Jurisprudence: Discourse Analysis of the Law

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Attempt is made, through theories of discourse analysis, to examine how the law constitutes itself vis-à-vis construction of a legal other. This necessarily involves a two-part inquiry: the first into object construction or representation, and the second into subject constitution. It is suggested that orthodox jurisprudence is ill-equipped to critically examine the legitimating processes of the law because of its refusal to engage with a working concept of ideology. The examination of indigenous Australians in legal discourse illustrates the problematic notion of a consensual community as the source of law's authority. The manner in which the law defines and constructs Aboriginality is examined through analyses of several areas of law including native title and copyright.

Introduction

It is not without significance that Dworkin's *Law's Empire*[1] should be so titled. Ponder, first, the semantic association. To have an empire is to be at the centre of an extended sphere of power. It is to be at the pinnacle of one's own land, and to assume absolute authority in another's land. This authority is attained via a violent political process based on unequal power relations between the imperial centre and the colonised space. The violence of imperialism, in addition to being manifest or physical, occurs also in the psyche and language of the enterprise. This latter form of violence — Spivak's "epistemic violence"[2] — is more elusive, subtle, insidious. It is difficult to observe because it is veiled in terms of benevolence and paternalism, and embedded in a hegemonic ideology.[3]

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1 Dworkin, R, *Law's Empire*, Fontana Paperbacks, London, 1986.

2 Spivak, G, *In Other Worlds: Essays in Cultural Politics*, Methuen, New York, 1987, p 209.

3 This notion of ideology is not specifically Gramscian, but rather comes from Spivak, id p 118. It is the condition/effect of subject constitution. This is discussed below.

In addition to its commentary on the law's centrality and authority, the title invites an irresistible comparison between the discursive practices that support and propel both the law and the empire. The benevolence and paternalism, as well as the violence and the silencing, are characteristic features of both enterprises, and it is through an analysis of the respective discursive practices that such characteristics are revealed.

In the following pages an attempt is made, through theories of discourse analysis, to examine how the law constitutes itself vis-à-vis construction of a legal other. This necessarily involves a two-part inquiry: the first into object construction or representation, and the second into subject constitution. It is suggested that orthodox jurisprudence is ill-equipped to critically examine the legitimating processes of the law because of its refusal to engage with a working concept of ideology.

The manner in which the law defines and constructs Aboriginality is examined through anaylses of several areas of law including native title and copyright. There are many legal others, however the place of indigenous Australians in the dominant narrative is interesting because it specifically problematises the very legitimacy of Anglo-Australian law. The survival of Aboriginal customary law, albeit not legally recognised, demands the question: "by what lawful process have you [the state] come into being?"[4] Furthermore, the point at which the state came into lawful existence serves as an example of Derrida's founding moment of "performative violence".[5]

Law as Discourse

Law is considered a discourse in so far as it produces meaning via its institutions and practices. Legal meaning is not simply a reflection of fact or reality; rather, it is culturally and historically contingent, fixed in time and space. The idea that meaning is not inherent in things, but rather is constructed, has prompted a recent flurry of inquiry into the processes

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4 Watson, I, "Indigenous People's Law-ways: Survival against the Colonial State" (1997) 8 *Australian Feminist Law Journal* 39, p 46.

5 Derrida, J, "Force of Law: The 'Mystical' Foundation of Authority" (1990) 11 *Cardozo Law Review* 919.

which produce meaning. According to Foucault, discursive practices "systematically form the objects of which they speak".[6] Foucault's analysis of institutional power highlights the relationship between power and knowledge, and how the subject's knowledge of the object is ultimately a power relationship. The knowledge of the object is authorised by a regime of truth, and the subject is empowered to assert this knowledge as true.[7]

The discursive practices which enable the subject to know the object, then, enable a degree of control over the object. The object, while dynamic and capable of many meanings, and perhaps itself a repository of some forms of power, becomes fixed, knowable, definable and ultimately controllable. It is in this sense that discourse produces the object.

Discourse analysis offers two complementary avenues of inquiry: one which focuses on the object and the other which focuses on the subject. The former is by and large a normative analysis and is concerned with the construction of the object via representational systems. The latter inquiry concerns itself with subject constitution, and permits insights into the make-up of what is revealed as a heterogeneous and fragmented subject.

