The Office of the Jurisprudent: The Status and Care of the Dying and the Dead

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as part of the collaborative doctoral degree and/or fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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During my enrolment, I have published the following works (either alone or with others). Some of these have been referred to in the text of the thesis. It is clear from the references where I have done so.

McVeigh, S. (2010) 'Rival Jurisdictions: The Promise and Loss of Sovereignty' in Barbour, C. and G. Pavlich (eds) *After Sovereignty: On the Question of Political Beginnings*. Routledge, 97-114

McVeigh, S. (2011) 'Reasons to be satisfied: Tim Dare and the Limits of Positivist Legal Ethics' *Australian Journal of Legal Philosophy* 36: 166-76.

Dorsett, S. and S. McVeigh (2012) *Jurisdiction*, London: Routledge

Dorsett, S. and S. McVeigh (2012) 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking' *Melbourne University Law Review* 36(2): 470-93

McVeigh, S. (2013) 'Law and Postmodernism' in Banakar, R. and M. Travis (eds) *Law and Social Theory*, Bloomsbury: Hart Publishing

Dorsett, S. and S. McVeigh (2013) 'Section 233 and the Shape of Native Title: The Limits of Jurisdictional Thinking' in Ford, L. and T. Rowse (eds) *Between Indigenous and Settler Governance* Routledge: London, 162-73

Dorsett, S., and S. McVeigh (2014) 'Jurisprudences of Jurisdiction: Matters of Public Authority', *Griffith Law Review* 23: 569-88

McVeigh, S. (2014) 'Law as (More or Less) Itself: On Some Not Very Reflective Elements of Law' *UC Irvine Law Review* 4: 471–91

McVeigh, S. (2015) 'Afterword: Office and the Conduct of the Minor Jurisprudent' *Irvine Law Review* 5: 499-512

Genovese, A and S. McVeigh (2015) 'Nineteen Eighty Three: A Jurisographic Report on Commonwealth v Tasmania' *Griffith Law Review* 24: 68-88

McVeigh, S. (2016) 'Jurisprudent of London: Arts of Association' *Law Text Culture* 20: 189-215

Genovese, A., S. McVeigh and P. Rush (2016) 'Lives Lived with Law: An Introduction' *Law Text Culture* 20: 1-13

McVeigh, S. (2017) 'Office of the Critical Jurist' in Desautels-Stein, J. and C. Tomlins (eds) *Searching for Contemporary Legal Thought* Cambridge and New York: Cambridge University Press, 386-405

McVeigh. S. (2017) 'Conditions of Carriage: Finding a Place' *Law Text Culture* 21: 165-90

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Abstract

The central concern of this thesis is the investigation of a contemporary ethic of the office of the jurisprudent – that is, someone who cares for the conduct of lawful relations or ways of belonging to law. This thesis investigates the ways in which jurisprudents understand their office and the conduct of office and links two questions: 'How is it possible to die well before the common law?' and 'How are the dead placed and cared for before the law?'. It responds to these questions in three ways. First by developing an ethic of office through analysing the competing repertoires, commitments and limits of the conduct of the office of the common law jurisprudent. Second, by analysing the repertoires of legal action in the care of the dying and dead. Third, by evaluating the *persona* (character) of the jurisprudent. This thesis is presented as a contribution both to the elaboration of an ethic of office of the jurisprudent and to developing forms of rhetorically inflected jurisprudence directed towards the conduct of lawful relations in the dying and the dead.

Chapter One

The Office of the Jurisprudent: The Status and Care of the Dying and the Dead

Introduction

In this thesis, I return to traditions of ethics and jurisprudence in order to consider the ways in which jurisprudents – those who care for the conduct of lawful relations – might elaborate and consider their responsibilities as scholars and participants in public life. I do so by refreshing a tradition of discussing the appropriate conduct of public life through the language and institutions of office. I am interested in how scholars, in particular in Australia and the United Kingdom, have given shape to the office of the jurisprudent since the early 1990s. I consider contemporary engagements with forms of civility and dignity as part of a training of jurisprudents and others in the conduct of their public lives.[1] I address the concerns of civility and dignity in relation to office in order to deepen the sense in which jurisprudence is still practised as part of scholarly tradition which is concerned with the conduct of life. My interest in office in this thesis lies in the ways that the ethos and conduct of the office of jurisprudent (concerned with the conduct of lawful relations). It does so by reflecting on the ways in which those in the office of jurisprudent have taken up responsibilities, for themselves and others, for the care of the dying and the dead and for the conduct of lawful relations between Indigenous and non-Indigenous peoples and their jurisprudences.[2]

In ways that will be elaborated, office might initially be viewed in terms of a long established formula for organising and considering the obligations, rights, privileges, liberties and immunities which are taken up in the conduct and service of public life

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1 Here I understand civility to be the decorous conduct required of citizens, and dignity to the honour (worth, status, comportment) of humans and institutions. This is substantively addressed in Chapter Three.

2 As a note of terminology the language of office refers both to the institution of office and the concern with the appropriate conduct of office. I have capitalised the institutions of public office and generally left other offices – for example, those of the jurisprudent, the scholar and the philosopher – as lower case. There is a case to be made for treating these offices as public (and hence presented as capitalised). I have decided not to do so but would invite the reader to imagine it so.

and life in public (Agamben 2013; Condren 2006: 66). As a language of conduct, office and its associated terms of liturgy (Greek), duty and community (Latin) has a significant and varied semantic valence and history of use. Formulated in broad terms, it encompasses the spiritual and temporal ordering of the 'West' and, in an institutional sense, that of church and state. In contemporary settings liturgy and office encompass the central significance of the sacramental and ceremonial practice of the Christian church as well as the distinctly mundane descriptions of the administrative organisation of modern corporations. Since the seventeenth century, this model of office has generally been associated with the bureau and the institutions of government and the administration of justice (governor, legislator and judge). However, the range of offices and obligations of public life is more varied and complex (Minson 2014; Weber 1978: 959-963). To write on office, then, is to join a long engagement with the appropriate conduct of public life or, somewhat differently, life in public. It is to examine how the obligations of public life are taken up and disputed. In this thesis that question is held in place by a consideration of how those who occupy the office of the jurisprudent care for the dying and the dead.

This thesis has taken shape in response to four sets of images or, really, scenes or montages, that have helped give shape to several contemporary debates about, among others, the role of jurisprudent. The first images are drawn from contemporary public representations of debates around assisted suicide. One is of (terminally ill) patients suffering and starving themselves to death as part of a medical, civil and juridical practice. There are many ways in which this image is powerful and shocking. It represents the contemporary limit of the right to die under medical supervision in Australia. In Australia, it is homicide to assist or be complicit in someone committing suicide. As will be discussed, this leaves patients with only the option to refuse food and water. In this thesis, the right to die in this manner is addressed from within the office of the jurisprudent. The representation and practice of death by self-starvation will be joined in this thesis to medical and legal understandings of conduct of living and dying. This jurisprudence presents a number of rival forms of an *ars moriendi* or art of dying which is recommended by jurisprudents. I am concerned in this thesis with how jurisprudents have taken up responsibility for such an activity.

The image of starvation is joined to the end of life in complex ways. In a religiously inflected account of the care of the dying it might be understood as a 'turning away

from life' or as an acceptance of death. In the context of contemporary debates about assisted dying under medical supervision, however, the image of terminally ill patients starving themselves to death has, for some, taken on a different valence. As well as being an image of a suffering death, it is one of extreme distress and of public engagement. Self-starvation has been presented as part of the contest of the 'right to die' or duty or privilege to assist in the participation in the dying of another. While there are clear roles for those who care for physical and spiritual well-being within both temporal and spiritual ordering, how might the office of the jurisprudent understand and execute its role?

