

# The Mimetic Life of Captain Cook and Sovereignty in Australia

FLEUR RAMSAY<sup>1</sup>

**ABSTRACT.** This paper argues that sovereignty in Australia is mimetic. The nature of sovereignty in Australia must be understood in the colonial context. Anglo-European sovereignty produces imperfect copies of itself (native title, civilised savage, traditional laws and customs) in order to secure itself as original and authoritative as a strategy and effect of its own power. However, as part of the mimetic nature of sovereignty in Australia, Anglo-European sovereignty is always at risk of being undermined by Aboriginal claims that they too have sovereignty.

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## Introduction

It is only the continuance of exploitation and the filling of the gaps with pragmatism, while all else continues as before, that washes the shores of where Cook walked before.<sup>2</sup>

The subject of this paper is the figure of Captain James Cook. In particular, I am concerned with the link between Captain Cook and sovereignty in the country we now call Australia. The figure of Captain Cook, like sovereignty itself, is contested in Australia along the lines of coloniser and colonised, Anglo-European and Aboriginal. For Anglo-European Australia Captain Cook is the celebrated “discoverer” of the east coast of the continent, claiming it as a colonial possession of the British Crown and paving the way for the occupation of Australia by the British in 1788. Captain Cook is a symbol, standing as a metonym, in both law and Anglo-European history for the assertion of British sovereignty over Australia. In contrast, Captain Cook is a figure of great ambivalence in Aboriginal accounts and narratives of colonisation and is largely characterised as villainous as well as a usurper of Aboriginal sovereignty and control over land. There is little doubt that Captain Cook has also become a metonymic symbol for sovereignty in Aboriginal Australia.

In this paper I take up one of these Aboriginal accounts of Captain Cook as a platform for my discussion of sovereignty in Australia. I will look at Captain Cook through the prism of *Too Many Captain Cooks*, a Rembarrnga account of Captain Cook from Arnhem Land in the Northern Territory (NT) of Australia. The extraordinary feature of *Too Many Captain Cooks* is that Captain Cook appears as a dreaming ancestor of the Rembarrnga. From the outside looking in the Rembarrnga Captain Cook is almost unrecognisable as Captain Cook but for his name, his stated association with the material things of Anglo-Europeans and his link with, so to speak, his “namesake” — the too many Captain Cooks that eventually follow him to Australia. Despite its almost unrecognisable incorporation of Captain Cook, I contend that *Too Many Captain Cooks* is mirror-like (it reflects back to “us”) and tells us something about the nature of sovereignty in Australia (Rembarrnga, Aboriginal and, importantly, the Crown’s sovereignty). There is something important in the

<sup>2</sup> Watson I, ‘Buried Alive’, *Law and Critique*, 13:3 (2002), 259.

very act of the copying of Captain Cook that gives us an insight into sovereignty in Australia.

In this paper I will argue that sovereignty is mimetic — there is an intrinsic relationship between Anglo-European and Aboriginal sovereignty in Australia. The literature on sovereignty has tended to treat Aboriginal and Anglo-European sovereignty as separate and distinctive. If we take Captain Cook to stand for sovereignty, a reading of *Too Many Captain Cooks* tells us that Aboriginal sovereignty and the Crown's sovereignty are in one way or another intimately tied. Some formulations of Aboriginal sovereignty have started to look more and more like the Crown's sovereignty, once we move past the Crown as a symbol of sovereignty to its institutional manifestation in the form of the State. In addition, the way in which the Crown's sovereignty is asserted in Australia (as an indivisible sovereignty) clearly contests the existence of Aboriginal sovereignty in Australia. This paper seeks to tease out exactly how the intimate relationship between, generally speaking, these two sovereignties play out. To aid this discussion I will draw on three theories of mimesis (Michael Taussig, Homi K Bhabha and René Girard) to discuss the link between Captain Cook and Captain Cook, sovereignty and sovereignty. I will relate these theories to a reading of *Too Many Captain Cooks* and to the influential theory of the nature of western sovereign power in the work of Thomas Hobbes. The discussion will be taken to the key High Court judgment in *Mabo v Queensland (No 2)*.<sup>3</sup>

The purpose of this paper is to give us an insight into the nature of sovereignty in the Australian colonial setting. I will show that Anglo-European sovereignty produces impoverished copies of itself in order to secure itself as original and authoritative as a strategy and effect of its own power. However, as part of the mimetic nature of sovereignty in Australia, Anglo-European sovereignty is always at risk of being undermined by Aboriginal claims that they too have sovereignty. This raises the possibility that while the mimetic nature of sovereignty in Australia is a strategy of domination, it also contains the seeds for its own contestation and provides a platform for a more reciprocal understanding of sovereign power.

<sup>3</sup> [1992] HCA 23; (1992) 175 CLR 1. (Hereafter *Mabo*. Subsequent references are to the HCA report).

## 1. Many Captain Cooks

### 1.1. *Too Many Captain Cooks* — A Rembarrnga Dreaming of Captain Cook

The following discussion of the Rembarrnga dreaming is taken from the video *Too Many Captain Cooks*.<sup>4</sup> The video records Paddy Wainburranga painting, singing and telling the story of Captain Cook. There are two Captain Cooks in *Too Many Captain Cooks*: Captain Cook the ‘law man’ and ancestor of the Rembarrnga and the ‘New Captain Cooks’ (the British). It appears that Wainburranga is disputing that white people know the real Captain Cook, as Captain Cook ‘was a law man’ from millions of years ago and not the Captain Cook of 200 years ago. Wainburranga says that his generation knew Captain Cook; the geese and cockatoo (amongst a list of others) knew Captain Cook in the time that they were human. Captain Cook was like, he recounts, Adam and Eve, though Adam and Eve were ‘only half way’. Captain Cook was, as Wainburranga puts it, ‘there first’.

Wainburranga tells us that Captain Cook was from Mosquito Island, an island east of Papua New Guinea. Captain Cook came to Sydney Harbour (sometimes called Sydney Island by Wainburranga) in his boat with his two wives. There were, we are told, millions of people in Australia when Captain Cook came, but he did not ‘interfere’ with them. Captain Cook brought in his boat useful material things of the white man, including blankets, calico, trousers, axes, steel knives and, even, flags.

Wainburranga tells us that Captain Cook was working on his boat at Sydney Island. ‘Satan’, who lived on the other side of Sydney Island alone with no family, wanted to kill Captain Cook and take his wives. Satan asked Captain Cook if he had magic, to which Captain Cook answered, ‘no’. We are told that Captain Cook says to Satan, as he has a magic bone (Captain Cook only has a stone axe) that they should fight hand to hand. Captain Cook manages to kill Satan in the fight. Wainburranga tells us that Captain Cook becomes the ‘owner of the country’ and is also ‘the boss of Mosquito Island’. Captain Cook sails back to Mosquito Island, but on his return he is speared by his own relatives. Wounded, Captain Cook makes it back to Sydney Island but dies there. Then Wainburranga

<sup>4</sup> McDonald P, *Too Many Captain Cooks* (Civic Square, ACT, 1988).

says, ‘other people started thinking they could make Captain Cook another way’.<sup>5</sup>

At this juncture the dreaming appears to morph into something more familiar — a historical account of colonisation. We are told that new people, ‘all his sons’, ‘New Captain Cooks’ come to Australia and their families follow over. While Captain Cook never made war with Aboriginal people, the New Captain Cooks killed many Aboriginal people first in Sydney and then ‘taking over’. ‘From the New Captain Cooks 100 years ago, 200 years ago’, Wainburranga tells us, ‘too many Captain Cooks, too many Captain Cooks’. Wainburranga finishes the story by saying that ‘we’ know and respect only one Captain Cook and that ‘no one can change our law, no one can change our culture … we have the story of Captain Cook’.

Captain Cook is an incredibly ubiquitous figure in Aboriginal Australia. The Rembarrnga dreaming is just one Aboriginal story in which Captain Cook is the central focus and figure. Captain Cook appears in Aboriginal stories from every corner of the continent, including in stories belonging to Aboriginal communities located in areas which, according to Captain Cook’s journal, Captain Cook did not set foot in nor sail near. Arnhem Land is situated in the north eastern corner of the Northern Territory and is not, at least according to Captain Cook or his botanist Joseph Banks, a place visited during the Endeavour exploration. While the Rembarrnga story of Captain Cook has all the indicia of what is called the dreaming, other stories fall somewhere between a contemporaneous oral history of first contact or subsequent contact and the dreaming. For example, in a Gurindji story (from South West of Arnhem Land) about Captain Cook and Ned Kelly, Cook/Kelly are figurative for villainous and friendly Europeans. Ned Kelly is the infamous bush ranger from the 19th century who, as far as we know, never ventured near Gurindji country. In the story, Ned Kelly was a pastoralist and friend of Aborigines, while Captain Cook looked ‘at the land and saw that it was very good and wanted it for himself’ and killed Ned Kelly.<sup>6</sup>

How are we to explain the ubiquity of Captain Cook in Aboriginal Australia with a view to developing a reading of *Too Many Captain*

<sup>5</sup> Emphasis added.

<sup>6</sup> Maddox K, ‘Myth, History and a Sense of Oneself’ in J Beckett *Past and Present* (Canberra, 1988), 18.

*Cooks?* Kenneth Maddox sees the Captain Cook stories as the emergence of political ‘myths’, which ‘not only explain or refer to a state of affairs but envisage an alternative to it’.<sup>7</sup> In the Gurindji story while Captain Cook is considered to be a villain, the Ned Kelly type figure personifies the possibility of amicable relations between Aboriginal and Anglo-European.<sup>8</sup> The various Aboriginal accounts of Captain Cook represent, what Michael Jackson calls, a ‘transmigration of a name’.<sup>9</sup> Jackson discusses the use of the name of Alexander the Great in different historical and cultural milieus as a political strategy to underscore political power, providing some support for Maddox’s reading. The Macedonian world-conqueror has even become an ancestor of a ruling lineage in a remote West African society in contemporary times. Reflecting on the impact that the transmigration of a name has on the definitive historical figure, Jackson poses a question:

Where then is the real Alexander, amid all these versions in which ancient events have become metamorphosed according to the pre-occupations of different societies in different epochs?<sup>10</sup>

The answer given by C B Welles to the question posed by Jackson is: ‘there have been many Alexanders. Probably there will never be a definitive Alexander’.<sup>11</sup>

Both Maddox and Jackson provide useful starting points by highlighting the political nature of transmigration figures but there are limitations to each analysis in this context. Maddox, for example, adheres to a strict separation between myth and history (there is a definitive or authoritative Captain Cook) and does not provide a platform to discuss the incorporation of Captain Cook into the Rembarrnga dreaming as more than metaphorical or allegorical. Jackson applies a less rigid view of myth and history. However, his analysis does not lend itself to the situation in which we find ourselves, where there is a contest over the name and representation of Captain Cook between, broadly speaking, Aboriginal and Anglo-European Australia. As we will see in the next section Captain Cook is an equally important figure for Anglo-European Australia.

<sup>7</sup> Ibid, 28.

<sup>8</sup> Ibid, 21.

<sup>9</sup> Jackson M, ‘The Migration of a Name: Reflections on Alexander in Africa’, *Cultural Anthropology*, Vol 2, No 2 (May, 1987) 235–254.

<sup>10</sup> Ibid, 240.

<sup>11</sup> Ibid, 240.

The other difficulty is that Maddox does not consider the incorporation of Captain Cook into the cosmological structure of the dreaming. None of the stories that he studies can be properly described as dreaming and his use of myth is only intended to distinguish the Captain Cook stories he has studied from the historical figure (the “real” Captain Cook). *Too Many Captain Cooks* departs from, for instance, the structure of the Cook/Kelly story because Captain Cook is an ancestor. Moreover, none of Maddox’s stories present Captain Cook in a good light nor as intimately connected to Aboriginal people. We have to consider the role the dreaming plays in order to understand *Too Many Captain Cooks*. My general contention is that a reading of *Too Many Captain Cooks* is possible without an intimate knowledge of the dreaming, but there are attributes of the dreaming that contribute to my proposed reading. *Too Many Captain Cooks* is more than cosmological in the strict sense because of its use of western symbolism, especially the second part of the story which is a familiar account of the impact of colonisation on Aboriginal people. That is to say, it is possible to read the Rembarrnga dreaming from a perspective of what it says about “us” as coloniser (as “we” are part of the object of the story), the Anglo-European colonial project and what it tells us about the Rembarrnga response to colonisation.

Those key attributes of the dreaming which contribute to my reading are as follows. The dreaming is a complex institution. It is a time when law is made and is a sacred and heroic time when human and nature came to be as they are.<sup>12</sup> However, neither time nor history as we understand it is involved in this meaning.<sup>13</sup> As the celebrated anthropologist W E H Stanner puts it, ‘one cannot fix the dreaming in time: it was, and is, everywhen’.<sup>14</sup> The dreaming infuses the past, present and the future. Thus, there is an important continuity between the dreaming and the here-and-now. The dreaming also talks about what life is and what it can be<sup>15</sup> and it is for this reason often associated with law. The ancestor through intentional and unintentional acts lays the foundations of the law which is revealed in the dreaming. In Stanner’s words, the dreaming is:

<sup>12</sup> Stanner W E H, ‘Dreaming’ in *White Man Got No Dreaming* (Canberra, 1979), 23.

<sup>13</sup> Ibid, 24.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, 29.

A kind of narrative of things that once happened; a kind of charter of things that can still happen; and a kind of *logos* or principle of order transcending everything significant for Aboriginal Man.<sup>16</sup>

The dreaming is also, importantly, a framework for care and control of country.<sup>17</sup> It is through the dreaming that Aboriginal people have rights and responsibilities in relation to land and a chief complaint about colonial interference is that it prevents Aboriginal people from caring for country.<sup>18</sup> Indeed Hobbles, an Aboriginal man from the Yarralin settlement in the Northern Territory, ironically uses the expression ‘Captain Cook’s “law”’ to characterise the progressive supplanting of an Aboriginal way of caring for country with an Anglo-European way.<sup>19</sup> Captain Cook’s law is not solely a reference to western law in an institutional sense, though law in this sense is undoubtedly an important factor in Hobbles’ complaint about the loss of control of country, it is also a broader reference to what Hobbles sees as destructive environmental practices (Anglo-European ways of caring for country).

