

# Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law

Shaun McVeigh\*

Introduction .....	471
I. Repatriation and the Acknowledgement of Laws .....	473
II. Common Law, Civil Jurisprudence, and Meetings of Law .....	475
III. Repatriations .....	481
1. Plural Jurisdictions .....	483
2. Inheritance and Placement .....	485
3. Museums .....	487
IV. Ethic of Responsibility .....	488
Conclusion .....	490

## INTRODUCTION

In many public institutions in Australia, it is customary to begin a public occasion with a form of acknowledgement of “country.” At the Law School of University of Melbourne in Melbourne, Victoria, one of the protocols takes the form: “We/I acknowledge the Traditional Owners of the land in which this event is taking place, the land of the Wurundjeri and pay respect to their Elders and families.”<sup>1</sup> This protocol is interesting for a number of reasons, not the least of them being the way in which it offers a form of acknowledgment of a relationship

---

\* Associate Professor, Melbourne Law School, University of Melbourne. I would like to thank Chris Tomlins for his generosity in initiating and hosting the “Law As . . .” II symposium in February 2012. This Essay draws on, and continues arguments and material developed in, a long-term collaboration with Shaunnagh Dorsett of the Faculty of Law, University of Technology, Sydney. In addition to thanking Shaunnagh Dorsett, I would also like to acknowledge with thanks the contributions to this Essay made by Olivia Barr, Christine Black, Ann Genovese, Jeff Malpas, Jeffrey Minson, Ed Mussawir, Sundhya Pahuja, Kim Rubenstein, and Peter Rush. Constantin Fasolt provided a generous commentary on a version of this Essay at the “Law As . . .” II symposium. I would also like to thank the editors of the *UC Irvine Law Review* for their editorial work.

1. Univ. of Melbourne, *Aboriginal Cultural Protocols Guidelines*, MURRUP BARAK, MELB. INST. FOR INDIGENOUS DEV., [http://www.murupbarak.unimelb.edu.au/files/miip/Cultural\\_Protocols\\_University\\_Council%20\(Final\).pdf](http://www.murupbarak.unimelb.edu.au/files/miip/Cultural_Protocols_University_Council%20(Final).pdf) (last visited Mar. 2, 2013).

between Indigenous and non-Indigenous peoples in Australia.<sup>2</sup> What is also interesting is the way that the protocol suggests, but does not make explicit, that what is being acknowledged is the meeting of Indigenous and non-Indigenous laws. By referring to the Wurundjeri people as “traditional owners,” Indigenous laws are acknowledged as laws of the past but are treated only as tradition in the laws of the present. “Settler” and “postcolonial” nation-states continue to struggle to create political and juridical forms adequate to the demands of the conduct of relations between non-Indigenous and Indigenous peoples.<sup>3</sup>

From within the common law tradition, this Article addresses two related aspects of the engagement of laws: one relating to the conduct and quality of the meeting of laws, and the other relating to the ways in which responsibility for the conduct of law is expressed by jurists. The conduct of lawful relations, or ways of belonging to law, addressed in this Article are those made available in the work of repatriation and the repatriation of the Indigenous dead from the museums and universities of Europe and North America to Aboriginal (Indigenous) peoples and nations in Australia.<sup>4</sup>

For differing reasons, the burial of the dead is important both to Indigenous and non-Indigenous relations of law. The contemporary engagement of the repatriation of the Indigenous dead held in museums, universities, and state institutions has a recent history dating back around forty years. Within traditions of Western law, the concerns of repatriation have generally arisen as matters of the conduct of war and the practice of religious ceremony.<sup>5</sup> For those who live with the common law tradition, the contemporary concerns of repatriation are often viewed as part of a necessary political and ethical response to the wrongs of the dispossession of Indigenous peoples. In this context, repatriation might be considered a part of the work of restitution and reconciliation. The point of engagement in this Essay, however, lies more directly in the conduct of lawful relations (of ways of belonging to law) than with the remedying of injustice and the redemptive possibilities of repatriation. It addresses the continuing juridical importance of the repatriation of the Indigenous dead as part of a meeting of laws.

---

2. In general, I have chosen to capitalize the term “Indigenous” when it refers to the indigenous peoples of Australia. Whilst there is no generally agreed protocol in Australia, the colonial and postcolonial practice of naming the diverse peoples and nations that inhabit what is now Australia as aboriginal or indigenous means that their specific national and juridical existence is not acknowledged. Since the consequences of this refusal to acknowledge laws and peoples is a central concern of this Essay, it seems appropriate to draw attention to this situation.

3. See generally LAW AND POLITICS IN BRITISH COLONIAL THOUGHT: TRANSPOSITIONS OF EMPIRE (Shaunnagh Dorsett & Ian Hunter eds., 2010).

4. The terminology of “old people,” “Indigenous dead,” “ancestral remains,” “human remains,” “cultural items,” or “body parts” varies with subject matter, context, and sense of responsibility. I have generally used “Indigenous dead” to indicate that it is the dead and the place and placement of the dead that is at issue. I indicate specific uses as relevant.

5. See generally Ernst H. Kantorowicz, *Pro Patria Mori in Medieval Political Thought*, 56 AM. HIST. REV. 472 (1951).

Accordingly, repatriation is addressed here in terms of the return of the dead to their proper law and jurisdiction.

The narrative of this Article runs from the concern with repatriation to the conduct of the meeting of laws and on to the forms of responsibility for the conduct of lawful relations. What is addressed, or what is followed, in this account is the lawful passing of the dead from one jurisdiction to another. Jurisdiction is understood here in terms both of the formal ordering of authority and of the authorisation or crafting of lawful relations.<sup>6</sup> The practice of jurisdiction is concerned with authority to act as well as with the repertoires or forms of conduct taken up through its exercise. Such practices are, in short, the technical means by which a conduct of lawful relations is given shape.<sup>7</sup> In this Article, the practices of jurisdiction that engage the meeting of laws are treated as being more or less nonreflective and nonreflexive. They are not addressed here either as reflecting broader social relations or as a point of critical reflection and transformation. The reason for restricting the scope of enquiry in this way is to draw out the particular forms of responsibility practiced in the repatriation of the Indigenous dead. In doing so, it also offers an account of the jurisprudence or conduct of lawful relations expressed through the technical (and empirical) forms of jurisdictional practice. This account, in turn, is shaped by the sense that it is meaningful to have a sense of honour or shame about the conduct of lawful relations within the common law tradition.<sup>8</sup>

#### I. REPATRIATION AND THE ACKNOWLEDGEMENT OF LAWS

Repatriation is more a term of political engagement than of legal art—its current usage relates without much doctrinal unity to the return of the military dead from the battlefield, to the return of refugees and stateless peoples, and to the return of the human and cultural remains of the Indigenous dead from the museums, hospitals, and other institutions of colonial and former colonial powers. In general, these concerns are linked with the maintenance of the *patria* or the nation.

The Indigenous dead were systematically disinterred, looted, and collected more or less from the moment of the British claim of sovereign possession and settlement in Australia from the 1790s through the 1930s and beyond. The experience of Indigenous peoples in Australia in this respect follows a familiar pattern of nineteenth-century British, European, and American political, military, and scientific expropriation of land and life.<sup>9</sup>

---

6. SHAUNNAGH DORSETT & SHAUN MCVEIGH, JURISDICTION 10–29 (2012).

7. Mariana Valverde, *Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory*, 18 SOC. & LEGAL STUD. 139, 144–46 (2009).

8. RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* 87–106 (Routledge 2d ed. 2000) (1998).

9. See TOM GRIFFITHS, *HUNTERS AND COLLECTORS: THE ANTIQUARIAN IMAGINATION IN AUSTRALIA* 58–59 (1996).

In Australia, it is Indigenous peoples and groups that have largely initiated the movement for repatriation. In the 1980s, organisations like the Foundation for Aboriginal and Islander Research Action (FAIRA) and the Tasmanian Aboriginal Centre (TAC) became important in advocating for repatriation. Considerable impetus for repatriation has also been generated from within the museums and universities in Australia, the United States of America, and Europe.<sup>10</sup>

The work of repatriation engaged by Indigenous peoples has been addressed in many different contexts. Henry Atkinson, a Yorta Yorta elder, has pointed out that in matters of repatriation the concerns of Aboriginal people lie directly with the dead rather than with human remains as such.<sup>11</sup> In *The Land Is the Source of the Law*, the jurispudent Christine Black of the Kombumerri and Munaljarli peoples draws out the sense in which the relationship between the living, the dead, and the yet to be born might be addressed within an Indigenous jurisprudence.<sup>12</sup> This understanding sets repatriation within an Indigenous cosmology, a law of relationship, and an account of (human) rights and responsibilities. The question of the dispossession and repatriation of the Indigenous dead is addressed both in terms of a relation between the living and the dead and in terms of the way that you and your kin are patterned into the land. This patterning is concerned with the ecology of the law of relationship: the balance through which the dyadic relationship to the land (cosmos) is maintained and the ways in which rights and responsibilities of humans are realized.<sup>13</sup> The removal of people—the dead, the living, and the yet to be born—from their land is a disruption of the cosmic ordering of the land and of the modes of its governance.<sup>14</sup> As Black points out, the remedy for this lies with an appropriate response to the lawful relationship with the land.<sup>15</sup> From this viewpoint, the national and international laws of the common law tradition take on value in so far as they can be patterned into an Indigenous law.

Christine Black also offers a blunt epitome of relations between Indigenous and non-Indigenous laws as that of a “full law” to a “half law.”<sup>16</sup> The rights and responsibilities that engage indigenous jurisprudences, Black notes, are not organised in terms of the interests of state sovereignty or common humanity so

---

10. See TIFFANY JENKINS, CONTESTING HUMAN REMAINS IN MUSEUM COLLECTIONS: THE CRISIS OF CULTURAL AUTHORITY 1–2 (2011).

11. Henry Atkinson, *The Meanings and Values of Repatriation*, in THE LONG WAY HOME: THE MEANING AND VALUES OF REPATRIATION 15, 18 (Paul Turnbull & Michael Pickering eds., 2010) [hereinafter THE LONG WAY HOME]; see also Franchesca Cubillo, *Repatriating Our Ancestors: Who Will Speak for the Dead?*, in THE LONG WAY HOME, *supra*, at 20, 20.

12. C. F. BLACK, THE LAND IS THE SOURCE OF THE LAW: A DIALOGIC ENCOUNTER WITH INDIGENOUS JURISPRUDENCE 3 (2011).

13. *Id.* at 15–16.

14. *Id.* at 107.

15. *Id.* at 109.

16. Christine Morris, *Constitutional Dreaming*, in BEYOND THE REPUBLIC: MEETING GLOBAL CHALLENGES TO CONSTITUTIONALISM 290, 291 (Charles Sampford & Tom Round eds., 2001) (Christine Morris has since changed her name to Christine Black).

much as engagements and actualisations of a full cosmology and law of relationship.<sup>17</sup> The “half law” of Western, state-based jurisprudences is organised in terms of an assemblage of limited jurisdictions that suspend judgment on full cosmological accounts of law, and that judge by reference to limited forms of authority and responsibility.<sup>18</sup> As a consequence, Indigenous jurisprudences do not usually relate to Western jurisprudences in terms of the ordering and expression of contiguous sovereign territories, but rather in terms of parallel cosmologies, laws, and jurisdictions.

## II. COMMON LAW, CIVIL JURISPRUDENCE, AND MEETINGS OF LAW

In so far as questions of lawfulness continue to be important to those living within a common law jurisdiction, questions about the meeting of laws also remain significant—as does the concern with the sense of honor and shame with which it is possible to live with law.<sup>19</sup> A meeting of laws can be arranged in many ways and with many degrees of engagement. It could be imagined as two people meeting and acknowledging a lawful relation. Usually, it is more mediated. While the repatriation of the Indigenous dead need not be understood in terms of law, part of the challenge of Christine Black’s formulation of what is at issue in the return of the dead is to offer an account of what it means to engage in lawful relations from within the common law tradition in Australia.

To arrange the common law into a shape that meets another law requires consideration of both the form and substance of the conduct of the meeting of laws and of ways of belonging to law. At one level, the formal and ceremonial arrangements of the meeting of laws are figured in the treaties, conventions, and contracts between nations. Such legal forms create protocols of lawful engagement that require acknowledgement of law and of status. However, as with the protocols of “welcome to country,” the arrangements for the repatriation of the Indigenous dead to their own law follow a pattern of relations where laws do not, or do not quite, meet. In order to hold on to the difficulties of finding a meeting place of laws within the common law tradition, attention is given here to the jurisdictional form or practice of law. The elements of substantive law relating to repatriation will also be recast in order to say something about the conduct of the meeting of laws.

The contemporary regulation of repatriation is predominantly constructed in relation to the authority and interests of the sovereign territorial state and of the civil prudential concerns of security, civil peace, and the common wealth of the population. For the most part, the care of the dead and of human remains is treated institutionally as a matter of administration and welfare. This is so at both a national and international level. At a national level, there is a range of legislation

---

17. BLACK, *supra* note 12, at 107.

18. MORRIS, *supra* note 16, at 291.

19. See generally GAITA, *supra* note 8, at 87–106.

that might deal with the repatriation and burial of the Indigenous dead.<sup>20</sup> Much of this regulation is shaped around legal concerns with ownership and possession. These concerns are addressed through general laws relating to civil rights, private property, and criminal law.

There is also a significant body of law relating to the protection of the cultural heritage of Indigenous peoples and Torres Strait Islanders.<sup>21</sup> This law joins the repatriation of the Indigenous dead with a political concern regarding cultural heritage and the self-determination of Indigenous peoples. It also addresses the circulation and exchange of “cultural objects” by museums, hospitals, and collectors. While given form in national legislation, this law of “cultural heritage” forms a part with international conventions.<sup>22</sup>

Since 2007, the repatriation of the Indigenous dead has increasingly been considered in the domain of rights. Article 12 of the UN Declaration of the Rights of Indigenous Peoples (2007) has located the repatriation of the human remains of the dead amongst a series of rights of Indigenous peoples to religion, ceremony, privacy, and cultural artefacts.<sup>23</sup> However, what is also important is that Article 12 is addressed to nation-states and directs them, in conjunction with Indigenous peoples, to assist in the realisation of such rights. There is no direct statement of the authority of an Indigenous law or jurisprudence. The repatriation of the Indigenous dead to their own law or jurisdiction in Australia is, then, largely addressed through the law of the Australian state.<sup>24</sup>

In order to draw out some of the ways in which Indigenous law and common law might meet, and to frame the responsibilities of lawful conduct, it is useful to step back from the “justice of repatriation” and return to a number of jurisdictional practices that address a meeting of laws. While it is more usual to think of jurisdiction as representing authority, there is a lot to be gained by treating the arrangements of jurisdiction as authorising or creating and maintaining relations of law. By attending to jurisdictional concerns, it is possible to make

---

20. Prue Vines, *Resting in Peace? A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia*, 20 SYDNEY L. REV. 78, 100 (1998).

