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SURVIVING COMMON LAW: SILENCE AND THE VIOLENCE INTERNAL TO THE LEGAL SIGN

Peter D. Rush[*]

It is a not uncommon situation nowadays: an indigenous person comes before the common law courts in Australia and asks for a response to the demands of injustice suffered. She is a member of the stolen generations and asks for relief.[1] Another is accused of a crime and questions the jurisdiction of the court to hear and determine his claim. He appears before the High Court of Australia as "Denis Bruce Walker, Bejam, Kunminarra, Jarlow, Nanaka Kabool, of Moongalba, via Goompie, Minjerribah, Quandamooka. I am the son of Oodgeroo of the tribe Noonuccal, custodian of the land Minjerribah." He wants to be adjudged not only by the judges of the common law but also by the council of the Noonuccal. "I suspect you and your friends are trifling with me," interjects the judge.[2] Another tells the court that current as well as past and future governments are the heirs-at-law of the dispossession and death of the Wiradjuri people. Declarations recognizing aboriginal sovereignty and granting reparation for the appropriation of land and for the genocide of the Wiradjuri are requested. The High Court judge directly rejects the idea that any

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[*] Professor of Law, Law School, University of Melbourne, Melbourne, Australia. This article was presented at the Derrida/America conference held at the Benajmin N. Cardozo School of Law, New York, February 20-21, 2005. Thank you to Nasser Hussain for extensively discussing the thesis of the article and making sure that it did not get lost in the writing, and to Tom Dumm. Acknowledgement is also due to Peter Goodrich, who gave me this opportunity to revisit Derrida and the jurisdiction of common law by kindly inviting me to speak at the conference in the Geo/BioPolitics panel.

[1] The stolen generations have achieved widespread currency in Australia and refer to those people of Aboriginal descent who were removed from their families as children by the actions of state, territory and commonwealth governments. These actions were carried out under both race-specific and general welfare regime legislation. More than 700 plaintiffs have commenced civil actions against the various Australian governments. The first of the stolen generations cases is Kruger v. Commonwealth (1997) 190 C.L.R. 1; *see also* Cubillo v. Commonwealth (2001) 174 ALR 97. More importantly, see the results of a "truth commission" by the Human Rights and Equal Opportunity Commission (Commonwealth of Australia), BRINGING THEM HOME: NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997). As this report evidences, the practice of removals continued well into the 1960s in some parts of Australia.

[2] Walker v. Speechley, S133/1997 (Aug. 17, 1998) (unreported transcript of proceedings), http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/1997/S133 (last visited May 20, 2005).

residual sovereignty remains with indigenous Australians, and compensation is not available to the dead.[3] Another wants to bring a prosecution for genocide against the Prime Minister and three other ministers. The majority of the Federal Court of Australia decides that genocide, albeit a crime under international customary law, is not cognizable in an Australian court. And this is the case even though our "deplorable history" gives us much to regret.[4] For the minority, genocide is cognizable, but claimants come with impossible expectations, and it must be remembered that "[i]t is not within the court's power, nor its function or role, to set right all the wrongs of the past nor to chart a just and social course for the future."[5]

There are many other such instances. Threaded throughout them can be read both a confrontation with how to relate the proximity of law and violence with an appeal to the moral conscience (of the court, of the community, of the nation) in the contemporary aftermath of the violent founding of Australia. In order to engage this confrontation and appeal, I traverse the judgment of the High Court of Australia in *Mabo and Others v. The State of Queensland*, now known as *Mabo (No. 2)*.[6] Returning to it here can help us think through some of the difficulties that shadow the response of the common law courts to the demands of injustice. Can responsibility be taken *in the name of the common law* for the settlement and appropriation—yet again—of the legal territory of Australia? The specific predicament that I emphasize concerns the possibility of a judgment dwelling with and in law. In responding to the demands of injustice, what resources remain available to us for the questioning of a judgment according to law? If the *longue durée* of the common law ordering of colonization holds the judgments of common

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[3] Coe v. Commonwealth (1993) 68 ALJR 110.

