

**TALKING TO JUDGES ABOUT THE ART OF JUDGING: AN ANNOTATED
PERFORMANCE TEXT**

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[We performed this paper at the Judicial Reasoning: Art or Science? conference held at the Australian National University in February 2009. We were performing on at least two levels: as academics and editors of a collection of judicially-authored essays on the art of judging but also, as we proclaimed at the outset, as Jester and Fool. We did not appear in costume as jesters or fools. We did not even appear as fairies, although one of us is well-known at Southern Cross University for donning fairy wings and fairy tales featured in this performance (as did sheep, land rights and playfulness). But then, our audience of judges had also left their costumes behind; there were no wigs or robes. They were in civilian clothes, recognisable only as judges through name tags. They were, in fact, unmasked.]

Greta began by acknowledging the traditional custodians of the land. Nicole then spoke. The accompanying slide portrays a fool, colourfully clad, balanced lightly and without any apparent concern at the edge of a precipice, and a jester in classic costume.]

Our focus is on judging as performance and judging as playfulness. We write as outsiders, in the guise of the Jester and the Fool: playful figures who are outside the law. Brian Sutton-Smith argues that the Fool ‘live[s] in the place where the “writ does not run”’.¹

We are also influenced, however, by our role as editors of a recent collection of articles on the art of judging. The articles were written by judges, retired judges and magistrates, and the collection was published as a special issue of the Southern Cross University Law Review in 2008.²

After we had received our twelve contributions, we were struck by some common themes. One of these was the emphasis on impartiality in judging. According to the contributors, impartiality and independence from the executive were essential attributes of judging. What happens, then, to judging at a time in which the executive arms of government in Western nations have assumed extraordinary powers in response to the war on terror, at a time designated by political theorist Giorgio Agamben and a host of

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¹ Brian Sutton-Smith, *The Ambiguity of Play* (1997) 212.

² (2008) 12 *Southern Cross University Law Review*.

other commentators as a ‘state of exception’?³ How can these qualities of independence and impartiality be maintained by judges, and at what personal cost?

We will begin by considering some of the features of the contemporary manifestation of a state of exception in Western nations and look at the implications for judging and the rule of law. We then want to turn to the second question. It is, we argue, in acknowledging the importance of the performative qualities of judging that we find one explanation as to how the process of judging can remain independent of the will of the executive and retain at least the appearance of impartiality and openness.

Furthermore, we will argue that judging is aligned with justice because it is not only performance but, incongruously enough, a form of playfulness. We will look at examples of playfulness in judging, in the *Mabo* decision⁴ and in the practice of dissent as exemplified in the judgments of the recently-retired Justice Kirby. We will conclude with an illustration of the ‘awfulness of lawfulness’, in the form of a decision in which the majority judges were not sufficiently playful to play with the rules: the *Al-Kateb* decision.⁵

THE MODERN STATE OF EXCEPTION

*[At this point we inserted some dialogue from a play, David Hare’s Stuff Happens, to illustrate the connection between the war on terror and the modern state of exception. Nicole explains that David Hare used the public statements of Western political leaders in writing his play, but he also used his imagination ‘when the doors close on the world’s leaders and on their entourages’].*⁶

*Rumsfeld: I liked what you said earlier sir. A war on terror. That’s good.
That’s vague.*

Cheney: It’s good.

Rumsfeld: That way we can do anything.^{7]}

Carl Schmitt was a German theorist who at the time of the Weimar Republic developed a theoretical model of a state of exception, in which the rule of law was set aside.⁸ Perhaps unsurprisingly, he would become a supporter of the ongoing state of exception set up by Nazi decree in Germany between 1933 and 1945. His ideas have been revived by a

³ Giorgio Agamben, *State of Exception* (Kevin Attell trans, 2005) 2, 87; see also Jude McCulloch and Bree Carlton, ‘Preempting Justice: suppression of financing of terrorism and the “war on terror”’ (2006) 17 *Current Issues in Criminal Justice* 397, 400–10; Lee Godden, ‘Terrorism: Reinvoking the barbarian to secure the space of civilisation’ (2006) 24 *Australian Feminist Law Journal* 69; Matthew Sharpe, ‘“Thinking of the extreme situation ...” On the new anti-terrorism laws or against a recent (theoretical and legal) return to Carl Schmitt’ (2006) 24 *Australian Feminist Law Journal* 95; and Antonia Quadara, ‘David Hicks in/as the event of terror’ (2006) 24 *Australian Feminist Law Journal* 141.

⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1; (1992) 107 ALR 1.

⁵ *Al-Kateb v Godwin* (2004) 208 ALR 124.

⁶ David Hare, *Stuff Happens* (2004) Author’s Note.

⁷ *Ibid* 24.

⁸ Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (George Schwab trans, 1985).

contemporary political theorist, Giorgio Agamben, who has contended that the modern Western political landscape resembles a state of exception in the ongoing erosion of the rule of law, the assumption of extraordinary powers by the executive, and the simultaneous dismissal of certain hitherto fundamental human rights. In the modern Western political landscape we find, according to Agamben, the obliteration of the normative aspect of law by governmental violence which *violates* international law but nevertheless is presented as an *application* of law.⁹

[An accompanying slide juxtaposes an image of the entrance to Auschwitz with an image of the orange-clad prisoners at Guantanamo Bay, kneeling behind barbed wire. At the conference dinner, an earnest young lawyer will tell us that we were wrong to compare Guantanamo Bay with a concentration camp. Furthermore, the reviewer of this article queried this juxtaposition and felt that the point needed to be 'carefully and thoughtfully unpacked'.]

