MABO
Encountering the Epistemic Limit of the Recognition of 'Difference'

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Introduction

There have been numerous characterisations of the High Court's decision in *Mabo*[1] as an example of the recognition of 'difference' through law. While most acknowledge the continuing asymmetry between Aboriginal and non-Aboriginal Australians in law and in other spheres of social life, there appears to be a consensus that *Mabo* was in various ways and degrees a recognition of difference. The following statements illustrate this view: *Mabo* as a 'partial recognition of difference';[2] *Mabo* as initiating a 'promise of postcolonial processes of reconciliation ... [where] ... the outcome might turn out to be a solution in which cultural differences are recognised as such and respected, instead of being misrecognised as lack or inferiority';[3] 'Mabo as a complex social event in Deleuze's sense of the term ... it breaks with the past and inaugurates a new field of political and legal possibilities, up to and including Aboriginal self-determination';[4] and 'the Mabo judgment provides a limited measure of justice for Aboriginal and Torres Straight Islander People'.[5]

In this article I contend that while the recognition of difference is an essential precursor to justice for Aboriginal people, it was not accomplished

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1 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1. The use of the terms 'indigenous' and 'Aboriginal' are problematic to the extent that they do not capture the particular affiliations of people who are identified in that way. It is symptomatic of the devastation wrought by colonial rule that even the names have been erased or tend not to be used by non-Aboriginal people. While conscious of this inadequacy, in this article I will refer to all indigenous people of Australia as 'indigenous' or 'Aboriginal', except where a different format is used by authors I quote.

2 MJ Detmold, 'Law and Difference: Reflections on Mabo's Case' (1993) 15 *Sydney LR* 159, p 167.

3 P Patton, 'Mabo, Freedom and the Politics of Difference' (1995a) 30 *Austl J Pol Sci* 108, p 116.

4 P Patton (1995b) 'Poststructuralism and the Mabo Debate: Difference, Society and Justice' in M Wilson and A Yeatman (eds) *Justice, Biculturalism and Difference*, Bridget Williams Books, p 154.

5 Ibid, p 165.

in the High Court's decision in *Mabo*. I argue that *Mabo* is more appropriately characterised as a recognition of 'sameness' rather than 'difference'. The Court acknowledged aspects of Murray Island life that corresponded with European conceptions of relating to the land and accorded these aspects a measure of equal treatment. It then declared the conditions under which such recognition would ensue on the mainland. In doing so, they abandoned the doctrine of 'terra nullius' which was untenable in fact and inconsistent with international law. This limited and belated acknowledgment of indigenous peoples' relationship to the land was called the common law's recognition of native title.

Law's capacity to address demands for justice depends on the possibility of recognising and understanding the particularity of the claimant. Current modes of recognition of difference or alterity have their origins in liberal humanism. Specificity and particularity is lost through these modes of constructing knowledge, and I explore ways in which we can overcome these limitations. It is important that we have a clear understanding of why the recognition of difference is central to justice. I discuss the distinction between law and justice with reference to the theory of Jacques Derrida and explore why it is essential that difference be recognised in order for there to be justice.

My arguments are organised as follows: an initial discussion of the 'non-recognition' of difference in *Mabo*; an assessment of the academic commentary since the judgment which has treated it as a recognition of difference; and then an examination of the limits on the very possibility of recognition through current modes of understanding the 'other'.

Mabo: Recognising 'Sameness' rather than 'Difference'

The issue for decision in *Mabo* was whether the annexation of the Murray Islands to the State of Queensland vested both radical *and* beneficial title in the Crown (ie absolute ownership). Once it was established that the indigenous inhabitants were capable of enjoying a proprietary interest (which the Court called 'native title'), the question was whether this title was a burden on the radical title of the Crown. The Court concluded that it was and established the common law's recognition of native title. In reaching this result, it was required to recognise the indigenous relationship to land. Rather than being a recognition of difference, this reception of the indigenous relationship to land was a recognition of the similarities between indigenous and non-indigenous ways of relating to land. At the general level of recognising that indigenous people have a 'beneficial interest' in the land and at the particular level of characterising how this interest can be established, the High Court imposed Anglo-European conceptions of relating to the land on indigenous people. To that extent, the decision in *Mabo* is not a cessation of colonialism or a postcolonial moment. It is a continuation of colonial rule whereby the original inhabitants are forced to accept the invader's law and *its* translation of their relationship to the land. This is evident in the judgment of Brennan J.

