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The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*

Jeremy Webber

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# The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*

JEREMY WEBBER\*

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## 1. Introduction

What is the basis for the High Court's decision in *Mabo v Queensland (No2)*?<sup>1</sup>

A number of answers suggest themselves. It might be said, for example, that *Mabo* represents the application to Australia of the general law regarding indigenous rights in British colonies, an application long overdue. On this view, previous Australian authorities got the law wrong; *Mabo* sets it right. Or it might be that *Mabo* is about equality. Although the rights of most Australians have generally been treated with respect, those of the indigenous peoples have been disregarded. *Mabo* redresses that wrong, granting a belated recognition to the proprietary interests of the first peoples. Or it might be that *Mabo* is about international law, rethinking the claim that Australia was *terra nullius* and acknowledging instead indigenous peoples' occupation of the land.

All of these answers are, in a sense, right; all figure prominently in the opinions in *Mabo*. Indeed, they are not strict alternatives. They are combined in the various judgments, although their different components are accorded different weight. Yet on reflection, all these answers, even in combination, are insufficient. It is not enough, for example, to view *Mabo* as merely applying a pre-existing body of indigenous rights law. That law has undergone substantial development in recent years, indeed is still very much in the process of creation, and far from being passive in that process, *Mabo* pushes that evolution in ways that are distinctly Australian, even in ways that are inconsistent with indigenous rights elsewhere.<sup>2</sup> Most importantly, treating *Mabo* as though it were simply the rectification of a mistaken interpretation of the common law of indigenous title begs the essential question: why should Australia follow that law? It has not done so for 200 years.<sup>3</sup> Moreover, the variant of indigenous

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\* Associate Dean (Graduate Studies and Research), Faculty of Law, and member of the Institute of Comparative Law, McGill University; Visiting Fellow, 1993-94, Faculty of Law, University of New South Wales. My thanks to Jennifer Clarke, Angus Corbett, Arthur Glass, Gerald Postema, and to the participants in faculty seminars at UNSW, Australian National University, and Macquarie, Flinders and Murdoch Universities. This paper has benefited from support from the Faculty of Law, UNSW, and the Social Sciences and Humanities Research Council of Canada.

1 *Mabo v Queensland (No2)* (1992) 107 ALR 1. I will refer to this decision as "*Mabo*", giving its number only when necessary to distinguish it from the earlier decision, *Mabo v Queensland (No1)* (1988) 166 CLR 186.

2 See the discussion below, at nn29-35.

3 See *Mabo* at 76-8 per Deane and Gaudron JJ; McNeil, K, "A Question of Title: Has the

rights that *Mabo* tends to follow emerged out of a very particular experience: indigenous/non-indigenous relations along the eastern coast of North America. While there certainly are analogies between that experience and the occupation of Australia, it is also true that the structure of indigenous title sketched in *Mabo* has a much more organic connection to North America than it has to Australia. What is the reason for its application, at this late date, to such a different society?

There are similar problems with the argument based on equality. Even if one recognises that the High Court used equality as an aid to interpreting the common law, not as an independent argument in its own right, one needs to be clear on the way in which equality is invoked. As the Liberal Party spokespersons reminded us repeatedly during the debate on the Commonwealth's *Native Title Act* 1993, some conceptions of equality cut strongly against the recognition of indigenous rights, such as the argument that all Australians should enjoy precisely the same rights, or that rights should depend not on descent but solely on individuals' inherent integrity as individuals.<sup>4</sup> Without more, the invocation of equality does little to persuade us that we should recognise this form of title now, a form of title unavailable to other Australians.

By emphasising these concerns, I do not mean to suggest that *Mabo* was wrongly decided. On the contrary, I think the decision is right. Nor will I argue that the judgments are inadequate as judicial opinions. There are limits to philosophical digression in judicial decision-making. But I do think there is reason for us, in response to *Mabo*, to probe more deeply. That decision deserves a more complete explanation of its moral structure, not only because *Mabo* is of profound importance to Australian law, but also because it is of general significance for an understanding of how justice can be achieved across cultures, especially across the indigenous/non-indigenous divide. Moreover, existing explanations for the decision have trouble grappling with its central characteristic: the fact that it did not merely "apply the law", but dramatically revised it. This tends to be a fault in much discussion of the common law. Descriptions of how that law works — indeed the very terms in which lawyers frame their arguments — tend to be good at showing how precedent can be marshalled, but they are much less adept at explaining how judge-made law necessarily changes, evolves, and transforms itself. Instead, they fall back, at crucial times, upon vague catch-phrases about "policy" or about principles supposedly latent in the law but hitherto undiscovered.

This article tries to capture the critical, creative dimension to *Mabo*, describing the structure of moral reflection underlying the recognition of indigenous title in Australia and suggesting how that structure shaped the result. In

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Common Law been Misapplied to Dispossess the Aboriginals?" (1990) 16 *Monash LR* 91, especially at 94-103. As McNeil suggests, the previous cases were not entirely conclusive; it remained open to the plaintiffs in *Mabo* to argue that in some of the cases indigenous title was not in issue and in the remainder the common law was misapplied. The fact remains, however, that for over 150 years prior to *Mabo*, the courts had assumed that full and complete title to all land had vested in the Crown at the time of the assertion of British sovereignty.

<sup>4</sup> See, eg, Tingle, L, et al, "Bishop ups Mabo pressure on Hewson" *The Australian*, 26 October 1993, 1-2. A similar argument persuaded Wilson J, dissenting, in *Mabo v Queensland (No1)* (1988) 166 CLR 186 at 204-8 (see also the comments by Dawson J, dissenting, at 243).

the process, this article will help answer some lingering criticisms of *Mabo*, especially the claim that *Mabo* constitutes an illegitimate judicial revolution. It will help us understand how the common law works and indeed should work with precedent — and, at a broader level of generality, how normative conceptions find their roots in a reflective engagement with our community's past. It attempts to bring together, in short, both the law's method in deriving moral reasons from precedent and a settler society's grappling with the legacy of its imperfect past, to suggest the foundation for indigenous title in Australia.

There are three important caveats to that objective, however. This article does not pretend to provide a comprehensive discussion of indigenous rights, their origin, and their justification. First, it concentrates exclusively on the non-indigenous side of the debate and even then primarily on the specific discourse of the law. Above all, it does not discuss the significance of indigenous title for the indigenous peoples themselves. Indigenous rights are always about the search for accommodation, about mediation, between two (and often more than two) profoundly different normative traditions. This article concentrates on the dynamic within one of these: the non-indigenous discourse of the law. Second, this article is concerned with the moral structure of the recognition of indigenous title in Australian law, not with describing the political struggle that led to that recognition. That struggle was crucial and contains features not canvassed here, but the moral dimension too was crucial, for in the end the effectiveness of the political struggle depended on the compelling nature of its moral claims. Third and finally, I should emphasise that the concepts invoked in this article, especially the key concept of regret, do not exhaust the basis for indigenous rights. They are useful for understanding the process of change addressed here: the court's decision to recognise indigenous title after such a long history of denial. Other arguments, drawing upon the past in quite different ways, support other demands, such as the claim to indigenous self-government.<sup>5</sup>

## 2. *Indigenous Title and the Experience of Contact*

This article is a companion piece to one on the origin of indigenous rights in North America. In that article, I argue that in North American and especially Canadian law, indigenous rights are best understood as originating not in some antecedent doctrine of British, French or Dutch colonial law, of international law, or in a straight-forward continuation of indigenous sovereignty, but rather in the practical interaction between colonists and indigenous peoples during the first decades of contact. During that period, by a process of trial and error, the parties stumbled upon a number of ways of handling intercultural conflicts, especially conflicts over land and intercommunal crime. Over time, those practices became standard procedures, settled rules for the relations between colonists and indigenous peoples. They came to constitute a body of

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5 I discuss some of these justifications in the Canadian context in "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Royal Commission on Aboriginal Peoples (ed), *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (1993), 133; *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (1994) at 183–275.

truly cross-cultural norms, born of the interaction between peoples and departing in significant ways from what either party would have required if it had been able to impose its own sense of justice.<sup>6</sup>

