

## **Wounded Space: Law, Justice and Violence to the Land**

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One of the most complex and pressing issues confronting Australian society today is the degradation and destruction of the environment. The fact that our soils, forests, wildlife and water have deteriorated so rapidly over the last two hundred years forces us to consider how our culture has impacted on this continent. Historically, our ethnocentric contempt for an “inferior” race, which often led to violence against indigenous people and the land, meant that our ignorance of indigenous knowledge systems denied us a shared space in which to discuss solutions. We have only gradually begun to realize that our understanding and management of the Australian environment can be enriched by recognising the knowledge that Aboriginal people have about “country” and living sustainably on this ancient and fragile continent. This paper analyses the role the law has played in shaping our nation and suggests that the law may be in fact implicated in the practice of injustice. It is imperative that we address the legacy of violence perpetrated against indigenous people and the land, and that questions of justice and not only the law are raised at the same time.

In this paper I will follow several strands of thought emerging from my reading of three major texts on the subject of violence and the law: Walter Benjamin’s “Critique of Violence”, Jacques Derrida’s “Force of Law: The

Mystical Foundation of Authority”, and Hannah Arendt’s *On Violence*. The first strand is Benjamin’s insight that generalization contradicts the nature of justice.<sup>1</sup> This opens up the possibility that law could be viewed as a series of negotiations within the context of a possible justice, and, in the context of my subject, that legal pluralism in Australia following the recognition of Aboriginal customary law may offer us a shared space in which to discuss difference. Another is Derrida’s statement that

the excess of justice over law and calculation ... cannot and should not serve as an alibi for staying out of juridico-political battles. ... Abandoned to itself, the incalculable and giving (*donatrice*) idea of justice is always very close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation. It is always possible ... [but] an absolute assurance against this risk can only saturate or suture the opening of a call to justice, a call that is always wounded. But incalculable justice *commands* calculation.<sup>2</sup>

The call to justice exceeds both law and justice, but one must always say “perhaps.”

Deborah Bird Rose speaks of wounding in relation to land, which is where the title of this paper originated; why “wounded space” and what does it have to do with the law and justice? By wounded space, and here I quote Rose, “I mean geographical space that has been torn and fractured by violence and exile, and that is pitted with sites where life has been killed.”<sup>3</sup> Rose focuses on geography as a cultural system, specifically as European geography “transported” to Australia. I would suggest that geographical space, not just the polis, must be included as part of the public realm and that the destruction of any part of the public realm is violence. Hannah Arendt’s relational ontology “the always already present” includes the individual within a network of concerns that includes the earth which supports human life. Violence to the land does not appear as violence to white Europeans: it is invisible to us. There is however an inseparable dimension between violence to indigenous people and violence to the land. To say that something is wounded is to imply at the same time that there once was wholeness and also that there exists a possibility in which healing can occur. The longing for undamaged space can also mean that, in the Australian context, the Other, whether it is unspoiled wilderness or a harmony and spirituality residing in Aboriginal people in general, becomes even more distant from us and separate from everyday reality. “A ‘redemptive function’ is thus ascribed to Aboriginal people, constructing ‘the Other’ as full of significance which we lack.”<sup>4</sup> The obverse of this of course is a denial or “radical exclusion” that denies full intentionality and subject status

to Aboriginal people and to nature. Indigenous geography was ruptured or wounded by colonization, that is, a coherent system of spatial organization and communication that formed a “chain of connection”<sup>5</sup> across the continent was interrupted through loss of life, of land, of language and culture. Rose argues that Australian settlers have inherited wounded space because of the violence that was used against both the indigenous inhabitants and the land itself: in other words, our actions have come back to bite us.

In the framework of colonization in Australia, an analysis of the role law has played can help us to understand why our relationships with indigenous Australians and with nature are failing, and why a recognition of the damage already done must take place in the concrete here-and-now, through dialogue and negotiation and the practice of justice rather than through the framing of new laws or empty rhetoric.

Discourse in the public realm has shifted to ideas about “practical reconciliation,” individual land use agreements and other negotiated agreements, an emphasis on the benefits of privatization, the encouragement of individual home ownership, the “failure” of Aboriginal homelands, and increasing violence in those homelands. By paying attention to the language of this discourse, which urges fairness, equal opportunity and an end to separate treatment (which is presented as a kind of favouritism on the one hand, and exceptional circumstance in the form of radical state intervention into the lives of indigenous Australians on the other), we can see that what in fact is taking place is a radical but hardly new attempt to impose one social and intellectual tradition on another tradition. The “failure” of traditional indigenous societies being supposedly self-evident, it follows that the “success” of *our* society, as the only alternative, is also self-evident. Inherent in this viewpoint is the belief that uniformity creates equality and that there is a cultural norm against which people can be measured. What is left out of this worldview is the inequality in power relations between settler/conquering societies and indigenous societies who co-exist as “conquered and encapsulated peoples.”<sup>6</sup> (Although this paper was written before the Federal Government’s “emergency intervention” in remote indigenous communities in the Northern Territory announced in June 2007, it can be seen that the inherent contradictions in approach outlined above are especially relevant in this case.)

One meaning of *gewalt* as used by Walter Benjamin is force, or having dominion over, and one way of having dominion over another culture or species is through the giving of names: calling this continent “*Terra nullius*” was in a sense the giving of a non-name, or the taking away of a (unknown) name. The doctrine of *terra nullius* also had more serious conse-

quences: along with social cohesion, Aboriginal traditional resource rights were wiped away by Crown sovereignty and possession for 200 years. As Marcia Langton explains: “Traditional resource rights have been procured in two ways: by statutory recognition of rights under the ‘grace and favour of the Crown’ or by case law.”<sup>7</sup> And further: “Australia is unique among the former British colonies in that no recognized treaty was ever concluded with any indigenous group.”<sup>8</sup> There are instances of official or legally binding documents that acknowledge the prior occupation of this continent by its indigenous inhabitants: such naming by the state forces us to concede that people did indeed live here and that violence was done to them in the name of another, such as the British crown.

