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The Prose and the Passion

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The Prose and the Passion: the call of an Australian Constitutional Epic

“[S]he might yet be able to help him to the building of the rainbow bridge that should connect the prose in us with the passion. Without it we are meaningless fragments....”¹

“Darryl: ‘I’m really startin’ to understand how the Aborigines feel.’

Sal: ‘You been drinking?’”¹

E.M. Forster’s *Howards End* is a story about English national identity of a particular kind: a “reverse postcolonial” fantasy of origins impelled by unavoidably insistent analogies between colonial oppression and a culture tolerant at home as abroad of violent hierarchies of race, gender and class. Forster’s *oeuvre* more generally insists on the ethical necessity of seizing the English “constitutional moment” potentiated by the collapse of Empire, on rigorous national self-scrutiny used to imagine a postcolonial English national identity. And Margaret Schlegel’s famous meditation on connection might make a proxy at once rough and convenient for therapeutic claims for “Law and Literature” of the kind that holds that literature’s feminine supplement might restore Law to Justice.

More thoughtful, less naïve, is Peter Goodrich’s insight that

The relation of literature to law is a question of genre.... [T]he status of the legal genre is predicated upon a paradox. Law is a literature which denies its literary qualities. It is a play of words which asserts an absolute seriousness; it is a genre of rhetoric which represses its moments of invention or of fiction; it is a language which hides its indeterminacy in the justificatory discourse of judgment; it is a procedure based upon analogy, metaphor and repetition and yet it lays claim to being a cold or disembodied prose, a science without either poetry or desire; it is a narrative which assumes the epic proportions of truth; it is, in short, a speech or writing which forgets the violence of the word and the terror or jurisdiction of the text. Law, conceived as a genre of literature and as a practice of poetics, can thus only be understood through the very act of

¹ E.M. Forster, *Howards End*, ch XXII.

forgetting, through the denial, the negation, or the repression by means of which it institutes its identity, its life, its fictive forms.²

In the aftermath of colonial violence, then, so such a Law and Literature project might insist, the nation responsible for that violence must reimagine, envision, dream itself into being, but if it does so without insistently remembering its origins and its history, it will be at a considerable price.

Australia's postcolonial circumstances are particularly complicated ones. This is because the appeal to address what David Marr and Marian Wilkinson call "its ghosts," and to "enlarge the [nation's] spirit"³ emerges as strongly – perhaps more strongly - from inside the nation's borders as from without. It is also because Australia has engaged in neocolonial practices in the "postcolonial" period, for example in the "Pacific Solution" to the claims of asylum seekers in 2001 that Marr and Wilkinson document in *Dark Victory*.

The late Robert Cover, the Yale Law School scholar/teacher/visionary/activist, reached an insight like Goodrich's in *Nomos and Narrative*, a candidate as plausible for "The Great American Constitutional Law and Literature" text as Toni Morrison's *Beloved* is for the Great American Novel, or David Malouf's *An Imaginary Life* for the Great Australian Novella. "The uncontrolled character of meaning," Cover wrote,² "exercises a destabilizing influence upon power." I will return to that insight later in this essay, but for now want to focus on Cover's special pleading for Constitutional Law and Literature.

The law and its texts of judgment are always critical sites for constituting the nation. Law and Literature scholar Drucilla Cornell registers that laying down the law negotiates "the

² Robert Cover, "The Supreme Court, 1982 Term: Foreword, *Nomos and Narrative*", 97 *Harvard Law Review* 4 (1983), p. 18.

relationship between the past, embodied in the normative conventions which are passed down through legal precedent, and the projection of future ideals through which the [imagined juridical and national] community seeks to regulate itself.”⁴ Or, as Cover puts it, “[l]aw may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative.”⁵ Cover’s thesis about explicitly constitutional literature is that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,” and thus that “[f]or every constitution there is an epic.”⁶

