

# Legal Witchcraft and the Craft of Fiction: Wik and its Literary Precedents

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*Adopted, fostered,  
Sexually abused  
Colonised, Christianised  
booris buried brutally  
by settlers, in sand,  
kicked their heads, off,  
but who cares for Kooris  
who mourns for Murries  
and as I walk  
on Wirradjeri land  
'discovered by' Henry Lawson  
I sense that I am angry  
Treaty, Compact, Reconciliation  
Mabo, 1978, Land Rights, Sovereignty  
Bicentennial Celebrations,  
The Royal Commission into Aboriginal  
Deaths in Custody, 339 Recommendations  
The deaths don't stop,  
The mourning; the grieving is  
there, all around, for 205 years  
There is  
no justice.*

(Lisa Bellear, 'Justice?' *Dreaming in Urban Areas* 71)

*A minor jurisprudence is one which neither aspires nor pretends to be the only law or universal jurisprudence. ... The fragmented and deterritorialised language of minority depends upon a different view - ...Justice is desire and not law.*

(Kafka, *Towards a Minor Literature* qtd in Goodrich 2)

I begin by quoting a poem in order, from the outset, to bring law and literature together in ways especially relevant to Australian Literature and I include in that work written by indigenous Australians and that 'other' body of work that has been called multicultural Australian Literature (Gunew, *Framing Marginality*).

In 'The Writer as Activist' from her book *Born of the Conquerors*, Judith Wright speaks of the importance of the period 1830–1850 for understanding later Australian history. It was, she argues, an important period in the lives of the first generation of Australian born European-Australians, a period in which that first generation (the Currency generation) was 'overwhelmed by the two materialist boom rushes of the pastoral invasion and the gold discoveries' (Wright 127), the period of the first emergence of white Australian rural poverty. She speaks too of the politics of literature, and of the power and politics of the making (or not) of literary reputations. Her main focus is the poet Charles Harpur, whom she calls 'Australia's first really important poet' (129). She discusses his political activism, his concern for social justice for Australia's rural poor and their desperate need for land. Son of a transported Irishman, Harpur fought for universal suffrage, and for many still current issues such as equal rights to education. Harpur was politically involved in the 1861 Free Selections Act which broke the squatters' hold on the land and permitted pastoral leases. Wright comments on the complex ways in which opposition to his political activism silenced his voice in his lifetime – it was in fact the twentieth century before he was published as a poet – and on the fact that it seems never to have occurred to Harpur that the land he was so eager to gain access to actually belonged to someone else. This despite the fact that he was also one of those in the Australia of the time who spoke and wrote against the early massacres of Aboriginal people and about the Myall Creek trials (130). There are significant class issues in this history of so-called 'egalitarian Australia', but Wright does not leave the matter there, turning to explore issues of gender and race as well. The issues she raises anticipate by some time the fictions of pastoral history constructed in the Wik native title judgement in 1996.

The other early Australian writer Wright discusses is Katharine Susannah Prichard and her novel *Coonardoo* (131). Wright chooses her because she is yet another writer whose socialist ideals and work for human rights, both through her novels and her other work, was 'seen as dangerous'. Like Harpur's wife, Prichard's husband ended in financial ruin because of his partner's literary and political activities. Wright argues that despite Prichard's concern with black–white relationships, what really concerned her were, 'the men and women of the bush and the goldmining days' so that she never looked 'at what underpinned the basis of their lives and those of the poor of the towns and the cities' (131), by which I take her to mean the dispossession of the indigenous people. Wright ends her piece on the writer as activist by pointing to new writing in English, in indigenous and multicultural Australia and in many other former British colonies, which she argues has continued the tradition of 'the partisan and activist art that has been excluded from our canons' (132). She makes a strong claim for the powers of these new literatures to speak politically, to give public voice, and in the public sphere, to voices that have long been silenced by powerful forces:

I think that, in spite of the dead weight of our conventional academicism and the influence of powerful interests opposed to Aboriginal self-determination and self-expression ( which stretch far into our publishing industry as well as elsewhere), our strongholds are already shaking. (133)

