AN ALTERED JURISDICTION
corporeal traces of law

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> The difficulty is not in perpetrating the deed,
> but in getting rid of the traces.[1]

> Indigenous peoples have quickly recognised that international law, word processors and even human rights rhetoric can hold the lines of power as fiercely as the guns and strychnine of times past. All this might give rise to deep pessimism.[2]

taking a part

At this moment, the articulation of law and native title has sunk into an immense discourse. Case reports are lengthy while their translation and exegesis is even longer; cafes, lecture theatres and taxis reverberate with the idioms of the so-called race debate; the fulminations of politicians (parliamentary or demotic) veer, when not exercising the right of silence, from the terse and reserved to the loquacious; legislative production becomes ever more voluminous with each amending native title bill; specialist journals have devoted special and not-so-special issues to representing, once again, the relations of law and native title. And so the discourse goes on.

Despite such volubility, the question of the corpus constructed in and exchanged as the law of native title is far from certain. What *is* the body of this law and *how*, if at all, is it articulated? A frequent response is to reflect back the plural and manifest parts of law so as to form an image of the extant system and its ideals, our pragmatic compromises. Here, law is already on the scene and all that remains for us is to represent the 'facts' and 'logic' of native title. A less familiar, although no less obvious, aspect of this representation is the very difficulty experienced in setting the scene for the elaboration of that logic and those facts. It seems that our experiences of law are so fragmentary and partitioned that it is far from self-evident how they could settle down and take hold as a system of rights and interests. Even if

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1 S Freud (1955b) 'Moses and Monotheism' in J Strachey et al (eds and trans) *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Hogarth Press and Institute of Psycho-analysis, vol 23, p 43.

2 M Dodson (1993) *Land Rights, The Religious Factor*, Charles Strong Memorial Trust, Flinders University, p 74, quoted in N Sharp, 'Native Title: the reshaping of Australian identity' (1994) 3 *Arena* 115, p 146.

we wanted, could they be taken up, once again, into a unified and coherent body? In other words, the body of law displays a considerable degree of anxiety about its status, *its ability to represent both itself and its other* — and hence to get started. The concern of this article is with the anxiety of representation or, in analytic terms, with the force of the 'other scene' which sets the legal corpus in motion and on its way.

In order to set the scene, consider the case report of *Wik Peoples v State of Queensland*.[3] The initial distress resolves itself into the representation of address. The knowledge and action of address is typically represented as a matter of procedure and, specifically, one which takes the form of an interrogation. A number of preliminary questions were answered by Drummond J at first instance. On appeal, first to the Federal Court and then removed to the High Court, it was these questions which demanded a response. Yet whether such a response is possible cannot be taken for granted, let alone assumed. The representation of the questions is the subject and object of repeated comment on the part of the High Court.[4] Gummow J remarks that the effect of the decision at first instance is to 'foreclose' the occasion for a trial of issues going to the establishment of native title and its content.[5] In similar vein and at the very outset of his opinion, Toohey J adds that whether the appellants are the holders of native title in respect of the leased land 'was not a matter explored and is shut out by his Honour's answers to the questions. The effect is to clothe the principal questions with a certain unreality'.[6] If that is the pretext, the 'postscript' of Toohey J reinforces the point. Written with the concurrence of Gaudron, Gummow and Kirby JJ, the meaning of their answers is prefaced by the comment that '[i]n these appeals the court has been called upon to answer questions which, no doubt, it was hoped would resolve all important issues between the parties. Having regard to the form of the question framed for the purpose of the proceeding in the Federal Court, that has not proved possible.'[7] While

3 (1996) 141 ALR 129 (hereafter *Wik*). The full title of the report also incorporates the appeal of *Thayorre People v State of Queensland and Others*.

4 The specific background to these comments may be found in the various determinations of the Waanyi case: *Re Waanyi People's Native Title Application* (1994) 129 ALR 100 (French J upholding National Native Title Registrar's decision that, on the basis of the evidence of extinguishment by the grant of pastoral leases, a prima facie claim could not be made out); *Re Waanyi People's Native Title Application* (1995) 129 ALR 118 (after further submissions on the issue, French J again declares that a prima facie claim could not be made out; *North Ganalanya Aboriginal Corporation v Queensland* (1995) 132 ALR 565 (Full Court of Federal Court upholding the ruling by French J); *North Ganalanya Aboriginal Corporation v Queensland* (1996) 185 CLR 595 (High Court ruling that the relevant evidence is the material submitted by the applicant and that, on the basis of that material, the claim was arguable and that the Registrar should have accepted the application).

5 *Wik* at 221; see also at 222.

6 Ibid at 166; see also at 185 and at 181: 'As the questions are framed, the question of extinguishment does not then arise'.

7 Ibid at 190. See also Kirby J's construction of the 'procedural saga' at 253–254.

the address of judgment might be procedural, the interrogatory remains refractory; the place from which judgment could proceed — to a substantive statement of the law — is foreclosed by the mode of representation. In the event, the response displaces the questions by reformulating them; the judgment of law is left hanging. This is no mere figure of speech but a constitutive part of the very process of representation. It recurs in the course of attempting to name the object to be adjudged. While the pleadings of the claimants and the questions demanding a response from the High Court speak of 'aboriginal title', what is substituted is 'native title'. This is done with some hesitation on the part of Kirby and Toohey JJ. In an aside, the latter notes that '[t]he expression "native title" and "native title rights" are now part of the vocabulary of law. However, I still confess a preference for "traditional title"'.[8] Kirby J confesses a similar preference but he explains his continued invocation of 'native title' by reference both to conventional judicial and legislative usage and to the fact that native title incorporates both Aboriginal peoples and Torres Strait Islanders.[9] These hesitations also inform the propositional structure of substantive law. Hence, the authorship of native title has been removed repeatedly from the extant system of common law and placed in the disjunct hands of aboriginal customary and legal practices. Deane and Gaudron JJ noted in *Mabo v State of Queensland (No 2)* that it is preferable to 'recognise the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis and unique'.[10] Having departed from common law, its authorship is assigned elsewhere. Brennan J's statement in *Mabo* has become iconic: native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[11] Yet, as Noel Pearson reminded us on the 20th anniversary of the Northern Territory land rights legislation, aboriginal law is not the author of native title either 'because patently aboriginal law will recognise title where the common law will not'. While

8 Ibid at 165 fn 154 and accompanying text.

9 Ibid at 249 fn 556 and accompanying text (per Kirby J). A reading and comparison of the difficulty of nomination both in respect of native title and in respect of the statutory use of 'leases' is pertinent in both these cases.

10 *Mabo v the State of Queensland (No 2)* (1992) 107 ALR 1 at 67 (hereafter *Mabo*). Despite this, in *Mabo*, the High Court did assimilate, to some extent, native title to personal and proprietary rights of the extant system of common law. See, for example, at 44 per Brennan J and at 83 per Deane and Gaudron JJ. Dawson and Toohey JJ regarded an exercise of logical classification to be somewhat pointless since it was largely a matter of enforcement: at 101–102 per Dawson J and at 152 per Toohey J.

11 *Mabo* at 42. See also at 83 per Deane and Gaudron JJ and at 152 per Toohey J. This is repeated in subsequent commentary; then in *Wik* there are several different formulations. Brennan CJ (as he had become) recites the formula in *Wik* at 151 and, in the context of the doctrine of tenures, at 157. See also at 182 per Toohey J. The syntax of Kirby J is perhaps the most illuminating: 'although not *of* the common law, native title is recognised *by* the common law as not inconsistent with its precepts' (at 256, emphasis added).

the conventional pragmatic wisdom has been to assimilate native title to aboriginal law, native title is at most a 'recognition-concept' or 'recognition space'.[12] Neither of common law nor of aboriginal law, the authorship of native title remains suspended in *the space between* two systems of laws.

