"It's like starting all over again": the lore and laws of aboriginal difference
(a review of *Indigenous People and the Law in Australia*)

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1. Introduction

At the time of writing, though not at the time of reading, it is National Reconciliation Week. The politicians have been making their announcements and pronouncements, while the print and televisual media have avidly followed suit. In doing so, appeals to law—its failures and its promises—seem commonplace. At the same time, innumerable cases and judgments concerning indigenous peoples in Australia continue to be reported, digested and glossed by lawyers, mining and farming activists, academics and the general reading public on a daily basis. Hence, hardly anyone will have failed to notice that the various and varied relations between law, Aborigines and Torres Strait Islanders have become the subject of serious social speech. In fact, of all the demotic and expert discourses on indigenous ethnicity, it is no exaggeration to say that it is the juridical discourse of law that has framed our knowledge and action. National Reconciliation Week begins with May 27 (recalling the 1967 referendum which accorded citizenship to Aborigines under the Constitution) and ends with June 3, the date of the High Court judgment of *Mabo and Others v. State of Queensland*.[1] What these events recall is that law—as a framework of knowledge and action—has been and is implicated in what one judge recently described as the 'endemic racism' of Australian society.[2] Despite such ruses of law and order, it remains possible to recreate the framework otherwise—to depart from the framework of law and order without necessarily leaving it behind. Such a possibility is the exorbitant vocation of *Indigenous People*

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1 (1992) 107 ALR 1.

2 The remark was made by Robert Bellear during the ceremony for his admittance to the NSW District Court. Judge Bellear is the first Aboriginal judge appointed in Australia. See *Weekend Australian*, 18-19 May, 1996.

and the Law in Australia.[3] It is a book—or more properly, a co-production—in which reading insinuates itself within the folds of an eclectic amalgam of legal materials, pushing them this way and that and, occasionally, turning their sense in the direction of sensibility. Abandoning the passive voice, I was captivated by the twists and turns of its subject-matter, the way it takes up and brushes against the grammar of law and order. In thus inventing another memory, the book offers a critical interpretation of the juridical limits of social memory. The rest is a matter of reading.

The subject of the book is contemporary indigenous legal relations. These relations include both anglo-australian laws applied to indigenous peoples and, to a lesser extent, aboriginal laws. Both these forms of legal relation are analysed in terms of their social and historical contexts. The interpretation offered is one which addresses the impact of those socio-historical conditions on our legal understanding and, in a recursive movement, the effects of that legal understanding on the legal practices which target indigenous peoples. At the same time, the understandings and practices of law are assessed in terms of how indigenous peoples have experienced and continue to experience law. In short, the subject of the book is the reception of law—as a matter of understanding, as a matter of practice, and as a matter of the nexus between knowledge and power. You will thus expect that, in a reflexive vein, *IPL* is keenly attuned to the status of its own discourse and its possible reception or audience.

And your expectations are met. The book is comprehensive in its coverage of legal topics and it includes an indigenous perspective on the substantive legal issues as frequently as possible (usefully and often by way of extended quotation). Yet these substantive concerns are framed by its pedagogic mode of discourse. This is a teaching text, plainly written, with rhetorical interrogatories as well as 'study activities' peppered throughout the chapters. In other words, the book is the latest instalment in the Butterworths' Legal Studies Series. It is, however, not only addressed to secondary school students (and their teachers), not only to tertiary students of law (and their teachers), but also to a wider community of readers. That community is largely composed of non-indigenous and non-specialist readers. *IPL* thus takes its democratic responsibilities seriously. But you should not be too quick to dismiss the book as having nothing to say to or about

3 Cunneen, C. and Libesman, T. 1995, *Indigenous People and the Law in Australia*, Butterworths, Sydney. This book will hereafter be referred to as *IPL*.

'school law'.[4] Rather, the interpretation offered by the book constitutes a veritable provocation and challenge to 'lawyers accustomed to black letter law texts'.[5] The nature of that provocation is, I suggest, that it asks the central question of the legal enterprise—namely, what takes place in the name of law and is it worth the name of law?

2. In the name of law

It is such a question that a New South Wales magistrate invokes in the foreword to the book. P. J. O'Shane recounts a story from her personal history and experience of law. The story concerns a time when she attended a conference on Aboriginal Education at the University of Sydney. At the conference, she spoke about the now-infamous *Aborigines and Torres Strait Islanders' Protection Act (Qld)* and its associated regulations. In the midst of talking, she is interrupted by an outburst from a member of the audience who expresses incredulity at O'Shane's account of what the legislation says can be done to aborigines in the name of the law. Apart from the conventional agonism of conferences, what is thus put in issue is not only the effects of law but the name or material substance of law. In response, the member of the audience—which at the time was largely anglo-australian—was invited to the lectern to actually read the terms and conditions of the legislation 'for herself'. Such an offer did not dispel the disbelief. However, as it turns out, reading the legislation and listening to other aboriginal experiences over the next two days brought the woman round to accepting the truth of what had been said is the law. The woman from the audience was 'persuaded that we not only spoke truly, but that indeed, throughout Australia Aborigines were being treated in very different ways to what she experienced—ways that she found abominable'[6].

