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SHIFTING GROUND: CONTEXT AND CHANGE IN TWO AUSTRALIAN LEGAL SYSTEMS

Richard Mohr

ABSTRACT. Indigenous land claims in Australia have brought Indigenous law into contact with the Australian common law, changing some of the terms of each of these systems of law. By tracing these contacts back to one of the first engagements, when the Yolngu people of northern Australia framed a petition to parliament in pictorial descriptions of their law, I explore the means by which changes have occurred. This is characterised as a process of mutual framings and re-framings. The delicate and contentious issue of meaning change in Yolngu law and in Australian common law's dealings with Indigenous law is examined in order to illuminate the ways in which meaning change may be understood in an epistemological and semiotic framework. The most recent common law decisions in land claims have begun to recognise a mutual relationship between common law and Indigenous law. This has occurred most notably at the edges of western law's epistemological practice, in its dealings with historical and Indigenous sources. The success of Yolngu epistemological and legal engagement with the dominant Australian society and its law suggests a means of understanding some of the ways in which meaning may change in response to changing contexts. This relationship can be seen through Yolngu categories of "inside" and "outside", or in terms of the cultural context of semiotic interpretation. Meanings may change within each frame, not through the simple incorporation or adoption of "outside" concepts, but through shifts in the broader context of meaning.

INTRODUCTION

In 1963 the Yolngu people of north east Arnhem Land in Australia's Northern Territory sent a petition to the Federal Parliament. This was no ordinary petition. There were two pages each in a Yolngu language, Gumatj, with an English translation, which were pasted to pieces of bark framing the petition. 1 Each of these frames was painted with designs describing Yolngu traditional legal relationships to the lands claimed by the petition, which were threatened by mining, since the Federal Government proposed to excise them from the existing Aboriginal reservation. The designs belonged to the two clans responsible for those lands, one from each of the two moieties into which all Yolngu are divided.² Since these petitions were strikingly attractive and did not fit conveniently into a filing cabinet, rather than suffering the fate of more conventional petitions they gained considerable attention. While they referred to specific lands and clans, they were inclusive of both the Yolngu moieties and were addressed to the Anglo-Australian population through their English translations. They were received by the House of Representatives, stamped and signed certifying that they were "in conformity with the standing orders of the House". The petitions, framed in relevant aspects of Yolngu law, were thus certified as Australian legal documents.

This encounter was an important step in a long and continuing process of framing and re-framing played out between Indigenous law and common law which offers some insights into legal semiotics. In particular, these interactions over four decades allow us to see ways in which meaning has changed. This investigation of the way representatives of the two legal systems have dealt with the delicate legal and political issues of changing meanings is intended

to illuminate the semiotic issues of meaning change. Shifts in meaning present different challenges to each of these disciplines: Yolngu law, common law and semiotics.

Yolngu law refers to origin stories as the basis of the links between particular clans and portions of land. The ancestors and spirit beings created the land and its characteristic sandhills, water holes and other features, which can be identified, through these stories, with animal species representing particular clans or moieties. These relationships between land and humans were laid down at the time of creation and are seen to be immutable. Yolngu law is unwritten, though it relies on objects (such as sculpted wood, and constructions of woven string, feathers etc) and designs (bark paintings) to communicate and strengthen the force of its principles. The Yolngu denial of legal change leads to difficulties in acknowledging change of meaning in the terms which refer to important aspects of the law. Yolngu resistance to explicit change in meaning will be seen in the difficulties posed by shifting clan associations as a result of demographic circumstances, and by problems posed when neighbouring groups have changed moiety relationships.

Change in the common law proceeds through statute and judicial interpretation relying on precedent. While precedent allows for change over time, the delicacy of these shifts is signalled in the common law by the attention which judges pay to reconciling their decisions with precedent or to reinterpreting or otherwise overcoming precedents which are unfavourable to new meanings. Several such instances will be seen in the present analysis. The role of precedent in judicial interpretation is of particular interest to a semiotics of changing meanings. Despite the common law's self-consciously oral tradition, these justifications and denials of change are usually to be found in the written record of judicial decisions.

A semiotics based on correspondence between a representamen or signifier and its object is required to explain shifts in meaning: how is it that the signifier *s* signifies *O 1* at time [1], while it signifies *O 2* at time [2]? The interpretant, as a matrix of social and cultural meaning systems, offers one of the possible mechanisms for such a shift.³ However, as a bearer of the weight of cultural heritage the interpretant of any particular sign provides a code which may be either overdetermined or inexplicit. A structural explanation may see meaning embedded in a web of significations, with a shift in anyone reverberating throughout the system, making for a catastrophic model of meaning change. Jacques Derrida suggests an alternative post-structural explanation, allowing for a play of meaning around a centre which provides a point of reference, while not limiting all interpretations.⁴ In order to explore the applicability of these or other alternative explanations of meaning change the present study asks of these two highly specified meaning systems, Yolngu law and Australian common law: how is it that the interpretation of particular terms adjusts to social and cultural changes? Of course, both systems have been involved in a matrix of vast changes over the past thirty or forty years, so I focus this inquiry on the relationship between the two sets of laws.

From at least the time of the bark petitions this is a relationship which has been characterised by mutual framings. The colonial construction of the otherness of Indigenous peoples by means of frames such as Orientalism has been widely analysed. Colin Perrin has characterised the Western approach to Indigenous rights as one of anxiety, based in a recognition of the distinctiveness of Indigenous cultures and concern to maintain the unity of the Western nation. In the ambiguities of time and place within which Indigenous peoples are framed by Western thinking we find "an assertive distance and an anxious proximity" which Romi Bhabha sees as a doubled or a split frame.⁵ This is a split Western frame which tries to locate or limit Indigenous culture and claims. In this study I seek also to understand the frame which

Indigenous law and struggles for land have placed around the common law. In the contest over interpretation, meaning systems are engaged in a struggle to frame the relevant discourse. In this sense, struggles for land can also entail semiotic struggles over the choice of an interpretive framework.