A second, closely related set of images, relates to that of the supplicant seeking death through an application to a court to grant permission for a doctor to assist in suicide (a 'prayer for relief' in an older procedural language of law). Starvation in this aspect might also be viewed an act of protest (and shame) (Bradatan 2015: 115-116; Binchy 1982). The image of state sanctioned death is troubled and contested, as are the practices of government. In the United Kingdom, requests to the courts for declarations of the legality of certain acts have, it seems, turned the Court of Protection and family courts into courts of conscience. Jurisprudents regularly write about the morality and legality of euthanasia and assisted dying. How should this be understood as an aspect of the obligations of the conduct of public life?

A third set of images is, in many ways, more confronting, and relates to holding of the Indigenous dead who have been traded, taken and stolen from the Indigenous peoples of the world and put on display in the hospitals and museums of the Imperial North. Today, perhaps, the display of the Indigenous dead as artefacts and curiosities needs no further comment as a moral concern for museums and for non-indigenous people. In the care of the dead and the return of the dead, including the Indigenous dead, to their proper place, however, law and jurisdiction have become part of a more complex engagement of those who live with the laws of the common law tradition. The return of the dead to a proper jurisdiction marks an insistence on the conduct of lawful relations and the dignity and respect for the dead. How is the office of the jurisprudent of the common law tradition to take up responsibility for these matters?

The final image is one of the jurisprudent, and of jurisprudent as legal scholar, representing their office as engaged in the conduct of public life. In so doing, a jurisprudent also presents an account of their own office and of their obligations in

relation to the authority and conduct of lawful relations as they address the jurisprudential care of the dying and the dead.

There are many ways of addressing an ethic of office from within the office of jurisprudent. In one register, this topic is part of the ethical consideration of the appropriate conduct of public life. In another register, the office of jurisprudent can be addressed through the conduct and management of office as a part of a profession or as an aspect of institutional life in the university. Here the concern lies with the role of jurisprudent as scholar and teacher as well, perhaps, as judge, advisor and advocate. This research, then, joins traditions of ethical writing from within the office of jurisprudent and from the humanities (broadly understood). It takes up the ways in which jurisprudents care for the 'patterning of lawful relations' and the forms of conduct of public life. The phrase 'pattern of lawful relations' is one borrowed from the Indigenous jurisprudence of C.F. Black. In *Land is the Source of Law*, Black points to the ways in which many Indigenous jurisprudences are figured from the patterning of relations into and out of the land (Black 2011: 16-19). Patterning might be thought of as a method or a way of finding, or finding yourself, in a relation of laws. It draws attention both to an obligation of office – to enter into relations of law – and to a conduct of office – the practice of creating and maintaining relations. More than that, Black suggests, it is important to attend to the protocols of establishing lawful relations and to understand what obligations and meaning those relations carry and what it might mean to live a life with law.

1. Research Question

In summary form, this thesis addresses the question: 'Within the common law tradition, and within Australia, how might a common law jurisprudent conduct their office well in relation to the concern with dying well and the dead?'

As the introductory statement suggests, the response to this question developed in this thesis can be organised under the topic 'the conduct of lives lived with law' and the complex relations established between law and life. The conduct in question is that of the jurisprudent. In one register, this research question joins some quite practical concerns with the contribution and work of the jurisprudent in the development and deployment of legal instruments that order the care of the dying and the dead. In

another register, this concern joins a range of engagements with the office, and ethic of office, of the Jurisprudent. In this thesis I return to (and refresh) a number of ethical and rhetorical forms that link the dignity and civility of office to the honour and usefulness of office. Such forms of address have a long tradition within jurisprudence. They have formed a staple of Roman (Ciceronian, Stoic) rhetorical training in office and were available to, and often at the centre of, jurisprudential engagements in Renaissance and early modern Europe. Refreshing this tradition helps show the repertoires of lawful relations that continue to shape the lives of those who live with the common law.

The images of the care of the dying and the dead raise questions, in quite stark terms, about the responsibilities of the office of the jurisprudent in the conduct of their public life. In Australia, since the mid-1990s concerns with dying under medical supervision and the care of the dead have frequently been addressed in the normative languages of human dignity, human rights and governance. For many, the practical ordering of law is addressed most comfortably in terms of its general normative force and its practical or, increasingly, factual efficacy. I argue that if the specific roles and obligations of jurisprudents are left out of the account of conduct and of public life something is lost both by way of prudence (practical wisdom) and of responsibility.[3] What is lost is the ability to articulate relations of law and life as a concern of public life. Insofar as the work of the jurisprudent and of the care of the dying and the dead carry with them some requirements of ceremony (or protocol), and of conduct and action, it remains important, I argue, to have an account of the responsibilities of office of the jurisprudent. It is also necessary to have some account of the mode and manner of the ways in which such an office is occupied. Moreover, we also need an account of how such an office has been, or might be, evaluated (as a matter of experience rather than necessarily of justification).

In this thesis I am particularly interested in the ethos of jurisprudents and the ways in which jurisprudents have trained themselves and others to address concerns of office, responsibility (obligation) and community. The focal point of the examination undertaken, then, is that of the ethos and ethic of the office of the common law jurisprudent. I provide an account of the ways in which contemporary jurisprudents

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[3] Prudence and the ethic of office is the subject of Chapter Two.

understand and practise the institutional responsibilities of creating and maintaining lawful relations or ways of belonging to law. In so doing, this research addresses the ways in which a jurisprudent might write about and understand their obligations of office and how they have developed, or might develop, a *persona* (comportment or character) adequate to the task (as a matter of civility) or 'worthy of the name' and 'adequate to the task' (as a matter of dignity).[4]

How the obligations of office are understood is contested. Such contests are by no means exclusively shaped by the writing of jurisprudence or legal philosophy. In this thesis, I am interested in following and understanding the ways in which groups of jurisprudents have engaged with questions of office from within the university and the legal profession. In this respect office is primarily understood through the civil authority of the state. Accordingly, in addressing the ethos and ethic of office of the jurisprudent I engage with the ways in which jurisprudents shape their responsibility around the government of conduct and conduct of government of themselves and others (Minson 1993: 15). Finally, it is important to remember that how an office is understood is also contested from both within and without political and legal theory. There are strong traditions which write against office – for example, Rousseau and the romantic traditions would prefer to naturalise, or socialise or, at least, de-juridify relations of public life (Minson 1993: 7-13).

From within the office of the jurisprudent I will address the ways in which the care of the dying and the dead can be taken up as a specific responsibility of that office. In establishing the obligations of this office in respect to the dying and the dead, I am able then to address how a conduct of office can be practised and understood. The care of the dying and the dead is a central preoccupation of the Western tradition of religious and legal thought and practice. It is important to attend to this, therefore, not only for the care of those who are dying and are dead, but also for the way in which we understand our tradition of law. However, to address the place of the dying and the dead in our tradition is also to enable a broader consideration of the continuing place for office and *persona*, and for an understanding of the importance of conduct and obligation, in contemporary jurisprudence and public life.

The Christian church has shaped office around liturgy and the ceremonial imitation

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[4] For the language of 'adequacy' see Chapter Two and for 'worthiness' see Chapter Three.

of the life of Christ (Agamben 2012). The ordering of relations of life and death through the office and liturgy of the Christian church has been central to the formulation of office and of the possibility of lives lived with law. The sacraments of baptism, confirmation, the Eucharist, penance, marriage, anointing the sick, and holy orders gave spiritual and temporal meaning or place to human existence. They did so through both ceremony and office (Agamben 2013: 3-5). The liturgical (official) and doctrinal significance of dying, death and the status of dead were intimately associated with the concern with what happened in the passage from one life to the next. It was attended both by duties as a well as the sacraments (last offices). Contemporary accounts of the dying and dead inherit from both the ideational and institutional ordering of Christian liturgical and theological practice and thought. There is also a distinct juristic inheritance shaped by this Christian understanding of office (Berman 1985).