What candidates, then, do we have for an Australian constitutional epic, and what might we learn from it? Legal “factions,” artful representations of the real, like Truman Capote’s *In Cold Blood*, have an especially strong claim to be law’s narrative supplements: their inhabiting of the borderlands of fact and fiction, law and literary journalism, make them generic doubles for the texts of judgment. Both genres – faction and what Australians call judgments and Americans legal opinions - make coherent and thus satisfactory narratives out of the messy contingency of evidence and the everyday, at the same time unwittingly drawing attention to the author’s editorial legerdemain and normative vision. *In Cold Blood* exemplifies Cover’s insight that the complex contested meanings that we make from our engagement with narrative have a peculiar aptitude to unsettle law’s totalizing claims to normative authority and interpretive orthodoxy: there is more than one way to read the law, and thus to make it. As Cover also registers, those who write a nation’s epic make choices about the ancestors they invoke, as do constitutional courts. “The normative universe,” of the nation, he observes, “is held together by the force of interpretive commitments – some small and private, others

immense and public. These commitments – of officials and of others – do determine what the law means and what law shall be.”⁷

Capote told the nation and its people a story of the pathology constitutive of their society and the law that was made and administered in their name. At the same time he manifested both the allure and the risks of an advocate getting “too close to the client.” Australian equivalents to *In Cold Blood* arguably include Helen Garner’s two controversial forays into the fiction genre, *The First Stone* and *Joe Cinque’s Consolation*, although for my taste and judgment, inhabiting as I do - as a result of training and professional experience in both - the worlds of law and of literature, they fail to satisfy. For a reader dwelling at once inside and outside “law’s empire,” their limitation lies in Garner’s stubborn novelist’s insistence that law do more than it can, tell a story as complete and rich in nuance as can fictional narrative, at the same time responding to Garner’s demands for a congruence between law’s judgment and her powerful vision of justice. The law as such, as a ragtag system constituted by institutions, discourses, and subjects, predictable only because of the iteration of practices passed from hand to hand, always falls short.

Garner’s assessment of law’s inadequacy is also shaped by her novelist’s forensic instinct and her great strength as an historian and elegist of the domestic, while mine is shaped by the practices of law teaching and public law scholarship, by the press of institutional hierarchies that drives home the message that “women’s business” is risky professional ground. While her focus in *Joe Cinque’s Consolation* is on the law’s failure to do justice to the life of Joe Cinque and the loss of his family, I came away from the book wondering

what I could make of what could be learned from Anu Singh's law school teachers and classmates about the histories of her acts of lawlessness, what that could teach us about how we educate lawyers, or should or might educate them, and the rueful recognition that beyond the shadow or canopy of the First Amendment, much of what I might learn might not be publishable.

More satisfying for this reader, genuinely products of both law and of literature in its literary journalistic genre, are John Bryson's *Evil Angels*, and David Marr and Marian Wilkinson's *Dark Victory*, both of which deliver, like Capote's masterwork, judgments about law and society, and thus about nation. These ostensibly non-fictional texts perform the telling of the – or a - whole truth, while demonstrating the limits of journalism and of law to truth-telling. They insist on law's human and practical dimensions: if the law is to do justice, it will depend on the people who practice it and lay it down, on their characters, their courage, their convictions, on how they read the nation's legal history, and write it.

Evil Angels and *Dark Victory*, then, share an interest in the role legal actors, judges and lawyers, play in the epic of Australian national identity. In *Evil Angels* Bryson, a lawyer by training and at his best as a writer in the genre of literary journalism, uses the characters of the Melbourne barrister Andrew Kirkham and Sydney journalist Malcolm Brown as stalking horses for his dissection of a grim pettiness and hostility to people who are “not like us” that characterize Anglo-Australia at its worst, and of how the law becomes complicit in and compounds this moral failing of the dominant national culture when due process is no more than “surreal epistemology.”⁸ Marr and Wilkinson likewise

show what happens when majoritarian democracy becomes tolerant of the Schmittian nightmare of an endless “state of exception,” where the potent fictions of the rule of law become no more than cynical sham, and “[n]ascent racism, ancient fears of invasion by immigration and talkback radio ranting about Asian [and Muslim] crime”⁹ become the dominant cultural story, circumscribe the majority’s national imaginary, their vision of how the nation’s past might shape its future.

In writing this essay, I returned to read *Evil Angels* after a gap of more than a decade, and discovered that I had forgotten that it begins with the bathos of a failed second coming awaited by Adventists on the banks of the Schuylkill river at Phoenixville, a few miles from where I now live and work. But I had vividly remembered Bryson’s account of Kirkham losing his patience with Lindy Chamberlain:

Her demeanor in the witness stand worried Kirkham. When she was annoyed with Barker she sounded like a fish-wife.