[4] Nulyarimma v. Thompson (1999) FCA 1192, per Wilcox and Whitlam, JJ. Wilcox, J., remarked at para. 8 that "[m]any of us non-indigenous Australians have much to regret, in relation to the manner in which our forebears treated indigenous people; possibly far more than we can ever know. Many of us have cause to regret our own actions." *See also* paras. 5-6.

[5] *Id.*, per Merkel, J., commenting at para. 62 that

> the applicants are seeking to remedy wrongs of the past committed against the Aboriginal people. In some instances litigants, even where assisted or represented by legal advisers, have unrealisable expectations of the capacity of the law to remedy past wrongs. However, the Court's role is to hear and determine, in accordance with law, controversies arising between parties. It is not within the Court's power, nor is its function or role, to set right all of the wrongs of the past or to chart a just political and social course for the future.

[6] Mabo v. Queensland (1992) 107 ALR 1 [hereinafter *Mabo (No. 2)*]. The earlier and first High Court judgment in the litigation is reported as Mabo v. Queensland (1988) 166 C.L.R. 186. This concerned the constitutionality of legislation passed by the Queensland Government which retrospectively declared that, upon annexation by Queensland, the Murray Islands became vested in the Crown free from all other rights and interests. If constitutionally valid, this legislation would have terminated the *Mabo* litigation before it was heard—which was in fact the purpose of the state's legislation. The High Court however declared that the legislation was invalid on the basis that it contravened the Racial Discrimination Act 1975 (Cth).

law in relation with the violence of the settlement and grounding of Australia, then Jacques Derrida's essay on the *Force of Law*[7] helps us cross these foundational grounds. But also, I want to suggest, it speaks to their implications for holding onto and narrating the life and death of common law. How does the hand of judgment hold itself within common law? On what condition does a legal order of judgment speak if its articulation of power and authority is neither mute nor mad? This is a question of jurisdiction and of life and death.[8]

I. AN AUDIENCE BEFORE THE COURT

The litigation in the *Mabo case* was initiated in the early 1980s by several plaintiffs from the Meriam nation on the Murray Islands to the north of mainland Australia. The immediate impetus for the litigation was the installation from Queensland of yet another legal and administrative regime for the Islands, one that would remove much of the autonomy of the plural and local communities of the Torres Strait. At the same time, long-term political struggles by indigenous communities in the north of mainland Australia had recently come to fruition with the enactment of the first land rights legislation and the consequent return of land and naming rights to indigenous communities in the Northern Territory. Governmental policies of assimilation were being rejoined by claims of self-determination within indigenous political movements. Coinciding with this, republican nationalism reemerged amongst Anglo-Celtic Australians wanting to insert a cultural and governmental independence from England and from the more recent alliance with the USA. In short, the *Mabo* litigation paralleled and traversed a period in Australia's contemporary history for which race relations (anglo-celtic and indigenous relations as well as multiculturalism), national identity and sovereignty were the complex coordinates of struggle or conflict, myth-making or dreaming.

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[7] Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 919 (Mary Quaintance trans., 1990).

[8] Jurisdiction is not so much a statement of the law as a site of enunciation. It refers us first and foremost to the power and authority to speak in the name of law, and only subsequently to the fact that the law is stated—and stated to be someone or something. Shaun McVeigh, with Shaunnagh Dorsett, has done much to revise our understanding of the plural sites of jurisdiction in modern law. In the context of native title jurisprudence, the important essays are Shaunnagh Dorsett & Shaun McVeigh, *Just So: "The Law Which Governs Australia is Australian Law"*, 13 LAW & CRITIQUE 289 (2002); Shaunnagh Dorsett & Shaun McVeigh, *An Essay on Jurisdiction, Jurisprudence and Authority: The High Court of Australia in Yorta Yorta (2001)*, N. IR. LEGAL Q. (forthcoming). I draw extensively on the former essay in this article. For my initial attempt to find an idiom of jurisdiction and its loss in the context of modern criminal law and judgments on indigenous title, see Peter Rush, *Deathbound Doctrine: Scenes of Murder and its Inheritance*, 16 STUD. L. POL. & SOC'Y 71-100 (1997).