The placement, status and care of the dead are also important to the institutional form of law. Within seventeenth century forms of law, the burial of the dead provided the ceremonial form of the conduct of law. The laws of burial have shaped both the spiritual and temporal understandings of law (Aries 1980; Lacquer 2016).[5] Historically, the most important temporal ceremonies of public authority have related to the death of the sovereign and the transmission of the authority of the law. However, the burial of the sovereign is by no means the only burial of importance. A long tradition of humanist legal thought, drawing on the jurisprudent Giambattista Vico's *New Science* organises civil existence (and the office of the jurisprudent) around natural law and the continuity of three institutions of political and social existence: religion; marriage; and burial. Vico assigns to the dead the task of humanising the earth – or at least it is through burial that the dead come to humanise the earth (Vico 1984: 7). By extension, for Robert Harrison it is our relationship to the dead (rather than death as such) that give us the shape of our humanity and something of our common humanity (Harrison 2003: 21-24, 34). The burial of the dead, then, gives us the ceremonial form of the conduct of life. It binds social action to memory, and provides a way through which to honour and and transmit law from one generation to the next. Contemporary jurisprudents who do not present a religious explanation of the social bond, such as Pierre Legendre and François Supiot, argue that an acceptance of the ceremonial

[5] This is further elaborated in Chapter 7, in the context of repatriation.

character of the (common) law continues to give us something of the juridical form of life (Legendre 1997; Supiot 2007). Others remove altogether questions of the sacred and the sanctified from consideration of state-centred legal orders. However, they continue to maintain various social functions for law (if not for specific institutions). These contrasting engagements of the dying and the dead are all addressed in this thesis from within the office of the jurisprudent. The focus on this thesis is on specific institutional arrangements even if this restricts the forms of generalisation available for the consideration of office.

The argument of this thesis does not address either the reformation or transformation of legal doctrine. Instead, by focusing on the responsibilities of the office of the jurisprudent, it is directed towards the sorts of commitments made, and made available, through the conduct of lawful relations. From the eighteenth century onwards, jurisprudents have been crafting and creating new *personae* for public and private life. Many of these engagements have also offered accounts of acting in public apart from or without office (Genovese 2013). In this thesis, I am interested in following the ways in which an ethos and ethic of office have been shaped through forms of non-transcendent authority, de-sacralised political association and a plurality of forms of duty and modes of engaging and creating public life.

2. Scope and Sources

The engagement with office presented here is undertaken from within the disciplines of humanities and law. It redescribes a number of engagements with office and draws attention to the ways in which they address (or not) relations between law and life in the varied concerns of the dignity, duty and jurisdiction of office. It also examines the range of substantive commitments (obligations) of the office of the jurisprudent to the care of the dying and the dead. This thesis does not proceed directly by defending a particular version of office against others. Rather, it tests several accounts of office that overlap in their concerns about the ways in which the office of Scholar and of the Jurisprudent is linked to the authority of the civil-state and the university. It also considers the technical means of the conduct of lawful relations and the virtues and substantive commitments of jurisprudents. In order to do so I address both substantive institutional literatures in jurisprudence, historiography and philosophy as well as

engage in more detail with particular authors. This way the argument of the thesis is developed through working with traditions of jurisprudence that already in some sense accept office and jurisdiction as engaged in the framing of the creation, representation and disposition of lawful relations. As will become apparent, the phrase 'in some sense' will be put under some pressure.

The scope and sources of this research are set within the writings of those who live with the common law tradition of Australia. The materials chosen, the methods of analysis and the decision to approach office and the conduct of the care of the dying and dead through a state-aware office of jurisprudent, is intended to allow the address of two concerns. The first of these relates to the training, obligations, performance and evaluation of office; and the second relates to what I argue are a broad range of duties of the contemporary office of jurisprudent. Some of these duties are uncontroversial – such as the writing of jurisprudence and the care for the conduct of lawful relations – while other responsibilities have become controversial. These include, for example, upholding the dignity and civility of office in relation to the care of the dying and the dead and a responsibility for relations between laws and people.

The general scope of this research is relatively easy to state. It draws on the work of several clusters of scholars. The first cluster is drawn from within particular universities of Australia since the 1980s. It includes work of the philosopher Jeffrey Minson, as well as the associated work and collaboration of the historians Ian Hunter and David Saunders. These scholars worked at the universities of Griffith and Queensland in Brisbane, Australia in the 1980s and 1990s. This literature has sought to revive a tradition of civil prudence and jurisprudence. This literature is, in many ways, unusual and particular. This particularity flows the way it crafts a civil prudence and a jurisprudence based around an account of office and *persona* which is suited for contemporary life. These (discussed predominantly in Chapters Two to Four) present varied accounts of civil prudence and civil jurisprudence, connected perhaps by a concern with state-centred authority. My purpose in engaging with these scholars is not to simply take up their accounts. In any case, they write as historians and philosophers and not as jurisprudents. However, directly engaging with their work enables me to craft my own account of a civil prudence and a civil jurisprudence.

I then pattern my account of civil prudence and civil jurisprudence into a concern with the conduct of office and, in particular, of the office of the jurisprudent. This has

three aspects. The first is the study of the office of the jurisprudent of the common law tradition through cultivation and training in the *persona* of the jurisprudent. Again, this is written with and against the work of Minson, Hunter and Saunders. To these scholars I will add Raimond Gaita. Gaita considers the conduct of life in the shadow of the good (ethical perfection) and the acknowledgement of humanity in the preciousness of life. His mode and manner of ethical address is, in many ways, strikingly different to that of the other scholars in this cluster, as his work often considers the ways in which the language and practice of office cannot express the worth of common humanity. Here he is, therefore, a counterweight to Minson, Hunter and Saunders. What he does share with them is a concern with the traditions of humanist scholarship and the importance of dignity and eloquence for the maintenance of public life.

The second aspect of the conduct of office is the analysis of the technical means of crafting the conduct of lawful relations. This is studied in terms of a jurisprudence of jurisdiction or the legal forms, devices and arguments used to authorise jurisdictional arrangements. A second cluster of interlocutors, then, is historians and jurisprudents who think with, and about, the prudence of law by linking an ethic of the office of jurisprudent to forms of institutional conduct. Here I include Shaunnagh Dorsett, Maria Drakopoulou, Ann Genovese, Ngaire Naffine and Peter Rush. I use this work to develop a description of the conduct of lawful relations through forms of juristic practice.

The third aspect of the conduct of office relates to the substantive duties and attributes of the jurisprudent in the conduct of office. This is studied through the training in conduct and prudence or experience of the jurisprudent. Here I return to the first cluster of scholars. This time, however, I am interested in how they frame questions of conduct and the duties of an office. In turn, I use this to develop my account of the obligations, duties and responsibilities of the office of jurisprudent.

Finally, having crafted my account of civil prudence and civil jurisprudence, as well as set out an understanding of a training in conduct, I turn to specific obligations, duties and responsibilities of the office of the jurisprudent in the particular context of the care of the dying and the dead. Here I introduce another cluster of scholars: the judges, jurisprudents and jurists of the common law tradition who address questions of law, legal order and value relating to the dying and the dead. They are addressed for

their importance to particular topics. Scholars here include Kenneth Veitch, Ngaire Naffine and Lindy Willmott. These in turn are drawn into the broader considerations of philosophers writing about dignity and jurisprudence. They include those jurisprudents who shape their work around a concern with dignity – Ronald Dworkin, Immanuel Kant and Gaita. Here I also draw on materials relating to the regulation of 'assisted suicide' or its cognates. To this cluster might be added the work of C.F. Black on Talgnai jurisprudence. Black's jurisprudence is not of the common law of Australia at all. However, it provides an important way of thinking about the relations between, and the meeting of, the laws of the office of the jurisprudent of the common law and the plural Indigenous jurisdictions of the Australian nation. Here I try to develop a practice of office adequate to the task of bringing laws into relation in certain matters – here relating to the care of the dead – and in particular the Indigenous dead.