21. Commonwealth policy is shaped around the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 21 (Austl.), which assists the preservation and protection of places, areas and objects of particular significance to “Indigenous Australians.” The States have a variety of legislative regimes. See *Protection Under State and Territory Laws*, AUSL. GOV'T: DEPT ENV'T, <http://www.environment.gov.au/heritage/laws/indigenous/protection-laws.html> (last visited Mar. 2, 2013).

22. Australia is a signatory to the United Nations Convention on the Protection and Promotion of the Diversity of Cultural Expression, Oct. 20, 2005, 2440 U.N.T.S. 311, and the United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see CRAIG FORREST, *INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE* 1–5 (2010).

23. G.A. Res. 61/295, *supra* note 22, at 6, 10 (relating to rights to lands, territories, and resources).

24. Self-determination, too, is shaped around the continuing existence of the state-form and interests of the state. See SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 10–43 (2011).

visible the ways in which the common law understands how laws meet and how those who live with the common law conduct themselves in such a meeting. The first, and most obvious, way in which jurisdictional thinking helps with this task is that it is concerned with who speaks and how. Jurisdictional thinking joins questions of authority to the mode and manner of the authorisation of laws. From here, and this is a second feature of jurisdictional practice, it is possible to describe (or redescribe) jurisdictional arrangements in terms of the crafting of repertoires of lawful conduct—or of ways of belonging to law. (In the final part of this Essay, it is suggested that, within the common law tradition, one of the more important responsibilities of the office of the jurispudent remains the care both for the jurisdictional practices of law and for the dead.)

As already suggested, jurisdiction is treated here as a technology that is concerned with the crafting of relations of law. This can be contrasted with the way that jurisdiction is usually cast within discussions that give priority to sovereignty. Viewed from the position of sovereign territorial states (and international law), jurisdiction is typically related both to the exercise of sovereignty as an attribute of the state and to the fact of the exercise of authority over a (physical) territory or land. Sovereign control of the territory by the state comes first; jurisdiction becomes a question of the rightful exercise of authority. At a national level, jurisdiction is often limited to a procedural concern with the exercise and administration of authority over a territory, dispute, person, or event. In this account, territory and population are part of the facts of the exercise of a jurisdiction. However, giving priority to jurisdiction as a practice of the authorisation of lawful relations allows for the consideration of the way in which relations of law are shaped through forms of conduct.<sup>25</sup> A territorial jurisdiction is one that authorises relations according to a practice of relating territorially. A territorial jurisdiction binds people, space, and place to law, but it need not bind land.<sup>26</sup>

The concern with the repatriation of the Indigenous dead expressed in this Article has more to do with the realisation or crafting of lawful relations than with the representation of right as rule or principle. While a concern with the exercise of sovereign territorial jurisdiction takes place at some distance from the particular arrangements of repatriation, if repatriation is to be understood as a movement of

---

25. DORSETT & MCVEIGH, *supra* note 6, at 25–29.

26. See, for example, Hannah Arendt's formulation of territory in terms of a relationship between individuals. Arendt argues that territory relates to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws. Such relationships become spatially manifest insofar as they themselves constitute the space wherein the different members of a group relate to and have intercourse with each other.

HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 262–63 (1963).

the Indigenous dead from one law to another, then the crossings need to be noted.

The law that arrived in Australia at the end of the eighteenth century with the establishment of British sovereignty and colonial settlement belongs to the common law tradition. Prior to the 1830s, the common law applied to settlers because of their status as subjects. It did not apply to Indigenous Australians precisely because they were not yet considered to be subjects. When it was determined in 1836 that Aborigines were amenable to English law, the British Crown effectively asserted territorial jurisdiction in a more modern sense: it asserted authority over the whole population within the territory.<sup>27</sup> From the 1830s onwards, it has been less easy to see either common law jurisdiction as a specific mode and manner of creating lawful relations or the presence of other Indigenous laws in relation to the common law. The juridical projects of the nineteenth- and early twentieth-century Australia were shaped around the creation of a single territorial jurisdiction in Australia.<sup>28</sup>

This is most obvious in the range of decisions that has developed the doctrine of “native title”—the common law expression of its relation to the laws of Aboriginal peoples. In a number of decisions from *Mabo v Queensland (No. 2)* (1992) to *Members of the Yorta Yorta Community v Victoria* (2002), the High Court of Australia established the forms of conduct of relations between the common law of Australia and Indigenous laws.<sup>29</sup> These cases, and the subsequent Native Title Act 1993 (Cth), have had the effect of shaping how meetings between Indigenous law and Australian common law are understood—and what a meeting place (such as a court or a museum) might require by way of lawful conduct.<sup>30</sup>

In *Mabo (No. 2)*, the High Court of Australia began its reconsideration of the status of the continuing existence of Indigenous interests in land. These interests, the High Court asserted, were founded in the relationship of Indigenous Australians to their country and survived the annexation of the continent and the establishment of sovereignty by Great Britain. Whilst the majority of the Court held that native title was sourced in the laws, customs, and traditions of the Meriam people (and formally, in later cases, Aboriginal peoples), it was unwilling to acknowledge any contemporary authority of law or jurisdiction of the Meriam people. The assertion of British sovereignty had the important consequence that,

---

27. *R v Murrell* (1836) 1 Legge 72 (Austl.). It did so as a matter of policy and government.

28. Shaunnagh Dorsett & Shaun McVeigh, *Just So: “The Law Which Governs Australia Is Australian Law,”* 13 LAW & CRITIQUE 289, 293 (2002).

29. *Members of the Yorta Yorta Aboriginal Cmty. v Victoria* (2002) 194 ALR 538, 549–50 (Austl.); *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 58–63 (Austl.). On the terminology of native title, aboriginal title, and tribal law, see P.G. MCHUGH, *ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS* 1–24 (2011).

30. Justin B. Richland, *Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty*, 36 LAW & SOC. INQUIRY 201, 220–28 (2011).

at the moment of acquisition, the common law became the law of the land. In this account, sovereignty is coextensive with the modern state, and indivisible.<sup>31</sup>

In creating a category of law under the heading of “native title,” the decision in *Mabo (No. 2)* created a relationship between two laws—those of the Meriam people and that of the common law of the Australian state.<sup>32</sup> It asked: under whose laws did Eddie Mabo inherit? The precise juridical nature of this relationship has proven hard to characterise. The doctrinal instantiation of territorial state sovereignty as the language of legal authority was completed in the case of *Yorta Yorta*.<sup>33</sup> For the High Court, the form of the meeting of laws was to be staged between two “normative systems”: Aboriginal laws and traditions, and common law.<sup>34</sup> However, as in *Mabo (No. 2)*, in doing so, the High Court in *Yorta Yorta* described the meeting only in terms of the sovereign-territorial authority of the Australian state. For the High Court, the assertion of sovereignty by the British Crown “necessarily entailed” that thereafter there could be “no parallel law-making system in the territory over which it asserted sovereignty.”<sup>35</sup> To hold otherwise, it stated, “would be to deny the acquisition of sovereignty and . . . that is not permissible.”<sup>36</sup>

Two ways of engaging the plurality of laws would seem to be possible for Australian common law after *Yorta Yorta*. The first is that as a result of that decision, after the assertion of British sovereignty, there is no Indigenous or Aboriginal law as such, merely a “normative system” that is something less than law. Such normative systems may be considered as custom or tradition, in which case no meeting point between laws is possible. Or, second, Indigenous or Aboriginal laws exist, but they run in parallel to the common law, and hence never meet common laws unless a nonlegal meeting point is built between them. Such a meeting point might, perhaps, be ethical, social, or governmental. Viewed from the perspective of Australian “territorial sovereignty,” the repatriation of the Indigenous dead cannot take place by means of a meeting of Indigenous and non-Indigenous laws.