This was especially true of the recognition of indigenous title. The colonies on the eastern seaboard of North America did not begin by acknowledging indigenous title. On the contrary, all except New Netherlands initially claimed that they, the colonies, possessed full ownership of the land falling within the boundaries fixed by their charters (an area much larger than that actually occupied by the colonists, including tracts intensively occupied by Indians, often with established villages and fields). Moreover, the colonists generally had unimpeachable legal authority for their claims (according to their law). In Virginia, for example, the colony's successive charters expressly granted it title to the land. Yet in each case, the colonists soon found it impracticable to insist on their strict legal rights. They might be convinced by the terms of their charters, but the Indians emphatically were not. Disputes over land were a common source of conflict, sometimes resulting in severe loss of life. To avoid strife, colonists began to purchase lands from the Indians. This system of purchase and settlement gradually became standardised, eventually resulting in stable practices by which colonial governments bought lands for settlement, forbade settlement until land had been purchased, and prohibited private sales of Indian land (in order to prevent fraud and multiple claims). They often had difficulty policing their rules. At times they lacked the will to do so. This led to further conflict between squatters and Indians, especially during the land rush into the Kentucky and Ohio territories. As a result, in the late 1750s Indian policy was centralised in the hands of the imperial authorities (as opposed to the colonial governments), ultimately culminating in the codification of rules for the limitation of settlement and the purchase of land in the Royal Proclamation of 1763.

These practices, and the treaties and documents founded upon them, formed the basis for the law of indigenous title in both the United States and Canada. The key judgments in the development of that law were expressly based on the practice and reproduced its content: the persistence of indigenous title was recognised; indigenous title could only be extinguished by valid act of the colonial sovereign.<sup>7</sup> The accommodation of fact had been transformed into a body of law.

But the North American article does not confine itself to a description of the emergence of indigenous rights. It also argues for their normative force. The parties themselves recognised that force. The rules for the protection and purchase of indigenous land came to be seen as a matter of entitlement by both indigenous peoples and colonial governors. The failure to respect those rules could provoke a deep sense of offence. Moreover, the parties had good reason to recognise the practices as normative. In the beginning, each had little

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6 Webber, J, "Relations of Force and Relations of Justice: the emergence of normative community between colonists and aboriginal peoples" forthcoming in (1994) 32 *Osgoode Hall LJ*. The following paragraphs summarise the gist of that article's argument.

7 The principal judgments, all of the United States Supreme Court, are *Johnson v M'Intosh* 8 Wheaton 543 (1823), *Cherokee Nation v State of Georgia* 5 Peters 1 (1831), and *Worcester v State of Georgia* 6 Peters 515 (1832).

knowledge of the other's beliefs or conceptions of appropriate social behaviour. They lacked a common moral tradition, common conceptions of justice. But they did share a desire for a measure of community (albeit limited): both groups at least wished to live in adjoining territories in peace. Their motives were rarely noble. In the northern areas, and to a lesser extent further south, economic interdependence was the principal reason. Both parties appreciated the benefits of the fur trade; both needed the other to conduct that trade. Moreover, in the eastern half of the continent the balance of force was such that neither could, in the medium term, eliminate the other, at least not without great cost. They therefore sought a measure of peaceable collaboration, but where to start? Collaboration could not be based on shared principles of justice. Indigenous and non-indigenous traditions were too separate for that. Instead, they began with the compromises that had emerged on the ground — with the adjustments and accommodations worked out through their practical interaction. Those compromises formed the foundation for a limited but real normative community between indigenous peoples and Europeans, furnishing models of peaceful co-existence. They formed the starting-point for the law's process of rationalisation, refinement and extension that eventually produced the doctrine of indigenous title.

These models did not accord with either party's antecedent ideas about "justice". How could they? The problem was precisely how to create justice across cultures, cultures with profoundly different normative traditions. To require consistency would have required a level of control, a degree of domination, that was beyond the reach of either party. During the early years of colonisation, North America was fundamentally multicultural, and the solution had to be multicultural. Nor were the norms untouched by considerations of power. They were based on compromises that were undoubtedly shaped by the relative might of the parties. But neither of these features vitiated their normative force. Initially that force resulted from perceived necessity, yet it soon took on a life of its own as all sides became accustomed to using the norms to regulate their relations and came to see continued respect for them as a way of keeping faith with each other.

This respect was by no means permanent. It was eroded by such factors as the decline of the fur trade, the increasing hunger for land for agricultural settlement, and the decimation of the native communities by war, disease and alcoholism. It was followed by a period of highly paternalistic Indian administration, with many indigenous people treated as wards of the state on reduced reserves. But when the disastrous consequences of that process became clear and indigenous peoples began to demand a more acceptable framework for intercommunal justice, the litigants and the courts returned to the models established in the 17th and 18th centuries, attempting to reclaim the measure of respect and autonomy present in those early relations. Thus, the courts once more took up the process of reflection and refinement based on the early accommodations.

The experience of Australia was very different from that sketched here. In Australia there were hints of similar accommodations in the early years,<sup>8</sup> but

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8 See below, nn37-8.

those generally produced few practical results. Instead, the dominant approach was one of the radical denial of indigenous rights and the forcible expulsion of Aborigines from their lands, indeed sometimes the attempted extermination of indigenous people. With a few isolated exceptions, there was no recognition of interdependence between the indigenous and new inhabitants. There was no development of an intercommunal body of norms governing indigenous/non-indigenous interaction. There were, at times, laws regulating that relationship, sometimes motivated by sympathy for the indigenous peoples' plight, but they were emphatically colonial norms, in no sense the product of an implicit mediation between the colonists and the colonised.

Where, then, does indigenous title come from in the Australian case? It certainly cannot be grounded (as in Canada) in the acknowledgment that those norms once formed the very basis for co-existence — that they were, in a very real sense, constitutive of a society in which indigenous and non-indigenous lived together. That kind of constitution was radically absent.

Gerald Postema has written a wonderful and evocative article entitled "On the Moral Presence of Our Past", an article that formed an insufficiently acknowledged but very real inspiration of my North American article.<sup>9</sup> In it, he sketches two broad ways in which our moral conceptions are rooted in the past. One of those ways is positive, in which we feel obliged to remain true to commitments assumed in the past — not just commitments undertaken voluntarily but also those that seem, on reflection, to be inherent in relationships that have been important to our own development and to that of our community (even if those relationships were inherited or otherwise thrust upon us). We draw upon the past, in other words, because it is one way of keeping faith both with ourselves and with other members of our community. It is a way of maintaining consistency, constancy, fairness, and respect, even if we have trouble justifying the commitments on any ground other than the fact that they have, in the past, been important to our lives and to the life of our community. That kind of relationship with the past is, I believe, largely exemplified in the North American experience I have described.

But Postema also proposes another way in which the past is crucial to our moral reasoning, one in which the past does not furnish positive models but instead gives rise to regret — in which we reflect on our actions in the past, we even acknowledge that they were a part of ourselves, but we believe that they pointed in a direction that we now judge to be wrong. We therefore seek to act in the present in a way that gets us back on the right track, coming to terms with our past, rectifying its effects on the present (to the extent we can), and charting a future course that accords better with what we take to be good in our community's experience. That, I believe, is the nature of the moral enquiry underlying the recognition of indigenous title in Australia. The jurisprudence in *Mabo* is, above all, a jurisprudence of regret.<sup>10</sup>

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<sup>9</sup> Postema, G, "On the Moral Presence of Our Past" (1991) 36 *McGill LJ* 1153.

<sup>10</sup> I do not argue that regret alone is in play. Indeed, I suggest below how the emerging Australian doctrine takes some positive content from Australian experience. Similarly in North America, the two approaches are often combined. The contrast is one of degree, our perspectives on the past generally combining elements of both obligation and regret.

### 3. *The Nature of Regret in Mabo*

Postema's article is chiefly concerned with explaining the moral force of precedent in common law adjudication. The countervailing element of regret is not extensively developed. He does, however, make two important points.