There are a number of engagements with the office and *persona* of the jurisprudent that are not addressed directly here. The most important of these relates to the engagements of feminist jurisprudents with an ethic of care and with the engagement with questions of health, community and the embodied experience of the practice of law and health. That engagement is a very specific research programme. It does not address the concerns of office or *persona*. Women have, and do, occupy social and vocational offices with specific obligations usually performed in the home or the church. There is a feminist inheritance at issue in 'the art of self-fashioning that is practised by the intellectual personae', as there is with the creation of an account of the distinct and distinctive 'skills or virtues' of *personae* taken up by women (Genovese 2013). However, feminist jurisprudence in Australia has generally not worked with jurisprudential accounts of office. Indeed, for very good reasons, feminist writing has often been resistant to office and the exclusions from public life enacted through office (Genovese 2013). In this thesis I draw on the insights of specific scholars, rather than address a substantive feminist ethic of office.

3. Orientation

The approach to the research question taken up in this thesis involves situating the thesis within a number of orientations. This section sets out the three most important: jurisography; training in conduct; and conduct of lawful relations.

Jurisography and the Writing of Jurisprudence

The research in this thesis involves writing from within a common law tradition about jurisprudence in Australia. Writing from within the office of jurisprudent also involves paying attention to the ways in which I, and others who also inhabit this office, write on the conduct of research and on forms of the conduct of official life. In this thesis the conduct of research is described in terms of an explicit orientation through jurisography and jurisprudence. Along with Genovese and Rush, I have presented a research practice under the heading of jurisography (Genovese, McVeigh, Rush 2016). In this thesis I take jurisography as attending to the writings of jurisprudents broadly understood. It involves:

- An orientation to a practice of research which engages with jurisprudence and jurisprudents through an acknowledgement of relationship;
- Treating your own research (including this thesis), as itself an engagement in jurisprudence which is conducted with others (rather than a neutral engagement external to jurisprudence). Such relations of practice, theory and forms of argument are also ones of persons and people (Genovese and McVeigh 2013);
- Insofar as jurisprudence and jurisography are written and practised in an office, they also involve the consideration of the training and conduct of office;
- Jurisography is not so much conceptually programmatic as a studied acknowledgement of the relational duties of the historiographer and the jurisprudent, and of experience of a life lived with law. The duties that attach to the *persona* of jurisographer are to take care of the many forms and sources of the jurisprudence writing that has been inherited from jurists, judges, jurisprudents and others (Genovese and McVeigh 2015);
- There is a relationship to be maintained between the style and tradition in which research is undertaken and written and what a jurisprudent might be responsible for or write about (Genovese, McVeigh and Rush 2017: 1-6).

As a mode of reflection on the jurisprudent, then, jurisography emphasises the ways in which the experience of law is represented in the conduct of lawful relations. The sources of such modes of reflection are varied (Dorsett and McVeigh 2007). Writing about the office of the jurisprudent from within an office brings with it its own tacit and complicit accounts of training, conduct and concerns about the possibilities of

being civil or dignified.

Jurisprudence and Training in Conduct

The training and conduct of the jurisprudent can be treated both historically and as a practice. Along with Genovese, I have argued that jurisprudence and history writing can be usefully drawn into relation with a long tradition of writing relating to the 'conduct of life'. This tradition, which is drawn from the inheritance of Greek, Roman and Christian thought, has been used as a resource of historical and jurisprudential discourse, but also, we argue, as a training in conduct of a life – albeit here a life of office (Genovese and McVeigh 2015).

Research into conducts and forms of life shaped by office also has a long tradition within humanist scholarship and philosophy (Genovese, McVeigh and Rush 2017: 1). In this thesis, for example, the Ciceronian traditions of writing about jurisprudence are addressed in order to make explicit the links between a rhetorical education for public life and a philosophical education that attends to the cultivation of a public *persona*. As noted, the immediate source of scholarship which shapes a response to the research question of this thesis draws on law and humanities scholarship developed within traditions of common law since the 1980s. This scholarship has developed a number of distinct modes of investigating the ways in which jurists and jurisprudents offer accounts of their own office and the ways in which they understand the conduct of lawful relations. The link between training in public life and training in oratory is at the centre of the Roman rhetorical tradition. Cicero's work can, in this respect at least, be seen as one of the texts which joins a training in oratory in the rhetorical tradition to a concern with forensic speech and analysis (Cicero 1939). This training forms a part of the intellectual discipline of the humanist scholar and, historically, part of common law legal education. This was explicitly the case in the nineteenth century and is implicitly so today (Pue 2016). As will be seen, even the pared down 'technical' or 'professional' programmes of contemporary legal education owe something to civic humanist and civil prudence programmes of rhetorical education (Hunter 1994; Minson 2009).

In the research presented here, the cultivation of the *persona* of the jurisprudent and the training in conduct of office are represented in a variety of ways. The analysis of the office and *persona* of the jurisprudent, however, is not restricted to

jurisprudential writings. While this thesis could be presented as more or less within the bounds of a formal jurisprudence, I am also interested not just in what jurisprudents argued but also in how jurisprudents present their arguments. This forms part of the training in conduct. The materials studied are drawn from common law, historiography, philosophy, feminist practice, museum and cultural studies and Indigenous jurisprudence. While the first point of engagement is one of discourse, these disciplines offer training in conduct of their own. They are not treated here as a part of eclectic or syncretic training but are followed for the ways in which they deploy specific techniques of style and form. One complicit interest in drawing on different genres of scholarship in order to engage the office of jurisprudent is to link the conduct of that office to other offices engaged with the laws, histories, jurisprudence and intellectual traditions of Australia.

One part of the orientation taken up in this thesis, then, involves the attempt to think of jurisprudence 'projects' as part of a way of examining and participating in a conduct of life and an experience of the conduct of lawful relations. The first approach taken to the question of conduct is through the history of jurisprudence. My interest in this thesis turns mainly around jurisprudents and jurisprudences that have contributed to public debates about assisted dying and the placement and care of the dead. The question of how and whether a jurisprudent occupies an office, and by what mode and manner of conduct, will not necessarily exhaust the question of how to live or die well. Without such an analysis, though, and without thinking about the responsibilities and limits of living with instituted legal ordering, it is hard to give place to either the dying or the dead.

Conduct of Lawful Relations

Within the office of the jurisprudent the general obligation is to address the conduct of lawful relations. This phrase – 'conduct of lawful relations' – has both a general discursive meaning and, in this thesis, is a specific point of reference. The general meaning of conduct of lawful relations, including terminology such as 'the rule of law' or 'legality' or 'legitimacy', has value precisely because it can be shaped for use in a variety of contexts. In this general sense conduct of lawful relations encompasses the idea of lawful as having value (as opposed to lawless) and is also directed to the

question of conduct and relationship. Conduct of lawful relations also characterises ways of belonging to law. More specifically, however, the sense in which the phrase is used depends on the jurisprudential accounts within which it is set. In this thesis, the conduct of lawful relations is placed within a number of different jurisprudences – civil jurisprudence and prudence being the primary reference – and Indigenous jurisprudence being the point of relationship. Within the jurisprudence developed in this thesis I take belonging to law as being also shaped by representation and authority and technique, technology and craft.

Representation and Authority

Questions of representation have a place in accounts of political authority and the representative role of office is a commonplace in political theory. For example, the representative role of office forms a central part of the discussion of the virtues of public office and democracy (Ignatieff 2013). For the most part, the topics of representation and of the visible form of law are treated within contemporary jurisprudence as separable matters. However, holding jurisdiction to both visible form and institutional procedures provides one way of making the conduct of lawful relations a central point of focus in thinking with law. It also aids in maintaining the visibility of rival accounts of the conduct of lawful relations (Goodrich 2008). In early modern Europe there were rival accounts of how spiritual and temporal authority was found and related within canon law, ecclesiastical and common law. Common law jurists came to see themselves as immersed in, and representative of, a customary tradition of the English nation. Disputes as to authority were not understood simply in terms of creating contiguous spheres of activity, but in terms of rival forms of authority, law and government (Cormac 2011).