Rather than going through Benjamin’s critique of violence (specifically legal violence) point by point I think it is useful to take a look at the actual legal manoeuvres that took place over time in this country. Judith Wright, in her book *The Cry for the Dead*,<sup>9</sup> outlines the inability of British law to provide any kind of legal framework that could deal with the reality of conflict between the indigenous people and the settlers. The question of law was first raised in relation to punishment: in 1805 five whites were arraigned for the murder of two pardoned Aborigines. Governor King had to decide if whites should be hanged for killing Aborigines and if so, on what legal grounds? Aborigines had no legal status, but even though they were “within the Pale of His Majesty’s protection,” since “they could not plead to charges they were ignorant of, the only method of dealing with them was by pursuit and punishment.”<sup>10</sup> The British government sent a dispatch from His Majesty in the same year which said in effect that “any instance of Injustice or wanton Cruelty towards the Natives will be punished by the utmost severity of the Law,” and that any such actions would result in the perpetrator “being dealt with in the same manner as if such act of Injustice or wanton Cruelty should be committed against the Persons and Estates of any of His Majesty’s Subjects.”<sup>11</sup> This did nothing however to resolve the issue of the legal status of the Aborigines. When Cook claimed the eastern coast of the continent for the King, such action was legally justifiable only on the principle that the land was *terra nullius*, or unoccupied. *Terra nullius* was a doctrine of international law, applied here through domestic interpretation: it was relevant in terms of acquisition of sovereignty but not relevant in other areas. Once the British Crown had given directions that indigenous people were to be treated as subjects by coming under the protection of British law, they should therefore have been treated as equal subjects. It is a myth that the 1967 Referendum put an end to the non-subject-hood of Aboriginal people when two references to discrimination – that special laws were necessary for Aboriginal people, and that Aboriginal people should

not be counted in the census – were removed from the constitution, and Aboriginal people supposedly became full citizens. Indigenous people had been counted in census counts as early as the late 1800s. However, it is true that the law has been used as a strategy of exclusion (if not as a blunt instrument), and that this is not a thing of the past: it is useful to remember that the law has always been implicated in the history of imperial dominion. Val Plumwood calls this exclusion or *hyper-separation* “an emphatic form of separation that involves much more than just recognizing difference ... The function of hyper-separation is to mark out the Other for separate and inferior treatment.”<sup>12</sup> Law is used to legitimate the actions of the state even when those actions are clearly unjust. As Benjamin says:

For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it, under the title of power.<sup>13</sup>

The inability of some local authorities to recognize the Aborigines as true subjects or indeed as human beings meant that violence against them could proceed both inside and outside of the law: the perceived absence of any law of protection was equal in effect to the establishment of an unjust law. In fact, justice was left to individuals; throughout our early colonial history the only nonviolent resolution of conflict took place when private citizens as well as the odd intelligent official acted with sympathy and trust, two of the “subjective preconditions”<sup>14</sup> that Benjamin believed necessary for any nonviolent resolution of conflict.

The failure to fully recognize Aborigines as the prior inhabitants and rightful owners of the land also rendered their connections to the land invisible and made it possible to claim that they lived like ‘wild beasts’<sup>15</sup> on the land, without tools, agriculture, buildings or cultural artifacts worth mentioning. Under British law and custom, the cultivation of the land and the possession of fixed dwellings or settlements – in other words evidence of labour, that “basic principle laid down for Adam by divine authority that in the sweat of his brow he should eat bread”<sup>16</sup> – was presumption of right of occupation, and the newcomers simply failed to see or interpret what was actually there.

The capacity to wage successful war could also give title to land: in Australia British soldiers were involved in frontier violence on many occasions, but the word “war” was never used to describe these engagements. This would have meant admitting a state of war which would in turn have

produced a peace treaty with all its implications. Benjamin states that “even in cases where the victor has established himself in invulnerable possession, a peace ceremony is entirely necessary.” The word “peace” being correlative to the word “war,” makes this peace ceremony “a priori, necessary sanctioning regardless of all other legal conditions, of every victory.” Further,

law nevertheless appears ... in so ambiguous a moral right that the question poses itself whether there are no other than violent means for regulating conflicting human interests. We are above all obligated to note that a totally nonviolent resolution of conflicts can never lead to a legal contract.<sup>17</sup>

In Australia war was never declared nor was there a nonviolent resolution of conflict: how then did the law affirm itself and by what authority did it operate? In a society built on crime and punishment, convicts were controlled by a system of harsh punishment meted out by soldiers; the settlers and squatters were granted land and made contact with indigenous people before any policy or agreement with the tribes was reached. Those who found the Aboriginal presence on their land-grants “troublesome” felt free to deal with the problem in any way they saw fit. The settlers themselves and the police were the only instruments for dealing with frontier clashes. The “law” of the police was the only law most indigenous people knew: the police aided in the dispossession of land, the dispersal of tribes and the destruction of whole communities. The “law” was further corrupted when indigenous people were persuaded to don uniforms and a Native Police force was formed. From this can be seen the truth of Benjamin’s statement that “the “law” of the police really marks the point at which the state, whether from impotence or because of the immanent connections within any legal system, can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.”<sup>18</sup> In Australia, the police operated in the legal vacuum created by the abrogation of direct responsibility for governing the colony by the British. In the early twentieth century Aboriginal people were placed under the protection of the state: such protection was governed by a whole raft of laws that did not apply to citizens, and enabled and enforced by the police under the direction of the Protector. Indigenous people could be excused from believing that from the early nineteenth century to the present day they have been living in a police state.

Through this denial of subject-hood and agency to Aboriginal people it was possible to ignore the reality of Aboriginal social organization and the rules and behavioral codes that governed relationships between people and between people and the land. Judith Wright’s book charts the destruc-

tion of the land along with its original inhabitants. Biblical authority as well as English custom justified the clearing of “wilderness” since cultivation was the highest use to which land could be put even though most Australian land was actually unsuitable for such use. By the early twentieth century Darwinian theories of evolution rather than Divine decree pronounced the Aboriginal people destined for extinction. By the 1920s most of the surviving members of tribes were removed from their traditional lands and taken to reserves where they would be “protected” until they died out. Far from being impartial, the law has always operated as an instrument of exclusion. All attempts to practice justice other than on an individual level were doomed to failure.