First, he suggests that the regret he is describing — the regret that forces us to turn back on our sense of what is just, consciously revising our position in order to correct what we now take to be wrong — is not just any regret. After all, his discussion takes place in the context of a robust justification for precedent — an exposition, in other words, of the reasons for remaining true to our past commitments. The relevant kind of regret is not merely the sense that things might have been done better or that they did not work out as well as they might. Rather, it is a regret focused on the consequences of the past for the present moral character of our society. It is founded on the fact that the past has had an important effect on the claims to value and purpose in our society, that it has shaped our society in a way that we now take to be wrong. It is that kind of regret that demands a response, in which we reform our sense of justice in order to overcome what now seems to be a fundamental defect in our society's constitution.<sup>11</sup>

Moreover, the nature of that regret is still shaped by the particular history of our society. The re-evaluation is not based on an absolute conception of justice (or at least, only partly so), but rather on what we think is crucial, valuable, worth preserving and fostering about our particular community.<sup>12</sup> Nor is it designed to remake utterly the past, righting all wrongs (as though that were possible). It is a matter of owning up to that past, with the objective of putting our society on the right track, affirming what appears to be valuable about our community and rectifying (in a manner that might not involve complete restitution) what we now take to be wrong.

These elements are evident in the recent Australian debate over indigenous title. They are, as I will argue, pronounced in the High Court's decision. They are less obvious in the popular debate surrounding the decision, although they are present there as well.

The issue of indigenous title has had considerable prominence precisely because of its implications for the self-image, for the moral constitution, of Australian society. The essential issue is not merely that someone lost a property right at some point in the past. Rather, it is an issue of equality, of citizenship. The Aborigines' loss of the land has a substantial moral charge precisely because of the link between dispossession and the denial of the moral equality of Aborigines, their forcible exclusion from the Australian community, perhaps even the lack of respect for them as human beings. The reason to remedy the wrong is not simply to correct an injustice in the past, but to achieve, as the terms of the popular debate suggest, reconciliation between indigenous and non-indigenous Australians. It is a measure, similar in motivation to the 1967 referendum on the constitutional status of Aborigines, designed to heal what is now seen to be a profound flaw in the Australian national fabric.

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<sup>11</sup> Above n9 at 1178–80.

<sup>12</sup> *Id.* at 1179–80.

The sense of regret draws much of its force from developments in Australian society. One of its immediate sources is concern about the social conditions in many indigenous communities — the poverty, alcoholism, lack of basic services, disease — conditions that challenge many Australians' beliefs about what their country stands for. Not all responses to this situation involve regret. They are sometimes concerned exclusively with the present, so that the deprivation of Aborigines is treated as though it were comparable to that of other disadvantaged groups. But frequently there is an added element that does testify to a concern with the past: a sense that Aborigines' present condition is a result of dispossession and harsh treatment for which non-indigenous Australians bear a special responsibility.

Above all, regret is evident in recent attempts to come to terms with the way in which dispossession occurred, a process that has involved important changes in the attitudes of Australians to Aborigines.

In one sense, dispossession was the outcome of an irreconcilable conflict between colonists, whose whole purpose was to convert the land to agricultural production, and Aborigines, whose sustenance — indeed whose entire sense of identity — was inextricably bound to specific tracts of land. For many involved in the process, even those who wanted some kind of peaceful accommodation, reconciliation must have seemed unattainable. The attachment of Aborigines to their country was profound. Reducing their territory to reserves was extremely difficult given the Aborigines' use of the land and the colonists' insatiable demand for the most cherished resources (especially water). Displacing the Aborigines both severed the Aborigines' connection to the framework of their identity and generated grave conflicts with neighbouring groups. Although some settlers managed to coexist with Aborigines on the same land, that path too was fraught with difficulty. Success required unusual restraint on the part of the settler so that Aborigines had a share of resources even during periods of drought, and Aboriginal and non-Aboriginal practices of land management could be balanced to secure the sustenance of both — all in a situation of profound ignorance about the culture and economy of the other. Even to settlers open to collaboration (and there were many who were not) the task must have seemed thankless, perhaps even impossible. The interaction often degenerated into a series of Aboriginal depredations on stock and brutal white reprisals eventually resulting in the expulsion or extinction of the Aborigines, indeed at times in the murder or expulsion of the Aborigines before any depredations occurred. And combined with the conflict over land there were other, more troubling sources of violence, especially disputes over the taking of Aboriginal women and children.<sup>13</sup>

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13 For an excellent account of the nature of this interaction see Critchett, J, "A distant field of murder": *Western District frontiers 1834-1848* (1990). See also Rowley, C D, *The Destruction of Aboriginal Society* (1970); Hasluck, P, *Black Australians: A Survey of Native Policy in Western Australia, 1829-1897* (2nd edn, 1970) at 172-90; Reece, R H W, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s* (1974); Ryan, L, *The Aboriginal Tasmanians* (1981), especially at 73-123; Loos, N, *Invasion and Resistance: Aboriginal-European relations on the North Queensland frontier 1861-1897* (1982).

The root conflict underlying dispossession, then, was one of colonists hungry for land versus an indigenous population that possessed a profound and incompatible attachment to the same land. Rarely, however, do people act from interest without offering more elaborate justifications for their actions. The Australian colonists were no exception. The most straightforward justification was one of necessity: Australia was a country of colonisation, and if colonisation were to occur at all, it had to occur this way. But for many, this argument was not terribly satisfying. As with many "practical" arguments, it failed to justify its all-important premise: the rightness of colonisation. A set of other arguments (sometimes held separately, often in combination) spoke directly to this: the assertion that Aborigines had no interest in the soil because they wandered over it as wild animals, because they were unable or unwilling to defend it, or because they failed to improve it through their labour (arguments that appeared to be based on assertions of fact, but that proved impervious to abundant contrary evidence); the presumption that Aboriginal societies were primitive relics, trapped in the stone age, inevitably to be destroyed through the encounter with more advanced societies; the belief that Aboriginal people themselves were remnants of a previous stage of human evolution, incapable of adaptation to a modern world or even of such civil virtues as gratitude or trustworthiness, that they were, when faced with advanced man, destined to be no more than a pathetic, dying race.<sup>14</sup> It was beliefs like these that gave a veneer of legitimacy, or at least inevitability, to the taking of indigenous land, and allowed non-indigenous Australians to reconcile the history of forced dispossession and degradation with the conviction that they had built a fair and just society. The justifications all shared the implication that Aborigines were not and never could be full members of Australian society.

Those beliefs have been profoundly shaken, especially in the years following the Second World War. The erosion has been due to a number of factors. First and most importantly, it resulted from the survival and the reassertion of the Aborigines and Torres Strait Islanders themselves. They did not die out. They survived, often retaining a substantial connection with their heritage despite the violence of their encounter with settler society. Indeed, there has been a resurgence of indigenous culture, as indigenous people work to develop what it means to be Aboriginal or Islander in contemporary Australia. The very tenacity of indigenous societies has, in short, provided a fundamental challenge to the racist assumptions of the past. Along with that implicit challenge, indigenous peoples have increasingly mounted an express challenge, insistently pressing their demands for justice.<sup>15</sup>

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14 Clark, C M H, *A History of Australia: vol 1: From the Earliest Times to the Age of Macquarie* (1962) at 4-5, 167-9, 255-6, 316-7; vol 2: *New South Wales and Van Dieman's Land 1822-1838* (1968) at 113-4, 135-6; vol 3: *The Beginning of an Australian Civilization 1824-1851* (1973) at 70, 107, 114, 122-3, 146-7, 149-50, 278-9, 307-8, 428-32; vol 4: *The Earth Abideth For Ever 1851-1888* (1978) at 24-8, 210-7, 221-3, 319-22, 358; Hasluck, above n13 at 167-77, 190-203; Reece, above n13 at 80-103, 169-74; Reynolds, H, *Frontier: Aborigines, Settlers and Land* (1987), especially at 104-30; Evans, R, Saunders, K and Cronin, K, *Race Relations in Colonial Queensland: A History of Exclusion, Exploitation and Extermination* (3rd edn, 1993) at 67-84. See also the reasons for colonial rejection of imperial support for Aboriginal land rights: Reynolds, H, *The Law of the Land* (1987) at 106, 142, 152.