The plaintiffs in the *Mabo* case requested declarations from the courts that would recognize their prior title, local customary practices, and actual continuing possession of land. They also claimed compensation for the impairment of their title by the Queensland government. The defendants in the litigation were the Queensland and Commonwealth governments. The hearing and determination of the facts of the case were carried out by the Supreme Court of Queensland, and lasted for some three and a half years. The three volume report of the facts turns the case into a trial of history; the history of occupation by Europeans and by the indigenous peoples of the Torres Strait is scanned in the course of an empirical description of the laws of inheritance and spiritual jurisdictions through which land was both demarcated and passed on by the Meriam nation.[9] In 1992, the High Court delivered its judgment in *Mabo (No. 2)*. In the briefest of terms, the question the court posed for itself was whether the doctrine of *terra nullius* extinguished indigenous attachment to country or whether instead some space remained within common law for its recognition. The court held that the Queensland Government had acquired sovereignty over the Murray Islands in 1879, that on the acquisition of sovereignty the Crown acquired radical title in the Murray Islands, and that native title to land survived the acquisition of sovereignty and radical title by the Crown. However, it also held that there had been some extinguishment of native title over particular areas of land on the Murray Islands. These technical rulings were represented through a jurisprudential scaffolding that mixed together elements of logical positivism, legal realism, and natural law traditions of right into a package that was named as the common law of Australia. At the level of doctrinal subject-matter, *terra nullius* was repudiated and a doctrine of "native title" was introduced as a part of the common law in Australia. The High Court narrated the recognition of the existence of native title as a declaration that both continued and departed from the common law. It is this recognition that called forth the most heated and often antithetical responses. The courts were usurping the function of a democratically elected government; judicial activism and a "black armband view of history" were making it possible for aboriginal people to steal "our backyards." The judgment was characterized as both a "judicial revolution" and a "cautious correction to Australian law," both a "landmark decision" and one which creates "a legal, political and constitutional crisis."[10] Whatever the merits of such academic

[9] *Determination by the Supreme Court of Queensland pursuant to reference of 27 February 1986 from the High Court of Australia*, 16 November 1990.

[10] The remarks are, in order, from MABO: A JUDICIAL REVOLUTION (M.A. Stephenson & S. Ratnapala eds., Queensland University Press 1993); Garth Nettheim, *Judicial Revolution or Cautious Correction?* Mabo v. Queensland, 16 U. NEW S. WALES L.J. 1, 2 (1993); Fiona

journalism, the common law recognition of a doctrine of aboriginal rights (to land) in the form and idiom of "native title" exhibited both continuities and discontinuities with the common law tradition of legal ordering of colonization.

II. A PLACE FROM WHICH TO RELATE?

Despite the maxim that where there is a right there is a remedy, the High Court held that no recompense was legally possible. By the time the court delivered its judgment, two of the plaintiffs had died. The judgment's delivery has not ceased to be in question. What remains in dispute is not only what the court said—the report of the decision runs for some 170 pages—but more importantly for present purposes, what remains in issue is the site from which it was possible to say what was said.

The judgment was delivered in shadows thrown by politics and ethics. The *recognition* of the continued claims of indigenous peoples to country haunts the High Court. Is such a "recognition-space" possible from within the common law?[11] In order to find a site for such recognition, the High Court declared that the doctrine or inherited teaching of *terra nullius* no longer commanded the attention of the common law courts in Australia.[12] *Terra nullius* represented the land as empty territory, sovereign-less. There was no affiliation or attachment to the order of law, people, and places and hence no inheritance to be transmitted by the indigenous peoples. It was—as the signal phrase of the doctrine put it—land "belonging to no-one" and thus open to appropriation or colonization. Here, what is to be noted initially is that, once *terra nullius* is repudiated as a doctrine of the common law, it is unclear just what remains of common law that would enable the High Court to hold onto and recognize the continued claims of indigenous peoples to country. What images remain in the mirror of common law that could command adherence by the courts and, at the same time, make possible the recognition of indigenous jurisdiction?