The state of exception is exemplified in the concentration camps of Nazi Germany¹⁰ and in, according to Agamben, Judith Butler and many others, the extra-judicial arena of Guantanamo Bay.¹¹ Both environments encompass what Agamben refers to as 'the pure absolute and impassable biopolitical space.'¹² In both environments, human beings are stripped of their rights, expectations and humanity;¹³ they become, in Agamben's terminology, 'bare life', and as such can be killed with impunity.¹⁴ In such environments, *homo sacer* is controlled and disciplined by the biopolitical mechanisms of the sovereign state and has no recourse to the protection of law.

[In illustrating the ambiguous status of homo sacer, we use the image of an orange-clad prisoner prone on a stretcher and the following words from a judge, Lord Justice Steyn of the English House of Lords:

The question is whether the quality of justice envisaged for the prisoners at Guantanamo Bay complies with minimum international standards for the conduct of fair trials. The answer can be given quite shortly. It is a resounding No . . .¹⁵]

Even outside these archetypal states of exception, we find today, if not the lawless void which constitutes a state of exception, both political and judicial acceptance of biopolitical strategies as mechanisms to survey and discipline the bodies of accused terrorists, ongoing references to exceptionalism, and claims that the rule of law should not apply in the war on terror. In particular, after the Victorian Court of Criminal Appeal

⁹ Giorgio Agamben, *State of Exception* (Kevin Attell trans, 2005) 87.

¹⁰ Giorgio Agamben, *Homo Sacer: sovereign power and bare life* (Daniel Heller-Roazen trans, 1998) 20, 169.

¹¹ Agamben, above n 9, 4; Judith Butler, *Precarious Life: the Powers of Mourning and Violence* (2004) 60-2.

¹² Agamben, above n 10, 123.

¹³ Ibid 159.

¹⁴ Ibid 82.

¹⁵ Johan Steyn, 'Guantanamo Bay: The legal black hole', Twenty-seventh F A Mann lecture, delivered 25 November 2003 < <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>>.

set aside the two convictions of accused terrorist Jack Thomas, deep misgivings were expressed by various conservative commentators about the role of what was described as ‘the blackest of black-letter law’ in exceptional times.¹⁶ In fact, the Court of Appeal judges had ruled that the prosecution’s evidence was inadmissible because it had been obtained under conditions of inducement and pressure.¹⁷

In such a climate, the temptation is there for judging to be part of the power apparatus of the state. In circumstances in which the executive, with appropriate legislative endorsement, is exercising an extraordinary degree of power and justifying this by reference to exceptionalism, judges can confer legitimacy upon such exercises of power¹⁸ or, alternatively, choose to condemn it. Here we want to move on to look at the performative aspects of judging which assist the judiciary in maintaining their independence from the executive, and thus their prized impartiality.

JUDGING AS PERFORMANCE

[The image we used here is that of a grim-faced New South Wales Supreme Court judge, in wig and red robe, sitting in judgment beneath the Latin motto and coat of arms which symbolises and supports the authority of court.]

From the traditional positivist perspective, law is a concrete set of rules and principles. In law, as David Fraser has pointed out, we assume that truth resides in ‘sacred text and hierarchy’ and ‘it is heresy to go beyond the text’.¹⁹ However, as Margaret Davies has pointed out, there is no law outside or prior to performance – whether this be the ‘performative utterances of the monarch’ or the performances of the courtroom.²⁰ Law might endure as text but it is made as performance. Anthony Kubiak, a theatre studies scholar, believes that the structures of socio-political power, including legal structures, could not have come into being ‘without some implied and already recognised structure of performance’.²¹ From this perspective, law is a verb rather than a noun.²²

To focus on judging as performance is to venture into the relatively new discipline of performance studies. Performance studies scholars analyse an extraordinary range of social and cultural activities as performances and are interested, *inter alia*, in the politics of performance, and the relationship between performances and power.²³ Thus, looking at

¹⁶ See Editorial, ‘A battle lost in war on terror’, *The Australian* (Sydney), 21 August 2006 <<http://www.theaustralian.news.com.au>>.

¹⁷ *R v Thomas* (2006) 14 VR 475, 503.

¹⁸ As, in fact, the High Court majority chose to do in upholding the validity of Division 104 of the Criminal Code in *Thomas v Mowbray* (2007) 237 ALR 194.

¹⁹ David Fraser, ‘Truth and hierarchy – will the circle be unbroken?’ (1984) 33 *Buffalo Law Review* 729, 746.

²⁰ Margaret Davies, *Delimiting the Law. ‘Postmodernism’ and the Politics of Law* (1996) 97–98.

²¹ Anthony Kubiak, *Stages of Terror. Terrorism, Ideology and Coercion as Theatre History* (1991) 5.

²² This approach is similar to that taken by performance studies scholars, who view culture as a verb rather than as a noun. See Dwight Conquergood, ‘Rethinking ethnography: towards a critical cultural politics’ (1991) 58 *Communications Monograph* 179, 190.

²³ *Ibid.*

judging through the lens of performance studies theory enables us to address the question of how judges can remain independent of an increasingly powerful executive.

[In moving on to look at the performance of judging, we wanted a more light-hearted image of judges. We chose an image which had appeared in the Sydney Morning Herald at the start of the law year. A group of New South Wales Supreme Court judges are pictured leaving a somewhat impressive building – probably St James cathedral. Their wigs and red and white robes are fully visible. Several judges are beaming and one appears to be skipping down the steps. No doubt this misrepresents his gait but nevertheless, possibly because the judges’ costumes are similar to that of Santa Claus, the picture conjures up an atmosphere of playfulness.]