---

31. For a comparative account of the meeting of “settler” and “indigenous” laws, see generally KIRSTY GOVER, *TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP* (2010).

32. The following three paragraphs repeat a broader argument made in Shaunnagh Dorsett & Shaun McVeigh, *Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking*, 36 MELB. U. L. REV. 470, 475–79 (2012).

33. *Members of the Yorta Yorta Aboriginal Cmty.* 194 ALR at 550–52.

34. *Id.* at 548 (quoting from *Fejo v NT of Austl.* (1998) 195 CLR 96 (Austl.)).

35. *Id.* at 552.

36. *Id.*; see also ANN CURTHOYS ET AL., *RIGHTS AND REDEMPTION: HISTORY, LAW AND INDIGENOUS PEOPLE* 60–80 (2008); Shaunnagh Dorsett & Shaun McVeigh, *An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in Yorta Yorta*, 59 N. IR. LEGAL Q. 1, 9 (2005). While the decisions in cases like *Mabo (No. 2)* and *Yorta Yorta* are made from within the common law, they are also consistent with the understanding of territorial sovereignty in International law. See James Crawford, *Sovereignty as a Legal Value*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 117, 119–20 (James Crawford & Martti Koskenniemi eds., 2012).

The decisions of the High Court of Australia and the formation of “native title” law have been criticized in great detail.<sup>37</sup> Here, a number of points can be made about the meeting of laws in relation to repatriation. The most obvious of these is that while “native title” marks a limit of the process of the colonization and decolonization, the affirmation of the sovereign territorial state does not end the meeting of laws.<sup>38</sup> If attention is turned from what is often treated as the territorial fact of sovereignty to the practice of jurisdiction, however, it becomes possible to consider the “native title” cases and legislation in terms of the conduct of a series of jurisdictional relationships. In this respect, the assertion of sovereign territorial jurisdiction in the manner of *Mabo (No. 2)* or *Yorta Yorta* does not end the meeting of laws: it sets conditions.<sup>39</sup>

While *Mabo (No. 2)*, *Yorta Yorta*, and subsequent legislation have formed a part of a reconsideration of the settlement of the continent of Australia, this reconsideration has instituted a complex relation of meeting between laws. It is a meeting that always takes place twice: once (retrospectively) at settlement and then, subsequently, by way of the improvisation of parallel laws. In *Mabo (No. 2)*, Justice Brennan reformulated an old doctrine on the meeting of laws in order to characterize the relation between Aboriginal law and common law. Brennan stated:

Native Title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>40</sup>

What is of concern for the Court (and government agencies) is understood in terms of an evidentiary inquiry: “Are you a rightful claimant?” “What customs do you have?” In terms of the conduct of a meeting of laws, the predominance of these questions engenders the more skeptical question: do you exist for our purposes?<sup>41</sup> The assertion of an Indigenous jurisdiction (and domain of rights and

---

37. See, e.g., PAST LAW, PRESENT HISTORIES (Diane Kirkby ed., 2012); Stewart Motha, *The Sovereign Event in a Nation's Law*, 13 LAW & CRITIQUE 311, 317–24 (2002). See generally BETWEEN INDIGENOUS AND SETTLER GOVERNANCE (Lisa Ford & Tim Rowse eds., 2012); THE SOCIAL EFFECTS OF NATIVE TITLE: RECOGNITION, TRANSLATION, COEXISTENCE (Benjamin R. Smith & Frances Morphy eds., 2007).

38. Shaun McVeigh & Sundhya Pahuja, *Rival Jurisdictions: The Promise and Loss of Sovereignty*, in AFTER SOVEREIGNTY: ON THE QUESTION OF POLITICAL BEGINNINGS 97, 104–10 (Charles Barbour & George Pavlich eds., 2010).

39. See Shaunnagh Dorsett, *Mapping Territories*, in JURISPRUDENCE OF JURISDICTION 137, 153–56 (Shaun McVeigh ed., 2007).

40. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 58 (Austl.).

41. Karolina Kuprecht, *The Concept of “Cultural Affiliation” in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 INT'L J. CULTURAL PROP. 33, 38–41 (2012); Peter Rush, *Deathbound Doctrine: Scenes of Murder and Its Inheritance*, 16 STUD. L. POL. & SOC'Y 71, 83–93 (1997).

government) with the Australian Courts continues to be a contest of both authority and form.<sup>42</sup>

The formulation of relations of law in terms of sovereign territorial states has meant that it is hard to see the repatriation of the Indigenous dead as a part of the honouring of the laws of Indigenous and non-Indigenous peoples. However, attending to the forms of jurisdictional practice allows for the analysis of other forms of lawful conduct in the meeting of laws. In the next section, a number of these jurisdictional practices are discussed to sharpen the jurisdictional arrangements of repatriation. Without wishing away the authority of the state assertion of sovereign territorial jurisdiction, jurisdictional practices can also be understood on a smaller scale in the form of legal relations shaped by the authority of an institution (a church, a university, or a museum, for example), the practice of adjudication, the formation of a legal category (say, that of the person or of a category like “ancestral remains”), or of a legal device. Jurisdictional practices, even those that organise lawful relations territorially, can be understood in terms of the forms of relationship they create and make available. In a like manner, it is possible, even within forms of common law understanding, to frame some meetings of law in terms of conduct rather than the proof of existence and fact of practice.

### III. REPATRIATIONS

In contemporary practices of the repatriation of the Indigenous dead in Australia and elsewhere, it is the museum that has become the central office or bearer of political, administrative, and cultural responsibility. In addition to being institutions and sites of the display of the glory of the sovereign and “civic laboratories” for new forms of citizenship, a significant number of museums have now taken up the task of caring for the ancestral remains of the Indigenous dead.<sup>43</sup> How this new task might be understood, and whether it should be

---

42. Marcia Langton et al., *Introduction* to HONOUR AMONG NATIONS?: TREATIES AND AGREEMENTS WITH INDIGENOUS PEOPLE 1, 1–3 (Marcia Langton et al. eds., 2004); Lisa Palmer & Maureen Tehan, ‘*Anchored to the Land*’: *Asserting and Recognising Aboriginal Jurisdiction in the Northwest Territories*, in SETTLING WITH INDIGENOUS PEOPLE: MODERN TREATY AND AGREEMENT-MAKING 66, 85–91 (Marcia Langton et al. eds., 2006).