A preliminary reading to lay the groundwork for what follows is that the representation of Captain Cook as law man is as simple and as complex as trying to share in and control what is seen by the Rembarrnga as the source of power of the coloniser. Captain Cook, as we shall see, is a metonym in both law and the Anglo-European public consciousness for sovereignty. Sovereignty has become a thing of significance for Aboriginal people. The making of Captain Cook as law man attempts to close the gap between dreaming — the time things of significance came into being for Aboriginal people — and the present. It is through Rembarrnga law via *Too Many Captain Cooks* that Captain Cook, as a metonym for sovereignty, is claimed as a significant property of the Rembarrnga.

<sup>16</sup> Ibid, 24.

<sup>17</sup> See Ingold T, ‘Hunter-Gathering as a Way of Perceiving the Environment’ in *The Perception of the Environment: Essays on Livelihood, Dwelling and Skill* (London and New York, 2000), 53; Munn N D, ‘The Transformation of Subjects into Objects in Walbiri and Pitjantjatjara Myth’ in Berndt R M (ed), *Australian Anthropology: Modern Studies in the Social Anthropology of the Australian Aborigines* (Perth, Western Australia, 1970), 146 and 148; Myers F, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among Western Desert Aborigines* (Berkeley, 1986), 49–50.

<sup>18</sup> Myers, ibid, 49–50.

<sup>19</sup> Rose D B, *Dingo Makes us Human: Life and Land in an Australian Aboriginal Culture* (Cambridge, 1992), 189.

There is an extraordinarily paradoxical consequence caused by the incorporation of Captain Cook into the dreaming. The Rembarrnga Captain Cook *as* metonym for sovereignty is prior to Anglo-European sovereignty. To paraphrase Wainburranga here: Rembarrnga know the real Captain Cook; Rembarrnga know and respect only one Captain Cook; and Captain Cook is an ancestor from millions of years ago — from the time of the dreaming — not from 200 years ago. *Too Many Captain Cooks* is also a contestation of Anglo-European sovereignty in Australia which is intimated in Wainburranga's words that, '*other people started thinking they could make Captain Cook another way*' and '*no one can change our law, no one can change our culture ... we have the story of Captain Cook*'. In this regard, *Too Many Captain Cooks* is both an assertion and a contestation of sovereignty — it is a strategy of power and not a metaphor for political power. To flesh out this argument, we must look more closely at the "object" of the story: the "historical" Captain James Cook.

## 1.2. Captain James Cook — His Majesty's Object

On a fateful day, 22 August 1770, Captain James Cook came to what he later called 'Possession Island' and took possession of the east coast of the continent now known as Australia on behalf of King George III. Captain Cook, the renowned English explorer made three South Pacific voyages (1768–71, 1772–5, 1776–80). It was during his first voyage that he navigated Australia in the ship named the Endeavour. Captain Cook had made a number of other declarations purporting to take possession of the east coast on the course of that voyage. However, the significance of that day was that Captain Cook had traversed the entire length of the east coast of the continent. Captain Cook records:

We saw a number of People upon this Island arm'd in the same manner as all others we have seen except one man who had a bow and a bundle of Arrows the first we have seen on this coast. From the appearance of these People we expected they would have opposed our landing but as we approached the Shore they all made off and left us in peaceable possession of as much of the Island as served our purpose. After landing I went upon the highest hill which however was of no great height, yet not less than twice or thrice the height of the Ships Mast heads but I could see from it no land between SW and WSW so that I did not doubt

but there was a passage, I could see plainly that the Lands laying to the NW of the passage were composed of a number of Islands of various extent both for height and circuit reigned one behind another as far to the Northward and Westward as I could see which could not be less than 12 or 14 Leagues. Having satisfied myself of the great Probability of a Passage, thro' which I intend going with the Ship and therefore may land no more upon this Eastern Coast of New Holland and on the Western side I can make no new discovery the honour of which belongs to the Dutch Navigators ... but the Eastern Coast from the Latitude of 38 South down to this place I am confident was never seen or visited by any European before us and notwithstanding I had in the name of his Majesty taken possession of several places upon this coast I now once more hoisted English Coulers and in the Name of his Majesty King George the Third took possession of the whole Eastern Coast from the above Latitude down to this place by the Name of New South Wales together with all the Bays, Harbours, Rivers and Islands situate upon the said coast after which we fired three Volleys for small Arms which were Answered by the like number from the Ship this done we set out for the Ship ... We saw on all the Adjacent Lands and Islands a great number of smooks [smokes] a certain sign that they are inhabited and we have dayly seen smooks on every part of the coast we lately been upon.<sup>20</sup>

While discredited in international law because it was prone to abuse, ‘discovery’ of a territory nevertheless was considered sufficient to provide the European sovereign with title.<sup>21</sup> It is at least clear from Cook’s journals that he thinks discovery is sufficient. In *Mabo*, sovereignty is described simply as an ‘act of state’<sup>22</sup> and while there is seemingly confusion amongst the judges over what “act” actually constituted the sovereign event, Captain Cook certainly forms part of the sovereign pantheon of

<sup>20</sup> Cook J, ‘Cook’s Journal: Daily Entries 22 August 1770’, <http://southseas.nla.gov.au/journals/cook/17700822.html>; <http://southseas.nla.gov.au> (16 May 2007).

<sup>21</sup> Anghie A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2004), 82.

<sup>22</sup> Brennan J, *Mabo*, above n.3, [31].

acts. At the very least he provides continuity between discovery and that later settlement of the colony by Captain Arthur Phillip and the First Fleet of 1788. Captain Cook, I suggest, is a metonym of sovereignty in law.

In the Anglo-European public consciousness he sits, some say inaccurately, alongside Captain Arthur Phillip of the first fleet as an ‘outstanding figure in the founding of Australia’.<sup>23</sup> Chris Healy argues that we should not assume that the, now exalted, place of Captain Cook in Australian history has always been a continuous one (from past to present). There was an active movement amongst an elite segment of the Australian population to turn Captain Cook into an identifiable “Australian” figure within the wider framework of a history encompassed by Europe.<sup>24</sup> In Healy’s words,

Those who believed passionately in Cook wanted his very name to perform a general public role as variously European, British, imperial, visionary and nationalist. Cook was to provide both a structure of historical time and a point of genesis which would serve to mark the end of empty time and the beginning of continuous historical time in Australia.<sup>25</sup>

We can think about the relevance of Jackson’s concept of the transmigration of a name in relation to Captain Cook’s place in Anglo-European Australian history. After all, as Healy points out, he lived and died somewhere else.<sup>26</sup> There are some interesting parallels between the historical and dreaming figure of Captain Cook which are worth drawing out here. In dreaming stories ancestors have generative or constitutive powers. They mark out sites as significant — hills, salt lakes, trees — by metamorphosing into these geological forms of the landscape in their travels.<sup>27</sup> ‘Ever present in these forms, their movements are congealed

<sup>23</sup> See Maddox, ‘Myth, History and a Sense of Oneself’, above n.6, 13 and 24.

<sup>24</sup> Healy C, *From the Ruins of Colonisation: History as Social Memory* (Cambridge, 1997), 7.

<sup>25</sup> Ibid, 30.

<sup>26</sup> Ibid.

<sup>27</sup> Myers F, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among Western Desert Aborigines*, above n.17, 49–50.

in perpetuity'.<sup>28</sup> Discovery and cartography appears to fit neatly with the world constitutive power of dreaming. The great navigators, of whom Christopher Columbus and Captain Cook have become household names, resemble dreaming ancestors who wrought radical transformations on a territory and the world. Like a dreaming ancestor Captain Cook marked the east coast of Australia with cultural significance for Anglo-European and Aboriginal alike, namely it became New South Wales and a British possession. By the 1930s in Australia there had been a spread of historical inscriptions marking Captain Cook's landing places. As Healy puts it:

Particularly in the case of Cook, the memorialising of landing places meant anchoring travelling deeds as if they were generative acts, as if an emergency landing at Cooktown was actually connected to the place which it had become. In other words, these were not acts of preserving memories in place but of memorialising events, which were then to be remembered in a place other than their performance.<sup>29</sup>

The use of "object" in the subtitle of this section is purposeful. We can no longer conceive of Captain Cook as a "real" person in the ordinary sense of the word. He and his name have been deployed by Anglo-European Australians in a way similar to the way in which Alexander the Great has been deployed across history and cultures. It is left open to us to ask — who deified Captain Cook, or to put it another way, who is responsible for the apotheosis of Captain Cook? There are numerous historical and anthropological studies that argue Captain Cook was deified by the "natives" he encountered on his voyages, much like the raising of Captain Cook to the status of ancestor by the Rembarrnga. Marshall Sahlins' anthropological study on the Hawaiian's mistaking Captain Cook for the god 'Lono' is the most well known.<sup>30</sup> Sahlins' thesis has been attacked by Gananath Obeyesekere, arguing that it was actually the English (such as missionaries and anthropologists) who raised Captain Cook to

<sup>28</sup> Ingold T, 'Hunter-Gathering as a Way of Perceiving the Environment', above n.17, 53.

<sup>29</sup> Healy, *From the Ruins of Colonisation: History as Social Memory*, above n.24, 36.

<sup>30</sup> Sahlins M, *How "Natives" Think About Captain Cook, for Example* (Chicago, 1995).

the status of a god or spread his reputation as god-like.<sup>31</sup> This perception of Captain Cook supported the sense of destiny as “Teacher of Nations” that the British felt in the colonial context.<sup>32</sup>

Obeyesekere’s perspective is supported by Kathleen Wilson’s study of what she describes as the apotheosis of Captain Cook in England during the eighteenth century. There were numerous representations of his achievements from publications, biographies, plays, poetry and paintings. These representations helped recuperate, Wilson argues, ‘British political and imperial authority, rescue the national reputation for liberty and restore faith in the superiority of the English character’ and the English genius for discovery and exploration.<sup>33</sup> As Wilson points out, Captain Cook reached a heroic stature in English national consciousness that few figures before or since have matched and his continued importance is assured as study after study assesses the impact of his legacy.<sup>34</sup>

The debate over the genesis of Captain Cook’s god-like status suggests that Captain Cook meets Max Weber’s notion of charisma. Charisma is rooted in some quality or character not accessible to everybody.<sup>35</sup> It may be that the “real” Captain Cook was undeserving of such a reputation but, at least, in the public imagination his feats and character were considered deserving of lofty accolades. Captain Cook had ‘superior abilities, judgment and discipline’ as well as ‘humble origins as a Yorkshire husbandman’s son’, was ‘auto-didactic’ (he taught himself mathematics and astronomy) and exhibited ‘humility’. In Wilson’s words, ‘all become inextricable parts of his heroic character’.<sup>36</sup>

It is Weber’s linkage of charisma with political or religious authority that is most important here. Charismatic authority is a spontaneous form of authority that can be contrasted with, at least in Weber’s view, institutional authority. Weber has been criticised for sometimes reducing

<sup>31</sup> Obeyesekere G, *The Apotheosis of Captain Cook: European Mythmaking in the Pacific* (Princeton, 1992).

<sup>32</sup> Wilson K, *The Island Race: Englishness, Empire and Gender in the Eighteenth Century* (New York, 2003), 91.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Weber M, ‘The Sociology of Charismatic Authority’ in Heydebrand W, *Sociological Writings* (New York, 1994), 254.

<sup>36</sup> Wilson, *The Island Race: Englishness, Empire and Gender in the Eighteenth Century*, above n.32, 6.

charismatic authority to, in Pierre Bourdieu's words, 'a spontaneously generated product of inspiration'.<sup>37</sup> However, as Bourdieu points out, while underdeveloped in Weber's thought, he did recognise the work carried out by specialist agents or an elite class, such as a priestly caste, in sustaining, regulating and regularising the authority of the charismatic figure, usually, after the figure's death.<sup>38</sup> This goes someway towards explaining the longevity of some figures considered to be charismatic.

This capturing, so to speak, of the charismatic authority by specialist agents is a form of institutionalisation. In Bourdieu's words:

And the principle of this institutionalisation consists, for Weber, in the process whereby charisma detaches itself from the person of the prophet to attach itself to the institution and, more precisely, to a specific *function*: 'the process of transferring such sacredness which derives from charisma to the institution as such ... is characteristic of all processes of Church-formation and constitutes their specific essence.'<sup>39</sup>

There is a key distinction that Bourdieu draws between Church-formation and the proliferation of the sect (another type of "institution" that also claims the charismatic figure as its property). Putting aside issues of authoritativeness, this suggests that no one institution has a monopoly on the deployment of a charismatic figure.

Returning to Bourdieu's account of the institutionalisation of charismatic authority, it is possible to substitute the term Church-formation with that of Nation/State-formation. The discussion above of the deployment of Captain Cook by elites in Australia supports this substitution. I suggest, however, that the judiciary are also capable of falling within Weber's and Bourdieu's concept of specialist agents and that the High Court's, albeit ambivalent, equation of Captain Cook with sovereignty performs a similar role in Australian law that Captain Cook does for Australian history. Captain Cook provides a point of genesis of a continuous sovereignty. The Captain Cook of Australian law, like Captain Cook the dreaming ancestor, is also a strategy of sovereign power.

<sup>37</sup> Bourdieu P, 'Legitimation and Structured Interests in Weber's Sociology of Religion' in Lash S and Whimster S, *Max Weber: Rationality and Modernity* (London, 1987), 119.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid, 135.

## 2. Mimesis and Sovereign Power

### 2.1. Mimesis and Power

The argument of this paper that sovereignty in Australia is mimetic invokes the concept of mimesis. My reading of *Too Many Captain Cooks* largely rests on this concept. What, then, is mimesis? In very simple terms mimesis refers to the mimicry or the copying of something and the dialectical relationship (the act of mimicry) between an original and its copy.

The critical point I seek to make in this section is that mimesis is about power; its generation, control, manipulation as well as its questioning and contestation. I have already suggested that the Rembarrnga portrayal of Captain Cook is a strategy of power, more precisely, a strategy of sovereign power that contests the Captain Cook of the colonial project. Thus, there is in the Rembarrnga example a power play between two Captain Cooks. In conventional thinking, best exemplified by Maddox, that power play is between an authoritative Captain Cook and a figurative or metaphoric Captain Cook. On my reading this power play is inverted in the Rembarrnga dreaming. The Rembarrnga version of Captain Cook is the authoritative version and the Captain Cooks that follow, albeit powerful, are impostors. How are we to account for two very different versions of the dialectical relationship between the original and the copy?