4 This term is taken from Murphy, W. T., "Reference without Reality: a comment on a commentary on codifications of practice" (1990) 1(2) *Law & Critique* 61-80. It describes the practices of law disseminated through the schools of law. Here 'schools' has a double signification—it has an institutional reference (as in 'Law School'), but also a scholastic reference (as in the conventional description of the various schools of legal thought—positivism, common law, natural law, and so on). It does not encompass the feminist, postcolonial and more generally critical interpretations of law—at least to the extent that these are instituted as *movements* rather than schools.

5 *IPL*, fn. 3 at iv.

6 Id at iii.

At the outset, then, the reader is presented with a tableau in which law is understood as a tradition of experience. This in itself is remarkable—since, in as much as modern law insists on the separation of law and morals, that law is predicated on the destruction of the common law tradition of experience and justice. Moreover, it is just such a destruction that is staged in the story told: illiterate and disbelieving, the refusal of the audience becomes a figure for the loss of legal experience. The theme of the tableau is not the anodyne one that different people have different experiences of law. It is rather that our experiences of law are structured according to a hierarchy of values and that, as a result, communicating experiences of other laws and other experiences of law becomes—to say the least—extremely difficult. It is this difficulty and refusal that provokes incredulity and anger on O'Shane's part: she could not believe that whites lacked the knowledge of their legislation and the governmental actions they thereby sanctioned. What is represented in and by the tableau is the predicament of modern law qua law. In somewhat brutal terms, the structure of the everyday experience of law is fractured by ignorance, illiteracy and incredulity on the part of self-identified anglo-australians, and disbelief and anger on the part of aboriginal peoples. The fracture evoked here is not simply a matter of varying opinions about the all-too-human practice of law which could at some point in time be reconciled by recourse to some form of external certification—such as the State or Reason or some other suitable hypostasis. Rather, what the tableau evokes is a caesura in the way our knowledge of law is organised, a faultline in the frameworking of legal practices. And it is, I think, in this personal and social context that O'Shane suggests we read *IPL*:

> No law text ever challenged the reader the way this book does. No law text ever related the law to the daily lives, and continuing experiences of those affected by the multitude of regulations, and their habitual enforcement, as this text does.[7]

3. Being moved

The social experience of law is a matter of being moved. There is no experience of law unless it gets under the skin, provokes the passions—of anger and disbelief, of ignorance and submission, of devastation and prejudices, of pride and self-satisfaction, not to

7 *IPL*, fn. 3 at iv.

mention the pains and pleasures of enlightenment and boredom.[8] In this respect, we have no choice—law is one part in a continuum of social control or, in pedagogic terms, the study of law is a training in and reproduction of the hierarchies of the legal profession. What remains as an open question, however, is—what emotions, what experiences, what lives are possible within law? Is it possible that law engages in a dialogue about the terms and conditions of social existence? O'Shane is circumspect:

> [n]o doubt there will be many in the community, most particularly lawyers accustomed to black letter law texts, who will dismiss this volume and cast it aside ... but there is no doubt that no reader will be left unmoved.[9]

The reception of law, the experience of being legally moved, is largely a matter of reading. The staple diet of generations of law students, come lawyers and academics, has been the reports of judicial judgments and parliamentary legislation—which themselves interpret previous reports and legislation, stretching back to 'time immemorial' as the rhetorical commonplace has it. Such an appeal to a precedent law beyond memory installs forgetting at the heart of law. And it is on this basis that the law is validated by anamnestic references to its sources. But more than this, the forgetting of law, the lost history of law, establishes the necessity of interpretation in the practice of law. If the authority of law comes from a time out of mind, a time before and beyond memory, then all we have is the texts of law—and as such we are condemned to interpret; law is sentenced to a hermeneutic activity. We are children of the writ—endlessly annotating the pronouncements that come from elsewhere and give us the law.[10] This is, however, not distinctive of legal experience. As Sonia Smallacombe reminds us,

> [i]t has only been in the past two hundred years in this country, that written culture has dominated the way in which

8 On boredom as the being of law, see Davies, M. 1994, *Asking the Law Question*, Law Book Co., Sydney, 1-3 and passim. More generally, pedagogic texts of law have for some centuries now addressed themselves—explicitly at first but implicitly with the rise of positivism and pragmatism—to the effects of legal study on the psyche of the student and practitioners. On the repetition over the long-term of such legal affects, see Goodrich, P. 1995, *Oedipus Lex*, University of California Press, Princeton, 1-6 and passim.

9 IPL, fn. 3 at iv.

10 On this theme, see Legendre, P. 1992, *Les Enfants du texte: Etude sur la fonction parentale des etats*, Fayard, Paris. The writ is a letter, and more latterly, a document. Its German etymology suggests the breach in social relations instituted by the writ as letter.