In order to speak of violence to the land and how it relates to the law, it is necessary to discuss how a colonizing consciousness aims to erase difference through denying any overlap between nature and culture in its dealings with the colonized other. Rather than emphasizing how culture might in fact be embedded in nature, it stresses instead the differences between human and non-human. In Australia, a system of British/Roman law codifies relations to land in terms of ownership, property, and the rights of individuals to treat land as a commodity. Marx regarded the land as the main means of production; in *Capital* he wrote that the “soil (and this economically speaking, includes water) in the virgin state in which it supplies man with necessaries or the means of subsistence ready to hand, exists independently of him and is the universal subject of human labour.”<sup>19</sup> The land is not only the subject of labour but is also an “instrument of labour.” Nature is denied agency in the dominant narrative: it has no inherent value apart from its usefulness to humans.

Our national identity was founded on the conquering of “wilderness” and is still informed by notions of nature as enemy, as other; even as the emphasis changes to an attitude of care through practices of preservation and conservation, nature is still separate. Deborah Bird Rose calls this assumption that humanity is fundamentally separate from, and can control, Nature, an epistemological error.<sup>20</sup> T. Ingold in *Perception of the Environment: essays in livelihood, dwelling and skill*, explains this separateness by suggesting that humanity has placed itself “on the outside, surrounding the global environment” and that the environment, “now surrounded rather than surrounding – no longer holds any place for human beings.”<sup>21</sup> This “displacement” has its roots in the emergence of agricultural civilizations in different parts of the globe. Previously, in animistic cultures there was an interaction and inter-relationality with the world; the non-human world was filled with articulate subjects able to communicate with humans.<sup>22</sup> Even in the medieval world, organic conceptions of nature in which human beings

saw themselves as a part of a living “Mother Earth” meant that exploitation of the earth’s resources was restrained. Literacy and the spread of Christianity meant that the articulate subjectivity that was experienced in nature ceased as oral culture was replaced with the written word. Until the end of the eighteenth century, “man” was formed in the image of God and his finitude was merely a limitation of infinity. “Humanity” had no way of conceptualizing “its” separateness. The discourses of natural history, the analysis of wealth, and general grammar, classified the world in imitation of the divine order of things. By the early nineteenth century these three discourses had become the separate sciences of biology, economics and linguistics. “Man” became the one who was able to “know,” and it became possible to say that Man lives, Man labours, and Man speaks. Language itself is located outside of “Nature”: rather than being one articulate subject amongst many, including (non-intentional) animals and even objects (insentient things), “Man” has become a unique subject and speaker. Human language has become “the point of intersection between the human subject”<sup>23</sup> and what is known about the rest of the world.

In Judeo/Christian theology the creation of all things is related to naming: God said “Let there be” and then “He named.” Benjamin says in *On Language as Such*: “Language is therefore both creative and the finished creation; it is word and name ... Man is the knower in the same language in which God is the creator.”<sup>24</sup> But the world is not part of this conversation; it remains silent and only speaks through man. Furthermore, Benjamin speaks of the “mute magic of nature,”<sup>25</sup> of “mute creation,” of the “imperfect language” of nature: “the languages of things are imperfect, and they are dumb ... They can communicate to one another only through the more or less material community.”<sup>26</sup> However in the creation stories of other cultures, God is not the originator: Aboriginal people (and I am generalizing here: there are of course many different tribal or language groups) have no myth of alienation from nature equivalent to the Fall in Benjamin’s account of Genesis. Aboriginal Spirit Ancestors in animal, human or some other shape moved across the land performing various tasks, creating, naming, leaving indications of their presence in different physical forms at particular places. Sometimes they “made themselves” or “turned themselves into,” as distinct from created, aspects of the physical environment which then remained enlivened or filled with spiritual presence and social meaning. In this sense, the land itself is semiotic, and can be read like a text by people who were and still are able to understand its language. Further, there is no distinction between external object (the physical world and everything in it) and inner meaning, or between signifier and referent. In the words of Bill Neidje in *Story About Feeling*: “That tree same thing/ Your body, my

body.”<sup>27</sup> “The Ngarinyin people of the Kimberley region,” and here I quote David Mowaljarli and Jutta Malnic,

say that the whole of Australia is a distinct human body lying on its back, belly up, in the ocean. Inside this body, which they call *Bandaiyan*, is *Wunggud*, the Snake, who grows all of Nature on her skin. *Bandaiyan* is mapped, or imprinted, by what the Ngarinyin call the *wunnun* system (the sharing and exchange system and Law) which connects all Aboriginal people and which cannot be destroyed other than by Australia being blown to pieces.<sup>28</sup>

The Law cannot be destroyed, but with white invasion the connection of people with a speaking land was disrupted: if there was a Fall, it happened in the eighteenth and nineteenth centuries. Paul Carter, in *The Lie of the Land*,<sup>29</sup> explains the connection between the land and the body through natality: “Instead of regarding birth as the first displacement, the first expulsion and ruin, it (was) the primary emplacement, ... the first choreography of the ground.”<sup>30</sup> This *methektic* identification he links to the non-representative principle behind Celtic and Aranda art, “whose spirals and mazes reproduced by an act of concurrent actual production a pattern danced on the ground.”<sup>31</sup> There is a dialectic between group and place, or nature, which takes place in time and for all time. In Arendt’s discussion of natality and the human capacity to embark on something new, she says that to “act and to begin are not the same, but they are closely interconnected.”<sup>32</sup> There is a living interaction between human and non-human worlds in the form of the dance and in painting which is constantly renewing itself, and which has entered the world of western culture in new forms that refer to the past but are enriched by encounters with the modern world.

