in the direction of international law themselves lack

force. They border on the farcical in a case where the colonial origins of international law itself, so often occluded in contemporary Western and liberal democratic discourse on international law, (for example, as irony would have it, in the *Mabo* case itself), are as evident as is the case here.

Let us shift the tack of our rhetorical engagement with the passage in question. Before asserting that 'it must be accepted in this Court' that the whole of the territory designated in Phillip's Commissions was, by 7 February 1788, validly established as a 'settled' British colony' (*Mabo* 1992: 79), Justices Deane and Gaudron note that there are problems even under contemporary international law with the assertion of sovereignty by the British over Australia (*Mabo* 1992: 78). They go on to characterise that act as an 'act of State whose primary operation lay not in the municipal arena but in international politics or law' (*Mabo* 1992: 78).

The clause 'it must be accepted in this court' is both an example of what Goodrich describes as 'oratorical definition' (Goodrich 1986: 192-3) and a characteristic judicial employment of a passive construction to efface lawmaking agency. Further, the doubling of indirection and the imperative is signal: power is exercised and denied in the one rhetorical gesture, which operates formally to suggest the Court's own asserted powerlessness.

There is interesting evidence of the problems for Constitutional theory of Australia's ironic hybrid of the British and US constitutions in Brennan J's acutely internally contradictory account of the superior sovereign executive power involved in the acquisition of sovereignty by a colonising State. While he stresses that such an 'act of State... cannot be challenged, controlled or interfered with by the courts of that State' and that such an exercise of Crown prerogative is similarly exercisable without legislative mandate, he sources the authority for such acquisition in the common law itself (*Mabo* 1992: 31-2).

If we move to a hermeneutic analysis of the assertion that the legitimacy of the British acquisition of sovereignty over Australia is not justiciable in

Australian Courts, the High Court's articulation of this principle, cited by Brennan CJ in *Mabo*, is *New South Wales v The Commonwealth* (1975). That statement of 'principle' was made by Gibbs J (as he then was). It does not however form part of the ratio decidendi of the case. While Gibbs J was part of the majority which held that the provisions of the Act in issue in the case which related to the continental shelf were within the legislative power of the Commonwealth pursuant to the external affairs power, his decision in relation to provisions affecting the territorial sea and inland waters was in dissent, and his reasoning on this issue makes clear the idiosyncratic nature of his conception of the way in which the external affairs power was attracted by legislation relating to the continental shelf, and thus of his excursion into analysis of the legislative power which derived from the novel assertion of sovereignty. In any event, his aside to the effect that '[t]he acquisition of territory by a sovereign state which cannot be challenged, controlled or interfered with by the courts of that state', is obiter dicta, removed from the finding of law necessary to ground the majority decision in the case.

Justice Gibbs' reference to the 'authority' on which he relies for this last assertion is revealing. He describes the English cases in question as offering 'statements and illustrations of this principle' (*New South Wales v The Commonwealth* 1975: 388).

Terms of Engagement

I should emphasise at this point that while my critique of the *Mabo* majority has a significant amount in common with Ian Hunter's, I radically differ from his contention that 'common law reasoning... is a specific intellectual technology, attached to its objects by procedures forged in practical use, and bestowing expertise only through conscientious adherence to those procedures' (Hunter 1994: 106). Michael Kirby's strategies in *Wik* - of shifting the analysis of native title claims from aboriginal evidence to the common law's own (colonial) land rights and the legal fictions that are the 'rules' of statutory interpretation - both deserve sustained discourse analysis and suggest the range of possibilities of a radical hermeneutics of law. They also suggest the problems of Hunter's account of legal method.