Wheeler, *Common Law Native Title in Australia—An Analysis of* Mabo v. Queensland (No 2), 21 FED. L. REV. 271 (1993); Hugh Morgan, *Mabo and Australia's Future*, QUADRANT, Dec. 1993, at 63, 64.

[11] For this formulation of common law as a recognition-space and hence concerned with the legibility (a question of authority) of common law, see Noel Pearson, *The Concept of Native Title at Common Law*, *in* OUR LAND IS OUR LIFE 150, 153-54 (Galarrwuy Yunupingu ed., 1997).

[12] If it ever did. It is at least arguable that the doctrine of *terra nullius* had not actually been a doctrine of Australian law until *Mabo (No. 2)* paradoxically claimed it only to reject it. For the detail of this argument, see David Ritter, *The "Rejection of Terra Nullius" in* Mabo*: A Critical Analysis*, 18 SYDNEY L. REV. 5 (1996). In pragmatic terms, it is the invocation rather than the rejection of the doctrine that has a function in the judgment: it provides a route for an appeal to a normative order of international law.

The remnants of common law also refract the judicial phrasing of the *acts and effects of dispossession* brought about by the settlement and colonization of Australia. The judgments of the High Court in *Mabo (No. 2)*—as well as the cases that followed in its wake—expend considerable energy in generating socio-historical descriptions of the history of the arrival of the English settlers. In disparate idioms to be sure, the judicial story of settlement opens with the acquisition of sovereignty and is characterized by a "white expropriation" which enabled the acquisition of territory and, more problematically, the assumption of ownership. In their joint judgment, Justices Deane and Gaudron spoke of

> the conflagration of oppression and conflict which were, over the following century, to spread out across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame . . . [T]he white expropriation of land continued, spreading not only throughout the fertile regions of the continent but to parts of the desert interior.[13]

In recalling the history of colonization, what the judgment renders legible is the appropriative action of settlement. The effect is to detach indigenous people from country. Moreover, the loss of indigenous jurisdiction continues to shadow the current common law courts. Justice Brennan made this explicit:

> The *common law itself* took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live.[14]

The narrating of a legal order as a question of social history and its reflection in legal doctrine infuses the judgments of the High Court with an ethics marked by a concern with the conscience and character of the court—variously articulated as "regret," as "shame," and less often as "guilt." In short, the acts and effects of dispossession brought about by the settlement and colonization of Australia returns as a question of the moral responsibility and moral authority of the court.

The return of the violent founding of Australia as a question of moral responsibility sends the High Court searching for a way to resituate common law in proximity with the character and conscience of the national community in a situation of global legality. In the place of the forceful expropriation at the origin of settlement, and without quite departing from its narration, the High Court in *Mabo (No. 2)* pushed

[13] *Mabo (No. 2)*, *supra* note 6, at 104-05, per (Deane & Gaudron, JJ.).
[14] *Id.* at 29 (Brennan, J.) (emphasis added).

itself to engage in various retrospective attempts to restore settlement to an overarching normative order of international human rights. Such restoration may be read and has been read as little more than an attempt to legitimate and exculpate the common law, but even so what remains unclear in the judgment of the High Court is how the common law provides a passage for the court through such an overarching and universal normative order.

Common law provides the site where the political and the ethical are brought together and related before the court. What runs throughout both these concerns is how the political question of recognition and the ethical question of a founding violence can be joined within the judgments of common law—and joined without at the same time losing the settlement of Australia. For the majority of the High Court, what remains unassimilable in and unassimilable to the body of the common law was the founding moment of settlement. The violent events of sovereign founding are represented as extrinsic and exceptional to the common law. The High Court reminded us—yet again—that the acts of state through which Australia was settled (sovereignty asserted, territory acquired, and ownership of land assumed) are not justiciable within the common law courts.[15] Moreover, even if they were justiciable, responsibility would not lie with the Australian state but with those who did the deeds whose consequences have been so devastating for the indigenous people and a matter of regret for non-indigenous Australians. Responsibility would lie with the British state, which is not amenable to the jurisdiction of common law courts in Australia.