Theories of colonial discourse

The role of colonial discourse in the practice and ideology of imperialism cannot be underestimated. Indeed, it is a legitimating process of imperialism.[8] The ways in which the empire constructs its object are powerful mediums of domination and control, and an essential part of imperial subject constitution. An examination of the production of knowledge as it relates to the colonised other reveals a complex interplay of tropes, and a curious ambivalence in the process of imperial subjectification.

The tropes of colonial discourse grant authority to the empire to describe, know, command and control the other. The ensemble of tropes, both miscellaneous and contradictory,

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6 Foucault, M, *The Archaeology of Knowledge*, Tavistock, London, 1972, p 49.

7 Foucault, M, *Power/Knowledge*, Harvester Press, Brighton, 1980, pp 194-96.

8 Said, E, *Culture and Imperialism*, Alfred A. Knopf, New York, 1993, p 50.

include the colonised other as primitive, infantile, savage, exotic, feminine, noble.[9] Located within the colonialist framework of self/other, the trope of the primitive assists in supplementing the empire's sense of self or identity. In other words, subjectivity is grounded and stabilised in the act of defining the other.

The seminal work on the empire's mythologised knowledge of the other is Said's *Orientalism.*[10] Drawing on Foucault, Said examines the politics inherent in colonial discourse, and how historicist forms of knowledge are linked to the ideology of European imperialism. While this work made undeniable inroads into understanding the mechanics of discursive practice, the main criticism is that, in his critique of a perceived homogenous Orient, Said constructs a monologic version of the Occident that is both cohesive and unified in its intentionality.[11] By focusing on the representation, Said is unable to escape the notion of instrumentality in the power of the colonised.

> "In order to understand the productivity of colonial power it is crucial to construct its regime of 'truth', not subject its representations to a normalising judgement."[12]

In problematising the colonial subject, Bhabha exposes not a unitary, integral entity, but rather an ensemble of conflicting and irrational positions. The irrational and illogical nature of the empire's self-claimed rationality is revealed by focusing on "latent" Orientalism, or that part which is made up of fantasy and myth. It is this aspect of Orientalism, attended by the strategic use of the stereotype, that is the driving force behind colonial discourse.

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9 Torgovnick, M, *Gone Primitive: Savage Intellects, Modern Lives*, University of Chicago Press, Chicago, 1990, p 8.

10 Said, E, *Orientalism*, Routledge & Kegan Paul, London, 1978.

11 Bhabha, H.K, "The Other Question: The Stereotype and Colonial Discourse" (1983) 24:6 *Screen* 18, p 25. The idea of a single, unified site of colonial power is also challenged by that body of scholarship that examines the role and agency of women in the imperial project; see, for example, Donaldson, L, *Decolonizing Feminisms: Race, Gender and Empire Building*, University of North Carolina Press, Chapel Hill, 1991; Chaudhuri, N, and Strobel, M (eds), *Western Women and Imperialism*, Indiana University Press, Bloomington, 1992.

12 id, p 19.

The ambivalence of the stereotype — its repetition and fixity — gives it the energy to repeat itself in "changing historical and discursive conjunctures".[13] The construction of colonial power and the justification for the exercise of power over another requires an articulation of difference based on physiological factors of race and sex. It is the physiological significance of the body and the need to have difference to acquire subjectivity that leads Bhabha to make an analogy between the colonial stereotype and Freudian fetishism. The fetish and the stereotype both act on the recognition and disavowal of difference, and vacillate between principles of pleasure and anxiety or fear.[14]

The use of the stereotype is useful in the analysis of law's construction of the legal other. It highlights the myths, and legal fictions, surrounding non-standard legal objects, and provides an insight into understanding how the law participates in subject-constitution processes. Perrin, drawing on Bhabha, asserts that the stereotype is an anxious response to the other that comes too close. Its proximity "threatens to reveal the inconsistency of a self which, consequently, suffers the anxiety of a dissolution, a fracturing or a splitting".[15] Applied to international legal discourse, the treatment of indigenous people accords with the ambivalence and anxiety of the stereotype and, consequently, Perrin finds that the law "fails both to exclude and to accommodate them".[16] We shall see this in more detail below in our examination of the domestic law's construction of Aboriginality.