Hypocrisy and disregard for human rights therefore lie at the basis of our society. ... Protest and partisanship, even within our own social boundaries, have not been encouraged and the canons of literary excellence still exclude them ... We might remember that over a century ago, Charles Harpur claimed that his own body of writing was a seamless whole, not to be divided into separate strands, the one allowed to be true art, the other to be disregarded [as partisan and political]. (132)

In this paper then, I take it for granted that the institutions of literature, law, politics, and economics, or the disciplinary knowledges law calls on for 'expert' evidence or as precedent, are all forms of representation and that they form a sociocultural network of elements that are never entirely autonomous and which constantly impact on one another. I also assume that each institution tends to produce habits, a *habitus*, and certain kinds of subjective and intersubjective relations of power and dominance (Threadgold). In calling this a sociocultural network, one of my assumptions is that these institutions and their habituated members actively produce what we like to reify as 'society', 'culture', the 'person' – or 'law' and 'Australian Literature':

And thus our nation is imagined through the law – Constitutional and also common and statutory – as it is also, for example, through popular culture [and Australian Literature or History] and current popular discourses on what constitutes a 'real Australian'. (Pether 1)

I want then to read Australian Literature, its histories and its futures, in relation to legal texts:

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

Part of my purpose in doing this is to clarify the *habitus* of the high court judges who have participated in the recent native title judgments in Australia. In the context of the Law and Literature movement, which arose in the USA, and has had its effects in Australia, the historical positioning of the judge – at least as old as the courts of Chancery, but going back to the sixteenth century and still current in some versions of the judge in equity (Parkinson; Pether and Threadgold) – has been collocated with that of poet/seer: 'the one God knew to be the authentic

voice' (to quote from Robert Dessaix's presentation at this conference). Literary humanism is seen to transform the judge, to make him an agent of progress, one who can manage political, social and ethical change in the polis at large. The judge is also empowered, in Mabo and Wik, to rewrite history, to represent the civilisation of the city against the dangers of the rural, the frontier. The judge stands for truth against legal fictions. Perhaps it does not need saying that this humanising view of literature, which allows the judges to 'remake' *themselves*, is not quite what Judith Wright had in mind (see also Morrow). For her, new, not canonical literatures, minor jurisprudences, might have taught the judges what they did not know and had not understood, might have made them doubt this repetition of the 'civilising' mission, of the fiduciary obligation (raised by Toohey J in Mabo) to the lesser other with its dangerous overtones of protectionism.

Both law and literature in Australia have been colonising institutions imposed in the new context by the invaders on a subject population (remembering that Australians until the mid twentieth century were British subjects *not* citizens) (Davidson). Both institutions have, with time, been forced to adapt and change their habits – their categories, their ways of seeing and being – in the colonised and colonising context. Much has been written of the colonising function of canonical English literature in India (Viswanathan) and Singapore (Yahya). In the Australian context it was not until the mid-seventies that what Judith Wright called the 'literature of the conquerors' established itself somewhat paradoxically, as Gunew has pointed out, as a 'postcolonial literature' (Gunew, 'Colonial Hauntings'). In these contexts Australian Literature is constructed as the Empire 'striking back' (Ashcroft, Griffiths and Tiffin). It is much later still before canonical 'Australian' Literature acknowledges multicultural or indigenous writing (Hergenhan). Australian Literature and Australian Law then share a narrative of adaptation, characterised by Goodrich and Hachamovitch in the legal case as 'the hallucinations of the common law'. The violent story of the imposition of a foreign law on a fully inhabited country with its own customary law and indigenous culture is told less often (Reynolds, *The Law of the Land*). It has taken the canonical institution of British-derived literature about the same length of time as it has taken the transported forms of the common law to recognise that this land was neither culturally nor legally *terra nullius* at the moment of invasion, and to acknowledge 'the principle of violence that inheres in every origin' (Fitzpatrick).

### Wik and Australian Histories: Contexts of/for Judgment

*This is a story about an injustice which is partly enacted in language. It is about acts of telling that are true and acts that are false; it is about the relation between telling stories and existing, or about being made not to exist. (Frow 4)*

John Frow writes these words in relation to the HREOC Report on the stolen children. In a similar context, anthropologist Elizabeth Povinelli has argued that expres-

sions of liberal multiculturalism in Australia serve only to mask the desire for a new form of national monoculturalism which speaks in two very different registers:

- 1) An abstract language of law, citizenship and rights.
- 2) 'A language of love and shame, of haunted dreams, of traumatic and recuperative memory, of sensuality and desire.'