The approach to representation and jurisdiction taken here focuses first on the technical form of the links between sources and forms of authority, and then on visive representations. How relations between the practices of jurisprudence and jurisdiction are understood depends on both an understanding of authority and an understanding of the practice of jurisdiction. It also depends on the tasks presented from within a jurisprudence (Raz 2009). For example, the language of *jurisdictio* in mediaeval thought can address a wide range of questions of authority. In its broad political and theological

sense, it related to establishing authority under a supreme power which charged with the obligation of securing justice and equity. Jurisdiction relates to both the authority and the power to judge or act on a matter. In this context, jurisdiction relates to both the authority and the ability to judge on a matter (Miaolo 2007: 76, 141-142). In contemporary histories of that period one of the most important contexts for the analysis of authority has been the examination of the relations between *regnum* (state) and *sacredotium* (church) (Dorsett and McVeigh 2014: 571-172). It is this distinction that has shaped much of the contemporary discussion of assisted dying in the philosophy of law and health care ethics.

Many contemporary philosophical and jurisprudential accounts of assisted suicide treat contemporary forms of debate between those who support the sanctity of life (Church) and those who support autonomy (either as a corollary of rational existence or as a matter of civil-state policy) as being framed within opposed forms of authority. However, in order to consider the care of the dying and the dead as part of the work of the office of the jurisprudent of the common law, something more than a clash of authorities is needed. Legendre and Goodrich provide a contemporary formulation of jurisdiction in terms of a division of two forums: the internal and external (sacerdotal and governmental) (Legendre 1997: 170). The internal forum is addressed to the formation and examination of the soul or conscience shaped around guilt and penitence. This is the achievement of the formation of Christian institutions and life (Goodrich 2008; Agamben 2013). The internal forum is concerned with establishing forms of authority that govern through conscience (Legendre, 1997a: 165–69; Legendre 1997b: 147). The external forum, on the other hand, is social and civil. The judge in the external tribunal occupies a position in relation to the government of relations between strangers and adversaries. It is the domain of the government of public relations of civil and commercial life and the forum of adversarial and external dispute (Supiot 2007).

Civil jurisprudence, by contrast, has tended to displace the significance of the internal forum and the 'bond' of law, and of 'community' to the social sphere. Within the modern common law tradition, jurisdiction is distributed according to particular jurisdictional arrangements. Assisted dying, for example, has been addressed at various times within the jurisdictions of canon law, ecclesiastical law and equity and that of the common law or civil government. Its institutional formulations traverse juristic

formulations based on Roman and canon law understandings of legal ordering. The central heuristic device used in this part of the thesis is to investigate forms of dignity within jurisprudence projects not only through a distinction between civil jurisdictions and jurisdictions of conscience but also with an awareness of rival accounts of the arrangement of jurisdictions and of ways on conducting oneself in relation to law.

In thinking about the office of jurisprudent and its relationship to authority, it is necessary to pay attention to the mode and manner in which authority is represented and authorised For Goodrich, it is through legal emblems and signs that the visible ordering of public life – its offices, duties, rights and privileges – takes place. In medieval accounts emblems provided the mark of office. In a modern, less institutional idiom, they stage or bring to life the norms or rules of action. The task of the ordering of appearances and of bringing law to life is part of the honour of the jurisprudent (Goodrich 2014: 213-214; Dorsett and McVeigh 2014: 574).

Technique and Technology

If jurisdiction is considered as an activity or practice, the question of representation becomes linked to that of the technical means or technologies of creating, maintaining and representing lawful relations. While in many respects noting the technical forms of law is a commonplace, attempting to hold jurisprudence to technical means is one organising gesture or technique in this thesis. In one register, it is enough to note that questions of form and technical form dominate the practice of law, whether or not a jurisprudence represents technical means as expression of principled reason or civil authority. In another register, giving priority to various aspects of technical means marks both a point of analysis and an intervention into existing practices of jurisprudence. In *Jurisdiction*, Shaunnagh Dorsett and I characterised jurisdiction in terms of practices, devices, techniques and organisational strategies through which persons, places and activities came to belong to law (Dorsett and McVeigh 2012: 54-58). In talking of the conduct of lawful relations as conduct and activity, the characterisation of authority through technical forms gives priority to institutional life and office. This is hardly a neutral approach.

Within contemporary jurisprudence matters of dying well and assisted dying are often framed in terms of the moral justification of acts of assisted killing, the political

justification of the scope of state legislation and the actions of health care institutions and workers. The doctrinal understanding of the status and scope of duties, rights and responsibilities of persons are treated as (disputed) expressions of political and moral action, expressed as legal form and argument. In following the work of jurisdiction and the repertoires of lawful conduct, this thesis takes a rather narrower perspective on assisted suicide than those suggested by focusing on moral, political and juridical rights. The orientation through office pays attention to the juridical and jurisdictional forms to which moral, political and legal arguments are attached.

4. Organisation

This thesis is divided into three Parts. The first concerns the office of jurisprudent; the second concerns conduct of office; and the third concerns the character of the office holder.

Part One of the thesis addresses the office of the jurisprudent. It is historical and analytical (although it bears little relation to analytical jurisprudence). It concentrates on the ways in which jurisprudence and writings on jurisprudence recommend and elaborate the cultivation of a *persona* for, and a training in, the conduct of the office of jurisprudent. In part, it is an analysis of the forms that rival traditions of common law jurisprudence have taken in relation to the office of jurisprudent. In part, it is a work of redescription.

Chapter Two, 'Ethic of Office', elaborates an understanding of office and training in office framed through the contests surrounding the ethic of office of the jurisprudent. It takes as a starting point ancient and modern accounts of appropriate conduct in the work of Marcus Tullius Cicero and Max Weber. Cicero is important here as he is the source of the rhetorical ethical tradition addressing the appropriate conduct of office. Weber's work on vocation stands as the high point of the modern tradition of thinking of office as bureaucratic institution.

Chapter Three, 'Civil Prudence, Civil Jurisprudence and the Practice off Civility', addresses the revival of civil prudence and civil jurisprudence traditions. It pays attention to the ways in which these traditions have provided the repertoires for a training in office which is organised in terms of the cultivation of a non-transcendent ethic of civility. It draws civil prudence and civil jurisprudence into a common law

tradition and takes up the resources of the training in conduct of those traditions in order to propose a genre and style of jurisprudence writing which is capable of addressing civility as a form of rhetorical ethics.

Chapter Four, 'Dignity and Training in Conduct', offers an account of training and training in dignity for the office of the jurisprudent. It does so through focusing on rival accounts of training in dignity which are, in some way, in dispute with or draw on the Kantian tradition.

The office of jurisprudent has been charged with the responsibility of the formulation of the conduct of lawful relations among the living, the dead and the yet to be born. Part Two moves to addressing the the substantive commitments or duties of the office of the jurisprudent in relation to the care of the dying. Chapter Five, 'Civility and Dying in a Dignified Manner', gives an account of the exercise of office of the civil Jurisprudent as it addresses the conduct of dying in terms of civility and dignified manners. Substantively this chapter examines three cases studies of assisted dying in Australia and the United Kingdom.

Chapter Six addresses an understanding of assisted suicide which shaped through a jurisdiction of conscience. It emphasises the ways in which a jurisprudence of conscience and a jurisdiction of conscience are in conflict in Australia and the United Kingdom.