Two possible outcomes of the process of reading native title jurisprudence hermeneutically might be the reshaping of the law's discourses, institutions and subjects through a refashioned legal hermeneutics on the one hand, and a formulation of an ethical juridical practice. A third possible outcome, and the one which is my immediate object, is to deconstruct the discursive constitution of the Australian nation at the colonial sacred site of its constitutional texts, and especially through the texts which evidence the emergent national metaphysics of the Mason and Brennan High Courts. The end to be served by such a deconstruction is to take up the possibilities offered by Sneja Gunew's critical deployment of Terry Eagleton's notion of a 'counter-public sphere'. Gunew notes that

purists who are aware of Eagleton's debt to Habermas's concept of the public sphere, which is regulated by reason but which allows for a variety of contending positions, rightly object to the notion that a 'counter'-public sphere could exist at all (Gunew 1990: 100).

She goes on to deploy the notion of the counter-public sphere as 'comprising a series of discursive formations of legitimizing and

institutionally endorsed public statements whereas a counter-public sphere qualifies and interrogates these authorizations.' One of the most attractive things - in the sense of making possible a transformative discursive praxis in the project of constructing a national imaginary - about the provisionality and ambivalence of Gunew's grappling with Eagleton's theoretical legacy is also characteristic of her essay as a whole. And what I think sets it apart from many of the essays in *Nation and Narration* as from more recent interdisciplinary analyses of *Mabo* jurisprudence is its carefully self-reflexive scepticism about the transformed and heteroglot transnational solidarity of the people imagined as the fruits of the labours of what Bhabha unselfconsciously celebrates as a 'tribe of interpreters' whose self-appointed task it is to be the judges of the institutions and discourses of cultural studies (Bhabha 1990: 1-7, 293). I am as disinclined to take on trust this coterie of judges as I am the judges authorised by the institutions and discourses of the law.

Rhetoric, Flesh, and Blood

The election in 1996 of a conservative government in Australia has brought the issue of native title to the forefront of national political debates - debates which also indicate a return to discredited Australian government policies of paternalism in relation to indigenous affairs. This essay engages with that debate by interrogating originary fantasies about legal 'regimes of truth' sanctioned by Australian courts. It suggests the utility and necessity of a detailed and contextualised rhetorical critique of the majority decision in *Mabo*, proposing that its 'humaneness' and 'activism' were in fact cloaks for a particularly problematic form of neocolonial practice, and that the subsequent history of post-*Mabo* Native title in Australia was predictable because of the violent forgetting which characterises the majority judgments in *Mabo* and which might be most appositely symbolised by

Justice Brennan's sinister metaphor for the illegal colonisation of Australia, a metaphor which circulates repeatedly in judicial discourse on Native Title and which appears at its most violent in the following poignant Catch-22⁷

recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principal of our legal system (*Mabo* 1992: 43).

I want to interpolate at this point one of the troubling discursive fragments which return or surface in native title discourse, evidence of that which the law most vigilantly represses: the deployment of its power. I quote from the *Sydney Morning Herald* January 11 1997:

Mr Fischer... praised the minority judgment of the Chief Justice, Sir Gerard Brennan, saying Sir Gerard had believed his would be the leading judgment. Instead it had been largely ignored.... Sir Gerard argued that Native title was extinguished by a pastoral lease and that it was too late in the nation's history to argue otherwise.... Mr Fischer said it was possible... that elements of Sir Gerard's judgment may guide the government in its search for a solution to the problems the *Wik* judgment raised.⁸

What I have described as the predictable legacy of the majority judgment in *Mabo* is as follows. The first successful claim under the *Native Title Act* 1993 was not made until late 1996, although there have been negotiated agreements made between parties pursuant to the Act, such as the Cape York agreement, about which I would say no more than there is a substantial body of largely feminist critique of the implementation of alternative dispute resolution procedures in cases where there is an inequality of bargaining power between parties, and that the legislative framework which sought to structure a 'level playing field' between negotiating parties, if it was ever effective, needs assessment in the light of Justice French's reading of the law in the *Waanyi* case and in the light of the governmentally sanctioned racist discourse which has been deployed in response to the *Wik* decision. The Native Title Tribunal in the *Waanyi* case 'returned' to the colonial consciousness of Millirrumpum. The conservative