The opening pages of Brennan J's judgment (with which Mason CJ and McHugh J agreed) refer to the gardening prowess of the Meriam people. He refers to the following findings by Moynihan J.

> Garden land is identified by reference to a named locality coupled with the name of relevant individuals if further differentiation is necessary. The Islands are not surveyed and boundaries are in terms of known land marks such as specific trees or mounds of rock.
>
> Gardening was of the most profound importance to the inhabitants of Murray Island at and prior to European contact. Its importance seems to have transcended that of fishing.[6]

The immediate conclusion Brennan J draws from these findings is that 'Meriam society was regulated more by custom than by law'.[7] The other oblique reference to the findings appears later in his judgment and is used for the purpose of refuting the validity of the 'enlarged notion of terra nullius. He states:

> [t]he theory that the indigenous inhabitants of a 'settled' colony had *no proprietary interest in the land* thus depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs. *As the basis of the theory is false in fact* and unacceptable in our society, there is a choice of legal principle to be made in the present case. This court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher 'in the scale of social organisation' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.[8]

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6 *Mabo* at 17ff. Note the discussion of gardening and the emphasis placed on its importance to the Meriam people.

7 Ibid at 18. I do not wish to pursue the problematic nature of this distinction. However, it is an ironic distinction in light of the discussion later in his judgment where it is apparent that the so called 'radical title' of the Crown arises out of medieval feudal relations between the Crown and feudal Lords. Brennan J states at 48:

> [t]he Crown was invested with the character of Paramount Lord in the colonies by attributing to the Crown a title, adapted from feudal theory, that was called a radical, ultimate or final title.

This 'radical title' was a postulate of the doctrine of tenure. The doctrine of tenure was in turn derived from customary feudal relations and practices: '[t]he origin of the rule [of universality of tenure] is to be found in the traditional belief that, at some time after the Norman Conquest, the King either owned beneficially and granted, or otherwise became the Paramount Lord of, all land in the Kingdom' (at 47). See generally the discussion at 46—52.

8 Ibid at 40 (emphasis added).

It is apparent that the doctrine of terra nullius could have been discarded on the basis that it was false in fact, and that international law no longer recognised the 'enlarged' notion of terra nullius. Brennan J acknowledges these two factors.[9] The 'excess' — the detailed discussion of the cultivation of the Murray Islands and the nature of its social organisation — made the recognition that the indigenous inhabitants had a 'beneficial interest' in the land, a result that was palatable for the Australian legal system.

The fact that the judgment is a recognition of 'sameness' rather than 'difference' is evident if we place the emphasis cultivation received in *Mabo* in the context of the dominant, Anglo-European conception of relating to the land. The Anglo-European tradition conceives of people (particularly man) primarily as a 'possessor'. What they possess before and above all else is the capacity for labour, that is, they have ownership of their individual self and all its capacities and potential. As owners of labour, they acquire a proprietary interest in all things they mix their labour with. A proprietary interest in land is derived from mixing one's labour with it, by cultivating the soil, erecting boundaries or transforming it in some other way.[10] The most influential proponent of this theory was John Locke. For Locke:

> [t]hough the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has a right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property....
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> But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that, too, is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common.[11]

It is clear that the Aboriginal relationship to land, whether called 'native title' or not, was recognised by the common law because it was made to conform with Western categories. This is evident when Brennan J states:

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9 See the discussion of the decision by the International Court of Justice in its *Advisory Opinion on Western Sahara* [1975] ICJR 39 in ibid at 40 ff.

10 For an excellent critique of the socially and historically contingent nature of this conception of the 'human' and 'human nature', see CB MacPherson (1962) *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press.

11 J Locke (1952) *The Second Treatise of Government*, ed Thomas P Peardon, orig 1690, Bobbs-Merrill, pp 17, 20 (paras 27, 32).