Anglo-Australian law has no capacity to understand or deal with the fact that in indigenous society, “the person is not conterminous with the body.” The boundaries of the person are not the same as the boundaries of the body: people who have the same “skin,”<sup>33</sup> or social category, share relations and interests, or “sameness”, with each other and with the animal or plant they are linked to. These relationships – with people, animals and country – are “embedded in shared bodily substance”<sup>34</sup> in a way that challenges western notions of sharing or being close to others whether human or non-human. Val Plumwood contrasts this embeddedness, which extends to spirits and bodies being “united in death with the earth from which we came, which grew us and nurtured us, in the same way as those of animals and trees,”<sup>35</sup> with the traditional Christian-rationalist system in which the dead are separated off from both the land and from all non-human life. In death as in life we are “solipsistic hyperbolized” individu-

als.<sup>36</sup> Many writers, including Deborah Bird Rose whose work I have quoted extensively, give examples of indigenous people whose connection with country (a more specific term than “nature,” implying ownership) has been broken in some way that leads to actual physical suffering or even death. Whether this is understood by white Australians or not, enough evidence has been presented to cause us to ask: what exactly do human rights mean when suffering inflicted on the body of the world is felt in the body of a person? How can justice be “performed,” or, where is justice enacted? Where is the *ground* to justify law’s legitimacy? If the ground is not human rights, then it must be in the already existent relations, the always-already that Arendt writes of, the social coherence of a people. One way in which to understand “wounded space” is to try to grasp the idea of country, precisely mapped, owned, and traversed by “dreaming tracks” which were used by people for thousands of years: these tracks usually followed water sources and areas where food was plentiful. The tracks were maintained and cared for by people. Irremediable damage was caused to the land itself when indigenous people were physically prevented from this active work of maintenance, when the dances and songs and stories were made separate, torn from, place; when people no longer had legitimate contact, literally through the soles of their feet, with their birth places. The physical degradation of land that followed has been well documented by Judith Wright, Rose, and Marcia Langton amongst others. Rose speaks of events which cannot be assimilated and of ruptured space which can never be mended.

Rose explains that because the boundaries of the person do not end with the boundaries of the body, it “would be a mistake to believe that if other people hold rights in a person’s body, that person is thereby violated.”<sup>37</sup> This statement would be impossible to understand out of context; for example, any discussion of indigenous customary law must come up against the reality of physical violence. In traditional aboriginal society (and it must be remembered that what we see today is sometimes, but not always, a fractured society held together by the remnants of mythic law, in Benjaminian terms) actions which mark the body in some way are not inherently lawless. (Nor are they in Anglo-Australian law.) The body is a site inscribed with the history of the “spirit that became the person”<sup>38</sup> as well as the history of growth, ritual and relationship: the body is marked perhaps with birthmarks, initiation marks and the signs of punishment for wrongdoing. A person’s history is thus visible to all in the group, and sometimes kinship links are reinforced by shared markings. Violence then, in this sense, is not always lawless nor is it irrational.

Violence to country must be understood as a violation of the principle

that a country and its people take care of their own. The lives of people (countrymen) and the life of their country cannot be viewed separately: moral behaviour means that this principle is always observed. It was essential to maintain balance in traditional societies: this is one way of understanding the sense of being within the Law. (In the interests of clarity, the term “Law” for indigenous people refers to mythically and ritually sanctioned standards and practices, and the term “law” refers not to a legal code but to dynamic social process.<sup>39</sup> See *endnotes for further clarification*.) Aboriginal society was organized through networks of relationships which actively resist hierarchy: there were no jails, no higher courts, no government. Wrongdoers had to be managed within society in order to maintain social cohesion, and mediated outcomes were sought through negotiation with violence as the last resort. Being within the Law meant being well or fully alive (*punyu* in the Ngarinman language of the Victoria River), and *punyu* could refer to physical, mental, spiritual or social being: the term does not distinguish between country and people. A person who is not within the Law is not healthy and can upset the balance in all domains of life, even to the extent of disturbing the country itself. Hence the necessity to “end trouble”: the trouble-maker is required to be responsible for any harm caused and to face those he or she has harmed. The term “payback” refers to the socially legitimate inflicting of violence on the body of the offender by the person harmed. Rose makes the point that “equivalence between the offence and the return is a matter of rights, and is not necessarily accomplished in physical fact.”<sup>40</sup>

The body then is the legitimate site of justice; justice is enacted on the body because in Aboriginal thinking the body, the Law and the land are the same thing. Justice is not deferred because it is essential for the balance of the whole society that wrongdoers are dealt with swiftly. However there is a space where justice can be negotiated in order that the good living of life can proceed, and this space is where mediation, confrontation, criticism and resolution all occur. When social cohesion breaks down as it did following white settlement, disorder follows.

Aboriginal customary law was recognized by the Australian Law Reform Commission for the first time in 1986, which does not simply mean that there are two separate laws for two groups of people, rather that there are multiple and contradictory demands that people in each system place upon the other. There are areas of disjunction, the primary one lying “between the Anglo-Australian legal system’s proposition that uniformity and consistency create the principle of equality before the law, and the pluralist vision of mutual recognition between different systems of law.”<sup>41</sup> This field of difference opens up a space of possibility in which it can be admitted that

one law, “our” law, is necessarily incomplete and can only exist in relation to the other: justice does not reside in either of the two laws, but in the spaces between. Mutual respect is the essential condition for dialogue, in which both parties can not only speak together but listen to each other. Hannah Arendt describes this interactive approach:

The power of judgement rests on a potential agreement with others, and the thinking process which is active in judging something is not, like the thought process of pure reasoning, a dialogue between me and myself, but finds itself always and primarily ... in communication with others with whom I know I must finally come to some agreement. And this enlarged way of thinking ... needs the presence of others ‘in whose place’ it must think, whose perspective it must take into consideration, and without whom it never has the opportunity to operate at all.<sup>42</sup>

All laws ultimately direct human relations, and all language, while it may be usefully deconstructed to reveal its ideological nature, exists ultimately in some kind of relationship to facts in a material and actual real world: while it is necessary to understand that there is no such thing as absolute justice and that justice is linked to the incalculable, nations as well as individuals must nevertheless have recourse to something called justice (represented by organized bodies) if we are to accept that all actions in the real world have consequences. If there is no agreement about what justice *is*, several examples will illustrate what justice most definitely is *not*, and also demonstrates the connection between justice and the land.

One of the world’s largest zinc mines, the McArthur River Mine in the Northern Territory near the Gulf of Carpentaria, was opened in 1993 on traditional Aboriginal land and was until 2006 an underground operation. Last October the Northern Territory government authorized its expansion to open cut, which requires a diversion of five and a half kilometers of the McArthur River. Aboriginal traditional owners challenged this approval on environmental grounds: one of the owners, Mr. Timothy, an elder and a leader in the fight against the expansion of the mine, spoke on television on the day their case opened in March 2007. He said: “We want them to look through our eyes, not through their dollar signs, you know.”<sup>43</sup> Mr. Timothy’s sudden death came two weeks before a Supreme Court judge declared illegal the government’s approval of the mine’s expansion. The government wrote off the judgement as a “narrow technicality” and rushed through legislation which retrospectively validated the expansion. The law was changed only two days before Mr. Timothy’s funeral: this was the greatest insult and the greatest disgrace to Aboriginal people. Barbara McCarthy,

Labor MLA, Arnhem, described it as an act of the “lowest form of disrespect against Indigenous people in this country when a great win had occurred for a senior traditional elder who had just passed away and had not even been buried.” A system of plurality in the law requires that both parties are equal within recognized “difference;” this must include respect for custom, which in any civilized society recognizes formal mourning and expression of grief.