43. Michael Pickering & Phil Gordon, *Repatriation: The End of the Beginning*, in UNDERSTANDING MUSEUMS: AUSTRALIAN MUSEUMS AND MUSEOLOGY 1, 2–3 (Des Griffin & Leon Paroissien eds., 2011), available at [http://nma.gov.au/research/understanding-museums/MPickering\\_PGordon\\_2011.html](http://nma.gov.au/research/understanding-museums/MPickering_PGordon_2011.html). The role was articulated in Museums Austl. Inc., *Continuous Cultures, Ongoing Responsibilities: Principles and Guidelines for Australian Museums Working with Aboriginal and Torres Strait Islander Cultural Heritage*, NAT’L MUSEUM AUSTL. 20 (Feb. 2005), [http://www.nma.gov.au/\\_\\_data/assets/pdf\\_file/0020/3296/ccor\\_final\\_feb\\_05.pdf](http://www.nma.gov.au/__data/assets/pdf_file/0020/3296/ccor_final_feb_05.pdf). See the National Museum of Australia’s policy documents on repatriation: *Repatriation*, NAT’L MUSEUM AUSTL., <http://www.nma.gov.au/collections/repatriation> (last visited Mar. 2, 2013). For an account of the civic project of museums in Australia, see Tony Bennett, *Civic Laboratories: Museums, Cultural Objecthood and the Governance of the Social*, 19 CULTURAL STUD. 521, 534–41 (2005).

undertaken, has been the subject of intense debate.<sup>44</sup> Museums have frequently hesitated over the return of ancestral remains, not only citing a lack of legal obligation to repatriate, but also expressing a number of competing or overriding duties, interests, and rights. These claims have been made in the name of scientific research, the obligations of civic education, and the curating or care of national or universal cultures.<sup>45</sup> These justifications and their forms of practice are not directly at issue in this Essay. Or, rather, such concerns are directly at issue, but it is argued here that they cannot be addressed without attending to the jurisdictional modes of the authorisation of the conduct of lawful relations.

In many respects, the question of rival or competing interests in museum practice has been decisively answered in Australia. The Australian Government, at least, is clear that repatriation is part of its concern with remedying the injustices of its “shared past.”<sup>46</sup> Australian regulation has followed the United States in developing an account of repatriation within domestic institutions that is based on a presumption of repatriation where it is possible to do so.<sup>47</sup> Rather than develop regimes of civil rights, Australian regulation has addressed repatriation through relations of cultural heritage and property.<sup>48</sup> Designated museums undertake the work of repatriation from Australian institutions and act as mediators in voluntary repatriations of work from overseas institutions.<sup>49</sup> These practices are set within a

---

44. Michael Pickering, *Despatches from the Front Line? Museum Experiences in Applied Repatriation*, in *THE LONG WAY HOME*, *supra* note 11, at 163, 166–68; Paul Turnbull, *The Vermilion Accord and the Significance of the History of the Scientific Procurement and Use of Indigenous Australian Bodily Remains*, in *THE LONG WAY HOME*, *supra* note 11, at 117, 121–30.

45. Tatiana Flessas, *The Repatriation Debate and the Discourse of the Commons*, 17 *SOC. & LEGAL STUD.* 387, 392–402 (2008).

46. The policy is captured in its opening statement: “The Australian Government is committed to addressing the injustice of Australia’s shared past as it relates to the removal of ancestral remains and secret sacred objects to empower Aboriginal and Torres Strait Islander peoples to meet their cultural obligations and contribute to the wider Australian society.” Office of the Arts, Dep’t of the Prime Minister & Cabinet, *Australian Government Policy on Indigenous Repatriation*, AUSTL. GOV’T 5 (Aug. 2013), [http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy\\_10%20Oct%202013.pdf](http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy_10%20Oct%202013.pdf).

47. The Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2012), and the National Museum of the American Indian Act, 20 U.S.C. § 80(q) (2012), shaped the presumption of the repatriation of Indigenous dead (“cultural objects”) along the lines of civil rights, property, culture, and public administration. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, in *THE FUTURE OF THE PAST: ARCHAEOLOGISTS, NATIVE AMERICANS AND REPATRIATION* 9, 22–31 (Tamara L. Bray ed., 2001).

48. Maureen Tehan, *To Be or Not to Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage*, 15 *U. TAS. L. REV.* 267, 280–87 (1996); Nicole Watson, *The Repatriation of Indigenous Remains in the United States of America and Australia: A Comparative Analysis*, 8 *AUSTL. INDIGENOUS L. REP.* 33, 38–40 (2003); Marilyn C. Truscott, *Repatriation of Indigenous Cultural Property*, AUSTL. GOV’T (2006), <http://www.environment.gov.au/system/files/pages/e535aa20-601d-4e5f-9279-5fe172d2b708/files/repatriation.pdf>.

49. At the level of commonwealth government, the “Return of Indigenous Cultural Property Program” covered these matters. Between 2001 and 2010, the program supported the return of more than 1400 ancestral remains and 1380 secret sacred objects to Indigenous communities. Work has

range of policy concerns running from the creation of spheres of Aboriginal self-determination and participation in government to urban and regional planning and development.<sup>50</sup>

In order to draw out the sense of repatriation as being concerned with the return of the Indigenous dead to their proper jurisdiction, it is necessary to recast the diverse range of regulatory materials, museum practices, and justifications in terms of the conduct of the meeting of laws. Despite the importance of the languages of rights and responsibilities in relation to repatriation, what is striking is how little attention is paid to the meeting and transmission of laws. Three jurisdictional arrangements are addressed here: the first involves the status of the Indigenous dead within the common law tradition; the second, the law of inheritance and the burial; and the third, the jurisdictional arrangement for the responsibility to care and speak for the dead. Historically, within Western legal idioms, the concerns with the status of the dead and the authority to care and speak for the dead all touch on the complex relations between church and state and between spiritual and temporal jurisdictions. These are the jurisdictional resources through which the Indigenous dead are given a place within the common law tradition. As jurisdictional arrangements, they also shape the forms of conduct made available for repatriation.

### *1. Plural Jurisdictions*

One of the complexities of thinking jurisdictionally within the common law tradition is that there is rarely a single point where jurisdictional practice is securely bound to sovereign territory and its administration. The first division of jurisdictions and of laws within European idioms was between common law (of nations and peoples) and canon or church law. The jurisdictional arrangements of common law and ecclesiastical law hold the shape of the distinction between the forum of conscience (church or spiritual authority) and the external forum of government (civil or temporal authority). Ecclesiastical jurisdictions and canon law played an important part in the law of England during the Middle Ages. One result of the English secession from the authority of Rome in the 1530s was the formation of the Church of England and the transformation of canon law into English ecclesiastical law. The canon law courts were incorporated into the

---

also been done to identify the origins of other ancestral remains and secret sacred objects held in the collections of these museums. This resulted in the identification, to community level, of over 1000 ancestral remains and over 3000 secret sacred objects. *See generally* Department of the Environment, Water, Heritage and the Arts Annual Report 2009-10, AUSTL. GOV'T: DEPT ENV'T, <http://www.environment.gov.au/resource/department-environment-water-heritage-and-arts-annual-report-2009-10> (last visited Feb. 13, 2014).