15 For the significance of this reassertion in the specific context of *Mabo*, see Sharp, N, "No

The tenacity of Aboriginal and Islander cultures has also undermined the less brutal successor to the conviction that Aborigines were a dying race: the belief that even if indigenous individuals had a place in contemporary Australia, that place could only be secured through assimilation into white society and the disappearance of indigenous cultures. As in comparable countries, attempts to assimilate indigenous Australians into non-indigenous society have failed, both because the people themselves resisted assimilation and because the attempts have often aggravated rather than reduced the problems of dislocation in indigenous communities. In consequence, indigenous people and policy-makers have turned away from the model of assimilation.<sup>16</sup>

At the same time, there has been increasing understanding in the non-indigenous community of the social organisation of Aborigines, the complexity and sophistication of their cultural life, and their deep ties to the land. This, combined with greater humility about the merits of non-indigenous society, has made it easier to think of indigenous and non-indigenous as alternative modes of social organisation, each with their own integrity. No one pretends that there can be a return to the time before contact, but there is a sense that some accommodation is possible, that indigenous people can take part in the broader Australian society without surrendering their aboriginality, and that indigenous cultures deserve respect.

Finally, all of these developments have taken place within an international context marked by increasing opposition to colonialism and racism. That opposition, which Australians have had a significant role in advancing, has caused a re-evaluation of the treatment of indigenous peoples everywhere, has shaken the presumption that there was something unique about Australia that excused dispossession, and has made the frank acceptance of racial inequality disreputable.

All of this has reinforced what Henry Reynolds has referred to as "this whispering in our hearts": the sense that there was, in the very formation of Australian society, an injustice that later events did not eradicate.<sup>17</sup> The effects of that injustice continue in the deprivation of Aborigines and their banishment to the margins, so that they lack, on the one hand, full acceptance in the broader society and, on the other, their own land on which to stand. It continues in the perception that Australian society was founded on an objectionable policy towards the indigenous inhabitants — a racism now rejected by many Australians but which nevertheless has left its trace, in reified form, in the law of property. The response among those who share these views is to look for a way of setting Australia on the right path — not undoing all of the past (that is impossible), but coming to terms with the aspects of Australian

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Ordinary Case: Reflections Upon *Mabo (No2)*" (1993) 15 *Syd LR* 143.

16 On the origins, character and effects of the policy of assimilation, see Rowley, above n13, as well as Rowley, C D, *Outcasts in White Australia* (1970) and *The Remote Aborigines* (1971). For an account by an administrator of the policy, who apparently retains considerable support for it, see Hasluck, P, *Shades of Darkness: Aboriginal Affairs 1925-1965* (1988).

17 Reynolds, *Frontier* above n14 at 162ff. The phrase is adapted from a speech by the New South Wales barrister, Richard Windeyer, in 1844, in which Windeyer argued that Aborigines did not have rights to the land.

society that now prompt regret, declaring the error, countering its impact in today's legal order, and at last giving indigenous Australians a "fair go".

There are those who deny the need for regret (although often with a heat that indicates the sensitivity of the issue for national identity). For some, this springs from a deep belief that there was nothing wrong, perhaps even that Aborigines are indeed inferior. For others, the reaction is more complex. Looking at their country's history, they have difficulty separating the good from the bad, retaining what they value about Australia while rejecting what appears to be one of its major premises. They therefore suppress any acknowledgment of wrong. For still others, the injustices of the past are accepted as part of an irredeemable history, something that happened but can no longer be undone and for which there is no use taking responsibility. This is an attitude that ignores a principal theme of this article: that without a willingness to address that history, the presumptions of the past continue to shape the present, indeed dispossessions founded on those presumptions will continue to occur today.<sup>18</sup>

There is, moreover, yet another reason that some people resist the language of regret — although one that is, I believe, ultimately compatible with the kind of regret described here. Some Australians reject that language (especially when expressed in terms of shame) because it seems to connote a personal moral failing on the part of their ancestors, perhaps even of today's Australians. But the kind of regret I am discussing does not involve personal guilt, at least not necessarily. In the first place, there are good reasons to be cautious in our judgments of those acting in another place at another time. Conceptions of justice are always provisional, affected by the mores of the period, subject to the benefit of hindsight. One can thus accept that the process of dispossession was wrong without damning all those who participated in it (although blame may well be appropriate in some cases, the most obvious being instances of indiscriminate physical brutality). One can even accept that the dispossession was, in a sense, inevitable — that it is inconceivable that the process of colonisation could have been arrested — without accepting that the disregard for Aborigines and Islanders inherent in dispossession should remain part of Australian law. And as for today's Australians, again the notion of regret does not involve personal guilt, although it undoubtedly implies a deep sense of responsibility: the civic responsibility that comes from membership in a society that cares about its present moral character, a character that is, in some measure, a function of its stance towards its past.

This, then, describes the contours of regret in the general debate regarding indigenous title in Australia. That regret is fundamental to the reasons for judgment in *Mabo* itself. It is reflected in the critical passages of two of the

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18 This seems to be the principal argument of Blainey, G, "Not Because they Are Aborigines, but Because they Are Australians" in Blainey, G, *Eye on Australia: Speeches and Essays of Geoffrey Blainey* (1991) at 122-5. Not only does this underestimate the extent to which past actions shape the present nature of a society, it also suffers from ignorance of the actual circumstances of many land claims, for it assumes that dispossession always occurred long in the past. It is very frequently the case that dispossession has not yet occurred or is in the process of occurring. This is true, for example, of the situations to which *Mabo* applies (see below, at nn26-35): the effect of the judgment is limited to Crown land in which possessory interests have not been granted to other persons and relative to which Aborigines or Islanders continue to have substantial connection.

majority decisions, in which the judges explain why the prior position, denying indigenous title, should be rejected.

The role of regret is patent in the judgment of Deane and Gaudron JJ. Their reasons refer to the "conflagration of oppression and conflict" which was to "dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame". The acts and events of dispossession constituted, according to them, "the darkest aspect of the history of this nation". In those circumstances, the Court was under a duty to reconsider the legal doctrines that had ratified that dispossession, despite their long acceptance. "The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."<sup>19</sup>

Regret is less obvious, but nevertheless operative, in the judgment of Brennan J (with which Mason CJ and McHugh J concurred). It is, it seems to me, the underlying element in Brennan J's emphasis on equality. At times, he invokes equality as though it directly forbade judgments between peoples. He suggests, for example, that a principle of non-discrimination on racial or ethnic grounds (traceable to international standards and to "the fundamental values of our common law") prohibits distinctions between indigenous peoples, or between indigenous peoples and other Australians, with respect to their scale of social organisation and consequently their ability to own land.<sup>20</sup> However, this cannot be right. Indigenous title is precisely the result of those peoples' unique customs and relationship to the land. Thus, if there truly were a difference in a people's social organisation and capacity for land ownership, it is hard to see how a principle of equality, consistent with the doctrine of indigenous title, could prevent courts taking that into account.

But there is another way in which Brennan J's use of equality is fully justified: not as a principle forbidding factual judgments but as the reason for renouncing the legal principles founded on the repugnant (indeed often plainly false) judgments of the past. It is because those legal principles were intimately connected to the discriminatory denigration of Aborigines and Islanders that they must be rejected, despite their longevity. This, I believe, is the true impetus underlying Brennan J's invocation of equality. He denies the assumptions that Aborigines and Islanders were incapable of complex social organisation or rights to land because they are false, and he then goes on to overturn the law based on those assumptions because otherwise the law would remain "frozen in an age of racial discrimination".<sup>21</sup> The language that Brennan J uses to justify this turn is more restrained than that of Deane and Gaudron JJ. It focuses on setting the Australian common law on a course free from the discriminatory attitudes of the past, not on roundly denouncing that past. But in its way, it too is concerned with coming to terms with Australia's history, ridding the law of the legacy of discrimination and its complicity in the rationalisation of dispossession. This is especially apparent in Brennan J's insistence on the actual course of dispossession which, he says, did not involve the automatic elimination of indigenous title by the assertion of sovereignty —

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19 *Mabo* at 79, 82, and 91 per Deane and Gaudron JJ.

20 *Id* at 15-6, 29 and 41 per Brennan J.