There are, in my view, seven interrelated aspects of the dialectical relationship between the original and the copy which provide a theoretical framework for understanding these two versions of the power play between Captain Cook and Captain Cook. The first aspect is the *power of mimesis*. That is, the copy shares in and takes power from the original. The second aspect of the relationship between the original and the copy is the issue of *imperfect copies*. The issue can be posed as a question — how exact does a copy have to be in order to be properly called a copy? The third aspect is *communicative*. Mimesis or, more appropriately, mimicry and mime emerged as a communicative strategy in the colonial context. The fourth aspect is *temporality*. There are two aspects to temporality if we locate it in the colonial context. The first is the construction of authority (the original) in the colonial context. The second can be put in the form of a question — what comes first or who is mimicking whom? The question

indicates that there is the possibility of temporal slippage and cyclical play between the copy and the original.

The fifth relationship is *ambivalence* and it concerns the affect that the copy can have on the original. The copy threatens to undermine the authority or authenticity of the original. The sixth aspect is *contestation* or *conflict*. While I propose to develop this aspect in greater depth in the next section, contestation can be broken into two aspects: the disrupting effects of ambivalence and the actual contestation over the authority, or the authoritative nature, of the “original” object. The seventh and final aspect of the mimetic relationship that I have identified is *reciprocity*, which I suggest adheres or is inherent in mimesis. I will say nothing more of this aspect as I will draw out the reciprocal nature of mimesis when I address contestation.

In relation to the first aspect, I am interested here in Taussig’s discussion of magical practice as a form of mimesis because it reveals so well the power play of mimesis. Magical practice took on a new type of mimetic quality in the colonial context, in which images of Europeans are incorporated into the craft of magic. The Cuna Indians of the San Blas Islands off Panama, for example, had carved wooden figurines pivotal to curing in the likeness of Europeans.<sup>40</sup> In the late 1940s one observer even noticed a figure in the likeness of General Douglas MacArthur.<sup>41</sup> Exactly when this transformation occurred is unclear, but what is clear is that at a certain point the healing figurines no longer looked like either Indians or demons.

The wooden figurines are an important aid to healing. For example, these figurines or, more importantly, the spirits that they represent search for an abducted soul of a sick person.<sup>42</sup> In one healing of a woman in obstructed labour the medicine man took the wooden figurines and sang to them the following: ‘the medicine man gives you a living soul, the medicine man changes for you your soul, all like replicas, all like twin figures’.<sup>43</sup> Taussig sees an intrinsic connection between mimesis — the act of copying or replicating something — and the magic hinted at in the use and function of the wooden figurines. As Taussig puts it:

<sup>40</sup> Taussig M, *Mimesis and Alterity: A Particular History of the Senses* (New York, 1993), 7–8.

<sup>41</sup> Ibid, 10.

<sup>42</sup> Ibid, 9.

<sup>43</sup> Ibid, 7.

Note the replicas. Note the magical, the soulful power that derives from replication. For this is where we must begin; with the magical power of replication, *the image affecting what it is an image of, wherein the representation shares in or takes power from the represented.*<sup>44</sup>

(I will put aside for the moment that the example also intimates that Europeans embody power or, saying the same thing in a slightly different way, are an object or symbol of power.) The example suggests that the power of the copy is derivative; that is, its power is generated from its association with the original.

The wooden figurines invoke James Frazer's two species of magic: the magic of similarity and the magic of contact or contagion. The first is based on the principle that 'like produces like' or an 'effect resembles its cause'.<sup>45</sup> The magic of similarity is best thought about by taking voodoo as an example as it is well represented in western popular culture. In voodoo an effigy in the image of someone is made 'in the belief that just as the image suffers, so does the man, and that when it perishes he must die'.<sup>46</sup> In Frazer's words, 'the magician infers that he can produce any effect he desires merely by imitating it'.<sup>47</sup> The magic of contact or contagion is based on the principle that 'things which have once been in contact with each other continue to act on each other after the physical contact has been severed'.<sup>48</sup> It uses items of clothing or body parts such as hair, nails, teeth and so on, to be magically acted upon.<sup>49</sup> While not requiring a more exact copy like the magic of similarity, it works on the same principle that there is a connection between one thing and another. In both examples as G E R Lloyd puts it,

[Magic's] general aim is similar to that of applied science, to control events, and one of the means whereby it hopes to achieve this is using the links which it believes may be formed between things by their similarities.<sup>50</sup>

<sup>44</sup> Emphasis added. *Ibid*, 7–8.

<sup>45</sup> Frazer in *ibid*, 47.

<sup>46</sup> Frazer in *ibid*, 48.

<sup>47</sup> Frazer in *ibid*, 47.

<sup>48</sup> Frazer in *ibid*.

<sup>49</sup> *Ibid*, 53.

<sup>50</sup> *Ibid*, 49.

Taussig's claim that the representation shares in or takes power from the represented says very little about the type or, even, the quality of the effect that the copy has on the copied and vice versa. The magic of similarity — like produces like — would suggest that in circumstances where the copy was similar enough to the "thing" that it replicates the copy takes on all the same attributes. Copyright law is based on this very premise. A copy of the 'text', to use legal terminology, derives its power from the original text and, indeed, affects the power and appeal of the original text as commodity. However, it is unlikely to be the case across the board that the copy will take on the same attributes as the original, bringing us to the problem of imperfect copies (the second aspect). The species of magic Frazer calls the magic of contact already alerts us to one element of this problem of imperfect copies, given that the link or resemblance between the copy and the original is more remote. The second element is that imitation may not, despite Frazer's assumption otherwise in relation to the magician's goal, produce the desired effect. The problem of imperfect copies is a problem of both form and effectiveness.

I will address these complexities of copying by discussing Walter Benjamin's spectacular paper on art in the age of mechanical reproduction. The paper concerns the effect that mechanical reproduction has on the work of art and, in particular, the affect that reproduction has on the work of art's aura. A critical reading of the essay brings the problem of imperfect copies into sharp relief. Benjamin uses the word 'aura' to refer to the sense of awe and reverence one experiences in the presence of unique works of art.<sup>51</sup> With the advent of art's mechanical reproducibility, and the development of forms of art in which there is no actual original (such as film), the experience of art could be freed from place and ritual and instead brought under the gaze and control of a wider audience, leading to a shattering of the aura of the work of art.<sup>52</sup>

It might be that Benjamin's theory is more appropriate to art (such as film) in which there is no actual original. Classical works of art (such as paintings) can only ever be imperfectly copied via mechanical or, these days, digital reproduction (such as in the form of a poster, a postcard or in a publication). Whereas, if a painting were to be expertly copied it would

<sup>51</sup> Benjamin W, 'The Work of Art in the Age of Mechanical Reproduction' in Arendt H (ed), *Illuminations* (London, 1970), 215.

<sup>52</sup> Ibid.

be evaluated as either a forgery or fake, regardless of how perfect the copy is.<sup>53</sup> The original preserves its authority and authenticity.<sup>54</sup> Therefore, it is arguable that mechanical reproducibility only serves to enhance the aura of the painting; after all there is only “one” Mona Lisa. As Benjamin puts it: ‘even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be’.<sup>55</sup> This view accords most closely to the conventional view stated above concerning the copying of Captain Cook in Aboriginal stories. Captain Cook as ancestor is an “imperfect” copy or, as Maddox would have it, is not authoritative.

This is not to say, however, that the aura of the original painting is not troubled in some way by the spreading of multiple copies. ‘The situations into which the product of mechanical reproduction can be brought’, Benjamin says, ‘may not touch the actual work of art, yet the quality of its presence is always depreciated’.<sup>56</sup> For Benjamin the aura was not inherent in the object but rather was generated by its control (via ownership, history and tradition), in particular the control over access to it through its restricted exhibition. Reproducibility detaches the work of art from the domain of tradition and its control putting the copy, to paraphrase Benjamin, into situations which would be out of reach for the original itself. It may be that reproductions of a painting invoking the presence of the original are used in ways that were never intended, thereby undermining the tradition and historical associations of the original work of art. In Benjamin’s words, ‘by making many reproductions it substitutes a plurality of copies for a unique existence’.<sup>57</sup>

Shifting focus a little I want to discuss the communicative aspect of mimesis, which is the third aspect of the relationship I have identified between the original and the copy or, perhaps more appropriately in this context, the original and the mimic. First contact provides a number of rich examples of mimicry and mime — side by side with exchange — as one of the central modes of communication in the colonial context. Charles Darwin’s famous expedition on the Beagle in 1832 provides the first account of mimetic “exchanges” between the Europeans forming the

<sup>53</sup> Ibid, 214.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, 214–215.

<sup>57</sup> Ibid, 215.

expedition party and the people of Tierra del Fuego (the Fuegians) during, near, first contact. Darwin's account consists of observations of the differences that he sees between 'savage' and 'civilised man' and is littered with disparaging comments about the Fuegians' language ('like a man trying to clear his throat'), dress and cultural depravity.<sup>58</sup>

But, the Fuegians are, in Darwin's words, 'excellent mimics: as often as we coughed or yawned or made any odd motion, they immediately imitated us'.<sup>59</sup> One should not mistakenly assume that Darwin's comment that the Fuegians are excellent mimics is intended to be complimentary. Mimicry has long been intimately associated with primitiveness or infancy in European thought.<sup>60</sup> It appears, however, that Darwin is guilty of a form of mimetic myopia. Captain Fitz Roy's account of the exchange reveals something wholly missing from Darwin's account.

They expressed satisfaction or good will by rubbing or patting their own, and then our bodies; and were highly pleased by the antics of a man belonging to the boat's crew, who danced well and was a good mimic.<sup>61</sup>

The second account of communicative mimicry is taken from Mick Leahy, an Australian gold prospector discussing the exchanges with people from the highlands who had never before had contact with whites. Leahy says:

We told the [highland] natives of our intention by signs and asked them to come down the next morning and show us the way. This was accomplished by leaning the head on one hand and closing the eyes — gestures of sleeping; pointing to the ground, to indicate this place; then pointing to the east, with a rising gesture — "sun he come up", and then pointing off down the creek, looking down for a trail and shaking our heads. The natives got it at once, and gave us to understand that they would be on hand. *Pantomime serves surprisingly well for conversation when you have to depend on it.*<sup>62</sup>

<sup>58</sup> Darwin in Taussig, *Mimesis and Alterity*, above n.40, 74.

<sup>59</sup> Darwin in *ibid.*

<sup>60</sup> Ibid, 81 and Benjamin W, 'On the Mimetic Faculty' in Demetz P (ed), *Reflections: Essays, Aphorisms, Autobiographical Writings* (New York, 1978).

<sup>61</sup> Fitz Roy in *ibid.*, 76.

<sup>62</sup> Emphasis added. Leahy in *ibid.*, 78.

The communicative aspect of mimicry and mime appears to have passed Darwin by, but Leahy recognises its fundamental pragmatic importance. Surely the compulsion to mimic was a very important communicative strategy, which is missed by Darwin's reduction of mimicry to mere automotive primitive gestures. Mimicry is here engaged as a translative and communicative strategy to bridge linguistic, cultural and other gulfs to recognition. If mimesis also functions as a communicative strategy this raises two possibilities if we bring the discussion back to *Too Many Captain Cooks*. First, Captain Cook the ancestor could presumably be thought to stand for something already existing within Rembarrnga cosmology, which without its conversion into a recognisable symbol would be lost on its intended audience. This undoubtedly raises question marks over whether the copy is a copy at all in the true sense. Secondly, it is also possible that the Rembarrnga have recognised in Captain Cook something underscoring Anglo-European colonial power and have sought via Captain Cook's incorporation into the dreaming to meet this power head on and to contest its control by Anglo-European Australia. If on one reading of Carl Schmitt, the German constitutional jurist, sovereignty is the capacity to decide,<sup>63</sup> the assertion of sovereignty in *Too Many Captain Cooks* is surely a bit of both. *Too Many Captain Cooks*, I contend, is an expression of a prior sovereignty manifest in the dreaming — the Aboriginal law for care and control of country indeed, the capacity to decide for country — as well as a contestation of the Anglo-European stranglehold on sovereign power in Australia.

We can also gauge the issue of temporality, the fourth aspect of the dialectical relationship, in Darwin's and Fitz Roy's accounts of mimicry. I suggested above that there are two parts to the aspect of temporality and the first is the construction of authority (the original) in the colonial context. Darwin provides us with a striking snapshot of colonialism. The enormous importance of Darwin's account is that in it we witness the emergence of an original in the colonial context ('they', as Darwin asserts, 'imitated us').<sup>64</sup> Added to this, Darwin's account incisively represents the investment of colonialist selfhood through the prejudiced observation of

<sup>63</sup> Schmitt C, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, 1985).

<sup>64</sup> Taussig, *Mimesis and Alterity*, above n.40, 79.

primitives so that we also are witness to the emergence *by* an original.<sup>65</sup> In Taussig's words, 'civilization takes measure of its differences through its reflection in primitives'.<sup>66</sup> In a similar vein, Bhabha argues that the English have no authority of their own but gain their authority only in the colonial context on the premise of colonial difference.<sup>67</sup>

I want to stay with Bhabha here as he provides a useful way to think about this complex issue of the generation of colonial power and authority, already indicated in Darwin's observation of the Fuegians. There were, if it is possible to talk about colonialism in the past tense, two broad types of colonial power and knowledge concerning the colonial "subject", which we can place under the umbrella terms of scientific racial difference and humanist universalism. Scientific racial difference and humanist universalism represent two extremes of a spectrum of knowledge and power in the colonial frontier. What they have in common is that the operation of the two types of power and knowledge produces discriminatory differences.

Scientific racial difference, in its ascendancy in the eighteenth century, was rooted in the classification of people into races differently positioned on a hierarchical scale based on categories such as intelligence and cultural sophistication. Scientific models of craniometry, for example, were used to measure the intelligence of 'Man' and "proved" that Africans, Asians and Aboriginal peoples were racially inferior.<sup>68</sup> Scientific racial difference was a pure form of discriminatory difference in which the differences between races were seen to be immutable and, for those at the bottom of the scale, nothing could, to invoke the famous Privy Council case on *terra nullius*, bridge the gulf.<sup>69</sup> Humanist universalism is based on the belief in (or desire for?) an underlying unity in the human experience. As Stewart Motha puts it, 'the other is transported/transferred into an imagined *we*, a community wrought on the back of the erasure of particularity in the name of a universal, abstract commonality'.<sup>70</sup> It is humanist universalism

<sup>65</sup> Ibid.

<sup>66</sup> Ibid, 79.

<sup>67</sup> Mohanram R, 'The Postcolonial Critic' in Wilson M and Yeatman A (eds), *Justice and Identity: Antipodean Practices* (Sydney, 1995), 189.

<sup>68</sup> Banton M, *Racial Theories* (Cambridge, 1998) and Gould S J, *The Mismeasure of Man* (London, 1992).

<sup>69</sup> Lord Sumner cited in Brennan J, *Mabo*, above n.3, [38].