It seems then that there is a constitutive inability to represent a site *external* to law which could guarantee the existence of law. In short, the body of law is suspended. Neither the representation of native title nor the form of the question provides an address for law, at least not without prompting a good deal of anxiety in law over its own status. Of course, such a state of affairs may be different if we could represent an *interiority* of law. Yet on the face of it, such an attempt encounters an anxiety that is, if anything, even more pronounced; the self-representation of law is seemingly unavailable to us. It would appear that we are living in the aftermath of a disastrous breach. A few examples, again in the context of the *Wik* case, will suffice to take the measure of this representation.

A certain triumphalism greeted the defence of common law in *Mabo.* Nevertheless, it is not uncommon to hear of the demise of the common law way of doing things. A number of ways of situating this demise circulate. Here, one could cite the disappearance of the old forms of action. Relatedly, one could take part by relating the story of the partitioning of tenures and estates into a fragmentary aesthetics that both separates the Australian situation from English law and gets in the way of business. Referring to the new forms of statutory tenure, Millard and Millard note that '[n]othing corresponding to the body of laws thereby created is found in English law'.[13] In a similar vein, Fry invokes a more extensive bodily partitioning when he remarked:

> [g]one is the simplicity of the law concerning modern English tenures; gone is the senile impotence of the emasculated tenurial incidents of modern English Land Law. In Queensland, as in the rest of Australia, we are in the middle of a period in which the complexity and multiplicity of the law of Crown tenures beggars comparison unless we go back to the early medieval period of English Land Law.[14]

Alternatively, the demise could be described in terms of the rise and dominance of a technical reason which has excluded experience itself from

12 N Pearson (1997) 'The Concept of Native Title at Common Law' in G Yunupingu (ed) *Our Land is Our Life*, University of Queensland Press, pp 153–4 and *passim.* In *Wik*, considerable ink is spilt on this thematic of recognition and its relation to enforceability.

13 AC Millard and GW Millard (1905) *The Law of Real Property in New South Wales*, Law Book, pp 5–6, as quoted in *Wik* at 225 per Gummow J.

14 TP Fry (1946) *Freehold and Leasehold Tenancies of Queensland Land*, p 29, as quoted in *Wik* at 225 per Gummow J. All of the majority in *Wik* cite from Fry primarily as historical fact and to demonstrate that feudal notions were inappropriate to Australian land law; see especially Kirby J at 39.

thought, so much so that knowledge and understanding have been sundered.[15] Of course, this is not to say that we aren't fascinated with the dead letters of the common law tradition of experience. At least according to Gummow J, traditional concepts 'may still exert in this country a fascination beyond their utility in instruction for the task at hand'.[16] Similarly, as the repeated invocations about 'judicial activism' evoke, the oracular theory of common law is rarely articulated with any rigour in a situation where the dominant representation of adjudication and interpretation oscillates between personal decisionism and the policies of social order. Or, as Gummow J put it comparing the historiography of critical legal studies, the evolutionary and functional representations of history have removed the ground from which it becomes possible to 'adhere in an absolute form' to the declaration of a law that arrives from time immemorial.[17] What has disappeared in time is the prudence and practice of the tradition and its institutional forms of hermeneutics and rhetoric. In their place, there is substituted the factual history of law and the socio-logic of acts of state. But the pathos of such remarks is not only conjured up by the apparent demise of the common law. At the same time, it appears that faith in the ideal of reason has waned. Gummow J takes note of the tendency to regard the logic and classifications of legal life as little more than a self-justifying 'rhetorical device'.[18] The possibility that reason could provide a foundation for the knowledge and action of law seems uncertain in the wake of its failure to guard against (if it did not contribute to) the mass expropriation of everyday

15 See generally T Murphy, 'The Oldest Social Science: the epistemic qualities of the common law tradition' (1991) 54 *MLR* 182 at 182. This representation of the demise, I think, is being invoked in *Wik* when Gummow J mentions the need, post-*Mabo*, 'to adjust ingrained habits of thought and understanding' (*Wik* at 227; see also at 232).

16 *Wik* at 226. He ends his extraordinary meditation on the common law tradition by putting all the difficulties noted to one side and states that, quoting from the Canadian judgment of *R v Van der Peet* (1996) 137 DLR (4th) 289 at 377, 'the better guide is the time-honoured methodology of the common law' (*Wik* at 232). In *Van der Peet* at 377, Maclachlin J had distinguished between analytical or a priori reasoning and empirical reasoning with the effect that he assimilates the common law tradition to a 'empirical historic approach':

> This is the time-honoured methodology of the common law. Faced with a new legal problem, the courts look to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.

17 *Wik* at 228. The *locus classicus* of historiography in the critical legal studies movement in the United States is evoked by the footnote to R Gordon, 'Critical Legal Histories' (1984) 36 *Stan LR* 57, pp 63–5. A number of pages later (*Wik* at 231 per Gummow J), the common law is assimilated to native title in that what is lost is the destruction of their foundation, our ability to represent them.

18 *Wik* at 231.

lives, cultures and peoples. In brief, neither reason nor tradition seem able to provide the plural parts of law with the security of self-representation; the body of law has disappeared in time and/or on the tides of history. Such an apparent disappearance could moreover be situated in the context of a more general demise in reflection on law and ethics. Here, the modern diremption of law and morals and its substitution by the facts of law seems to have removed the generic ability to articulate the values of law. The declarations of the 'moral shortcomings' of determinations of native title, the apologies for dispossession and the stolen generation (if and when they are made), all seem unable to be performed as a performance of law. In all these various ways, the discourse of native title seems to incarnate an image of law in which and from which it is impossible to articulate the question of juridical existence and to articulate it as a question of law.

While the effects of these representations are far from guaranteed, the representations do at least signal that the body of law is anxious. Anxiety arises when the subject of law is confronted with the desire of the other *and* does not know what object it is for that desire. In this affect, the discourse of native title cannot but take a part. What is of interest here is the acting out of this anxiety, an anxiety which congeals on the question 'Am I legal?'. In addressing, judging and instituting the law of native title, law and native title are unhinged both from each other and from themselves. Having been taken apart, what is substituted is a narrative of an extant system of law, its ideals as well as its pragmatic compromises of rights and interests. However, to note such a compensation is not yet to say that the law is put back together again. Rather, what the substitution displaces is the force and form which sets the body of law in motion and on its way.

In order to explore this affective economy of representation and its displacements in more detail, this discussion returns the question of the law of native title to the ancient and uncanny topos that there is a 'body of law'. As the subjective sense of the genitive indicates, the commonplace imagines the body as that which gives law its power and authority to speak, its jurisdiction. This body and its images, our memories, are evoked by way of two case reports. The first *mise en scène* takes place in the context of the judgment of *Mabo*. While the substance of this judgment has been the subject-matter of considerable commentary, the hope of returning to the material form of the judgment is that its force will once again be rendered strange. What is evoked are images of death and transmission, murder and inheritance. The judgment responds to the obligation prompted by the expropriation of aboriginal life and, more specifically, the contiguity between that expropriation and jurisdiction. Modern representations of law become a confession of guilt; adjudication and interpretation become penitential. However, what is exhibited on and as the staging of modern law is the return of the contiguity of law and death in the substituted formation of native title. The second *mise en scène* of modern law continues the description of jurisdiction and, specifically, the power and authority to speak in the name of law in the wake of *Mabo*. The contiguous images are those of sovereignty and genocide. What is described is the manner and processes by

which *Coe v Commonwealth* insistently displaces the site of legal enunciation,[19] the body from which the laws of self and other come to be articulated.