21 *Id*, especially at 26-9 and 41-2 per Brennan J.

this was only a comforting illusion — but rather the taking of land, parcel by parcel, by government action.<sup>22</sup>

Of the majority judgments, the notion of regret is absent (or at least well-hidden) only in that of Toohey J.<sup>23</sup> In this respect, Toohey J's otherwise admirable opinion is deficient, for although it provides a solid discussion of the common law of indigenous title, it declines to suggest why, at this late date, Australia should adopt that law. Given the long history of denial, a judge should offer some justification, at least implicitly, for rejecting the old position and embracing the new. It is insufficient to state the common law as though it has always been thus, for in Australia that was manifestly not the case. If law is more than the momentary expression of a judge's will, its movement, as well as its content, must be justified.<sup>24</sup>

Regret is nevertheless central to the decisions of five of the seven members of the High Court in *Mabo*. The previous cases on indigenous title are rejected because they were intimately founded upon and perpetuated the discriminatory denigration of the indigenous inhabitants of Australia. Rejecting those cases was an essential step in freeing the law of its discriminatory foundations and of welcoming Aborigines and Torres Strait Islanders to full membership in the Australian moral community.

#### 4. *The Search for Standards of Justice in Mabo* ✱

There is a problem, however, with regret as the foundation for law. Regret concentrates, above all, on eliminating the evils of the past. But once one accomplishes that, how does one define the law's positive content? A body of law requires more than mere opposition to discrimination. It requires structures and rules appropriate to the interests concerned, and those rules must have sufficient social warrant, sufficient claim to be law, to justify their enforcement by judges. In the North American context, the content of indigenous title was provided by the norms that emerged during the first decades following settlement. Australia lacks those positive models.

I am referring here to the cross-cultural content of indigenous title — the relationship established *between* indigenous and non-indigenous norms. In the

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22 *Id* at 41–2 and 50 per Brennan J. These passages may be read as an attempt to absolve the common law of past complicity in the dispossession, but this seems unlikely given that in each of these passages, Brennan J is discussing the reasons for overruling precisely those cases that had supported dispossession by denying the existence of indigenous title. Rather, the passages are best read as a refusal to permit the common law to continue to excuse that conduct, so that the actual course of governmental action henceforth stands unprotected by the convenient fictions of the past.

23 The one hint of regret in Toohey J's judgment occurs at 143–4 where, after declaring that the common law did not dictate that indigenous title was extinguished with the assertion of sovereignty, Toohey J continues, "if it were thought to be, this court should declare it to be an unacceptable consequence, being at odds with basic values of the common law".

24 This criticism takes Toohey J's judgment as a self-sufficient statement of his reasons. However, there often is a measure of specialisation in the judgments in appellate cases, even in the absence of express concurrence. Judges limit their contributions to certain issues only, believing that their colleagues have adequately dealt with other issues. This may be true of Toohey J's treatment of this point. If so, the criticisms in the text lose much of their force.

sense that indigenous title recognises and protects indigenous customs, it necessarily draws its content from a distinctively Australian experience: that of the indigenous traditions themselves. But this does not exhaust the matter, because the very act of recognition, in relation to a different legal culture and in a very different environment from that existing before contact, always involves a measure of adjustment and accommodation. The question then is, how should that accommodation occur?

Part of the problem lies in the broad range of possible outcomes, given that the impetus for change is predominantly negative. But it also goes beyond this to the lack of social rootedness of the possible outcomes. Postema argues persuasively that we feel an obligation (though by no means absolute) to keep faith with commitments inherent in relationships that have been important to us, even if those relationships have not been chosen by us and even if the specific commitments are difficult to justify on independent grounds. The relationships demand a measure of respect simply because they have formed the basis for subsequent interaction — they have entered into the constitution of our social life.<sup>25</sup> This, I believe, captures much of the force of indigenous rights in Canada. There is a real sense that Canadians have lived with those structures, that they have formed the basis for peaceful cooperation, and that they have, in a fundamental way, been integral to the founding of Canadian society. That kind of organic source for indigenous title is unavailable in Australia, at least to the same extent. How, then, does one fasten upon specific standards of indigenous/non-indigenous justice?

To begin, it is a mistake to suggest that there are no resources within Australian experience to give shape to the new doctrine of indigenous title. The very reasons for rejecting the old position give some definition to the new. A belief in the fundamental equality of all humanity, for example, is pivotal to the re-evaluation of the former authorities, and must be retained in the new. So is a principle of respect for substantially different cultures. At a more specific level having real significance for land rights, the recognition of indigenous title necessarily involves a revalorisation of the hunter/gatherer way of life, so that that use of land can no longer be treated as worthless and primitive, liable to displacement without recourse.

Beyond the reasons for rejecting the old authorities, however, there is also a way in which Australian indigenous rights law draws some of its features from the history of Aboriginal/non-Aboriginal interaction in Australia. Although aspects of that interaction were profoundly regrettable, the interaction has had an impact on both societies. Some of that impact is inescapable and necessarily shapes today's responses. For example, there have been dramatic

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25 Above n9 at 1173-7. See also the arguments against the erosion of the Treaty of Waitangi in the non-Maori publication, the *New-Zealander*, in 1847, quoted in Orange, C, *The Treaty of Waitangi* (1987) at 126: "For seven years and more has this agreement of Waitangi — the Runnimeede [*sic*] of the Antipodes — passed for binding here: guaranteed by successive Ministers of opposite political opinions ... conned over with the most painstaking scrutiny by the Natives themselves ... still adhered to, in spite of the disappointing construction it was afterwards found to bear, by men who long had the power to have hunted us out of the country, had they thought fit to do so; and we now affect to call it 'a device to amuse savages'."

transformations in the lives of some Aborigines, transformations that make a re-establishment of a relationship to traditional lands (for those people) extremely difficult — or at least, make attempts at re-establishment much more the creation of something new than the continuation of something traditional. In such circumstances, indigenous title, as a right over a specific tract of land founded on connection to that land, may no longer have sufficient basis.<sup>26</sup> There may be extremely good reasons for providing remedies for dispossession, but the particular remedy of a court-adjudicated proprietary right is no longer appropriate.<sup>27</sup> Moreover, the remedies that are appropriate (for example, the provision of funding for the acquisition of a new land base) may be beyond the reach of adjudication precisely because they involve the creation of something new, from whole cloth, rather than the protection of a persisting relationship with the land. This reasoning is responsible for *Mabo's* requirement that to retain native title, a people must still have some connection to the land and perhaps also to their laws and customs.<sup>28</sup>

The specific nature of the Australian context — especially the fact that a lot of water has flowed under the bridge during the long period that title was denied — also appears to have influenced Brennan J's discussion of the extinguishment of indigenous title on the one hand, and the majority's rejection of compensation for extinguished title on the other.<sup>29</sup> The issue of extinguishment is crucial, for it determines whether indigenous title has been displaced by subsequent action and therefore determines the amount of land that can be claimed by indigenous peoples. Although Brennan J cites the Canadian authorities with approval,<sup>30</sup> he apparently allows extinguishment to occur with more ease than is now the case in Canada. This is especially evident in his treatment of leasehold interests which, he suggests, would entirely extinguish indigenous title, even with respect to the Crown's reversion and even where there are reservations in the lease providing for continued indigenous use of the land.<sup>31</sup> The majority's decision to foreclose compensation similarly

26 See Brennan J in *Mabo* at 43: "when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared."

27 The use of the term "proprietary" in the text prejudices the result of a debate among the judgments in *Mabo*. Brennan J at 44 assumes that native title can be "proprietary". Deane and Gaudron JJ at 66 characterise the title as personal as opposed to proprietary. Toohey J at 152 suggests that the debate is unnecessary and unhelpful. For the purposes of the argument in the text, it is sufficient that indigenous title be proprietary in the sense that it involves rights over a specific tract of land. On this point, all the majority judgments are agreed.

28 *Mabo* at 43 and 51 per Brennan J; at 83 per Deane and Gaudron JJ. Tentatively at 83 Deane and Gaudron JJ, and less tentatively at 150 Toohey J, suggest that connection to the land might be sufficient to maintain indigenous title even if the group has lost its traditional customs. Brennan J (at 43 and 51) suggests that indigenous title requires at least some retention of traditional laws and customs.

29 *Mabo* at 46–50 per Brennan J, extinguishment; at 7 per Mason CJ and McHugh J, compensation.

30 *Id* at 46–7.