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13 id, p 18.

14 id, pp 26-28. Of course a major problem with this conception is that the subject of which Bhabha speaks is inevitably male. The perceived "lack" which informs difference is a post-Freudian (Lacanian) notion which sees the differentiation of the self, vis-à-vis the object (mother), as acquired negatively; ie the male child acquires subjectivity by realising his sexual difference as "not female". The object is thus cause for anxiety (fear of castration) and pleasure; see, for instance, Chodorow, N, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, University of California Press, Berkeley, 1978. This is highly problematic because the empire, while paternal, was also supported by the agency of colonising women and it tends to conflate the subject position of empire into an overdetermined psycho-sexual, political grid.

15 Perrin, C, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples" (1995) 6:1 *Law and Critique* 56, p 67.

16 id, p 68.

Legal discourse

The law shares many similarities with the empire. Like the empire, the law is far reaching, paternalistic and benevolent in its intention, yet violent and silencing in its application. It is also propelled by powerful discursive practices. The law assumes one cohesive pattern of determinate meaning. Its insistence on rationality and reason asserts one true way of knowing, to the exclusion of other ways of knowing. It is an exemplary modern discourse.

The legal object is disembodied of experience and "de-faced" of any subjectivity via the subject-constituting practices of the law. In addition to constructing the legal other in ways similar to the imperialist construction of the colonised other, the law further constitutes itself by privileging its own truth and alienating others from their experiences. As the law embodies itself, it disembodies others from their experiences:

> "the authoritative discourse cannot face the aggrieved except to the extent that the discourse itself recognises and defines the other through its own familiar signs."[17]

True, the adversarial nature of the Anglo-Australian legal system provides for the existence of competing interpretations, however such interpretations must comply with the dominant pattern of legal meaning. The law will not tolerate that which threatens its internal logic. Goodrich's example of the Haida Indians' action for an injunction against logging on their land is a cogent illustration of the law's refusal to engage in a dialogue beyond itself.[18] The Haida Indians refused legal representation and sought to represent themselves by telling their stories through a variety of languages: through dress, song, and lore the Indians told of their relationship to the land. Their mode of legal argument challenged the orthodox language of the law, and inevitably failed. The evidence was not legally relevant to the issue at hand:

> "[It] was annulled in the simple, direct and brutal sense that it was not even referred to save as a

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17 Conklin, W, "The Invisible Author of Legal Authority" (1996) 7:2 *Law and Critique* 173, p 192.

18 Goodrich, P, *Languages of Law: From Logics of Memory to Nomadic Masks*, Weidenfeld & Nicholson, London, 1990, pp 179-85.

> curiosity, a relic, a primitive remnant of a more savage past. The court would not compare mythologies, *it refused even to countenance the question of the 'other'*, because to do so would raise questions of its 'self', of the social and mythic construction of its own body..."[19]

This case of "legal deafness" is an instance of how the law silences the legal other's voice and privileges its own internal logic. It is an example of the epistemic violence that effaces one's subjectivity and compels a subject to "cathect (occupy in response to a desire) the space of the Imperialists' self-consolidating other"'.[20]

Some recent inquiries into the law's logocentricity have exposed the regime of truth asserted by legal discourse. Feminist jurisprudence, methods of deconstruction and political-economy critiques have revealed the socio-historical contingency of universalist assumptions and an unquestioned orthodoxy.[21]

Constructing the Indigenous Legal Object

The construction of Aboriginality within legal discourse highlights the extent to which the law is prepared to separate from its positivist assumptions and embrace the possibility of pluralism and specificity of experience. The fiction of *terra nullius* opens the discussion as the high watermark of a racist colonial discourse. It represents the moment at which Anglo-Australian law was imposed on the indigenous inhabitants; the immediate effect of Derrida's founding moment of violence.[22] This is followed by an examination of the status of Aboriginal customary law in the areas of native title and the protection of indigenous cultural and intellectual property, which highlights some of the silencing strategies of legal discourse. A brief look at the Report of the Hindmarsh Island

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19 id, p 183. (Emphasis in original.)