The representation that emerges from the narrative retold is an image of an altered body of law. In order to be legal, the subject of law must incorporate the other since the subject receives its message from the other. It is this necessity which here and there produces the anxious predicament of modern law. However, in the wake of the so-called '*Wik* debate', it may seem particularly perverse to return to the judgments of *Mabo* and *Coe*. In this article, however, my concern is not so much with the substantive law of native title — although it forms a part — but with the images in which it speaks. My conviction is that an analysis of law, critical or otherwise, which ignores the legal idiom of images does so at the risk of being institutionally and politically irrelevant. It is by way of images that we come to receive the truth of law and take up our inheritance and it is in the allegorical idiom of images that the affective qualities of jurisdiction are embodied.

belonging to law

Jurisdiction is not so much a discourse, not so much a statement of the law, but a site or space of enunciation. It refers us first and foremost to the power and authority to speak in the name of law and only subsequently to the fact that the law is stated — and stated to be something or someone. In a range of debates, the force of that site has been represented as a matter of socio-historical violence and its empirical consequences. Such representations have rediscovered the complicity between the wholesale dispossession of Aborigines and the possession of law. Yet the affective dimension of this complicity remains a question. The predicament of modern law is that it apparently has no place from which to engage the symbolic order of existence, no place from which to reimagine another law. In order to take up the force and form of this predicament, I return to the (post)colonial displacements of *Mabo*.[20]

Some ten years after the litigation has begun, the High Court hands down a decision. It was something of a juridical memorial to two of the initial plaintiffs who, by the time of the decision, had died. The memorial has been invested with countervailing claims (descriptions and misdescriptions) but what is indisputable is that the name of the decision has been thoroughly embedded in the popular and professional understanding of law.

The litigation had named both the Queensland state government and the Commonwealth government as the defendants. The subject matter of the declarations requested from the court ranged widely. In respect of the Murray Islands, declarations were requested concerning the status of traditional native title and usufructuary rights based on local custom, on

19 (1993) 68 ALJR 110 (hereafter *Coe*).

20 The description of *Mabo* and subsequently the *Coe* case provided borrows from my article addressed to a North American audience and locating the law of inheritance inscribed on *Mabo* within the foundation of modern criminal law: P Rush, 'Deathbound Doctrine' (1997b) 16 *Stud Law, Pol & Soc'y* 69.

original title and on actual continuing possession. In respect of the government defendants, declarations were requested as to both the right of the Queensland state government to extinguish the land title of the Meriam people and the compensation owed by the defendants for the impairment of their title. From the outset, the Queensland government tried to defeat the claim by arguing that the plaintiffs' statement of claim did not give rise to a recognisable cause of action. Apparently, anything that is unrecognisable becomes illegible.[21] Eventually, the Queensland government drops this line of argument and the parties tried to come to an agreed statement of facts. In 1985, however, the Queensland government pursued another course of action to forestall the claim before it was heard, namely, passing legislation which retrospectively declared that, upon annexation by Queensland, the Murray Islands became vested in the Crown free from all other rights and interests. This legislation was declared invalid by the High Court, the reason being that it contravened the *Racial Discrimination Act* 1975 (Cth).[22] As yet, there had been no agreed statement of facts and the High Court sent the initial claim to the Supreme Court of Queensland in the person of Justice Moynihan in order to hear and determine the facts raised by the claim. Moynihan J held sittings of the Supreme Court in Brisbane, Thursday Island and Mer Island. The hearing and determination took some three and a half years. In November 1990, Moynihan J handed down his three-volume determination of facts.[23] The facts concerned the history of occupation by Europeans and by the indigenous peoples, the practices and laws of

21 The 'causes of action' in modern law are usually regarded as *types*. The more general problem this poses for modern law is whether and how these typical causes permit the move from knowledge to action. It is this problem which becomes a key issue for the High Court and which it addresses in terms of 'recognition'.

22 The state legislation was the *Queensland Coast Island Declaratory Act* 1985 (Qld). In technical legal terms, it was declared invalid by virtue of being inconsistent with Commonwealth legislation, namely section 10 of the *Racial Discrimination Act* 1975 (Cth). The latter Act was passed by the Commonwealth as part of its obligations under the UN Convention on the Elimination of All Forms of Racial Discrimination, which was ratified by Australia in 1975. The *Racial Discrimination Act* prohibits discrimination in a range of contexts including land, housing and accommodation. In accordance with s 109 of the Commonwealth Constitution, Commonwealth legislation takes precedence over state legislation — and, in this instance, the Queensland legislation — where the latter is inconsistent with the former. See *Mabo v Queensland (No 1)* (1988) 166 CLR 186 and, for commentary, G Airo-Farulla, '"Dirty Deeds Done Dirt Cheap": Deconstruction, Derrida, Discrimination and Difference/ance in the (High) Court' (1991) 9 *Law in Context* 102.

23 Determination by the Supreme Court of Queensland pursuant to reference of 27 February 1986 from the High Court of Australia, 16 November 1990. For an anthropological and dialectical critique of the factual construction, see N Sharp, 'Contrasting Cultural Perspectives in the Murray Island Land Case' (1990) 8 *Law in Context* 1 and N Sharp (1996) *No Ordinary Judgment: Mabo, The Murray Islanders' Land Case*, Aboriginal Studies Press.

inheritance through which land was both demarcated and passed on by the Meriam nation and, more generally, the nature of the rights and interests that attach to land on the Islands. Having determined the facts, the matter went back to the High Court. Two years later, the High Court delivered a decision.

By a majority of six to one, the High Court found in favour of the plaintiffs, although, as a matter of the facts, Eddie (Koiki) Mabo and another plaintiff were now dead. The court held that the Murray Islands were not Crown Land and specifically not Crown Land within the meaning of the *Land Act* 1962 (Qld); that the Meriam people were entitled to possession, use, occupation and enjoyment of the Murray Islands; that, upon acquisition of sovereignty over and annexation of the Murray Islands by the Queensland state government in 1879, the Crown acquired radical title in those islands; and finally, that native title to land survived the acquisition of radical title and sovereignty by the Crown. In brief, the plaintiffs' claims were granted. This grant, however, was qualified by rulings stating that there had been some extinguishment of native title over particular areas of the islands. Beyond these pared-down rulings, the various opinions of the court differed as to how to address the questions of determining native title, extinguishing native title and compensation for such extinguishment.[24] The following discussion focuses on how the judgment positions itself *vis-à-vis* two elements. One element is the telluric mythology by which the common law of England was received as Australian common law. In this context, the particular concern is with the articulation of terra nullius and its putative death or abolition in the present. A second element is the expropriation of aboriginal life and culture and the extinguishment of aboriginal laws. As I will suggest, the judgment puts these elements into circulation but in such a way that it cannot extract its own position from that which it denounces.