Of course, the performative, even theatrical qualities of the courtroom have long been recognised. It is arguable that the courtroom provides more moving and powerful performances than the theatre. Sir Alan Moses, Justice of the English Court of Appeal, begins his essay ‘The Mask and the Judge’ in our collection with an extract from another essay: one written in 1908 by an English theatre critic. The extract begins:

In the courts I find satisfied in me, just those senses which in the theatre, nearly always are starved.²⁴

In the courtroom, there are actors; there is live performance; there are costumes and even wigs, which Johan Huizinga in his classic work *Homo Ludens* compared to ‘the dancing masks of savages’²⁵ (we will come back to masks) and there is, of course, an audience. Of course, court personnel and even judges may prefer to distinguish the courtroom performance from theatrical performance. In 2007, a sheriff’s office had to point out that the courtroom was neither a café nor a theatre when people tried to reserve seats at Marcus Einfeld’s committal hearing.²⁶ In that same year, the High Court ordered a re-trial on the basis that the courtroom re-creation of a hold up, in which the accused was asked to assume the role of the robber, was unfair.²⁷

[Our audience laughs at this.]

If judging constitutes performance, what sort of performance is it? Here it is useful to turn to Victor Turner’s model of a social drama.

[We leave behind our modern judges in their medieval costumes and display now a primitive figure, wearing horns and brandishing ceremonial objects, silhouetted against a fire. After our performance, we will be approached by a young legal anthropologist, who is pleased that we referred to Turner.]

²⁴ Sir Alan Moses, ‘The Mask and the Judge’ (2008) 12 *Southern Cross University Law Review* 1, 1.

²⁵ Johan Huizinga, *Homo Ludens. A Study of the Play Element in Culture* (1950) 77.

²⁶ Kate McClymont, ‘Einfeld sent to trial on 13 charges’, *The Sydney Morning Herald* (Sydney), 14 December 2007, 3.

²⁷ Jonathon Pearlman, ‘Robber disguise ruled unfair’, *The Sydney Morning Herald* (Sydney), 14 December 2007, 7.

Victor Turner, a social anthropologist and co-founder of the discipline of performance studies, focused on investigating the relationship between social drama and aesthetic drama, between ritual and theatre. He argued that all performative genres develop from the social drama, which consists of the following sequence: breach, crisis, the application of redressive or remedial procedures, and either reintegration or the recognition and legitimation of schism.²⁸ He hastened to add that social dramas could take a different direction in times of major social change, when there was no longer consensus over values; at such times, the redressive procedures frequently failed to resolve conflict.²⁹

The performance of judging is part of the redressive or remedial process and Turner pointed out that often, during this phase of the social drama, a liminal or threshold space is created which permits scrutiny or introspection. At this point, the events leading up to and composing the crisis are frequently reproduced and then critiqued; at this point, there is performance.³⁰ Yet the performance of the courtroom and the performance of judging are quite distinct from the aesthetic performances which often take place once the social drama is over, and which address the *entire* social drama, imitating and assigning meaning to it.³¹ Judicial performance, and similarly, the performances of ritual which also comprise part of the 'redressive machinery of spontaneous social drama', '[attain] only a limited degree of reflexivity' because they '[lie] . . . on the same plane as the agonistic events being scrutinized.'³² Theatrical re-enactments of social dramas are 'a meta performance, a performance about a performance',³³ whereas legal performances and the performance of judging are *functional* performances *within* the social drama.

[We become a little daring now with our images, drawing on popular culture for our inspiration. Under the heading 'The judge and the mask', we superimpose an image of the masked and invincible avenger, of fiction and the movie screen: Batman.]

We have already referred to Lord Justice Moses' essay 'The Mask and the Judge'. Lord Justice Moses last year ruled that the decision of the British government to discontinue an inquiry into allegedly corrupt dealings between Saudi Arabia and a leading global weapons manufacturer was unlawful because it was made in response to threats from Saudi officials. Moses stated that 'No one, whether within this country or outside, is entitled to interfere with the course of justice.'³⁴

We have heard about the 'cloak' of judicial independence from David Brown³⁵ but Lord Justice Moses' focus is on the mask: the mask which distinguishes the judge from

²⁸ Victor Turner, *From Ritual to Theatre. The Human Seriousness of Play* (1982) 69. This process could be used to describe colonisation in Australia.

²⁹ Victor Turner, *The Anthropology of Performance* (1987) 35.

³⁰ Ibid 34-5.

³¹ Ibid 95.

³² Ibid 107.

³³ Ibid 107.

³⁴ Peter Walker, 'SFO wrong to drop BAE inquiry, court rules', *The Guardian* (London), 10 April 2008 <<http://www.guardian.co.uk/world/2008/apr/10/bae.armstrade>>.

³⁵ David Brown, 'Judging the judges' (1984) *Australian Society* 21, 21.

administrator and counsellor.³⁶ He observes that ‘we forget symbols to our peril.’³⁷ Moses draws parallels between theatre and judging in discussing the significance of the mask, which separates actors and judges from their audience.³⁸ He also sees the connection between judging and ritual. Law was once indistinguishable from religion and magic and derived its mystique from the status of judges as priests, prophets and oracles.³⁹ Despite the secularisation of law and the separation of law from religion and magic, the mask remains the essential symbol of judicial authority. He concludes:

Judges diminish the authority which a legal decision requires when they speak without a mask. Without the mask, they can no longer be distinguished from any other member of the executive or government; they are deprived of authority. The judge is least himself when he talks in his own person. Give him a mask and he will tell you the truth.⁴⁰

The judge’s mask is, of course, a metaphorical concept; it is not the ‘soft leather, thin and ambiguous’ mask⁴¹ of theatre. It is much more than the judicial costume and other trappings of judicial power,⁴² the ‘cloaks and wigs of archaic practice’.⁴³ It is ‘the form through which judges deliver their decisions’;⁴⁴ with the assumption of the mask comes the apparent abnegation of the individual and the purported ‘surrender of individual judgment’.⁴⁵

Thus it is the performative aspects of judging, judging as masked performance, which provides the necessary distance and independence from the executive. Furthermore, in donning their mask, judges are above and hence outside the law, like Batman or the sovereign in Agamben’s state of exception,⁴⁶ or even like Batman’s nemesis, the Joker, another masked figure outside the law. Judges, once masked, cannot simultaneously declare the law, and be subject to the law. Once unmasked, they are of course subject to the law. Indeed, the unmasked judge is perhaps *more* subject to the law than others, as the particularly punitive zeal of the state in relation to the activities of former judge Marcus Einfeld and scapegoat High Court judge Lionel Murphy suggests.