> knowledge is passed on. The Australian colonisers have relied on written sources and most written sources give the view 'from above', that is, the view of the powerful.[11]

Although legality is an appropriate metaphor for a subjection to the writ, such subjection is the predicament of Australian social history. Yet this predicament should not be represented in exclusively negative terms. Condemned or sentenced to interpretation also means that law is, in principle, always capable of being revis(it)ed differently, practised creatively, read.[12] The tableau evoked by O'Shane reminds us then that the modern legal enterprise is predicated on an unwitting refusal to read—which is to say, practise—the law. The tragedy of this refusal is that what is risked is the loss of law—the loss of its being, its foundation, its letters, its aboriginals. Ironically, the only chance that law has is to return to reading its difference.[13]

4. Reconstruction

IPL, then, is a welcome return to the ethical aspirations of law and legal study, a return of difference to the very being of law. The book recounts the legal and governmental practices of colonisation and discrimination, practices that devastate and destroy the existence of indigenous peoples. But if the book stopped there, it

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11 Smallacombe, S., "Oral Histories of the Stolen Generation" (1996) 2(1) *UTS Review* 38 at 38. See also Mudrooroo 1995, *Us Mob*, Angus and Robertson, Sydney, lecture 11.

12 It was this solidarity between interpretation and creation that the glossatorial tradition of law embodied, and which we have forgotten, if not repressed. The stakes of its return have been marked out for sometime now in terms of critical legal studies and its various associated movements.

13 This is not the place to review the tradition of legal interpretation which pays attention to the textuality of law. For such a review and programmatic statement, see Davies, M. 1994, *Asking The Law Question*, Law Book Co., Sydney, chs 7 & 8, and Douzinas, C. *et al* 1990, *Postmodern Jurisprudence*, Routledge, London. Suffice it to say here, that I am not suggesting that the situation in which law finds itself can be resolved exclusively in thought (the world as library) nor exclusively in action (the "reality" of the street, the classroom, the courtroom). Rather the generalised textuality of law being evoked here would say, as Spivak suggests, "that practice is, as it were, the blank part of the text but it is surrounded by an interpretable text. It allows a check on the inevitable power dispersal within practice because it notices that the privileging of practice is in fact no less dangerous than the vanguardism of theory." See Spivak, G. 1990, *The Post-Colonial Critic*, Routledge, London, 2. In other words, what I am suggesting is that, although legal practice is a frequent trope of legal discourse, legal practice—whether academic or practitioner oriented—has rarely *exercised* the freedom that founds legal practice.

would simply be increasing our knowledge of the relations between law and indigenous peoples. Both law and the indigenous would remain as no more than mere objects of information, for consumption yet again by an audience eager for the power of definitions and rules—albeit in a more liberal vein. Paralleling this concern to document the destruction by law and the resistance of aboriginal peoples to that destructive law, *IPL* also reconstructs the difference within law. Hence, a theme running throughout is the reconstruction of aboriginal laws. These laws take two different yet interrelated forms—the customary or social laws of indigenous peoples in Australia, and the bureaucratic institutions of law created to deal with Aborigines and Torres Strait Islanders as the subjective bearers of cultural and legal rights.

It is perhaps best to begin with the reconstruction of aboriginal customary laws. In this respect, the law of the land is crucial. Chapter 9 begins by noting that the aboriginal system of land ownership and management is extremely complex, and provides lucid extracts evoking the aboriginal meanings of country. These meanings cannot be reduced to propositional form from which instrumental effects can be read off, and yet the tendency has been for anglo-australian law to become stuck within its own modes of legal reason. As the President of the National Native Title Tribunal has noted, '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.'[14] The rest of chapter 9 forcefully demonstrates this impasse of difference—first by juxtaposing the Lockean conception of property (land as raw material to be transformed into private property through a labour of extraction) with aboriginal country, and then remarking the ways in which the ideology and practice of private property brought with it the legally-sanctioned dispossession of the indigenous peoples. The rehearsal of these arguments is by now somewhat familiar, but the novelty of the approach in *IPL* is that it takes seriously the aboriginal laws of country. 'Country' (and quotation marks are essential here) is not so much an external source which validates the laws of aboriginal peoples, but rather an embodied experience of law—a phenomenological matter. As such, the structure of country is not so much an addition to community, but rather a surplus value which—in being excessive—delimits the space of social existence

14 Justice R. French, President, National Native Title Tribunal, Evidence before the Joint Committee on Native Title, 24 November 1994, *Hansard* at 647.

and thereby guarantees the transmission of law. It is thus not an incidental matter that law is fundamentally a telluric mythology—for it is as art, as dream, as culture, that the subjective law of country is exchanged or transmitted. In short, law is a travelling exhibition, the life of which resides in its audience—not as passive recipients of a technological product but as active subjects responsible to the alterity of law. As an extract in *IPL* evokes, albeit in an instrumental language:

> [d]ecision making and law enforcement were divided between men and women, and ultimate power was often accorded on the basis of custodial obligations towards relevant land or kinship obligations. The tablet of the law which was ensconced in the landscape itself was explained through Dreaming stories as people travelled ... Dancing and singing, story telling, drawing, painting and sculpture took place all year round, and through such entertaining means everyone learnt the law of their group.[15]

Although aboriginal customary laws and the anglo-australian legal system exist in a relation of fundamental exteriority to each other, it remains to note that nevertheless they also exist in a relationship of proximity. It is on this issue, I think, that *IPL* lets its intended reader down. In a book largely addressed to non-indigenous Australians, it would have been useful if *IPL* had drawn out some of the connections that the experience of aboriginal customary law has with the experience of the lex terrae of the common law. While not wishing to erase the differences, the aboriginal laws of country could have been related to a number of features of the anglo-australian legal system. These could include the practices of the itinerant justices in eyre which carried and recreated the law as they travelled; or the common law of England which was brought to Australia in the pockets of Englishmen and which has been transformed into the common law in Australia; or more recently, it can be related to the continuing practice of courts going on circuit. These practices of anglo-australian law have fundamentally marked the nature of juridical existence and marked it as itinerant, on the move.[16]

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15 *IPL*, fn. 3 at 3, quoting from Johnstone, E. 1991, *Royal Commission into Aboriginal Deaths in Custody, National Report, Volume 2* at 7.