In this study I focus on some of the ways particular practitioners of Indigenous and common law have responded to shifting meaning, and how they have tried to induce meaning changes in other systems.⁶ They have not acted in a social or political vacuum, but have been engaged in promoting their interests and in applying and defending their views of a legal and epistemological order. The conflicts considered here have arisen in the material world of mining interests, property and land claims, and they continue to refer to specific portions of land. While comparing common law and Yolngu law as having some equivalence as legal and epistemic systems, their vast inequalities in power and resources cannot be overlooked in understanding the outcomes of these contests. A consideration of these conflicts offers a valuable field of inquiry because, beyond their specific referents, to land, property or sacred objects, they are framed as arguments within and between highly elaborated epistemic frameworks which take any meaning change very seriously. In this discourse between systems based on consistency of meaning, signifiers (in the form of laws or symbols) persist over time. In attempting to shift those meanings to signify something different, while respecting the signifier, the interpretant is available as a medium of change. Alternative meaning or legal systems offer a ready made framing device to bring to bear on interpretive contests. As we will see, while each legal system may sometimes deny such change, it has often enough been so central to their internal and mutual conflicts that shifts in meaning have become the subject of discourse, if not always of dialogue. This study explores the possibility and nature of the impact of external systems of meaning as frames, which may not enter directly into the same cultural field, but which exercise interpretive influence from the background, outside the picture, as it were.

The framing of the petitions to the Australian Parliament in bark paintings of Yolngu law was a significant and innovative attempt to use the power of the frame to shift meaning. Throughout this story of petitions, art works, court cases and legislative change regarding Indigenous rights to land there runs a common theme of such efforts to influence the discourse within which each group's claims are assessed. Much of this colourful story, encompassing some of the most important events in Aboriginal land rights in Australia over the past forty years, has been told before by anthropologists,⁷ Aborigines,⁸ lawyers,⁹ and even missionaries.¹⁰ These are valuable sources for a semiotic analysis. For four decades each of these competing conceptions of law and land has changed as a result of the framing and re-framing of each others' discourse. Apart from occasional direct engagements, where a judge may comment on the mutability of Yolngu law or a Yolngu representative defines sacred objects in terms of the common law, the systems have rarely engaged in direct exchanges of meaning or redefinition of each other's terms. Instead the meanings of one legal framework have altered the context in which those of the other is understood, in the way that a picture takes on a different appearance depending on the frame in which it is displayed.

In tracing these interactions I begin by considering the differing conceptions of property used by the Yolngu and the judge in the land rights case *Milirrpum v. Nabalco* (1971) which followed the Parliament's rejection of the land claims in the bark petitions. In particular, I consider the arguments from European precedent put by the judge, and the degree to which the Yolngu accommodated common law concepts and institutions in their arguments and tactics. This strategy is traced to Yolngu epistemology and its implications for the use of art and law in

various land rights campaigns. Beginning with the possibility of change in Yolngu law as an issue in the *Milirrpum* case, I then consider the ways in which change has been accommodated, accepted or denied in Yolngu law and in common law. That discussion also offers an opportunity to mention the ways Australian common law has accepted a concept of native title subsequent to the *Milirrpum* case, notably in *Mabo v. Queensland (No.2)* (1992). In that historic case the High Court rejected the applicability of terra nullius to Australia and accepted that, under limited circumstances (including those of the Meriam people on whose behalf Eddie Mabo and others claimed the Murray Islands), native title had survived colonisation as a traditional, communal and inalienable right to land. 11 In more recent cases judges have re-evaluated change in Indigenous law which has led to some understanding of the interaction between the two cultures at the level of practice and epistemology. Yolngu epistemological practice (through art and education) has proven to be effective as a means of engaging with the ideas of the dominant Australian society and its law. This suggests a means of understanding some of the ways in which meaning may change in response to changing contexts. These points are taken up and elaborated in conclusion.

1. PROPERTY

Following the attention received by the bark petitions, the Australian Parliament debated Yolngu representations and set up a select committee to look into the issues. The ruling conservative parties maintained their determination to excise land for mining from the Aboriginal reserve, and bauxite mining commenced in 1968. The Yolngu lost this battle but the war continued. Once mining commenced and they saw the destruction they had feared being realised on their lands, the Yolngu turned to the courts. They challenged the legality of the aluminium company Nabalco's use of the land and the Commonwealth government's excision in the Supreme Court of the Northern Territory.¹² Not only did this case test Aboriginal land rights in court for the first time, but it also brought Yolngu law into the Australian courts. If the bark petitions framed Australian law within Yolngu law, Yolngu law was now within a common law frame. In preparation for that case the Yolngu again revealed sacred objects, in this case the holy rangga, objects often made from hard wood which are kept hidden at the bottom of waterholes except when they are required for secret ceremonies. The elders showed these to their lawyer and to one of the anthropologist expert witnesses in the case to indicate that these were the clan's title deeds to the land. This act of showing and explaining was considered to impart the necessary knowledge. "Now you understand," said the Yolngu representatives. ¹³ These objects were not, in the end, produced in court although the Yolngu recognised the court as the white man's law place where such secret materials could be revealed. So the Yolngu accepted the court as the frame of the common law, to which they would try to communicate their own conceptions of land tenure. More significant was their analogy of common law title deeds with the rangga. This is one of the few instances in which Yolngu law can be seen to have accepted common law definition of Yolngu terms. It was an analogy rejected by the common law.

The court heard extensive evidence from anthropologists and Yolngu on the nature of their law and rights to land under that law. The case turned on these two issues. Justice Blackburn acknowledged that Yolngu law was, indeed a system of law, yet he denied that Yolngu law contained a notion of proprietary rights. The extensive revelation of Yolngu law in the court convinced the judge that he was indeed seeing an alternative legal system.

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from

the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.¹⁴

Nevertheless, Justice Blackburn decided that the lands of Australia had been neither ceded nor conquered but had been "settled" by the British in declaring their sovereignty.¹⁵ The authorities on which the judge relied defined such lands as "desert and uncultivated".¹⁶ The question of cultivation loomed larger in the sources cited by Justice Blackburn than did the question of Indigenous law. He referred to Kent's *Commentaries on American Law*, citing Vattel's earlier doctrine of the duty of civilized people to develop the earth's resources, and the Massachusetts Puritans' view that this was "a command of God given at the Creation".¹⁷

Of greater legal standing, if having a shorter pedigree than these puritan beliefs or their purported origin in the creation, were Justice Blackburn's arguments from property law, again relying heavily on Blackstone's commentaries, which Nancy Williams has traced to Grotius and Pufendorf.¹⁸ Peter Fitzpatrick traces "the long occidental romance between law and agriculture"¹⁹ to a colonial imperative to establish distinctions between European settlers and more "primitive" peoples.