> [i]f it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature; there is no other proprietor.[12]

It might be argued that *Mabo* did recognise rights and interests which are other than proprietary in nature. However, even when Brennan J recognised individual non-proprietary interests, such as usufructuary rights, such rights and interests were only recognised to the extent that a 'community proprietary interest' could be shown to exist. As Brennan J states:

> [t]he fact that individual members of the community ... enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, *it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title.*[13]

The judgment might be seen by some as the fulfilment of a modernist promise. It was the assertion of the European enlightenment at the birth of modernity that equality of all peoples would be recognised and respected. An aspect of this ideal of the enlightenment was the 'common humanity' of all peoples. As the history of colonialism demonstrates, this humanist vision which asserted the equality of all denied the status of humanness to many. *Mabo* might be seen as the manifestation of Australian law finally recognising the humanness of Aboriginal people by discarding the doctrine of terra nullius. But this belated gesture replicates the features of domination of modernity by erasing 'difference' in the name of recognising 'sameness'. The indigenous peoples' relationship to the land is recognised, but only as a proprietary interest which conforms to the concepts and categories of the dominant normative framework. The deficiency of recognising sameness rather than difference is a point I will address below. At this point it is apt to address some of the plethora of claims that have characterised *Mabo* as a recognition of difference.

Law and the Recognition of Difference

By cultural 'difference' (or alterity) I am referring to the existence of a consciousness and normative framework in a group or culture prior to the commencement of social, political and economic relations with another group, which continues notwithstanding this interaction, albeit in an altered manner. This is not to imply that what is sought through the recognition of

12 *Mabo* at 51.

13 Ibid (emphasis added).

difference is a return to some form of 'pure' state or ontologically prior condition. The tyranny of origin is confining and further determines the other. 'Difference' as used here asserts the existence of a consciousness and normative framework that continues in spite of *and* because of the arrival of colonists. The content of this 'difference' continues to emerge in new forms and manifestations through the emergence of *hybrid* consciousness and normative frameworks.

The recognition of difference cannot be accomplished under a single category of citizenship that applies equally to all. This presents a major conundrum in law, for the denial of equal citizenship harms those excluded, but to subsume all claims under the banner of 'equal citizenship' ignores particularity and specificity or erases it. This is the mistake in Webber's analysis where the Court's recognition of indigenous title in *Mabo* is explained as 'not merely that someone lost a property right at some point in the past ... it is an issue of equality, of citizenship'.[14] Webber explains the High Court's decision as an expression of 'regret' for the past denial of the moral equality of indigenous people and the lack of respect for them as human beings.[15] He fails to draw from his own explanation of the root cause of dispossession. 'The root conflict underlying dispossession, then, was one of colonists hungry for land versus an indigenous population that possessed a profound and incompatible attachment to the same land.'[16]

This 'incompatibility' in use, treatment and attachment to the land will not be overcome by the granting of equal citizenship rights. Such rights recognise our commonality and can accommodate the various aspects of our existence which are the same and demand equal treatment. According to Webber, it is this failing in Australian law and society that the Court in *Mabo* attempted to rectify. However, this approach continues to violate indigenous people to the extent that the various ways in which they relate differently to the land and other aspects of their existence is not recognised. Treating the recognition of native title as the extension of equal citizenship rights also leaves the political community which Aboriginal people are being invited to become more equal citizens of unproblematised. While the denial of equal citizenship rights to all marks the absence of justice, the provision of these rights is by no means its zenith. Equality does not address specificity and particularity.

The 'difference' at issue in *Mabo* is the difference in Aboriginal and non-Aboriginal relationship to land. Even the characterisation of what took place as 'dispossession' does violence in describing the violence. The indigenous peoples' relationship to the land was much more than 'possession' dislocated and fractured by colonial invasion. Detmold accurately characterises the challenges this presents for law. *Mabo* was not just a legal dispute between two claimants who desired the same piece of land.

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14 J Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in Mabo' (1995) 17 *Sydney LR* 5, p 11.

15 Ibid.

16 Ibid, p 13.

> [I]t would be far too simplistic to say that there was a conflict of desire and leave it at that. At the bottom of the desires there was a vast difference of perception of what the land was and what it was to desire it.... When this issue is expanded to embrace all aspects of the relations of humans in community the size of the problem of law and difference is encompassed: it is nothing less than the whole of our cultures which constitute our communities of difference.[17]

It is curious then that Detmold, having conceptualised the problem so well, misses the mark in his treatment of *Mabo* as a recognition of difference. The flaw in his analysis is the flaw in all liberal humanism — the initial emphasis on difference is taken away by the attempt to introduce an underlying unity.