hysteria around *Wik* has seen a recrudescence of the metaphoricity which seems a characteristic of settler discourse on native title in such events as: the Deputy Prime Minister, Tim Fischer's disingenuous statement that 'outlandish' native title claims would 'rip the fabric' of a reconciliation which the current Federal Government has turned its face against (*Australian* 17 January 1997); the Prime Minister's desire for a 'commonsense' response to the *Wik* ruling (with apologies to Mandy Rice-Davies, he would, wouldn't he?); and the early favouring by conservative state governments, which (on the evidence of Bob Carr's position on *Wik*) (*Australian* 23 January 1997) might include Labor governments, of a response to *Wik* that mirrors the ominously-named 'reservation' provisions in Western Australian, Northern Territory and South Australian legislation (which allows Aborigines access to leased farm land in a legal 'swap' and which it seems would be open to the High Court to hold invalid as infringing one of the few explicit guarantees of individual rights in the Australian Constitution, characteristically a 'land' right of the kinds imaginable by the common law, to compensation on just terms for the forced alienation of property).

Originary Phantasms/Fantastic Origins

This paper opens with epigraphs, the first two of which are taken from the work of Peter Goodrich, and suggest the utility of his work in generating a model of discourse analysis for the legal articulation of Australia's originary fantasies. I should perhaps at this point both take a leaf out of Goodrich's book and also suggest just how outrageous and dangerous to the power of the law a 'law and literature' analysis might be.

Goodrich has written that '[i]t has been my experience...that the faith or dogma of law, its distance from subject, person or emotion, is precisely what precludes the dialogue or the attention to singularity which justice or

ethics requires' (Goodrich 1996: vii). In October last year I ran, with Justice Bill Priestley, the judgment writing workshop at Australia's National Judicial Orientation Program. Two of the texts I set the students - newly appointed judicial officers from state and federal courts across Australia, and from some South Pacific states - to read prompted particular outrage. One was an excerpt from Goodrich's *Reading the Law* - the section which outlines the figures of legal dialogue and legal monologue, and thus the section which I would argue would ground an effective rhetorical analysis of the detail of the text of native title jurisprudence. The other was the judgement of the Queensland Court of Appeal in the statutory review of the murder conviction of Robyn Kina (1993, per Fitzgerald P, Davies and McPherson JJA, Williams J). In that case, a form of statutory second appeal against Kina's conviction for murdering a violently abusive de facto spouse, the Court found that the poor communication skills of Kina's lawyers effectively deprived her of the opportunity to raise an arguable defence. It is clear from the judgment that Kina's aboriginality, her sex, her class, and the class and gender issues involved in her having been a sex worker were factors which meant that her lawyers shared so little communicative context with her that they could neither interview her adequately nor hear and comprehend the information she in fact made available to them.

What was particularly interesting about the attack on Goodrich was that this coterie of newly-fledged professional interpreters of texts claimed that a text my first-year students can work with was 'unreadable'. A claim that Kina's case had nothing to do with writing the law came from a woman judge, one of the few in the program, who had been a successful commercial lawyer before her appointment to the bench. It seems that bringing legal subjects, especially those marked by their sexed bodies as 'other' within the institutions and discourses of the law, into proximity with bodies marked by their sex and race, destabilise what seem increasingly to me to be law's most tender fictions. Those fictions occlude Australian law's currently endemic gender and racial bias (to which might be added homophobia and discriminatory class-consciousness). Destabilising them,

like instituting dialogue with the law of the other (whose recognition in Irigarayan terms would necessarily make colonial law in the image of *Mabo* misrecognise itself), sends certain kinds of authoritative legal subjects into paroxysms of violence which find their particular expression in the deployment of strategies of deligitimation. Further, as Terry Threadgold has written, in seeking to explain the 'resistance to (critical) theory' familiar in humanities departments and increasingly surfacing in legal contexts,

If you have been made subject by the technologies of the self that characterised the great 'liberal humanist tradition' then your identity is very much at risk when confronted by a very different story of the nature of the tradition to the one in which you have always confidently located yourself. In the new stories the plot has changed - and suddenly you find yourself not the hero but the villain of the piece (Threadgold 1993: 8).