20 Spivak, already cited n 2, p 209.

21 For example, Troupe, M, "Rupturing the Veil" (1993) 1 *Australian Feminist Law Journal* 63; Derrida, already cited n 5; and Duncanson, I, "Power, Interpretation and Ronald Dworkin" (1989) 9 *University of Tasmania Law Review* 278.

22 Derrida, already cited n 5.

Bridge Royal Commission further reveals both the paternalism and logocentricity of the law.

The doctrine of *terra nullius* enabled the acquisition of Australia by settlement. *Terra nullius* — the land of no one — assumes desert and uncultivated land uninhabited by any civilised people, and completely lacking in any system of law.[23] Informed by a "scientifically objective" theory of social Darwinism[24] and bolstered by the trope of the primitive, this conception of a primitive society — a "wretched" and uncivilised lot — secured the legal extinguishment of Aboriginal sovereignty. The doctrine

> "created a reality that was not true: 'Australia' empty of sovereign peoples, awaiting European occupation."[25]

Not only might this be considered one of the greatest legal fictions because of its historical inaccuracy, it might also be regarded a great legal fiction by sheer fact of its staying power.

In *Milirrpum v Nabalco Pty Ltd*[26] Blackburn J recognised Aboriginal customary law as a legal system,[27] but found that Australia's status as a settled colony precluded survival of that law. He also said that Aboriginal concepts of land title were inconsistent with common-law requirements.

Furthermore, the *Mabo* decision,[28] while granting common-law recognition to native title, does not negative the doctrine of *terra nullius*. The High Court found that a form of communal native title survived settlement, but confirmed an earlier finding[29] that the acquisition of sovereignty, as an act of state,

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23 ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31, AGPS, Canberra, 1986, p 34.

24 This powerful "scientific" theory of modern anthropological discourse shows eurocentricity and logocentricity at its best. This teleological perception of the development of human societies saw hunter-gatherers at the base and civilised European man at the apex. The "frozen-in-time" Aborigines were considered so far back on the evolutionary scale that colonisation, civilisation, assimilation were scientifically and culturally justified; see also Watson, already cited n 4.

25 id, p 47.

26 (1971) 17 FLR 141.

27 id, pp 267-68, where he rejects positivist law as the only law.

28 *Mabo v State of Queensland* (No 2) 1992 175 CLR 1.

29 *Coe v Commonwealth* (1979) 24 ALR 118.

was unchallengeable.[30] The decision does not acknowledge the legal validity of Aboriginal customary law, nor does it expand the law to accommodate indigenous conceptions of land ownership. Rather, it expands the common-law to accommodate a form of communal native title, the content of which is determined by reference to indigenous law.[31] The significance of indigenous law in this regime is confined to fact or circumstance; it is not law in and of itself.[32]

Rather than being legally refuted, the greatest legal fiction that is *terra nullius* continues today as a legal truth. This notion, along with its concomitant imperialist assumptions, underpins much of the law's response to the indigenous legal other. In the area of indigenous cultural and intellectual property the recognition of indigenous law is permitted as a circumstantial factor, and apparently even this is subject to creative judicial discretion. It is also an area in which construction of Aboriginality is rife with the trope of the primitive.

Milpurrurru v Indofurn Pty Ltd[33] is significant for its treatment of Aboriginal customary law. The case was the first to find copyright infringement of traditional Aboriginal art, despite incompatibility between indigenous conceptions of art and property, and dominant Anglo-Australian conceptions.[34] The

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30 (1992) 175 CLR 1 at 31-35.

31 id, at 58, per Brennan J: "the nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs".

32 Tehan, M, "To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage" (1996) 15:2 *University of Tasmania Law Review* 207 notes the two-fold effect of *Mabo*. It recognises native title based on spiritual links without the spiritual being a necessary element of the title. However, by classifying native title as a recognisable property interest at common law, it also removes from consideration any interests in land that do not amount to native title.

33 (1995) 30 IPR 209. This case involved the reproduction of Aboriginal designs on carpets manufactured in Vietnam, imported and offered for sale in Australia. The claimants submitted that Indofurn's actions infringed ss 36, 37, 38 *Copyright Act* 1968 (Cth), and ss 52, 53 *Trade Practices Act* 1974 (Cth).