[Continuing with our Batman analogy, we use here the powerful image of Heath Ledger as the Joker, the outlaw whose damaged face is a form of a mask. On the screen appears the following statement from director of the Batman movie, Tim Burton:

³⁶ Moses, above n 25, 21.

³⁷ Ibid 15.

³⁸ Ibid 6.

³⁹ Ibid 9 – 10.

⁴⁰ Ibid 23.

⁴¹ Ibid 4.

⁴² Ibid 15.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid 11.

⁴⁶ Agamben writes: ‘That the sovereign is a living law can only mean that he is not bound by it . . .’; Agamben, above n 9, 69.

*The Joker is such a great character because there's a complete freedom to him. Any character who operates on the outside of society and is deemed a freak and an outcast then has the freedom to do what they want.*⁴⁷

We want to suggest that the outsider status which we voluntarily assumed at the beginning of the performance is as much part of the identity of the judge (once masked) as it is part of the identity of the outlaw.]

Yet there is more to judging than masked performance; it is more than the mask which distinguishes judging from, for instance, the meticulous rule-following of a murderous bureaucracy, from the 'awfulness of lawfulness'.⁴⁸ Judging, we would contend, is the pursuit of justice; thus it is akin to playfulness.

JUDGING AS PLAYFULNESS

[It is with the temerity of the jester that we stand before a group of judges and tell them that they are playful. Could this perhaps be contempt of court? We press on, using images from tarot cards of the Fool and the Hanged Man. After all, for a playful activity, judging can have some very dire consequences.]

What do we mean by playfulness? Roger Callois argues that there are two very different forms of play at either end of the spectrum of play: at one end, we find rule-bound orderly play and at the other we find unpredictable free play, characterized by 'diversion, turbulence, free improvisation and carefree gaiety'.⁴⁹ Mihai Spariosu calls these two types of play rational and pre-rational and locates the origins of both forms of play in classical Greece. According to Spariosu, these two forms of play have been engaged in an ongoing 'contest for cultural authority'.⁵⁰ One could argue that rational play is associated with the modernist impulse to create order, boundaries and classifications, while pre-rational play is aligned to postmodernism.

Play in its pre-rational guise can also be designated as playfulness: it is unpredictable and disruptive of all rules and expectations. Thus, playfulness seems quite distinct from the rule-bound character of rational play.⁵¹ In fact, playfulness exists outside such play; it encompasses 'play[ing] with the frames of play itself'.⁵² It is, of course, the tool of trade of the trickster and jester but is it the tool of trade of the judge?

⁴⁷ Quoted in Wikipedia <[http://en.wikipedia.org/wiki/Batman_\(1989_film\)#cite_note-Elfman-0](http://en.wikipedia.org/wiki/Batman_(1989_film)#cite_note-Elfman-0)>

⁴⁸ This phrase appears in the title of the following article: Sam Blay and Ryzard Piotrowicz, 'The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law,' (2000) 21 *Australian Year Book of International Law* 1. It has also been subsequently used by our colleague, Shelley Bielefeld, as the title of a poem.

⁴⁹ Roger Callois, *Man, Play and Games* (Meyer Barash trans, 1979) 13.

⁵⁰ Mihai I Spariosu, *Dionysus Reborn. Play and the Aesthetic Dimension in Modern Philosophical and Scientific Discourse* (1989) 6.

⁵¹ Sutton-Smith, above n 1, 148.

⁵² Ibid.

Many people would assume that judging is rule-bound orderly play; after all, as Margaret Davies has pointed out, the performance of law is ‘deadly serious’.⁵³ Playfulness is anarchic, irrelevant, capricious and unpredictable.⁵⁴ Surely there is no room for playfulness in the courtroom.

[We produce here the images of a bearded and defiant Jerry Rubin, appearing before the United States House of Un-American Activities Committee (HUAC) in bizarre fancy dress. In the hearing room, he is surrounded by men and women dressed in conservative outfits; in the second photo, a woman, encountering him on the steps outside the hearing room, looks positively horrified. This is an example of playfulness in a political rather than a legal setting. Nevertheless, the images suggest the conflict between playfulness in one of its most anarchic forms and law, as represented in the conservative, rule-bound proceedings of a quasi-legal hearing.]

At this point, there is an aporia in the text of our performance. At this point, we are both silently reflecting upon and editing out of the performance our own use of playfulness in a Ballina courtroom. In 1994, both of us participated in a breastfeeding protest after a young breastfeeding woman was evicted from the courtroom.⁵⁵ Alas, we do not have the defiant courage of the Fool in our first image, who struts near the edge of a precipice without any visible qualms. In front of an audience of judicial Big Daddies,⁵⁶ we refrain from mentioning our own unruly behaviour in the courtroom.]