The High Court declared that the doctrine or inherited teaching of terra nullius, which provided the legal foundation of the Australian legal system, was implicated in the '*unutterable* shame' that the Australian nation must feel for the social and cultural history of aboriginal dispossession. The invocation of a shame or guilt that cannot be uttered has been recited innumerable times since the judgment. It is cited from the joint judgment of Deane and Gaudron JJ. Additionally, the various opinions of the High Court have difficulty in differentiating the shame that cannot be uttered from the shame that must not be uttered. Their invocation of the 'dispossession of the original inhabitants' begins:

> The first days of the Colony were peaceful in so far as the Aboriginal inhabitants were concerned.... As time passed, the connection between different tribes or groups and particular areas of land began to emerge. The Europeans took possession of more and more of the

24 The opinion of Brennan J (as he then was) is typically read as the leading judgment. I will follow this practice, although it should be noted that there are differences on particular substantive law issues as between the various justices. Dawson J was the dissenting opinion.

> lands in the areas nearest to Sydney Cove. Inevitably, the Aboriginals resented being dispossessed. Increasingly, there was violence as they sought to retain, or continue to use, their traditional lands. An early flash point with one clan of Aboriginals illustrates the first stages of the conflagration of oppression and conflict which were, over the following century, to spread out across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame. It came in 1804 in the fertile areas surrounding the lower reaches of the Hawkesbury River.... Throughout the rest of the century, the white expropriation of land continued, spreading not only throughout the fertile regions of the continent but to parts of the desert interior.[25]

Yet from what place is this statement given? From where is the empirical and imperial history of violence exhibited? After all and in its own terms, the reception of this history means that the community is deprived of its ability to speak. It is not only that, within the teaching of terra nullius, the violence remained unsaid (albeit manifest). More fundamentally, it is unsayable; shame and articulation have become disjunct.[26] While the history can be stated as an empirical matter, its affect cannot be uttered — except in the mode of negation.

To remain within the doctrine of terra nullius is to inherit the history of dispossession and violence. The response is a lengthy negation of the doctrine of terra nullius. But also, since the doctrine was implicated in the repeated refusal to acknowledge the existence of aboriginal title, the repudiation of terra nullius seemingly created a space from which to create and recognise 'native title' as a category of the English common law *in* Australia.[27] In the briefest of terms, three strands are weaved throughout the High Court's judgment: (i) in a language that the judges describe as passionate, the

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25 *Mabo* at 78–79.

26 In other words, the various opinions of the High Court have difficulty in differentiating the shame that cannot be uttered from the shame that must not be uttered as law. A similar structure informs the invocation of a 'significant moral shortcoming' by French J in *Re Waanyi People's Native Title Application* (1995) 129 ALR 118 at 166 but this time it is articulated as the relation between the judiciary and the executive rather than between affectivity and enunciation.

In a 'postscript' to the reasons for judgment, French J declares that '[t]he process must seem perverse to those who maintain their association with their country and upon whom indigenous tradition confers responsibility for that country. The operation of past grants of interests to irrevocably extinguish native title, regardless of the current use of the land, reflects a significant moral shortcoming in the principles by which native title is recognised' (at 166).

27 The term 'native title' is a catachresis. It is used by the High Court not without a good deal of violence, in as much as it refers to the inheritance of both Aboriginal peoples and Torres Strait Islanders (see n 8 above and accompanying text). This assimilation, of course, elides the differences between Aborigines and Torres Strait Islanders but also excludes South Sea Islanders. Of course, such elisions are enabling if violent; with these elisions, the judgment declares that its law applies to all indigenous peoples of Australia — and was thus not confined to the particular facts of the case before them.

Court expresses *concern* at the dispossession of Aborigines and Torres Strait Islanders; (ii) the judgment *repudiates* the empirical and logical viability of the doctrine of terra nullius; and (iii) the Court *substitutes* a doctrine of native title.

However, there is a fourth strand of the judgment and it continues to trouble the law of native title. This strand is the other side of the formal legal recognition of native title. In order to succeed in proving that an aboriginal claimant possesses native title, the claimant must prove that the title has *not* been *extinguished* by the rules and actions of imperial, colonial or national states. Extinguishment of native title would only have taken place if the legislative or executive government exhibited a 'plain and clear intention'. Thus, while the judgment acknowledged the prior title of the aboriginal peoples to the land now called Australia, the judgment also remarked that the priority of aboriginal title has been extinguished to a large extent by land grants which are inconsistent. In short, the history of occupation and conquest is subordinate to the logic of possession. What remains to be done by the judgment is to determine the *failure* of extinguishment or, more positively, the *survival* of native title. In doing so, *history is reintroduced but it has changed places.* Now it is not so much the history of government and executive action but the history of aboriginal practices. The main way in which an aboriginal claimant is required to prove the failure of extinguishment is by showing that the claimant is an aboriginal and, specifically, that the claimant has come into her or his inheritance. Moreover, the proof of transmission and reception is to be done by demonstrating a physical and cultural connection[28] with the land through the continued repetition of ancestral and telluric mythologies.

The judicial teaching of native title is thus primarily a doctrine of the *extinguishment* of native title in that it shifts the burden of substantive law away from Anglo-Australian institutions and onto the evidence of aboriginal claimants as to their reception of aboriginal institutions. The effects of this displacement are twofold: one in respect of how the Aborigine is legally determined and another how the law is determined.

In respect of the legal determination of the aboriginal, the displacement produces a situation in which indigenous peoples are required to orient their daily lives to law, to pledge themselves as subjects of law, to experience themselves as legal subjects. In the local context of the Anglo-Australian law of native title, however, aboriginal experiences of law are not cognisable. Thus, as the lawyers in the *Mabo* case have noted, the difficulty of the claim largely resided in the production of proof. In common law aboriginal title, the claim is subject to the demands of the law of evidence. Hence, the actual proof of title to land in *Mabo* constantly fell foul of the rule against hearsay. The rule against hearsay prohibits testimony which reports what the witness

28 The nature of the legally required connection remains the subject of considerable dispute. The latest salvo fired in the dispute has been the Native Title Amendment Bill 1997 (Cth), which proposed to reduce the test of connection to a physical one. In December 1997, the Senate rejected the proposed physical connection test for native title claims and placed limitations on the physical connection test proposed for determining access to leases.

heard *other* people say. Law regards testimony from others as inherently unreliable and specifically unreliable because of something intrinsic to the manner of transmission. The effect in this context is that the oral transmission of title is severed by the law of evidence from the inheritance of title. In short, the indigenous evidence is ejected at the same time as the demand to prove title is placed upon indigenous peoples.[29] The Aborigine is caught in a double-bind between logic and history, form and procedure, law and fact. The effect is that the Aborigine is determined adjectivally, which is to say evidentially or aesthetically.

The second effect of the shift from formal law to the procedural processes of evidence concerns the *self-representation* of the law of native title. At this level of the High Court's judgment, what is crucial is that the emphasis falls on the legal determination of *extinguishment* of title. Native title as a specific legal doctrine only exists in law as a survival, a remnant and remainder. The *law* of native title becomes insubstantial, adjectival. The legal foundation of native title is indeterminate at the same time that the Aborigine is determined adjectivally. The combined effect is that native title can only ever be juridically experienced second-time round in the form of injury, which is to say in the form of its extinguishment.

In fact, the circulation of the substantive and the insubstantial, law and evidence, replays a structural ambiguity in the seemingly negated doctrine of terra nullius. As I have indicated, the common law doctrine of terra nullius is placed as the foundational or inaugural moment of the imperial, colonial and national laws of Australia. And as Brennan J indicates, that inaugural moment is where law and violence are put into exchange, where the proximity of law and violence is exhibited.

