

Chapter 15 The Return of the Repressed

EXTINCTION in philosophy is not forever. Any opinion or argument, no matter how finally it seems to have been hunted down and refuted into oblivion, has the chance of being rediscovered by a new generation eager for novelties. In this chapter, we examine the revival of two old philosophies once thought well off the agenda: idealism and Catholic natural law philosophy. They have not been seen much in philosophy departments, but have flourished in, respectively, literature departments and the High Court of Australia.

As we saw in chapter 6, David Stove wrote that idealism, the doctrine that everything is mind-dependent, was sustained by what he identified as the ‘Worst argument in the world’: We can know things only as they are related to us/under our forms of perception and understanding/in so far as they fall under our conceptual schemes, etc, so, we cannot know things as they are in themselves. In Berkeley’s version, ‘we cannot have trees-outside-the-mind in mind without them being in mind, so there cannot be trees outside the mind (or if there could be, they could not be thought of). That argument did not vanish with the 1890s. We saw in chapter 11 that John Burnheim adopted an ‘inevitably partisan’ reading of the Sydney disturbances on the grounds that philosophy ‘rests not on ultimate truths, but on a reading of our specific historical situation’ (that is, we cannot know things except through our specific historical situation, therefore we cannot know things as they are in themselves). In the last chapter, we saw that Elizabeth Grosz ‘questioned’ the ‘patriarchal belief’ in a ‘single, eternal, universal truth independent of the particularities of observers, history, or social conditions.’ And it is the argument that drives the ‘linguistic idealism’ known as postmodernism that festers dankly in all too many corners of the humanities world of the present. How can we talk about anything outside texts — truth in history or

science, or what authors really intended by their writings — since that is just more text? How can there be texts about what-is-outside-texts, without them being just more text? Therefore, there cannot be (or cannot be talked-about, at least) things outside texts. As one admirer explains it,

Based on the Saussurean principle of the sign, which is that the relationship between the signifier ... and the sign ... is arbitrary, the structure of language for Lacan is such that 'language' is already cut off from 'reality'. What is taken as the meaning ... of any word, for example, is always going to be the result of that word's *difference* from all other words within a particular language. ... Consequently the Saussurean-based theory of language ... is radical because it erases 'reality' from the system: reality is never present 'in' or 'to' the system of language ... The gap between word and thing ... is a necessary one inasmuch as language can never be identical with what it names, for example, and vice versa ... From this it follows that presence (truth, reality, self-identity) is an effect of a system that is constituted by absence and separation. The very lack within language and the very gap between word and thing is what makes reality possible, making it seem present.¹

The last part of this is a 'Worst Argument'. The apparent preceding reasoning from Saussure's view of linguistic structure is no more than a softening-up operation: while you're cowering in your foxhole disoriented from hearing that 'cat' gets its meaning merely by contrast with 'dog' and not from any connection with your experience of cats, the real Worst Argument is coming across the wire at you. It is just a linguistic version: we cannot speak about things except through the forms of language, therefore we cannot speak about things as they are in themselves.

The argument is, in short, of the same form as 'We have eyes, therefore we cannot see.'² The parallel makes it clear what is wrong with all such arguments: the fact that knowledge has to be implemented in brains, or cultures, or languages, is not a reason in itself for doubting it, or regarding it as cut off from reality. Just as the electronic insides of a calculator are not cut off from the laws of arithmetic, but instead implement them, so the knowledge processes in brains can track reality. There may be reasons for thinking they are sometimes in error, but the mere fact that they are implemented in brains

¹ N. Lucy, *Postmodern Literary Theory: An Introduction* (Oxford, 1997), p. 23; cf. p.42.

² A. Olding, 'Common sense and uncommon nonsense', unpublished; A. Olding, 'Religion as smorgasbord', *Quadrant*, 42 (5) (May 1998), pp. 73–5.

is not such a reason.³ To think it is is to revert to Stove's caricature of the typical products of a modern high school:

Their intellectual temper is (as everyone remarks) the reverse of dogmatic, in fact pleasingly modest. They are quick to acknowledge that their own opinion, on any matter whatsoever, is only their opinion; and they will tell you, too, the reason why it *is* only their opinion. This reason is, that it is *their* opinion.⁴

And was the same argument behind the excesses of feminism, seen in the last chapter? Stove suggests it was:

The cultural-relativist, for example, inveighs bitterly against our science-based, white-male cultural perspective. She says that it is not only injurious but cognitively limiting. Injurious it may be; or again it may not. But why does she believe that it is cognitively limiting? Why, for no other reason in the world, except this one: that it is ours.⁵

Throwing a dart anywhere in the humanities in the 1990s would be very unlikely to have missed an example of the effects of these arguments. Let us look at just one area, 'media studies'. Somewhere back in the Seventies, the (then) Colleges of Advanced Education saw the opportunity to offer courses for students hoping to become journalists. They employed some ex-journos with ten or twenty years' experience in the industry to teach the students what they wanted to know. Then a dilemma arose. These lecturers could not be appointed heads of department, since they only possessed BAs. And the courses could not count as 'respectable' university courses because they lacked theory. The void was filled in the traditional way, by importing from the Old Country the latest in ideological technology — in this case the graduates of the 'Cultural Studies' movement associated with Birmingham University.⁶ It is all linguistic idealism:

Understood this way, language does not describe reality, it actually constitutes it. Our language system determines, delimits and shapes the way in

³ J. Franklin, 'Stove's discovery of the worst argument in the world', *Philosophy* 77 (2002): pp. 615–24; A. Musgrave, 'Conceptual idealism and Stove's Gem', in A. Musgrave, *Essays on Realism and Rationalism* (Amsterdam, 1999), pp. 177–84..

⁴ D.C. Stove, *The Plato Cult and other Philosophical Follies* (Oxford, 1991), p. 168.

⁵ Stove, *The Plato Cult*, p. 167.

⁶ K. Windschuttle, 'The poverty of media theory', *Quadrant* 42 (3) (Mar 1998): pp. 11–18.

which we understand the world. Therefore, to examine the structures of our language is to examine the structures of culture in general.⁷

Naturally, a theory like that gives endless scope to fill up courses with 'deconstructions' of the guile of media tycoons, the self-deception of readers and so on. But surely the public demands that the media tell in reasonably plain English what actually happened? There is an official answer to that naive realist thought: according to one Professor of Media Studies, the reading public is made up too:

the invisible fictions that are produced institutionally in order for various institutions to take charge of the mechanisms of their own survival. Audiences may be imagined empirically, theoretically or politically, but in all cases the product is a fiction that serves the need of the imagining institution. In no case is the audience 'real' or external to its discursive construction.⁸

It is a perfect example of the ability of philosophical errors, nailed time and again centuries ago, to ooze out of their sarcophagi, clothe themselves with a local habitation and a name, and stalk the earth seeking a *tabula rasa* to colonise.