With "primitive common ownership", declared Grotius, men were content "to feed on the spontaneous products of the earth, to dwell in caves". They did not constructively tame nature. What Grotius was thus content to learn from "sacred history", Locke arrived at with no history at all. The savage was a wanderer or related to land in an indefinite communal way, not sufficiently "removed from the common state nature placed it in". In either capacity, the savage had no sufficiently fixed relation to things to support a legal right to them. Property was the basis of law. In the state of nature, Austin confirmed: "men have no legal rights".²⁰

This Hobbesian idea of a state of nature characterised by the absence of property and the absence of law²¹ survived well into the nineteenth century and continued to justify colonial appropriation in Justice Blackburn's decision. He focused considerable attention on the late eighteenth century, as the period in which Australia was colonised, and then devoted forty pages to a discussion of the colonial and post-colonial common law in North America, India, Africa and New Zealand, before turning back to the "Australian historical material".

Justice Blackburn distinguished Yolngu law, whose existence he accepted, from "proprietary rights". Despite the Yolngu occupation and use of the lands, and their law which governed relationships with the land, Justice Blackburn used his sources on common law traditions of property to conclude:

In my opinion, therefore, there is so little resemblance between property, as our law, *or what I know of any other law*, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests.²²

The category of "any other law" included English colonial law and the common law of several former British colonies on four continents. Yet by denying the applicability of a property relation as defined in *any law* the judge, having defined Yolngu law as law, then excluded it from this category.²³ Having spent fifteen pages in consideration of the admissibility of the plaintiffs' and anthropologists' evidence (it was admissible), Justice Blackburn turned to the content of that evidence as it related to Yolngu law, with these words:

I now turn to matters of fact. What follows will be an account of my findings, upon the evidence, as to the customs, beliefs and social organization of the aboriginals of the subject land.²⁴

That it is not common law, and indeed is cast as "not law" is signified by placing it on the "fact" side of the fact/law distinction. Without ever addressing the issue directly, the clear message of the *Milirrpum* judgement is the supremacy of the common law over Yolngu law. Justice Blackburn considered that native title would, following colonisation, "owe its validity to the common law".²⁵ We are so accustomed to seeing this outcome that it was hardly noticed. The case was more notable, within the common law tradition, for the judge's recognition of Yolngu law. Yet he admitted no conflict between these legal systems, and so did not find any need to justify the supremacy of his own court. Since he found that native title did not exist as a form of property, the assertion that even if it did it would "owe its validity to the common law" was unnecessary to his argument. It was clearly important, however, as a device for re-framing Yolngu law *within* a dominant system of common law. By excluding Yolngu definitions of property from his definition of property by "any other law" Yolngu law was so firmly framed by the common law that it had no claim to force and no independent authority.

By the end of the *Milirrpum* case, the Yolngu had directed their campaign for land rights at the two key legal institutions of the Australian state: the legislature and the courts. They had achieved significant public support and understanding, not least through the educational role of their revelation of their system of law through the bark petitions and evidence to the court. Even the Australian court had accepted that they had a system of law. But they still did not have rights to their land under common law, and it was to be another twenty years before the High Court would overturn the doctrine that Australia was terra nullius and establish the existence of native title,²⁶ expressly denied in *Milirrpum*.

The Yolngu achieved land rights well before the common law decision in *Mabo*, through two other legal steps. The first had been taken in 1967, four years after their bark petitions. The Australian Constitution had to be changed to formally recognise the existence of Aboriginal Australians, who had served in the armed forces but not been treated as citizens or even counted in the census until then. The constitutional amendment was passed by an unprecedented margin, in a country where constitutional change is notoriously difficult. ²⁷ One effect of this constitutional change was to empower the Federal government to make laws in respect of Aboriginal people.

Legislative recognition of the land rights of Yolngu and other Indigenous people of the Northern Territory was finally achieved after two changes of government. When a reforming Labor government came to power at the beginning of the seventies a commission of inquiry was set up to advise the government on land rights in the wake of the Yolngu defeat in *Milirrpum*. The resulting legislation was not passed until 1976, amended by the returning conservative government, as the *Aboriginal Land Rights (Northern Territory) Act*. In this way the Yolngu finally achieved title to the land in the reservation they inhabited, not including the excisions which had already been made for bauxite mining and processing.

This road to Indigenous land rights, in which the Yolngu played such a major role, can be seen as a narrative of Australian common law mechanisms employed by the Yolngu and other Indigenous communities in pursuit of their land rights: a petition; a parliamentary select committee; constitutional amendment; judicial consideration of common law rights; a

commission of inquiry; legislation. It has been a momentous legal struggle which did eventually achieve some changes to Australian common law.

2. FRAMES AND FRAMING IN YOLNGU EPISTEMIC PRACTICE

What has been less clear, up to this point, has been the work done by Yolngu law in adjusting to the common law and the presence of the colonising society, which I have only considered in regard to the *Milirrpum* case and its preparation. To understand more of the way in which Yolngu have interacted with the common law and the politics of land rights it is necessary to look into their epistemology. The ways Yolngu have mediated the frames of common law and western thinking is based in their own theories of law and knowledge. These theories and the practices that have flowed from them have been noteworthy for their imaginative interaction with the colonisers, as we have already seen in the bark petitions. Such Yolngu epistemic practices may be understood as part of a broader process of opening up Yolngu secret knowledge to outside access. Efforts to incorporate Europeans, as a new set of "outsiders", within the Yolngu system have also led to some loosening of the boundaries among the Yolngu themselves.²⁸

Yolngu knowledge operates in very general categories of "inside" and "outside". An object or design may have a number of meanings, and even names, depending on the "insideness" of the discourse it occurs in. This epistemology is employed by Yolngu to understand some of the distinctions they encounter in white society. For instance, a surgeon is more specialised than a general practitioner and operates in a hospital in the capital, Darwin, in part because he practises a more "inside" knowledge. In a less literal instance, white negotiators trying to get Yolngu approval for a highway through their land linking Yirrkala with Darwin are thought to only give the "outside" reasons: the benefits to Yolngu in improved access to their homelands. The secret "inside" reasons are thought to have more to do with white access to Yirrkala and the aluminium smelter at neighbouring Nhulunbuy.²⁹ There is still no highway from Darwin to Yirrkala or Nhulunbuy.