31 *Id* at 49, 51, and 53. Compare Brennan, F, "Mabo and Its Implications for Aborigines and Torres Strait Islanders" and Reynolds, H, "Native Title and Pastoral Leases" in Stephenson, M A, and Ratnapala, S (eds), *Mabo: A Judicial Revolution* (1993) at 35–7 and 119ff respectively. For the criteria for implied extinguishment in Canada, see *R v Sparrow* (1990) 70 DLR(4th) 385 (SCC) at 399–401; *Delgamuukw v British Columbia* (1993) 104 DLR(4th) 470 (BCCA) at 521–5, 532–3 per Macfarlane JA. These cases do not expressly

departs from the dominant tendency in Canada, in which compensation is probably available, within limits.<sup>32</sup> Both these conclusions flow, one presumes, from the majority's unwillingness to expose to reconsideration (even by means of claims to compensation) the entire history of land grants in Australia, especially the extensive use of leases for pastoral purposes, many of which contain express reservations of Aboriginal uses.<sup>33</sup> Instead, the majority opts to draw a line under the past, accepting that the vast majority of grants prior to 1975 were sufficient to extinguish indigenous title. In this, it follows the balance struck in an earlier, legislative effort to give effect to indigenous title, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).<sup>34</sup>

These aspects of the judgment, then, like the requirement of continued connection to the land, apparently draw their content from a distinctively Australian experience. Unlike the requirement of continued connection to the land, however, there is real doubt whether they are necessary concessions to the effects of settlement. Indeed, in *Mabo*, two judges argue for more demanding tests for extinguishment and three for the possibility of compensation.<sup>35</sup>

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refer to the existence of reservations for indigenous activities in leases. In the latter case, however, Macfarlane JA summarised the general position on extinguishment as follows (at 525): "Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorised by the legislation, could not possibly co-exist. Again, if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied." Macfarlane JA also referred with approval (at 532) to *R v Bartleman* (1984) 12 DLR(4th) 73 (BCCA), in which even an interest in fee simple, held by a third party, did not prevent the continuation of indigenous rights to hunt on the land. This case concerned hunting rights guaranteed by treaty, but it remains indicative of the criteria for extinguishing indigenous title: the treaty in question merely confirmed, within limits, traditional (ie indigenous) rights; and indeed Macfarlane JA cites *Bartleman* with respect to the extinguishment of indigenous title.

32 *Calder v Attorney-General of British Columbia* (1973) 34 DLR(3d) 145 (SCC), at 209 and 219 per Hall J; Slattery, B, "Understanding Aboriginal Rights" (1987) 66 *Canadian BR* 727 at 751-3. Damages in the context of extinguishment may also be available for breach of fiduciary duty: *Guerin v The Queen* (1984) 13 DLR(4th) 321 (SCC).

33 For the inclusion of clauses in pastoral leases to protect Aboriginal land use, see Reynolds, *The Law of the Land*, above n14 at 139-40, 143-5; Aboriginal Land Rights Commission (the "Woodward Commission"), *Second Report* (1974) at 38-9; Australian Law Reform Commission, *Report No. 31: The Recognition of Aboriginal Customary Laws* (1986), vol 2 at 154-8. For the extent of pastoral leases, see Altman, J C, "Economic implications of native title: dead end or way forward?" in Sanders, W (ed), *Mabo and Native Title: Origins and Institutional Implications* (1994) at 64-7.

34 Toohey J (*Mabo* at 148) is the only judge to refer expressly to the Act, but the other judges certainly are familiar with it. Brennan J acted as counsel for the Aboriginal Northern Land Council before the Woodward Commission, the recommendations of which led to the adoption of the Act. See Brennan, F, "Mabo: options for implementation — statutory registration and claims processes" in Sanders, above n33 at 33; Woodward Commission, above n33 at 10 and 33-7. Toohey J was the first Aboriginal Land Commissioner under the statute. The High Court as a whole heard numerous appeals regarding the Act's terms. (I am indebted to Garth Nettheim for bringing this to my attention.)

35 *Mabo* at 83 and 88-9 per Deane and Gaudron JJ, in which only a lease "conferring the right to exclusive possession" is said to extinguish title; and at 67-71 and 84-5 per Deane and Gaudron JJ and at 152-3 per Toohey J (on compensation). Toohey J did not address in detail the extent to which leases extinguish indigenous title.

There are three other aspects of the emerging doctrine that have distinctively Australian traits. One is the attention paid to the interaction between indigenous title and the holding

But all these distinctively Australian elements, while important, still deal primarily with the limits to indigenous title. They do not say much about its basic structure. That gap is filled primarily by the authorities on indigenous title from other common law jurisdictions, founded on the North American experience. That body of law does not have the organic connection to Australian history that it has to the societies in which it arose. Nevertheless, given the repugnant foundations of the previous Australian common law position, it provides the obvious and, for a number of reasons, appropriate model on which a new Australian doctrine can be built.

To begin, the general common law doctrine of indigenous title has been elaborated within a context broadly compatible with the Australian legal tradition. First, it emerged in the policy of the same imperial sovereign, acting within an analogous colonial structure and a common law tradition. It was refined and developed within a country (Canada) that followed a trajectory to independence similar to that of Australia, and went through a period of disregard for indigenous rights and paternalistic disruption of indigenous communities similar to, if not so extreme as, that in Australia. It could be adapted with some ease, then, to the Australian legal and institutional context. Second, the common law doctrine was developed to deal with a relationship in many ways analogous to that between indigenous and non-indigenous Australians. It provided a way of recognising the interest in land of peoples (some wholly involved in hunting and gathering) that had no experience of a commercial economy in land, that considered rights in land to be intrinsically limited and inextricably bound up with responsibilities, and that often maintained collective forms of land-holding. The doctrine provided a means of handling, with some claim to justice, transactions between these societies and an expanding non-indigenous population, in particular with regard to the acquisition of land for agricultural settlement. Third, the doctrine has already achieved a measure of currency, a measure of generalisability, beyond the specific context in which it emerged. It has been applied (sometimes with modifications) not

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of land on trust for Aborigines or Torres Strait Islanders. The use of trusts for Aboriginal and Islander lands is especially pronounced in Australia. Hence the particular need to clarify the relationship. The second is the High Court's caution in embracing the North American doctrine of a fiduciary duty owed by the Crown to indigenous peoples. Toohey J (at 156-60) accepts that such a duty exists; the other members of the majority decline to discuss it. In Canada, the fiduciary duty is founded upon the historical role of the Crown as the protector of indigenous occupation against the encroachment of settlers, under which (among other things) the Crown assumed exclusive responsibility for the acquisition of Indian lands, see Slattery, above n32 at 753-5. The High Court's caution may be due to the lack (or at least the weakness) of that kind of historical role in the Australian context, see Brennan, F, "Mabo and the Racial Discrimination Act: The Limits of Native Title and Fiduciary Duty Under Australia's Sovereign Parliaments" (1993) 15 *Syd LR* 206 at 213-8. The same goes for the third feature that reflects a distinctively Australian experience. One of the central tenets of the North American doctrine, again founded on the historical relationship, is that indigenous title can only be alienated to the Crown. The judgments in *Mabo* are much less confident about this. Toohey J (at 151, especially n594) openly questions it. Deane and Gaudron JJ (at 66) accept it simply on authority. Brennan J (at 42-4) attempts to provide a justification based on considerations divorced from the North American context — in particular, on his understanding of the relationship established between traditional and common law systems of law upon the assertion of British sovereignty — an explanation that ends up, however, appearing somewhat strained.

only along the eastern seaboard of North America, but also on the central plains and the mountainous west coast of North America, and in Africa, New Zealand, and New Guinea.<sup>36</sup>

There are differences in the Australian case. The density of the indigenous population in many areas of the Australian mainland was less than in much of North America or indeed in the other countries in which indigenous rights were respected. The conflict over land was acute, unmitigated by the economic interdependence associated with, for example, the fur trade. The balance of destructive power was much more in the colonists' favour in Australia than in other societies. The Aborigines were often nomadic, accumulating few material possessions. The apparent distance between the indigenous and non-indigenous cultures was much greater. All these differences contributed to the Australian colonists' disregard for the Aborigines' occupancy of the land, indeed at times to their disregard for Aborigines' humanity. Once the underpinnings of regret took hold, however — once the claim to justified disregard was eroded — the similarities assumed more prominence than the differences. The differences, shorn of their discriminatory gloss, lost much of their significance for indigenous title. The general common law doctrine provided an obvious model of what might have been had discriminatory denigration been absent.