16 I have developed this theme of itinerant lores at the heart of modern law in Rush, P., "Deathbound Doctrine: the distractions of another jurisdiction?" in Sarat, A. & Silbey, S. (eds), 1996, *Studies in Law, Politics and Society*, JAI Press, Greenwich.

Although obvious—but for all that, uncanny—these remarks indicate that a reconstruction of aboriginal laws has unexplored possibilities, despite being beset by extreme difficulties. These difficulties stem not only from the socio-historical effects of the anglo-european invasion, and not only from the fact that the customary laws contain a range of different rules, principles, definitions and classifications of the substantive laws. More fundamentally, the reconstruction of aboriginal customary laws brushes up against the limits of anglo-australian modes of thought. And it is here that *IPL* provides an important contribution to our understanding of law—for what *IPL* prompts is a different way of delimiting western law, and hence a different future for both aboriginal customary laws and anglo-australian law. Such a promise (if not always realised) is extremely concrete. To take just one instance from a plurality of local instances—this one from the northern parts of Western Australia:

> In early 1992, less than one hundred year's after Jandamarra's death, the Bunaba took back Leopold Downs station following its purchase by the Federal Government. The country was handed back without fanfare, or any public recognition that hundreds of Bunaba had died in its defence only a few generations earlier ... The Bunaba renamed the station Yaranggi and now conduct it as one of the most successful cattle operations in the Kimberley. For the first time in nearly forty years young boys now go through the ceremonies of induction to Bunaba law in the country of Jandamarra. Life and culture has returned to the land.[17]

These are some of the promises of a reconstruction of aboriginal laws, and it is perhaps a symptom of the difficulties that it is the bureaucratic and instrumental mode of aboriginal laws that receives the most extensive treatment in *IPL*. This mode is the panoply of aboriginal administrative institutions which form what has come to be known as the 'aboriginal domain' and which in recent months we have seen the newly-elected Federal Government attempt with unseemly haste to remove from the democratic control of indigenous peoples. Thus chapter 13 deals with the emergence of land rights, a state-by state analysis of the respective legal regimes, and an assessment of their relevance to self-determination. Similarly, chapters 15 and 16 contain valuable material on, amongst others, the Aboriginal and Torres Straight Islander Commission, various aboriginal legal services, the Aboriginal Provisional

17 Pedersen, H. and Woorunmurra, B. 1995, *Jandamarra and the Bunaba Resistance*, Magabala Books, Broome, 199.

Government, and the Council for Aboriginal Reconciliation. The importance of these institutions is that the limited democratic rights thereby ceded to the indigenous peoples have assisted in ameliorating the injustices of mainstream Australian law. And *IPL* usefully arranges its material to bring out that historic importance: before getting to the comprehensive account of the aboriginal domain (which is largely centred on land rights as distinct from obligations to country), *IPL* provides a brief introduction to criminal law (ch. 5), a more extensive study of the over-representation of aboriginal peoples in the criminal justice system (chs 6 & 8), and an overview of the juridical power and authority that anglo-australian law has asserted towards aborigines (ch. 7). The extant system of that juridical assertion is then described by way of an extensive and informative account of *Mabo and Others v. State of Queensland,*[18] together with its aftermath in a legislative regime of 'native title'(chs 10-12). These chapters, while providing important studies in their own right, provide the legal backdrop and social context for the obvious importance of the aboriginal domain. The theme throughout the selection and discussion of the materials is the problems and possibilities within such a bureaucratic domain of law. These problems and possibilities are, however, limited by their subsumption within and regulation by the policies and objectives of the national legal system. In other words, the rights instituted by the bureaucratic domain of aboriginal law are enabling rights and not so much the end of the matter. That is, they establish the threshold for negotiation and institute that which is non-negotiable in any just response. The problem has been, however, that rights have been regarded as an unquestioned teleological good. It is this latter approach which positions aboriginal demands for justice within a genre of complaint. Having been granted rights within the anglo-australian legal system, the response is quickly: *'what more do you want!'*, *'you've got too many rights'* or, *'at least more than me!'*. In short, the demand for justice is met by an accusation. The irony is that the creation of a bureaucratic aboriginal domain which formally determined, recognised and recorded rights to land was not in the interests of the aboriginal population, for their rights to country were already in place and took place under aboriginal laws. This irony is exacerbated and doubled in recent debates over the *Native Title Act*, for the Act was in a certain sense surplus to the requirements of aborigines. The *Mabo* judgment had recognised what the indigenous peoples had