Within such a framework it clearly makes sense to maintain the traditional secrecy of sacred knowledge, while at the same time using it for purposes of negotiation and education. Howard Morphy points out that even if knowledge gains more power by remaining secret, this strategy reaches its limits in the possibility that it may remain so secret that it dies with its possessor.³⁰ In a less extreme scenario, if the knowledge is powerful, then it may need to be used to achieve particular ends where it is necessary to invoke a certain amount of power. In this way Yolngu have released knowledge to white society, while maintaining their own categorisations. of insiders and outsiders in that society. The knowledge revealed in a design to be sold or reproduced commercially may be more public than that in a painting revealed and explained to an anthropologist, or in evidence to be presented to a judge in court. Nevertheless, Yolngu have not limited their release of information to specific instances of litigation and negotiation with powerful outsiders. It is a fluid arrangement whereby outsiders must first be convinced of the value of the knowledge (by some controlled release and limited explanation) and subsequently have the implications of these truths explained to them. The Yolngu release and western reception of their designs as "art" is a case in point. The immediate appeal of Yolngu designs to western aesthetic tastes made them a sought after commodity in the art market before they were used for more explicitly political purposes in the bark petitions. Initially Yolngu art made its way to the outside world through gifts and exchange with missionaries and anthropologists. During the 1950s there were some unprecedented changes in the way the Yolngu revealed their sacred law. Until this time their most sacred objects had been hidden from the sight of

uninitiated members of the group, and only the older men had access to the full range of objects and their meanings. In 1957 some of these objects were publicly displayed for the first time, in colourful and attractive arrangements, in a public space outside the church on Elcho Island. The stir this created among anthropologists is visible to us today through their publications.³¹ We can only imagine the stir among the Yolngu at the time. Whatever concerns the traditionalists, among both anthropologists and Yolngu, may have had, we can look back today to see this as the first of many politically and legally significant Yolngu actions of cultural exchange, negotiation, litigation and public education. In addition to their educative function, this use of art on Elcho Island redefined insiders and outsiders within Yolngu lands.

The Yolngu have, more than any other single Aboriginal group, continued to release their art and knowledge to white society in ever more sophisticated forms. From the early revelations on Elcho Island to the bark petitions and beyond, Yolngu art has aesthetic appeal and an epistemological or educational function as well as political purposes. The attractiveness of the bark paintings had an impact on an uninitiated viewer even before they understood the implications for clan structures and land ownership which they encoded. Yolngu have always combined cultural exchange with an overt politics addressing the Indigenous concerns of the time.

Galarrwuy Yunupingu, one of the interpreters and mediators of Yolngu knowledge in the *Milirrpum* case, has been a force behind the popular band Yothu Yindi, which in 1992 released the hit song *Treaty*. Calling for a legal treaty between the colonizers and Indigenous communities, the song reinforces the message of the 1971 case:

This land was never given up.

This land was never bought and sold.

The planting of the Union Jack never changed our law at all.³²

The band incorporated the song into their performance at the Sydney Olympics and included a computer-read video clip on their latest commercial compact disk, *Garma*.³³ Like the bark petitions, the song and the clip frame Yolngu and English language versions of a powerful political and legal message within a highly attractive and accessible version of Yolngu art: in this case music, dance and ceremony. The petitions themselves are now one of the more popular displays in the public area of Parliament House in Canberra. Last year they were loaded to a website established by the National Archive, "Documenting a Democracy", which celebrated the centenary of Australian Federation.³⁴ They have also been reproduced in an exhibition which opened the new Australian National Museum in 2001, describing the Yolngu relationship to three of the clans' burial sites, part of the continuing education and awareness campaign by the Yolngu.

3. CHANGE IN YOLNGU LAW

The common law's resistance to change was an important subtext in the *Milirrpum* judgement. The lengthy chains of precedent and the wide ranging authorities from across the British empire and the common law world over several centuries signify that this decision is not simply that of one judge, made in 1971. All this is designed to lead the reader to believe this is the only decision the judge could come to under the burden of this tradition. The decision is cast clearly within the meaning framework of ancient traditions of the common law.

I have already referred to the lengthy pedigree of precedent signified by the judge's references to Kent's and Blackstone's commentaries and his legally gratuitous reference to western origin stories, in the beliefs of the Massachusetts Puritans. While the first of these references signifies the long and internally consistent tradition of the common law, the latter appears to jostle the frame of the Yolngu law which is explicitly based in actions and commands dating from the creation of the land and the ancestors. Justice Blackburn's attention to change in Yolngu law was another curious aspect of his decision. The judge considered the Yolngu and anthropological evidence in relation to permissive use of the land (bearing on the exclusivity of clan ownership) and the antiquity of each clan's links to their specific land, concluding against the plaintiffs on each point. That their occupancy had not been exclusive had a strong bearing on his assessment of the proprietary nature of their claim. That the specific clans did not (on the balance of probabilities) have "the same links to the same land" in 1788 as in 1971 was of doubtful legal relevance.³⁵

The issue of the possibility of changed clan relationships to the land receives more attention than any other aspect of Yolngu law, and was described by the judge as "by far the most difficult of all the difficult questions of fact in the case".³⁶ It is not obvious, in common law terms, why the judge troubled himself so much over this issue. He follows this discussion by listing the conditions under which he could find that "communal native title" did exist, including the determinacy of the community and of the land, and the crucial question of whether their interest was "proprietary". Yet he never suggests immutability of ownership as a defining characteristic of property. How could he, since common law titles are traded daily? The only mention of immutability in land tenure comes from a contention the judge attributes to the plaintiffs. Their predecessors laid claim to the subject land in 1788 and "no surrender or purchase has ever taken Place".³⁷ There was no need in common law for the Yolngu to prove that there had been no adjustment in ownership among the clans since 1788. This issue never forms part of the explicit reasons for judgement, even though it had taken so much judicial effort to conclude that clan ownerships may have varied since 1788.