<sup>70</sup> Motha S, 'Mabo: Encountering the Epistemic Limit of the Recognition of "Difference"', 7 *Griffith L. Rev.* 79 (1989), 86.

that is my principal interest here and its linkage, as its epistemological backbone, to colonial mimicry. Bhabha argues that ‘mimicry emerges as one of the most elusive and effective strategies of colonial power and knowledge’.<sup>71</sup>

Colonial mimicry is the ‘desire for a reformed, recognisable Other, as a subject of a difference that is almost the same, but not quite’.<sup>72</sup> By invoking sameness and difference in the same sentence there is an apparent contradiction in Bhabha’s definition of colonial mimicry. The contradiction can be resolved if we think of the project of colonialism as the simultaneous desire for reformation of the Other — the civilising mission — and subjugation or domination, two dual bases of colonial rule. In this respect, colonial mimicry is a project of (ambivalent) assimilation that is most powerfully exemplified by two examples. First, ambivalent assimilation is perfectly illuminated in missionary thinking. In Christian universality all peoples are always *potential* children of God, but are, to paraphrase Bhabha, not quite. With tutorage and pastoral care (the European “mission” and the institutional manifestation of domination and subjugation) heathens can be reformed and assimilated into the flock of God’s children.

Secondly, this same ambivalent assimilation or, to put it another way, discriminatory universality is evident in Francisco De Vitoria’s international law scholarship on the rights of the Spanish in relation to South American Indians and Indian territory. In Anthony Anghie’s words:

According to Vitoria, Indian personality has two characteristics. First, the Indians belong to the universal realm like the Spanish and all other human beings, because Vitoria asserts, they have the facility of reason and hence a means of ascertaining *jus gentium* which is universally binding. Secondly, however, the Indian is very different because the Indian’s specific social and cultural practices are at variance from the practices required by the universal norms — which in effect are Spanish practices — and which are applicable to both Indian and Spaniard. Thus the Indian is schizophrenic, both alike and unlike the Spaniard.<sup>73</sup>

<sup>71</sup> Bhabha Homi K, *The Location of Culture* (New York, 1994), 85.

<sup>72</sup> Bhabha, *ibid*, 86.

<sup>73</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n.21, 22.

The application of *jus gentium* to the Indians meant that they were obliged by natural law to allow the Spanish to ‘travel’ and ‘sojourn’ in the land of the Indians, whereas because of cultural differences (such as their status as heathens) the Indians are effectively excluded from the realm of sovereignty. As heathens they are unable to engage in a ‘just’ war, a sovereign’s right, in circumstances of Spanish incursions on Indian territory.<sup>74</sup> Both are examples of the production of discriminatory identities (an imperfect copy) that secures the “pure” and the “original” or, more appropriately in this context, the universal.

The second part of the aspect of temporality can also be found in Darwin’s and Fitz Roy’s accounts of mimicry. It is already evident in Darwin’s thoughts that the colonial context is pregnant with structural power relations and one of the generators of power relations is different layers of mimesis. If we take Darwin to be a symbol of western colonial thinking about the “savage” we see only one side of the mimetic relationship (this one-sidedness is itself a product of colonial thinking). Fitz Roy provides us with an alternative way to think about the mimetic relationship; the emergence of the original and by an original is already swimming in the shallows of temporal problems. If we compare Fitz Roy’s account with Darwin’s we are left with the question posed by Taussig — ‘who is mimicking whom, the sailor or the savage?’<sup>75</sup> This is another way of asking the recurrent question, what comes first, the original or the mimic? Both questions highlight the problem of temporal slippage or blurring.

The problem of temporality naturally leads us to the ambivalence that always threatens to engulf the original when it is copied. Ambivalence is the fifth aspect of the relationship between the copy and the original. Ambivalence can also be called the menace of mimicry. The desire of a reformed and recognised Other in the colonial project contains the seeds of the undermining of colonial power and authority. This undermining is engendered by what Bhabha calls hybridity, which is the mixing that occurs between cultures so that binaries like colonised/coloniser and savage/civilised become unstable. One need only think of the colonial anxiety that was caused by the miscegenation of races and the fear that it would cause a dilution of the European race, as an example of hybridity. The

<sup>74</sup> Ibid, 20.

<sup>75</sup> Taussig, *Mimesis and Alterity*, above n.40, 76–77.

mixing of races also caused immense confusion for colonial administrators over how to categorise offspring.

The menace of mimicry is what happens to colonial authority and power when the Other, recognised *as* Other, takes up a text, symbol, sign or discourse of colonial power (now a hybrid). As Bhabha puts it, colonial presence ‘is always ambivalent, split between its appearance as original and authoritative and its articulation as repetition and difference’.<sup>76</sup> The power of the menace of mimicry to undermine the authority of colonial power is revealed by the questioning of the Bible by Indian converts outside Delhi in the early 1800s. The equation of the Bible with the English, one strategy upon which colonial power rested is put to question by Indian converts.

The native questions quite literally turn the origin of the book into an enigma. First: *how can the word of God come from the flesh-eating mouths of the English?* — a question that faces the unitary and universalist assumption of authority with the cultural difference of its historical moment of enunciation. And later: *how can it be the European Book, when we believe that it is God’s gift to us? He sent it to us at Hurdwar?*<sup>77</sup>

The questions go to the origins of the Bible, particularly its embedded tradition in Europe. Let me return to the problem identified in Benjamin’s thought about the original work of art. There is only one Bible and, by all measures, it is the authoritative text. However, the questions raised by the Indian converts are made possible by the translation of the Bible — its reproducibility — into local dialects, which not only enhances its accessibility but estranges the word of God from sole association with the English. The unique place of the Bible in Europe/Britain is undermined by the menace of mimicry.

## 2.2. Sovereign Power — Girard’s Mimetic Desire and Hobbes’ Leviathan Motivation

There are two essential points that I wish to make in this section as a lead into a closer look at *Mabo*, the 1992 landmark judgment in Australian law that recognised that Aboriginal people possessed a form of proprietary

<sup>76</sup> Bhabha, *The Location of Culture*, above n.71, 107.

<sup>77</sup> Emphasis in the original. *Ibid.* 116.

rights called ‘native title’. *Mabo* is, as we will see, the High Court’s response to this contest over sovereignty. First, drawing on Girard’s theory of mimetic desire I will show how contestation over an object (like sovereignty) causes societal crisis. This point develops in greater depth the ambivalence between the original and the copy caused by the menace of mimicry. Second, I will illustrate that the mimetic desire underlying societal crisis is manifested in institutional form, as sovereign power, in Hobbes’ *Leviathan*. Hobbes’ *Leviathan* is the enormously influential text on the nature of western sovereignty. In this respect, I will turn the gaze of this paper towards, what I suggest, is the sovereign behaviour of the High Court in Australia.

I want to first outline the story of the ‘spirit boat’.<sup>78</sup> In my view the spirit boat exemplifies the use of mimesis as a strategy of power, as a precursor to contestation, in a way which is not apparent on the face of the Rembarrnga dreaming. The story of the ‘spirit boat’, relayed to an anthropologist by Choco Indians, is about a Shaman who was ‘frightened speechless’ by a visitation by the spirits of white men and who, in a daring move, decided to capture them to add to his stable of spirit helpers.<sup>79</sup> It turns out that the visitation in question is an event where the Shaman sees a boat of white men while in a canoe on the Congo River.<sup>80</sup> The Shaman’s grandson describes the event:

We saw a boat of many colors, luminous with pure gringos aboard. It sounded its horn and we, in the canoe, hauling, hauling, trying to catch up to the boat. We wanted to sleep alongside it but the boat moved out to sea, escaping us. Then we smelled gasoline. Our vision could no longer stand the fumes and [the shaman said]: “Let’s go back. This is not a boat. This is a thing of the devil”.<sup>81</sup>

The Indians in the canoe became violently sick and consumed by fear.<sup>82</sup> Once they had managed to get home they prepared for a healing ritual. Instead of a ‘defensive ritual’ which would have healed the party of

<sup>78</sup> Taussig, *Mimesis and Alterity*, above n.40, 14.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid., 15.

Indians who witnessed the spirit boat, the Shaman decided to capture the gringo spirit-crew for himself and makes a copy of them and the boat.<sup>83</sup> The spirit boat is a strategy of power where the Shaman captures the gringo spirit-crew in what is an offensive rather than a defensive gesture.

Girard's mimesis reworks the dialectical relationship between the copy (called the 'subject') and the original (called the 'model'). Girard structures this relationship — in a sense fuels it — with the concept of rivalry. We are presented with the fascinating, even startling, claim that the subject's attention is drawn to the object because the model desires it; that is to say, desire is mediated. Livingston notes that Girard is using desire here as *le désir selon l'Autre* or 'desiring according to the Other', as opposed to *selon soi* or 'desire that is a spontaneous and autonomous manifestation of an individual's wants or preferences'.<sup>84</sup> It is worth quoting Girard on mimetic desire in full here:

Rivalry does not arise because of the fortuitous convergence of two desires on a single object; rather, *the subject desires the object because the rival desires it*. In this triangular relationship it is the rival that is accorded the prominent role and serves as a model for the subject not only in regard to secondary matters as style and opinions but also, and more essentially, in regard to desires.<sup>85</sup>

There are a number of problems that Girard's theory raises. Chief amongst them is that it is not entirely clear what makes a model a model or a subject a subject in Girard's thought. It appears that he takes the relative position of each as a given of or, at least, engendered by the wider socio-cultural context. However, the relationship between the model and the subject and, even, the identity of the model and the subject is not static or fixed. Who is the model and who is the subject will shift depending upon the circumstances. Perhaps more importantly, the model is always under threat of losing his or her power, or the efficacy of that power, because he or she too has a *rival*. In this sense, the model is also intimately affected by the desires of another. Paradoxically, there may

<sup>83</sup> Ibid.

<sup>84</sup> Livingston P, *Models of Desire: René Girard and the Psychology of Mimesis* (Baltimore, 1992), 1.

<sup>85</sup> Emphasis in the original. Girard R, *Violence and the Sacred* (London, 1972), 11.

even be circumstances when the model and the subject are equal or that the differences between them, be they hierarchical or not, dissipate.

Further, the object in Girard's concept of mimetic desire appears to take on a subordinate role in generating rivalry. However, there may be instances where the object takes on a charismatic quality and the possession of an object by one party may have the capacity to confer, to paraphrase Girard, a greater plenitude of power on that party. This coalesces with Benjamin's idea that the aura of an object is generated by its control. Lastly, it would be wrong to see the subject as merely passive because his or her desires are mediated by another. Livingston argues that it is more useful to think of mediated desires as subject to selectivity.<sup>86</sup> This is an important point because the concept of selectivity assumes agency and provides an important rebuttal to the Darwinian notion that mimicry is a form of primitive automatism. There are defensive forms of mimesis as Caillois points out when discussing camouflage, but even here there is an important strategic element.<sup>87</sup>

The importance of Girard for my purposes is that he treats mimesis as a form of conflict. Girard argues that mimetic desire is a chief cause of societal conflict, which generates a structural crisis in society. The societal crisis (as he calls it) is caused by the erosion or the instability of the system of differences such as different identities, which underpins the social fabric.<sup>88</sup> The societal crisis is another way of referring to the paradox of the equalisation of the subject and the model or, even, the menace of mimicry taken to its logical conclusion. This loss of differences can take a number of forms, but all are ultimately mimetic. Girard calls them 'monstrous doublings'<sup>89</sup> (such as, the rivalry between two brothers) given the immensity of the societal crisis that they engender. The example of the rivalry between two brothers is particularly illuminating. Kluckhohn points out that the most common mythical conflict is the struggle between brothers.<sup>90</sup> This conflict is expressed in rivalry which leads to a cycle of violence. The rivalry of two brothers over the throne of their father King

<sup>86</sup> Livingstone, *Models of Desire*, above n.84, 20.

<sup>87</sup> Taussig, *Mimesis and Alterity*, above n.40, 64.

<sup>88</sup> Van der Walt J, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (London, 2005), 227.

<sup>89</sup> Girard, *Violence and the Sacred*, above n.85, 64.

<sup>90</sup> Ibid.

is a classic archetypical example and, is an example which is not just mythical.<sup>91</sup> It has historical resonance. It is also an example which brings us closer to thinking about the contest over sovereign power.

In this respect the two brothers desire the same object — the throne.<sup>92</sup> At moments in the brothers' rivalry the differences between them dissipate. In this example of the two brothers who desire their father King's throne the system of differences in the given society (mythic or otherwise) would have a way in which entitlement to the throne is conferred on one of them (via custom or law). This could be by anointment of the father King before his death or conferral of title based on being the first born son. It is through rivalry that the system of differences blurs and the two become more equal. For example, the King may die before anointing a successor, reducing the differences between the brothers and sparking a crisis which may spiral into violence. The conflict between the two brothers will have a significant impact on the whole society such as segmentation or fragmentation of society via alliances and factions.<sup>93</sup> Girard argues that under such conditions society and culture becomes increasingly impossible.<sup>94</sup>

If the relationship between mimetic desire and violence is not channelled into ritual practices such as sacrifice, Girard argues that violence is pursued by the combatants in an absolute sense.<sup>95</sup> Violence becomes an end in itself like some ultimate prize. When violence becomes an end in itself we reach the peak of societal crisis and the peak of revenge and reprisal. As Girard puts it:

There is never anything on one side of the system that cannot be found on the other side, provided we wait long enough. The quicker the rhythm of reprisals, the shorter the wait. The faster the blows rain down, the clearer it becomes that there is no difference between those who strike the blows and those who receive them. On both sides everything is equal; not only the desire, the violence, the strategy, but also the alternation of victory and defeat, of exaltation and despair.<sup>96</sup>

<sup>91</sup> Ibid, 64–65.

<sup>92</sup> Ibid, 66.

<sup>93</sup> Ibid, 67.

<sup>94</sup> Ibid, 66.

<sup>95</sup> Ibid, 160–161.

<sup>96</sup> Ibid, 163.