Here, a first difficulty emerges for the exercise of taking responsibility for the settlement of Australia. It would seem that the jurisdiction of common law is found wanting. *Between the violence of the exceptional decision and the restoration of an international normative order, the common law has trouble settling down, finding a place or site from which to speak, no body with which to speak.* Common law jurisdiction—as that which attaches to living bodies of law—is lost.[16]

III. JUDGMENT AND LEGAL DEATH

If the first issue that vexed the High Court was the founding moment of settlement (and its embodiment in and as the common law); the second and related issue concerns the difficulty of establishing and

[15] On the governmental ordering of the law of the land and the limiting function of the acts of state doctrine, see Ian Hunter, *Native Title: Acts of State and the Rule of Law*, *in* MAKE A BETTER OFFER: THE POLITICS OF MABO (Murray Goot and Tim Rowse eds., 1994).

[16] *See* Rush, *supra* note 8.

maintaining a doctrine of "native title." This remains from start to end as a difficulty of naming. In *Mabo (No. 2)*, Justice Toohey uses "traditional title"; the rest of the court use "native title." Further, while Justice Brennan defines native title as having its "origin in and is given content by the traditional laws acknowledged by and the traditional customs observed by indigenous inhabitants of a territory,"[17] Justices Deane and Gaudron invoke "the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as *sui generis* and unique."[18] In subsequent cases, members of the High Court have expressed a preference for "traditional title" but resign themselves to the fact that "native title" and "native title rights" are now part of the vocabulary of law and accepted judicial and legislative usage.[19] Nevertheless, the difficulty of establishing and maintaining a doctrine of native title remains. *What is the ground of native title? Is it common law? Is it an aboriginal jurisdiction?* In traversing these questions, the High Court presents them in terms of a judgment on the *extinguishment and survival* of native title—literally, legal death and life.

The recognition of native title is limited on the one hand by acts of state and, on the other hand, by the forms and procedures of the action of law. In relation to the former, native title rights are only available to the presently living where those rights have not been extinguished by the policies and actions of imperial, colonial and now commonwealth states. Having opened a space—however minimal—where exclusive possession could be withheld, the High Court acknowledged that native title rights had been extinguished to a large extent by the actions of sovereign governments. As the court puts it, these rights had been "washed away" by the "tide of history."[20]

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[17] *Mabo (No. 2)*, *supra* note 6, at 42 (Brennan, J.).

[18] *Id.* at 67 (Deane & Gaudron, JJ.). For the subsequent legislative definition and use of "native title," see Native Title Act 1993 (Cth) section 223(1). On this legislative definition and the meaning of its use of "tradition," the now central High Court judgment is Members of the Yorta Yorta Community v. Victoria (2002) 194 ALR 538.

[19] See, for example, Wik Peoples v. Queensland and Others (1996) 141 ALR 129, at 165 n.154 and accompanying text (Toohey, J.) and at 249 n.556 and accompanying text (Kirby, J.). Note also that in this case the pleadings of the claimants speak of "aboriginal title."

[20] *Mabo (No. 2)*, *supra* note 6, at 59-60 (Brennan, J.):

> Where a clan or group has continued to acknowledge the laws and, (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

From a position proximate to the tide of history, the High Court also posed a question of survival. If native title has not been extinguished by the intentional actions of sovereign governments, this is not yet to say that indigenous people can re-settle country as an act of right. What must survive, beyond the assertion of sovereign territorial jurisdiction, is indigenous attachment to the body of their country (law, people and places). For the High Court, however, survival can only come in the forms and procedures of law. It can only come in the form of a local custom whose validity has been specified as reasonableness, unbroken continuity and practice since time immemorial—in short, as the tradition and experience of the common law. What *Mabo (No. 2)* required is that the testimony of survival furnish the court with evidence of a physical and cultural connection with the land maintained, since the acquisition of sovereignty, through the continued repetition in time of ancestral and telluric mythologies. Yet, as subsequent litigation and cases have made clear—if it was not already clear in *Mabo (No. 2)*—the juridical ordering of evidence would preclude effective proof by indigenous claimants of such a connection. The use of cadastral maps to mark out boundaries and locate land holdings is discontinuous with aboriginal rights to land and results in asymmetries when representing those rights. More generally, the modern scriptural textuality of common law has repeatedly generated ellipses, misunderstandings, irritation, mistranslations and silence on the part of the law courts when brought before indigenous testimony. One year after *Mabo (No. 2)*, the President of the then newly-created Native Title Tribunal would conclude melancholically that:

> To use, I hope, not an overdramatic metaphor, native title may prove . . . to be a thing of shards and fragments, bits and pieces, with sharp edges and corners that have nothing much to do with the concept of country as the Aboriginal people see it. That is a very hard thing.[21]

This conclusion can be considered a second difficulty. It would seem that, *between extinguishment and survival, the indigenous people of Australia have no jurisdiction, no authority and ordering place from which to speak the law of country.* If it is the case that native title

The marine metaphor of history has become iconic—its implicit focus is on the flow of extinguishment rather than the ebb of survival. However, for a rare and recent example of a judicial counter-use, see Nangkiriny v. State of Western Australia [2004] FCA 1156, at para. 19: "As this hearing concludes, I wish to express the hope that the events of today will be seen in due course as part of the tide of history which washed away the past injustices which, according to the evidence, were visited upon the Karajarri people." The parties—indigenous, government, pastoralists, and commercial—had just concluded a native title agreement which was approved by the Federal Court. Rather than the tide of history erasing yet again the legal memory of plural jurisdictions in favor of the generalized piracy of imperial and colonial settlement, the current recognition of native title is seen to wash away the injustices suffered.

[21] R. French, *Evidence Before the Joint Committee on Native Title*, 24 HANSARD 647 (1994).

appears at the intersection of common law and aboriginal custom, then a death marks the spot. The predicament for the High Court is that, in announcing the legal death of aboriginal jurisdiction, they also announce the death of common law. How can the court decide (on the extinguishing and survival of native title) and still live on as an institutional embodiment of the common law? If the common law has no body with whom to speak, then on what condition can common law speak at all? After all, the common law is a durable order of settlement and colonization which needs to be repeatedly established and maintained in every act of enforcement, every judgment.

In sum, the High Court finds itself in two difficulties when it attempts to hold onto and narrate the settlement and resettlement of Australia as a question of the common law. The first I have specified as that of jurisdiction, understood as a site of enunciation. What is in issue is the possibility of obtaining and retaining a common law voice. The second I have formulated as a judgment on whether Aboriginal Australians can legally speak. The difficulty for the High Court is that this judgment on aboriginal jurisdiction raises the specter of the death of common law.

For those who wish to remain within law rather than abandon it, how could this problem of foundation and its transmission as a living force be addressed? Derrida's essay "Force of Law" provides a number of resources. Here, I dwell on his phrasing of relations between force and justice.[22] This can be considered as a question of jurisdiction, of speech and its relations to legal death and life.

IV. LIFE: BEYOND FOUNDATION

Derrida's account of the force of law ties violence to the phenomenality and possibility of language. The activity of founding law is phrased in terms of relations between two different modalities of action: the performative and the constative. There is no need to repeat this here. What is of interest is not simply the founding moment but *also its continuity*, the possibility of survival. What is inherited or transmitted of the foundation such that a *live* (new or fresh) judgment of law remains possible?

For Derrida, the claim of foundation is inaugurated within a complex temporal figuration. For the moderns, Law always arrives on the scene too early: the issue of violent settlement is always prejudged

[22] The remainder of my essay here relies on the more patient and extensive unfolding of Derrida's formulations from "Force of Law" in Shaun McVeigh et al., *A Judgment Dwelling in Law: Violence and the Relations of Legal Thought*, *in* LAW, VIOLENCE AND THE POSSIBILITY OF JUSTICE 101-140 (Austin Sarat ed., 2001).

by law. Violence can only be adjudged as an irreducible fact of life, once the law has been invoked in its place—that is, once the law has denied, repressed and superseded the question of its own forceful origins and practices. Force comes before the law and is reconstituted as an excess of law.