‘I know it’s difficult for you,’ Kirkham said, ‘but you must hold your temper. You sound too harsh, too angry.’

‘I am angry,’ she said. ‘What do you expect?’

‘It’s not going to go over well with the jury. Try to be more,’ he cast around, ‘demure.’

She was angry all over again. ‘I am the way I am,’ she said. ‘the jury will have to get used to it.’

Plainly she was not prepared to take notice of him. He glared at her. Kirkham’s eyes are generally described as ‘piercing blue’. Whatever goes on in there in the midst of fury, it is not the abode of warmth. ‘Understand this,’ he said, in a glacial voice, ‘When this case is over, I am going to climb on a plane and get the hell out of the place. You could be staying here for a fucking long time.’¹⁰

Bryson's characterization of Kirkham evokes one aspect what I recall of Australian lawyers at their best: independence from the client, a willingness to give unwelcome advice if professional judgment demanded it. That independence also enables the best of Australia's lawyers and the judges some of them become to be fiercely protective of what the rule of law can mean if it is precept, not cipher, article of faith, not rhetoric. Writing from a nation where the most recent appointee to the Supreme Court fawningly touted his conservative credentials when seeking an Executive government appointment early in his career, and where the paradigmatic client of the Constitutional lawyers who constitute a significant number of the Supreme Court bench is the government, those lawyers seem worth recognizing. The appeal to recognize them becomes insistent in an age where it is increasingly evident that all that stands between individuals, especially the powerless ones among us, and raw, unchecked government power, are those members of the legal profession who are willing to speak truth to power.

An impulse to recognize the value of courageous legal and other professionals is evidently shared by Marr and Wilkinson, who relentlessly document the calculated exclusion of lawyers, doctors, and journalists from access to the asylum seekers on the *Tampa* and its successor SIEVs (suspect illegal entry vessels) as from high level Howard government decisionmaking, and the equally calculated Americanization of the Australian federal civil service. Accordingly, beyond a comparatively brief description of the Federal Court challenge to the detention of those asylum-seekers held on the *Tampa*, lawyers are signally absent from *Dark Victory*. As a result of government policy, the law in any form other than fiat was likewise absent from Australia's conduct in respect of asylum seekers in the period from August to November, 2001. Worse than that can

happen to constitutionalism, of course, and texts which gesture towards what that worst might be are the “torture memos” written by Jay Bybee and John Yoo, then both of the increasingly inaptly-named Justice Department, now a federal appellate judge and Boalt Hall law professor respectively, lawyers far too close to their client, executive government, with little awareness of being servants of the law. One might find equally troubling legal texts in the “outsider jurisprudence” of the High Court in the period after Marr’s and Wilkinson’s epic concludes.

As both *Evil Angels* and *Dark Victory* share identity as constitutional epics, they in turn share their interest in the role of legal actors in the epic of Australian national identity with an accidental constitutional epic, Rob Sitch’s *The Castle*. While I might have been struck anew by the profundity of Cover’s insights as I taught Comparative Constitutional Law this past semester, one of my students was insistent that *The Castle* had given him a more acute insight into constitutionalism than any of the constitutional theory we read. It conveyed the same message again and again, he said: “Constitutionalism,” for which a rough proxy might be living under a genuine rather than rhetorical rule of law, one that applies to the governors as much as to the governed, or provides meaningful protections for citizens from government tyranny, “matters to all of us.”

The Castle is a slippery text: on one hand, it makes a case for both the land rights of Australia’s indigenous peoples and the virtues to an Antipodean Everyman of the *Mabo* decision. On the other, it has a *Borat* problem. That is, it is arguably implicated in the racism it satirizes, perhaps most evidently in the character Farouk, portrayed by Costas Kiliadis (himself a lawyer) as a Lebanese immigrant so blind to cultural context that an

injunction to wear a suit to court sees him attend in dodgy black tie, and whose response to a threat to back off legal action against the forced acquisition of his modest suburban Melbourne house or risk a beating (delivered by Les Toth's Anglo-Australian thug, who, to this former Sydney lawyer, having once inadvertently spent the prison officers' lunch hour locked in a cell at Pentridge with Mark Alfred Clarkson, stereotypically evokes Melbourne's gangland) is "You have friend, I have friend, my friend come to your house, put bomb under your car and blow you to fucking sky." As he reflects, reassuring his neighbours, "I don't really have friend like this, but, you know, I'm Arab, and people think all Arab we have bomb."