Media studies was not the only discipline in the 1980s on the lookout for a bit of theory. Nursing studies, for example, had to change quickly from hands-on training in hospitals to serious study in Colleges of Advanced Education, soon renamed universities. So it too needed some theory, any theory, in a hurry. So it has had to take on wads of prose like: 'Post structuralist feminist processes of deconstruction remind us that the world is a place of multiple and contradictory views'; 'Feminist and other scholars are showing that this ideal person (who may not exist!) who derives from European Protestantism and capitalism is epistemologically androcentric rather than a truly abstract objective individual.'⁹ No doubt graduates of such courses find emptying bedpans a relief.

⁷ G. Turner, 'Media texts and messages', in S. Cunningham & G. Turner, eds, *The Media in Australia: Industries, Texts, Audiences* (Sydney, 1993), p. 219, quoted in Windschuttle, 'Poverty'; further in K. Windschuttle, 'Cultural studies versus journalism', *Quadrant* 43 (3) (Mar 1999): pp. 11–20; similar in I. Marshall & D. Kingsbury, *Media Realities* (South Melbourne, 1996), pp. 38–40.

⁸ J. Hartley, 'Invisible fictions', in J. Frow & M. Morris, eds, *Australian Cultural Studies: A Reader* (Sydney, 1993), p. 166, quoted in Windschuttle, 'Poverty'.

⁹ A. Street, *Nursing Replay* (South Melbourne, 1995), p. xv; J. Horsfall, *Social Constructions in Women's Mental Health* (Armidale, 1994), p. 2; also A. Street, *Nursing Practice* (Geelong, 1990), pp. 5, 10; A.J. Walters, *Caring as a Theoretical Construct* (Armidale, 1994); C. Cheek & T. Rudge, 'Nursing as textually mediated reality', *Nursing Inquiry* 1 (1) (Nov 1994): pp. 15–22;

There is even postmodern Australian history. Paul Carter's *The Road to Botany Bay*, widely noticed in Australia and New York, dismisses all earlier writing on Australian history thus: 'We are well-supplied with historical geographies, but these share the diorama mentality: they take it for granted that the newcomers travelled and settled a land *which was already there* [his emphasis]. Geomorphologically, this was perhaps so — although even the science of landforms evolved as a result of crossing the country — but historically that country remained to be described. The diorama model shows us the river on the hill's far side; it shows us hills. But it was precisely such features which spatial history had to constitute.'¹⁰ Of course there can be histories of such matters as how the colonists saw the landscape, but that is not what writers like Carter are doing. They are dressing up phenomenology as idealism to make it look shocking. One is intended to think, 'I might not go as far as that, but it is certainly good to see writers being bold, stimulating and transgressive.' Their rhetorical strategy seems to have been successful in every case, so far.

Writers such as these are best known to the public through the caricature in David Williamson's *Dead White Males*. Dr Grant Swain, lecturer in literary theory at 'New West University', is a composite caricature of a number of vogue ideologues. His belief that 'there are no absolute "truths", there is no fixed "human nature" and what we think of as "reality" is always and only a manufactured reality' is, as we have seen, mild enough in comparison with what is actually out there.¹¹ The main problem with the caricature is that the playwright has to compress Swain's views into a short space, lest the audience drift off. As a result, Swain's views are a good deal more coherent than those of the originals.

Any suspicions that Swain is an exaggeration are easily refuted by attention to the article 'Monstrous knowledge', by Bob Hodge,

A.M. Evans, 'Philosophy of nursing: Future directions', *Australian and New Zealand Journal of Mental Health Nursing* 4 (1) (1995): pp. 14–21; N. Glass & A. Davis, 'An emancipatory impulse: A feminist postmodern integrated turning point in nursing research', *Advances in Nursing Research* 21 (1) (1998): pp. 43–52; a reply in J. Solas, 'The poverty of postmodern human services', *Australian Social Work* 55 (2002): pp. 128–35.

¹⁰ P. Carter, *The Road to Botany Bay* (London, 1987), p. xxi; similar in S. Ryan, *The Cartographic Eye* (Cambridge, 1996), pp. 121–4; discussion in K. Windschuttle, *The Killing of History* (Sydney, 1995), ch. 4; more on 'calling space into being' in R. Barcan & I. Buchanan, *Imagining Australian Space* (Nedlands, 1999), pp. 8–9.

¹¹ D. Williamson, *Dead White Males* (Sydney, 1995), p. 2; a reply in M. Morris, "'The truth is out there ...'", *Australian Book Review* no. 181 (June 1996): pp. 17–20.

Foundation Professor of Humanities at the University of Western Sydney, Hawkesbury, and co-author of *Language as Ideology, Myths of Oz, Children and Television: A Semiotic Approach*, etc.¹² After running through the views of the usual revolutionary thinkers like Kuhn and Foucault, he gives a picture of the type of PhD which will dominate in the postmodern regime. The student will be anarchist and oppositional, be forever immersed in CD-ROMs and image packages, welcome discontinuities, and draw on 'a long tradition of experimental avant-gardism, with its breaks with the modernist values of realism, transparency of text, linear logic ...' Hodge casually mentions that he has supervised or examined thirty-seven PhD theses in the last five years, so we are in for many decades of reconceptualising yet.

Postmodernism is a form of the French movement known as post-structuralism, and it inherits from structuralism the particularly *linguistic* cast of its idealism. The Australian philosophers Devitt and Sterelny, in their introductory book on the philosophy of language, put their finger on the weak point in Saussure, the founder of structuralism and hence father of the linguistic phase of idealism. Saussure compares language to a chess game, in which the 'meaning' of any piece, or move, arises solely through its place in the matrix of other moves. Similarly, he says, the meaning of words is constituted by their relation to other words. It is essential to the meaning of 'white', for example, that it is the opposite of 'black'. It is 'the view of language with each of its signs "defined" in terms of "pure difference" from all other signs; which is a bit like geography based on the generalization of Lennie Lower's dictum that "Chatswood is one of those places that are a stone's throw from some other place".'¹³ What is missing from this picture is any relation between 'white' and white things, between language and the reality it is supposed to be about. That is what makes it a form of idealism.¹⁴ It should have been pinned down in Saussure's time, but it wasn't, and the result is summed up in the much-quoted aphorism of Derrida, 'There is no outside-the-

¹² Bob Hodge, 'Monstrous knowledge: Doing PhDs in the new humanities', *Australian Universities' Review* 38 (2) (1995): pp. 35–9; see J. Franklin, 'The Sokal hoax and postmodernist embarrassment', *Continuum: Journal of Media and Cultural Studies* 14 (3) (Dec 2000): pp. 359–62.

¹³ A. Olding, 'The law of the exclusive muddle: Categories and social theory', *Australian Journal of Anthropology* 3 (1992): pp. 43–54, at p. 51.

¹⁴ M. Devitt & K. Sterelny, *Language and Reality* (Oxford, 1987), ch. 13; also P. Godfrey-Smith, 'Towards a sensible semiotics', *Arts* (Sydney) 14 (1989): pp. 22–37; J. Maze, 'A realist view of deconstruction', *Heraklitus* 65 (May 1998): pp. 2–9.