Detmold correctly concludes that the rejection of terra nullius was the rejection of the fundamental denial of the very existence of the other.[18] In response to his analysis, I wish to stress that the recognition of the 'existence' of the other should not be mistaken for the recognition of the 'difference' of the other. In attempting to clarify what it *would* mean to recognise difference, he states:

> and so for the settlers looking at the inhabitants of the land; they saw with their own conceptions and perceptions, not with those of the (different) other. To see difference (and have community) it is necessary to *see the other as other conceiver and perceiver.* This was expressed by Kant as the *recognition of the other as an end in itself.* The term is entirely apt. If I recognise the other and its relation to myself, I recognise a second and different end-point of perception and desire. It was precisely the point of terra nullius to deny this otherness: the land was not fixed with another's set of perceptions and desires (including, as a subset, their law). And this the High Court has (happily) rejected.
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> The other had a different law. From the recognition of the existence of the indigenous inhabitants there followed the recognition of the possibility that their law was a different law. There is also in the various High Court judgments a recognition and acceptance of the fact that the indigenous property conceptions were different and that the common law needed to be modified accordingly. But that (unhappily) is as far as it goes.[19]

The European subject was and is unable to recognise the indigenous relationship to the land other than through their own conceptions of it. But in an attempt to bridge the gap between indigenous and non-indigenous people, a universal is being smuggled in. There is an attempt to reach 'difference' by characterising the different 'other' in the same terms and within the same parameters that the 'self', at some level of abstraction,

17 Detmold (1993) p 160.

18 Ibid, p 161.

19 Ibid, pp 161–2 (emphasis added).

conceives of itself. A unity between self and 'other' is invoked; the particular is subsumed in the general. The 'other' becomes 'other conceiver and perceiver', the same as '*me*'. This gesture surrenders to the difficulty of grappling with difference. Can *I* not recognise anything more about *you* than the fact that at a very general level we are both receptors of what goes on in the world? The other is transported/transferred into an imagined *we*, a community wrought on the back of the erasure of particularity in the name of a universal, abstract commonality. Contrary to Detmold's claim, accepting that the 'other' is an 'other conceiver and perceiver' does not amount to the recognition of difference. When we conceptualise the 'other' as 'other conceiver and perceiver', 'the individual', 'a human' or 'an end in itself', it is not difference we are recognising but sameness. The particularity we have been challenged to grapple with, to recognise, is subsumed in the 'abstraction' of these generalities.[20] Characterising the 'other' as a 'second and different end-point of perception and desire' is a way of acknowledging that someone else exists and that my perceptions and desires, consciousness and normative framework, are not the only ones. However, this gesture which recognises the *existence* of the 'other' — in the case of *Mabo*, it is the abandonment of the *denial* of the existence of Aboriginal people by the doctrine of *terra nullius* — is not the recognition of difference. The very different way in which Aboriginal people relate to the land is subsumed in the conceptions and categories by which they and their relationship to the land is received by the common law.

Detmold's analysis is yet another example of the persistent flaw in liberal humanism. I alluded earlier to the tendency in liberal humanism to emphasise difference and then erase it by the very gesture that purports to recognise it. The gesture usually attempts to invoke an underlying unity that purportedly sustains difference while simultaneously accomplishing an erasure of difference in the terms of this gesture. The dynamic of this gesture is well summarised by Robert Young's examination of Roland Barthes' essay 'The Great Family of Man'.[21] The myth of the global, universal community is accomplished in two stages.

> [F]irst, there is an emphasis on difference — a multiplicity of exotic varieties of work, play, birth, death, etc are compiled; but such diversity is only introduced so that it can be taken away again in the name of an underlying unity which implies that at some level all such experiences are identical, despite their wide cultural and historical differences, that underneath there is one human nature and therefore a common human essence. Barthes argues that such humanism, so

20 I deploy the term 'abstraction' here as a criticism. This is not to say that I dismiss the usefulness of abstraction in theorising. It is the displacement of the particular and the specific wrought in these particular abstractions that I find problematic.

21 R Barthes (1993) 'The Great Family of Man' in *Mythologies*, trans A Lavers, Vintage, p 100.

> reassuring at the sentimental level, functions simply to override differences 'which we shall here quite simply call 'injustices'.[22]

The epistemological origins of this universalising drive are to be found in the enlightenment. It is important that we investigate how this methodology for constructing knowledge and understanding accomplishes the erasure of particularity.

For Horkheimer and Adorno, the enlightenment contains the seeds of this totalitarian gesture which results in the annihilation of the 'other'.[23] The dialectic of enlightenment does not allow correspondence between the referent and the concept which is supposed to represent it.