One response to this torsion can be read in *Mabo (No. 2)*. In the leading judgment, Justice Brennan represents the founding moment of settlement by recourse to acts of state, an international normative order, and finally, in an often unremarked passage, the violence of common law itself. He then adds, somewhat dolefully, that "our law is the prisoner of its history"[23]. Similarly, for Justices Deane and Gaudron, what survives of the conflagration of violence through which settlement proceeded is a "national legacy of unutterable shame"[24]. Justice Brennan then moves to defend the judgment against the need to use history, and specifically its recognition of prior violence and injustice. The form of this defence is identification: as he insists, "the law which governs Australia is Australian law."[25] That law is further specified as the "skeleton of principle" which gives the law of the nation its shape and consistency.[26] In this representation, what undoes the temporal figuration that inaugurates foundation is tautology. In attempting to take responsibility for the founding settlement of Australia, the Court becomes unsettled and the possibility of judgment according to law is extinguished.

Yet perhaps a judgment survives and can be invoked without losing the co-implication of legality, violence and ethics. Minimally, this would be a judgment that is instituted from a place that is not undone or unsettled by tautology. Here Derrida's phrasing of the excess enfolded in law and encrypted as the "mystical foundation of authority" provides an opening. This excess establishes the dwelling place through which law is instituted and from which law is disseminated.[27] The original encounter of law (the joining and disjoining of force and violence) does not simply constitute force as the exterior to law; nor does it show violence to be only a fictive inscription of an outside through which the real violence is hidden. And finally, it does not equate violence and law so as to leave justice and ethics on its outside.

[23] *Mabo (No. 2)*, *supra* note 6, at 29 (Brennan, J.).

[24] *Id.* at 104 (Deane & Gaudron, JJ.).

[25] *Id.* at 29 (Brennan, J.).

[26] *Id.* at 29-30. Here Justice Brennan argues that any leavetaking from precedent—including English precedent which had been earlier followed by the Australian courts as stating the common law of Australia—is impermissible if it would fracture the skeleton of principle that gives the law of the nation its shape and consistency. Justice Brennan adds, however, that the difference between the skeletal and the fleshly principle is indeterminate: "It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not."

[27] *See* MARK WIGLEY, THE ARCHITECTURE OF DECONSTRUCTION: DERRIDA'S HAUNT (1993), especially 150-52.

The irrelation between the performative force of constitution and the constative act of constitution of law (as a system of right) are not simply cast into a general economy of violence—but cast into a differential one of excess. Law is a response to the excess of force of its origins.

The performative meeting of force and justice in law in turn encrypts violence in law—at once threatening it and making it possible. In "Force of Law," Derrida considers the "violent structure of the founding act" to entomb or "wall up a silence."[28] On the one hand, this silence is an indecipherable (that is, mystical) rather than unintelligible limit of foundation. The silence is indecipherable because legibility (the question of law) is suspended in the moment of creation. The law is transcendent because it depends only on who authorizes it in an absolute performance whose presence always escapes him. Yet the possibility of evaluation lies before a law "yet to come."[29] On the other hand, this entombed silence *opens* the *positivity* of law to questions of normativity and its aspirations.

This encrypting of violence is the first positioning of the interiority of law; it is the condition of possibility of a judgment dwelling in law. It creates the spacing and division of legitimate and illegitimate violence. It prevents the simple assertion of the division of inner law (justice) and outer conformity to law (authority). And just as importantly, it opens the law to "what is to come." As infinite responsibility beyond calculation, the performance of justice "remains, is yet to come, *à venir*, it has, it is *à venir*, the very dimension of events irreducibly to come."[30] This is a necessary and impossible task.

The matter of an entombed or "walled up silence" is of some interest for reconstructing the jurisdiction of death and life, especially given that *Mabo (No. 2)* considers its task as determining if Aboriginal Australians can legally speak. What Derrida emphasizes is the legally generative aspects of the encrypting of violence in the performance of the word of law. *The silence of law could well have walled up the dead body of law, but it could also be an indication of the secret of law—the passion of law that Derrida signs as the openness of law to justice.*[31] The decision of justice would thus be one limit.