With respect to Australia's indigenous peoples, these registers combine, she argues, to make shame and reconciliation 'an index and requirement of a new abstracted national membership' (Povinelli, 'State of Shame' 579–80). In legal and political contexts then, indigenous people are required to perform their traditional authenticity for the benefit of the 'nation's ideal image of itself as worthy of love and reconciliation' (580). She makes these comments in relation to experience of the Northern Territory Land Claims Tribunal in the seventies and eighties and debates about native title in the aftermath of the Mabo and Wik judgments, and specifically in relation to the requirement that Aboriginal land claimants be able to demonstrate an unbroken traditional connection to lands being claimed. I want to explore her arguments that these complex processes involve not revolution but the articulation of 'new relations of social dominance', that the constant references to a 'repaired social body' in discourses constituting and debating the questions of native title and British sovereignty are actually about repairs to the torn images and institutions of Anglo-Celtic Australians (584).

Post-Mabo and Wik 'madness' in the Australian community (Markus, 'Between Mabo' 93) has in fact been about threats to *a specific kind* of Anglo-Celtic or Anglo-European body, the ANZAC body, the mateship body of nineteenth century egalitarianism, the pastoral and mine lease owning body, a body with strong land management and property ownership 'bonds with the land' (Tim Fischer quoted in *The Australian*, 21 July 1993; Markus, 'Between Mabo' 99). What is at stake here is a fragile corporeality, constructed out of violent and dreadful fictions, a corporation bent on incorporation which again suddenly declares the Aboriginal people to be 'backward', 'dying out', 'a Stone Age people' – our Deputy Prime Minister, the Chief Minister for the Northern Territory, and other major figures were all guilty of such remarks at the height of the native title media hysteria, rearticulating all of nineteenth century racism (see Markus, 'Between Mabo' 92–93). The Prime Minister's insistence that the passing of the ten-point plan (which effectively legislated the extinguishment of the recognition of native title in Mabo) and the 'resolution' of the Wik debate in 1998 meant again that all Australians would be equal was a fitting if terrifyingly circular conclusion.

## Gendered Silences in the Wik Debate

Anne McGrath in the post-Wik debate challenged the narrative of pastoral relationships which was institutionalised in Wik. She questioned the meanings given to

'pastoralists', 'cattlemen' and 'rural people' in the Wik debates, asking about the absence of the Aboriginal stockmen, including the Aboriginal women who worked as drover's boys, recently recovered for history and popular culture it seems in plans for a film ('Faithful Wife, Never a Bride'). She pointed to the historical logic of Mabo and Wik, remarking, like Judith Wright above, that 'the seismic fault [that caused them] had existed since Australia's foundations were laid' (McGrath 69) and pointing out that Wik said nothing that Aboriginals and pastoralists did not already know and much less than could have been said. She reported the long history of cooperation that occurred on the cattle stations, even in Queensland, on the dependency of whites on Aboriginal labour, tracking and droving skills, on the ways in which Aboriginal people adapted and changed their traditional ways to accommodate these mutual pastoral dependencies (see also Reynolds, *The Other Side of the Frontier*) in order to maintain their connection with their lands. She articulated too some of the more intimate connections – sexual relations between black and white, the black birthing and nursing of white babies and mothers, histories which are usually elided and mean that:

... conservatives should not fear acknowledging that some of their history occurred alongside Aboriginal people. Even, in many cases, their or their father's first experience of sex. (72)

These histories of course were very well known at the turn of the century when the first debates about citizenship and suffrage were in process. Sandra Berns in a wide-ranging paper on citizenship in Australia points out that one of the reasons used by politicians of the day to argue against the vote for Aboriginal people was what were perceived in the cities to be their too-close relationships with the pastoralists who might be able to 'use' the Aboriginal vote.