A simulacrum of Jacques Derrida impresses a youthful audience, University of New South Wales, 13 Sept 1996. (Newspix)

text.¹⁵ At least some of Derrida's local followers agree that this denial of 'reference' to language is his key achievement. John Hay, later Vice-Chancellor of the University of Queensland, writes, 'the tenacious notion that scientific and philosophical discourse is referential, mimetically reflecting a verifiable reality, seems often to have exempted it from the suspicion that, quite as much as literature, its

¹⁵ See R. Freadman & S. Miller, *Re-Thinking Theory* (Cambridge, 1992), ch. 5; C.R. Pigden, 'Est-ce qu'il y a de hors texte? — On a defence of Derrida', *Critical Review* 30 (1990): pp. 40–62; J. Passmore, *Recent Philosophers* (London, 1985), pp. 29–33; G. Matte, 'Derrida, Foucault and the real estate market', *Australian Journal of Comedy* 5 (1) (1999): pp. 149–86; more sympathetic accounts in D. Buchbinder, *Contemporary Literary Theory and the Reading of Poetry* (South Melbourne, 1991), ch. 4; K. Hart, 'Differant curioes', *Southerly* 49 (1989): pp. 182–96; T. Thwaites, L. Davis & W. Mules, *Tools for Cultural Studies* (South Melbourne, 1994), pp. 26–31; N. Lucy, *Debating Derrida* (Melbourne, 1995), ch. 1; deeper analyses in J. Curthoys, *Feminist Amnesia* (New York, 1997), ch. 6 and J. Teichman, 'Deconstruction and aerodynamics', *Philosophy* 68 (1993): pp. 53–62; on Derrida and Mabo, see P. Patton, 'Mabo, freedom and the politics of difference', *Australian Journal of Political Science* 30 (1995): pp. 108–19; on Derrida's 1999 Australian visit, *SMH* 12/8/1999, p. 19, 13/8/1999, p. 7; D. McQueen-Thomson, 'Derrida comes to town', *Arena Magazine* 44 (1999): pp. 13–14; texts of his 1999 Australian talks in *Jacques Derrida: Deconstruction Engaged*, ed. P. Patton & T. Smith (Sydney 2001).

procedures are tropical and metaphoric. For many, Paul de Man and Jaques [sic] Derrida have decisively set aside this view of scientific and philosophical discourse that has lasted from the time of Plato to that of Lévi Strauss.¹⁶

Postmodernism in the Parisian style is a perfect candidate for deflation by Australian realism, which would do something to redress the shocking disproportion in the French–Australian balance of intellectual trade. Australian computer scientists have already made a contribution, with the Monash Postmodern Essay Generator, a computer program that randomly generates a new postmodern essay each time you log in.¹⁷

A special place in the story is held by Jean Baudrillard, the French philosopher whose theory that everything is a media construct caused widespread offence after the publication of his book *The Gulf War Did Not Take Place*.¹⁸ Baudrillard chose to comment on (to the extent that his works could be said to be ‘on’ anything) art, so that he soon enough found himself in the sights of one of the masters of aggressive Australian prose, Robert Hughes. Hughes is not a professional philosopher, but then, idealism is not a very subtle doctrine, and it only needs a basic intelligence and a readiness to wade through some jargon to sort it out. Hughes writes:

Baudrillard is something of a McLuhanite: not only is the medium the message, but the sheer amount of traffic has usurped meaning. ‘Culture’ — he is fond of those snooty quotation marks — is consigned to the endless production of imagery that has no reference to the real world. There *is* no real world. Whether we go to Disneyland, or watch the Watergate hearings on TV, or follow highway signs while driving in the desert, or walk through Harlem, we are enclosed in a world of signs. The signs refer just to one another, combining in ‘simulacra’ (Baudrillardese for ‘images’) of reality to produce a permanent tension, an insatiable wanting, in the audience ... It lets him take a wonderfully lofty view of

¹⁶ J. Hay, ‘Deconstructing Utopia: The blind metaphors of colonial painters and diarists’, in *The Writer’s Sense of the Past*, ed K. Singh (Singapore, 1987), p. 133; cf. J. Hay, ‘Canonical and colonial texts’, in *A Sense of Exile*, ed. B. Bennett (Perth, 1988), pp. 15–21.

¹⁷ www.elsewhere.org/cgi-bin/postmodern, based on TR 96/264: ‘On the Simulation of Postmodernism and Mental Debility Using Recursive Transition Networks’. Compare with the ‘real’ thing available on the Australia’s Wackiest Academic Web Sites page, www.maths.unsw.edu.au/~jim/wackiest.html.

¹⁸ J. Baudrillard, *The Gulf War Did Not Take Place*, trans. P. Patton (Sydney, 1995); similar but less extreme analysis in M. Wark, *Virtual Geography: Living with Global Media Events* (Bloomington, Ind, 1994), chs 1–2; *Australian* 5/6/1996, p. 28.

the relations between fact and illusion, for it denies the possibility of experiencing anything *except* illusion.

The accusation that this or that philosopher hides meaninglessness behind high-sounding jargon is a common one in the trade, so much so that professional philosophers have more or less agreed to a moratorium on it. Not so outsiders, and Hughes on Baudrillard is one of the best examples of the genre:

Jargon, native or imported, is always with us; and in America, both academe and the art world prefer the French kind, a thick prophylactic against understanding. We are now surfeited with mini-Lacans and mock Foucaults. To write direct prose, lucid and open to comprehension, using common language, is to lose face. You do not make your mark unless you add something to the lake of jargon to whose marshy verge the bleating flocks of post-structuralists go each night to drink, whose waters (bottled for export to the States) well up between Nanterre and the Sorbonne. Language does not clarify; it intimidates. It subjects the reader to a rite of passage and extorts assent as the price of entry. For the savant's thought is so radically original that ordinary words will not do. Its newness requires neologism; it seeks rupture, overgeneralization, oracular pronouncements and a pervasive tone of apocalyptic hype.

The corollaries for the art world hardly need to be stated:

If all signs are autonomous and refer only to one another, it must seem to follow that no image is 'truer' or 'deeper' than the next, and that the artist is absolved from his or her struggle for authenticity — an ideal proposition for dealers with a lot of product to shift and a clientele easily snowed by jargon.¹⁹

An unfair parody? Baudrillard himself said, when interviewed for a Brisbane art magazine, 'Simulation refers to a world without reference, from which all reference has disappeared ... I have rather a primitive knowledge of the fine arts, and I've deliberately maintained this slightly primitive attitude. I'm instinctively suspicious of everything which is aesthetic or part of culture as a whole. I'm something of a peasant or a barbarian at heart, and I do my best to stay that way.'²⁰

Baudrillard visited Sydney University in 1984 as the star turn at a conference 'Futur*Fall: Excursions into Post-Modernity'. His paper 'The year 2000 will not take place' was received with acclaim. In fact, a thousand people turned up, so that many had to listen to him, appropriately enough, on closed-circuit television. Other papers with

¹⁹ R. Hughes, 'Jean Baudrillard: *America*', in R. Hughes, *Nothing If Not Critical* (London, 1990), pp. 375–87.