> [T]he common law *itself* took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides,

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29 For example, consider *Mason v Tritton* (1994) 34 NSWLR 572. In this case, a criminal defendant's claim of a customary right to fish for abalone was thrown out of court due to lack of evidence: (i) that native title survived; (ii) that if it did exist, there was no evidence of entitlement to exercise native title rights to fish; and (iii) that if he was so entitled, there was no evidence that the defendant was in fact exercising that native title right. It is no solution to such difficulties to vest the jurisdiction to determine land rights in informal tribunals. Of course, such tribunals are by definition not subject to or bounded by the laws of evidence. However, as the practice of the Aboriginal Land Commissioners in the Northern Territory attests, the hearing of evidence and the conduct of the land claims are hedged in on all sides by quite rigorous 'practice directions'. These 'practice directions' function as a de facto system of substantive laws of evidence. In place of argument, let me anecdotally note the way in which lawyers for aboriginal claimants invariably want to conduct the hearing of the evidence at the relevant sacred site and the practice directions repeatedly reduce the possibility of such embodied evidence taking place. More generally, see G Neate, 'Determining Native Title Claims — learning from experience in Queensland and the Northern Territory' (1995) 69 *ALJ* 510.

> vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live.[30]

Given that terra nullius has been placed at the foundation of Anglo-Australian law, what the judgment risks is that the overturning of terra nullius will not simply be a repudiation of a particular doctrine but a repudiation of doctrine or the inherited teachings *as such*. The judgment would cut itself off from its ground or jurisdiction and, correlatively, Anglo-Australian law itself would have no space from which to speak. Yet that space is, from the outset, split or doubled. And, as I want to go on and describe, it is within the space of this doubled reading that the judgment unwittingly circulates.

The doctrine of terra nullius is popularly translated as 'land belonging to no one'. It has been described repeatedly as a mirage, a bizarre conceit, in short, as a legal fiction. What is somewhat less familiar is to find it being read on its own terms, that is, as a fiction.[31] Instead, it is converted into an ideal form which has been imposed on the facts or which is opposed to the facts. As a fiction, however, it must be read literally - that is, neither opposed to nor assimilated to the fact of law but emerging as the idiom of the phantasmatic structure of law. Like all phantasms, the uncanny structure of 'land belong to no one' is that it has plural places of attachment for the legal subject, the subject can enter the doctrine by way of 'belonging' or be captivated by 'no one'. Thus, the doctrine has been and can always be interpreted in two ways: land *belonging* to no one and land belonging to *no one*.

In the interpretation that places the accent of the phrase on 'belonging', the doctrinal formula reads: the Aborigines *exist* and the land does *not belong* to them or anyone. This formula is threaded through *Mabo* in terms of the common law appropriation of the international law notion of terra nullius. Brennan J calls this appropriation an 'extended notion of terra nullius' which simply exposits an evolutionary hierarchy of races.

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30 *Mabo* at 18 (emphasis added). Compare, however, J Purdy (1996) 'Native or Nobody: Colonial Images of Indigenous Australians in *Mabo (No 2)*', paper presented to 15th Annual Law and Society Conference, La Trobe University, Melbourne, 3–5 December. Quoting from Brennan J in *Mabo* at 69, she writes: '[Brennan] declared that what mattered was that "the events which resulted in the dispossession of the indigenous inhabitants of Australia" be identified — not to give Indigenous Australians any legal remedy but "in order to dispel the misconception that it is the common law rather than the action of governments which made many indigenous people of this country trespassers on their own land"' (p vi).

31 An exception is perhaps D Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: a critical analysis' (1996) 18(1) *Sydney LR* 5. The essay details the 'straw man' logic in which the judgment reinvents the doctrine of terra nullius and reinvents it only so as to repudiate the doctrine.

> If the international law notion that inhabited land may be classified terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organisation' that it is 'idle to impute to such people some shadow of the rights known to our law' can hardly be retained.[32]

In short, existence and belonging are severed by time but not in time; the Aborigines exist but it is a primitive existence and thus it does not give rise to belonging.

The other interpretation places the accent on 'no one'. The doctrinal formula is thus elaborated as: the Aborigines do *not exist* and therefore the land does *not belong* to anyone. This formula is weaved through *Mabo* by reference to the international law notion derived from Vattel 'who defined terra nullius as a land empty of inhabitants'.[33] This interpretation is not simply a matter of legal miscognition, as if the existence of the Aborigines was simply ignored by those who wielded the doctrine. In this reading, the aboriginal legal subject does not exist, not simply as a matter of the facts and logic of land law but as the law *of* the land in the strong subjective sense of the genitive.

Both formula, then, articulate law as the site of the conjunction between existence and belonging. When the High Court rejected the doctrine of terra nullius, what was abolished was the claim in the second reading that Aborigines do not exist. The negation of terra nullius thus linked the two readings together at the point of aboriginal existence and specifically as an existence which is cognisable or posited by law. Aborigines thus become an object of information and specifically socio-historical information. Yet in this rearticulation of aboriginal existence, what remains is the broken link of existence and belonging. It is this breach that institutes and returns as the injury of law.

Although incalculable, it is necessary to calculate the costs. One consequence is that the law of native title becomes a substitute-formation of the first interpretation of the doctrine of terra nullius. The law of native title is invested in the conjunction of aboriginal existence and dispossession. The formula of this substitute-formation, or more properly phantasm, is: aborigines do exist *and* the land does not belong to them.[34] As then Prime Minister Paul Keating remarked of both *Mabo* and the *Native Title Act* 1993 (Cth):

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32 *Mabo* at 28. See also at 82 per Deane and Gaudron JJ.

33 Ibid at 28 per Brennan J. Brennan J is quoting in part from *Re Southern Rhodesia* [1919] AC at 233–234, after discussing the *Western Sahara Case* [1975] ICJR at 39 and 85–86.

34 The theoretical elaboration of the notion of a substitute-formation is provided by S Freud (1955a) 'Inhibitions, Symptoms and Anxiety' in J Strachey et al (eds and trans) *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Hogarth Press and Institute of Psycho-analysis, vol 20, pp 77ff.

> It was not, however, of great practical benefit to the majority of Aboriginal peoples and Torres Strait Islanders. Most will not be able to prove the continuing association with their land necessary to claim native title. Many retain a strong attachment to their traditional country, but will be denied native title rights as a result of prior alienation of the land concerned. Many also remain on the margins of this country's economic, social and cultural life.[35]

Yet the uncanny return of that which is dispossessed cannot simply be reduced to the practical exigencies of political and legal life in Australia. The injury of dispossession cannot be reduced to the empirical effects of judicial, legislative and executive action. As I have indicated, the doctrine itself is not an empty space which simply takes on meaning in its application. Rather, it is the substitute-formation as a repetition of terra nullius that is the injury. As a defensive structure, the law of native title incorporates the guilt and unutterable shame of judgment. The guilt of terra nullius trades places with the guilt of native title.

