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Critical Response

I

Two Laws: Response to Elizabeth Povinelli

John Frow and Meaghan Morris

Appearing at a time of backlash in Australia against the multicultural policies of the past twenty-five years and of retreat by the present conservative government from the complex issues raised by indigenous peoples using their citizenship to seek entitlements under the law, Elizabeth A. Povinelli's important article 'The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship' (*Critical Inquiry* 24 [Winter 1998]: 575–610) provides a challenging critique of the conditions in which this retreat took shape.

The value of Povinelli's essay in this context is that it catches neatly the unhappy paradox of difference theories posited as an alternative to the politics of identity: that they come to rely on the self-identity of the different. Her argument is that the Australian High Court's *Mabo* judgement (more precisely the complex of *Mabo and Others* v. *The State of Queensland* (1992), the Native Title Act of 1993, and *The Wik Peoples* v. *The State of Queensland* (1996), proclaimed both by the court and by the Labor government (1990–96) of Paul Keating as constituting a moment of restoration of rights and of national reconciliation, in fact returns meagre benefits to Aborigines and imposes a criterion of authenticity to which they must conform (in a 'performance [of cultural difference] before the law' [p. 591]) in order to receive entitlement. Recognising a performance of nonmodernity (see pp. 604–5), the law actively discourages any ambivalence about customary identities.

For Povinelli this criterion marks the limits of multicultural policy. Her argument is not just the familiar one that multiculturalism fails to

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recognise the radically different status of indigenous groups in a mixed settler society, thus reaffirming the centrality and superior citizenly status of, in particular, Anglo-Celtic settlers; rather, she demonstrates that such a multiculturalism cannot find a place for the complexity and the 'fundamental alterity' (p. 581) of Aboriginal identity, never pure or singular but always diversely produced in and by interactions over time with the dispossessing settler population.

We are troubled, however, by the certainty with which Povinelli writes off that multicultural project, which, as she says, was 'a deeply optimistic liberal engagement with the democratic form under conditions of extreme torsion as social and cultural differences proliferate and as capital formations change' (p. 583). There are two aspects of her critique that we find problematic. The first is the instrumentalism that she ascribes to multicultural policy. She puts the matter this way: What her essay investigates is

> how the state uses a multicultural imaginary to solve the problems that capital, (post)-colonialism, and human diasporas pose to national identity in the late twentieth century. . . . These state multicultural discourses, apparatuses, and imaginaries defuse struggles for liberation waged against the modern liberal state and recuperate these struggles as moments in which the future of the nation and its core institutions and values are ensured rather than shaken. [P. 579]

The claim is thus not just that multiculturalism has less than perfect political effects (on this we do not disagree), but that it has in some sense been designed in such a way as to do so, with a specifiable political intent.

Second, this instrumentalism is ascribed by Povinelli to the state, understood as a singular, unified, and intelligent agent. The High Court of Australia (corresponding to the U.S. Supreme Court) is assumed to share an intentionality with the government, and they are jointly equated with 'the state'; the phrase 'state law', odd and ambiguous within a common-law jurisdiction, carries these conflations throughout the article (p. 598). The constitutional separation of powers is thus treated as an epiphenomenon of a more fundamental unity, and the High Court is criticised for not having effected a *political* break with the existing structure of property rights by giving recognition to Aboriginal customary law. More precisely, the High Court grants a 'recognition' which, in full bad faith, at once gives and refuses; Aboriginal law is accorded a place as the necessary con-

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dition for Aboriginal identity and the recognition of native title rights, but it is rendered entirely without valence in the present, at once subsumed and abolished within the common law. It exists only for as long as it takes to sight it and then sinks back into the darkness of a superseded culture.

But to make this criticism, and to accuse the High Court of having used 'the very tools that had legislated and institutionalized racial and cultural prejudice to free national institutions from that prejudice without performing an ideological critique of the institutions themselves' (p. 584), is surely to miss the point. The High Court is a judicial, not a political (let alone a 'critical') institution. It makes legal judgements in accordance with legal precedent; were it to act in a political manner (for example, by recognising Aboriginal sovereignty) it would lose a legitimacy that is already deeply contested. It has no grounds of action beyond the interpretation of existing law, and its decisions are constrained by the specificity of its genres of writing. Moreover, the criticism misses precisely the creative radicalism *within its own terms* of the court's break with the predominant doctrinal strand (that of *terra nullius*) within which the issue of indigenous property rights had in all previous Australian decisions been decided. The *Mabo* judgement was at the outer limit of what is possible from a conservative judicial institution; to expect something dramatically different is to obviate the politics of the possible.

Native title is a construct of the Australian legal system, and it depends precisely on the peculiar modality of recognition/nonrecognition that Povinelli rightly identifies as its aporetic condition of existence. It then has a secondary set of conditions of existence constructed in statutory law. The conditions constructed by the High Court in *Mabo* and subsequently in *Wik* gave potentially real, although limited, benefits to some groups of indigenous people; the Native Title Act, initially passed by the Keating government in 1993 and then substantially modified in 1998 by the Howard government, removed or constrained many of those benefits. The political effects of these different constructions cannot be conflated into a singular project of the state. In overturning the doctrine of *terra nullius* the *Mabo* decision conformed to a juridical rather than a political logic. It took both the advocates and the opponents of multiculturalism by surprise; if its effect was in no way to free Aboriginal Australians from their oppression, it was also not—either deliberately or in its own despite—'the resubordination of the Aboriginal society vis-à-vis European law and society' (p. 591). Rather, its effects were mixed, problematic, and unstable, and it is for this reason that it is wrong to subordinate its dynamic to the aims and rhythms of the state or, for that matter, to those of capital. The law is not a simple instrument of other forces.