18 (1992) 107 ALR 1.

already known and practised; and those rights were now enforceable in the anglo-australian courts. The comprehensive registration of land use—coded as 'native title'—was not in the interests of indigenous peoples but of the anglo-australian community (this is the significance of the demand for certainty and efficiency). In other words, the system of native title is a defence against the fact that the foundation of title is the aboriginal laws of country.[19]

Such then is the current state of play in indigenous legal relations. In summary terms, *IPL* provides a lucid and stimulating reconstruction of aboriginal laws from two vantage points—the social or customary laws of aboriginal peoples, and the laws that mark out and create an aboriginal domain of legal regulation. Along the way, what is reconstructed is the irrevocably plural jurisdictions of law, the plural power to speak the law. The effect is that *IPL* leaves the reader—or at least this reader—with the impression that what is important in the contemporary study of law is not only or primarily a knowledge of the varied relations that pertain between law and indigenous peoples. As a matter of the facts, it is undoubtedly the case that (the history of) law is a history of heterogeneous, even contradictory and incompatible, approaches to indigenous peoples. But this is not yet to say that law can imagine itself as being fundamentally heterogeneous. Yet the implicit suggestion of *IPL* is that what is also and primarily important for our current experience of law is a return of difference to the ontology of law, a return to the difference within law. This return of difference in the reconstruction of law is performed in a quiet, unassuming—and sometimes unwitting—manner by *IPL*. For that reason, *IPL* is all the more challenging.

5. Fractured images

The nature of that challenge becomes obvious and familiar when juxtaposed to the image of law as a unified and autonomous system of rule-bound institutions—and in pedagogic terms, that image of legal practice as an infinite series of classificatory and definitional issues. How then does *IPL* locate itself in terms of the institutions of legal scholarship and its plural traditions of teaching?

19 It is the priority of aboriginal title and the irony of native title that has been all-too-frequently erased in the current debates over whether pastoral leases extinguish native title. Compare, however, Brennan, F., "This time, there is nothing to offer Aborigines", *Australian*, 27 May 1996.

The appearance of this book takes place in a venerable and long tradition of legal scholarship which locates law in its contexts (here, social and historical) and law in its difference (here, indigenous). It was this tradition which the High Court recently and belatedly deployed in its *Mabo* judgment. Moreover, the judgment was made possible not only by the legal and democratic struggles of the indigenous peoples (thoroughly documented in *IPL*) but also the pedagogic resources provided to recent generations of students with the emergence of courses on 'aborigines and the law', 'indigenous peoples and the law', or even 'multiculturalism and the law'.[20] While these developments changed the culture of law and legal education, they have not been received with equanimity, let alone enthusiasm, by the legal profession, the legal academy, and the wider community. It thus needs to be recalled, perhaps now more than ever, that the *Mabo* judgment was ten years in the coming, that in the time of that decade a number of the plaintiffs had died, and that the legal and public debate which ensued could only be described as anything but 'balanced'.[21] *IPL* provides a selection of material which gives a flavour of the shifts in legal culture and social context within which the Mabo judgment and the Native Title legislation emerged. The importance of this context and culture is only emphasised by events subsequent to *IPL*'s publication. Thus, on the second anniversary of the Mabo judgment, and at the end of the period of mourning for Eddie Koiki Mabo, a ceremony unveiled his tombstone in Townsville. Overnight the tombstone was desecrated—the effigy of Eddie Mabo removed from the headstone, eight blood-red swastikas and the epithet of 'ABO' defacing the rest of the tomb.[22] Again, one

20 This development was pioneered at the Aboriginal Law Centre in the Law Faculty of University of New South Wales, with the guidance of Professor G. Nettheim. *IPL* emerges out of the authors' work with the Centre. The foundational textbook that disseminated the resources to law students was primarily McRae, Nettheim and Beacroft 1991, *Aboriginal Legal Issues*, Law Book Co., Sydney. See also Bird, G. 1988, *The Process of Law in Australia: intercultural perspectives*, Butterworths, Sydney. This tradition of legal scholarship is now authoritatively established with the Aboriginal Law Centre's *Aboriginal Law Bulletin*, and in 1996 the first issue of the *Australian Indigenous Law Reporter*.

21 Needless to say, much legal ink has been spilt on the judgment and the native title legislation which ensued. As a sign of the times, however, the most thorough and legally-attuned reading of the *Mabo* decade, the judgment and its aftermath is provided by an anthropologist. See Sharp, N. 1996, *No Ordinary Judgment*, Aboriginal Studies Press, Canberra.

22 A eulogy prompted by this destruction of memory and identity is given by Reynolds, H., "Mabo" (1996) 4 *RePublica* 1. The tombstone was recovered

could hardly escape the feeling of *deja entendu* when listening to the protracted disputes around native title and pastoral leases—with the loudest voices demanding legislation extinguishing still further any remaining rights recognised by the anglo-australian legal system. Consonant with this is the emergence of a tendency within the newly-elected federal government to regard aboriginal culture as a tradeable commodity, such that you can cut back on funding aboriginal organisations at the same time as trading health for land rights. And as a final example, the federal government's paper outlining the issues it sees as necessary in reviewing the *Native Title Act* suggest, at least minimally[23], that the negotiating threshold established by the Act is being extinguished—not to mention, its legal obligations under the *Racial Discrimination Act 1975* (Cwlth). All these shifts in the legal and cultural climate subsequent to the writing of *IPL* suggest at least that O'Shane was prescient in predicting that the community and black-letter lawyers will simply cast aside this book. *IPL* then is a timely publication, providing an informed and sensitive discussion of the issues in a context when, as Bonita Mabo remarked after the desecration of her husband's tomb, "[i]t's like starting all over again".