I want to pursue these gendered histories which are nowhere to be found in Wik or indeed Mabo. John Frow's construction of the report on the stolen children locates it as deconstructing the opposition between the registers of law and shame which Povinelli identified, the languages of legal abstraction and of haunting and ghosts. He reads it, in ways which make clear the gendered nature of the histories and testimonies it records, as a document about mothers and children and the power of the language of men to make realities and real people disappear. What is now becoming clearer in this context, as in the case of genocide and dispossession (see Reynolds's histories) is the amount of opposition to the practice of stealing children which was audible and apparent even as the stealing happened. Disciplined historians have not recorded the challenges at the time of middle-class Australian feminists and others to what was happening (see *Bringing Them Home*, Endres-Stacy, Paisley). A similar 'partial' reading of history is evident in Brennan CJ's selective reading, as precedent, of Reynolds on the question of *terra nullius*. As Rush has demonstrated *terra nullius* was a 'creature of the common law'. The nineteenth century inhabitants of Australia knew it never existed. They too were busy using language, and more violent means, with the connivance of the common law, to make the indigenous people *disappear*. This is what Reynolds calls legal witch-

craft in *The Fate of a Free People*.

Reynolds's rewriting of the disciplined historian's account of D.G. Robinson's heroic and mystic ability to 'bring the natives in' and of the Aboriginal woman Trugernanna – seen, Reynolds says, by all former historians, as a 'black Bimbo' who slept with Robinson and was 'under his spell' – is part of the necessary recovery of a different history of Aboriginal women and their importance to the survival and resistance of the Aboriginal peoples in the face of invasion. This story is carefully elided too in the High Court's version of *terra nullius*. Reynolds's account, carefully traced in writings by Robinson and Trugernanna herself, is of an astute politician, a woman who spoke several languages and could negotiate with many tribes. It was she, and her Aboriginal supporters (many of them women) who made Robinson's mission possible when there was no further choice but to try to save the remnants of their people. It was she who led him, not God, as Robinson later wrote. Of course another and also very different version of this history could have been found in Mudrooroo's account of *Dr. Wooreddy's Prescription for Enduring the End of the World* (1983) which had told the story in novel form long before Reynolds had demonstrated history also to be fiction.

The exclusion of these feminine and black narratives is reminiscent of Moira Gatens's work on the masculine image of the Leviathan which founds the idea of a liberal body politic – an image of *one* body – a *masculine* body – which cannot recognise and always tries to cannibalise and incorporate different bodies, bodies of difference. Trugernanna's and Mudrooroo's narratives signal the need for a body politic which can accommodate more than one body, a body politic which might recognise its own wilful blindness. But while we still have a Prime Minister who calls this kind of rewriting a 'black armband view of history' we have I think to ask, with Avery Gordon: 'What does it mean for a nation to choose blindness as a national pledge of allegiance?' (Gordon 39).

When historian Henry Reynolds asked his questions about Aboriginal sovereignty and the inconsistencies in the Mabo judgment, feminist historian Marilyn Lake replied with a query about Aboriginal women and feminism. It is sufficiently important to quote at length:

... in other words, the re-conceptualisation of Aboriginal communities as 'politically organised societies' raises questions, not asked by Reynolds himself, about the relationship between different systems of 'law' and the political relationships and standing of women and men. It illuminates Aboriginal women's strong sense of equality. How, one wonders, has Aboriginal accommodation with the dominant Western systems of law-making and the process of state-formation – including the formation of a public sphere – altered, if at all, the relations of rule between women and men in indigenous communities? (Lake)

There are traces of answers to Lake's question to be found in literary fictions. *Aunty Rita* is a remarkable story, simply told, of a strong Aboriginal woman's survival and of her activism right through the period of the reservations, the Pro-

tection Board and the assimilationism of the stolen generations. One would think that that might be enough to endure in one lifetime, but the final harm for Aunty Rita, is the observation, in a younger generation, of a domestic violence, of changed ways of relating, that she herself had never known:

I see a big change in the lives of the people of Cherbourg. We had no drinking, no drugs, no breaking up of people's marriages. There's a lot of fighting and drinking going on now. You hear stories. ... I never knew too much violence. People used to hit each other but then make up. They were very forgiving. But now I hear the violence is increasing. It breaks my heart to see what it's like today (Huggins and Huggins 131)

If it is a trace of what it seems to be then it is a haunting and terrible consequence of the legislated subjection of Aboriginal women, and their men, a terrible consequence of the benevolence of the British common law system and its projection of its concerns with property and possession into the private sphere in the process of 'civilising' the natives.