The economy of this exchange is displacement. What is striking about reading the judgment of *Mabo* is that the return of terra nullius in the form of native title never permits the law of native title to settle down. Over the course of the 170 pages, the judgment ceaselessly circulates from substantive law to adjectival evidence to adverbial procedure, from municipal or national law to international law, from a history of dispossession to a logic of the present, from the common law of England to the common law in Australia. To briefly take but one example. As I have remarked, the rejection of terra nullius functions initially to expel history from the logical space of law. However, 'our law is the prisoner of its history'[36] and thus the judgment also moves to defend the logic of law against its own need to use history: the order of time, precedence and inheritance. This defence consists in the identification of Australian law. As Brennan J somewhat offhandedly notes, '[t]he law which governs Australia is Australian law'.[37] In the space opened by this classical metalepsis, history returns as a substitute-formation, variously named as native title, Australian law and, more remarkably, as the emblematic figure of legal logic itself: 'the skeleton of principle which gives the body of our law its shape and internal consistency'. The return of history is the dispossession of law; the substance of law loses its jurisdiction and in its place is a totemic substitute: a skeletal principle of moral responsibility. While this figure of the skeleton has been invoked repeatedly, what is often taken for granted is that the figure could and does bind the knowledge and action of law. Yet, as Brennan himself remarks in *Mabo*, the skeletal principle is a principle which does not differentiate or

35 Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill, Second Reading Speech by the Hon Paul Keating MP, Prime Minister, House of Representatives, February 1995, reported in (1996) 1 *AILR* 45, p 46.

36 *Mabo* at 18.

37 Ibid.

judge. 'It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not.'[38]

One conclusion, then, is that the representation of the dispossession of Aborigines is a relay for the dispossession of law. The skeletal law of native title becomes a law that has lost its destination and its promise but which is nevertheless followed faithfully. At the end of the first year of the *Native Title Act* 1993 (Cth), the President of the National Native Title Tribunal declared that it had no jurisdiction.

> To use, I hope, not an over-dramatic metaphor, native title may prove ... to be a thing of shards and fragments, bits and pieces, with sharp edges and corners that have nothing much to do with the concept of country as the Aboriginal people see it.

And added:

> That is a very hard thing.[39]

Such is the shame that the *Mabo* judgment could not utter: that the substitute-formation of native title has lost its address, that the history of legal dispossession has robbed Anglo-Australian law of its destination and jurisdiction, the unreachable corpus of aboriginal country, aboriginal law. Anglo-Australian law cannot tell the difference between title and dispossession, native and aboriginal. In order to pursue the limits of this law that cannot tell itself apart from others, the next section of this discussion turns to the displacement of and defence against the juridical existence of Aborigines in a post-*Mabo* judgment.

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38 Ibid at 18 and 19 respectively. The figure of the 'skeleton which gives the body of our law its shape and internal consistency' is reiterated by Brennan J in *Dietrich v R* (1992) 177 CLR 292 at 320, a case concerning the legal representation of indigent accused. For commentary on the principle as a question of judicial creativity, F Brennan SJ (1993) 'Mabo and the Racial Discrimination Act' in *Essays on the Mabo Decision*, Law Book, p 86, especially pp 100–1. In *Wik* at 158, Brennan CJ forecloses on the historical determination of law and claims, in dissent, that it is 'too late' to remove the logical skeleton of tenures and estates.

39 R French, President of the National Native Title Tribunal, evidence given before the Joint Committee on Native Title, Hansard, 24 November 1994, p 647. Sharp has noted a similar differend and locates it in the shift from the recognition of Meriam native title in *Mabo* to the recognition of native title for all indigenous peoples of Australia in the *Native Title Act* 1993 (Cth): Sharp (1994) pp 128–30. One year later, with no successful native title claimants in sight, President French recovers himself and reduces the problem to an empirical and procedural difficulty exacerbated by the 'cargo-mentality' of some indigenous peoples. See R French (1996) 'Mabo process opens gate to negotiation', *Australian*, 2 January, p 11. See the critical response by M Dodson, the then Aboriginal Social Justice Commissioner, as reported the same day in the *Australian*, p 1.

'the body of our law'

> The tradition of all the dead generations weighs like a nightmare on the brain of the living.[40]

The Royal Commission into Aboriginal Deaths in Custody was appointed in 1987 to inquire into 99 deaths that were recorded between January 1980 and April 1991. The deaths took place in police custody. Recommendations were made, the object of which was to reduce the criminalisation and death of Aborigines at the hands of the criminal justice system. While the considerable and expansive archive produced by the Royal Commission displays a good deal of concern at the empirical frequency of such deaths,[41] the recommendations on the whole have not been instituted in the criminal justice systems of the various state governments. Moreover, there has been concern at the fact that there has been little if any reduction in the annual rate of deaths in custody. The deaths are now taking place in detention,with a growing number of those deaths taking place in juvenile detention centres. Yet it is not only empirical deaths that have been the object of community concern. As the judicial opinions in *Mabo* repeatedly evoke, the concern is with the death and destruction of a culture, life and tradition. Relatedly, in 1996, nationwide hearings were conducted into the stolen generation and specifically, the 'forcible removal' of aboriginal children from their families, communities and cultures by juridical, legislative and welfare administrations. As the report of the National Inquiry described itself, '[g]rief and loss are the predominant themes of this report. Tenacity and survival are also acknowledged'.[42] As these and other contemporary archives register, there is undoubtedly a growing belief that law is bound to the death and dying of a people with whom the representative community shares nothing. Yet perhaps the most explicit concern for the dead and dying other has been in those cases in which it is the genocide of aboriginal peoples that is invoked. Thus, Hal Wootten (a former Aboriginal Land Commissioner in the Northern Territory and now a member of the National Native Title Tribunal) has examined the practices of the New South Wales Aboriginal Welfare Board and argued that the policy of assimilation which the board pursued fell within the United Nation's definition of genocide. In

40 K Marx (1977) *The Eighteenth Brumaire of Louis Bonaparte*, Progress Publishers, p 10.

41 Royal Commission into Aboriginal Deaths in Custody (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*, 5 vols, Australian Government Publishing Service. There were also individual reports on each of the 99 deaths investigated, as well as numerous research papers.

42 Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Commonwealth of Australia, p 3. See also *Kruger v Commonwealth of Australia* (1997) 71 ALJR 991 concerning the High Court's response to a challenge to the Northern Territory legislation which legally authorised the 'forced removal' of children from their families.

particular, he mentioned the 'attempt to "solve the aboriginal problem" by the taking away of children and merging them into white society'.[43] Or again, at the 1992 Australian launch of the International Year for the World's Indigenous People, the then Prime Minister Paul Keating referred to the 'murder' and 'dispossession' of the indigenous peoples by the Australian nation.[44] Perhaps even more strikingly, some ten years earlier in a judgment in which the substantive legal issue was only tangentially related to questions of genocide and ethnocide, Murphy J of the High Court denounced what he described as 'the unprovoked aggression, conquest, pillage, rape, brutalisation [and] attempted genocide and systematic and unsystematic destruction of their culture'.[45] There can be no doubt then that legal practice reeks of death, pain and suffering. Yet more specifically, each of the above instances indicate that the concern for the expropriated other, whether an individual or a community, is registered in the *self-representation* of law. In *Mabo*, this self-representation exhibited the proximity and exchange of law and death in terms of a confession of guilt and shame. It would seem then that the expropriated other comes first and exerts a pressure in and on the legal representation of practice. The questions that the other asks concern the nature and purpose of juridical existence: a question of the teaching and transmission of the social order and a question of order according to which law, whose law, which set of teachings. In short, the question of the other is the question of jurisdiction and its body parts.