What then is the status of this determination or delimitation of law by reference to the social contexts in which indigenous legal relations take on meaning and get under the skin? I am in agreement with the authors of *IPL* in seeing law as one part of a continuum of social control—but also more significantly, I am in accord with their habit of seeing such a claim as primarily a descriptive statement rather than as a denunciation of law, as a liberal frame of thought would have it. Nevertheless, a caveat—or more properly caution—needs to be entered. Locating the law in its social context is always capable of recoding society according to juridical categories, and much in this tradition of legal scholarship has done so with its reduction of law to a set of policy interests and institutional objectives. *IPL* participates in this reduction. As such, its pertinence is in understanding the *strategic* uses of law by

from the Townsville cemetery and taken to the island of Mer. In September 1995, there was a second unveiling.

23 In the wake of the Act, the right to negotiate has taken on the hue of a legal term of art. But consonant with the earlier description of rights as enabling, it needs to be remembered that rights are enabling by virtue of their symbolic pertinence and, as such, cannot be reduced to technical criteria of efficiency. It is this reduction that is most in evidence in the federal government's discussion paper on the review of the *Native Title Act*. And it is this reduction—rather than a shift in technical competence—which affects what I am here calling the negotiating *threshold*.

lawyers, aborigines, government agencies—as well as politicians and the media. Such is the significance of chapter 4. The chapter provides a timely case study of the removal of aboriginal children—a practice that quite easily falls within the practice of ethnocide, if not genocide.[24] It is possible to misread this chapter as simply another round in the so-called vogue for making the present generation of anglo-celtic Australians feel guilty for the deeds of their ancestors. Apart from its historical inaccuracies, such a misreading would presume a juridical notion of responsibility. The caution I have then is that, in reducing law to a system of institutional and policy imperatives, *IPL* does not sufficiently guard against the possibility of such a misreading. In the light of its persistence, it is necessary to state that the authors of *IPL* do not advocate and demand guilt according to law—and nor do they simply dismiss the injustices of the present by blandly requiring us to *acknowledge* the past and get on with the future. In fact, *IPL* provides ample material—both in this case study and throughout—which makes possible a more apposite and productive reading of indigenous legal relations. That reading would be one in which the recounting and retelling of the experience of the stolen generations is not a demand for guilt according to law but a demand for justice. My cautionary tale is thus that neither 'law' nor 'law in context' can guarantee the difference between the juridical demand for guilt and the ethical imperative *be just.*

A similar fate befalls the tradition of legal scholarship which locates law in its indigenous difference. Put simply, it depends on how you read the conjunction in the title of the book. It is always possible to read the relation of 'indigenous people and the law' as one of logical subsumption.[25] Such a reading would amount to the

24 The final chapter of *IPL* discusses Australia's obligations under international law, and in doing so notes that the Royal Commission on Deaths in Custody found that genocide had been committed. Law has traditionally misrecognised ethnocide and this misrecognition has given rise to many of the legal difficulties in bringing prosecutions for genocide in respect of the situation of aborigines. On the distinction between genocide and ethnocide, see Clastres, P. 1994, *The Archeology of Violence*, New York, Semiotext(e), esp. ch. 4. In summary terms, genocide refers to the destruction of a race by reference to genetic (and specifically chromatic) stigmata, while ethnocide refers to the destruction of a race by targeting their daily lives and embodied cultures. While the history of anglo-australian law and society has clearly involved acts of genocide, perhaps the most fundamental tendency of that history has been the ethnocide of aboriginal peoples.

25 This difficulty is covered, but not done away with, by the semantic slippage entailed in the use of the phrase "indigenous legal relations". Rather it effaces

dogmatic assertion that indigenous peoples are subject to national law and hence only have a juridical existence to the extent that indigenous peoples submit to the superordinate law of Australia. As Brennan J (then unpromoted) metaleptically remarked in *Mabo*, "[t]he law which governs Australia is Australian law".[26] Thus, in a series of claims which have argued that the Australian courts have no jurisdiction to try aborigines, it has been repeatedly asserted by the Courts that, to the extent that there is aboriginal law, and Mason CJ did not accept this possibility in *Coe v. Commonwealth*,[27] then it is a system of law which is subordinate to or secondary to Australian law. While these cases have largely concerned challenges to the criminal jurisdiction of the Australian courts,[28] the legal arguments intersect more generally with claims to aboriginal sovereignty (chs 15 & 16). In synoptic terms, Australian courts have summarily despatched the claims to sovereign status and the Court has peremptorily declared that its own jurisdiction is not open to question in municipal national law. Australian law thus effaces its own foundation and rejoins the dogmatic legal tradition; it also means that aboriginal peoples can only ever appear and be heard in law as subordinate to anglo-australian law (and not even as, in the parlance of North American jurisprudence, 'domestic dependent nations').[29]

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the dialectic of object and subject, individual and society, which is at stake here.