Part Three of the thesis draws attention to the duties owed to the dead and the comportment and prudence of the office of jurisprudent. In Chapter Seven, 'Common Law Care of the Dead', the key concern is the responsibility of the office of jurisprudent to the meeting of laws (here Indigenous and non-Indigenous) in the care of the dead. The chapter examines the continuing juridical importance of the repatriation of the Indigenous dead as part of a meeting of laws.

Chapter Eight, 'Art of Association: Jurisprudents of London', continues the examination of the care of the dead. It centres on two exhibitions associated with the holding of Indigenous artefacts and materials: *Indigenous Australia enduring Civilization* at the British Museum in London; and the *Encounters* exhibition at the Australian National Museum in Canberra, Australia. Both were held in 2016. In contrast to Chapter Seven, this chapter concentrates on the *persona* and non-institutional role of the jurisprudent and activates the responsibility to acknowledge the presence of the dead and their laws

– even when the dead are not corporeally present.

The Conclusion addresses the experience of the conduct of the office of jurisprudent and presents the ethic of that office as developed in this thesis.

5. Innovation and Significance

In this thesis I draw attention to the continuing importance of an ethos, ethic and conduct of office in relation to the practice of jurisprudence. I do so in part to offer a nuanced account of the institutional forms of public engagement with the conduct of lawful relations within a common law tradition. I also do so in order to sharpen accounts of the conduct and obligations of the office of jurisprudent in relation to the care of the dying and the dead. As in many works of jurisprudence, the links between the problem studied and the innovation sought are closely tied to the concerns of method or the way of addressing a problem. The contributions to scholarship of this thesis are both methodological and substantive:

1. The first innovation lies with providing an account of office that is sensitive to the cultivation of the *persona* and a training in conduct of the office of the common law jurisprudent of Australia. The shaping of the work of jurisprudence in terms of office is not itself new. However, it has not been the subject of engaged research since the 1950s. What is new in the account of office presented in this thesis is the direct link made between the writing of jurisprudence and the cultivation of the *persona* and training in conduct of the jurisprudent.
2. The second innovation is the re-linking of the account of common law jurisprudence to jurisdictional practices. By directly linking accounts of the jurisprudence of jurisdiction to training in office this thesis significantly develops an earlier account of jurisdiction by Dorsett and McVeigh (2012). That work did not offer an account of office. This account draws attention to the technical forms of law and legal ordering. The re-orientation of jurisprudence around the concerns of office and responsibility gives a distinct prudential inflection to the understanding and practice of jurisprudence.
3. The third innovation is to provide an account of civility and dignity in terms of rival conducts of lawful relations. It adds to the repertories of jurisprudence a concern with dignity as being 'the ability to be dignified','adequate to the task' or

'worthy of the name'.

4. The fourth innovation is methodological. In developing an account of jurisography which pays attention to the forms of writing and conduct of jurisprudence, this thesis draws out the way in which the conduct of office and its concerns with civility and dignity are addressed through decorum and eloquence. In so doing, this thesis extends the work of Genovese, McVeigh and Rush on jurisography (2017). That earlier work was not concerned with prudence, decorum or eloquence.

Conclusion

This thesis takes a different direction from the more usual approach to the dying and the dead. Rather than being concerned with the creation and justification of normative arguments or legal norms, it is concerned with the work of office in jurisprudence. It also differs from projects that are designed to resettle or transform the relation between Being and Western institutions and beings. It shares a sense with normative legal thought that office is the site of an instituted activity and that jurisprudence addresses questions of office. It is, however, interested in the ways in which offices, and forms of official and unofficial thought and practice, can carry meaning. In this respect, it engages in a form of ethical reflection – albeit one that does not stray far from institutional life and, as will be argued, treats such engagements in terms of rhetorical and juridical performance (competence).

The patterning of lawful relations that is traced here is of jurisprudents into office, of the dying and the dead into the responsibilities of law. One reason for doing this is to express and record something of the 'conflict of offices' (of jurisprudent). Another reason is to test the *ethoi* of those who occupy the office of jurisprudent; or, at least, to worry about the sorts of responsibility a jurisprudent can bear, or express, given the resources of ideas, institutions and practices through which they engage the conduct of lawful relations. This, I think, involves a continuing engagement with rhetorical, technical and administrative forms of law. Finally, the impetus of this thesis is to investigate the resources and practices of the office of the common law Jurisprudent of Australia. This office, as many have imagined it since the 1990s, has obligations to engage with more than one law – both Indigenous and non-Indigenous.

How these obligations are understood and realised is still a matter of dispute.

The impulse of this thesis has been that it is possible to direct attention to the forms of conduct and repertoires of action through which a jurisprudent might assume some obligations for the care of the dying and the dead. By the end of the thesis the concern with the dignity of office will have become a matter of conduct and of ways of dignification, being dignified and of living with dignity. If dignity is to remain a language appropriate to such activities, then the training in conduct associated with the forms of conduct adequate to the task, or worthy of the name of the office of the jurisprudent, need to be practised. This understanding of ethos and an ethic of office is shaped by the cultivation of the *persona* and training in the conduct of the office of the jurisprudent.

This thesis also carries its own training that directs attention to the concerns of everyday life. The Conclusion of the thesis draws attention back to the sorts of 'ordinary virtues' cultivated in the *persona* and office of the jurisprudent within a common law tradition. These are virtues of character or disposition, shaped by office and engaged in the conduct of lawful relations between people and institutions. They operate within the constraints of time and place and are shaped and answerable to forms of experience and judgment. In the accounts offered here I have refrained from elaborating any meta-ethical or jurisprudential position beyond the concerns of conduct. I have, however, assigned a number of duties to the office of the jurisprudent which receive critical attention. The first of these duties is one of form and relates to the care for the conduct of lawful relations. The second is substantive and relates to the responsibility for (or answerability to) the cultivation of human relations between the living, the dead and the yet to be born. In this account the heroic stance of dignity and the virtue of justice do not occupy all the horizons of legal thought. Attention is given here to the virtues of propriety, civility, dignity and care in being lucid about how we live well with ourselves and others. These dispositions, styles, comportments and virtues carry their own prudence and jurisprudence – at various points relating to judgment, the art of association and responsibility, the awareness of the importance and dangers of thinking with legal forms – complicitly, compromisingly and so on.

Chapter Two

Ethic of Office

Introduction

This chapter provides an opening account of an ethic of office and the cultivation of the *persona* appropriate to the office of jurisprudent. It develops an account of training in conduct by linking forms of philosophical exercise to training in the conduct of office and to the elaboration of understanding of tradition in the common law tradition. It closes by considering the ways in which questions of civility and dignity can be approached through the modes of analysis undertaken in this thesis.

These introductory statements of office, *persona*, training and tradition are presented as part of the contested background and orientation of this thesis. While not exhaustive, they provide a review of the methodological concerns presented in this research. In so doing, this chapter does not attempt a history of the disciplinary training of the (Australian) common law scholar, but rather follows the induction of a jurisprudent into office as part of a conduct of life. At this point, the concern is with how an ethic of office and training in office might be characterised; in other words, the concern is more with how it is done than why it is done.[1] This chapter also temporarily disengages from, but does not ignore, some of the polemical force of the discussions that surround the office of the jurisprudent. As noted in Chapter One, this chapter, and indeed this part, focuses on a more general discussion of office and training in conduct. This discussion sets the broad framework for a more specific consideration of office in the context of the jurisdictional arrangements of the dying and dead in later parts.

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[1] As will be discussed in Chapter Three, one consequence of playing down the history of the education of legal scholars is that the training of the philosophers is given more emphasis than is warranted by the historical record. Counter-weights to this emphasis are presented in the second part of this research.