### **Coonardoo**

I want here to return to the question of *Coonardoo* (1929), to the question of partial visions and of blindness, and to the way Prichard represents black-white relations in this early novel. Stephen Muecke has written about two different versions of the story. The one Prichard writes is a romance about a relationship between a young station owner in the Kimberley and Coonardoo, whose tribes-people are the traditional owners of the country. What is important, as Muecke argues, is the way Prichard ends the novel with Coonardoo's lyrical, romantic death, the destruction of the Blacks and the collapse of the station, an ending that 'makes death the consequence of miscegenous desires' (Muecke 100). Coonardoo's death is a consequence of 'the impact of the early pastoral economy'. Muecke then compares this with another version of the story, not widely known, written by naturalist E.L. Grant Watson in 1914, *Out There*. In this version the white station owner has actually taken a number of Aboriginal wives:

... 'gone over the hill', a rarely represented thing in Australian literature, a complete 'becoming-Aboriginal' which, if one continued the story, would no doubt have the stabilisation of the sexual exchange with the black wives as emblem for the economic stabilisation of the Aboriginal community on the station (as virtual owners). (Muecke 101)

In this story the Aboriginal women murder the white woman the man brings to the station as his wife, 'an act of reclaiming their property'. Prichard, Muecke believes, probably knew this story, but she wrote an ending her audience could



handle, perhaps also the only ending she could imagine. If so, then in so doing she deprived Aboriginal women of their agency and strength, a gesture which is repeated in the High Court contexts of *Wik* and *Mabo*.

### **Wik and Failures of Courage**

These attempts to trace the intersections of race and gender in Australia begin to contextualise the desexualised historical narratives selected by the *Wik* judges when they read new histories as precedent. The lack of context is however more serious than this. As Pether has demonstrated, the habituated judges also draw on a number of precedents derived from nineteenth century colonial legal contexts which reinscribe colonisation even as the rewriting of history attempts to erase it. What is more, this return of the repressed is then oddly recontextualised against a series of more recent native title judgments from Australia and Canada. It is difficult not to conclude that the judges are both partial and uncritical readers who produce hybrid realities of uncertain provenance as part of their everyday work in the courtroom.

Brennan CJ's minority judgment repeats the ultimate gesture of clinging to the 'skeleton' he had discovered in *Mabo*, the Act of State Doctrine which prevents the common law from questioning the executive branch of government (Pether). Faced with the argument from the *Wik* and *Thayorre* peoples that it would have been 'truly barbarian' had the granting of leases been intended to exclude the Aboriginal inhabitants and make them trespassers on their own land he responds:

It does not follow that the Aboriginal inhabitants are necessarily turned into trespassers. ... But the adversely discriminatory treatment suffered by the holders of native title is not now at issue – ... It is too late now to develop a new theory of land law that would throw the whole structure of land titles based on Crown Grants into confusion. (*The Wik People* 180)

Thus if *Mabo* had seemed to be on the verge of recognising two systems of law, this judgment effectively returns, as Povinelli has demonstrated with some strategic discourse analysis, to making Aboriginal land rights and customary law conform once again to British common law (Povinelli, 'The Cunning of Recognition' 25–26).

Toohy J, whose important role in the much earlier Northern Territory Land Tribunal cases (Rowell) is not to be forgotten here, seems in the majority judgment somewhat more inclined to actually read the history to which Reynolds's work has alerted him. He does acknowledge that the grant of pastoral leases did not occur in a historical vacuum. He talks about the 1820s, the period when the 'squatters' moved to land to which they had no title and which required the regulation that led to pastoral leases in the first place. He also acknowledges the ways in which what happened in the statutory and common law in Australia deviated from the British traditions: 'It was in 1842 that the management and disposal of Crown land was first brought under statutory control with the enactment of the Sale of Waste Lands

Act 1842.' But there was, he argues a 'subsequent invention of a multitude of Australian tenures of new types' such that: 'It suffices to say that they reflected a regime that was unknown in England' (The Wik People 102).