What is most striking is that the antagonists are truly doubles — captured in a mimetic relationship that is, essentially, reciprocal and equal.<sup>97</sup> Reciprocity here should not be thought of in terms of mutuality (which presupposes a different understanding of equality). Reciprocity is used in the sense that the fate of the two combatants are inextricably linked and captured within a “to and fro” conflict. However, there is a mutualness between the combatants which opens up towards mutuality or, at least, its possibility. We find that while identities seem to persist in conflict of this kind, the antagonists are in reality the same. The rivals see themselves as separated by formidable differences, but this is not the case as the conflict is founded upon the very reduction of differences or the engendering of radical equality. It seems, though Girard does not pursue this line of thought, that this radical equality is an opportunity to build different relationships between the combatants and assert new identities precisely because differences are undermined or even rendered unable to be convincingly reasserted. The closest approximation that we have to this idea is Benjamin’s concept of ‘divine violence’, which is a power that destroys laws (as a structuring force in society) and is a precursor to a revolutionary form of violence.<sup>98</sup>

Girard’s mimetic conflict is invariably in one way or another violent and incessantly threatens to descend into a full scale war. However, mimetic conflict need not be reduced merely to instances of violent conflict, particularly if we are to treat the desired object as a symbol, rather than a thing that can be possessed in a tangible, or perhaps more precisely, an empirical sense. The concept of mimetic conflict is capable of being applied to symbolic forms of conflict. Certainly, in the example of the spirit boat the object that the Shaman wishes to capture is the European, but the European as a symbol of power. Moreover, if we bring the discussion back to the object of the paper, Captain Cook has become part of the Australian Nation-State’s stable of symbols, a symbol, as I have argued, the Rembarrnga contest (whether by claiming ownership of the symbol or by devaluing the Anglo-European version of Captain Cook). This is not to suggest that symbolic forms of conflict can be isolated from (for want of a better word) “real” conflict. As Harrison puts it:

<sup>97</sup> Ibid, 155.

<sup>98</sup> See Benjamin W, ‘Critique of Violence’ in Demetz P (ed), *Reflections: Essays, Aphorisms, Autobiographical Writings* (New York, 1978).

Competition for power, wealth, prestige, legitimacy or other political resources seems always to be accompanied by a conflict over symbols, by struggles to control or manipulate such symbols in some vital way.<sup>99</sup>

However, symbolic conflict does not necessarily always engender ‘real’ conflict or violence.

Drawing on Bourdieu’s concept of symbolic power, Harrison identifies four types of symbolic conflict: valuation contests, proprietary contests, innovation contests and expansionary contests. Valuation contests involve competitors ranking symbols according to some criterion of worth such as prestige, legitimacy or sacredness.<sup>100</sup> The aim of valuation contests is to raise the prestige and status of one group’s symbols while at the same time devaluing another group’s symbols.<sup>101</sup> Proprietary contests involve claims of proprietary rights over symbols and treat attempts by other groups to copy them as hostile acts.<sup>102</sup> The contestants or competitors agree on the prestige of the symbol but dispute the ownership.<sup>103</sup> Innovation contests are the creation of new symbols or the changing of old symbols,<sup>104</sup> whereas in expansionary contests the goal is to make the opposition adopt one’s own symbols or to displace its competitor’s symbols of identity with its own symbols.<sup>105</sup> To paraphrase Harrison, the resources for which the players are implicitly competing in an expansionary contest, seems to be people’s political allegiances.<sup>106</sup> While these four types of symbolic conflict can be separated for analytical purposes, many conflicts will exhibit more than one type of symbolic contest.

Harrison calls symbolic conflict a ‘zero sum game’.<sup>107</sup> The issue is not the quantity of the symbols (i.e., how many each group has) but the quality of the symbol or symbols. As Harrison puts it:

<sup>99</sup> Harrison S, ‘Four Types of Symbolic Conflict’, *The Journal of the Royal Anthropological Institute*, (1995) 1:2, 255.

<sup>100</sup> Ibid, 256.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, 258.

<sup>103</sup> Ibid, 259.

<sup>104</sup> Ibid, 261.

<sup>105</sup> Ibid, 263.

<sup>106</sup> Ibid, 265.

<sup>107</sup> Ibid, 269.

In short, a characteristic of symbolic conflict is that it takes the form of a zero-sum game in which ratios and not quantities of symbolic capital are at issue, and in which any gain to one group or actor can only be made at the expense of some other or others.<sup>108</sup>

Harrison's zero sum game is similar to Frazer's magic of contact or contagion, discussed earlier, in that symbols when employed in symbolic conflict act on each other, either diminishing or increasing the value of the symbols held by a group.

Bourdieu argued that symbols represent the funds of 'symbolic capital'.<sup>109</sup> Symbolic capital is, as Harrison puts it, 'in part a disguised, mystified form of economic capital'.<sup>110</sup> Bourdieu developed his notion of symbolic capital by studying Kabyle society in Africa. The economic capital of the descent group in Kabyle society includes land, manpower and other material resources (its power in a tangible sense).<sup>111</sup> Its symbolic capital is its reputation or prestige and its economic capital can be added to or furthered by exploiting its symbolic capital.<sup>112</sup> However, I suggest that symbolic conflict can cause the same kind of societal crisis in Girard's terms. Symbolic contests between rivals (such as rivalry over the ownership of a symbol) can threaten to undermine the status of one group whose entitlement to economic capital is partly legitimised by its symbolic capital.

How then is societal crisis or the menace of mimicry resolved? Part of the answer lies in Girard's model of ritualised violence, which is the 'primitive' institution of sacrifice. My understanding of ritualised violence, like conflict, is a wider one, to include the western institution of law, but for the moment I will confine my comments to sacrifice. For Girard, sacrifice functions to prevent the type of reciprocal violence and conflict (putting aside symbolic conflict) discussed above. The sacrificial entity, and hence the word "scapegoat", 'is a substitute for all members of the community, offered up by members themselves'.<sup>113</sup> The sacrifice serves to protect the entire community from *its own* violence by choosing victims

<sup>109</sup> Bourdieu P, *The Logic of Practice* (Cambridge, 1990), 112-21.

<sup>110</sup> Harrison, 'Four Types of Symbolic Conflict', above n.99, 268.

<sup>111</sup> Ibid, 268.

<sup>112</sup> Ibid.

<sup>113</sup> Girard, *Violence and the Sacred*, above n.85, 8.

outside the community. Sacrifice is itself a form of violence — a very real violence — though one intended to prevent the eruption of reciprocal violence. Any dissension scattered throughout the community is drawn to the scapegoat and is eliminated by its sacrifice.<sup>114</sup> The sacrificial entity or victim can be actual or figurative, animate or inanimate but, most importantly as Girard puts it, ‘always incapable of propagating further vengeance’.<sup>115</sup>

Sacrificial violence, as opposed to reciprocal violence, is the *unanimous* violence of the community. However, the dissension within the community is eliminated only on a temporary basis and requires repetition of the sacrificial process.<sup>116</sup> The institution of sacrifice replaces the vicious cycle of reciprocal violence with the vicious cycle of ritual violence which, unlike the destructive nature of reciprocal violence, is meant to be creative and protective in nature. Girard sees a difference between sacrifice (ritual violence) and law. The key difference between the two is that sacrifice *prevents* reciprocal violence, while the legal system in ‘modern’ societies *cures* reciprocal violence.<sup>117</sup>

There may be ‘rudimentary’ forms of curative institutions in some primitive societies, but according to Girard the establishment of the judiciary is the most efficient of all curative institutions.<sup>118</sup> Girard’s theory echoes legal theories which seek to justify the centralised criminal justice system, in particular the theory of retributive justice in which the criminal justice system is seen to have rationalised the principle of vengeance. Girard argues that the efficiency of the modern legal system at curing reciprocal violence is founded in the recognition of the sovereignty and independence of the judiciary whose decisions, at least in principle, no group, not even the community as a whole can challenge.<sup>119</sup> As Johan van der Walt puts it discussing Girard, an independent judiciary ‘terminates the cycle of revenge by staging its revenge as the revenge of everyone in society’ and not on behalf of a faction or segment in society.<sup>120</sup>

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid, 21.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid, 21–22.

<sup>119</sup> Ibid, 23.

<sup>120</sup> Van der Walt, *Law and Sacrifice*, above n.88, 228.

It is at this juncture that I want to discuss Hobbes' theory of sovereign power, which is famously known as the Leviathan (that common power to keep the multitude in awe).<sup>121</sup> It is Hobbes' model of sovereignty that most graphically exemplifies the idea of a sovereign "body" that stages its revenge as the revenge of everyone in society. As Hobbes says:

The only way to erect such a Common Power . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say to appoint one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgments, to his Judgments . . . This done, the multitude so united in one Person, is called a Commonwealth, in Latine Civitas. This is the generation of the great Leviathan or rather (to speak more reverently) of that *Mortall God*, to which we owe under the *Immortall God* our peace and defence.<sup>122</sup>

It might be objected that Hobbes' model of sovereignty is no longer adequate to capture the complex nature of sovereignty in the modern world. There has been a marked shift in legal and political theory away from thinking about sovereignty as exclusively belonging to one institution, be it a King, parliament or the modern executive, even if the institution in question is the State itself.<sup>123</sup> For example, Michel Foucault famously said that 'power is everywhere'; power having transformed in such a way that legal institutions can no longer be regarded as the locus of power.<sup>124</sup> More recently, there has been a 'questioning' of sovereignty in globalisation theory, because the nation-state (the nucleus of law or legal institutions) is seen as increasingly ineffectual in a globalising or

<sup>121</sup> Hobbes T, *Leviathan* (London, 1914), 88.

<sup>122</sup> Ibid, 89.

<sup>123</sup> See Veitch S, Christodoulidis E and Farmer L, *Jurisprudence: Themes and Concepts*, (London, 2007), 9–17.

<sup>124</sup> See Foucault M, *Discipline and Punish: The Birth of the Prison* (New York, 1977) and Foucault M, *History of Sexuality: Volume 1* (New York, 1990).

regionalising world.<sup>125</sup> Moreover, van der Walt criticises Girard's picture of the judiciary as representative of the community as untenable because the idea of a bounded cohesive community is equally untenable. However, there appears to be a marked schism between theory and the judicial decrees on sovereignty in the Australian colonial context. The "weakness" or "redundant" thesis of sovereignty, whatever its genesis, is simply indefensible in the wake of *Mabo* and the designation by the High Court of the Crown's sovereignty as non-justiceable. In the context of colonial relations in Australia sovereignty is unchallengeable.

I want then to suggest that Hobbes' model of sovereignty is mimetic, and in the next section I will discuss its persistence as a model of sovereignty in *Mabo*. There are three ways in which Hobbes' sovereignty is mimetic. First, Hobbes' infamous 'state of nature' bears a striking resemblance to Girard's societal crisis underscored by mimetic desire. Hobbes' state of nature is the state of 'Man' in 'his' natural condition. On one reading Hobbes' theory of the state of nature starts from a different premise to Girard's societal crisis. Hobbes does not start with a system of differences that erupts into societal crisis when those differences dissipate; Hobbes begins with a system of radical equality in which societal crisis is already embedded. 'Nature', Hobbes says, 'hath made men so equal, in faculties of body, and mind'.<sup>126</sup> Any differences in individual strength and intelligence is of little consequence to Hobbes, since they can be overcome in one way or another (such as, through alliances or 'secret machination').<sup>127</sup>

As in Girard's societal crisis Hobbes' radical equality generates rivalry. To quote Hobbes in full here:

From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation, and sometimes their delectation only), endeavour to destroy, or subdue one another.<sup>128</sup>

<sup>125</sup> See Veitch S, Christodoulidis E and Farmer L, *Jurisprudence: Themes and Concepts*, 53 and MacCormick N, *Questioning Sovereignty* (Oxford, 1999).

<sup>126</sup> Hobbes T, *Leviathan*, above n.121, 63.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

It is not entirely clear whether Hobbes views desire as something generated by the appeal of the object or by rivalry. The motivations which underpin rivalry are as dynamic as Girard's. For example, Hobbes considers that there are three chief causes of 'quarrell': competition, diffidence and glory.<sup>129</sup> Competition concerns the invasion of another's person or property for 'gain'<sup>130</sup> (based presumably either on the convergence of desires on an object or even engendered by rivalry itself as seems indicated by Hobbes' use of 'delectation');<sup>131</sup> diffidence concerns the invasion of another's person or property for 'safety',<sup>132</sup> (diffidence could be thought of as a preventative strike caused by the anticipation of competition and rivalry and is, in this respect, a mediated motivation); and glory concerns the invasion of another's life or property for reputation.<sup>133</sup> Thus the state of nature, like societal crisis, is a state of conflict and contestation. Hobbes expresses the same concerns raised by Girard about the impossibility of society (no 'Industry', Science, 'Arts' and 'Letters') under such conditions.<sup>134</sup> This leads Hobbes to famously say: 'And the life of man, solitary, poore, nasty, brutish, and short'.<sup>135</sup>

Secondly, Hobbes' Leviathan has a preventative function as well as a curative one. Girard saw the legal system and the institution of sacrifice as having the same function — to deflect societal crisis — though the judiciary cures the societal crisis and sacrifice prevents it. It is curious that Girard maintains the distinction between sacrifice and law in this way. Although not expressly saying so, Girard appears to have seen unanimity as already existing in law, unlike the institution of sacrifice that creates or produces it, as one reason for maintaining this distinction. Hobbes no doubt would have agreed with Girard that unanimity exists in law. As representative of the multitude the Leviathan demands no less than that each individual renounce his or her particularity in so far as it conflicts with the 'Will' (or unanimity) of the community as embodied by the Leviathan. However, Girard did not consider that the judiciary also prevents the societal crisis and the erosion of differences that under-

<sup>129</sup> Ibid, 64.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid, 63.

<sup>132</sup> Ibid, 64.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid, 64–65.

<sup>135</sup> Ibid, 65.

scores the societal crisis by creating unanimity via the adjudicative function itself.

This creation of unanimity may in turn rest on the “sacrifice”, in a symbolic sense, of an individual’s or a group’s particularity to the greater needs of the wider community (often thought of in terms of the “universal”). Van der Walt argues that a form of sacrifice inheres in adjudication when judges prefer one submission to other competing submissions and raise it to the status of legal precedent. As Van der Walt puts it:

At issue with every judicial decision is the representation of the particular case, the inevitable representation that reduces to oneness the multiple conflicting desires and concerns that inform the law in a contradictory fashion. The sacrificial nature of the law stems from this need to reduce social ambiguity and the multiplicity that stems from it to simplicity and oneness.<sup>136</sup>

Law can, in some instances, inflict a symbolic violence by reducing individual or group experience to legal categories or by failing to accommodate particularity.

Furthermore, by accepting that unanimity was inbuilt in law Girard did not give his attention to the possibility of sovereignty (or law) becoming the object of contestation and becoming the trigger for societal crisis. For Hobbes, politically astute as he was, this was a possibility, indeed the possibility that he sought to render nugatory by erecting a sovereignty that was beyond contestation as well as by providing a graphic rationale for why sovereignty must be maintained. To bring the discussion back to the language of mimesis, the Leviathan cannot be copied or replicated as it has a unique presence in time and space as the creature of the social contract or the agreement between men to erect the Leviathan. However, once erected it was unique in another way. The Leviathan, as Hobbes puts it, is a ‘mortall god’,<sup>137</sup> imbued with the enduring qualities of a god, even though it is a human institution.