50. *See generally* DAVID EDELMAN ET AL., NAT'L NATIVE TITLE TRIBUNAL, COMMONWEALTH, STATE AND TERRITORY HERITAGE REGIMES: SUMMARY OF PROVISIONS FOR ABORIGINAL CONSULTATION (Lincoln Hayes & Kathryn Neville eds., 2010); ELOISE SCHNIERER, NEW S. WALES ABORIGINAL LAND COUNCIL, CARING FOR CULTURE (2010).

framework of English national courts and into the framework of English law itself. Much was changed in the translation of canon law into a national law.<sup>51</sup>

One problem for those who address the repatriation of the Indigenous dead through the common law is that the common law does not always care for its own dead. The reasons for this are varied. However, in matters of repatriation of the Indigenous dead, the statement of law that there can be no property in the dead has been used to explain why museums have no legal obligation to repatriate the Indigenous dead. If there can be no property in the dead, there can be no common law duty to return stolen property. As a consequence, any claim for the return of the human remains was treated as a “moral” claim rather than an enforceable legal claim. Within the common law, this is a proposition that is traced either to a decision of Edward Coke in 1613 in *Haynes’s Case* (1614)<sup>52</sup>—although, it is questionable whether Coke ever determined in *Haynes’s Case* that there could be no property in a dead body—or to Coke’s *The Third Part of the Institutes of the Laws of England (Third Institute)* (1644)—“the buriall [sic] of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclefiastical [sic] cognifance [sic], but as to the monument, action is given . . . at the common law for defacing thereof.”<sup>53</sup> Coke’s argument in the *Third Institute* suggests something other than a property right is at issue in the care of the dead. The *Third Institute* does not say that a cadaver does not belong to law, or even that it could not be bound to the common law. Rather, it says that, in the matter of burial, the body belongs or is bound to another law—ecclesiastical law. In *Haynes’s Case* and the *Third Institute*, the dead body itself was not at issue.<sup>54</sup>

The way in which the common law declined jurisdiction over burial in the seventeenth century has become more problematic with the decline of the significance of an ecclesiastical jurisdiction. The consequence of the failure to bind the body to the common law, the way in which precedent transmits law across time, and the effective demise of noncommon law jurisdictions has been to leave the dead body without jurisdictional place. Of course, it is possible within Australian law to treat the body as property or being owned. The heritage legislation for the state of Victoria in Australia does something like this, declaring that Aboriginal people who can show a traditional or familial link to Aboriginal

51. PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS 53–110 (1990).

52. *Haynes’s Case*, (1614) 77 Eng. Rep. 1389, (H.C.) 1389.

53. EDUARDO COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 203 (London, W. Clarke & Sons 1817) (1644). This principle has been affirmed in *R v. Lynn*, (1787) 168 Eng. Rep. 350 (K.B.) 351. See also *Doodeward v Spence* (1908) 6 CLR 406, 411–14 (Austl.); *In re Organ Retention Grp. Litig.*, [2004] EWHC (QB) 644, [2005] 2 W.L.R. 358 [390]–[93] (Eng.).

54. See Yan Thomas, *Res Religiosae: On the Categories of Religion and Commerce in Roman Law*, in LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 40 (Alain Pottage & Martha Mundy eds., 2004).

human remains become the owners of the human remains.<sup>55</sup> Where Aboriginal human remains are held by state institutions, they are to be handed over to the relevant museum's board with a view to returning the remains or keeping them as custodian.<sup>56</sup>

*Haynes's Case* struggled with what can be held within a jurisdiction or what can happen when what were two distinct jurisdictions become joined. Following, or developing, a line of argument about the meeting of laws requires a sense of the way in which the transmission of law is also an engagement of the institution and address of law. The inheritors of the decision in *Haynes's Case* lost the mode and meaning of what is bound to law. A failure to attend to this has meant that the dead of the common law and the Indigenous dead brought into the sphere of authority of the common law have come to be treated without care or reason. They are not patterned into the ordering of forms of life and death and the relations of the living, the dead, and the yet to be born, as they were within an ecclesiastical jurisdiction of conscience.

The dead and the practice of repatriation as questions of property lose the sense in which repatriation is concerned with a meeting of laws. In the alignment of the care of the dead with property relations, a museum, for example, charged with the care of the dead can only conduct itself as a matter of statutory authority, administration, and policy. An Aboriginal person can be recognised as an owner under Australian law, but not directly as someone with responsibilities and rights under Aboriginal law. (The Aboriginal Heritage Act 2006 (Vic) does not mention Aboriginal or Indigenous law at all.) At the level of the description of policy and activity, the lack of reference to another law may not matter. Contemporary juridical forms generally work with a very small repertoire of ceremonial engagements. However, what might be lost for those living within the common law tradition is the ability to formulate a relationship of lawful conduct, either of conscience or government. A further sense of this can be gained from another vestige of ecclesiastical ordering: the laws of inheritance.

## 2. *Inheritance and Placement*

Although the narrative of the movement and placement of the Indigenous dead lies at the centre of repatriation, relatively few attempt to give shape to the forms of conduct appropriate to repatriation itself. In the United Kingdom, for example, the concern for repatriation is addressed in the Human Tissue Act 2004 (UK). There, repatriation is considered as a matter of the treatment and care of human remains in hospitals, museums, and other public institutions. Museum policy in Australia, however, operates both with an account of human or ancestral remains and, increasingly, an account of the return of the Indigenous dead. While the language of rights and self-determination are capable of giving a general sense

---

55. *Aboriginal Heritage Act 2006* (Vic) s 13 para 1 (Austl.).

56. *Id.* at s 15.

of political responsibility, something else is needed to articulate the sense of caring lawfully for the Indigenous dead. Within the common law, the care of the dead has been treated as of inheritance and burial.

One example of the treatment of the return of the Indigenous dead as a concern of proper inheritance can be found in the Tasmanian case of *In re Tasmanian Aboriginal Centre Inc.* (2007).<sup>57</sup> This case was initiated by the Tasmanian Aboriginal Centre (TAC) as part of its political work to secure the return to Tasmania of those Indigenous dead held in museums in England and Scotland. The application to the Tasmanian Supreme Court was sought in order to make the TAC an administrator of the estates of the seventeen dead Aboriginal Tasmanians whose remains were being held in the Natural History Museum in London. As an administrator, the TAC was given the responsibility to secure the inheritance of any possible descendants of the dead Aboriginal men and to bury the dead men according to “customary [Indigenous] law.”<sup>58</sup> Most interesting from the viewpoint of the meetings of laws is that by making the Indigenous dead a concern of inheritance and burial, rather than heritage and property, the Indigenous dead come to be treated as dead and in a relationship with the living and the yet to be born. However, the cost of such acknowledgement is that inheritance and burial must take place as a matter of Australian law.

A related jurisdictional ordering can be seen in the arrangements where there is a dispute of law and ceremony in the burial of the dead. As in *Haynes's Case* (1610), the concern is one of authority and care. However, in this situation, the question of jurisdictional arrangement was not posed in terms of a relation between common law and ecclesiastical law, but between two common laws. In the New Zealand case of *Takamore v Clarke* (2011), a dispute arose over burial place and burial rites of James Takamore.<sup>59</sup> The question arose as to whether he should be buried according to the wishes of James Takamore's wife, who was also the executrix of his will, or according to the wishes of the family of his birth. Mr. Takamore was of Whakatohea and Tuhoe decent. His family *marae* at Kutarere observes the *tikanga* (law) of Tuhoe. Mrs. Clarke and her children wished for Mr. Takamore to be buried near them. The question of proper burial was raised both as one of the authority of the common law of New Zealand and of its relationship to Maori laws. While the *tikanga* of Tuhoe was recognised as “customary” law, the different common law courts that heard this case held different views as to its status. The High Court, the Court of Appeal, and Supreme Court all held that the

---

57. *In re Tasmanian Aboriginal Centre Inc. (Tas)* (2007) 16 Tas R 139, 141 (Austl.).