> The concept, which some would see as the sign-unit for whatever is comprised under it, has from the beginning been instead the product of dialectical thinking in which everything is always that which it is, only because it becomes that which it is not. That was the original form of objectifying definition, in which concept and thing are separated.[24]

This is not merely discursive or the necessary loss of specificity in the process of abstraction. The result of this technique of constructing knowledge is that the 'other' is made to conform to the representation of their particularity. The room for resistance is there, but a law informed by these techniques for 'treating' actual experience can exact a heavy toll.

> What was different is equalised. That is the verdict which critically determines the limits of possible experience. The identity of everything with everything else is paid for in that nothing may at the same time be identical with itself. Enlightenment dissolves the injustice of the old inequality — unmediated lordship and mastery — but at the same time perpetuates it in universal mediation, in the relation of any one existent to any other ... it excises the incommensurable. Not only are qualities dissolved in thought, but men are brought to actual conformity.[25]

It is my contention that 'native title', the concept which emerged in the judgment in *Mabo* as a means of accommodating and recognising the relationship of indigenous people to land, is an example of the 'other' being brought to 'actual conformity'. Notwithstanding that the nature and incidents of 'native title' are to be ascertained as a matter of fact by reference to traditional laws and customs,[26] or that native title would be regarded as 'sui

22 R Young (1990) *White Mythologies: Writing History and the West*, Routledge, p 122.

23 M Horkheimer and T Adorno (1972) *The Dialectic of Enlightenment*, trans John Cumming, orig 1944, Allen Lane.

24 Ibid, p 15.

25 Ibid, p 12.

26 *Mabo* at 58 per Brennan J.

generis or unique' and not forced to conform with traditional common law concepts,[27] the common law has reduced the *actual* indigenous relationship to the land to something other than what it is.

There is a paradox evident in my argument. In order to conclude that the actual experience and particularity of the 'other' cannot be accessed through the concepts we invent, do we not need to know, name and identify the experience or particularity which is lost? Otherwise, how can we know that it has been subsumed or displaced? Do we not have to know what it is before it can be said that there is no proximity between our concepts and the thing being represented? To even attempt to resolve these questions would turn the universalising drive into an essentialising one — and that is far from my project. It is not for non-Aboriginal people to name the character and content of the 'actual' as lived and experienced by Aboriginal people. However, it is possible to recognise the epistemological limits of conceptual thought as a mode of understanding without having to elaborate the content of what is being lost. It is better to allow this analysis to stand on its own than to engage in the contradictory exercise of naming what is lost through conceptual thought. To use the Copernican analogy, it is possible to know that the Earth revolves around the Sun without having to observe this phenomenon from some point in space where the two objects are visible in the same frame, where the actual movement of Earth around the Sun can be observed. We discount geocentrism by acknowledging that the apparent movement of the Sun arises out of our inability to observe our own movement. This is also true of our capacity to have knowledge of the other. It is possible to discount our ability to know the other by acknowledging that conceptual thought is contingent on the limited perspective of the knower. Once we accept that knowledge is limited by the perspective of the knower, we can deduce that there is something beyond what is experienced by the knowing subject.

Recognising that knowledge is relative to the standpoint of the knower is not the end of the matter. The limits of knowledge can be supplemented by dialogue. Non-Aboriginal people can, to a limited extent, know what lies beyond the limits of their knowledge by listening to what Aboriginal people have to say. What is understood through dialogue may never amount to actual understanding. However, it may enable non-Aboriginal people to cease the practices that do actual harm to Aboriginal people and facilitate the emergence of a relationship that allows Aboriginal people to realise their self-determined aspirations. The possibility of this is closed off when concepts like 'native title' or a property right are introduced as the mediating device for the relationship between the two groups. The possibilities then become finite and the dialogue becomes deadlocked. This is evident in the current climate where the debate is dominated by the conditions of extinguishment of 'native title'.

In summary, the invocation of concepts such as 'other conceiver and perceiver' and 'human' as an 'end in itself' are, as Horkheimer and Adorno claim, an attempt to dissolve past injustices and inequalities, but in doing so,

27 Ibid at 89 per Deane and Gaudron JJ.

they 'perpetuate it in universal mediation'. It is the dialectic of this universalising drive that results in our discursive, and for many, bodily enslavement. In the name of including the difference, specificity and particularity of the 'other', the mediating device of an abstract concept is introduced. The result is the antithesis of what is aimed for — it is the loss of what we were striving to include. The singular, particularity of the 'other' is what we are called on to recognise, and we accomplish the erasure of this particularity when it is subsumed in a universal, general concept such as a property right.