These preoccupations with questions of continuity and change in Indigenous law persist to the present. Like Justice Blackburn, later common law decisions claim an impressive legacy of continuity relying on precedent, while finding shortcomings in the continuity and consistency of Indigenous laws and cultures. I return below to this theme as it has been developed in more recent decisions. There we will see the tensions within the common law over issues of continuity and change, and the relationships seen by judges, after the reversal of the doctrine of terra nullius, between continuity and change in Indigenous and common law.

First we may explore this theme in a little more detail as regards Yolngu law. While changes in clan ownership may take place under Yolngu law, this is a more complicated matter than the exchange of titles in common law. The probing of changes in clan ownership in the *Milirrpum* case point to ways in which the common law opponents of Yolngu land rights exposed a delicate issue which Yolngu had not been able to translate into a metaphor as simple as "title deeds". The difficulties presented by this issue derive from some of the fundamental principles of Yolngu jurisprudence.

Yolngu law was established by the spirit beings, some of whom are forebears of the present Yolngu. It has existed since the creation of the land and the ancestors. While its claims to longevity are comparable to those of the Massachusetts puritans cited by Justice Blackburn, there is, however, this difference: the law and the land have always been in the same

relationship in the Yolngu lands. The law can be read off the land just as the law defines human relationships to the land.³⁸

While the Yolngu deny any variation in their law over time, it seems that, as in any system of law, adjustments may need to be made. The Yolngu kinship system is closely related to land ownership by clans. Without going into the amount of detail documented by the anthropologists, suffice to say that all Yolngu belong to one of two moieties (Dhuwa and Yirritja). One must not marry into one's own moiety: individuals belong to their father's moiety and marry someone from their mother's.³⁹ All lands are owned by a clan from one or another moiety. Clan membership is defined in complex ways which mean that demographic factors make it feasible, on rare occasions, for a clan to die out. This is a difficult and delicate aspect of Yolngu law, but there are ways of adjusting to such an event by reallocating land to another clan from the same moiety. Such decisions are made by the elders within the men's ceremonial ground. The rules and knowledge around these decisions are among the most "inside" of all inside Yolngu knowledge.

Contact with common law courts as occurred when shifting clan ownerships were probed in the *Milirrpum* case has brought such decisions and vagaries into a more public forum, with consequent changes in the ability of Yolngu to define inside and outside quite as clearly as they once did.

Some things that were masked by their restriction to the inside have had to be brought, at least temporarily, into the open and made more explicit than perhaps they once were. Art was part of a process of forgetting past connections and giving authority to present ones. When European courts demand to know the details and mechanisms of how such processes of succession and change of ownership take account of the exigencies of demographic change and political fortune, then such a masking process becomes no longer as possible.⁴⁰

Morphy goes on to show the change in the way Yolngu paintings function when they must "operate in a context where Yolngu practice articulates with European law", becoming more like the documentary evidence inherent in legal documents such as title deeds. We may also suggest that the more these paintings and their rationales are exposed to public scrutiny the less they are like the self justificatory statements of common law judgements in giving authority to present connections while masking changes that have occurred over time.

Other more traumatic changes and stresses may occur in Yolngu law and its observance, particularly as the bonds of traditional society are loosened by contact with outside society. Although the anthropological sources I have read on the Yolngu (up to 1991) record no instances of moiety intermarriage, the Yolngu themselves know of nearby groups where individuals and groups have changed moieties, and will not marry them since they cannot be sure which moiety they are marrying into. Another group has their moieties "the wrong way round" leading the Yolngu to say that they "marry just like animals".⁴¹ These issues are among the most sensitive in Yolngu law, since they threaten the continued coherence of the social structure. Consequently they are unlikely to be discussed with outsiders. Nonetheless, the recent Yothu Yindi song *Ghost Spirits* portrays young people tempted by improper marriage or reproduction ("forbidden love") juxtaposed with the elders' taboo and the ancestors' threats (the "ghost spirits" of the title).⁴² Tensions between law and desire have no doubt been common throughout Yolngu experience. This song represents the latest revelation of Yolngu law and its impact within the society to a wider audience of outsiders.

Such instances of the loosening of determinate categories of Yolngu law are to be expected in an Indigenous society after contact with a dominant European society. What is most interesting in the Yolngu case is the way this has been managed by the elders and the rest of the community, as they make adjustments to the law, while admitting an increasing fluidity of inside and outside knowledge and a new economy of cultural exchange with Europeans.⁴³

Yolngu laws became more exposed to public scrutiny through their interrogation in common law courts. As the "outside" of European society expands its influence over Yolngu society, so the definitions of "inside" within that society have expanded to include women.⁴⁴ Changes in meaning may occur within Yolngu law as external reference points shift, even though these may not be changes imposed or imported directly from the common law. To refer in a common law context to the *rangga* as title deeds is to perform an act of interpretation into the outside system of reference. In itself such interpretation does not make the *rangga* mean "title deeds" within Yolngu law. Yet these shifting points of reference suggest one model for meaning change within a relatively closed legal system. These reference points remain outside Yolngu law when they frame it, or are themselves redefined by Yolngu law when it frames them. Each of these framings and re-framings introduces a loosening of meaning, an opportunity for new relationships within the one system.

4. CHANGE IN COMMON LAW

Given the inaccessibility of much Yolngu law, both for reasons of secrecy and the epistemological gap between our ways of thinking, it is useful to turn attention to a parallel process as it has occurred within the common law. Just as Yolngu law has framed and re-framed the common law, so common law has participated in these framing operations. It has framed Yolngu law in the *Milirrpum* case, and been itself framed by the Yolngu, as I have described. The impact of these framings on the meaning of the common law has particular significance, given the dominant position of the common law and the epistemological and socio-political order in which it is based. While Yolngu law and society are under pressure from all aspects of the outside dominant culture, the common law interacts with Indigenous law in a more limited frame, and more often on its own terms. Hence we may suggest that the interactions have been confined to a more limited semiotic realm.