He also recognises the atrocities that gave rise to the need for leases. He quotes Gipps:

It is apparent from a dispatch from Sir George Gipps, transmitting The Crown Lands Unauthorised Occupation Act to the Secretary of State, that one of the main aims was 'for the purpose of putting a stop to the atrocities which have been committed both on them [the natives] and by them. ... A licensee could lose a license for 'any malicious injury committed against any aboriginal native or any other persons' ... (Wik Judgement 207)

And he resolves:

That a system of feudal rights brought to Australia ... should determine the fate of the indigenous people is a conclusion not lightly to be reached. (209)

Then in a remarkable understatement for which he finds a precedent in *Delgaamuku v. British Colombia* 1993, he continues: '*There is something curious in the notion that natives can somehow suddenly cease to exist*' (my italics). And yet, having decided to bring the natives back into existence by recognising the possibility of co-existing title, Toohey J immediately makes them disappear again. Legal witchcraft. Now you see it, now you don't:

To say that the pastoral leases in question did not confer exclusive rights to possession is in no way destructive of the title of the grantees. ... If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. (Wik Judgement 215)

One is forced I think to conclude that like *terra nullius*, the recognition of co-existing rights on pastoral leases is a 'creature of the common law', 'a legal fiction of enormous colonial proportions' (Rush).

### **Authenticity and the Question of Change**

In a 1997 paper Povinelli argues cogently that the Mabo and Wik decisions are another iteration of the racial and sexual agendas that played themselves out at the moment of invasion. At that time, Aboriginal bodies, male and female, were con-

tained (incorporated) and eroticised, their sexuality and their race literally produced in the imposition of white law. In the Mabo and then Wik requirement (and that of the later Howard ten-point plan) of the legal performance of a fantasised and fictional Aboriginal authenticity in relation to the connection to the land, that moment, she argues, is replayed. To make her point, she records a historical incident: the 'modest' British demonstration of the white phallus on the shores of Botany Bay to an 'immoderate' and naked group of natives who roared with laughter at this unprepossessing sight. This incident in which the British sought to demonstrate their sexuality despite their clothes was reported by the British as demonstrating the incivility (outside and excluded from civil society), the primitivism and the rampant sexuality of the Aboriginal people. Clearly these people belonged to no body politic. This was a narrative used by the military to produce *terra nullius* through invasion and genocide.

Irene Watson writes tellingly of this question of nakedness and clothing, speaking of the shame of being unclothed as being in the eyes of the beholder, of clothing as a colonising institution like 'their prisons, mental institutions and medical institutions'. She writes:

Judge Barron Field of the Supreme Court of NSW in 1825 commented:

Without faculties of reflection, judgment or foresight, they are incapable of civilisation. They are the only natives in the world who cannot feel or know that they are naked and they are not ashamed.

But what was said and is still not realised, is that there was no shame. And the shame that was sought was in its seeker. Nakedness and the awareness of it came to the old people through the reflection of the other, and the other's shame. (Irene Watson 9)

As Povinelli emphasises, 210 years later in the Mabo decision, the judges again demonstrated the power of the white phallus in simultaneously arguing that there had formerly been 'misrecognition' of the traditional culture *and* requiring that the 'authenticity' lost by invasion and genocide be performed regularly for their benefit, in order to heal and make whole (give some *integrity* to) their Anglo-Celtic-European bodies. The colonial act of exclusion from the body politic is repeated here then in a new and more complex form.

This newly created 'traditional Aboriginality' with traditional and continuous connection with its homelands is supposed to have survived genocide, deaths in custody, the stolen generations, and two centuries of the 'protection' of the British common law system. It is to be different from white 'misrecognitions' of urban Aboriginal people as 'sites of decayed and dissolute cultural mixing', sites of rampant sexuality, criminality, alcoholism. These latter products of the law's fiduciary duty to its others are not the ones to whom we will return the land.

In fact, of course, the white social imaginary in which Povinelli sees the desire for 'authentic' Aboriginal Culture as forever fixed may not be located in as distant

a past as she imagines. It seems to me that the roles played by a number of the High Court judges of Mabo fame in the Northern Territory since the seventies may be where their 'imaginings' come from. The imaginings of both trained linguists and anthropologists (Eames; Brandl and Walsh; Layton) and judges (Rowell) have changed in that context, however slowly, in ways they have not in urban criminal justice contexts (*Heroines of Fortitude*). It may well be that the location of these first land claim tribunals in the space of the territory, unimpeded to some extent in that space by the ability of a state government to legislate against them, has also produced among the High Court judges a sense of a fiduciary obligation to preserving a relation to land that cannot and does not exist in the rest of Australia.