According to Callois, forms of rational play are used to absorb and discipline playfulness.⁵⁷ Indeed, when playfulness has been introduced into the courtroom, it tends to undermine the authority of legal performances. An example of this can be found in the disruption of HUAC by activists in the 1960s. The Committee may not have been a court but it had successfully terrorised suspected Communists in a series of publicised hearings in the 1950s. HUAC was undone by the Yippies. Jerry Rubin, for instance, decided to view HUAC as a ‘costume ball’.⁵⁸ In his first appearance, he wore the costume of an American Revolutionary soldier. For his second appearance, he wore a Black Panther beret, Viet Cong pyjamas, bells and bullets, painted his body with psychedelic designs and carried a toy rifle.⁵⁹ When he attempted to return to HUAC for a final appearance as Santa Claus, he was refused entry.⁶⁰

[The next slide, headed the awfulness of lawfulness, depicts a succession of identical sheep with one black sheep in their midst.]

⁵³ Davies, above n 21, 132.

⁵⁴ Callois, above n 50, 13.

⁵⁵ Nicole Rogers, ‘Stepping out of the ivory tower with contemptuous breasts’ (1994) 19 *Alternative Law Journal* 115.

⁵⁶ See Ellen Donkin and Susan Clements (eds), *Upstaging Big Daddy. Directing Theater as if Gender and Race Matter* (1993).

⁵⁷ Callois, above n 50, 13.

⁵⁸ Jerry Rubin, *Do it! Scenarios of the Revolution* (1970) 60.

⁵⁹ *Ibid* 203.

⁶⁰ *Ibid* 207.

We would argue, however, that playfulness appears in judging where judging departs from the rules. The idea that judges decide cases simply by following rules has long since been dismissed as a myth; as Lionel Murphy famously stated, the doctrine of precedent is well-suited to a nation populated overwhelmingly by sheep.⁶¹ Judges can and do depart from rules in pursuit of justice. As Derrida pointed out, justice is ‘rebellious to rule’;⁶² it is singular, incalculable and elusive.⁶³ It ‘exceeds law and calculation’.⁶⁴ It is, in fact, akin to playfulness, to playing with the frames of play. And like playfulness, justice can be volatile and explosive.

We will now talk about a moment of playfulness in the history of judging – a departure from rules and precedents which indeed proved to be volatile and explosive but which was clearly done in pursuit of justice: the *Mabo* decision.

[At this point, Nicole concedes her place at the microphone to Greta. Normally, when we perform together, the one who is not speaking constantly interjects; students tell us in their written feedback sheets that they enjoy our ‘banter’. We have modified our normal performative behaviour in order to perform in front of judges. Other than in exceptional circumstances, the only person permitted to interrupt in a courtroom is a judge.]

The next slide depicts a fairy, wearing a crown of butterflies, with the caption: Do we believe in fairy tales?

Greta begins by thanking our host, Professor Michael Coper, for introducing us to playfulness. At this point, there is a non-judicial interjection, a robust ‘Steady on!’ from Michael Coper who is sitting in the front row, and this is greeted with laughter. Greta goes on to explain that she is referring to the playfulness of his work Encounters with the Australian Constitution, or what Nicole has described elsewhere as his unusually light-hearted approach to Constitutional Law.⁶⁵]

THE PARADOX OF JUSTICE: RESPONDING TO THE OTHER

As Derrida has pointed out, a just decision is one which is both regulated by law and unregulated.⁶⁶ He also has theorised that justice is impossible.⁶⁷ He writes that ‘justice would be the experience that we are not able to experience . . . there is no justice without

⁶¹ Lionel Murphy, ‘The Responsibility of Judges’ in Gareth Evans (ed), *Law, Politics and the Labor Movement* (1980) 5.

⁶² Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ (Mary Quaintance trans, 1990 ed) in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 22.

⁶³ Ibid 16-7.

⁶⁴ Ibid 28.

⁶⁵ Nicole Rogers, ‘The Playfulness of Constitutional Law’ (2005) 9 *Southern Cross University Law Review* 183, 186.

⁶⁶ Derrida, above n 63, 23; Derrida states that ‘for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation’.

⁶⁷ Ibid 27.

this experience, however impossible it may be, of aporia. Justice is an experience of the “impossible”.⁶⁸ Justice requires a singularity: a response to the other person that does not deny their difference.⁶⁹ Law, on the other hand, assumes sameness by dismissing differences as irrelevant, and reducing such differences to generalisations. The legal decision ‘simply consists of applying the law’ and is one where ‘the judge is a calculating machine’.⁷⁰

Law, certainly according to orthodox positivist thought, is independent of morality. However justice, according to Emmanuel Levinas, lies in an ethics of alterity, where the injustice suffered by another person calls forth a response from us.⁷¹ Judges are frequently called on to make ethical decisions and, in the oppressive political climate described earlier in this paper, such decisions may be politically unpopular. Yet judges must make their decisions by taking the long view and remembering the future. Their performance of law becomes part of the fabric of history and anticipates that history.

Thus, the finding of an aporia in the *Mabo* case permitted a ‘line of flight’⁷² that has delivered some measure of land justice and hope for Indigenous Australians. The decision however falls short of a justice that engages with Indigenous perspectives. It legitimises the ‘act of state’ that ushered in white sovereignty over the continent. As Watson writes, ‘Aboriginal sovereignty [is] unspeakable’.⁷³ The case anticipated the speech made by Prime Minister Kevin Rudd in February 2008, known as ‘the apology’, and this speech provided relief for some members of the stolen generation and a moment of redemption for white Australians.⁷⁴

PLAYFULNESS, LAND RIGHTS AND MABO

Greta identifies the starting point for land justice in Australia in the fight by the Gurindji people of the Northern Territory for their land. They were working in the pastoral industry for rations on their traditional lands which were ‘owned’ in white law by Lord Vestey. Vincent Lingiari and his mob decided to walk off, sit down and go on strike. Unlike other striking workers they did not want to receive wages; instead, they wanted their land. After an eight year struggle for land justice, the Gurindji people succeeded in having an area of their own land excised from the Vestey pastoral lease in 1975.