²⁰ N. Zurbrugg, Interview with Jean Baudrillard, *Eyeline* (Brisbane) no. 11 (1990): pp. 4–7.

titles like 'Humour/Perversity/And Other Shit' completed the program.²¹

A number of Australian tertiary courses in art theory then fell into the hands of Baudrillardian and allied forces, with what effect on students' appreciation of quality in art may be imagined.²² Meanwhile, Baudrillard's theory that Disneyland is a plot to hide the real America ('presented as imaginary to make us believe that the rest is real') had a role in inspiring some of his Australian followers to hold a conference on the relevance of French theory to Bugs Bunny. It resulted in what claimed to be the world's first book of 'scholarly essays theorizing animation'.²³

Needless to say, outpourings like Hughes's were taken by Baudrillard's Australian admirers to be as ignorant as they were tasteless. Their continued support for the master was expressed by their invitation to him to revisit Australia. The result was an unexpected media circus, variously describable as a stunning confirmation of Baudrillardian media theory, or Brisbane's best literary beat-up before Helen Demidenko. A collection of photographs by Baudrillard — announced as 'a sort of Elvis Presley of science-fiction theory'²⁴ — was to be exhibited at Brisbane's Institute of Modern Art, sponsored by the French Ministry for Foreign Affairs. When the philosopher and his photographs arrived, Customs demanded excise of \$16,000 because *they were not art*. 'As Griffith University's Dr Nicholas Zurbrugg, who is researching M. Baudrillard's legacy for the 90s, said: "The man who said art was dead then became (a photographic) artist, but when his art got to Australia the Customs said, 'Your art isn't art', Perhaps they've read him".' Desperate negotiations between Queensland's Minister for the Arts and the Federal Minister for Customs

²¹ C. Ferrall, 'Simulating post-modernity', *Arena* no. 68 (1984): pp. 20–2; G. Gill, 'Post-structuralism as ideology', *Arena* 69 (1984): pp. 60–96; the papers are in *Futur*Fall: Excursions into Post-Modernity*, ed. E. Grosz (Sydney, 1986); further in A. Frankovits, ed, *Seduced and Abandoned: The Baudrillard Scene* (Glebe, 1984); something more critical in B.S. Turner, 'Baudrillard for sociologists', in *Forget Baudrillard?*, ed. C. Rojek & B.S. Turner (London, 1993), pp. 70–87; a later visit, *SMH* 27/3/2001, p. 14, 29/3/2001, p. 16, *Australian* 11/4/2001, p. B3.

²² J. McDonald, 'The failure of art schools', *Independent Monthly* (Mar 1991): pp. 37–8; less rudely in C. McAuliffe, 'Jean Baudrillard', in *The Judgement of Paris: Recent French Theory in a Local Context*, ed. K.D.S. Murray (North Sydney, 1992), pp. 97–111.

²³ A. Cholodenko, ed, *The Illusion of Life* (Sydney, 1991), pp. 34, 9.

²⁴ *Courier-Mail* 20/4/1994, p. 22.

secured the release of the photographs hours before the exhibition opened.²⁵

Baudrillard then visited Sydney. His talks were booked out. He told reporters, 'The kind of thing I bring to fruition is a simulation — it's neither true nor false. We can't therefore be wrong ... art has already disappeared without us noticing it ... There's no denial of reality. Rather my discourse goes beyond reality.'²⁶ That certainly explains why anyone trying to refute Baudrillard on his own terms will experience not so much confusion as vertigo; if he hasn't denied or asserted anything, where could you possibly start? What would count as evidence against him? As one who valiantly made the attempt found, 'It is dizzy torture indeed to stabilize, for security's sake, some sense of what Baudrillard means, and when, by *meaning*, *reality*, *the real*, *representation*, *reference*, *referent*, or "a" *referential*.'²⁷

One of Baudrillard's most ardent local admirers has been Julian Pefanis, senior lecturer in Visual Culture of the Twentieth Century at Sydney University, who went to the trouble of translating his *Revenge of the Crystal* and editing Lyotard's *The Postmodern Explained to Children*.²⁸ His own prose style has become something of a legend. An admiring reader submitted a selection of it to the first Bad Writing Contest, run in 1994 by the PHIL-LIT electronic discussion forum on philosophy and literature. Against ferocious international competition across all disciplines, it took off second prize. This is the entry:

The libidinal Marx is a polymorphous creature, a hermaphrodite with the 'huge head of a warlike and quarrelsome man of thought' set atop the soft feminine contours of a 'young Rhenish lover'. So it is a strange bi-sexed arrangement giving rise to a sort of ambivalence: the Old Man and the Young Woman, a monster in which femininity and virility exchange indiscernibly, 'thus putting a stop to the reassuring difference of the sexes.' Now the Young Woman Marx, who is called Alice (of Wonderland fame), is obfuscated by the perverse body of Capital because it simultane-

²⁵ *Australian* 22/4/1994, p. 6; cf. N. Zurbrugg, *The Parameters of Postmodernism* (Carbondale, Ill, 1993), pp. 21, 150; obituary of Zurbrugg in *Australian* 9/1/2002, p. 31; agreement with Baudrillard's 'art is dead' in P. Hutchings, 'Once more with feeling: Art and disappearance', *Art & Text* no. 36 (1990): pp. 36–44, at p. 36.

²⁶ *SMH* 4/5/1994, pp. 29–30.

²⁷ M. Morris, 'Room 101 or a few worst things in the world', in M. Morris, *The Pirate's Fiancee* (London, 1988), ch 10, at p. 195; also D. Broderick, *Theory and its Discontents* (Geelong, 1997), pp. 29–32.

²⁸ J. Baudrillard, *Revenge of the Crystal*, ed. & trans. P. Foss & J. Pefanis (London, 1990); J. Lyotard, *The Postmodern Explained to Children*, ed. J. Pefanis & M. Thomas (Sydney, 1992); also J. Pefanis, *Heterology and the Postmodern: Bataille, Baudrillard and Lyotard* (Durham, NC, 1991).

ously occasions in her a revulsion and a strange fascination. She is the Epicurean Marx, the Marx of the doctoral thesis, the aesthetic Marx. She claims a great love for this man of thought who offers to act as the Great Prosecutor of the crimes of Capital. He is 'assigned to the accusation of the perverts' and entrusted with the invention of a suitable lover, the proletariat, for the little Alice.²⁹

If that excursion into Looking Glass Land couldn't pull off first prize, we was robbed.

What makes them do it? David Stove remarks:

Defects of empirical knowledge have less to do with the ways we go wrong in philosophy than defects of *character* do: such as the simple inability to shut up; determination to be thought deep; hunger for power; fear, especially the fear of an indifferent universe.³⁰

NOW for something completely different.