[28] For commentary on this phrase, see Louis Wolcher, *The Man in a Room: Remarks on Derrida's "Force of Law"*, 7 L. & CRITIQUE 35 (1996).

[29] *See* Derrida, *supra* note 7, at 993. The law is not sustained in itself. It is constantly recreated in the form of the crisis of violence—and specifically recreated through the meeting of force and justice.

[30] Derrida, *supra* note 7, at 969.

[31] On silence, see Derrida, *supra* note 7, and JACQUES DERRIDA, *Before the Law*, *in* ACTS OF LITERATURE, (Derek Attridge ed., 1992). *See also* Alexander Carnera Ljungstrom, *The Silent Voice of Law: Legal Philosophy as Legal Thinking*, *in* 8 LAW & CRITIQUE 71 (1997). On the secret, see JACQUES DERRIDA, *Passions: An Oblique Offering*, *in* ON THE NAME (1995) and, on the history of secrecy as the history of responsibility, see JACQUES DERRIDA, GIFT OF DEATH (1995).

Does Derrida's aporia of justice give too much to the calculations of law? Without departing from the space that Derrida opens up for a way of reading the beginnings of the violence of the word of law, let me end by noting that the limits of legal judgment are not only held in place by an illegible, silent and excessive promise that opens the law to justice. Those limits also involve the paths and practices of the institutions of jurisdictional settlement and of doctrine.[32] Derrida's account of law, as much as his account of justice, is ascetic—it is stripped of the positioning and attachment of law to the doctrinal body of particular posited law, to the actions of law. It is stripped too of the agon of authority and of jurisdiction—of the effort of speaking for the law, and of people standing before the law and asking for relief from pain, suffering and injustice.

This personal and collective effort is marked in *Mabo (No. 2)*, however minimally, as the "national legacy of unutterable shame" and as the narrative of dispossession, violence and genocide. On the other hand, to undo this shame, to do recompense, undoes the Court—so the only justice in *Mabo (No. 2)* that can be given is to the dead. The predicament of jurisdiction is that the court cannot tell the difference between dying and living.

V. HEADSTONE YET AGAIN

Marking the end of mourning, a black granite headstone is ceremonially placed in the Townsville cemetery above the grave of Eddie Koiki Mabo. It is the second anniversary of the High Court case which takes his name for its title. The headstone reads in part: "He was a known and respected member in local, state and national organizations. His involvement in black affairs dates back to the early 1960s. The most important one was the Murray Island land claim known as the "Mabo case." He put so much of his strength, his inspiration, his fighting spirit and his wisdom into the case which has

[32] This may simply be a result of a difference in emphasis in respect of Derrida's formulations of the messianic. Where Derrida's formulations of justice have been taken up through his use of the messianic to give an account of the general structure of the promise as a future yet to come, my concern would be to relate this more closely to the historical messianisms of the Book. In a way akin to such messianisms, legal doctrine lays down the conditions of being legal (saved) but not all is revealed. Both emphases are warranted by Derrida's formulations in that he equates the messianic with the general structure of the promise and with the historical messianisms of the book. *See* JACQUES DERRIDA, SPECTRES OF MARX 168-69 (Peggy Kamuf trans., 1994). In terms of the themes of my essay, a *living* judgment would be one which holds in place—without precisely joining—ethics (as an excessive promise of the future yet to come) and doctrine (as a historical messianism of the book).

profound significance for the Murray Islanders, but also for the Torres Strait, Aboriginal and indigenous peoples everywhere."

Atop the headstone is an effigy in brass. That night, the effigy is severed from its moorings and the tombstone is defaced with red swastikas and the word ABO. Soon after, family and friends will have exhumed Eddie Koiki Mabo's body from the Townsville cemetery in Queensland and taken him back to the Torres Strait Island of Mer. Bonita Mabo, his wife, will have related that "It's like starting all over again."