34 For example, the *Copyright Act* 1968 (Cth) requires the work to be fixed in material form (ss 10, 22(1)), original (s 32(1)), and assignable to the individual creator of the work (ss 32(1)(a),(b), 32(4). Given that much indigenous art is non-tangible, pre-existing and communally owned the Act is perhaps not the most appropriate form of legal protection. For an outline of the issues in this area, see Australian Copyright Council,

court found copyright law does apply to the unlawful representation of Aboriginal images and considered Aboriginal customary law relevant in terms of background. Von Doussa J's regard to customary law assisted in determining the extent of damages to be awarded. In addition to conversion damages, the court also awarded damages to compensate the cultural harm suffered.

The treatment of indigenous law then, in this case as in *Mabo*, is limited to acknowledging it as fact:

> "statements about Aboriginal norms amount to 'facts' of the case, they are not awarded any intrinsic application or authority."[35]

Even the willingness to countenance customary law must first be permitted by law, and then it is subject to the creative genius of the presiding judge. In this case, the court awarded compensatory damages, via a discretionary provision in the legislation, which provides for the court to have regard to "all other relevant matters".[36]

Despite this limited success, the legal regime which protects indigenous cultural and intellectual property remains divisive and incompatible with indigenous conceptions of art-land-law. Copyright law protects the commercial value of creativity and so is inadequately equipped to protect incorporeal property of a secret-sacred nature or which is spiritually and culturally significant.[37] As a result, the law has created an artificial distinction between "art for commerce" and "art for culture".[38] This division is ill-founded and naive as it assumes that

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Protecting Indigenous Intellectual Property: A Copyright Perspective, Government Printer, Canberra, 1997.

35 Davies, T, "Aboriginal Cultural Property" (1996) 14:1 *Law in Context* 1, p 15.

36 Section 115(4) *Trade Practices Act.*

37 The most appropriate avenue for such protection is the common-law action of breach of confidence, for example *Foster v Mountford* (1976) 29 FLR 233 involved the granting of an injunction on the publication of ethnographic material obtained by an anthropologist. See Australian Copyright Council for discussion of issues, already cited n 34.

38 See, for example, Ellinson, D, "Unauthorised Reproduction of Traditional Aboriginal Art" (1994) 17:2 *UNSW Law Journal* 327; Davies, already cited n 35.

commercial value negatives authenticity or cultural significance.

Consistent with the trope of the primitive, the law defines Aboriginality according to some social Darwinist conception of a frozen-in-time "traditional" culture. In reconfiguring and categorising the content of indigenous cultural and intellectual property, the law has sought to impose its assumptions about what part of that property is and is not spiritually and culturally significant.

The notion of tradition or cultural authenticity is a peculiarly modern fetish. It represents the need to conserve the cultural other, via stereotypes, and is attended by the requisite ambivalence of the romantic (pleasure) and the racist (fear/anxiety). Both areas of native title and copyright are characterised by this approach. Whereas native title is established by evidence of a continuing pre-contact connection and descent from pre-contact owners,[39] the narrative of intellectual property protection is characterised by an obsession with traditionality. Gray examines the key cases in intellectual property protection and the government's recent issues paper on legislative change in this area[40] and notes the way in which the criterion of traditionality dominates discussion. The issues paper, Gray claims, is directed at protecting art informed by custom and tradition, and at one particular group of indigenous Australians:

> "those living on [sic] 'traditional' communities, and producing 'traditional' artistic works which are definable by the non-Aboriginal market as 'authentic'."[41]

In this approach we see the epistemic violence which denies subjectivity to the indigenous legal person. The highly diverse and heterogenous experiences of indigenous Australians are conflated and forced to occupy that space of the law's self-

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39 Davies, already cited n 35, p 15.

40 The cases are *Bulun Bulun v Nejlam Pty Ltd*, unreported, Federal Court, 1989; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; and *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209. The report is *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (1994).

41 Gray, S, "Squatting in Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist" (1996) 14:1 *Law in Context* 29, p 39.

constituting other. Aboriginal conceptions of art-land-law, to be acknowledged, must first be translated into the language of the law. Dominant notions of property, ownership, and title consume and ultimately deny alternate realities of custodianship, communal possession or complex owner-manager relationships, which inform indigenous laws. And in their place is instituted an artificial, fetish-like construction of Aboriginality.