A previous chapter left Catholic philosophy in an apparently decrepit state. The scholastic philosophy descended from the middle ages came to be thought a hopelessly antiquated embarrassment, both inside and outside Catholic circles. But in the legal world the middle ages are only yesterday. There, the scholastic method of arguing for and against propositions with the citation of learned authorities is fully preserved.³¹ So are practices like wearing robes and hiring champions to fight one's case. The scholastic natural law philosophy of ethics, stressing objective principles of justice, has also survived and flourished in the nourishing habitat of the Australian courts.

Consequently, the most dramatic outcome of Catholic philosophy in recent times has been the High Court's Mabo judgment on Aboriginal land rights. The fundamental issue in the case was the conflict between the existing law based on the principle of *terra nullius*, and what the judges took to be objective principles of justice.

The relation between law and morality is a question on which Catholic philosophy is dramatically opposed to traditional legal theories. On one older view of the relation between the two, 'the King can do no wrong': the law simply is whatever is laid down by properly constituted authority. A less extreme position holds that there

²⁹ J. Pefanis, 'Jean-François Lyotard', in *The Judgement of Paris: Recent French Theory in a Local Context*, ed. K.D.S. Murray (North Sydney, 1992), pp. 113–129, at pp. 122–3; on the libidinal, see also 'Author, lover lose the plot', *Daily Telegraph* 1/6/1996, p. 1.

³⁰ D. Stove, *The Plato Cult and Other Philosophical Follies* (Oxford, 1991), p. 188.

³¹ J. Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Baltimore, 2001), pp. 17, 345.

may be moral constraints on law as on any other human activity, but that law is still not especially connected with morality. Instead it is a set of customs that have arisen to allow society to become organised. They could have been different, but once they arise they are fixed so that everyone can get on with life, knowing what is expected of themselves and others.³² It is hard to see what other view is possible for those who lack the scholastic view that morality is somehow founded on the objective facts of human nature. At the opposite extreme, the scholastics hold that law and morality are so closely related as to be almost the same thing. The whole point of law, they say, is to implement the demands of justice, whose standards are external and objective. Or rather, one should not think of the standards of justice as external to law, since the aim is that law should realise and internalise the principles of justice: 'the precepts of law are designed to be the precepts of justice.'³³ Father Farrell, the Dominican who denounced university philosophy in 1961, was one of the most active in promoting this view, and many other Australian Catholics have defended it.³⁴

³² M. Krygier, 'Law as tradition', *Law and Philosophy* 5 (1986): pp. 237–62; M. Krygier, 'Julius Stone: Leeways of choice, legal tradition and the declaratory theory of law', *UNSW Law Journal* 9 (1986): pp. 26–38; summary in article 'Common law/custom' in *Routledge Encyclopedia of Philosophy*; an ethical defence in T. Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, 1996); T. Campbell & J. Goldsworthy, eds. *Judicial Power, Democracy and Legal Positivism* (Aldershot, 2000); a more nuanced view in M. Krygier, 'Ethical positivism and the liberalism of fear', in Campbell & Goldsworthy, pp. 59–87; further in J. Finnis, 'The truth in legal positivism', in *The Autonomy of Law*, ed. R.P. George (Oxford, 1996), pp. 195–214; defence of similar view by former logic lecturer and Chief Justice of the High Court, Sir John Latham, in Latham papers, National Library of Australia, series 12; J.G. Latham, 'Law and the community', *Australian Law Journal* 9 Supplement (1935): pp. 2–8.

³³ F.G. Brennan & T.R. Hartigan, *An Outline of the Powers and Duties of Justices of the Peace in Queensland* (Brisbane, 1967), p. 200; discussion of such views G. Sawyer, 'The administration of morals', in *Legal Change: Essays in Honour of Julius Stone*, ed. A.R. Blackshield (Sydney, 1983), pp. 88–99; the topic avoided in *Bulletin of the Australian Society of Legal Philosophy* special issue on justice and legal reasoning (1981); other views of the question in M.J. Detmold, *The Unity of Law and Morality* (London, 1984); E. Kamenka & A.E.-S. Tay, eds, *Justice* (London, 1979); P. Cane, *Responsibility in Law and Morality* (Oxford, 2002).

³⁴ P.M. Farrell, *Sources of St. Thomas' Concept of Natural Law* (pamphlet, Melbourne, 1957), reprinted from *The Thomist* 20 (1957): pp. 237–94; 'The theological context of law', *ACR* 32 (1955): pp. 319–25; 'The location of law in the moral system of Aquinas', *Australian Studies in Legal Philosophy*, ed. I. Tammelo *et al.* (Berlin, 1963), pp. 165–94; earlier, J.G. Murtagh, *Australia:*

The two views come into conflict over the issue of whether a precedent should be followed even when it is unjust. Generations of lawyers absorbed the fundamental doctrine of precedent: a precedent cannot be overthrown in favour of some abstract conception of 'justice'; there is to be no private revelation of justice, since that would make the law unstable, as each new judge imposed his own opinions or the changeable opinions of society. Sir Owen Dixon, often regarded as Australia's most eminent Chief Justice of the High Court, expressed the old consensus in 1956:

But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend the application of accepted principles to new cases, or to reason from the more fundamental of settled legal principles to new conclusions, or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an

The Catholic Chapter (New York, 1946), pp. 252–3; M.V. McNerney, 'Natural law', *Twentieth Century* 1 (4) (June 1947): pp. 58–68; D.P. O'Connell, 'The natural law revival', *Twentieth Century* 7 (4) (Winter 1953): pp. 35–44; Anon, 'The natural law and Catholic social principles', *Social Survey* 3 (7) (July 1954): pp. 13–17; later in 'The natural law as a basis of social justice', Australian Catholic Bishops' Social Justice Statement, 1959, in *Justice Now!*, ed. M. Hogan (Sydney, 1990), pp. 206–12; R.D. Lumb, 'The scholastic doctrine of natural law', *Melbourne University Law Review* 2 (1959/60): pp. 205–21; R.D. Lumb, 'Natural law — an unchanging standard?', *Catholic Lawyer* 6 (1960): pp. 224–33; B. Miller, 'Being and the natural law', *Australian Studies*, ed. Tammelo, pp. 219–35; F.A. Mecham, 'Philosophy and law', *ACR* 46 (1969): pp. 137–46; and *Australian Society for Legal Philosophy, Preliminary Working Papers*, 1972; D.W. Skubik, 'The minimum content of natural law', *Bulletin of the Australian Society of Legal Philosophy* 12 (1988): pp. 101–46; J. Finnis, *Natural Law and Natural Rights* (Oxford, 1980); on which V. Kerruish, 'Philosophical retreat: A criticism of John Finnis's theory of natural law', *University of Western Australia Law Review* 15 (1983): pp. 224–44; J. Finnis, 'Natural law and legal reasoning', *Cleveland State Law Review* 38 (1990): pp. 1–13; also in *Natural Law Theory*, ed. R.P. George (Oxford, 1992), pp. 134–57; an unsympathetic view in M. Davies, *Asking the Law Question* (North Ryde, 1994), pp. 59–74; Andersonian objections in W.L. Morison, 'Anderson and legal theory', *Sydney Law Review* 8 (1977): pp. 294–304, at pp. 302–3; see also on earlier history, G.P. Shipp, 'Divine and natural law in Greece', in *For Service to Classical Studies*, ed. M. Kelly (Melbourne, 1966), pp. 149–52; D. Grace, 'Natural law in Hooker's *Of the Laws of Ecclesiastical Polity*', *Journal of Religious History* 21 (1997): pp. 10–22; L. Chipman, 'Grotius and the derivation of natural law', *Bull. ASLP* no. 26 (1993): pp. 66–78; H. Ramsay, 'William Blackstone's natural law', *Bull. ASLP* 20 (1995): pp. 58–70; T.J.F. Riha, 'Natural law and the ethical content of economics', *Australian Journal of Legal Philosophy* 22 (1997): pp. 15–50.