In this case the power of the State to create laws overrides justice, which operates within the law, but because justice itself does not exist except through the actions of judges, justice is in “itself” powerless. A further example of the law overriding justice is evident when one considers that Aboriginal people’s rights under the common law that every other Australian enjoys over their land are significantly impaired under the amendments to Native Title made by the Howard Government: once Aboriginal people have left their traditional lands, forcibly or otherwise, they must prove native title as construed by the High Court, which in practice means that they may in some cases lose their rights to that land.

Another example of this failure of law to “capture” justice is what Marcia Langton calls “environmental racism,”<sup>44</sup> which occurs when conservation organizations threaten what she calls ancient economic systems by demanding the suppression of traditional forms of small-scale hunting and gathering. Governments respond by creating new laws which further restrict the ability of indigenous groups to retain control over their own management of resources: most governments in Australia have effectively banned traditional hunting and gathering, largely because of public opinion about the use of vehicles or guns and other modern technologies, described by Langton as a clash with the ideal of the primitive and pure Aboriginal culture. (However, where native title rights in relation to hunting and gathering have been established, any extinguishment of them requires compensation: native title can also be used as a defence to contravening legislation regulating hunting.) Further, in cases where indigenous people have established wildlife harvesting enterprises or entered into agreement with bioprospecting companies, they receive no benefit from the companies. Langton says: “Such appropriation of natural resources from the indigenous domain is a new form of dispossession.”<sup>45</sup> Fred Chaney has just retired from his position as deputy chairman of the Native Title Tribunal, the body set up to oversee land use agreements reached after the Mabo and Wick High Court rulings. He gave a speech titled “Policy Incoherence in Aboriginal Affairs” in 2006 in which he pointed out that governments “deplore the lack of economic development on Aboriginal land, yet firmly restrict Native Title outcomes to a bundle of non-economic usable rights.”<sup>46</sup>

The law continually erases and rewrites itself: thus the Law which is a mythic and founding Law contains within it the ghost of justice. It contains the possibility of justice, and also injustice, within itself; it allows for change, for doubling back and beginning again. It is not a relentless straight line or an enclosed circle; rather, it is a spiral or a line that is sometimes broken, sometimes double or curved. It can always amend itself, whether this is for “good” or ill. Perhaps the very ambiguity of the law allows it to be used differently: it can cut, as it were, both ways. Gaps are opened up in the law through interpretation and through the system of appeals to higher courts. Judges have some latitude in their application of the law, which works at its best when Indigenous customary law is considered alongside European law in certain circumstances. Justice may reside in the spaces created in the complexities of negotiation, and in the impossibility of reaching a simple decision, in the need to stay the “hand” of the law in some instances. The deferral of decision, as against the urgent need to decide, may occasionally mean that, in Derrida’s words, “the undecidable remains caught, lodged, as a ghost at least, but an essential ghost, in every decision, in every event of decision.”<sup>47</sup> However, the latest Federal intervention, which was announced and then pronounced law with unseemly haste, meant that there was no time for consultation or dialogue with indigenous people: the undecidable, which is justice, needs a gap, a pause, an interruption rather than an intervention.

If justice is incalculable and transcendent, then how is decision to be made? Governments can claim legal exemption from international laws and in fact question the very validity of such laws; they can ratify but not implement an international document; they also thumb their noses at bodies such as the United Nations claiming that these bodies are imperfect – which of course they are – or corrupt, and hence deserve no respect or compliance. Australia has curtailed any involvement in United Nations human rights processes: it has reversed its support for self-determination in The Draft Declaration on the Rights of Indigenous People and lobbied other countries, for example Canada, to take a similar stand. The moral ambiguities in our own law stem from the colony’s flouting of British law and the refusal of the British to enforce their own law, a contradiction that persists in relation to international law, which is often unenforceable. How can a State which was itself founded in violence make a just settlement with a people who were never a State and with whom a treaty was never signed? Ethics, human rights, and international law all contain within them a viewpoint, a structure, an order which imposes itself upon any society based on different principles, but the members of this society desire the same thing as all human beings: the ability to live a life which is good. Derrida says that the

condition of ethics, which is *beyond* the state, had to produce itself *in* the state.

The “relation with the other – that is to say, justice”<sup>48</sup> in Emmanuel Levinas’s words, goes beyond notions of equality before the law. In this time (a time which is not unique) of relentless assault by an ideology that has instrumentality at its core, the only ethical stance to take whether it is on questions of environmental degradation or racism, would be one founded upon the possibility of relationship. But ethics imply justice and responsibility, and responsibility, in Maurice Blanchot’s words, is a term “which the language of ordinary morality uses in the most facile way possible by putting it into the service of order:”<sup>49</sup> responsibility in this sense is a calculation. Responsibility when it is not a duty withdraws me “from all orders and from order itself,”<sup>50</sup> it “separates me from myself (from the “me” that is mastery and power, from the free, speaking subject) and reveals the other *in place* of me, requires that I answer for absence, for passivity. It requires, that is to say, that I answer for the impossibility of being responsible – to which it has already consigned me by holding me accountable and also discounting me altogether.”<sup>51</sup> This is the call to justice, and the call from justice. “I can no longer appeal to any ethics, any experience, any practice whatever – save that of some counter-living, which is to say an un-practice, or (perhaps)” – that word again – “a word of writing.”<sup>52</sup> Or perhaps, silence and listening to the other, or, learning to see through the eyes of the other. For example, the primary ethic expressed in indigenous relationships with the natural world involves responsibilities which have the force of jural principles, quite different to our primarily economic and romantic relationship to “nature.” For Aboriginal people, wisdom “lies in being aware of life systems and in behaving responsibly so as to sustain the created world.”<sup>53</sup> In our society, an ethical approach would include relationships between Indigenous people and their knowledge systems, and the descendents of settlers and their knowledge systems. It would also include, as Deborah Rose says, “our moral engagements with our past and future, and with our ecosystems,”<sup>54</sup> and an acknowledgement that we are all enplaced beings with a responsibility to that place.