There is a long history to this question in law.[46] Yet, in a post-*Mabo* political and legal climate, the High Court once again had to confront the site or space from which it speaks. The case concerns the Wiradjuri Kooris of New South Wales (NSW). Their claim was that the imperial, colonial and national legal foundations of Australia owe a debt for the genocide of the Wiradjuri nation. Perhaps not surprisingly, the High Court did not accept the validity of the attempt to call into question the inaugural jurisdiction of the Anglo-Australian legal system and somewhat swiftly despatched the

43 Royal Commission into Aboriginal Deaths in Custody (1989) *Report of the Inquiry into the Death of Malcolm Charles Smith*, Australian Government Publishing Service, pp 76–7. Contrast the High Court's counter-conclusion in *Kruger v Commonwealth of Australia* (1997) 71 ALJR 991 that the forcible removal of the children was not authorised by the legislation and hence the legislation did not evidence a genocidal intent.

44 M Ryan (ed) (1995) *Advancing Australia: The speeches of Paul Keating, Prime Minister*, Big Picture Publications, pp 227–31. The text of the speech is also reproduced in (1993) 4(61) *Aborig L Bull.*

45 *Tasmania v The Commonwealth* (1983) 158 CLR 1 at 180.

46 In the specific context of Anglo-Aboriginal legal relations, the convention is to simply begin by noting *R v Jack Congo Murrell* (1836) Legge 72, in which Burton J dogmatically asserted that 'the greatest possible inconvenience and scandal to this community would be consequent if it were to beholden by this court that it has no jurisdiction' (at 72) in a case concerning crimes committed by aborigines inter se. On this and the counter-precedent of *Bonjon* (unreported, 1841); see P Rush (1997a) *Criminal Law*, Butterworths, pp 20–4.

claim. This is the judgment of *Coe v the Commonwealth*[47] and I will argue that the claim prompts a good deal of anxiety in law because it puts on display the defensive fragility of law, namely, that if Anglo-Australian law has a place from which to speak, it is a place which must necessarily be within violence. This violence is not simply a matter of legal and political expediency. The violence in law is not only that which is retroactively and legally justified in the interests of the present legal community, not only the empirical and historical violence of law's effects. It is a violence which comes prior to the self-representation of law; it is a non-legal violence of jurisdiction that is necessary to differentiate legal from illegal violence. It is this force which sends the judgment of *Coe* on its way and circulating.

Ms Coe brought the claim on behalf of the 'Wiradjuri people, who are known as Wiradjuri Kooris and who are included in that group of people known as Aboriginal people'[48] and of which she is a member. She requested that the court make declarations to the effect that the Wiradjuri Kooris are the owners of a large part of southern and central NSW, in fact, some 80,000 square kilometres. For the purposes of this discussion, the declarations requested are of two types. One is a declaration that 'the Wiradjuri are a sovereign nation of people'.[49] This was not simply a request that they be treated as a 'domestic dependent nation', a category of North American jurisprudence which has become a popular theme in recent High Court judgments and their exegetical adherents. Rather, it was a request for a determination that the Wiradjuri are a nation alongside and proximate to the jurisdiction of Australian laws and government. It is a demand that establishes a dual jurisdiction. The second declaration concerns the transmission or inheritance of the Anglo-Australian jurisdiction. It requested that the court declare that the current state and commonwealth governments as well as:

> George III, George IV, William IV, Victoria Regina and the colony of New South Wales, being predecessors of [the current State and Commonwealth governments] ... [did]... by unprovoked and unjustified aggression including murder, acts of genocide and other crimes against humanity, and contrary to international customary law, wrongfully and unlawfully attempt by force to settle, the whole or part of the tribal lands of the Wiradjuri, and partially excluded the Wiradjuri people and the Plaintiff's forebears from the Wiradjuri land.[50]

In addition to these and other declarations, the Wiradjuri Kooris asked for compensatory and reparatory relief in the form of land and monies.

The NSW and Commonwealth governments were joined as defendants. They made a number of defensive counter-applications. These called into

47 (1993) 68 ALJR 110.

48 *Coe* case, Plaintiffs' Statement of Claim, paragraph 2.

49 Ibid, paragraph 6.

50 Ibid, paragraph 9.

question the juridical *form* of the claims by seeking to have the juridical *procedure* of the plaintiff's claim declared invalid. This strategy of splitting form and procedure was also the initial response by the Queensland government to the *Mabo* claim but it was dropped. Here however both the NSW and Commonwealth governments pursue the strategy. They requested that: (a) the judge strike out at least parts, if not all, of the statement of claim; and (b) the action itself be dismissed or at least stayed. And finally, they argued that the proceedings constituted an abuse of process to the extent that the law was being used for what they called an 'improper purpose' or 'purpose *foreign*'.[51] In short, the defensive strategy of the governments is to reduce the substantive claims of the Wiradjuri Kooris to a matter of strategic calculation and, moreover, a calculation projected as being exterior to the procedural forms of law. Mason CJ seemed to agree when he remarks:

> the principal purpose of the proceedings is to pursue the sovereignty claim in order to play a part in creating the impression that the Aboriginal people have rationally based legal claims to much of New South Wales with the consequence that the farming community should start negotiating with the Wiradjuri with respect to the payment of royalties for occupation of traditional Wiradjuri lands.[52]

What is lost in this reduction is the subject and object of the claims, namely, the questions addressing sovereignty, genocide and the transmission of law. It is these questions which oblige the High Court, in the person of Mason CJ, to respond.

How does it respond? He argues that there is simply no legal authority and no legal precedent which supports a subsisting claim to aboriginal sovereignty. Rather, he simply repeats an earlier judgment to the contrary. This earlier case is from 1979 and also carries the title of *Coe v Commonwealth.* It was also brought by the Wiradjuri nation and the representative plaintiff then was Paul Coe, the brother of the current plaintiff. Moreover, the first instance judge in that case was none other than Mason J (as yet unpromoted to Chief Justice). At this point, the text displays a certain amount of irritation that, in the 1979 case, the Coes had appealed his order against them.[53]

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51 *Coe* at 111 and 120.

52 Ibid at 120. In a similar vein, it could be remarked that what Mason CJ forgets to mention is that the plaintiff's brother and the Redfern Legal Service (along with other aboriginal legal services and corporations) are being subjected to high profile auditing investigations alleging fraud and abuse of government funds. These pragmatic bargaining strategies are part of a more general government policy of holding the aboriginal domain 'accountable' and restricting their funding and autonomy.

53 *Coe v Commonwealth* (1979) 53 ALJR 403. At first instance, Mason J had refused leave to amend the statement of claim. On appeal, the court divided equally on the issue: Gibbs and Aickin JJ considered that the appeal should be dismissed while Jacobs J and Murphy JJ considered that leave to amend should

Quoting from the earlier appellate judgment, he points out that 'the history of the relationships between the white settlers and the aboriginal peoples has not be[sic] the same in Australia and in the United States'.[54] Because there is no such analogy on the field of history, it then becomes logically impossible to legally classify aboriginal peoples as a distinct political society and logically impossible to say that the legal system of Australia has treated aboriginal peoples as a state. In short, the historical question interrupts and excises the conditions necessary for the logical articulation of law, either of the United States and Australia or of Australian law and aboriginal peoples. The effect of this excision is to pull Mason's judgment in two directions.