While these areas of the law are obsessed with the authentic, in other areas the law flatly denies alterity as it legitimates its own meaning systems. In the Hindmarsh Island Inquiry a Royal Commission determined the status of women's law business as fabrication. The Commission reached this conclusion through an assessment of anthropological knowledge of Ngarrindjeri culture, and via the application of plain old logic:

> "The beliefs said to constitute the 'women's business'...are not supported by any form of logic, or by what was already known of Ngarrindjeri culture."[42]

It is clear that the Inquiry privileged evidence that was consistent with western epistemology. It could not countenance spiritual waters or sterility caused by bridges, indeed the Report mocks such claims. Yet, if anthropologists or historians had ethnographically documented such phenomena, the claims, ironically, would have been validated.[43]

The displacement (or de-facement) of Aboriginal perspectives thus occurs on several levels. First, the experience must be translated by expert anthropologists, ethnographers, archaeologists, or historians, and second these translations must be interpreted and packaged by legal personnel for proper legal presentment before the law.[44]

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42 Royal Commission, *Report of the Hindmarsh Island Bridge Royal Commission*, State Print, Adelaide, 1995, p 241.

43 ibid; and see Harris, M, "The Narrative of Law in the Hindmarsh Island Royal Commission" (1996) 14:1 *Law in Context* 115, p 123.

44 Harris, id pp 119-20.

We can see in these few examples how the discursive practices of the law deny indigenous Australians subjectivity and silence their voices. The language and logic of the law is paternal and benevolent, yet violent and silencing. It offers to protect, but only on its own terms; it acknowledges then disavows. Like the discourse of empire, legal discourse seeks to consolidate its legitimacy by constructing the legal other using strategies of the stereotype.

The ambivalence towards the colonial or legal other exposes the anxiety felt in response to an other that comes "too close". This closeness, according to postcolonial theories of discourse, "threatens to reveal the inconsistency of a self which, consequently, suffers the anxiety of a dissolution, a fracturing or a splitting".[45] The idea that the law should be internally inconsistent, fractured, and suffering anxiety is anathema to orthodox theories of law. While orthodox jurisprudence champions the logocentricity of the law, more recent mainstream jurisprudence, such as *Law's Empire*, represents a conservative attempt to temper the seeming cohesiveness and instrumentality of the law.

Locating the Subject

Discourse analysis enables a normative assessment of object construction and representation, as well as affording the tools to critique the subject-constituting processes of the law. But, one might ask, where is this site of subjectivity that the legal other consolidates and legitimates? To whom or to what do we assign subjectivity? Like the empire, the law's subject is plural and fragmented. This then begs the question of orthodox jurisprudence that can still assign instrumentality and determinacy to legal meaning.

The nineteenth century positivism that informs orthodox jurisprudence constructs a regime of truth that is unified and intentional. According to Austin, for example, law is justified, true and legitimate because it is posited by the monarch and sanctioned by sovereignty. This idea is modified somewhat by Hart's positivist conception of law which, drawing on ordinary-language philosophy, shifts the site of authority from the

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45 Perrin, already cited n 15, p 67.

hands of the monarch to social convention. The privileging of usage and convention, then, anticipates the question of *whose* usage? This convention represents the communal acceptance of the 'rule of recognition', which authorises officials to make law. This rule effectively empowers those in power to be legitimately powerful. The tautological reasoning is almost painful.

Another aspect of Hart's positive law is the idea of core and penumbral meaning. A core or determinate meaning contrasts starkly with a postmodern insistence on indeterminate meaning, relational meaning, or many meanings. However, for Hart most meaning is fixed and that which isn't falls within that designated area of doubt, or penumbral meaning. It is at this penumbral zone, which necessitates interpretation of legal meaning, where hard cases are decided and law is made.

While core and penumbral meaning might not of itself be problematic, Hart's uncritical acceptance of the distinction as natural is. A refusal to entertain the significance of power and ideology effectively naturalises core and penumbral meanings, rather than prompt inquiry into the mechanics and politics of their distinction.