I want to suggest that Hobbes’ state of nature is also preventative in providing a powerful motivation, which I call the “Leviathan Motivation”, to protect “society” against the erosion of societal differences. This is an institutional motivation that I would like to later attribute to the High Court. For Hobbes, sovereignty is something that cannot be shared or

<sup>136</sup> Van der Walt, *Law and Sacrifice*, above n.88, 11.

<sup>137</sup> Hobbes, *Leviathan*, above n.121, 89.

divided, otherwise society is always under threat of descending into crisis, which he represents in the form of the state of nature. Hobbes presents us with — at least for him — another frightening mimetic image of a State in which sovereignty is either contested or divisible (Hobbes likely saw contestation and divisibility as the same thing as he refers to institutions based on a separation of powers as ‘factional’).<sup>138</sup>

To what disease in the natural body of man I may exactly compare this irregularity of a Commonwealth, I know not. But I have seen a man that had another man growing out of his side, with a head, arms, breast, and stomach of his own: if he had had another man growing out of his other side, the comparison might then have been exact.<sup>139</sup>

Thirdly, Hobbes’ Leviathan is itself mimetic. The mimetic nature of Hobbes’ sovereign power is already evident in his example of what appears to be Siamese twins (twins are also an omen in some so-called primitive societies of a coming societal crisis). Hobbes was writing at a time when theology was no longer capable of legitimating sovereign power. It used to be that sovereign power in the person of the King or the prince mimicked the heavenly power of Christ or God. The King or the prince was God’s representative on earth. James I of England was, in Buijs’ terms, one of the most outspoken rulers with respect to the divine appointment of the King,<sup>140</sup> but there is a long association of the Crown with God.<sup>141</sup> Hobbes raises Man to the status of God and the Leviathan appears to mimic Man. The Leviathan or State is, as Hobbes puts it, ‘an Artificial Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the *Sovereignty* is an Artificial *Soul*, as giving life and motion to the whole body’.<sup>142</sup>

I leave open the question whether western sovereignty is mimetic, separately to my contention that it is in the Australian colonial context. I

<sup>138</sup> Ibid, 176.

<sup>139</sup> Ibid.

<sup>140</sup> Buijs G, ‘Que les Latins appellent maiestatem’: An Exploration into the Theological Background of the Concept of Sovereignty’ in Walker N, *Sovereignty in Transition* (Oxford, 2003), 231–232.

<sup>141</sup> See Kantorowicz, E H. *The King’s Two Bodies: A Study in Medieval Political Theology* (New Jersey, 1957).

<sup>142</sup> Hobbes, *Leviathan*, above n.121, 9.

greatly doubt, in any event, that it can be isolated from the colonial context. As Anghie puts it, ‘no adequate account of sovereignty can be given without analysing the constitutive effect of colonialism on sovereignty’.<sup>143</sup> Indeed, in the same breath that Hobbes doubts that the state of nature has existed all over the world, he notes ‘there are places where they so live now’.<sup>144</sup> In Hobbes’ words:

For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all, and live at this day in that brutish manner, as I said before.<sup>145</sup>

At the same moment in time that sovereignty mimics Man, ‘savage people’ are set both outside and against sovereignty — simply put: a people without sovereignty. Hobbes’ passage is reminiscent of Darwin’s reaction to the Fuegians in so far as we are witness to the emergence of an original and by an original. Europeans are sovereign people and sovereignty is something that Europeans, not savage people, possess.

### **3. Contesting Sovereignty in Australia — Mimetic Strategies**

#### **3.1. The Contest over Sovereignty: *Mabo* and the Strategy of Native Title**

I now turn to address the critical issue — what does it mean to say that sovereignty in Australia is mimetic? In this section I will turn my attention to *Mabo*, the High Court’s recognition of native title. My starting point is not with native title, which I will return to below, it is with the contest over sovereignty in *Mabo*. It is not usual to discuss the case as a contest over sovereignty. In *Mabo*, we are told by the Court in no uncertain terms that sovereignty is not contestable and the literature on the subject has largely critically evaluated *Mabo* in these terms. Moreover, there was no contest over sovereignty in a purely technical sense. In legal

<sup>143</sup> Anghie A, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law’, *Harvard International Law Journal*, (1999) 40:1, 1–80.

<sup>144</sup> Hobbes, *Leviathan*, above n.121, 64.

<sup>145</sup> Ibid.

terms sovereignty did not form part of the controversy which the Court was asked to decide. At the outset of Brennan J's judgment, considered the leading judgment in *Mabo*, the Crown's acquisition of sovereignty was said to have been conceded by the plaintiffs, Eddie Mabo and others, claiming on behalf of the Meriam people of the Murray Islands in the litigation. The question before the Court was the consequence of the Crown's acquisition of sovereignty over Australia and whether at the time of the assertion of sovereignty the Crown became the beneficial owner or proprietor of all lands.

If we enlarge the context of *Mabo* a different picture emerges. The judges were on notice from *Coe v Commonwealth* that Aboriginal claims of rights to land were wrapped up in assertions of Aboriginal sovereignty.<sup>146</sup> The lesser known *Coe v Commonwealth* was heard by the High Court in 1978, at the peak of an Aboriginal activism which had emerged in the early 1970s asserting pan-Aboriginal claims in the form of an Aboriginal nation, Aboriginal sovereignty and Aboriginal land rights. The most famous protest of that period was the establishment of the Aboriginal Tent Embassy in 1972 on the lawn of the then Parliament House in Canberra, in response to the refusal of the McMahon Coalition Government to recognise land rights. The rest of the '70s saw the cyclical police removal of the Aboriginal Tent Embassy and its reestablishment by the activists. In 1979, one year after *Coe v Commonwealth*, the Aboriginal Tent Embassy was re-established on top of Capital Hill, the ground of the proposed new Parliament House, as a 'National Aboriginal Government'.

The issue before the Court in *Coe v Commonwealth* was a seemingly benign one of whether leave should be granted to amend a statement of claim. But, the statement of claim included different formulations of claims to Aboriginal sovereignty as well as the contestation of the validity of the Crown's sovereignty in Australia, including the following claim: 'From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now called Australia'.<sup>147</sup> The statement of claim also included a raft of claims to Aboriginal proprietary rights to land in Australia. However, these claims and the sovereignty claims were largely intrinsically tied. For instance, the statement of claim states that Captain Cook wrongly proclaimed

<sup>146</sup> *Coe v Commonwealth* [1978] HCA 41.

'sovereignty *and* dominion' over the east coast of the continent; Captain Arthur Phillip wrongly claimed 'possession *and* occupation'; Captain Cook and Captain Arthur Phillip wrongly treated the continent as *terra nullius* (empty or waste land) 'whereas it was occupied by a sovereign aboriginal nation'; and as a nation, aboriginal people were entitled to 'the quiet enjoyment of their rights, privileges, interests, claims and entitlements in relation to lands' and were not to be dispossessed 'thereof' without 'bilateral treaty, lawful compensation and/or lawful international intervention'.<sup>148</sup>

Paragraph 23A of the statement of claim put the sovereignty claim in an unusual form:

On November 2nd, 1976 members of the aboriginal nation including the Plaintiff planted their national flag on the beach at Dover, England, in the presence of witnesses and natives of the territory of the second named defendant and proclaimed sovereignty over all the territory of the second named Defendant, namely the United Kingdom of Great Britain and Northern Ireland. On the 9th day of April, 1977 the aboriginal nation confirmed this sovereignty over its lands, country and territory known as the Commonwealth of Australia by planting its flag in the presence of witnesses at Kurnell.<sup>149</sup>

Two out of four judges (Jacobs and Murphy JJ) thought that the claims to land could be separated out from the claims to sovereignty and would have granted leave to amend. The other two judges (Gibbs CJ and Aickin J) thought that the issues concerning land were arguable, but not in the form in which the land claim had been pleaded. The High Court had laid the foundations for a *Mabo* type decision; however, the ultimate result in *Coe v Commonwealth* was the striking out of the statement of claim and the burying of both the sovereignty and land claims.

In the years between *Coe v Commonwealth* and *Mabo* the form in which claims to sovereignty, pan-Aboriginal nationhood and government were made, started to look starkly more and more like that which it appears to be emulating. In 1990, two years before *Mabo* was heard, an 'Aboriginal Provisional Government' (APG) was set up by activists to

<sup>148</sup> Emphasis added. *Ibid*, [1].

<sup>149</sup> *Ibid*.

agitate for an Aboriginal ‘State’ with a federal type structure vesting power in Aboriginal communities to determine their own affairs and a national government with ‘residual powers’ to deal with foreign governments, coordinate ‘some uniformity between Aboriginal communities’ and so on.<sup>150</sup> The proposal also included the issuing of Aboriginal passports to put pressure on the Australian Government to recognise a separate Aboriginal nation/state.<sup>151</sup> The Aboriginal Government would operate alongside all other Governments, including the Australian Government, ‘and not be subordinate to it’.<sup>152</sup> The context for the APG is the setting up of the Aboriginal and Torres Strait Islander Commission (ATSIC) two months beforehand. ATSIC was quasi-governmental (with a structure that mimicked the Federal Government) and acted as a service delivery provider to Aboriginal communities as well as a representative body. Its governing representatives were elected by Aboriginal people in periodic elections. However, it was funded and overseen by the Federal Government and thus remained subordinate to it.

Before moving on to *Mabo* I want to return to *Coe v Commonwealth* and to the incredulity with which the Court greeted the claim in paragraph 23A in the statement of claim, set out above. Chief Justice Gibbs was shocked that ‘experienced counsel’ who had appeared to argue the case before the Court strived to justify the statement of claim, ‘including even paragraph 23A’.<sup>153</sup> Chief Justice Gibbs mentions paragraph 23A another two times calling it ‘absurd’ and ‘vexatious’ and ‘no judge could in the proper exercise of his discretion permit the amendment of a pleading to put it in such a shape’.<sup>154</sup> Justice Jacobs said that it ‘cannot be allowed’ and doubted, unlike Gibbs CJ, that it was even ‘seriously pressed’.<sup>155</sup> Justice Murphy said that the statement of claim ‘exhibits a degree of irresponsibility rarely found in a statement intended to be seriously entertained by a court’, noting as an example the claim on behalf of the

<sup>150</sup> Mansell M, ‘Towards Aboriginal Sovereignty: Aboriginal Provisional Government’ in Kerruish V, (ed) *Law, Laws and Aboriginal Peoples*, (Course Materials, Division of Law, Macquarie University, Sydney, 1997), 156 and 158.

<sup>151</sup> Ibid, 159.

<sup>152</sup> Ibid, 158.

<sup>153</sup> Gibbs CJ, *Coe v Commonwealth*, above n.146, [8].

<sup>154</sup> Gibbs CJ, ibid, [9] and [19].

<sup>155</sup> Jacobs J, ibid, [15].

aboriginal nation to the whole of the territory of the United Kingdom.<sup>156</sup> Perhaps not surprisingly the Court fails to tell us why it is such an absurd claim or something that surely can't have been seriously pressed, taking it as self-evident. The irony of the claim is lost on no one, and I suggest, it is certainly not lost on the judges.

This brings me to elucidating what I mean when I say that *Mabo* is a contest over sovereignty. *Mabo* needs to be read in the context of *Coe v Commonwealth* and Aboriginal claims to sovereignty and nationhood. The trigger of the contest from the Court's point of view, whether it grasps the contest in this way or not, is the menace of mimicry. The colonised assert, in various formulations, that they too are a sovereign people *equal* to the coloniser. And, it is that claim to equality that sparks a crisis for the Court. Chief amongst the "problems" for the Court is that the recognition of Aboriginal sovereignty would depreciate in one way or another, the nature of the Crown's sovereignty in Australia. For example, Aboriginal sovereignty clearly takes historical precedence over the Crown's. It might be objected that claims to sovereignty as a rightful property of Aboriginal people, especially a sovereignty that looks no different to the Crown's, actually underscores the authority of the Crown's sovereignty, making it paradoxically more authoritative and original. That is to say, Aboriginal sovereignty can be dismissed as a mere copying or, even, mockery rather than something that is intended to be taken seriously, invoking some of the issues discussed earlier in this paper in relation to Benjamin's discussion of art, aura and mechanical reproduction.

At first glance Aboriginal claims to sovereignty appear to underscore the power of the Crown's sovereignty. For example, Gibbs CJ in *Coe v Commonwealth* outrightly rejects any notion that there is an aboriginal nation, 'if by that expression is meant a people organised as a separate State or exercising any degree of sovereignty'.<sup>157</sup> Without the benefit of evidence Gibbs CJ states (or hopes) that 'they have no legislative, executive or judicial organs by which sovereignty might be exercised'.<sup>158</sup> However, there had been a significant levelling of differences between colonised and coloniser in the international setting that makes a response like Gibbs CJ's increasingly difficult to justify and sustain. By the time a

<sup>156</sup> Murphy J, *ibid*, [2].

<sup>157</sup> Gibbs CJ, *ibid*, [22].

<sup>158</sup> Gibbs CJ, *ibid*.

“competent” claim to indigenous rights finally reaches the Court in *Mabo*, the Court is deep within complicated mimetic territory.<sup>159</sup>

The ground had shifted from under the Court’s feet with the post-colonial developments in the international setting, itself referable to the colonial struggles of the Other for independent “states”, “nations”, “sovereignty” or “self-determination”. Numerous documents against discrimination based on race and protecting human rights had been published and exulted in the international sphere. Justifications of colonisation based on scientific racism or based on ethnocentrism, including *terra nullius*, had been denounced. In 1975 the International Court of Justice in the *Western Sahara Case* had declared that ‘the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned’.<sup>160</sup> *Terra nullius*, as Irene Watson puts it, became ‘discredited as a tool for the colonisation and occupation of territories’.<sup>161</sup>

How then does the Court respond to the menace of mimicry? The rest of this chapter is devoted to answering this question. I argue that the Court responded with a mimetic strategy of its own.