58. *Id.* at 143. For a fuller account, see generally Chris Davies & Kate Galloway, *The Story of Seventeen Tasmanians: The Tasmanian Aboriginal Centre and Repatriation from the National History Museum*, 11 NEWCASTLE L. REV. 143 (2009).

59. *Clarke v Takamore* [2010] 2 NZLR 525 (HC) (N.Z.); *Takamore v Clarke* [2011] NZCA 587 (N.Z.); *Takamore v Clarke* [2012] NZSC 116 (N.Z.). The Australian law is briefly illustrated in *Jones v Dodd* (1999) 73 SASR 328, 333–35 (Austl.); *Jones v Dodd* [1999] SASC 125 (Austl.); and *Dodd v Jones* [1999] SASC 458 at paras [29]–[32] (Austl.).

*tikanga* relating to burial could not be recognised as consistent with the common law.<sup>60</sup> What is extraordinary in this case is that the two laws are related not to the present situation in New Zealand, but to the relation between the common law of England and the common law of Ireland. The majority of the Court of Appeal returned to the *Case of Tanistry* (1608) in order to develop a test of the recognition of custom based on repugnancy.<sup>61</sup> More recently, the majority of the Supreme Court returned the question of the authority to order a burial to that of the role of the office of executor and the inherent jurisdiction of the Supreme Court to decide questions of burial where disputes are irresolvable or resolved unreasonably.<sup>62</sup> With this, the question of the meeting of laws is returned to any array of concerns of judicial and administrative office within the common law of New Zealand.

From its own viewpoint, the common law of Australia and New Zealand is conducted and organized through forms of territorial jurisdiction. From this standpoint, the shadow of older personal, ecclesiastical, and rival common law jurisdictions is mainly of historical interest. However, such a jurisdictional arrangement also points to the continuing effects of rival forms of jurisdictional ordering.

### 3. Museums

By holding on to the meeting of laws as a jurisdictional arrangement of conduct, it is possible to open up two lines of observation about the status and authority of museums in the conduct of repatriation of the Indigenous dead. The first, in a sense, is obvious. The development of museum policy addresses the concerns of repatriation through the aspirations of the UN Declaration of the Rights of Indigenous Peoples. It acknowledges the centrality of Indigenous self-determination and proposes a practice of consultation that differs considerably from, and, in part, resists the jurisdictional forms of lawful relations incorporated within, Australian common law. The way such understandings are related to the forms of the conduct of law and administration is left as a matter of politics and negotiation. However, as the analysis presented here suggests, such domains of rights and administration do continue to be conducted through long established jurisdictional practices. This becomes a matter of acute difficulty when jurisdictional techniques used to develop practices of colonial administration are

---

60. *Takamore v Clarke* [2011] NZCA 587 (CA) at paras [163]–[165]; *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at paras [86]–[88].

61. See *Takamore v Clarke*, [2011] NZCA 587 at paras [109]–[110] (drawing from *Le Case de Tanistry*, (1608) 80 Eng. Rep. 516 (K.B.) 524 (unofficial translation from Law French)); Shaunnagh Dorsett, ‘*Since Time Immemorial*’: *A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry*, 26 MELB. U. L. REV. 32, 49–50 (2002).

62. *Takamore v Clarke* [2012] NZSC 116 (SC) at paras [90]–[95], [152]–[155]. It is worth noting Elias CJ’s acknowledgement of the importance of the obligations to the dead and the yet to be born for those who are guided by the *tikanga* of Tuhoe. *Id.* at para [97].

turned to those of transitional justice or when the museum acts as a custodian of either a universal heritage or of the Indigenous dead. For some, withdrawing from the project of promoting national or world culture marks a loss of authority for museums.<sup>63</sup> However, at least in Australia and New Zealand, it might be the case that museums are taking up new roles and responsibilities.

The second observation is more speculative. Museums have been directly charged with the responsibility for mediating the repatriation of the Indigenous dead. In doing so, they exercise a distinct authority. To consider the museum a jurisdictional entity also invites consideration of the basis of that authority and how it might be understood within the array of jurisdictional arrangements that are represented in the montage of law.<sup>64</sup> In this section, the jurisdiction of the museum has been aligned with that of the ecclesiastical jurisdiction of conscience—although it has been pointed out that it is a jurisdiction that does not know its own craft of conducting lawful relations. For such a jurisdiction to be established, it would have to take responsibility for the dead rather than care for human remains. Against this, legislation such as the Aboriginal Heritage Act 2006 or the Australian policy on museums and repatriation prefers to present repatriation as a matter of government and civil authority.<sup>65</sup> In neither account is it clear that the legal ordering will permit a meeting of laws.

Before leaving the museum, the last account of the conduct of meeting must address the right to “speak for country” and to conduct the proper ceremonies of the dead.<sup>66</sup> A plurality of legislative arrangements for the representation of Aboriginal elders has developed in the government of cultural heritage and the repatriation of human remains.<sup>67</sup> Such forms of consultation are important in the work of the repatriation since they establish an institutional form that both attends to the care of the Indigenous dead and provides for their return to their own law. However, whether museums will take up a jurisdiction and accept responsibility for the meeting of laws remains in dispute.

#### IV. ETHIC OF RESPONSIBILITY

The account of the meeting of laws in repatriation offered here has been

---

63. This is argued by Jenkins, cited above. JENKINS, *supra* note 10, at 26.

64. DORSETT & MCVEIGH, *supra* note 6; Peter Goodrich, *Visive Powers: Colours, Trees and Genres of Jurisdiction*, 2 L. & HUMAN. 213, 221–23 (2008).

65. TONY BENNETT, PASTS BEYOND MEMORY: EVOLUTION, MUSEUMS, COLONIALISM 136–59 (2004).

66. Outside of museums, the acknowledgement of the right to “speak for country” and to uphold Indigenous law is limited to general Australian law or rights exercised in relation to the exercise of Native Title rights and interests. For example, the native title “right to maintain and protect” burial sites is notoriously limited. See *Neowarra v Western Australia* [2003] FCA 1402, 132–35 (Austl.).

67. See, for example, the Advisory Committee for Indigenous Repatriation formed in 2012. *Indigenous Repatriation*, AUSTL. GOV'T, <http://arts.gov.au/indigenous/repatriation> (last visited Mar. 2, 2013).

limited and, in many respects, unhappy. The final part of this Article returns questions of jurisprudence and jurisdiction to the office of the jurist—the institutional figure who takes responsibility for the conduct of law. Focusing on the office here draws out the institutional (rather than directly existential) quality of the conduct of repatriation in the meeting of laws.<sup>68</sup>

The analysis of the meeting of laws presented in this Article has followed a number of ways in which Indigenous and non-Indigenous laws meet without necessarily coming into close relation. At its centre is an account of lawful relations that follows the contours of a civil jurisprudence ordered around sovereign territorial authority, civil peace, and the welfare of the population. The social task of this jurisprudence rests on security and limited sociability.<sup>69</sup>

The contemporary formulation of repatriation in Australian museums responds to a somewhat different account of the conduct of the meeting of laws. In this account, common law and Indigenous law are in relation. This returns repatriation to the more general conditions of the conduct of lawful relations. The works of the Canadian jurists Jeremy Webber and Mark Walters draw attention to the ways in which both Indigenous law and common law would have to be drawn in relation for such accounts to establish a meaningful meeting of laws.