Paying attention to embodied specificity and discourses on subject formation, legal knowledge and national identity in the Constitutional context puts into question precisely the violent fictions of identity on which modern national imaginaries depend. By 'analysing that space within law which asserts or legitimates its legality, a space of self-evidence and so of forgetting' 'through the evidence of its absence, through its repetitions and through the failures which indicate the return of that which is repressed in law,' (Goodrich 1996: 112-3) in the context of native title jurisprudence in Australia, we might not only facilitate the 'return of that which is repressed in that jurisprudence'⁹ - the question of indigenous sovereignty - but also begin to generate a postcolonial or poststructuralist constitutional theory of the kind which in Australia as well as in the U.S.A. might address increasingly insistent 'citizenship claims' such as the conflict between 'due process' rights and the interests of alleged victims in sexual assault cases,¹⁰ projected federal constitutional challenges to U.S. state laws providing for 'same sex marriage', and issues around citizenship and race of the kind which are presently occupying the U.S. Law and Literature scholar

Brook Thomas in his current work on the legal treatment of Asian-Americans.

I should register here that groundbreaking as I think Paul Patton's (1995a, 1995b, 1996) work on *Mabo* has been for the articulation of poststructuralist philosophy with social justice issues in Australia, there is for me a troubling flavour of Whig history about the different future republic that he imagines, a more local and particular manifestation of that which Homi Bhabha desires. Jeremy Waldron's (1992: 24-5) apparently unconscious, but to this reader egregiously racist originary fantasy - imagined in the name of metaethics - of the paradigm of Enlightenment man, that is of the philosopher, should warn poststructuralist scholars of the dangers of what I will call lying with Rawls, and thus manifesting in a quite unexpected way (Patton 1995b) the classical liberal's uncritical faith in the rule of law: that is, of interdisciplinary critiques of law which treat its fictions as anything more serious than truth claims, a risk akin to what has been described by Kathryn Trees and Mudrooroo (1993) in this way:

In countries such as Australia where aboriginal sovereignty, in forms appropriate to Aboriginal people, is not legally recognized, postcolonialism is not merely a fiction, but a linguistic manoeuvre on the part of some 'white' theorists who find this a comfortable zone that precludes the necessity for political action.

This is also to suggest the particular promise of a 'law and literature' (in the peculiarly Australian sense of that term) incursion into the territory that is represented by *Mabo* might, as Goodrich's recent work explicitly suggests, have something rather different to offer than the other interdisciplinary excursions from disciplines like philosophy and anthropology which have proliferated around its borders.

When I describe the High Court's decision in *Mabo* (to which one might now add *Wik*) as 'almost certainly the most politically contentious in its history' I should connect it with what I see as its predecessors in this tradition - the prisoners of Parliament case, *R v Richards*; *Ex parte*

Fitzpatrick & Brown (1955), and the cases which in the 1990s discovered an implied right to free speech in relation to political discourse in the Australian Constitution (*Nationwide News Pty Ltd v Wills* 1992; *Australian Capital Television Pty Ltd v Commonwealth* 1992). There are two points to make about these cases. The first is that the free speech cases and *Fitzpatrick & Brown* are routinely treated as Constitutional cases. The native title cases are not, except by self-identified radical commentators.¹¹ The second is that these cases are contentious precisely because in the context of what I will characterise as disputes about the civil rights of citizens they cast into relief conflicts between the judicial arm of government and the executive. That is to say they are about the power of governance, and thus reveal the law's constitutional power in a way that the law seeks to keep hidden, as something other than 'merely' interpretive. It is also to suggest that the slipping of the veil occurs when democracy's founding fiction - that of a balance rather than an aporia between authority and the populace, a conflict which Homi Bhabha has characterised as the split between the pedagogical and the performative (Bhabha 1990: 299) is destabilised by the insistence of certain demands of subjects who embody a questioning of the founding fictions of majoritarian democracy.