Above all, we speak justice without knowing what it means. But how can individuals be trusted to always choose or even recognize justice? This is where the risk always lies. Derrida says this is “what makes the worth of man, of his Dasein and his life ... that he contains the potential, the possibility of justice, the *avenir* of justice, the *avenir* of his being-just, of his having-to-be just.”<sup>55</sup>

There can be no law without justice, and no justice without law: if we accept this as an impossible conundrum, then we must proceed as if it

were not impossible. We cannot live without law but we must continually question and study law, and yet “the urgency of bringing help to someone upsets all study and imposes itself as application of the Law which always precedes the Law.”<sup>56</sup> A responsibility towards the Other does not come from the Law and cannot be regulated. If, according to Arendt, “there is no original condition that does not include the other,” then everything we do must include this responsibility; we are already the Other to whom the same responsibility is owed. It is interesting to consider Arendt’s position on collective guilt in the light of this thought about responsibility. It is true that “where all are guilty, no one is,”<sup>57</sup> and that despite the best efforts of people who wish to hear a national apology for the treatment of Aboriginal people in the past, such an apology has yet to be given by our head of government. The rift between people is not, as Arendt goes on to say, “healed by being translated into an even less reconcilable conflict between collective innocence and collective guilt.” Here I disagree, not with the statement itself, but with what it leaves out: some people in this country do not feel guilt in relation to past events and accept no personal responsibility. However, many people do feel profound unease and would like to know what, if anything, can be done in the present to redress past injustice. If this were not so, then justice would not be a living thing whose affect can be felt outside the courts. The same people are probably part of the million or so who marched for reconciliation, crossing the Sydney Harbour bridge and filling our city centres. The choice of words is unfortunate and addresses nothing: this is not a problem that can be remedied by “reconciliation.” Reconciliation cannot be “granted” or given; it is a negotiation, and in whose language and under which law should such negotiation begin? Compassion and a positive ability to be moved, along with a desire for justice, are not simply misplaced and “fashionable ... white liberal” manifestations of guilt, but are linked to a felt or intuited sense of responsibility in the here-and-now. In Australia, collective guilt has been shifted onto the despised minority, who are expected to bear the burden of shame for us all. There is hypocrisy at work when the leaders of a country continually call for everyone to be treated as “the same”, thereby masking the inequality that exists, and then in certain circumstances remove that “equality.” As Arendt points out, “words can be relied on only if one is sure that their function is to reveal and not to conceal.”<sup>58</sup>

The concept of wounded space demands *recognition* as a starting point, which means acceptance of the true condition of things. Beginning with Arendt’s proposition that there is no original condition that does not include the other, we must learn to think about otherness, accepting that we are the other, not the indigenous people whose space we entered. But we

exist together *now* in the same space – a shared space. The country to which Aborigines are so profoundly connected *already* includes us; we are not separate from it, it encloses us. Even as we think separation, difference and otherness, these are only difficulties of perception and language: it is language, action and the law that separate us. Recognition of the rupture of common space, of the support or ground of a shared life, means that a commitment must be made to a “cultural reconstruction of the land”<sup>59</sup> including acknowledgement of the contribution Aboriginal people have made and continue to make to this society. Respect for indigenous knowledge means admitting that Aboriginal people are entitled to receive economic benefits from the commercial utilization of that knowledge; it also means recognizing the critical role, largely unpaid, of indigenous people in biodiversity conservation. The vast majority of the world’s biodiversity is in land and sea inhabited and used by indigenous people, including Australian Aborigines, whose culture has helped to preserve what remains of the great variety of remaining life forms. (Over 70% of plant species on the planet remain ‘un-named,’ that is, named *only* by indigenous people.) Noel Pearson calls for a

practical synthesis of human rights and land rights, which includes not just rights but responsibilities, on both sides ... Rights should not lead to separatism and segregation, but rights must include rights to ancestral lands, languages, traditions and recognition as the indigenous people of this country.”<sup>60</sup>

There are other indigenous leaders with different perspectives and solutions whose creativity and intelligence could contribute to the debate, but since the dissolution of ATSIC there is no longer any national forum where indigenous voices can be heard.

The land is a witness; events are inscribed on it – the trace of history, the sites of trauma. Indigenous people avoid certain places because the memory of past events is written there, a history that is not written in textbooks but which is nevertheless a preserved history. It is a haunting, an invisible reminder that the land was appropriated by violent means. Maurice Blanchot says in *The Writing of the Disaster* that the wounded space is “the body animated solely by mortal desire ... a subjectivity without any subject,” the body which is already dead and of which no one could ever say *I, my body*.<sup>61</sup> This is the body in which the burden of meaning, of memory, of conscience, is hidden deep in the Unconscious; where the work of mourning cannot take place. If anything haunts this body, it is silenced; it is silence that becomes the unspeakable, becomes an “unsayable secret.” Nicholas Rand<sup>62</sup> suggests that this silence affects individuals, fami-

lies, social groups and entire nations. The untold secret or denied feeling, the concealed shame of families or the collective repression of historical events damages and disrupts lives. Whatever is “most strange, distant, threatening” reappears in unexpected places, in writing that Derrida calls writing “with ghosts”: “everyone reads, acts, writes with *his or her ghosts*, even when one goes after the ghosts of the other.”<sup>63</sup> “If he [*sic*] loves justice at least, the “scholar” of the future, the “intellectual” of tomorrow should learn it and from the ghost.” To learn how to live we must also learn from ghosts. The ghost of the law is not simply the ghost of past laws, or a haunting by past decisions, wisdoms, mistaken judgements etc. but it is in a sense the law’s other, or the law’s not: the not-said, never-said and never-to-be-said. That which has been repressed in our culture is the haunting or the mourning of the other since, according to Derrida, “only through [the] experience of the other, and of the other as other who can die, leaving in me or in us this memory of the other,” does the ‘me’ or the ‘us’ arise.<sup>64</sup> The deeply repressed returns as a “phantom” in conversation or in the text, and whether one knows it or not, phantoms or ghosts can be used or they can use us: they write the other “even if they do not exist, even if they are no longer, even if they are not yet.”<sup>65</sup>

Val Plumwood suggests that the problem lies not in silence or repression but in a “kind of (constructed) deafness”<sup>66</sup> which is inherent in the colonizing consciousness and which makes it impossible for us to engage in any kind of dialogue with Aboriginal people or the more-than-human world. This deafness, along with a refusal to see the land as owned, led to the practice of naming places in the colony after British ministers or explorers, or of inappropriate naming of places that had prior meaning to the inhabitants. Plumwood sees the process of re-naming as an important contribution towards reconciling the colonizing culture with the indigenous culture.