Moreover, the general common law doctrine did have some presence (though dissentient and ineffectual) in Australian history. In some ways, the Australian denial of indigenous land rights was constructed against the backdrop of the general doctrine; that doctrine was the alternative rejected in the course of settlement. There were hints of its presence early in the history of Australian colonisation. The Admiralty's instructions to Lieutenant James Cook in 1768 authorised him to take possession of "convenient situations" "with the consent of the natives". The instructions to the first Governor of New South Wales, Captain Arthur Phillip, did not mention the purchase of Aboriginal land, although they did caution against "any unnecessary interruption in the exercise of their [the Aborigines'] several occupations". As Deane and Gaudron JJ suggest, this phrasing should be read in the context of the profound uncertainty at the time of first colonisation as to the nature and extent of indigenous occupation in New South Wales. Governor Philip Gidley King's handling of a land dispute on the Hawkesbury River in 1804 (in which he promised to restrict settlement in order to preserve Aboriginal use of the river) carries echoes of the North American experience.<sup>37</sup> Clear evidence of the currency of the doctrine in official discourse occurs especially in the second quarter of the 19th century, in the inconstant but nevertheless real imperial concern for Aboriginal hunting and gathering and the creation of reserves in areas newly opened to colonisation, in the ultimately ineffective measures to

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36 *R v Symonds* [1847] NZPCC 387; *Nireaha Tamaki v Baker* [1901] AC 561 (PC); *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC); *Sobhuza II v Miller* [1926] AC 518 (PC); *Oyekan v Adele* [1957] 2 All ER 785 (PC); *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353; *Calder v AG BC* (1973) 34 DLR(3d) 145 (SCC); *Guerin v The Queen* (1984) 13 DLR(4th) 321 (SCC).

37 See *Mabo* at 72-4, 79 per Deane and Gaudron JJ; Nettheim, G, "'The Consent of the Natives': *Mabo* and Indigenous Political Rights" (1993) 15 *Syd LR* 223 at 223; Reece, above n13 at 104ff; Reynolds, *The Law of the Land*, above n14 at 51-2, 60-1. King eventually lost faith in conciliatory measures: Clark, *vol 1*, above n14 at 166-8.

protect indigenous title in South Australia, and in other, less formal ways, such as the acknowledgment by George Gipps, Governor of New South Wales, that the North American doctrine of indigenous title applied to New Zealand.<sup>38</sup>

The common law doctrine of indigenous title thus provided the obvious, albeit imperfectly rooted, framework for a new Australian doctrine. It was broadly compatible with the structure of Australian law and indeed was the model against which the colonial rejection of indigenous title had been defined. When the reasons for that rejection were called into doubt — when the law's disregard for Aborigines and Torres Strait Islanders came to be seen as profoundly regrettable — that model provided the natural framework to which to turn.

## 5. *Mabo and the Judicial Role*

Thus far, I have described the contours of regret in broad terms appropriate for virtually any social actor. Courts are, however, very special actors, subject to particular institutional constraints. Given those constraints, was it appropriate for the High Court to overrule the former authorities and remake the law as it did in *Mabo*?

The starting point for determining the propriety of the High Court's actions must be that the obligation to follow precedent is never absolute. Not only is the common law subject to perennial revision and refinement in the name of greater consistency across the whole, but it has always been open to more far-reaching, if rarer transformations, in which previous assumptions have been overturned in response to changed social conditions or a re-evaluation of the fundamental demands of justice. The problem is not simply one, then, of "judicial legislation" versus fidelity to precedent, but rather whether the innovation that occurred in *Mabo* was of the appropriate kind. There are no hard and fast criteria for resolving this issue. The sphere for judicial innovation is a matter of judgment, not proof. But a number of factors suggest strongly that the Court's actions were appropriate.

First, the previous doctrine denying indigenous title was very much a judicial creation.<sup>39</sup> In the 19th century, the courts themselves had propounded the view that the assertion of British sovereignty, or alternatively the reception of English land law, had been sufficient to confer full title to the Australian soil on the Crown.<sup>40</sup> When, in the 20th century, an Aboriginal people first challenged

38 See *Mabo* at 80–2 per Deane and Gaudron JJ; Clark, *vol 3*, above n14 at 69ff, 104ff, 430–2; Rowley, above n13 at 74–85; Reece, above n13 at 127–39, 168–76, 183–5, 198–205; Reynolds, *The Law of the Land*, above n14 at 99–141; Reynolds, H, "The *Mabo* Judgment in the Light of Imperial Land Policy" (1993) 16 *UNSWLJ* 27; Critchett, above n13 at 141–56; Orange, above n25 at 94–5. I am not suggesting that imperial authorities unambiguously maintained that indigenous title existed in Australia. Their policy is better summarised as discomfiture with the practice of dispossession, sporadic and ultimately ineffective attempts (often associated with particular officials) to bring Australian practice into line with that of other colonies, and eventual acquiescence in the facts of settlement in Australia.

39 In fact, as a matter of considered opinion, it was quite a recent creation. The first judgment to discuss specifically the existence of indigenous title after hearing representations from those most directly affected — the indigenous peoples themselves — was *Milirrpum v Nabalco* (1970) 17 FLR 141, decided at trial and never appealed.

40 *Attorney-General v Brown* (1847) 1 Legge 312 (NSW SC); *Cooper v Stuart* (1889) 14

that line of authority, another court determined that because of their manner of using the land, the Aborigines possessed no interest susceptible to recognition under the common law.<sup>41</sup> In practice, the expulsion of the Aborigines may have occurred by the actions of settlers with the approval and support of their governments, but the courts, through their development of the common law, gave that dispossession a legitimacy it would not otherwise have had. They took the fact of dispossession, accepted the popular presumption that Aborigines were incapable of owning land, and wove them into the very pattern of the law so that in the end there had been no dispossession at all! The land had, since the moment of discovery, belonged to the Crown. Aborigines became the trespassers, living on land possessed by the Crown or its grantees.

Thus, in *Mabo* the High Court was dealing with its own province: the development and refinement of the common law. That common law might have been tightly bound up with the practice of governments; it may have been premised on a denigration of Aborigines broadly shared among colonial legislators; but the distinctive pattern of rationalisation that it propounded was nevertheless a judicial construction. When the premises of that law came to be seen as profoundly wrong, the courts could not escape responsibility for them. The courts had fashioned their own justifications for dispossession, and in *Mabo* they either had to reaffirm those reasons or reject them. This sense of responsibility for the common law is especially evident in the judgment of Brennan J. His reasons are, in fact, carefully limited to the criticism and re-evaluation of the common law. He emphasises that that law was founded on discriminatory premises and had been used to excuse dispossession:

According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.<sup>42</sup>

He might not be able to undo the entire history of dispossession, but he is at least going to end the common law's complicity in that process by renouncing the fiction that when Britain asserted its sovereignty over Australia, it automatically obtained the full beneficial ownership of the land.

Second, the process of regret underlying *Mabo* is precisely the kind of moral reflection that should drive the evolution of the common law. This is true in both a general and a specific sense. At the general level, it is important to emphasise that in Postema's article, the notion of regret is an integral part of a theory of precedent.<sup>43</sup> Regret is defined in direct response to the reasons for respecting precedent and is conditioned by those reasons. The relationship is this: retaining a measure of consistency in our judgments through time —

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AppCas 286 (PC); McNeil, above n3 at 94–103.

41 *Milirrpum v Nabalco* (1970) 17 FLR 141.

42 *Mabo* at 18 per Brennan J. See generally at 18–9, 41–2, 50 per Brennan J and at 82 per Deane and Gaudron JJ.

43 Above n9.

following precedent — is a way of keeping faith with the principles and relationships that have constituted our community. This consistency is not a matter of rote copying or slavish adherence. It is a much more active process of probing for what is valuable in our past, cherishing what we take to be important, refining it, and basing our further growth and reflection upon it — all elements of a sophisticated grappling with precedent. Respect for precedent involves modesty — a sense that we can and should learn from our own community's past — but it also involves a critical element, in which we actively engage our past, drawing from it lessons for the future. At times, reflection upon our past (including reflection upon where our community now seems to be moving) leads us to question prior assumptions. We can come to the conclusion that elements that once seemed central to our society are now out of step with, perhaps even antagonistic to, our most cherished commitments. Regret is an inherent product, then, of a community that cares about its connection to its past. It is a product of the way in which we work with precedent.