entirely different thing for a judge, who is discontented with a result held to flow from long accepted legal principles, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience ... The latter means an abrupt and almost arbitrary change. The objection is not that it violates Aristotle's precept 'that the effort to be wiser than the laws is what is prohibited by the codes that are extolled.' The objection is that in truth the judge wrests the law to his authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong ... It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday.³⁵

This means, in plain terms, that if the legal system as a whole falls into a mistake, it can never dig itself out.

One will not find in Dixon's works a discussion of such matters as whether there is or could be any such thing as an abstract standard of justice. His view on such large philosophical issues is clear, though, from his remark, 'An enquiry into the source whence the law derives its authority in a community, if prosecuted too far, becomes merely metaphysical.'³⁶

Such inquiries were pursued nonetheless, by those less shy of metaphysics. Besides the work of Catholics, the massive volumes and long years of teaching of Julius Stone, Professor of Jurisprudence at Sydney University, served to bring questions about the source of legal authority to the fore. Though he did not precisely agree with the view that there are moral principles that the law must implement, that view was one he took seriously and expounded sympathetically. His students, who included three of the Mabo judges, were introduced to a range of opinions on the matter and a habit of looking for the principles that informed the law.³⁷

Dixon's view was upheld by his immediate successors as Chief Justice, Barwick and Gibbs.³⁸ Barwick did indeed allow that there is a community sense of justice and fairness that may occasionally be

³⁵ O. Dixon, 'Concerning judicial method', reprinted in *Jesting Pilate and Other Papers and Addresses* (Melbourne, 1965) pp. 152–65, at pp. 158–9; P. Ayres, *Owen Dixon* (Melbourne, 2003), pp. 251–4; some doubts as to whether Dixon's practice accorded with his pronouncement, K. Mason, *Continuity and Change* (Leichhardt, 1990), pp. 38–9.

³⁶ O. Dixon, 'The Statute of Westminster 1931', *Australian Law Journal* 10 (Supplement) (1936): pp. 96–112, at p. 96.

³⁷ J. Stone, *Human Law and Human Justice* (London, 1965), pp. 249–52; J. Stone, *Precedent and Law* (Sydney, 1985), pp. 238–9; see L. Star, *Julius Stone: An Intellectual Life* (Sydney, 1992), pp. 176–9.

³⁸ G. Barwick, *A Radical Tory* (Sydney, 1995), pp. 224, 274–5; H. Gibbs, 'Law and government', *Quadrant* 34 (10) (Oct 1990): pp. 25–9, at p. 28.

‘pandered to’ when interpreting ambiguous laws, but went on to say, ‘it is not for the individual judge or judges to express his or their own views as to the law, views perhaps tinged by a philosophy of one kind or another. Such a course would, it seems to me, be a complete deviation from the judicial tradition of the common law. It would lead to a rule by men rather than a rule by law.’³⁹ But by the 1980s, doubts had set in at the highest level. Sir Anthony Mason, Chief Justice at the time of the Mabo decision, wrote of Dixon’s passage, ‘Yet in some respects his Honour’s outline resembles an elegantly constructed mansion in which some of the windows have been deliberately left open.’⁴⁰ He means that Dixon has neglected the possibility of inconsistency among precedents, or between precedents and principles. ‘If applied too rigidly, the doctrine of precedent produces both injustice and lack of rationality — the very flaws whose purpose it is to expel. Thus adherence to a past decision which reflects either a principle undermined by subsequent legal development or the values of a bygone era, will produce an unjust result, judged by the standards of today.’⁴¹ Mason thus emphasised the conflict an outdated precedent may have with ‘community values’ rather than with an abstract standard of justice, but the recognition that a precedent may conflict with something more basic was the major step away from Dixon’s reasoning.

The most detailed and explicit answer to Dixon, in terms of the conflict between precedent and absolute standards of justice, came from Sir Gerard Brennan, the writer of the first Mabo judgment and Mason’s successor as Chief Justice. His theory of the relation of morality and law is that of the Catholic natural law school. In earlier works he had praised such Catholic legal heroes as Thomas More, well known for his stand on the conflict of law and morality, and the colonial Irish lawyers Therry and Plunkett, whose ‘impartial enforcement of the law’ secured the convictions of the perpetrators of the Myall Creek massacre. He also commented favourably on Hig-

³⁹ G. Barwick, ‘Judiciary law: Some observations thereon’, *Current Legal Problems* 33 (1980): pp. 239–53, at pp. 243–4; G. Barwick, ‘Courts, lawyers and the attainment of justice’, *Tasmanian University Law Review* 1 (1958): pp. 1–19, at pp. 3–7; criticism in M. Atkinson, ‘Trigwell in the High Court’, *Sydney Law Review* 9 (1982): pp. 541–67.

⁴⁰ A. Mason, ‘Future directions in Australian law’, *Monash University Law Review* 13 (1987): pp. 149–63, at pp. 155, 159.

⁴¹ A. Mason, ‘The use and abuse of precedent’, *Australian Bar Review* 4 (1988): pp. 93–111, at p. 94; also A. Mason, ‘Courts and community values’, *Eureka Street* 6 (9) (Nov 1996): pp. 32–4; Lionel Murphy’s view in G. Sturges & P. Chubb, *Judging the World* (Sydney, 1988), p. 362; cf. pp. 346, 351.

gins's adoption in the Harvester judgment of the phrase 'reasonable and frugal comfort', as the standard which a basic wage ought to support, from an outside moral source, an encyclical of Pope Leo XIII.⁴² Lawyers, he also said, have moral duties beyond simply applying the law they find in place. 'If the law itself is an obstacle to justice, the duty of a Christian lawyer extends to seeking its reform.'⁴³ Most remarkably, in a speech on 'Commercial law and morality', he said:

Moral values can and manifestly do inform the law ... The stimulus which moral values provide in the development of legal principle is hard to overstate, though the importance of the moral matrix to the development of judge-made law is seldom acknowledged. Sometimes the impact of the moral matrix is obvious, as when notions of unconscionability determine a case. More often the influence of common moral values goes unremarked. But whence does the law derive its concepts of reasonable care, of a duty to speak, of the scope of constructive trusts — to name but a few examples — save from moral values translated into legal precepts?⁴⁴

The complex maze of rules that makes up commercial law may seem an inhospitable domain for moral imperatives, but the opposite is true, according to Brennan. It is for the commercial lawyer to discern the moral purpose behind each abstruse rule, and advise his client's conscience of what is just in the circumstances, not merely what he can legally get away with.