All this is to identify precisely the kind of encounter with the law that I am staging:

In the most radical of senses, literature demands the end of law in the precise sense that in rendering the legal text to consciousness, in reconstructing the contingency of language and the fiction of a genre without genre, it questions the difference that demarcates law as a singular enterprise. A literary analysis, in short, promises eventually to collapse both the modernity¹² and the unitary identity of law' (Goodrich 1996: 113).

Diana Eades is a linguist who has done and made available radical work on the reception and interpretation of aboriginal English in legal settings. Generally speaking, her research has demonstrated the ways in which the

English language, 'the primary manipulative tool in the courtroom' (Cooke 1996: 59), operates systematically to read aboriginal signifying and linguistic practices against the grain and to the material disadvantage of speakers of Aboriginal English, and to occlude the differences between legal English and Aboriginal English. It was in significant part her evidence, as well as the intervention of the Social Worker David Berry and journalists including the Four Corners researcher Margot Saville which led to the statutory proceedings which functioned as a second appeal against Robyn Kina against her murder conviction. Which is to suggest the material effects of a rhetorical engagement with the law's stories, evidentiary regimes, sanctioned discourses, and practitioner subjects. What I want to suggest is that because what happens in the *Native Title Case* is about radically incommensurable *langues*, analysis which makes it evident that '[s]uccessful participation in the legal process greatly depends on the manipulation of language' might usefully be deployed beyond the textual genres which Eades and others have principally worked on - trial transcript, particularly of the adduction of evidence - in intertextual analysis of the genres of judgment, evidence, submission, might serve to make evident that incommensurability, and disable the obfuscation of crude questions of State power which characterises the language of the Native title judgments. I should register my consciousness that this process runs some risks. Most of these risks are versions of the recentring of law, the imagining of law as therapeutic process in which law itself is the subject. Such risks are evident in the most interesting legal commentary on *Mabo*, by Netheim or Michael Detmold (1993), say, or even in Dianne Otto's (1995) splendid article. The other risk is that of forgetting subject positions, investments, interests.

Goodrich's deployment of the feminine itself frequently runs this first risk in a way that is analogous to much 'liberal' discourse on settler-indigenous relations. Andrew Lattas (1988: 57) has argued that there is a popular tradition of discourse on Australian nationalism and the aborigine which transforms 'the white man's historical repression of Aborigines into an act of psychic self-repression....[whereby the] historical violence inflicted upon

Aborigines by white colonisers is... rendered as a violence inflicted by the white man against the spiritual sacred part of his psyche.' Lattas' example of this tendency is Keneally, not coincidentally I would suggest a key player in the Australian Republican Movement. The same urge to consume the aboriginal, to eat the evidence of the violent establishment of the Australian nation, to what Suvendrini Perera (1994: 17) has described as 'happy hybridisation' is, I would argue, evident in Justices Gaudron and Deane's characterisation of and curative for Australia's 'national legacy of unutterable shame.' It finds a more sinister inflection in Justice Toohey's generally celebrated invocation of Equity in his judgment that the Crown has a fiduciary duty which should guide its dealings with native title land; sinister because equity is the jurisdiction in which, historically, powerful men of law have decided what is good for those whom the law itself renders powerless: married women under traditional English property law, minors, the insane, de facto spouses (typically relatively economically powerless women) after the breakdown of these relationships. Equity presents the benign aspect of its Janus face, too, in Michael Kirby's judgment in *Wik* (1996: 248); we should remember that he, too, is a judge, and one who wrote in the *Wik* judgment, apparently without irony or a sense of mischief, that '[t]here were many reasons of legal authority, principle and policy for adhering to the understanding of the law which existed prior to *Mabo*...' (1996: 250).

Peter Goodrich has recently written that the law is 'a speech or writing which forgets the violence of the word and the terror or jurisdiction of the text' (Goodrich 1996: 112). He has also argued, to my mind extremely persuasively but more through the insistently diachronic genealogy of texts and authorities which he constructs than through his social psychoanalytic account of law, that the law is constituted through a characteristic mental geography. My immodest proposal entails supplementing Goodrich's territory of the legal imaginary. In what is implicitly the constitutional context he sees 'the text of the law become... the territory of the realm' (Goodrich 1996: 103). He writes

The etymology of text as legal jurisdiction can remind us usefully that both text and territory as legal concepts have their root in a terror (*terreo*) mapped upon the order of the soul and only secondarily upon the body' (Goodrich 1996: 101).