[In the accompanying slide, Prime Minister Gough Whitlam pours a handful of earth in Vincent’s hand to symbolise the transfer in white law of traditional lands to the Gurindji people. This powerful performative moment has been described in the Kev Carmody/Paul Kelly song, From Little Things Big Things Grow.

⁶⁸ Ibid 16.

⁶⁹ Ibid 23.

⁷⁰ Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001) 74.

⁷¹ Emmanuel Levinas, *Humanism of the other* (Nidra Poller trans, 2003).

⁷² Paul Patton, *Deleuze and the political* (2000) 126.

⁷³ Irene Watson, ‘Settled and unsettled spaces: are we free to roam?’ in Alison Moreton-Robinson, *Sovereign subjects: Indigenous sovereignty matters* (2007) 20.

⁷⁴ Gary Foley, ‘Duplicity and deceit: Rudd’s apology to the Stolen Generations’ (2008) 36 *Melbourne Historical Journal* <http://www.kooriweb.org/foley/essays/essay_28.html>.

Without the technological means to play this song, Greta instead recites some of the lyrics.

*British Lord Vestey and Vincent Lingiari were opposite men on opposite sides
Vestey was fat with money and muscle
Beef was his business
Broad was his door
Vincent was lean and spoke very little
He had no bank balance
Hard dirt was his floor.*

*Gurindji were working for nothing but rations
They picked up their swags and started off walking
At Wattie Creek they sat themselves down
Vincent said we're sitting right here till we get our land.*

(Vincent goes to Sydney and gets yarning.)

*Eight years go by
Eight long years of waiting
Till one day a tall stranger appeared in the land
And he came with lawyers and he came with great ceremony
And through Vincent's fingers poured a handful of sand
This is the story how power and privilege cannot move a people
Who know where they stand and who stand in their law.]*

Shortly after this incident, the first land rights law, the Northern Territory *Land Rights Act*, was drafted by the Whitlam government and subsequently passed by the Fraser government. In 1986, the Gurindji people's claim under this legislation was successful. These events preceded the ground-breaking *Mabo* decision, in which some of the central myths of legitimacy of the Australian legal system were challenged and displaced and others reinforced.

[We now show an image of Eddie Mabo, wearing a sarong, standing with a companion on the island of Mer.]

Playfulness is a serious business which allows rules to be re-shaped and new possibilities to emerge. This is apparent in the *Mabo* case. Previously, the dispossession of Aboriginal people had been legitimated through the fiction of 'terra nullius' and an earlier attempt to displace this fiction in the *Gove Land Rights* case⁷⁵ had failed. Justice Blackburn, sitting as a single judge, had acknowledged the complexities of the laws governing traditional Aboriginal societies, describing 'a subtle and elaborate system highly adapted to the country in which the people led their lives'.⁷⁶ He called this 'a government of laws and

⁷⁵ *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141.

⁷⁶ *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141, 267.

not of men'.⁷⁷ Nevertheless, according to Justice Blackburn, the plaintiffs did not have a proprietary relationship to their land.⁷⁸ Until the *Mabo* decision, therefore, the common law was 'frozen' and racial discrimination was embedded in it. The *Mabo* case provided the High Court with an opportunity to revisit the matter.

The first chance meeting between Eddie (Koiki) Mabo, then working as a gardener at James Cook University, and academic historian Henry Reynolds occurred many years before the proceedings came before the High Court. In the intervening period, Reynolds organised a conference on land rights, a decision was made to bring the challenge, and Justice Moynihan of the Queensland Supreme Court undertook a fact-finding expedition to the Murray Islands.

[At this point, we put up a slide of the Murray Islands – an idyllic tropical island paradise ringed by blue water, as seen from the air. The caption reads 'My island home?' We would like to play the Warumpi Band's My Island Home, from 1987, made famous in a later version by Christine Anu. Yet again we are thwarted; there is no equipment to enable us to do so. Instead, Greta recites some of the lyrics.

*They say home is where you find it
Will this place ever satisfy me?
For I come from the saltwater people
We always lived by the sea . . .
My island home is waiting for me. . .
I close my eyes and I'm standing
In the boat on the sea again
And I'm holding that long turtle spear
And I feel I'm close now
To where it must be
My Island home is waiting for me.]*

The Supreme Court of Queensland met in a public hall under the sign *Gelar Meta Ged Sikarem*, which meant 'Protect the law of home and land'. The purpose of this inquiry was to collect evidence about Meriam law and ascertain the facts for the High Court hearing. The islanders demonstrated that they had strict rules about interests in land; for instance, prior to colonisation, they had harsh penalties for trespass. There were court records documenting their extensive litigation in relation to disputes over land.

[The next slide shows the Murray Islanders in traditional costume, dancing. The caption reads 'Dancing the law'.]

The Murray Islanders claimed that they had never ceded their property rights and that their traditional law was still in operation. They further claimed that their native title rights were recognised at common law. In order to demonstrate that the 'tide of history' had not washed away their connection to land, the islanders danced their law for Justice

⁷⁷ *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141, 267.

⁷⁸ *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141, 273.

Moynihan. Thus, dancing, song, art and other performance, as well as photographic and written records, provided a compelling body of evidence to document the land law of the Murray Islanders.

An attempt by the Queensland government to sabotage the claim failed when legislation passed specifically for that purpose was held to contravene the *Racial Discrimination Act*.⁷⁹ The land rights challenge then arrived in the High Court. In the *Mabo* case, six judges held that the Murray islanders had native title rights to their land recognised in the common law. The dissenting judge was Justice Dawson.

In *Mabo*, the High Court had to come to terms with a completely different system of law, made up of quite different performative moments and occasions to those which are of significance in the Australian legal system. The meeting of two legal systems is symbolised in the accompanying slide.