The movie's most unselfconscious passage, however, is in the representation of "Lawrie," "Lawrence Hammill, or "Mr. Hammill," the Melbourne Silk with a heart of gold, and a deft and paradoxically genuine common touch. Charles Tingwell's character is the hero who saves Darryl Kerrigan's "Castle," a house that only a mother could love, from the rapacious developer who, in an uncannily prescient gesture towards the recent controversial U.S. "takings" case, *Kelo*, is a private corporate wolf in the sheep's clothing of a governmental authority. Queen's Counsel and towtruck driver meet during a hiatus in Court proceedings: Darryl is there for his ill-fated appeal to the Federal Court; Lawrie to see his son admitted to the bar. Darryl, in whom the obtuse and the acute struggle for ascendancy, recognizes what they have in common: children whose achievements they celebrate, whether those achievements are a hairdressing certificate from Sunshine TAFE or a clutch of University degrees from what is apparently an "Australian Ivy."

Darryl's haplessness and Candide-like frankness, and his various appeals to their shared humanity, evidently make Lawrie reflect, and then act, in an attempt to make constitutionalism intervene in a struggle between David and Goliath, or Darryl and a State acting as a lackey to ruthless commerce. Not only does he arrive out of the blue at the despondent Kerrigans' door on the eve of the threatened dispossession of the home that is their castle to offer to appeal their case *pro bono* to the High Court, but he wins the case by recognizing and convincing the Court of the merits of Aussie Everyman Darryl's lyrical tribute to home and family. He goes on to secure parole for Darryl's eldest son, Wayne, serving an armed robbery conviction, and to become Darryl's mate.

Some might judge *The Castle*, then, the cinematic double of the *Mabo* decision itself, which, as Elizabeth Povinelli argues, can be read as an attempt to redeem the common law from the stain of colonialism. Others might dissent, as Noel Pearson did in his scathing judgment of what the *Yorta Yorta* Court had made in 2002 of the flawed but historic promise of *Mabo*. In the ominously precedential *Yorta Yorta* decision, the Court concluded, 5:2, that the Native Title Act recognized only those interests in land "rooted in traditional law and custom," that is, effectively frozen in time in 1788, at the point of the British "Crown's acquisition of sovereignty and radical title" to the lands that were made to constitute Australia. The failure of the *Yorta Yorta* claim resulted from the insistence of the Chief Justice and Justices Gummow and Hayne (with whom Justice Callinan and a grudging Michael McHugh concurred) that only rights and interests in land deriving from traditional law and customs existing as at 1788 "that [have] had a continuous existence and vitality" until the present day are recognizable under the Act. The alternative – which

Justice McHugh reasoned was what the Keating government had intended in passing the Native Title Act - would potentially have been genuinely redemptive of Australia's common law: it would have enabled the incidents of Native Title to "be determined in accordance with the developing common law" of Australia.

"The present High Court," Pearson wrote, in passing judgment on the *Yorta Yorta* decision, "does not know what it is doing with the responsibility which their predecessors assumed with *Mabo*."¹¹ As Pearson dissented from the judgment of a majority of the Court in 2002, so I will elect to do from my first account of Sitch's film, reading *The Castle* through the lenses of history, expatriation, and teaching and writing about comparative constitutional law, a field of study that owes its modern origins to the aftermath of what Michael Kirby, increasingly a comparative constitutionalist's constitutionalist, described in his at once stinging and agonized 2004 dissent in *Fardon*: the original Schmittian nightmare, that paradigmatic "state of exception" constituted by the governance of Germany from 1933 to 1945.