Nonetheless, we may see instances in which common law has shifted its own meaning system in response to these shifts in the external context. Justice Blackburn recognised that he was being introduced to a hitherto unknown legal system when he heard from the Yolngu in *Milirrpum*, even though he framed it in the common law category of "facts", effectively bracketing it off from "law". By defining 1788 as the moment at which Indigenous law surrendered its validity to the common law, the judge was again attempting to delimit and frame Yolngu law. Those boundaries are now contested from within the common law as well as in challenges raised by Indigenous claims to native title. The sequel to Justice Blackburn's rejection of common law native title is still developing in the Australian courts and legislature. In proclaiming the existence of native title the High Court judges in *Mabo v. Queensland No.2* (1992), like Justice Blackburn twenty years earlier, couched their judgement in the terms of common law tradition and precedent.⁴⁵ Had the precedent changed or had the context? It was possible to change the meaning of common law native title as a result of changes in the frames which the Yolngu, together with many other groups, had put around the common law. After the bark petitions and the overwhelming evidence of the force and consistency of Yolngu law in *Milpirrum*, it had become increasingly difficult for the common law to cling to the doctrine of *terra nullius*. The recognition of native title in *Mabo*, its subsequent codification in the *Native*

Title Act (1993) and interpretations in recent judgements illustrate some of the tensions within the common law's attempts to reconcile continuity with change.

The increasing fluidity in contact between the common law and Indigenous law may be demonstrated in a recent determination under the *Native Title Act* (prior to amendments), *Yorta Yorta v. Victoria* (2001). The *Native Title Act* (1993) defines native title in the same common law terms used by the majority in *Mabo*. In applying that act to decide whether native title still applied to an area within the populous contact zone of south eastern Australia, three judges of an appeal bench of the Federal Court had to consider how the changed traditions of the dispersed, decimated and partially assimilated Yorta Yorta people impacted on their claim to native title. The trial judge had relied upon written European historical evidence from the nineteenth century, over contemporary Indigenous oral evidence, to find that native title had been extinguished through the failure of the claimants to maintain their traditional laws and customs in relation to the land. The minority and majority judges agreed that Aboriginal claimants should not be expected to maintain the precise relationship to the land which had pertained in 1788. They each adopted the terminology suggested by counsel for the Yorta Yorta, and rejected a "frozen in time" approach which maintains that true Aboriginal traditions which may constitute rights to land could only be those originally established and maintained in a primordial pre-contact state. The judges differed in their interpretation of the reasoning of the trial judge, the majority deciding that he did not fall into the error of taking a "frozen in time" approach. Dissenting, the Federal Court's Chief Justice Black defined the error of the trial judge, in

... failing to give proper recognition to the relevance of adaptation and change in the traditional laws and customs of the claimants' ancestors at about this time. The time in question was a time at which change was to be most expected since it was the time at which European settlement was having its most direct and invasive impact. . . . I am persuaded therefore that the learned judge was in error in that he applied too restrictive an approach to the concept of "traditional" when making his determinative finding that native title expired before the end of the 19th century.⁴⁶

The implications of change for Indigenous law are quite different in this judgement than those we saw in *Milirrpum*. Here we see Chief Justice Black accepting that Aboriginal law may change without undermining its claims. In recognising the possibility of change in Indigenous law, judges have recognised the impact of common law and of its own changes upon Indigenous people and their law. One test of native title is the continuity of a connection with the land based on laws and customs. Justice Merkel pointed out in *Commonwealth of Australia v. Yarmirr* (1999) that it was not open to the Indigenous inhabitants to maintain that connection during the period that they were denied those same rights to land.

Thus, when the issue of continued acknowledgement or observance of laws and customs in relation to land arises for consideration, the extent to which that acknowledgement or observance has diminished or changed may require some consideration of whether the diminution or change falls short of abandonment but rather, came about by reason of conditions, including non-recognition of any native title, which were externally *imposed* on the indigenous population.⁴⁷

These conditions were imposed by the prevailing common law's denial of native title rights. Such a decision acknowledges not only that native title was denied during a specific historical period and was subsequently recognised, but it also attributes loss of Indigenous connection to

land to this defunct law. In this way the common law sees its own mutability reflected in Indigenous law as Chief Justice Black in *Yorta Yorta* recognises in referring to the *Yarmirr* decision. Furthermore, the "the fiction of terra nullius was maintained by the common law until *Mabo (No.2)* in part by reason of historical preconceptions about Aboriginal society in Australia".⁴⁸ Continued reliance upon such sources to the exclusion of oral evidence from living witnesses perpetuates the injustice which would otherwise have been corrected by changes to the common law.

In these judgements two common law judges have drawn attention to the implications of the common law's changed treatment of native title. They have also recognised that these changes have been reflected in Aboriginal law and practices. This discussion, however, while providing an insight into some of the reasoning within the common law, does not reflect its current state in Australia. The majority judges in *Yorta Yorta* did not agree with Chief Justice Black that the trial judge had erred in ignoring the oral evidence while accepting the written sources of nineteenth century settlers. The majority decision in *Yorta Yorta* continues to require native title claimants to prove that they have maintained their connections to the land through customary law despite over two hundred years of Australian legal denial of their right to those practices. And they must prove these connections not on their own oral evidence but through the evidence of European records written by settlers and the expert evidence of historians and anthropologists.⁴⁹

Just as Yolngu law has been transformed from within while framing and being framed by common law, we may see the possibility of the common law being transformed in its framing of Indigenous laws. We do not see an importation of Indigenous legal concepts, but rather a sea change in the concepts of the common law as it grapples with its own relationship to other legal systems existing within its jurisdiction. By drawing attention to *mutual* change and the mutual impact of Indigenous and common law Justice Merkel and Chief Justice Black signal a new relationship of the frame to the common law. By recognizing that common law may change in its interaction with Indigenous law, these judges glimpse the possibility that common law could exist within an Indigenous frame, just as Indigenous law exists within the frame of the common law.

5. CONCLUSION

This inquiry into shifts of meaning has been limited to a number of specific encounters between Yolngu law, on the one hand, and the Australian common law in its relationship to various Indigenous legal frameworks (including that of the Yolngu), on the other. We have seen that both Yolngu law and common law have adopted terminology or analogies which purport to realign the meaning of central concepts within their own frameworks. For example, the Yolngu have described the sacred objects which represent clan ownership of land, the *rangga*, as "title deeds". For its part, the common law has adopted a conception of property which it calls "native title" which purports to describe a type of proprietary relationship between Indigenous Australians and particular portions of land. In each of these cases it appears that the legal framework has undergone a profound shift in meaning. Prior to the contact and interaction between the different systems neither had any concept equivalent to those of the other law's. Common law defined property quite explicitly in opposition to the type of occupation and use of land by native peoples. Yolngu had no conception of a document representing ownership of a defined portion of land which could be bought and sold. If the *rangga* really were title deeds, this would introduce a whole new range of transactions into Yolngu society, transactions normally associated with property transfer under common law.