1. Office and Ethic of Office

The focal point of the analysis presented in this thesis is the office of the jurist and Jurisprudent and the representation of the conduct of lawful relations. While office is, perhaps, no longer the most usual point of ordering of lawful conduct, it will be argued here that office and the shadow of office still perform useful work. Office allows for the consideration of the variety of ways in which responsibility has been expressed (or not) for law and the conduct of lawful relations in public life; it provides the point of ordering for treating conduct and institution as part of a prudence or form of practical engagement with the conduct of lawful relations; and it provides the link between the work of the jurisprudent and the writing of jurisprudence.

Although the terminology of office needs to be treated with care, an office might usefully be considered as one of the ways in which duties, responsibilities, rights and obligations are given institutional form. It is addressed as a concern of appropriate conduct. The language of office has formed the basic accounts of Roman public life, as well as being the point of ordering of early modern spiritual and temporal government. Drawing on Cicero's *De Officiis*, the historian Conal Condren treats office as 'a whole sphere of responsibilities, rights of action for their fulfilment, necessary attributes, skills and specific virtues, highlighted by concomitant vices and failures' (Condren 2006: 66).

Office, at least in its formulations in Renaissance humanist discourse and early modern natural law jurisprudence, provided a way of elaborating a huge number of obligations and responsibilities. Without an account of office, as Condren notes, it was not possible for the early modern person to speak or be heard in public. This was so, in ways that will be elaborated, because office not only provided the responsibilities and language of action; it also provided the repertoires of action and the means of their evaluation.

In order to present the outlines of the study of an ethic of office as a concern of historically inflected jurisprudence and jurisography, a set of concerns are abstracted from the literatures of office in order to provide a horizon for study. Rather than provide an analytical frame, this opening account of an ethic of office takes two exemplary accounts – one from Marcus Tullius Cicero and the other from Max Weber. The first is writing at the beginning of the office tradition and the other towards the end. Both writers concentrate their accounts of office on ethics and

appropriate conduct (*officia*). For Cicero what matters is the appropriate performance of duties. For Weber, the significance of office is held more in the institutional arrangement of duties and the vocation of the office holder. They are taken up here as exemplary engagements. The differences of emphasis will provide a pattern of engagement with the formulation of the office of jurisprudent through a focus on appropriate conduct of office rather than institutional histories, normative legal theory or legal doctrine (Williams 1985: 170-178). So here, I will be reading Weber and Cicero through the lens of conduct rather than solely through the lens of historical institution.

Invoking Cicero as a source of authority or argument rarely establishes a definitive argument. His writings can be taken as a Roman source for most engagements of character and morality, speech and writing, political and philosophical life. Here, however, I turn briefly to Cicero's *De Officiis* (1991) to set the scene for the later investigations. Cicero's work can provide a point for showing the range of practical engagements of ethics that surround taking up forms of public life. His account of morality is shaped by a distinction between perfect and mediate (middle) duties. This distinction is one made between those duties that can be fulfilled by the wise man (philosopher) and those that can be fulfilled by the many (Cicero 1991: 3.14). These duties are in turn given form according to Cicero's account of the four *personae*. The duties of the first *persona* relate to the whole of humankind (common humanity), and are those of natural law (Naussbaum 2000: 184); the duties of the second *persona* relate to the particularities of one's own nature; those of the third *persona* are shaped by chance and circumstance; and those of the fourth, that of vocation, are grounded in decorum. This is particularly so for advocates whose authority depends on the community of citizens (Cicero 1991: 1.107-17; Remer 2017: 19). These arrangements of reason, nature and action, form a substratum of argument for Western legal thought (Kelley 1990).

Cicero's conception of the 'appropriate duties' of a statesman and orator follow the texture of the rhetorical forms and topics of Roman political life. In many ways, his conception of appropriate duties *(officia*) was an attempt to make Roman citizens care for their political, moral and juridical lives. Each status – noble, orator, head of the household – requires an appropriate performance of office. For Cicero, the art of performing these many roles well is related to the ability of the actor to achieve a

certain element of ethical consistency (Harriman 2004). In the *Orator* (1939), Cicero's last work of rhetoric, he divided the cultivation of the *persona* of the public official between a philosophical training which was mainly concerned with rationality and will and a rhetorical training which engaged the conduct of civic life (Guerin 2009: 109-11). The relative importance attached to rational will, to stoic justice and to honour (*honestum*), is the subject of dispute. Colish, among others, emphasises the eclectic character of Cicero's philosophical engagement with Greek thought and ethics (Colish 1990: 95–104). While at times Cicero seeks to transform Roman moral practice, he does so while also asserting the importance of Roman tradition and virtues. In so doing, Cicero turns the rhetorical and worldly training of oratory towards the comportment of the philosopher (Remer 2017: 80-82). He has also provided the topics for the consideration of the ethic of office.

The work of Max Weber provides a slightly different point of engagement for the discussion of an ethic of office. The difference in tone and texture of argument from Cicero is obvious. However, if Weber's central concern is taken as the 'fate of man as man' (*menchentum*), then, like Cicero, a link can be drawn to the philosophical tradition (Hennis 1988: 46). Read as an historical anthropology, Weber's work can be understood as a series of investigations into the types and styles of conduct and rationality appropriate to the conduct of life in the modern world. His principal studies relate to the office of the Bureaucrat, the Scholar, the Scientist, and the Politician (Du Gay 2008: 131; Hennis 2000). It is through these forms of public life or, broadly, office, that Weber provides the point of analysis for the 'life orders' (*lebensfuhrungen*) through which people (mostly men) conduct their lives (Minson 1992: 134). In particular, Weber's two lectures, 'Science as Vocation' (1917) and 'Politics as Vocation' (1919), are important because they address the specificity and difficulty of the conduct of public life. In these lectures Weber's concerns with forms of reason and rationality give shape to ethic of offices of the Human Scientist and Politician (McVeigh 2017).

For Weber, the office of Scholar in Germany in 1917 was shaped by a concern with the authority of science in two ways: first, in the relationship between science and politics ('can science provide authority for politics?'); and second, in the status of the meaning and value of science in the modern world ('can a science without ultimate ends have value?') (Owen and Strong 2004: xxi). These questions are existential before they are sociological. To answer them, and to establish the scope of vocation or calling

of the human scientist, Weber set out to establish the conditions under which the vocation of the human scientist and politician exercised their calling. Weber saw the university as a corporate enterprise within a state capitalist system (Weber 2004: 7). Its significant institutional arrangements relate to the bureaucratisation and rationalisation of knowledge and of scholarly life. For Weber, this rendered the conduct of scholarship a matter of intellectualisation and its knowledge a matter of calculation. One consequence has been to turn way from an understanding of the office of Scholar as being an aristocratic or artisanal pursuit of knowledge and excellence (with a library), to that of a manager whose work is understood as subject to the interests and constraints of government and as being answerable to the public (Weber 2004: 3-4).

In addition to the external constraints of the university, the personality of the scholar must be adequate to the task of living with the demands of their discipline. For human scientists, this means pursuing a discipline that lacks both a final purpose or end (it is polytheistic) and public authority (it is a specialist form of enquiry). For Weber, such demands are to be met directly by maintaining diligence and clarity in research as well as honesty in its reporting. In 'Politics as Vocation', Weber addresses a more general account of the conduct of office. As in 'Science as Vocation', much of the lecture is taken up by considering the conditions of political life. Of interest here, however, is the way that Weber develops his account of the conduct of the politician as office holder. He marks a contrast between an ethic of responsibility and an ethic of conviction; or, between an ethic that attends to the means and consequences of a situation, and one framed in terms of conviction that judges according to intentions and ultimate ends.[2] For Weber, an ethic of responsibility shaped by means and a causal relation to the world is appropriate for forms of bureaucratic office. It accepts both the limits of responsibility and the means by which an office is conducted by marking the distinction between action and consequence. However, an ethic of responsibility is not always sufficient to sustain either the passion of a vocation or the authority of the politician or scholar.