In writing off *Mabo* as a manifestation of the will of the state Povinelli's argument does not allow for the reality either of the court's achievement (partial as it is) or, more significantly, of ongoing political conflict between a plurality of complexly aligned parties. Her argument makes it

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a matter of indifference that the present conservative government has effectively almost extinguished the small gains made, or potentially achievable, by some Aborigines, and that this action has been bitterly contested not only by the opposition Labor Party and minor Senate parties but by other 'organs of the state' (such as the Human Rights and Equal Opportunity Commission, not to mention the Aboriginal and Torres Strait Islander Commission), and by the peak Aboriginal organisations. In Povinelli's account, this politics can only figure as inconsequential, whereas—rightly or wrongly—it has assumed absolutely central symbolic importance within the Australian polity as a test of whether the national state has the capacity now to confront its racist past. No one believes *Mabo* in itself is or ever was a solution; large numbers of people, including Aborigines, consider its symbolic value to be of crucial *political* importance.

Similarly, multiculturalism is a *policy* and not, as Povinelli suggests, a 'claim' expressive of the will of 'the Australian state' (p. 581). Policies are the hybrid products of diverse political activities by many social agents; almost always (in Australia) compromise formations that satisfy no one for long, they are open to contestation, sudden abandonment, and unpredictable change. True, multiculturalism until recently provided what Povinelli calls 'national hegemonic projects' (p. 579)—we emphasise the plural—with a long-lasting and stable policy framework. But this was possible only because it had a bipartisan status. Given that status, however, it was furiously criticised and, in practice, was varied from all sides (and by competing hegemonic 'projects') over time in the political *processes* of 'the state'. Not least in those organs of the Australian state called universities and schools, critiques not unlike Povinelli's were widely propagated and, especially in the last few years of multiculturalism's 'hegemony', aired on state radio and television. If in 1996 this situation changed, it did so because a 'popular' right-wing revolt against cosmopolitanism as well as against globalisation was able to use the processes of state effectively to demand and achieve a drastic shift in policy framework and thus of the national agenda. Multiculturalism is still a policy, but one unequivocally espoused now only by Labor and allied minor parties. Thus rendered oppositional, its outlines are blurred, rewritable, up for grabs; it has to be fought over again in a fundamental way, and the outcome of this struggle is unforeseeable—by 'the state' or anyone else.

These matters have implications for the politics of difference everywhere. If the state is understood (as it still so often is on the Left, perhaps especially within the libertarian traditions of the United States) as a monolithic and repressive force, then no action by legislatures or courts to propound and enforce policies of recognition of cultural difference can be taken seriously; they are never more than the ruses of power. With this revelation installed as the conclusion that must always be reached, it is difficult to see how the mobility that Povinelli rightly requires of critical analyses can really be achieved (see p. 580); more than once she calls for analysis to show *how* subaltern and critical energies are defused, adjusted,

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seduced, and recuperated by dominant forces, a formulation of the critical imperative that allows only for motion towards the known, rather than for the mobility that political creativity requires (see pp. 579, 583). The upshot of this logic of the foregone conclusion is to strand critical thinking and radical politics alike in a Platonic realm of appearances; behind the sound and fury of the world of 'normal' politics—legal challenges, policy processes, community lobbying, media wars, group negotiations, and mundane federal elections—loom the massive, unchanging forms of 'the state', 'the law', and 'the market'.

Most immediately, indigenous people are then forced into precisely that position of radical otherness (the requirement not to be complicit with the ruses of the state) in which *Mabo*'s criterion of cultural authenticity—as Povinelli herself so subtly and persuasively shows—places them. This immobilising gesture, so much at odds with most of her analysis, is enacted in her essay by the figure of clitoridectomy—an odd figure to invoke repeatedly, since to the best of our knowledge (and that of the anthropologist friends we checked with) the practice does not occur amongst indigenous Australians. Its rhetorical function in the essay is to emblematise a kind of radical acceptance of cultural otherness. In the absence of a definite or appropriate cultural referent, however, its use in this context actually has the effect of conflating different others within a generalised figure of Otherness.

For Povinelli, Australian multiculturalism is 'an especially interesting example of the role a multicultural discourse and fantasy play in cohering national identities and allegiances and in defusing and diverting liberation struggles in late modern liberal democracies' (pp. 580–81); the core paradox she identifies is that this apparent recognition of and respect for difference, this 'new collective self-understanding', works at the same time as a 'new technology of state power' that nevertheless has the appearance (but no more than that) of being 'a means to liberate subalterns from the state' (p. 592). Together, 'the court and state construct native title as a legitimate part of state multiculturalism only to plough it into the ground of a new, transcendental, monocultural nation' (p. 579). The reality, we would argue, is that these 'liberation struggles' had and have few paths other than by way of these civic and legal machineries, which are not a diversion from some more authentic struggle but important enabling conditions of indigenous peoples' political advancement. The very word *liberation* can be misleading in its sense of movement out of a space of oppression; for the Belyuen in the Darwin hinterland, as for *koori* housing associations in Redfern, the crucial political questions have to do, as Povinelli herself shows, with control of the spaces that indigenous people inhabit.[1]

1. *Koori,* meaning 'people', is the word by which many people of indigenous descent in southeastern Australia designate themselves as a collective.

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