[The slide depicts the white lawyers who represented the Murray Islanders, Greg McIntyre and Brian Keon-Cohen, surrounded by islanders. The lawyers, despite their otherwise relatively conservative costumes, are wearing woven hats and sipping on coconut juice. During this 1989 visit to Mer, McIntyre and Keon-Cohen viewed the mounds and stones which represented property boundaries, were shown traditional methods of food production, and learned to speak and read some of the local language.]

Here, law was being performed on another stage, with new actors. Yet it was the introduced Australian law which was the most powerful, and ultimately the success of the *Mabo* case depended upon recognition of Murray Islander law by Australian judges, in an Australian courtroom.

The High Court was criticised by some commentators for recognising the legitimacy of the Murray Islanders' traditional rights to land; *Mabo* was described as the decision of an activist court. The current Chief Justice of the High Court, Robert French, has recently pointed out that there are many definitions of judicial activism;⁸⁰ he refers to 'the almost meaningless rubric of "judicial activism"'⁸¹ but acknowledges that in Australia, debate about judicial activism is triggered most often in the context of judicial review of executive action. Another current High Court judge, Dyson Heydon, has been more critical of judicial activism, including the activism in the *Mabo* case, in a 2003 speech delivered at a Quadrant dinner.⁸² Indeed, the *Mabo* decision made many people deeply uncomfortable. The judges had demonstrated their power to play with precedent and with the texture and rules of the common law.

Despite the inherent playfulness of the decision, the High Court did not bestow upon the holders of traditional native title rights the same sort of legal recognition enjoyed by

⁷⁹ *Racial Discrimination Act* 1975 (Cth); see *Mabo v Queensland* (1988) 166 CLR 186.

⁸⁰ Robert French, 'Judicial activists – mythical monsters?' (2008) 12 *Southern Cross University Law Review* 59, 67.

⁸¹ *Ibid* 73.

⁸² Dyson Heydon, 'Judicial activism and the death of the rule of law' (2003) Jan/Feb *Quadrant* 9.

owners of other property rights. Native title rights were usufructory or bare; they did have the fullness of other property rights. Furthermore, they were inferior to any competing non-Indigenous use, and their destruction did not warrant compensation. Michael Mansell has described these rights as only a step above ‘mere possession’.⁸³ Thus, the ‘legacy of unutterable shame’⁸⁴ remained. Peter Fitzpatrick has observed that law is not innocent of racism.⁸⁵ The Australian common law was still tainted by racial discrimination, and the inferior status of the land rights conferred on Aboriginal people suggested their inferior legal status.

The *Mabo* decision displaced the myth of terra nullius, but the Court did not attempt to disturb the stability of the Australian legal system by discarding its foundations, and nor did it permit a ‘fracturing’ of the principles of this system.⁸⁶ A white-washed version of terra nullius was retained. The so-called ‘judicial revolution’⁸⁷ had ushered in but a ‘cautious correction’.⁸⁸

[The woman chairing our session stopped Greta here as we were out of time, and the remainder of our paper remained unperformed. But here it is anyway – the text of the missing performance, in which we intended to extend and finish our discussion of judging as playfulness.]

THE ‘AWFULNESS OF LAWFULNESS’: THE *AL-KATEB* CASE

Greta pre-empts her discussion of the *Al-Kateb* case by considering the playfulness of the High Court’s ‘great dissenter’.⁸⁹ recently-retired Justice Michael Kirby. The *Al-Kateb* case is but one decision in which Justice Kirby’s powerful dissent, as we have argued in another context, ‘provide[s] a contextualised critique of the often legalistic judgments of his fellow judges’ and ‘allow[s] us to deconstruct the legalistic reasoning of the majority’.⁹⁰

[The slide depicts a painting by Ralph Heimans of seven judges, all wigged and robed in the red robes of the New South Wales Supreme Court. The painting is entitled Radical Restraint: A Portrait of Justice Michael Kirby. Four judges are grouped together in collegial solidarity. Two others are engaged in discussion. The faces of these six judges are either completely or partially obscured. In the foreground is Justice Kirby, also

⁸³ Quoted in Greta Bird, *The Process of Law in Australia – Intercultural perspectives* (2nd ed, 1993) 323.

⁸⁴ *Mabo v Queensland (No 2)* (1992) 107 ALR 1, 79 (Deane and Gaudron JJ).

⁸⁵ Peter Fitzpatrick, ‘Racism and the innocence of law’ (1987) 14 *Journal of Law and Society* 119, 119.

⁸⁶ *Mabo v Queensland (No 2)* (1992) 107 ALR 1, 28 (Brennan J).

⁸⁷ See Margaret Stephenson and Suri Ratnapala, (eds), *Mabo: A Judicial Revolution – The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993).

⁸⁸ Garth Nettheim, ‘Judicial revolution or cautious correction’ (1993) 16 *University of New South Wales Law Journal* 1. See also Phillip Falk and Gary Martin, ‘Misconstruing Indigenous sovereignty: maintaining the fabric of Australian law’ in Moreton-Robinson, above n 74, 34. The authors write: ‘in the *Mabo* decision, the High Court conveniently found that the issue of Indigenous Sovereignty was non-justiciable.’

⁸⁹ Michael Lavarch, ‘Great Dissenter is no ordinary judge’ *The Australian* (Sydney), 30 January 2009 <<http://www.theaustralian.news.com.au/business/story/0,,24981425-17044,00.html>>.

⁹⁰ Greta Bird and Nicole Rogers, ‘Art or artifice: Judging in troubled times’ (2008) 12 *Southern Cross University Law Review* vii, xi.

attired in red robes but without his wig. He alone is facing the viewer, a half smile on his face.]