In his work, *Law's Empire*,[46] Dworkin attempts a jurisprudence that maintains the primacy and unitary site of law's authority, while distancing himself from Hart's positivism. Taking the law as an interpretive concept, Dworkin divorces himself from the traps of ordinary-language philosophy, and attempts a marriage between law, morality and politics. Despite the politics inherent in interpretation, Dworkin maintains that there will always be a correct interpretation of meaning. An interpretive attitude requires an interpretive community of shared assumptions[47] and a belief that:

> "one interpretation of some text or social practice can be on balance better than others, that there can be a 'right answer' to the question which is best even when it is controversial what the right answer is."[48]

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46 Already cited n 1.

47 id, p 67.

48 id, p 80.

This idea of interpretation assumes an internally coherent text, and the existence of a homogenous community in which to ground the better interpretation.

It seems that despite the attempt to merge morality, politics and law into a workable conception of law, the thesis is essentially a staid, functional approach to interpretation which does not permit a politics of interpretation. That Dworkin is lacking in any sense of politik is evident in his hypothetical community of courtesy. Interpretation within this community is "*essentially* concerned with purposes rather than mere causes":

> "The citizens of courtesy do not aim to find, when they interpret their practice, the various economic or psychological or physiological determinants of their convergent behaviour."[49]

This concern with purpose or function precludes any critical understanding of the politics inherent in interpretation, particularly in a community that is socially fragmented and culturally diverse. Dworkin's notion of community is based on cohesion and consensus. Really, this is Hart's privilege of usage in another form and, as such, does not offer insight into complex processes of subject constitution.[50]

It is proposed that contemporary orthodox jurisprudence, such as *Law's Empire*, is ill-equipped to examine the legitimating processes of law so long as it resists a working concept of ideology. Spivak proposes a concept of ideology that is hegemonic in nature yet dynamic, and integral to the processes of subject constitution:

> "It is both the condition and the effect of the constitution of the subject (of ideology) as freely willing and consciously choosing in a world that is seen as background. In turn, the subject(s) of

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49 id, p 51.

50 Dworkin does acknowledge divisiveness in communities, particularly in colonial societies, however treats such division as problems of interpretation. Such issues are conveniently disregarded because "they do not arise in the countries of our present main concern" (relegating to a footnote the situation in Northern Ireland): id, pp 207-8.

> ideology are the conditions and effects of the self-identity of the group as a group."[51]

This description captures both the fluidity and heaviness of what is by and large an elusive concept. Ideology is both a condition precedent to and a consequence of the process of subject constitution. It operates dialectically as it simultaneously directs and results from the processes of establishing self and group identity. These processes, as we have seen, are inherently political, as they involve the violent elision of others' voices and subjectivity.

A critical view of legal meaning and interpretation; that is, one which included Spivak's concept of ideology, would effectively deconstitute the community to reveal a divided, fragmented, and internally inconsistent community. In its absence, however, Dworkin can, at best, offer a jurisprudence which is not in any way reflective of 'reality' — or, indeed, alternative realities.

Conclusion

Positivist law has as its source of authority the monarch, the state, social convention or, for Dworkin, the community. Given these various sites of origin it is curious that none has effectively factored in politics of difference or interpretation. In Derrida's deconstruction of the law,[52] he reveals an absent foundation of authority. The source of law is, paradoxically, a site of non-law; hence, the notion of mystical foundations. This casts serious doubt on the assumptions of universality, determinacy and rationality which characterise orthodox jurisprudence. Contrary to such theories, these assumptions are not unquestionable truths, but are products of a historically and culturally specific ideology.

The examination of indigenous Australians in legal discourse illustrates the problematic notion of a consensual community as the source of law's authority. The legitimacy of the law, its determinacy of meaning, its intentionality and instrumentality are assigned by an ideology that constitutes the community. In other words, legal meaning resides in the politics of ideology, not some fanciful notion of community.

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51 Spivak, already cited n 2, p 118.

52 Derrida, already cited n 5.

We have witnessed some of the manifestations of this ideology through an analysis of the subject-constituting processes of the law, which entail powerful silencing techniques, and imperialist assumptions that buttress the trope of the primitive other.

A comparison of the discursive practices of the law and the empire show how regimes of truth are constructed, and how they ultimately reinforce the disempowerment of their other. Both enterprises are couched in terms of benevolence and paternal protection, yet, in their benevolence lies epistemic violence, instituted by a complex process of representation and subject constitution.