For Webber and Walters, the prospect of a meeting of law and of the possibility of justice depends on the realisation of the customary character of both common law and Indigenous law. It also depends on developing an awareness of the “intersubjective” quality of lawful relations, as well as of the importance of negotiating between laws.<sup>70</sup> For Webber, this requires both the work of comparing law and the political insistence on a common horizon of justice.<sup>71</sup> For Walters, the task of engaging the meeting of laws is bound up with reconciliation. Reconciliation itself is the “unwritten” principle of legality.<sup>72</sup> Here, both Indigenous and non-Indigenous law in Canada is joined in the realisation and maintenance of “social harmony, political coordination, and rational deliberation.”<sup>73</sup> The work of repatriation, then, might be given shape in finding a common language of law and custom that relates the importance of the burial of the dead to the conduct of lawful relations.<sup>74</sup>

---

68. CONAL CONDREN, ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND: THE PRESUPPOSITION OF OATHS AND OFFICES (2006); Jeffrey Minson, *Holding On to Office, in THE PRINCE'S NEW CLOTHES: WHY DO AUSTRALIANS DISLIKE THEIR POLITICIANS?* 127, 134–37 (David Burchell & Andrew Leigh eds., 2002).

69. PAHUJA, *supra* note 24, at 44–94.

70. Jeremy Webber, *The Grammar of Customary Law*, 54 MCGILL L. J. 579, 589 (2009).

71. *Id.* at 623–25.

72. Mark D. Walters, *The Jurisprudence of Reconciliation: Aboriginal Rights in Canada, in THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* 165, 188–89 (Will Kymlicka & Bashir Bashir eds., 2008).

73. *Id.*

74. This is also the task articulated by Museums Australia in its recommendation of museum

Whether or not entering into and reconciling customary relations is possible or convincing depends on whether the common law tradition has a sufficiently meaningful account of jurisdiction, conduct, and experience to sustain the lawful relations required in the meeting of laws. The Australian jurist Peter Rush has pointed out that much of the concern of common judges and jurists is directed towards the quality of the common law rather than reconciliation. What is the way in the possibility of lawful relations is tied to the experience of law. In Rush's reading of the common law, the experience of the common law in Australia is one of anxiety and trauma.<sup>75</sup> The trauma of the common law—as the judgments in *Mabo (No. 2)* make plain—relates to the loss of tradition.<sup>76</sup> For Rush, the ethic of the office of the jurist is not directly concerned with the meeting of laws. It is concerned with care for the conduct of law that is brought to the meeting. Where Webber's ethic takes shape in intersubjective relations, Rush's ethic of office engages the responsibility of the jurist to create and maintain some form of "interiority" to law—an interiority or experience of law adequate to sustain conscience and judgment.<sup>77</sup> It is an ethic of responsibility that is framed in terms of finding the appropriate internal qualities to meet external realities.<sup>78</sup> To this has been added a concern with the technical forms of jurisdictional practice by which lawful relations of the common law tradition are conducted.

#### CONCLUSION

From the viewpoint of those who follow the common law, I have argued that the conduct of the meeting of laws is shaped by the repertoires of jurisdictional practice and that the meeting of laws is also a practice of lawful conduct or jurisprudence. In considering the responsibilities for the dead, the living, and the yet to be born expressed within Indigenous jurisprudences, Christine Black has emphasised the ways in which law is authorised through experience and through the actualisation of relations. In response, I have argued that it is through a jurisprudence of jurisdiction that the common law comes closest to offering an account of the conduct of lawful relations. Insofar as a jurisprudence of jurisdiction presented in this Article also carries with it a teaching about how to conduct oneself in relation to law, this Article has pointed to some of the ways in which the jurisprudence of the common law has responded to

---

practice. Museums Austl. Inc., *supra* note 43, at 6–10. The recommendations emphasize: custodianship rather than ownership; recognition of the value of stories; acknowledgement of Indigenous cultural practices; and creation of genuine relationships of reciprocity. *Id.*

75. Peter Rush, *An Altered Jurisdiction: Corporeal Traces of Law*, 6 GRIFFITH L. REV. 144, 149 (1998).

76. Dorsett & McVeigh, *supra* note 28, at 289.

77. Rush, *supra* note 75, at 147; see Rush, *supra* note 41, at 71–99.

78. See Peter D. Rush, *Dirty War Crimes: Jurisdictions of Memory and International Criminal Law*, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 367 (Kevin Jon Heller & Gerry Simpson eds., 2013); MAX WEBER, *Politics as a Vocation*, in THE VOCATION LECTURES 32, 82–84 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

Indigenous laws and jurisprudence through the creation and maintenance of the repertoires of meeting. Doing so allows for the consideration of the particular ways in which the jurisprudences of jurisdiction have contributed to the creation of a meeting of laws in a lawful rather than a lawless way. It has also enabled the practice of the meeting of laws and the repatriation of the Indigenous dead to be addressed in terms of the honoring or dishonoring of laws.<sup>79</sup>

This Article closes with two accounts of repatriation. The first account is taken from the return of Maori Ancestral remains from the Field Museum in Chicago, United States, to the Te Papa Museum in Wellington, New Zealand.<sup>80</sup> The repatriation was accompanied by representatives of Menominee Nation and involved a reciprocal gift to the Field Museum. This might be taken as part of the conduct of a heritage practice or, more powerfully, as the exercise of an Indigenous international law—a movement of the dead from one law to another. The second account, already addressed earlier, is taken from the recent repatriations of the Indigenous dead from the museums and institutions of the United Kingdom to Australia. What I want to note here is the ceremonial character of the return of the Indigenous dead from museums in the United Kingdom to Tasmania. There were two significant ceremonies: the passing of the remains from the British Museums to the representatives of TAC in London, and then the passing of the Indigenous dead from the representatives to the TAC.<sup>81</sup> The conduct of an Indigenous international (or better, transnational) law and the ceremonial meeting of laws might be taken as one of the ordering and of the limit of the meeting of one jurisdiction with another. The question of the ceremony and burial is returned to an Indigenous jurisdiction.<sup>82</sup>

While these are images of the practice of repatriation, they are not images of the redemption of the common law so much as shadows of its practice. What is required for those who live their lives through the common law tradition is to give place to the dead.

---

79. Christine Black, *Maturing Australia Through Australian Aboriginal Narrative Law*, 110 S. ATLANTIC Q. 347, 358 (2011).

80. *International Repatriations*, MUSEUM N.Z., <http://www.tepapa.govt.nz/AboutUs/Repatriation/Pages/InternationalRepatriations.aspx> (last visited Mar. 2, 2013).

81. See *PM with Mark Colvin: Ancestral Aboriginal Remains Arrive in Hobart* (Austl. Broad. Corp. News radio broadcast May 14, 2007) (transcript) (on file with *UC Irvine Law Review*), available at <http://www.abc.net.au/news/2007-05-14/ancestral-aboriginal-remains-arrive-in-hobart/2548730>; *Aboriginal Remains Row* (Austl. Broad. Corp. News television broadcast Feb. 21, 2007) (transcript) (on file with the *UC Irvine Law Review*), available at <http://www.abc.net.au/7.30/content/2007/s1853611.htm>.

82. See, e.g., Christopher Wilson, *Ngarrindjeri Experiences of Repatriation: Engaging in an Effective Consultation Process for Returning Old People*, 6 INDIGENOUS L. BULL. 16, 17 (2007).