Justice Kirby has written of the importance of dissent, and pointed out that dissenting viewpoints can become the orthodoxy of the future.⁹¹ He has stated that ‘the right to disagree or dissent from the majority view in courts when things seem wrong or unjust is one of the most precious freedoms that exist in a democracy.’⁹² He is playful in the sense that he enjoys the creativity which the common law tradition offers judges, and exploits the aporias present in the text of statutes. Indeed, he has been described as a court jester.⁹³ Kirby is a staunch defender of human rights and draws on international law in order to play with the common law. His dissenting judgments in cases like the *Al-Kateb* case move law towards Derrida’s impossible justice. In a globalised world, Kirby’s approach is both radical and prudent.

[The next slide, entitled ‘An unlawful non-citizen is being detained’, depicts the benign visage of Iraqi asylum seeker Abbas Al Khafaji, who together with Palestinian non-citizen Ahmed Al-Kateb unsuccessfully sought freedom from indefinite detention in the High Court proceedings known as the Al-Kateb case.]

Ahmed Al-Kateb was declared to be an unlawful non-citizen upon his arrival in Australia. According to the *Migration Act* 1958, he could therefore be held in detention until he was deported. However, Al-Kateb could not be deported anywhere as he was a stateless person. On the majority’s positivist black letter interpretation of the statute, Al-Kateb could therefore be held in detention for the rest of his life. It did not matter why Al-Kateb had arrived in Australia, and the morality or injustice of this outcome was also irrelevant. Justice McHugh wrote that ‘whatever criticism some – maybe a great many – Australians make of such laws, their constitutionality is not in doubt.’⁹⁴

We would propose that the Australian legal system must become more cosmopolitan. Our current system with its focus upon the rights-bearing individual citizen must adapt to changing global phenomena; one such phenomenon is the flood of refugees who are either stateless or the citizens of dysfunctional states that can no longer supply their basic human needs.

[We display a picture of a child throwing a stone at a tank. The caption is ‘Facing violence’.]

Violence and senseless destruction are an unwelcome part of the daily existence of people in many parts of the world. Children come face to face with weapons of destruction. We who live in peace, in a country without violent conflict, can fail to

⁹¹ Michael Kirby, ‘Consensus and dissent and the proposal for an Australian Statute of Rights’ (2008) 12 *Southern Cross University Law Review* 129, 137.

⁹² *Ibid* 143.

⁹³ Jonathon Pearlman, ‘Jesters brought humour to High Court’, *The Sydney Morning Herald* (Sydney), 3 September 2007, 1.

⁹⁴ *Al-Kateb v Godwin* (2004) 208 ALR 124, 137 (McHugh J).

understand the plight of people who leave their homes and enter Australia illegally. If we think back to the refugees who escaped the brutalities of Nazi Germany during and before the Second World War, we can gain an insight into the desire for peace and security which motivates Australia's asylum seekers.

[The next image is of an Iraqi city street. People, including a man and child, walk through the war-torn ruins. This caption simply reads 'Home'.]

Home is a word which conjures up safety, security and stability. It is a place to bring up family and welcome friends. Home can be destroyed in an instant. Many of the people who come to Australia have experienced the trauma of losing their home. They come here in the hope that their lives will be improved. What does the legal system offer them?

[The slide shows people struggling behind the barbed wire fences of an Australian detention centre, seeking to climb over them.]

Here we see the result of the search for asylum. They are locked away in detention centres.

Derrida states that hospitality is impossible, because it requires admitting a person without enquiring who they are.⁹⁵ As Derrida writes, 'absolute hospitality requires that I open up my home and that I give not only to the foreigner . . . but to the absolute, unknown, anonymous other, and that I *give place* to them . . . without seeking either reciprocity or even their names.'⁹⁶ This is not possible. He states: 'We would not simply leave the house with no doors, no keys and so on and so forth'.⁹⁷ While unconditional hospitality may be impossible, Derrida himself was involved in political activities to assist asylum seekers. There can be a movement towards hospitality when we offer sanctuary and asylum to those who are different to ourselves.

There was no offer of sanctuary or asylum in the *Al-Kateb* case. Justice Hayne noted that 'because Immigration Detention Centres are places of confinement having many, if not all, of the physical features commonly found in prisons, it is easy to equate confinement in such a place with punishment.'⁹⁸ However, he and the other majority judges did not make this mistake. According to the majority, *Al-Kateb* was not being punished, but merely confined. The razor wires, the many invasions of privacy, the boredom and the hopelessness were irrelevant in their interpretation of the non-punitive nature of such detention.

[The final image is the photo of an unhappy child, clutching the barbed wire of the prison fence and peering through the wire with a look of stoic despair.]

⁹⁵ Jacques Derrida, *Of hospitality* (Rachel Bowlby trans, 2000).

⁹⁶ Ibid 25.

⁹⁷ Paul Patton and Terry Smith (eds), *Jacques Derrida Deconstruction Engaged: The Sydney Seminars* (2001) 101.

⁹⁸ *Al-Kateb v Godwin* (2004) 208 ALR 124, 190 (Hayne J).

Here we illustrate yet another example of ‘the awfulness of lawfulness’, the *Re Woolley* case⁹⁹; in this case, the High Court held that it could not release children from detention, despite evidence of physical, sexual and mental trauma and despite Australia being a signatory of the Convention on the Rights of the Child. Thus we conclude our discussion of playfulness and its antithesis, lawfulness, with the evocative image of a small child confined behind barbed wire.

‘To ban play is, in fact, to massacre the innocents.’¹⁰⁰

As we write our paper for publication, we reflect on our arguments and ask whether play is the path to impossible justice.

⁹⁹ *Re Woolley, Ex parte Applicants M276/2003* (2004) 210 ALR 369.

¹⁰⁰ Turner, above n 30, 169.