Deborah Bird Rose's reading of the tribunals and their operation is different to Povinelli's and relevant here. She argues that the *performativity* of 'authenticity' has been having its effects on judges and tribunals. The latter, like the older pastoral leases, are co-opted and used by the Aboriginal people in creative ways in order to keep their land. Her view of Aboriginality is, ironically perhaps, less primitivised, less victimised, than Povinelli's, more like that of Henry Reynolds in *The Other Side of the Frontier*.

So I want to conclude on a more positive note, returning to Australian literature where in some ways I began, to look, with Judith Wright, at the importance of the new voices, black and white, which in that context are also slowly changing the way the nation can be thought, the way it does imagine itself. And I emphasise as I do so the importance of pedagogy and of literature as pedagogy, let alone as a minor jurisprudence in legal contexts.

The two novels, Sam Watson's *The Kadaitcha Sung* and Rodney Hall's *The Second Bridegroom*, were drawn to my attention by Bronwyn Davies' work on them and by her interview with Sam Watson. Watson's remarkable novel makes no concession to the establishment, either literary or legal. In the novel, Uluru is the centre of the world and Cook arrives because of a battle among the Aboriginal gods. The hero, Tommy, the Kadaitcha man, born of a white mother, is the vengeful instrument of the same gods, but he disobeys the spirits of the Aboriginal cosmology to impregnate a native woman. Watson has said that the child will be the subject of his next novel. The novel is confronting to a white reader in its relentless hatred of the *migloo*, its depiction of historical and contemporary violence against Aboriginal people, especially in the rape scene at the beginning of the novel, and in urban Brisbane. It confronts, with no concessions to the High Court's imaginings of a recoverable 'authenticity', questions of contemporary urban miscegenation as potentially healing and productive, and it weaves all of this into a texture complexly intertwined with a performative Dreaming and spirituality. The ending too confronts the norm – the ending, as Muecke has said, that white society can accept – the hanging of the Aboriginal hero. In this novel the hero makes his own decisions about conclusions in order to continue Aboriginal resistance into the next generation. The novel uses a form of magic realism, it transcends western concepts of time and space, it incorporates and disciplines the white reader. As Sam Watson has said, in an interview with Bronwyn Davies, we cannot go back, we cannot

change the past, and if there is to be a future, white and black have to be in it together. There is also a remarkably different representation of women and of relations between men and women in this novel by an Aboriginal man.

Rodney Hall's novel *The Second Bridegroom* is one of those recent fictions which rewrites the making of Australia with hindsight. Hall, like Watson, is in search of a body politic that would allow more than one body, be based on more than one white masculine body image, a plurality of different bodies, but also different masculinities within the one body. The British convict hero and escapee is appropriately near-sighted, an escaped convict who cannot see the landscape in which he finds himself, who has no language to describe it, who, taken in by the Aboriginal people in the belief that he is a lost ancestor, learns to see and to know as they do. He is thus able to feel, physically, the violence done to the land by the imposition of fences and the pastoral economy, just as he knows already, as convicted, the violence done to bodies and selves by the British common law system. His final coming to self-recognition is through a writing, while again imprisoned, which produces himself as difference – neither one nor two, but many – and unable to return to oneness, to the masculinity with which he began.

Both novels suggest new corporealities, new masculinities, new relationships between men and women, subjectivities, and narratives of settlement and invasion. Both deconstruct very effectively and often in very confronting ways, the myopia of our Australian past and of the contemporary High Court as well as of our current federal government and many of the powerful forces which stand behind them both. Such writing, like new histories, could be used to educate the judges, not to make them more convinced of their literary sensitivities and their equitable powers to judge *for* and in the place of Aboriginal people – but rather to confront them with a minor jurisprudence, with the enormities of what they still do not understand. They might also learn, from Povinelli and others, to do a little productive discourse analysis on their own rhetoric, in order to understand why it is indeed that through the convolutions of *that*, rhetorically and linguistically, the common law continues to supplant native title even as they think they recognise it. And if we follow Judith Wright's lead, we might even discover in the precedents of literary history some of what returned to haunt us, in 1998, in the Queensland elections.

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