In light of this analysis, is there a possibility of doing justice to the 'other' and what would such justice involve?

The Common Law's Encounter with the 'Aporia'

In exploring the possibility of doing justice to the 'other', in encountering and recognising difference, we are faced with the challenge of taking into account the 'other's' *experience* of the world when devising laws and administering their application. In entering into an analysis of what it would mean to do justice to the 'other', it is important to consider the proposition that the 'application of law' and 'according justice' are two distinct phenomena.[28] The validity of this proposition and what it would mean to do justice to the 'other' is usefully discussed by Derrida.

Derrida characterises the experiences of the 'other' as an 'aporia'.[29] Derived from the Greek word for 'passage' (*poros*), 'aporia' indicates the 'impassable' or, for our purposes, the impossibility of reaching the 'experience of the 'other'. However, the experience of this impossibility is essential for justice, so justice becomes at the same time essential and impossible.[30] For Derrida, the experience of 'aporia' means two things.

> 1. As its name indicates, an experience is a traversal, something that traverses and travels toward a destination for which it finds the appropriate passage. The experience finds its way, its passage, it is possible. And in this sense it is impossible to have a full experience of aporia, that is, of something that does not allow passage. An aporia is a non-road. From this point of view, justice would be the experience that we are not able to experience.... But, 2. I think there is no justice without this experience, however impossible it might be, of aporia. Justice is the experience of the impossible.[31]

28 This is by no means an uncontroversial proposition. It is beyond the scope of this article to review this literature here. For a developed argument on the contrary proposition that the application of all laws must include a fresh judgment which accords with morals and that all 'legal' judgments necessarily entail this, see MJ Detmold (1984) *The Unity of Law and Morality: A Refutation of Legal Positivism*, Routledge.

29 J Derrida, 'Force of Law: The "Mystical Foundations of Authority"' (1990) 11 *Cardozo LR* 921, trans M Quaintance, p 947.

30 Ibid. This becomes more clear below where I discuss Derrida's distinction between law and justice.

31 Ibid.

It is this problem of justice that is not addressed by abstract, universal concepts which I discussed above. The 'passage' to reach the 'other's' experience remains untraversed by the universal, general concepts which are used by the law when administering justice to the 'other'. As Derrida writes:

> [h]ow are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form.... To address oneself to the other in the language of the other is, it seems, the condition of all possible justice, but apparently, in all rigour, it is not only impossible (since I cannot speak the language of the other except to the extent that I appropriate it and assimilate it according to the law of an implicit third) but even excluded by justice as law (*droit*), inasmuch as justice as right seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms.[32]

Why does justice, as distinct from law, require this traversal? For Derrida, the application of rules or law (*droit*) in a mechanical way where the judge acts as a 'calculating machine' is not justice.[33] Applying a rule may conform with the law and in that sense be legal but it will not be just.[34] For the decision of a judge to be 'just' it must involve a 'fresh judgment', which can conform with pre-existing law, but 'the responsible interpretation of the judge requires that his 'justice' not just consist in conformity, in the conservative and reproductive activity of judgment'.[35] Justice requires a traversal to a union with the experience of the 'other'. It is this impossible *pre cursor* to justice that we grapple with when law struggles to recognise difference.

For Derrida, this problem of justice is a persistent conundrum in two sites: the origin of law and the undecidability of justice for the 'other'. In considering the problem of justice at the origin of law, Derrida argues that:

> in the founding of law or in its institution, the same problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed. Here the best paradigm is the founding of the nation-state or the institutive act of a constitution that establishes what one calls in French *l'etat de droit*.[36]

In Australia, the original violence at the founding of the nation-state is associated with the doctrine of terra nullius. The view that Australia was a settled colony on uninhabited land was a violent repression, in the Derridian sense, of the existence of the 'other'. *Mabo* was an attempt by the common

32 Ibid, p 949.

33 Ibid, p 961.

34 Ibid.

35 Ibid.

36 Ibid, p 963.

law to free itself of this violence, the violence that inheres in its origin. Drawing from international law, in particular the *Advisory Opinion on Western Sahara* by the International Court of Justice which condemned the doctrine of terra nullius,[37] Brennan J reasoned that if it was permissible in past centuries for the common law to keep in step with international law, it would be consistent with the imperatives 'in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[38] This was a belated attempt to take responsibility and correct the consequences which flowed from the artificial distinction between law and fact which led Blackburn J in *Milirrpum v Nabalco Pty Ltd* to conclude that it was beyond the power of that court 'to decide otherwise than that New South Wales came into the category of a settled or occupied colony', which relied on the 'enlarged notion of *terra nullius*',[39] despite the evidence before him of:

> a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me [Blackburn J].[40]

However, the attempt to take responsibility and ensure that the common law is 'not frozen in an age of racial discrimination' and conforms with 'contemporary notions of justice and human rights'[41] — those persistent universals — is accompanied by a persistent anxiety in the form of a denial. This is the denial that the common law was in any way responsible for the dispossession of Aboriginal people. As Brennan J stresses:

> it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.[42]

There is a transfer of responsibility to the Crown's acquisition of sovereignty which is declared to be non-justiciable in a municipal court.[43] Implicit in this is the fact that the High Court of Australia cannot nullify the colonial condition which gives it the jurisdictional capacity to determine

37 *Advisory Opinion on Western Sahara* [1975] ICJR 39.

38 *Mabo* at 41–42.

39 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267, as cited by Brennan J in *Mabo* at 39.

40 *Mabo* at 39.

41 Ibid, p 30.

42 Ibid, p 69.

43 Ibid, p 31.

the questions which flow from the acquisition of sovereignty, such as whether the acquisition of radical title by the Crown extinguished the antecedent rights of the indigenous people. The attempt to absolve the common law is farcical in circumstances where the conditions for the reception of the common law in Australia is determined by that law.[44] The ability of governments to alienate Crown land and thus extinguish the rights of indigenous people cannot be quarantined as an act of state that does not sully the common law, for it is the common law that lends legitimacy and determines the conditions and consequences of such acts by governments.

At the very moment when the common law was striving to take responsibility for its complicity in past injustices, it reinforced the founding violence of its origin by shielding certain aspects of the common law from deconstruction. It did so by invoking the amorphous notion of a 'skeletal principle' As Brennan J writes:

> [i]n 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.[45]

According to Brennan J, the law is both 'he prisoner of its history' and 'is not now bound by decisions of courts in the hierarchy of Empire then concerned with the development of its colonies' and 'since the *Australia Act* 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control'.[46] Free it may be of Imperial control, but is it any less imperialistic or colonial in its operation? Here lies the 'anxiety-ridden moment of suspense' that Derrida identifies in the moment where responsibility regulates justice.[47] The aspirations of the contemporary Australian legal system are to accord with contemporary values and human rights, but a rule or doctrine which offends these values will only be overturned if a pragmatic test is met.

> Whenever such a question arises, it is necessary to assess whether, if the particular rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.[48]

At the moment when the past was deconstructed and the law appeared as if it was going to take responsibility as a *pre cursor* to justice, we are returned to the violence of its origin. For Brennan J:

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44 See the discussion of the 'Reception of the Common Law' in the judgment of Brennan J: *Mabo* at 34–38.

45 Ibid at 29.

46 Ibid.

47 Derrida (1990) p 955. I revisit this point below.

48 *Mabo* at 30.

> [t]hough the rejection of the notion of terra nullius clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognise such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.
>
> A basic doctrine of the land law is the doctrine of tenure ... and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency. It is derived from feudal origins.[49]

What explains this difficulty the law has in freeing itself of the violence of its origin? Derrida addresses this question and explains it as the inseparability of the concept of responsibility 'from a whole network of connected concepts'.

> ([P]roperty, intentionality, will, conscience, consciousness, self-consciousness, subject, self, person, community, decision, and so forth) and any deconstruction of this network of concepts in their given or dominant state may seem like a move toward irresponsibility at the very moment that, on the contrary, deconstruction calls for an increase in responsibility.[50]

The doctrine of tenure, the stability of the Australian community and the ability of the court to decide in choosing principle were part of the network of concepts which vitiated the move toward justice and responsibility. As Brennan J expressly stated, the 'peace and order of Australian society is built on the legal system' and though 'it can be modified ... it cannot be destroyed'.[51] Indeed, taking responsibility at a time when the continued denial of the existence of indigenous people through the doctrine of terra nullius would have rendered the legal system blatantly racist and illegitimate is consistent with maintaining order and reinforcing the legitimacy of that system. For Derrida, at this point justice is faced with a 'moment of suspense'.