Things which are hidden, whether buried deep within the archive or erased by re-naming as in the giving of new names to indigenous people and places, reappear in the spaces of writing. “To write *with* ghosts, however, is to effect a writing practice that admits the *unheimlich* – the uncanny effect of a certain spacing of which Derrida says ‘it feels itself occupied, in the proper secret ... of its inside, by what is most strange, distant, threatening.’”<sup>67</sup> This writing practice takes into account the secret (the hidden), the burial and the return.

Kim Scott’s novel *Benang: from the heart* is at once a lament for what has been damaged, and a becoming or beginning, something new in indigenous writing; it is writing that incorporates the dead, the ghost, and simultaneously breaks open the crypt, sometimes violently. Scott is a

Nyoongar man from Western Australia; *Benang* is both history and not history. Indebted to Aboriginal story-telling techniques including the contrapuntal polyphonic style of group production of story, as well as narrative and non-narrative modernist techniques, this novel ruptures the space of “profound forgetting” that Deborah Bird Rose and Val Plumwood speak about. It is a rupture of style as well as of thought, a laying bare of power relations through an analysis of the bureaucratic mind, the archive and the law – white man’s law – which is hierarchical and organized; and its effect, which has been to overturn and replace any remaining sense of autonomy, community and dignity of a people it has classified as inferior and degraded. Its rules re-classify, destroying tribal cohesion, language groups and families: it also destroys connection by removing people from their country and sending them to places where not only do they have no connection with their own ancestors, their dead, but where they may be actually defying their own law i.e., customary law of trespass, proximity to sacred or defiled ground etc. The internal dynamic or pattern of movement in Scott’s book is one of capture, removal, confinement, escape, flight, recapture and so on, with an underlying current of violence and the constant use of force within the law: the broken families counter with movements of their own which evade and resist these relentless lines of force. White authorities continually conceal their true motives through lies and justification, but the response in this book is not anger and violence directed at the oppressors, but a kind of flight, of freedom almost, a refusal of these structures. Scott offers us a different kind of seeing, a different kind of (apparently) random traversal of the land, a flight “back to” rather than away: people go back to country despite the efforts of the authorities to tear them from it.

In summary, I believe it is essential that we understand the importance of recovering a meaningful relationship with the land and its indigenous people, and that we recognize the nature of the wounded space in which we live. If the Law as it operates within the framework of colonization can never be impartial, and if it cannot be challenged, we must nevertheless be prepared to engage in juridico-political battles. We should be prepared to use the means at our disposal, that is, language and writing, and national and international conferences, forums and bodies whose aims are to provide for the possibility of justice. We should aim to correct obvious injustice and imbalance wherever possible, for example, calling for a treaty with indigenous Australians that includes commonwealth compensation on “just terms” for loss of attachment to land. We should call for formal arrangements of indigenous rights, including protection of indigenous knowledge, and for the setting up of a public indigenous institution to replace ATSIC. Queensland has already proposed that there should be Indigenous seats in

parliament: perhaps there should be a national Indigenous parliament.

Above all, the Law should never be “adored in and for itself,” as Blanchot put it, because the law of justice precedes the Law. We have an obligation towards the “Other,” to all the “others,” that does not come from the Law, but from understanding our shared corporeality, the “always already present” that includes the earth which supports all life.

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#### NOTES

- <sup>1</sup> Walter Benjamin, “Critique of Violence” *Walter Benjamin: selected writings Volume 1, 1913 – 1926* (Eds.) Marcus Bullock and Michael W Jennings, (The Belknap Press of Harvard University Press: Cambridge, Mass. and London, England 1996) p. 247
- <sup>2</sup> Jacques Derrida, “Force of Law: The Mystical Foundation of Authority”, *Acts of Religion* (Ed.) Gil Anidjar, (Routledge: New York, London 2002) p. 257
- <sup>3</sup> Deborah Bird Rose, “Rupture and the Ethics of Care in Colonized Space” *Prehistory to Politics: John Mulvaney, the Humanities and the Public Intellectual* (Eds.) Tim Bonyhady & Tom Griffiths, (Melbourne University Press, Melbourne 1996) pp. 191-262, p. 191
- <sup>4</sup> A. Lattas, “Aborigines and Contemporary Nationalism: Primordality and the Cultural Politics of Otherness” *Social Analysis Vol 27* 1990 pp. 61, 67
- <sup>5</sup> D. John Mulvaney, “The Chain of Connection: The Material Evidence” in N Peterson (Ed.) *Tribes and Boundaries in Australia* (Australian Institute of Aboriginal Studies: Canberra 1976) pp. 72-94
- <sup>6</sup> Deborah Bird Rose, *Indigenous Customary Law and the Courts: post-modern ethics and legal pluralism* (North Australia Research Unit, Australian National University 1996) p. 3
- <sup>7</sup> Marcia Langton, “The ‘wild’, the market and the native: Indigenous people face new forms of global colonization”, *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era* (Eds.) William M Adams and Martin Mulligan (Earthscan Publications Ltd.: London, Sterling VA 2003) p. 99
- <sup>8</sup> Langton, “The ‘wild’”, p. 99
- <sup>9</sup> Judith Wright, *The Cry for the Dead* Oxford University Press: Melbourne 1981
- <sup>10</sup> Wright, *The Cry*, Quoted p. 28
- <sup>11</sup> Wright, *The Cry*, p. 28