What *The Castle* might teach us is that good lawyers take pains to bring constitutional challenges on behalf of the poor and disenfranchised and unpopular who are their fellows and their equals, the paradigms of whom in recent Australian constitutional history have been what are called in the U.S. "sexually violent predators" like the litigants in the 2004 decisions *Fardon* and *Baker*, and the asylum seekers and immigration detainees who were the subject of a trio of 2004 High Court decisions, *Al Kateb*, *Behrooz*, *Re Woolley*, and the 2005 decision *Ruhani*, all of these latter companion texts to *Dark Victory*. It

might lead us to interrogate Justice McHugh's exasperated evaluation of *Wik in Ward* (2002) as "one of the most controversial decisions of this court.... [which] subjected the Court to unprecedented criticism and abuse." It might counsel that, as Justice McHugh's subsequent reference to the greater criticism and abuse directed towards the U.S. Supreme Court in the wake of *Brown* might suggest, it might properly be said to be a duty of Constitutional judges to make unpopular decisions when, to paraphrase "the other Coke," the New Zealand jurist Sir Robin Cooke, later Baron Cooke of Thorndon, executive or legislature impinge on common law constitutional protections of individuals against the incidents of what I will mindfully call tyranny, particularly the right to genuine judicial review that was in varying ways at issue in the recent Australian sexually violent predator and asylum seeker litigation.

Justices Gummow and Hayne were rather more robust invokers of rights culture than I have been in this essay in the *Hindmarsh Island Bridge Case*, decided in 1998, the year I left Australia to live and work in the U.S.: they wrote of "fundamental common law rights" and invoked Dixon J's statement in the *Australian Communist Party Case* that the Constitution "may fairly be said" to assume "the rule of law." It is against that Australian judiciary, symbolized too by the judgments of Chief Justice Street and Justice Priestley of the New South Wales Court of Appeal in the *BLF Case*, that one might measure the High Court's recent jurisprudence characterizing judicial power.

Since 1998 such a thick understanding of common law constitutionalism has largely been replaced with a Court arguably more concerned about its own legitimacy than with

developing its constitutional expertise, a charge leveled by the Yale Constitutional scholar Paul Kahn at the Rehnquist Court in the wake of *Bush v. Gore*. Common law constitutionalism is heard most notably in Justice Kirby's increasingly distinct and dissentient jurisprudential voice, more fleetingly elsewhere, as when Chief Justice Gleeson and Justice Gummow joined Justice Kirby in a dissent in *Al-Kateb*, invoking the "principle of legality, which governs both Parliament and the courts," but envisioning the role of an Australian constitutional court as akin to that of British courts before the passage of the Human Rights Act:

[i]n exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided on abrogation or curtailment.

It might judge equally harshly Justice McHugh's suggestion in *Ward* that the persisting foundational constitutional injury to Australia's indigenous citizens is both beyond the capacity of law to redress and that (common) law has no role in declaring what indigenous "rights ought to be," a role apparently recognized in his *Yorta Yorta* dissent, and his conclusion that, absent a written Bill of Rights, Ahmed Al-Kateb's indefinite detention by legislatively-authorized executive fiat is the business of the tragedian but not of the jurist. Finally, it might direct the retired justice, an attentive if sometimes selective scholar of U.S. Constitutional jurisprudence, to the remarks made by Justice Felix Frankfurter, who, in 1949, in *Mapp v. Ohio*, signally called one aspect of the rights one has in the home *qua* castle "human rights," to Haim Cohn, David Ben-Gurion's emissary

to the Supreme Court Justices to get advice about an Israeli constitution: “What you need are independent judges, not a written constitution.”¹² The Gleeson Court seems determined to see only a “written constitution,” putting their (at best naïve) faith in narrow textualism, looking back to an exceptionalist past for guidance to our shared future rather than to the lessons of history. One such lesson, starkly visible to a comparative common law constitutionalist, might be that the Warren Court’s jurisprudence was a signal if now much-eroded chapter in rewriting the grimly racist majoritarian narrative constitutive of a nation.

¹ The Castle.

² Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, London and New York, 1996), p. 112.

³ David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin, Crows Nest, New South Wales, 2004), p. 280.

⁴ Drucilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (Routledge, New York, 1993), p. 23.

⁵ Cover, p. 9.

⁶ Cover, p. 4.

⁷ Cover, p. 7.

⁸ Cover, p. 9.

⁹ Marr and Wilkinson, p. 123, p. 133.

¹⁰ John Bryson, *Evil Angels* (Penguin, Ringwood, Victoria, 1988), p. 462.

¹¹ Noel Pearson, "The High Court's Abandonment of 'The Time-Honored Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong and Yorta Yorta*," 7 *Newcastle Law Review* 7 (2003), p. 4.

¹² Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States*, quoted in Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 2nd ed. (Foundation Press, New York, 2006), p. 1431.