Likewise, common law has created its own concept of "native title" which does not match the relationships between people and land in any actual Indigenous community.⁵⁰

Behind these apparently radical shifts of meaning we can also see some subtle changes which are not explicitly promoted as such. Common law maintains the term "property" and common law judges continue to relate their decisions to Blackstone's eighteenth century exposition of the term.⁵¹ Yolngu maintain the distinction of inside and outside, and insist on restricting certain knowledge within the confines of the men's ceremonial ground, even though these boundaries have shifted radically from the time of the Elcho Island displays to the increasing integration of women described above. Yet these shifts in common law's conception of property or Yolngu secrecy are portrayed as continuity, not change.

These meanings derive from the relationship of the representamen to the object, and as such they depend upon the interpretant which is applied in any situation. In the former type of cases just mentioned, where terms like "title deeds" or "native title" are adopted from another legal system, we see that these terms are not defined in precisely the same way in the different legal frameworks. In shifting from common law to being applied to the rangga, "title deeds" takes on entirely different meanings. Likewise, we saw that "native title" means something quite different to common law than to any "native law" system. In this situation the interpretant shifts depending upon the context in which it is applied. Indeed, this is just what the interpretant is. As the series of signs by which we come to know or interpret the meaning of a term, the interpretant is the total context of a meaning system.

At this point there begins a process of unlimited semiosis, which, paradoxical as it may be, is the only guarantee for the foundation of a semiotic system capable of checking itself entirely by its own means⁵²

If this is so, then what is occurring in the latter type of cases, where terms within the one meaning system continue to be used *as if* they retain the same meaning, while actually shifting? We have considered the situation in which the representamen ("property" in common law) stays the same, while its object changes. While in the former cases the context of the interpretant appears to stay constant within its meaning system even though a term is imported from another system, in this situation it appears that the interpretant is changing. This suggests that the interpretant, which is the context itself, changes while the terms remain the same. The immediate context of a term is the meaning system or the legal framework within which it is interpreted. This is why "title deeds" means something different in a Yolngu context than a common law context. However, once we comprehend the total context of the interpretant, we find that meaning can change within the semiotic system. The "unlimited semiosis", by which the entire context of meanings comes to bear upon the interpretation of any term, begins with the related terms within the specific legal framework. However, once the different legal frameworks (of Yolngu or Indigenous law and common law) have come into contact with, that is to say, have framed each other's meaning systems, each one ultimately becomes part of the context of the other.

This does not occur at the level of an individual term. One term is not introduced into a meaning system bringing, virus-like, its entire interpretant baggage with it. Both the Yolngu law and the common law have immune systems quite capable of resisting that sort of invasion. The interpretant framework is endowed by the system within which we are doing the interpreting, which is how Yolngu or common law reinterpret each other's terms. However, the process we see here is that of the different legal systems framing each other so that, at the

broadest level of meaning, they ultimately reach into each other for interpretants. This "broadest level" is not confined to explicit definitions of particular terms, nor is it even restricted to the legal system itself, but it operates at the level of epistemology.

This explains why, in both the Yolngu law and the common law, the tensions only really become apparent at the level of epistemic practice. In the case of the Yolngu, the detail of the meaning of the *rangga* is quite capable of withstanding a convenient analogy with "title deeds". Framed by the common law as "title deeds", the *rangga* are insulated from this common law meaning by the rich interpretant framework of Yolngu law. The epistemic practices which do cause loosening of the Yolngu framework are those at the level of insiders and outsiders. Yolngu have quite consciously manipulated those boundaries, as was seen at Elcho Island or in the *Milirrpum* case when sacred law was revealed in the common law court. In doing so, the boundaries for the Yolngu themselves have loosened, as a result of the epistemic framework shifting in practice.

Likewise it is at the level of epistemic practice that the shifts in common law meaning have changed. "Native title" can be a convenient term by which common law subsumes Indigenous law within its own meaning frameworks, inoculated by common law property definitions against infection by the broader meaning framework of Indigenous law. Again the trouble starts on the edges. As the common law, in *Yarmirr* or *Yorta Yorta*, deals with the epistemic practices of its own admission of historical and oral evidence, it admits the possibility that common law practices of the past have corrupted that evidence. The more honest and reflective judges have admitted that the common law cannot be insulated from Indigenous meaning systems. In admitting the oral evidence of the native title claimants, the interpretive framework of common law really does shift. Other judges such as the majority in *Yorta Yorta* seek to limit the boundaries of common law's semiosis by privileging the written evidence of nineteenth century settlers, that is to say, the epistemological framework. In cases from *Milirrpum* to *Mabo* to *Yorta Yorta*, the Indigenous laws frame the common law in increasingly comprehensive ways, first through presentation of the living law of the Yolngu and Meriam peoples and then through evidence of the reality of common law impacts on the *Yorta Yorta* and the survival of their laws and cultures in the oral evidence of the witnesses. "Property" may still be defined, within the common law frame, by reference to Blackstone, but as the interpretive framework spreads, and the limits of semiosis loosen, the meanings of the term can shift.

These interactions between legal systems are comprehended in legal theory and law reform as "conflicts of laws" or as issues in "recognition of Indigenous law". I have attempted instead to explain these relations in semiotic terms. The Yolngu genius for negotiating the shifting contexts of their own and the common law through processes of framing and reframing has been apparent in their leading role in the land rights struggle in Australia. By exploring the origins of this genius in the Yolngu epistemology of inside and outside we have been led to a better understanding of some of the processes of common law.⁵³ The metaphor of the frame, employed in the bark petitions and since, illuminates the semiotic relationships attempts, as we have seen, do not immediately change the meanings of specific terms in the system they frame, nor do they provide for the direct incorporation of any of the elements which they have framed. Indeed, the mechanism of the frame successfully draws boundaries between the system which is framed and the system which frames it. This analysis has shown, however, that within each frame the meanings can change. They do not change through any process of incorporation or adoption of concepts, but through shifts in the broader context of meaning. Changes to the external frame or context of the system shift the ground it stands on.