> And this anxiety-ridden moment of suspense — which is also the interval or space in which transformations, indeed juridico-political revolutions take place — cannot be motivated, cannot find its movement and its impulse (an impulse which itself cannot be suspended) except in the demand for an increase in or supplement to justice, and so in the experience of an inadequation or an incalculable disproportion.[52]

'Native title' is precisely such a 'supplement to justice', something added to remedy a deficiency, to remedy law's founding violence. It is

49 Ibid at 45.

50 Derrida (1990) p 955.

51 *Mabo* at 30.

52 Derrida (1990) pp 955–7.

'inadequate' and 'incalculably disproportionate' to the original violence, and in that sense it repeats this violence at the very moment when it attempts to take responsibility for it. Not only is the concept introduced to remedy the violence inadequate to the task of traversing to the point of the experience of the 'other', the terms of the attempted traversal also effects a violence that is symptomatic of the anxiety.

This anxiety presents itself at other points in *Mabo*. Terra nullius is declared to be inaccurate in fact — a movement towards justice. However, the acts of violence and dispossession which terra nullius enabled, the extinguishment of the antecedent rights of indigenous people, is endorsed by the Court. As Detmold correctly points out, as 'native title' receives its nature and content from Aboriginal law (the law of the other), then extinguishment cannot be effected, at least not in a way consistent with Aboriginal law. Detmold argues that:

> [t]here is no justification for such a radical distinction between title and extinguishment of title. Certainly, Brennan J distinguishes between skeletal and non-skeletal principles of the common law, but on what ground is extinguishment of title skeletal but [native] title not? And, anyway, even if that distinction can be sustained, the recognition of (different) otherness is reduced to a token acceptance of non-fundamental (non-skeletal) things, and we might better (more honestly) be back with *terra nullius*.[53]

While the court purported to discard the doctrine of terra nullius, the acts of dispossession sanctioned by that doctrine are accepted without question. To that extent, the doctrine of terra nullius as an instrument of dispossession continues its reign. As Purdy and Kerruish point out, indigenous people who do not satisfy the criteria for 'native title' 'continue to be unidentified inhabitants of a terra nullius'.[54] This reading suggests that *Mabo* was an unsuccessful attempt by Australian law to recognise difference and treat the 'other' as a subject whose normative framework is respected. Indeed, Purdy and Kerruish make the important observation that Aboriginal law was not treated as 'law' by Australian law. It was treated as a 'fact' to be established with evidence by applying the parameters and criteria set by the law of the coloniser.[55]

Where does this leave the possibility of justice in relation to Aboriginal people? The colonial drive to consolidate the appropriation of land and secure it under a regime of land title unassailable by those from whom it was stolen was augmented by the decision in *Mabo*. The concept of the 'nation' and sovereignty issues I have not discussed at length but which are no less significant have to be problematised in order to explore their place in the

53 Detmold (1993) p 162.

54 J Purdy and V Kerruish, 'He 'Look' Honest — Big White Thief' (1998) 4(1) *Law, Text, Culture* 146 (special issue: 'In The Wake of Terra Nullius', ed C Perrin), p 161.

55 Ibid, p 153.

colonial project.[56] We are faced with the challenge of taking responsibility for past injustices and constructing ethical frameworks for doing justice to the 'other'. Deconstructing the universalising drive of humanism is not an abandonment of the possibility of ethical relations and it is a misrepresentation of the politics of this enterprise to characterise it as nihilistic. It is now left for us to explore the possibilities for an ethical encounter with the 'other'.

The Way for the Present...

How should non-Aboriginal people position themselves for recognising the particularity of Aboriginal people? And, to what extent can law be an instrument for this purpose — to what extent can law do justice? In *Mabo*, an attempt was made to devise a concept for recognising the Aboriginal relationship to land. This was called 'native title'. In this article, I have examined the epistemological underpinnings of this enterprise. Through the invention of 'native title' the law has confined what justice may entail for Aboriginal people. I have attempted to point out that this is not justice. Most of the post-*Mabo* debate has focused on property rights, thus confining the positionality that can be adopted by Aboriginal and non-Aboriginal people. A more dialogic approach is necessary. Both Aboriginal and non-Aboriginal people need to explore much more flexible and temporary categories and concepts for resolving the conundrum of recognising difference. The positions taken need to be momentary as we are now situated at the limits of understanding. The beyond may never be reached, but injustice is perpetuated by ignoring its existence and by closing off the possibility of adopting new, more appropriate positions.

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56 Purdy and Kerruish explore some of these issues, examining the relationship between racism, colonial rule and the capitalist mode of production: ibid, pp 162–5.

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