Robyn Kina's sexed, raced, classed and sexualised body suggests how destabilising the recognition of the primacy of the Aboriginal body might be for this hierarchy. Claims for the recognition of aboriginal sovereignty, that which is unspeakable in the High Court's discourse on native title, remind the Australian constitutional imaginary that there is something anterior to the text of the 'common' law and the territory of the realm that undermine both their foundational claims, that disable the imperial body of Australian law from remaining 'wrapped in its self-evident and productive virtue' (Povinelli 1994: 132).

Notes

- ⁰ This essay is part of a larger study of discourses on national identity.
- ¹ David Ritter (1996) has notably challenged this orthodoxy.
- ² Schizophrenic analysis derives from 'Schizophrenic literacy', a term coined by the author and Dean Bell in their research on legal writing skills tuition. It advocates analysing the law in a doubled and destabilising way, through identifying what Goodrich (1986) has labelled its hermeneutics - the protocols for reading and interpretation that the law sanctions and desires - and combining a hermeneutic reading of the law with a rhetorical analysis, which reads the law against the grain of its hermeneutic interpretive codes and practices, according to strategies of discourse analysis developed in other disciplines.
- ³ This list might appear at first blush to herald a linear history rather than a genealogy in the Foucauldian sense, and the deconstruction of the common law's 'originary fantasies' involves the unpicking and thus the retracing of those very stories of origins. However, the analysis I propose seeks in the 'unpromising place' that is the insistent synchronicity of legal discourse accumulated evidence of the 'invasions, struggles, plundering, disguises, ploys' from which might be retrieved the

singularity of certain recurrent constituting stories (Foucault 1986: 76-100). A Foucauldian reading of the originary fantasies characteristic of the common law - and particularly marked both in constitutional law and in native title jurisprudence - has a certain curious appositeness, as it recognizes 'the events of history, its jolts, its surprises, its unsteady victories and unpalatable defeats - the basis of all beginnings, atavisms, and heredities.'

- ⁴ Justice Kirby reprises *Milirrpum* in a curiously satisfying way in *Wik* by making his conclusion that the pastoral leases in issue in that case permitted the coexistence of native title depend on evidentiary considerations.
- ⁵ See Goodrich's (1995) account of law's repression of the feminine and Stacy's (1996) analysis of the Hindmarsh Island affair for insights in to what an analysis of *Wilson* might reveal.
- ⁶ A proposition that seems difficult to square with the repetition of the point and the florid metaphoricity used to articulate it.
- ⁷ 'Blackbirding' is another such usage which is of particular interest in the context of this paper (*Mabo* 1992: 19).
- ⁸ The Chief Justice criticised the then Acting Prime Minister in a letter of 3 January, saying, *inter alia*, 'I ask you to... consider whether the making of attacks on the performance by this court of its constitutional functions is conducive to good government, even if an attack can gain some temporary political advantage.' The Herald's report of the exchange (*Sydney Morning Herald* 28 February 1997) describes Mr Fischer's view that The Chief Justice's minority judgment was written in the belief that it would be the lead judgment as speculation.
- ⁹ I should note here that I remain to be persuaded of the superior utility of contemporary - generally Lacanian - psychoanalytic jurisprudence for the projects of poststructuralist legal critique, as against that group of generally interdisciplinary scholarship which emerges from the Foucauldian theorising of discourses and institutions and Bourdieu's account of subject formation.
- ¹⁰ See Pether 1996, 1997 for an account of these conflicts in the Australian constitutional context.

- ¹¹ See, for example, Flood 1997: 2.
- ¹² 'In claiming to escape from the contingencies of genre, in forgetting its sources, its languages, its judges and legislators, law aspires to assume the modern character and quality of the discourse of fate' (Goodrich 1996: 112).

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