26 *Mabo and Others v. State of Queensland* (1992) 107 ALR 1 at 18. The remark is embedded in a lengthy extract in *IPL* (at 117) from the judgment. Of course, on its own terms, it is legally absurd but nonetheless powerful. In the very judgment that makes the claim, the conceptual structure and material substance of the legal argument owes more to American legal realism than any homegrown Australian tradition. This is even more the case with the semantics and syntax of "native title" which is explicitly and implicitly taken from a North American jurisprudence. It is not without pertinence that, in an Australian context, "native" carries with it an abusive reference. And just as fundamentally, Justice Brennan's metalepsis here functions to shore up the foundational aporia of Australian law: namely, reason cannot guarantee which came first—law or Australia?

27 (1993) 68 ALR 193.

28 *IPL*, fn. 3 at 68ff.

29 There is no room here to review the extant operation of communities living in the interstices of a vibrant tradition of 'two laws'. Suffice it to say that most of the problems and difficulties in this tradition have emerged in the context of the dogmatic structure of anglo-australian law. On the two laws tradition, the *locus classicus* is Williams, N.M. 1987, *Two Laws: managing disputes in a contemporary Aboriginal community*, Australian Institute of Aboriginal Studies, Canberra. More recently, there is the densely-woven dialectical study in Povinelli, E.A. 1993, *Labor's Lot: the power, history, and culture of aboriginal action*, University of Chicago Press, Chicago.

6. In the shadows of history

These then are two traditions of legal scholarship within which *IPL* locates itself. In doing so, it provides an eclectic selection of materials and discusses a wide range of themes, institutions, and laws. To the extent that I have suggested that these two traditions are limited by their reduction of law to a system of institutional and policy imperatives, it is not to gainsay the fact that their image of law is an improvement on one which understands law as a system of propositional rules and definitions. At which point, it is necessary to emphasise the major innovation of the authors—namely, their commitment to the importance of history for understanding the present. It is the historical density of their contextual interpretation of the extant legal system that prevents *IPL* from turning its object of study into just another product for distribution to unwitting students and scholars. Such a thoroughly historical approach will meet with resistance.

Contemporary legal thought seems to have been largely immune from the renewal of historiography in an extensive range of disciplines. Instead, it has largely been satisfied with responding to the past as that which does not count—or, at most, an ornament which may decorate the more imposing edifice of law before getting down to the real business of plain-speaking and good government.[30] What is thereby banished is the wherewithal to assess the value of law. The historiography of *IPL* is thus best read as a return to the question of value in law. As *IPL* unequivocably states and demonstrates,

> the history of the relationship between the indigenous people in Australia and the colonising people who took control of the country affects the current context in which Aboriginal and Torres Strait Islander people interact with the law.[31]

While I would argue that a law stripped of its history does not exist, the history of law has a particular importance in understanding indigenous legal relations—especially if that understanding is to incorporate an indigenous perspective. Mudrooroo is eloquent:

> Until recently, the Master's idea of history rested on a time-line with beads of events strung along it. But although this history always claims to be propounding the 'truth' about the past, free of any ideological prejudice, in fact it is in a

30 This resistance may in large part account for the justificatory—or more properly defensive—tone of the *IPL's* heading "*Why Study History in a Legal Studies Course?*" (at 1).

31 *IPL*, fn. 3 at 1.

> constant process of being revised and updated to give the present a more satisfactory account of the past in accordance with new ideological conceptions. In other words, history is the past reconstructed for an ever-increasing series of presents. Its importance lies not in its exposition of 'truth', but as a device which orders society and gives meaning to a collectivity. Still, for all this denial of 'truth', at the risk of appearing to contradict myself, I must affirm that a people, a society, a community, or even a person without a past really has no culture and no deeper meaning or purpose. We Indigenous people are caught in the dilemma of having a past without a 'true' past, and consequently no 'self'. This is why the past is important for us and why so many regional Indigenous historical narratives are being written. It is our past and only we can write it, for in a sense we need history and it is not 'ours' until we do the writing ourselves, giving importance to those stories which now matter to us.[32]

In other words, the history that is yet to be written is a history of aboriginal subjectivity—although, as Mudrooroo indicates, there is an emergent historiography. In the meantime, the ironic history of indigenous legal relations is a history of discontinuous yet overlapping object-positions.