#### *The gardens were being tilled*

The issue for decision in *Mabo* was whether the annexation of the Murray Islands to the State of Queensland vested an absolute form of ownership to all land in the Murray Islands, also known as beneficial ownership, in the Crown, thereby stripping the Meriam people ‘of their right to occupy their ancestral lands’.<sup>162</sup> The Court accepted the assumption that Australia had been settled under the doctrine of *terra nullius*, which, in turn, underpinned the theory that the Crown became in law the sole proprietor of all lands in Australia. Therefore, it confined its ‘critical examination’ of the doctrine to the way in which indigenous rights and interests in land were made invisible by *terra nullius*.<sup>163</sup> *Terra nullius* in the literal sense of the term means unoccupied land. However, its significance in the colonial

<sup>159</sup> This is not to say that Court was not in complicated mimetic territory at the time of *Coe v Commonwealth*.

<sup>160</sup> Brennan J, *Mabo*, above n.3, [41].

<sup>161</sup> Watson, ‘Buried Alive’, above n.2, 257.

<sup>162</sup> Brennan J, *Mabo*, above n.3, [38].

<sup>163</sup> Brennan J, *ibid*, [28].

context was to consider inhabited land as ‘practically unoccupied’,<sup>164</sup> if the inhabitants were deemed ‘low’ on the ‘scale of social organisation’.<sup>165</sup> Lord Sumner speaking for the Privy Council aptly sums up *terra nullius* in this way:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usage and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.<sup>166</sup>

There had been a string of cases concerning Australia that supported this doctrine, including *Attorney General v Brown* where New South Wales was described as a wasteland with no proprietor other than the Crown.<sup>167</sup> In *Cooper v Stuart* the Privy Council described New South Wales as ‘practically unoccupied, without settled inhabitants or settled law’ at the time it was ‘peacefully annexed’ to the Crown.<sup>168</sup>

*In re Southern Rhodesia* indicates that the Privy Council were looking for — and not seeing — an aboriginality that it could reconcile with civilised society (as its measure of estimation). It is perhaps significant, seen in this light, that the Meriam people’s ‘gardening prowess’ becomes the focal point of Brennan J’s recognition of their relationship to land.<sup>169</sup> In the opening pages of his judgment Brennan J cites at length Moynihan J’s description of the Meriam people at the end of the 18th century.

The cultivated garden land was and is in the higher central portion of the island. There seems however in recent times a trend for cultivation to be in more close proximity with habitation. The groups of houses were and are organised in named villages.

...

<sup>164</sup> From *Cooper v Stuart* cited in Brennan J, *ibid*, [36].

<sup>165</sup> Brennan J, *ibid*, [38].

<sup>166</sup> Cited by Brennan J, *ibid*.

<sup>167</sup> Brennan J, *ibid*, [25].

<sup>168</sup> Emphasis added. Brennan J, *ibid*, [36].

<sup>169</sup> Motha S, ‘Mabo: Encountering the Epistemic Limit of the Recognition of “Difference”’, above n.70, 81.

Garden land is identified by reference to a named locality coupled with the name of relevant individuals if further differentiation is necessary. The Islands are not surveyed and boundaries are in terms of known land marks such as specific trees or mounds of rocks. Gardening was of the most profound importance to the inhabitants of Murray Island at and prior to European contact. Its importance seems to have transcended that of fishing. Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange during the various rituals associated with different aspects of community life.<sup>170</sup>

There have been a number of celebratory, albeit critical, characterisations of *Mabo* as a recognition of ‘difference’ through law.<sup>171</sup> In contrast, Stewart Motha argues that the judgment really amounts to a recognition of ‘sameness’.<sup>172</sup> If, as Motha suggests, we widen our context to take in the dominant ‘Anglo-European conception’ of relating to the land, the reason for Brennan J’s focus on gardening becomes apparent.<sup>173</sup> As an example Motha cites John Locke’s theory on the mixing of one’s labour with the land as giving rise to legal rights of possession.<sup>174</sup>

As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common.<sup>175</sup>

Further, the passage cited by Brennan J is overflowing with “signs” of a quintessential English connexion to land. From the organisation of huts into villages, the reference to boundaries (not quite fences but a type of enclosure nevertheless) and to the garden — all are historically English symbols of ownership, permanence, cultivation and improvement.<sup>176</sup>

Having found that the Meriam people have a relationship to the land that the Court can (literally) recognise, Brennan J comes to the view

<sup>170</sup> Moynihan J cited in Brennan J, *Mabo*, above n.3, [3].

<sup>171</sup> See Motha, ‘*Mabo*: Encountering the Epistemic Limit of the Recognition of “Difference”’, above n.70, 82.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Locke cited in *ibid.*

<sup>176</sup> Seed P, *Ceremonies of Possession in Europe’s Conquest of the New World, 1492–1640* (Cambridge, 1995), 18–19 and 22.

that the most just course for the Court would be to overrule the existing authorities that disregarded the distinction between inhabited colonies that were *terra nullius* and those which were not. He thus imported the judgment into the mainland.<sup>177</sup> All indigenous inhabitants of Australia have proprietary interests in land or a native title capable of recognition by the common law, which is not extinguished on a ‘mere change in sovereignty’.<sup>178</sup> Native title, Brennan J tells us, is not a creature of the common law. It has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.<sup>179</sup> The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>180</sup> The indigenous inhabitants of Australia are ‘recast’, in Motha’s words, as ‘proper(tied)’ subjects.<sup>181</sup>

There is an extraordinary contradiction at work here. While the recognition of the Meriam people’s relationship to land was based on ‘sameness’ we see a subtle shift to “similarities”, invoking Bhabha’s concept of the ‘same, but not quite’. The garden was of central importance for the establishment of English colonies. Each European nation bidding for colonial expansion had ceremonies or rituals of possession intended to signify to each other universally clear acts of establishing colonies (though it is questionable how universally clear these acts of possession were even amongst European nations). The English, Seed argues, planted gardens and she notes the English preference to refer to its territories in the New World as ‘plantations’ rather than colonies.<sup>182</sup> Although Seed’s examination of possession ceremonies is predominately concerned with the establishment of colonies in the New World, she nevertheless points out that gardening as a sign or, more precisely, act of possession continued well into the 18th century. Captain Cook was known to have planted gardens on some of the islands that he visited as one way of fulfilling orders from the Admiralty to take possession of settlements ‘by Setting up Proper Marks

<sup>177</sup> Brennan J, *Mabo*, above n.3, [39].

<sup>178</sup> Brennan J, *ibid.* [61].

<sup>179</sup> Brennan J, *ibid.* [64].

<sup>180</sup> Brennan J, *ibid.*

<sup>181</sup> Motha S, ‘Reconciliation as Domination’ in S Veitch, *Law and the Politics of Reconciliation* (Hampshire, 2007), 74.

<sup>182</sup> Seed, *Ceremonies of Possession in Europe’s Conquest of the New World, 1492-1640*, above n.176, 41.

and Inscriptions, as first discoverers and possessors'.<sup>183</sup> There is, in this respect, an important link between property and sovereignty and Seed's theory fits neatly within the linkage of property and sovereignty in European political thought. Locke, for example says, the 'great and chief end' of 'men uniting into commonwealths and putting themselves under government, is the preservation of their property'.<sup>184</sup>

This contradiction was likely at the back (or even forefront) of Brennan J's mind, when referring to the justification for the settlement of land under the doctrine of *terra nullius* as being that the land was uncultivated by the indigenous inhabitants, his Honour said:

It may be doubted whether, even if these justifications were accepted, the facts would have sufficed to permit acquisition of the Murray Islands as though the Islands were *terra nullius*. The Meriam people were, as Moynihan J found, devoted gardeners.<sup>185</sup>

Do we not again see the menace of mimicry? Just as quickly as Brennan J opens up the possibility that the Crown's acquisition of sovereignty over the Murray Islands is invalid, his Honour immediately closes it down by saying that it is not something for the Court to 'canvass'.<sup>186</sup> This possibly also explains Brennan J's characterisation of Meriam society as regulated more by 'custom' than law.<sup>187</sup> It seems that indigenous people are not quite the same after all.

#### *The mimetic strategy of sovereignty*

This leads to my argument that there was a mimetic strategy of sovereignty in *Mabo*. I want to return to the central problematic here to tie the mimetic threads together. The essential point is this: the remarkable power of mimicry, hence its menacing nature, is that it depreciates the uniqueness of the "original". The Court, I contend, responds to this menace of mimicry with a double move of its own. On the one hand, the Court asserts sovereignty in a way that seeks to insulate it from mimicry and it does so by asserting that its sovereignty — in the form

<sup>183</sup> Ibid, 35–36.

<sup>184</sup> Locke J, 'Natural Rights and Civil Society' in Lessnoff M (ed), *Social Contract Theory* (Oxford, 1990), 101.

<sup>185</sup> Brennan J, *Mabo*, above n.3, [33].

<sup>186</sup> Brennan J, ibid.

<sup>187</sup> Brennan J, ibid, [3].

of the Crown — has the status of an original. In *Mabo*, we are witness once again to colonial “history” repeating itself as the Court behaves in a similar manner to Darwin by responding to “mimicry” with claims of Anglo-European originality. However, this claim to originality is infused with Hobbes’ “paranoia” to erect a defensible Sovereign, so that the sovereignty that the Court deploys is authoritative in the Leviathan sense and is protected from mimetic contest. While on the other hand, underscoring Anglo-European claims to authoritativeness, the Court produces a “copy”, or perhaps more precisely a “version” (“Aboriginal”, “civilised savage”, “gardener”, “myth”, “traditional laws and customs”, “Crownless” and “native title”) that is qualitatively different from the original (“Anglo-European”, “civilised”, “discoverer/possessor”, “history”, “sovereignty”, “the Crown” and “tenure/property”). All copies or versions can be bundled into native title, but it should be kept in mind that there are a number of different levels of construction at work here. The original, which in *Mabo* is Anglo-European sovereignty, produces an impoverished copy of itself — native title — as a strategy and as an effect of its power *as original*.

But the Court’s first rejoinder to the contest over sovereignty is a somewhat curious one, giving us an insight into its encounter with the societal crisis and the erosion of differences. This erosion of differences, put another way, is a crisis concerning its own foundations. We already see this crisis in Brennan J’s questioning of the factual application of *terra nullius* to the Merriam Islands. The Court assesses its historical claim to sovereignty over Australia in the face of an Aboriginal challenge, but finds history wanting as a plausible reply.

Even though the Court informs us that sovereignty was not contested by the plaintiffs, it spends an unusual amount of time discussing the “question” of sovereignty. This questioning of sovereignty is accompanied by a hint of anxiety and, seemingly, confusion over what act constituted the Crown’s acquisition of sovereignty over Australia. As a direct result there is some ambivalence about the legal significance of Captain Cook’s act of possession as well as, interestingly, Captain Arthur Phillip’s act of occupation. There were consistent references to ‘our territory called New South Wales’ in the Commissions from King George III to Captain Arthur Phillip, which indicated the view that the part of Australia that was annexed by Captain Cook, ‘backed by an unexplored interior’ of the colony,

had already become British territory by virtue of ‘discovery’.<sup>188</sup> However, Brennan J found such claims ‘startling’ and ‘incredible’, including under these terms a similar claim made by Isaacs J in *Williams v Attorney General for New South Wales* that when Governor Phillip received his first Commission from King George III, the whole of the lands of Australia ‘were already in law the property of the King of England’.<sup>189</sup>

Justice Brennan considered that a sovereign could claim the territories newly discovered by their respective discoverers provided discovery was confirmed by occupation.<sup>190</sup> Justices Deane and Gaudron agreed with Brennan J that the preferable view is that the Crown established sovereignty on settlement of the colony.<sup>191</sup> Captain Arthur Phillip claimed possession for the Crown on arrival on 26 January 1788 and, curiously, once again claimed possession by reading out his second Commission on 7 February 1788 ‘with all due solemnity’.<sup>192</sup> Even on that approach, Deane and Gaudron JJ observed, ‘there are problems about the establishment of the Colony in so far as the international law of the time is concerned’.<sup>193</sup> In Deane and Gaudron JJ’s words:

It is scarcely arguable that the establishment by Phillip in 1788 of the Penal Camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions.<sup>194</sup>

The same questioning of the reach of the Crown’s jurisdiction on the establishment of the Penal Colony at Sydney could be asked again and again as inroads made across the continent by the British were similarly inchoate.<sup>195</sup> The Court in *Mabo* essentially scrutinises the historical acts that were challenged by the plaintiff in the statement of claim that was struck out in *Coe v Commonwealth* and with some consternation finds that these acts are riddled with problems. In the search for the original foundation of the Crown’s sovereignty the Court confronts the critical

<sup>188</sup> Deane and Gaudron JJ, *ibid*, [3].

<sup>189</sup> Brennan J, *ibid*, [44].

<sup>190</sup> Brennan J, *ibid*, [33].

<sup>191</sup> Deane and Gaudron JJ, *ibid*, [3].

<sup>192</sup> Deane and Gaudron JJ, *ibid*.

<sup>193</sup> Deane and Gaudron JJ, *ibid*.

<sup>194</sup> Deane and Gaudron JJ cited in Motha, ‘The Sovereign Event in a Nation’s Law’, *Law and Critique* 13:3 (2002), 319.

<sup>195</sup> See also Motha, *ibid*.

problem with colonial authority; it lacks, as Bhabha reminds us, authority of its own. Jacques Derrida makes a similar point, though he sees this as an inherent problem with sovereignty, in a sense its ontological deficiency (the ‘origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves’).<sup>196</sup>

How then does the Court assert its claim to sovereignty? The Court finds that sovereignty is embedded and entrenched *in* the concept of the Crown which, once the personal imprimatur of the Monarch or King, stands for the political and legal *authority* of institutions (such as, parliament, courts and the executive, or responsible government) in British and later Australian constitutionalism. The anxiousness and uncertainty with which the Court approaches the question of sovereignty suddenly falls away as the Court regains its confidence. ‘We need not be concerned’, Brennan J puts it, ‘with the date on which sovereignty over Australian colonies was acquired’.<sup>197</sup> The power to extend its sovereignty and jurisdiction to a territory lay within the prerogative power of the Crown. In common law, prerogative powers are exceptional powers and privileges belonging exclusively to the Crown. Citing Diplock LJ, Brennan J states:

It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction.<sup>198</sup>

This assertion of sovereignty by the Crown is an ‘act of state’. This act of state is non-justiciable, meaning it cannot be ‘challenged, controlled or interfered with by the courts of that state’.<sup>199</sup>

It is intriguing that in the same year and in another constitutional context, a Court that shows a “modernising” willingness to supplant the Crown with the sovereignty of the Australian people in *Australian Capital Television Pty Limited v The Commonwealth*,<sup>200</sup> should invoke the Crown as the operative symbol of sovereignty in *Mabo*. International post-colonial and separatist struggles illustrated the incredible power of the symbol of a

<sup>196</sup> Derrida J, ‘Force of Law: The “Mystical Foundation of Sovereignty”’, (1990) 11 *Card. L. Rev.*, 943.