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Endnotes

1 They are now displayed in Parliament House, Canberra and may be seen at http://www.foundingdocs.gov.au/explore/picture_album/cth_pics.htm

2 Howard Morphy, "Now You Understand': An analysis of the way Yolngu have used sacred knowledge to retain their autonomy", in *Aborigines, Land and Land Rights*, ed. Nicolas Peterson and Marcia Langton (Canberra: Australian Institute of Aboriginal Studies, 1983), 110-133 at 115.

3 Umberto Eco, *A Theory of Semiotics* (Bloomington: Indiana University Press, 1976), 68ff.

4 Jacques Derrida, *Writing and Difference*, trans. Alan Bass (Chicago: University of Chicago Press, 1978), 278-279.

5 Colin Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples", *Law and Critique* 6/1 (1995), 55-74 at 67.

6 Recognising that meaning change is as much a challenge to a discipline of legal semiotics as it is to those which it studies, I do not purport to describe mechanisms of meaning change in any general or definitive way.

7 Howard Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (Chicago: University of Chicago Press, 1991); Nancy M. Williams, *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* (Canberra: Australian Institute of Aboriginal Studies, 1986).

8 Galarrwuy Yunupingu, "From the Bark Petition to Native Title", in *Our Land is Our Life. Land Rights: Past, Present and Future*, ed. Galarrwuy Yunupingu (St. Lucia, Qld.: University of Queensland Press, 1997), 242.

9 John Hookey, "The Gove Land Rights Case", *Federal Law Review* 5 (1972), 85-114. 10 Edgar Wells and Australian Institute of Aboriginal Studies, *Reward and Punishment in Arnhem Land, 1962-1963* (Canberra: Australian Institute of Aboriginal Studies, 1982).

11 *Mabo v. Queensland* [No.2] (1992) 175 C.L.R. 1. Just how limited those circumstances would be has been the subject of subsequent legislation, amendment and case law, a small part of which is discussed below.

12 *Milirrpum v. Nabalco* (1971) 17 F.L.R. 141, also known as the Gove Land Rights case.

13 *Supra* n. 2.

14 *Supra* n. 12 at 267.

15 *Supra* n. 12 at 244.

16 *Supra* n. 12 at 201, referring particularly to Blackstone, writing in 1765.

17 *Supra* n. 12 at 200.

18 *Supra* n. 7 at 118.

19 Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, UK: Cambridge University Press, 2001), 158.

20 Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 82. (references omitted).

21 *Supra* n. 20 at 77.

22 *Supra* n. 12 at 273 (emphasis added).

23 Another possible interpretation, that the common law does not accept the Yolngu analogies of their concepts of title with common law, is discussed below.

24 *Supra* n. 12 at 165.

25 *Supra* n. 12 at 198.

26 *Supra* n. 11.

27 The defeat of the referendum for a republic in 2000 is a well known case in point.

28 Morphy, *supra* n. 7 at 301-302.

29 Morphy, *supra* n. 7, chapter 5, *passim*.

30 Morphy, *supra* n. 7 at 98-99.

31 Discussed by Morphy, *supra* n. 2.

32 Mandawuy Yunupingu et al., *Treaty* (Yothu Yindi and Mushroom Records, 1992).

33 Yothu Yindi Music, 2000.

34 *Supra* n. 1.

35 *Supra* n. 12 at 198.

36 *Supra* n. 12 at 198.

37 *Supra* n. 12 at 198.

38 Law's groundedness in the land may thus not only be found in western laws derived from Roman geomancy, or a Greek equation of *nomos* - as a right to grazing land – with law *cf* Fitzpatrick, *supra* n. 19 at 91-92.

39 Morphy, *supra* n. 7 at 44.

40 Morphy, *supra* n. 7 at 301.

41 Morphy, *supra* n. 7 at 44.

42 Stuart Kellaway et al., *Ghost Spirits* (Yothu Yindi Music, 2000).

43 *Supra* n. 2 at 112ff.

44 Morphy, *supra* n. 7 at 302.

45 In an interesting echo of Justice Blackburn's convenient relegation of Yolngu law to matters of fact, Justice Brennan in *Mabo* justifies change in the common law as a result of new facts: "The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there IS no warrant for applying in these times rules of the English common law which were the product of that theory," *supra* n. 11 per Brennan J. at 39.

46 *Yorta Yorta v. Victoria* (2001) 180 A.L.R. 655 at 675-677.

47 *Commonwealth of Australia v. Yarmirr* (1999) 168 A.L.R. 426 at 502 (emphasis in original).

48 *Supra* n. 46 at 672.

49 Wayne Atkinson, "'Not One Iota' of Land Justice. Reflections on the Yorta Yorta Native Title Claim 1994-2001", *Indigenous Law Bulletin* 5/6 (2001), 19-23; Robert Foster, "Turning Back the Tide. The Use of History in the Native Title Process", *Indigenous Law Bulletin* 4/22 (1999), 17.

50 Luke McNamara and Scott Grattan, "The Recognition of Indigenous Land Rights as 'Native Title': Continuity and Transformation", *Flinders Journal of Law Reform* 3 (1999), 137-162, at 145.

51 Milirrpum, *supra* n. 12 at 201, *Mabo*, *supra* n. 11 at 34-35,79, *Yarmirr*, *supra* n. 47 at 548-50; *cf* Williams, *supra* n. 7 at 112; Fitzpatrick, *supra* n. 20 at 83ff.

52 *Supra* n. 3 at 68.

53 The Yolngu epistemology and kinship system of inside and outside and the definition of the two through incest taboos could invite analysis in structural terms. Morphy refers to this form of analysis as "tempting", before developing his own alternative interpretation (*supra* n. 7 at 291ft) which, like the present analysis, has more in common with Derrida's deconstruction of

Levi-Strauss's structuralist categories. Any system of meaning has a centre, where meaning is determinate and where change is "forbidden" (*supra* n. 4 at 279). But there is also an area where play is possible. Derrida uses this word in both senses: there is play in a rope, and we can play a game. While the centre anchors the system, the play of meaning allows for metaphor and change. In these terms, Yolngu law and common law have been anchored by their internal consistency and self-referential traditions, while the play of meaning occurs, as I have shown, at the epistemic edges of these systems, through Eco's "unlimited semiosis" of the interpretant.