Starting somewhat arbitrarily in the eighteenth century,[33] there is the 'noble savage'. Alongside this construct, the aborigine emerges as the pagan but appreciated object of missionary efforts in the early nineteenth century. And the story goes on, folding ever more strands into the historiography before it splits apart at the seams and unravels to a melancholy narration. Another strand constructs the aborigine as the object of calculated annihilation from the time of invasion until the present day. From the mid-nineteenth century, a further page in the text of history is added when the aborigine emerges as the grateful recipient of protection and the right to die in peace on reserves. By 1911, all States and Territories of Australia have legislated for protection and segregation. Such legislation is little more than the formal juridical registration of a process of welfare colonialism, the seeds of which were in place from the beginning of anglo-australian history on the

32 Mudrooroo 1995, *Us Mob*, Angus and Robertson, Sydney, 177-8.

33 This is not, however, to say indeterminate. The starting point is somewhat overdetermined by the arrival of a naval captain by the name of Cook on the eastern seaboard of New Holland. Prior to this, the Great Southern Land had been no less imagined by Europeans as populated by objects of all sorts. Similarly, from an indigenous perspective, it may be noted that the dreaming assigned the aborigine a position that, in retrospect, may be described as subjective (in the classical sense of subject—namely, the Other).

continent.[34] And in the twentieth century, the aborigine appears yet again as the object of successive government policies. From the 1930s, it is as the object of assimilation; from the 1970s, it is as the object of integration, as the citizens of an anonymous national and universal community. Perhaps the final strand in this complex weave of historical objectification is the emergence of an indigenous counter-discourse of self-determination and reconciliation.

Each of these moments in an ironic historiography of indigenous legal relations are fleshed out throughout the book. Apart from their content, what needs to be emphasised is that each moment cannot be synchronically distributed on a continuous line, but rather are concertinaed into the diachronic time of the present. Contrary to a conventional historiography, this ironic history cuts across and disrupts the currency of the present. Moreover, this history is doubled, for it is shadowed by a melancholic aboriginal history. Thus, within the frame of land rights legislation in the 1970s, there emerged an aboriginal historiography. By recourse to mythological modes of history—oral story-telling, on-site dramatisations, and anthropological reports—a counter-history recovered and revalued what had lost value in an anglo-centric historiography. In this other history, reconciliation is not so much a triumphal final stage but rather, as Enoch and Mailman put it, the seventh stage of indigenous grieving. Reconciliation is read as 'wreck con silly nation', and we have not arrived at the end of history.[35]

In fact, history is just beginning all over again. In the representative language of law, it is to say that the logic of law is always predicated on the history of law, the validity of law is always predicated on the prior historical milieu in which law has creatively differentiated itself from others. This then is the value of *Indigenous People and the Law in Australia*: in rewriting the legal history of indigenous peoples, it reminds us that what has been lost is important now to the life of law. And further in re-experiencing that loss, what the book opens up is a responsibility to the future. That future is unhedged in by the farsightedness and amnesia of a legal tradition which forgets that, prior to its obligations to

34 For a brief regional study, see Yu, P., "The Kimberley: from welfare colonialism to self-determination" (1994) 35(4) *Race & Class* 21ff. In terms of my earlier recounting of aboriginal laws, 'welfare colonialism' and the formation of an 'aboriginal domain' are often assimilated to each other.

35 Enoch, W. and Mailman, D. 1996, *The 7 Stages of Grieving*, Playlab Press, Brisbane, 71-2 and passim.

perpetuate itself, there is the fact that law is beholden to the alterity of indigenous peoples. For now, however, it is not possible to say that current indigenous legal relations are just. Justice is always a promise and, in losing the past, law loses its capacity to destine itself to the future, to address the future. It is apposite, then, that *IPL* is a book which addresses students of law, the coming community.

7. Conclusion

Given this appeal of justice, I would like to end by drawing attention to a protocol of reading that has guided my response to *Indigenous People and the Law in Australia*. O'Shane's comment, in the foreword to the book, left a lasting impression on me: some members of the legal community would, if not cast out, at least cast this book aside. As I read *IPL*, I kept asking myself what would a legal community be that finds anything difficult or objectionable in this. The answer to which I came, eventually, was that the legal community submits, by and large, to cognitive standards. This has a number of corollaries. First, what we know as law is largely the self-representation of the legal community. Second, this self-representation is built on a distanced stance towards both itself and its others. This is what O'Shane refers to as the process of being cast aside, and which indigenous peoples have experienced as a part of their everyday lives. Such a process is, I think, a structural tendency of law and as such those who judge themselves knowledgeable will no doubt cast this book aside. Yet such a judgment does not clear an empty space through which an alternative could move. It remains impossible to cast out this other reading. What has guided me here, then, is not so much an alternative but a distinction and predicament within which any reading will be caught. Hence, while the empirical or cognitive claims of the book have not been dismissed, the emphasis in my reading has been on the ethical responses that emerge in engaging with the book. Such a response does not simply appeal to a cognitive standard and its various political positions. Rather, doing ethics takes place in the declarative mode of a singular (but not individualistic) profession of faith. It is a matter of saying: whatever happens, here I stand and there I will remain. With such adverbs of place does a reading submit to an ethical mode. Cognitive structures, however, require the erasure of the place from which they speak—whether by the avoidance of the first person, through the use of a metacommentary or, in a more occluded manner, the

claim to speak on behalf of others. To this extent, cognitive standards and ethical modes of reading law are fundamentally incompatible. As the history and experience of indigenous legal relations have played themselves out, law cannot be host to both cognitive and ethical exercises—at least not at the same time (now) and in the same place (here). Knowing law betrays its ethical mode, and ethics always-already punctuates the cognitive standards of law. This is the choice, and law has no choice but to make it—over and over again. Such is the paradoxical condition of articulating aboriginal justice, such is life.