So when he comes to the specific matter raised by Dixon, whether a precedent can be overturned for conflicting with justice, it is no surprise to find him agreeing that it can: 'The existing body of law may yield no relevant legal rule, or, in rare cases, may yield a legal rule which is offensive to basic contemporary conceptions of justice.'

⁴² G. Brennan, 'The peace of Sir Thomas More', *Queensland Lawyer* 8 (1985): pp. 51–66; G. Brennan, 'The Irish and law in Australia', in *Ireland and Irish Australia*, ed. O. MacDonagh & W.F. Mandle (London, 1986), pp. 18–32; Higgins and Leo XIII from J. Rickard, *H.B. Higgins: The Rebel as Judge* (Sydney, 1984), pp. 173–4; on which see also J. Dynon, 'The social doctrine of Leo XIII and Australia', *Twentieth Century* 6 (1) (Spring 1951): pp. 12–21; full details in K. Blackburn, 'The living wage in Australia: A secularization of Catholic ethics on wages, 1891–1907', *Journal of Religious History* 20 (1996): pp. 93–113.

⁴³ G. Brennan, 'The Christian lawyer', *Australian Law Journal* 66 (1992): pp. 259–61; cf. G. Brennan, 'Pillars of professional practice: Function and standards', *Australian Law Journal* 61 (1987): pp. 112–8.

⁴⁴ G. Brennan, 'Commercial law and morality', *Melbourne University Law Review* 17 (1989): pp. 100–6, at p. 101; see also G. Brennan, 'The purpose and scope of judicial review', *Australian Bar Review* 2 (1986): pp. 93–113, at pp. 104–5; P. Finn, 'Commerce, the common law and morality', *Melbourne University Law Review* 17 (1989): pp. 87–99.

In overturning it, however, the judge does not simply impose his private morality. 'The reasons for judgment in the higher appellate courts increasingly look behind the legal rule to discover the informing legal principle and behind the informing principle to discover the basic value.'⁴⁵ The answer of the innovators to Dixon's charge that judges who upset a precedent are imposing their idiosyncratic notions of morality is thus a cunning one. Overturning an unjust precedent need not be a matter of judges implementing their personal morality, but instead (in Dixon's own words) 'to reason from the more fundamental of settled legal principles to new conclusions.' It is simply that the judges now perceive that the offending precedent conflicts with more fundamental legal principles or values. Brennan's successor as Chief Justice, Murray Gleeson, asserts that all judges must be for Dixon's 'strict and complete legalism'; what this means, however, is not an adherence to the letter of the law but that judges are appointed to 'interpret and apply the values inherent in the law.'⁴⁶

In the Mabo case, such a conflict was found between the existing law, which justified the dispossession of the Aborigines by the doctrine of *terra nullius*, and principles of justice which, the judges held, conflicted with that precedent. *Terra nullius* is not a phrase of English law, but its substance is contained in a judgment of the Privy Council in 1889 according to which New South Wales in 1788 was 'a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominion.'⁴⁷ Aborigines, in other words, have no more rights to the land they walk over than tourists. To explain what is wrong with this, the Court needed first to adopt a theory of native title. Obviously, this cannot be part of the existing (British) law, and must be found in more general principles of justice. An explanation close to that adopted by the Court is found in a 1988 article by Frank Brennan, Jesuit, barrister, son of Sir Gerard and adviser to the Catholic bishops on Aboriginal affairs:

⁴⁵ G. Brennan, 'A critique of criticism', *Monash University Law Review* 19 (1993): pp. 213–6.

⁴⁶ M. Gleeson, *The Rule of Law and the Constitution* (Sydney, 2000), p. 134; cf. p. 98; similar in M.H. McHugh, 'The judicial method', *Australian Law Journal* 73 (1999): pp. 37–51, esp. p. 46; some backsliding from Dixon himself in *Jesting Pilate*, p. 165.

⁴⁷ *Cooper v. Stuart* (1889) 14 AC at p. 291, per *Finding Common Ground*, ed F. Brennan *et al.* (2nd ed, Melbourne, 1986), p. 13; other philosophical perspectives in D. Ivison, P. Patton & W. Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Melbourne, 2000); G. Lloyd, 'No one's land: Australia and the philosophical imagination', *Hyppatia* 15 (2) (Spring 2000): pp. 26–39.

Where a traditional tribal community has continued to reside on its traditional land, discharging its spiritual obligations with regard to that land, and that land has never been occupied by any other persons, that community is entitled to a legal title to that land in *legal recognition* of the fact that they have always lived on that land, land to which no other persons have any moral claim. To deny legal title to that land would be to complete the act of dispossession commenced 200 years ago, or else it would be to deny the rule of law operation with respect to these citizens and their most precious possession.⁴⁸

Insiders of scholastic philosophy will notice that the judges' theory of native title is even closer to one of the scholastic classics, and a founding work of modern international law, Francisco de Vitoria's *De Indis*. It was written in 1539 in response to the original question of this kind, the rights of the American Indians to their land.⁴⁹

Having established that native title exists, the question of its conflict with precedent arises. Both of the two main Mabo judgments, the first written by Gerard Brennan and the second by Justices Deane and Gaudron, admit that to achieve justice in the case, the existing law will have to be overturned. Brennan writes, 'According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to the deprivation of the religious, cultural and economic sustenance which the land provides, 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. Judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contem-

⁴⁸ F. Brennan, 'The absurdity and injustice of terra nullius', *Ormond Papers* 5 (1988): pp. 51–5, at p. 54; see also F. Brennan, 'Aboriginal aspirations to land' in *Finding Common Ground*, pp. 11–49.