- <sup>12</sup> Val Plumwood, "Decolonizing Relationships with nature" *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era* p. 54
- <sup>13</sup> Walter Benjamin, "Critique of Violence" p. 240
- <sup>14</sup> Benjamin, *Violence*, p. 244
- <sup>15</sup> Wright, *The Cry*, p. 29
- <sup>16</sup> *The Cry*, p. 29
- <sup>17</sup> *Violence*, p. 243
- <sup>18</sup> *Violence*, p. 243
- <sup>19</sup> Karl Marx, *Capital: A Critical Analysis of Capitalist Production* (Foreign Languages Publishing House: Moscow Vol 1, 1954) p. 178
- <sup>20</sup> Deborah Bird Rose, *Reports from a Wild Country: ethics for decolonization* (UNSW Press: Sydney 2004) pp. 188-89
- <sup>21</sup> T Ingold, *The Perception of the Environment: essays in livelihood, dwelling and skill* (Routledge: London, New York 2000) p. 218
- <sup>22</sup> See Robert H Lowie, *Primitive Religion* (Boni and Liveright: New York 1924) pp. 99-135
- <sup>23</sup> Christopher Manes, "Nature and Silence" *The Ecocriticism Reader: Landmarks in Literary Ecology* (Eds.) Cheryl Glotfelty and Harold Fromm (The University of Georgia Press: Athens and London 1996) pp. 15-29, p. 22
- <sup>24</sup> Walter Benjamin, "On Language as Such and on the Language of Man" *Walter Benjamin: selected writings*, p. 68
- <sup>25</sup> Benjamin, *Language*, p. 69
- <sup>26</sup> *Language*, p. 67
- <sup>27</sup> Bill Neidje, *Story About Feeling* (Magabala Books: Broome WA 1989) p. 3
- <sup>28</sup> W E Stanner, "Religion, Totemism and Symbolism" in R M and C H Berndt (Eds.) *Aboriginal Man in Australia* (Angus and Robertson: Sydney 1965)
- <sup>29</sup> Paul Carter, *The Lie of The Land* (Faber and Faber: London, Boston 1996)
- <sup>30</sup> Carter, *The Lie*, p. 84
- <sup>31</sup> Carter, *The Lie*, p. 84 *Methexis* means "one must share in" or "group sharing": in theatre, the audience participates in, creates and improvises the action of the ritual.
- <sup>32</sup> Arendt, *On Violence*, (San Diego, New York, London: Harcourt Brace & Company 1970) p. 82
- <sup>33</sup> Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission: Canberra 1996) p. 35 and footnotes. The English technical terms are section, sub-section, semi-moiety etc., depending on the precise organization of the skins.
- <sup>34</sup> Rose, *Indigenous Customary Law*, p. 9
- <sup>35</sup> Val Plumwood, *Environmental Culture: The ecological crisis of reason*

- (Routledge: London and New York 2002) p. 226
- <sup>36</sup> Plumwood, *Environmental*, p. 227
- <sup>37</sup> Rose, *Indigenous*, p. 9
- <sup>38</sup> Rose, *Indigenous*, p. 10
- <sup>39</sup> Rose, *Indigenous*, p. 6 Rose makes it clear that these are her distinctions: Law has its ground of being in sacred order of the cosmos, and law is subject to human mediation and negotiation in daily life.
- <sup>40</sup> Rose, p. 8 This is not the place to explore payback and conflict resolution fully: Rose's discussion paper recommends many relevant texts.
- <sup>41</sup> M Lavarch, "Closing Remarks" *Indigenous Customary Law Forum: Australian pluralism* (Government Publishing Service: Canberra 1999) pp. 63-4
- <sup>42</sup> Quoted in S Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Polity Press: Cambridge UK 1992) pp. 8, 9
- <sup>43</sup> Report from *The 7.30 Report*, ABC Television, Reporter Murray McLaughlin 07/05/2007
- <sup>44</sup> Langton, "The 'wild'", p. 80
- <sup>45</sup> Langton, "The 'wild'", p. 86
- <sup>46</sup> Fred Chaney quoted on *The 7.30 Report* ABC television Kerry O'Brien 19/04/2007
- <sup>47</sup> Derrida, "The Force of Law", p. 253
- <sup>48</sup> Emmanuel Levinas, *Totality and Infinity* (Trans.) A Lingis (Duquesne University Press: Pittsburgh 1969) p. 89
- <sup>49</sup> Maurice Blanchot, *The Writing of the Disaster* (Trans. ) Ann Smock ( New Bison Book Edition 1995 University of Nebraska Press: Lincoln, London 1986) p. 26
- <sup>50</sup> Blanchot, *Disaster*, p. 25
- <sup>51</sup> *Disaster*, p. 25
- <sup>52</sup> *Disaster*, p. 25
- <sup>53</sup> Rose, *Nourishing Terrains*, p. 28
- <sup>54</sup> Rose, *Wild Country*, p. 189
- <sup>55</sup> Derrida, "Force of Law", p. 289
- <sup>56</sup> Maurice Blanchot, *The Unavowable Community* (Trans.) Pierre Joris (Station Hill Press: New York 1988) p. 60
- <sup>57</sup> Arendt, *Violence*, p. 65
- <sup>58</sup> Arendt, *Violence*, p. 66
- <sup>59</sup> Stephen Muecke, Krim Benterrak, Paddy Roe *Reading the Country: Introduction to Nomadology* (Fremantle Arts Centre Press: Fremantle WA 1984) p. 16
- <sup>60</sup> Noel Pearson "Hunt for the Radical Centre" *The Weekend Australian* April 21-22 (Sydney 2007)
- <sup>61</sup> Blanchot, *Disaster*, p. 30
- <sup>62</sup> Nicolas Abraham and Maria Torok *The Shell and the Kernel: Renewals of Psy-*

*choanalysis Vol 1*, Trans. & ed. Nicholas T Rand (University of Chicago Press: Chicago 1994)

<sup>63</sup> Jacques Derrida *Specters of Marx: The State of the Debt, The Work of Mourning and the New International*, Trans. Peggy Kamuf (Routledge: New York 199) pp. 139, 144

<sup>64</sup> Jodey Castricano, *Cryptomimesis: The Gothic and Jacques Derrida's Ghost Writing* (McGill-Queen's University Press: Montreal & Kingston, London, Ithaca 2000) p. 22-3

<sup>65</sup> Derrida *Specters of Marx*, p. 176

<sup>66</sup> Plumwood, *Decolonizing Nature*, pp. 67-8

<sup>67</sup> Castricano, *Cryptomimesis*, p. 29