Moreover, in the specific circumstances of *Mabo*, the framework of regret was forged in a more formal, less amorphous manner, in the evolution of Australian and international law since the 19th century cases overturned by *Mabo*. Those cases were decided in a period of colonialism, when presumptions of racial inferiority were much more readily accepted. Since that time, the law has been revised to embrace a much more substantial commitment to equality. This has occurred in a number of ways. Its most obvious expression at a general level was the adoption of the *Racial Discrimination Act 1975* (Cth), patterned on international human rights guarantees. With regard to Aborigines and Torres Strait Islanders, it is reflected in the 1967 amendments to the Constitution and the repeal of much of the restrictive legislation governing indigenous Australians. At the international level, there has been a similar retreat from colonialism and inequality with the adoption of a multitude of human rights instruments, decolonisation, and, alongside the latter process, the rejection of the doctrine of *terra nullius* by the International Court of Justice.<sup>44</sup> Although none of these events dictated the result in *Mabo*, they all made the retention of *terra nullius* in Australia increasingly anomalous, an archaic hold-over profoundly out of step with the contemporary direction of Australian law.

Third, the sense of regret at issue in *Mabo* was not about some action or defect of the remote past. The defect was very much alive within the law, its application in question today. Often, people presume that indigenous title is about dispossession long ago. Usually, however, the dispossession is much more recent, often happening in the present. That was certainly the case with *Mabo*. The Meriam people were still living on their land. They had maintained an unbroken occupation since time immemorial. The court had to decide whether they had a right to that land or whether they were mere sojourners, subject to removal at the government's whim. If dispossession occurred, it would not be in 1788 or in 1879. It would effectively be now, in 1992, by virtue of the judges' action. While the previous cases might be old, it was their present operation, at the end of the 20th century, that was in issue. The problem was not one of correcting an ancient injustice, but whether Australian

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44 *Western Sahara (Advisory Opinion)* [1975] ICJR 12.

law still took indigenous land, paying no heed to the present inhabitants — the moral presence of the past indeed!

Not surprisingly the Court, faced with this option, drew back, unwilling to find that Australian law still decreed the discriminatory dispossession of the Islanders. The judgments are marked by an acute awareness of the immediacy of the issue. To quote again from Brennan J:

Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the radical title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty...

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.<sup>45</sup>

In the end, their judgment was limited to situations that had this immediacy: indigenous title would only exist where there was a continuing indigenous connection to the land. Moreover, this immediacy, combined with the limitation of indigenous title to Crown lands, clearly outweighed any prudential argument against overturning the previous authorities. Who could complain of uncertainty in the law, when indigenous title only applied to Crown lands, and then only to benefit people who had maintained their connection to that land?<sup>46</sup>

Finally, the general common law doctrine of indigenous rights was, for the reasons canvassed above, an appropriate foundation for a new, judicially-elaborated, doctrine of indigenous title. I will not repeat those reasons here, but will simply note that the process of borrowing and adjustment involved in the reception of that law is a standard part of the common law's arsenal of techniques. There has always been a measure of comparison and adaptation among common law jurisdictions, especially in private law fields, although borrowing usually occurs in modest increments, when the broad contours of the law are already set along similar lines. The borrowing here goes further than that, for it involves the reconstruction of a significant portion of the law on new principles. But even that is a more fundamental part of the common law than we might think, especially in societies that began their lives as British colonies. There, many areas of the public law are descended from transplanted concepts, adjusted (sometimes dramatically) to local conditions. Colonial lawyers and judges have generally worked with what were, in the

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45 *Mabo* at 37 and 41 per Brennan J.

46 The obvious answer, of course, is the mining companies (or other firms engaged in resource exploitation on Crown lands). Nevertheless, given that the underlying title remains in the Crown, that the indigenous people have maintained an attachment to that land, and that conflicts of use can always be resolved by negotiation or, in the last analysis, by legislation, it seems an extravagant concession to resource development to insist upon the continued, blanket dispossession of indigenous peoples. Australians do not insist that non-indigenous property rights be nullified to encourage resource development. Why should Aboriginal and Islander interests be singled out?

first instance, imported models, modifying them to serve new purposes or re-interpreting them to fit different environments.<sup>47</sup> Indeed, the very doctrines that were used to justify the dispossession of Aborigines and Islanders were local versions of English concepts, especially the principle that the Crown held original title to the soil, a principle founded on an excessively literal reading of the feudal fictions of English land law.<sup>48</sup> The adoption of the common law of indigenous title therefore follows in a time-honoured tradition of borrowing and adjustment, and does so on premises that are arguably much more suited to the Australian context than the doctrines it replaces. A literal application of feudal fictions was always an odd foundation for Australian land law. It is all the more inappropriate now, given the discriminatory impetus underlying the denial of indigenous title.

## 6. Conclusion

This article has sought to describe the structure of regret that led to the recognition of indigenous title in Australia. It has attempted to show how the Australian doctrine was in part the product of a process of moral reflection, in which the judges of the High Court were moved to confront the discriminatory foundations of the denial of title, to come to terms with the implications of those foundations for the moral constitution of Australian society, and ultimately to seek to excise those elements from Australian law. It has suggested why that process was eminently part of the judges' function, indeed fell squarely within the tradition of reflection and reconsideration of the common law.

In this, the Court reproduced, within the special domain of the law, a process that was to some degree occurring throughout Australian society. There were important differences. The Court's emphasis on coming to terms with the past was more overt and much more consistent than was the case in the popular debate (although, as I suggest above, regret was present, though somewhat hidden, in the popular forum). Indeed, prior to *Mabo*, attempts to deal with indigenous title through legislative action had met with only mixed success. Only with *Mabo* did Aborigines and Islanders achieve a general recognition of indigenous title in Australia. Why the disjuncture between the political and the judicial realm?

The contrast points, I believe, to a special characteristic of judicial reasoning, at least within the common law. Judges have, by the nature of their office, a particular concern with the normative structure of a community through time. The very means by which they justify their decisions require that they reflect upon the substance of previous judgments, that they care about consistency

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47 There is now a solid body of literature on this phenomenon in the Canadian context. See Baker, G B, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 5 *Law and History R* 219; Hibbits, B J, "Progress and Principle: The Legal Thought of Sir John Beverley Robinson" (1989) 34 *McGill LJ* 454; Girard, P, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova-Scotia*" (1993) 11 *Law and History R* 101 especially at 135-43.

48 See *Mabo* at 16-8 and 32-7 per Brennan J. See also Edgeworth, B, "Tenure, Allodialism and Indigenous Rights at Common Law: English and Australian Land Law Compared After *Mabo v Queensland*", paper presented to the Australasian Law Teachers' Association Annual Conference, University of Canterbury, Christchurch, NZ, 2 October 1993.

over time and across contemporaneous judgments, and that they seek to mould the law's evolution in a manner that takes seriously the law's claim to be a framework of justice — part of the normative fabric of a society that cares about its claim to be a moral community. They are, in short, distinctively concerned with the "moral presence of our past". Unlike legislators or the public at large, they are denied the illusion that the past can be ignored and that they can remake their community anew in every hour. They have to come to grips, in a very concrete fashion, with the way in which the moral judgments of the past continue to operate today. While other Australians might be able to pretend (with limited success) that dispossession and the discrimination that excused it are long past, and that Australia can get about its business without worrying about that history, the Court in *Mabo* could not. It was faced with the continuing presence of that legacy in the law, and had either to perpetuate or renounce it.

I do not want to exaggerate the virtue of judges in comparison to politicians (or indeed to citizens). There are real and justifiable limitations on judges' ability to remake society. The nature of legal reasoning, combined with the composition of the judiciary, can at times produce a sterile and unreflective conservatism. At its best, however, adjudication can force us to come to terms with the way in which our past conduct has shaped what we are today. It can call our attention to the integrity of our moral community. That is what happened in *Mabo*.