<sup>197</sup> Brennan J, *Mabo*, above n.3, [44].

<sup>198</sup> Brennan J, *ibid*, [31].

<sup>199</sup> Gibbs CJ cited in Brennan J, *ibid*, [31].

<sup>200</sup> (1992) 177 CLR 106.

“sovereign people” to successfully underpin claims to political autonomy, as the characterisation of one people as sovereign and another people as not sovereign could not be sustained without applying some kind of discriminatory discourse. However, the Court refuses to meet the Aboriginal challenge to also be a sovereign people on an equal playing field. I say “operative symbol” here because the Crown as it is used by the Court clearly stands for sovereignty and this rendering produces two complementary effects. First, the Court invokes a symbol that is a product of Anglo-European history, occupying a unique place in space and time. This uniqueness of the Crown is generated, as Benjamin would say, by its ownership and control. Simply put: the Crown belongs exclusively to the Anglo-European constitutional tradition and, as such, so does sovereignty. Secondly, the Crown is used as “indicia” to deny the existence of an Aboriginal sovereignty. We see this explicitly in Gibbs CJ’s assertion in *Coe v Commonwealth*, as if a page out of Hobbes’ *Leviathan*, that Aboriginal people have no organs by which sovereignty might be exercised, but the *Mabo* judges, acknowledging the era of post-colonial “equality”, are much more circumspect.

Like Darwin’s claim to originality, the Court’s own claim through the symbol of the Crown relies upon the existence of an Other. The shortcoming of Derrida’s analysis that sovereignty rests upon itself or upon its own assertion is that it fails to see sovereignty as something that is contextual or relational. The Court’s assertion of sovereignty is not made in a vacuum, though it is clear that the Court thinks that this is the case, it is made in the colonial context. The Court’s claim that sovereignty is an exclusive Anglo-European possession, like the magic of contagion or the zero-sum game, is intimately connected to the denial of Aboriginal sovereignty. To complete Bhabha’s claim: colonial authority only gains authority or, as I put it, “authoritativeness” belatedly in the colonial context and this authoritativeness is built on the back of the production of discriminatory differences. In the Australian context the discriminatory difference is *terra nullius*, which, as I indicated above, could no longer underwrite colonisation in the new international climate that the Court finds itself in. ‘Whatever the justification advanced in earlier days’, Brennan J acknowledges, ‘an unjust and discriminatory doctrine of that kind can no longer be accepted’.<sup>201</sup> However, while the Court seeks a reformed

<sup>201</sup> Brennan J, *Mabo*, above n.3, [42].

and recognised proper(tied) subject, its reformation and recognition is limited. Faced with all the consequences — societal, legal and political — that flow from the recognition of radical equality, the Court traverses a predictable path. It refuses to upset the structural differences (such as, ownership of property) that underscores the wider society; that is, what Brennan J calls in highly abstract terms the 'skeletal principle'. Law is a key structuring force that reinforces wider societal or structural differences and it cannot, as the Court tells us, be 'destroyed' or 'fractured'. The 'peace and order of Australian society', as Brennan J puts it, 'is built on the legal system'.<sup>202</sup>

It is through the "recognition" of native title that the Court rejects the entirety of the Aboriginal claim to equality — land rights *and* sovereignty — by creating native title, an imperfect rendering of Anglo-European sovereignty (and property). The impoverishment of native title is caused by its severance from an Aboriginal sovereignty or sovereignties equal to Anglo-European sovereignty or, even, an inkling of sovereignty able to withstand the full force colonisation, like the domestic dependent nation status accorded to Native American Indians. Whether this limited recognition and reformation is a conscious move is not important, it is both a strategy and effect of the model of sovereignty that the Court deploys in *Mabo*: the Leviathan, albeit in monarchical clothing.

Sovereignty in *Mabo* is overflowing with the Leviathan, which by its nature is a sovereign power that prevents contestation by demanding, backed by threat of force, political allegiance of all those within its jurisdiction. There is an assimilative project at work in *Mabo*. In Harrison's terms, this is an expansionary project where symbols are imposed on another group as a strategy of political allegiance (allegiance and subjecthood are two sides of the same coin in British constitutional thought). Aboriginal people are brought within the scope of the power of the object of contestation. On the acquisition by the Crown of sovereignty in Australia, the indigenous inhabitants automatically became subjects of the British Crown; the multiplicity of Aboriginal voices became one voice, subsumed into the unanimity of the Leviathan. As Justice Brennan puts it:

<sup>202</sup> Brennan J, *ibid*, [29].

Thus the Meriam people in 1879, like Australian Aborigines in earlier times, *became British subjects owing allegiance to the Imperial Sovereign* entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided.<sup>203</sup>

However, the Court's assimilative project is incomplete or riddled with ambivalence. The indigenous inhabitants of Australia are, as already intimated in the Court's discussion of the Meriam peoples, proper(tied) subjects with a difference. Native title is not to be regarded, the Court tells us, as equivalent to the doctrine of tenure (the technical legal term for Anglo-European property) because it does not owe its existence to the Crown but to the traditional laws and customs of Aboriginal people.

In the construction of Anglo-European sovereignty we see sovereignty and property firmly wrapped up together in what the Court calls the Crown's 'radical title'. The link between property and the Crown is a fundamental one, much like the link between "improvements" to land and sovereignty discussed above. On the acquisition of sovereignty the Crown acquires radical title to the various colonial territories making up Australia. The Crown does not become the owner of all lands in Australia when it acquired sovereignty, but holds the ultimate right to exercise power in respect to land within its territory. Radical title, a relic from the English feudal system of landholding, is a 'postulate to support the exercise of sovereign power' in relation to territory.<sup>204</sup> In Brennan J's words:

It is a postulate of the doctrine of tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne.<sup>205</sup>

We can hear the echoes of Locke's claim that the chief end of government is to preserve property but, it seems, not native title. Native title can be easily extinguished by an exercise of the paramount power or radical title of the Crown and, in this respect, lacks the constitutional, legal,

<sup>203</sup> Emphasis added. Brennan J, *ibid*, [36].

<sup>204</sup> Brennan J, *ibid*, [56].

<sup>205</sup> Brennan J, *ibid*, [50].

moral and political protections accorded, as almost a matter of obsession in Anglo-European thought, to Anglo-European private property. Even as British “subjects” Aboriginal peoples are impoverished. Since Anglo-European settlement of Australia, ‘many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it’.<sup>206</sup> They were ‘dispossessed’, Brennan J says, ‘by the Crown’s exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown’s purposes’.<sup>207</sup>

In contrast to the awesome power of the Crown’s sovereignty, Aboriginal laws and customs are apparently ‘fickle’<sup>208</sup> and able to be lost. There is no acknowledgment by Brennan J of an Aboriginal form of sovereignty and one can only assume as I have already suggested, that the dominant, although not absolute,<sup>209</sup> historical bias that Aboriginal people have no political organisation or a ‘fragile’<sup>210</sup> one remains at large in *Mabo*. Justice Brennan’s rendering of the Meriam people’s proprietary interest in land as customary rather than guaranteed by law is indicative of this thinking. This bias is perfected by the High Court ten years later in *Members of the Yorta Yorta Aboriginal Community v Victoria*.<sup>211</sup> Chief Justice Gleeson, Gummow and Hayne JJ say:

But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible.<sup>212</sup>

<sup>206</sup> Brennan J, *ibid*, [66].

<sup>207</sup> Brennan J, *ibid*, [82].

<sup>208</sup> Kerruish V and Perrin C, ‘Awash in Colonialism’, *Alternative Law Journal*, 24:1 (1999), 4.

<sup>209</sup> See Jacobs J and Murphy J, *Coe v Commonwealth*, above n.146, [12] and [4]. Both were willing to hear a contest over whether Australia was annexed to the Crown by means of settlement or by conquest. The latter would have recognised a lesser form of sovereignty in Aboriginal people.

<sup>210</sup> Kerruish V and Perrin C, ‘Awash in Colonialism’, 4.

<sup>211</sup> [2002] HCA 58 (hereafter *Yorta Yorta*).

<sup>212</sup> Gleeson CJ, Gummow and Hayne JJ, *ibid*, [44].

## Sovereignty in Australia in the Wake of Captain Cook

In this paper I have sought to show that sovereignty in Australia is mimetic. Colonial power and authority in Australia depends upon the production of discriminatory identities to avert conflict over land between Aboriginal people and Anglo-European Australians (used here interchangeably with the term “nation” that the High Court chose to employ in *Mabo*). Aboriginal dispossession, Brennan J acknowledges, ‘underwrote the development of the nation’<sup>213</sup> and in so far as land has been alienated by a valid Crown grant there can be no contest over that grant of land.

However, *Mabo* was heralded by the Court as a ‘retreat from injustice’,<sup>214</sup> a retreat from discrimination and the ushering in of equality before the law, all aspirations of the contemporary Australian legal system.<sup>215</sup> As Brennan J put it, to maintain the authority of the cases on *terra nullius* ‘would destroy the equality of all Australian citizens before the law’.<sup>216</sup> Nevertheless, the recognition of the Aboriginal claim to equality was incomplete and this, I suggest, was partly due to the Court’s fear of unleashing the mimetic contest into and onto the ‘nation’. One might wonder whether Brennan J would have been so eager to find that native title survives the assertion of the Crown’s sovereignty, if he did not believe that its continued existence was ‘exceptional’.<sup>217</sup>

Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people.<sup>218</sup>

The controversy generated over *Wik Peoples v State of Queensland*<sup>219</sup> a mere four years after *Mabo* is especially telling. A divided Court in *Wik* (Brennan CJ was one of the dissenting judges) expanded native title to include properties covered by a Crown grant of a pastoral lease, exposing a larger portion of land in Australia to native title. The decision unleashed

<sup>213</sup> Brennan J, *Mabo*, above n.3, [82].

<sup>214</sup> Kerruish and Perrin, ‘Awash in Colonialism’, above n.208, 4

<sup>215</sup> Brennan J, *Mabo*, [29]

<sup>216</sup> Brennan J, *ibid*, [63].

<sup>217</sup> Kerruish and Perrin, ‘Awash in Colonialism’, 4.

<sup>218</sup> Brennan J, *Mabo*, above n.3, [66].

<sup>219</sup> (1996) 187 CLR 1 (hereafter *Wik*).

what can only be described as mass national hysteria that the average person was under threat of losing his or her “backyard” to native title claims. This hysteria gives us a real insight into the existence of a fear deeply embedded in the national consciousness that tenure or private property, the bedrock of the Anglo-European claim to land in Australia, holds the pulse of the “original” Aboriginal proprietary interest.<sup>220</sup>

What was missed by the ‘nation’ was that the majority judges in *Wik* had recognised, though it is unlikely that this recognition was conscious, the aspect of reciprocity fundamental to mimetic conflict. The desire of Aboriginal people and Anglo-European Australians to have their interest in land recognised and secured, however that interest is manifested, is fundamentally the same. Instead of seeing the object of the interest — property — as exclusively belonging to Anglo-European interests the Court considered that both interests, Aboriginal and Anglo-European, could co-exist in the same property. The fleeting promise of *Wik* was the concept of the co-existence of different forms of land uses and interests, though with one caveat, so to speak. When the two uses came into conflict, native title, still the impoverished copy, would give way to Anglo-European property rights. However, the symbolism of co-existence contained the seeds of a more significant retreat from colonial injustice. The post-*Wik* calls of the Howard Federal Government for “certainty” of effectively the exclusivity of Anglo-European ownership, later turning into a legislative response of extinguishment of native title, signalled once again the Leviathan motivation towards coercion rather than contestation. The opportunity was lost to grasp that even though contestation always threatens to descend into further crisis, it generates reciprocity, which is a step towards mutuality and a more profound basis for a progressive dialogue.

What remains to ask is what is the status of Captain Cook in the wake of *Mabo*? This question becomes more pertinent since *Wik*. In *Mabo's* wake native title has started to work injustices in the form of extinguishment (*Wik* in the context of High Court native title cases is itself exceptional). Motha points out that the Court’s assertion of sovereignty in *Mabo* paradoxically repeats and retreats from the original foundation of Australian law.<sup>221</sup> Captain Cook’s place and role within the pantheon of sovereign acts remains intact. As I suggested in the first section of this

<sup>220</sup> Many thanks to Dean Wadiwell for this insight.

<sup>221</sup> Motha, ‘The Sovereign Event in a Nation’s Law’, above n.194, 317.

paper, his act of most consequence was to bring the continent within the framework of Anglo-European “history”. In law he brings the continent within the framework of the Crown’s prerogative which, indeed, works an extraordinary power, in fact, a sovereign power in *Mabo* and beyond. The presence of Captain Cook’s act of bringing Australia within the fold of Anglo-European history and sovereignty (the two intrinsically linked) is conveyed in Brennan J’s ‘tide of history’ metaphor in *Mabo*. As Brennan J puts it:

When the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has ceased.<sup>222</sup>

As Watson frames it, *Mabo* ‘legitimised Cook’s violent arrival’.<sup>223</sup> The ‘tide of history’ metaphor was invoked by Olney J of the Federal Court in *Members of the Yorta Yorta Aboriginal Community v Victoria*<sup>224</sup> to justify his decision that the descendants of the Yorta Yorta peoples had ceased to occupy their traditional lands in accordance with their traditional laws and customs. His honour effectively found that the tide of history, presumably itself a further metaphor for the march of civilisation, had stripped the Yorta Yorta peoples of their nativeness. This is the realisation of the assimilative project of western mimetic sovereignty where the “native” loses his or her indigenous claim — the original claim — to land because they become too much like “us”’.

*Too Many Captain Cooks* grasps the ‘tide of history’ all too well when at the critical juncture in the Rembarrnga dreaming the power of Captain Cook the ancestor is replicated in the Captain Cooks that come later to Australian shores. For the Rembarrnga, the (sovereign) power of Captain Cook and his sons are equivalent (the Rembarrnga are a sovereign people), but the balance between the two is ruptured by the multiplication of the sons of Captain Cook — there are just too many of them. The brilliance of *Too Many Captain Cooks* is that it provides us with a haunting picture of the colonial project as a mimetic one while, at one and the same time, showing us that there is some scope for resistance in the very symbols that are used by colonial power and authority to dominate.

<sup>222</sup> Brennan J, *Mabo*, above n.3, [66].

<sup>223</sup> Watson, ‘Buried Alive’, above n.2, 264.

<sup>224</sup> [1998] FCA 1606.

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