⁴⁹ Original in F. de Vitoria, *Political Writings* ed. A. Pagden & J. Lawrance (New York, 1991), pp. 231–92, especially pp. 239–40 and 264–5; see J. O'Rourke, 'Francis de Vitoria', *ACR* 17 (1940): pp. 308–20; Stone, *Human Law and Human Justice*, p. 62; mentioned in H. Wootten, 'Mabo and the lawyers', *Australian Journal of Anthropology* 6 (1/2) (1995): pp. 116–133, at p. 123 and in J. Thompson, 'The loss of Aboriginal sovereignty', *Res Publica* 2 (2) (1993): pp. 1–8; similar in F. Brennan, *Land Rights: The Religious Factor* (Adelaide, 1993), p. 5; J. Malbon, 'Natural and positive law influences on the law affecting Australia's indigenous people', *Australian Journal of Legal History* 3 (1997): pp. 1–39; G. Marks, 'Law, theology and justice in the Spanish colonies', *Australian Journal of Legal History* 4 (1998): pp. 163–73; a slightly different discussion also from scholastic principles in E. Azzopardi, *Human Rights and Peoples* (Drummoyne, 1988), pp. 131–2, 159–64.

porary Australia must be questioned.’⁵⁰ Both judgments treat the overturning of precedent that this circumstance renders necessary as a serious matter, needing careful justification. Not any unjust law whatever can be overturned, they hold. ‘In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.’

To overturn a law like that of *terra nullius*, it must be found inconsistent with one of the basic underlying principles of the law. That principle is a simple one: equality before the law. ‘No case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law).’⁵¹ Even if there is such an inconsistency, one must weigh whether the disturbance to the settled rule of law would be ‘disproportionate to the benefit flowing from the overturning.’ (Even this last point, which appears at first sight to be a modern and sophisticated concession to the Dixonian view, can be found in Aquinas.⁵²) One must also consider international law. While the English legal system is not strictly bound by outside decisions, an influence from them is legitimate, ‘especially when international law declares the existence of universal human rights.’⁵³

The same views are crucial to the other Mabo judgment, that of Deane and Gaudron. In writing of the natural law basis of international law, as founded by Aquinas and Vitoria, Deane had earlier said that ‘This basis gave international law a rich philosophical foundation which was a source of unlimited development. In it there is a reservoir of rules for all situations and cases. A law based on natural law can never grow out of touch with the current needs of nations.’⁵⁴ The legal principle drawn out of the reservoir for Mabo is again that of equality before the law, on which he had written more explicitly in an earlier case:

For one thing, there is the conceptual basis of the Constitution. As the preamble and s. 3 of the *Commonwealth of Australia Constitution Act* 1900

⁵⁰ G. Brennan in *The Mabo Decision with Commentary by Richard H. Bartlett* (Sydney, 1993), p. 18.

⁵¹ *The Mabo Decision*, p. 19.

⁵² Thomas Aquinas, *Summa Theologiae* I-II q. 97 art. 2.

⁵³ *The Mabo Decision*, p. 29.

⁵⁴ W.P. Deane, ‘Crisis in the law of nations’, *Social Survey* 6 (1957): pp. 8–15, at p. 12; also briefly in W. Deane, review of Oppenheim & Lauterpacht, *International Law*, *Sydney Law Review* 2 (1957): pp. 382–4; W. Deane, ‘Vatican diplomacy’, *Twentieth Century* 15 (1960–1): pp. 347–52; cf. W.P. Deane, ‘An older Republic’, *Hermes* 1950, pp. 5–10.

(Imp.) (63) make plain, that conceptual basis was the free agreement of ‘the people’ — all the people — of the federating peoples ... At the heart of that obligation [to act judicially] is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.⁵⁵

The intrinsic equality of all people, he said, ‘might sound a bit wet, but it is just basic to the whole of my thinking.’⁵⁶ Deane acknowledges the role of Catholic natural law philosophy in his Mabo judgment. ‘The basis of natural law’, he says, ‘is the belief that some things are innately right and some innately wrong, flowing from the nature of things, including our nature as human beings. That approach provides a philosophical basis for seeing such things as human rights as going deeper than any particular act of Parliament or what have you. That is not exclusively Catholic. It runs through Christian belief.’⁵⁷ Similarly, Mary Gaudron writes that ‘equality’ means more than a purely formal requirement that there be no irrelevant discriminations among litigants. The High Court, she says, has been embedding in constitutional interpretation a theory of equality ‘not dissimilar to that propounded by Aristotle.’ This theory, as she explains it, involves an active taking into account of relevant differences, so that true equality between persons is preserved; it implies, for example, the provision of legal aid and interpreter services in court to prevent discrimination by default.⁵⁸

The inevitable outcome of this philosophical orientation was the rejection of the law’s unjust past, in the passage of great moral force that became the most quoted part of the Mabo decision:

⁵⁵ Deane J. in *Leeth v. The Commonwealth*, *Commonwealth Law Reports* 174 (1991–2), pp. 486–7; cf. *CLR* 168 (1980), p. 522; I am grateful to George Winterton for calling these passages to my attention.

⁵⁶ T. Stephens, *Sir William Deane: The Things That Matter* (Sydney, 2002), p. 94.

⁵⁷ W. Deane to author, 14/5/1996; Stephens, *Sir William Deane*, p. 100.

⁵⁸ M. Gaudron, ‘Equality before the law with particular reference to Aborigines’, *Judicial Review* 1 (1992–4): pp. 81–9; implications in *Dietrich v. The Queen*, *Commonwealth Law Reports* 177 (1992): p. 292; similar in Gleeson, *The Rule of Law and the Constitution*, pp. 61–3; opposite view in Barwick, *A Radical Tory*, p. 274; bibliography of philosophy of law and equality in A.E.-S. Tay, *Human Rights for Australia* (Canberra, 1986), pp. 173–5; also H.J. McCloskey, ‘A right to equality?’, *Canadian Journal of Philosophy* 6 (1976): pp. 625–42; K. Dunn, “‘Yakking giants’: Equality discourse in the High Court”, *Melbourne University Law Review* 24 (2000): pp. 427–61.

If this were any ordinary case, the court would not be justified in re-opening the validity of fundamental propositions which have been endorsed by long-established authority ... Far from being ordinary, however, the circumstances of the present case make it unique. As has been seen, the two propositions in question [that Australia was *terra nullius*, and that full ownership vested in the Crown] provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. In these circumstances, the court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection.⁵⁹

For giving effect to philosophical principles, the law is supreme.

Naturally, there were complaints from those who abhorred such judicial 'activism'. The complaints entirely ignored the careful arguments of the Mabo judges concerning the basic principles of the law. Instead they returned to Owen Dixon's jibes about the personal standards of judges. The 'activists' were said to replace 'strict rules with flexible standards based on their own notions of reasonableness, fairness and efficiency.'⁶⁰ In assuming there were no objective standards and moving discussion instead to the sociological entity 'their own standards', the conservative commentators were making the same move as the postmodernists in replacing objective standards of truth with relations of power and rhetoric. Why should we accept our laws as they stand? For no other reason than this, that they are ours.

⁵⁹ Deane and Gaudron, in *The Mabo Decision*, p. 82; reflections in R. Gaita, *A Common Humanity* (Melbourne, 1999), pp. 73–86, cf J. Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge, 2002)

⁶⁰ J. Gava, 'The rise of the hero judge', *UNSW Law Journal* 24 (2001): pp. 747–59; D. Heydon, 'Judicial activism and the death of the rule of law', *Quadrant* 41 (1) (Jan-Feb 2003): pp. 9–22.