One direction runs like this. In order to possess sovereignty, the Aborigines must be able to exercise it. The only way in which they could exercise sovereignty is to possess legislative, executive or judicial organs. However, as a matter of the facts according to Mason CJ, Aborigines do not have any such organs. In other words, the aboriginal community is a *disarticulated* corpus or 'body without organs'. And the positive remedy for this is an administrative one, what some sociologists and anthropologists describe as the 'aboriginal domain'. By this is meant the panoply of administrative institutions which have been fabricated to deal with and represent 'the Aboriginal problem'.[55]

It is this panoply of administrative institutions that Mason CJ has in sight when, having declared the aboriginal community to be a 'body without organs', he goes on to *imagine* a situation where Aborigines would have legislative, executive or judicial organs. Thus, he quotes: '*If* such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them'.[56]

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be granted. By virtue of a technicality, the division was taken as affirming the first instance refusal by Mason J. As it turns out, Mason CJ became something of a specialist in responding to these jurisdictional contests. For such a contest in a criminal legal context, see the later case of *Walker v the State of New South Wales* (1994) 126 ALR 321.

54 *Coe v Commonwealth* (1979) 53 ALJR 403 at 408, and quoted in the later *Coe* case at 115.

55 On the 'aboriginal domain' generally, see T Rowse (1992) *Remote Possibilities*, Northern Australian Research Unit and Australian National University. The formation of such an administrative enclave is subjected to a good deal of criticism, both from conservative and ethnocentric critics who regard it as ruled by 'tribal dictatorships' and by aboriginal feminists who have described problems of conjugal and domestic sexual violence that beset aboriginal communities. As the latter reminds us, the aboriginal domain is a concrete response to the dispossession of the indigenous peoples in Australia and is not yet justice. To the extent that it is a distinct administrative enclave, it is a risky and violent staging of aboriginal politics in collaboration with the enemy. As such, it is to be read minimally — useful in the face of social anonymity and estrangement, a necessary strategy for survival in positive social life, rather than an unquestioned teleological good.

56 Mason CJ is quoting approvingly from the judgment of Gibbs J in *Coe v*

If the earlier direction of his argument pulls Mason CJ down the track of a body without organs, his imaginative supposition pulls him down the track to a situation in which the aboriginal community exists as 'organs without a body'. And although Mason CJ places the aboriginal administrative domain in a relation of subsumption to Australian law, what is to be noted is that this subsumption repeats the repression of an aboriginal jurisdiction. The jurisdiction of law vacillates between a *dis*articulated body and a *re*articulated body. Whether an aboriginal body exists or does not exist, it does not and must not count as a *site* of articulation; it does not possess the power and authority to speak in the name of law. As Mason CJ remarks, sovereignty is not *cognisable* in an Australian court of law; it is not possible for a court to hear a challenge to the jurisdiction under which the court exercises its power. This has two aspects. One is that, while an Australian court is sovereign in its own domain, the site of its jurisdiction cannot be articulated. Another and correlative aspect is that what is foreclosed in law is a place from which aboriginal peoples can speak. In this respect, law becomes irredeemably and unbearably guilty. What this foreclosure repeats is the loss of external certification and a concomitant incapacity of law to represent itself. Law cannot represent itself because its jurisdiction is other than itself, either sovereign or aboriginal.

It is as a defence against this loss that the judgment unwittingly puts sovereignty and genocide in a relation of proximity and constitutive exchange. Mason CJ's response to the genocide claim is beset by similar difficulties but this time they are worked out in terms of a series of conjunctions and disjunctions between international law and national-municipal law, between past and present, between the fact of genocide and the debt of genocide.[57]

To give the shape of his difficulties, I will follow the text to its nodal point. Mason CJ argues that unless there is legislation carrying an international convention into effect, then that convention does not give rise to any rights or interests in Australia. He then remarks that there has been no such legislation and therefore the Wiradjuri have no rights and interests in this court. This is no different to his response to the sovereignty claim but this time played out in terms of the relations between legislative capacity and international convention. But this leaves the common law tradition and, as Mason notes, the common law recognises international customary law as part of the common law tradition. Mason CJ doesn't respond to this issue,

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Commonwealth (1979) 53 ALJR 403 at 408 (emphasis added). Gibbs J is himself drawing a distinction between the Wiradjuri nation and the Cherokee nation, the latter as described by Marshall CJ in *Cherokee Nation v State of Georgia* 5 Pet 1 at 16 and 17 (1831).

57 A similar set of difficulties and displacements is to be read in the High Court's response to the genocide claim in *Kruger v The Commonwealth of Australia* (1997) 71 AJLR 991. For commentary on its 'economy of assumptions', see V Kerruish (1996) 'Out of a Wooden Brain: Situating the Kruger decision', paper presented to 15th Annual Law and Society Conference, La Trobe University, Melbourne, 3–5 December.

simply saying that that there are other problems that befall the Wiradjuri. In strict analytic terms, Mason CJ's displacement here may be read as a symptom of repression. What is foreclosed yet registered in the displacement is the contiguity of national sovereignty and the expropriation of aboriginal experience. Mason CJ's difficulty is that the genocide is attributed by the Wiradjuri not only to the British, not only to the colonial governments but also to the descendants and inheritors of these governments, to the Australian nation as such. Thus, Mason CJ notes in an off-the-cuff remark that 'in any event ... the acts complained of ... took place in the late 18th and early 19th centuries when New South Wales was a British colony'.[58] This remark returns in the final argument of Mason CJ in respect of the question who is entitled to claim compensation if it is proved that the genocide took place. His response is that it is by no means self-evident that the plaintiff Wiradjuri nation are entitled to compensation for the genocide of their people. For Mason, what makes the question of compensation enigmatic is that the only people who are entitled to compensation are the victims of the genocide. In blunter terms, only the dead have a claim on us, their inheritors — and they are dead *and gone*.[59] It is this conclusion which is buried in the earlier sovereignty argument and the agreement with the abuse of process claim by the government defendants. Having got rid of the dead, Mason CJ creates a room for himself to project aboriginal sovereignty as always-already 'adverse'[60] to the power and authority of Australian courts and to position the Coe's claim as an attempt to use the courts for extra-legal ends. In short, while the dead are dead and gone, an Aborigine before the court is always-already malicious. And finally, it is this process of incorporation that permits the jurisdiction of the court to lay claim to sovereignty as the lost cause of Australian law. What cannot and must not be uttered as law is that the dead Aborigine functions as that which is beyond and prior to law yet which permits the sovereign jurisdiction of the Australian nation to get off the ground.

As the epigraphs to this article suggest and the cases evoke, murder and interpretation have one thing in common: 'the difficulty is not in perpetrating the deed, but in getting rid of the traces'. Such is the inevitable predicament of modern law. By following the rhythm and affectivity of *Mabo* and *Coe*, what has here and there been read is the substitution and displacement of another law, the juridical exclusion of the other. But the exclusionary process and structure does not result in a simple identity — of self or other. Rather, it works in an uncanny fashion. It is not radical

58 *Coe* at 116. This is no insignificant detail; the off-the-cuff remark is a distinctive characteristic of Mason's style of judgment and genre of discourse.

59 Mason CJ suggests that the plaintiffs have two related problems. One, the Commonwealth government was not a party to many of the acts complained of and hence the plaintiff has no entitlement against them. And two, '[i]f the acts complained of gave rise to an entitlement to compensation at common law, that entitlement would naturally vest in the person or persons suffering loss or damage in consequence of those acts': ibid at 116.

60 See ibid at 115.

enough to make a secure judgment possible, to differentiate between the power and authority of law and an aboriginal jurisdiction *and* it is clear enough for a *defensive* position to be taken up in and as the body of our law. The affective lesson of this body is that, to the extent that it is legal, law has become an anxious performance in and through which the other bleeds.

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