An ethic of conviction draws attention to the inner relation between ultimate values

[2] At this point I note that this distinction repeats in form but not substance the one between *honestas* and *utilitas*. I will draw together a number of comments on such distinctions in Chapter Five.

(or meanings) in life and action. The two forms of ethic rely on different ways of judging the value of actions and the world. The ethic of conviction responds to the passion or calling of public life. It also responds to the desire to consciously mould the soul and the world. While there is a sense in which Weber draws a distinction here between duty and consequence, it is a distinction that is held in terms of *persona* or character. In his closing commentary in 'Science as Politics', Weber considers the danger of the ethic of conviction to be the risk of romanticism and the formation of prophetic cults. However, he holds out the possibility of holding the two ethics in relation. To be able to take responsibility for the circumstances around you, and to act in the knowledge of the consequences is, for Weber, to act with maturity in the face of the realities of the world (Weber 2004: 92; Gaita 2017: xxi). The qualities that Weber would praise in the politician would be passion (matter of factness), an acceptance of responsibility for actions, and a sense of proportion. This is also the dignity of the vocation of the scholar (Owen 1997; Minkkinen 2010).

Weber's account of office has shaped much of discussion of the figure of the bureaucrat as (public) official (du Gay 2005). As the investigation of the office of the common law jurisprudent of Australia proceeds, the argument of this thesis will follow the ethic of responsibility in a number of writers. I have not presented this as being in direct opposition to or in agreement with the ways in which Weber has presented his ethic of office. For example, Chapter Three addresses a number of authors (including Ian Hunter, Jeffrey Minson and David Saunders) who align office and the ethic of office with an ethic of responsibility ordered around the authority of the state. While the work of these authors has distinct similarities with some of Weber's formulations, their engagement with both institutional history and with ethics is directed towards different matters. The variety of official responsibilities and the jurisdictional forms through which they are maintained invite a consideration of a plurality of forms of responsibility. Similarly, Chapter Four addresses groups of scholars (primarily Emmanuel Kant, Ronald Dworkin and Raimond Gaita) who judge the ethic of office according to another (higher) authority. Both cohorts of scholars attend to the ways in which an ethic of office might limit responsibility (Cane 2002: 4; Veitch, S 2007). Finally, with Cicero, in occupying the office of jurisprudent it is necessary to pay attention to the form and texture of an office shaped (or patterned) by official activity and jurisdictional practice. It is through this activity that the care of the conduct of

lawful relations is expressed as a measure of law.

2. Office, *Personae* and Conduct of Law

How questions of office in political legal thought are understood and given meaning often depends on where you start your investigation. Weber, for example, offers one account set within the modern German university. However, the language of office is more broadly pervasive in the institutional and administrative understanding of the political and legal order. Consider, for example, the use of office as an aspect of constitutional law (the law establishing the offices of state, and public and administrative law addressing government through office). The law of obligations likewise is a law of offices or obligations taken up by virtue of an engagement in public activities and arrangements (in the sense of being part of public life). The law of status relating to the institutions of public life (corporations, family, persons) establishes another set of engagements of office by determining who can act in public and how. These institutional topics of legal thought are an important mode of ordering the responsibilities and practices of office. They shadow older legal forms and debates.

Starting in the Middle Ages, the devices (practices) of office, along with those of jurisdiction, dignity, and privileges, provided the central institutional forms of government of both Church and State. The offices of Bishop and Priest and of King and Noble established responsibilities, privileges, and rights, as well as distinct modes of conduct towards the world (Dorsett and McVeigh 2012: 39-40; Condren 2006). For Ernst Kantorowicz (1981), for example, in late Mediaeval England what was crucial to the ordering of political authority and the staging of the authority of kingship was the office and dignity of the Sovereign. For Kantorowicz doctrinal and ceremonial questions of kingship were shaped round the doctrine of 'the king's two bodies' (Kantorowicz 1981; Goodrich 1990; Santer 2011). This doctrine expressed kingship, and the authority of the king, in terms of a relationship between the natural body and the political or corporate body of the king. The king has two bodies: the body natural is mortal (and suffers all associated frailties) while the body politic is a perfect, and I would add juridical, form that contains the 'office, Government, and Majesty Royal' (Kantorowicz 1981: 9; Parsley 2011). The conjoining of the two bodies with its echoes and formulations of Christian theology figures in both the ecclesiastical and temporal

ordering of kingship. Kantorowicz's study tracked the official or corporate body of the king across the variations of the office of the Sovereign as concerned with theology, law and humanity. It was the corporate body that carried the dignity of the Crown.

Many of doctrines of kingship discussed by Kantorowicz in *The King's Two Bodies* continue to find echoes in contemporary political and legal thought. So, for example, the formulation by jurists of the *lex animata*, or the living law, is taken up in the work of the sociologist and jurist Eugene Erhlich (1936) as well as, although in a different manner, by Giorgio Agamben (2013). However important attending to 'political theology' has been in contemporary law and humanities scholarship, their accounts do not exhaust the importance of office. In this thesis, I will treat the ideational and institutional formulation of office as providing the purpose, range and limits of a broad range of roles. I am also interested in the way in which the formulation of office has provided both a public language of criticism and evaluation for a variety of social and intellectual activities as well as a way of considering their ends and means (Condren 2006: 16, 68).

For Renaissance humanism, Ciceronian accounts of office and of the *personae* necessary to occupy office provided the repertoires of conduct for the King and the Judge, as well as for the Noble, the Bishop, the Actor, the Poet and the Philosopher (Condren 2006). However, while there is agreement about office – in the early modern period, it is possible to argue, all, or nearly all, social and public roles were official – it is not the case that there is agreement about what this means. The differences of interpretation over the reception of Cicero's *De Officiis* also affect the range of understandings of conducting oneself in public life.

This first take on office and on offices, then, has emphasised the ways in which office is used as a discourse and practice of public service. I have noted both the long tradition of, and contest as to, the meaning and understanding of office. In so doing I offer a range of engagements which will be taken up in this thesis as it moves between the jurisprudents within and without the university in Australia. In this way, I have begun to mark out an ethic of office which is shaped by both conduct and by institutional life. I have also suggested, and will argue explicitly in the next section, that there are distinct ways of linking office and office-holder which turn attention towards questions of prudence and performance, rather than towards social arrangement (and sociological analysis). The ways in which jurisprudents understand the responsibilities

of office (their own and that of others) that are of interest in this thesis are those which address the ensemble of duties, responsibilities, rights, privileges, jurisdictions as to their proper fulfilment or performance.

The links between office and the *persona* (mask or character) of the philosopher, jurisprudent or citizen is a point of intense dispute in early modern thought. If office is considered in terms of the taking up of a life in public, the creation of a *persona* is what allows for the representation and conduct of life. Even more so than the discourse of office, that of the *persona* is not one that can be taken up without also taking on a range of conflicting views (Parsley 2011). Here I want to offer some preliminary points of orientation in order to help frame the way this thesis is conceived and understood. The details of associations and links made by the writers studied in this thesis will carry the weight of thinking of the development of *persona*.

In the context of juridical and rhetorical forms, the *persona* has long been linked and taken up as the mask which joins the political and legal to the human or natural. The *persona* is attributed to the theatre, but it might also be understood as deriving from the death mask and other situations where image or representation is at issue (Parsley 2011: 14-15; Mussawir 2011: 23-28; Santer 2011). It is through the *persona* that an individual acquires a status, role and, in modern terms, an identification or identity. The juridical order of persons is concerned with the attributes and incidence of status, rank and associated dignities, duties, privileges and liberties (Goodrich 1990: 15-17). The emphasis on the social and legal forms of *persona* turns attention to the primacy of obligation to the *civis* or city-state.

One way of making visible some of the different commitments to the shaping of office in the writing of philosophers and jurisprudents is to hold institutional, rhetorical and philosophical registers of office to a concern with decorum and eloquence. Here I want to return briefly to Cicero's *De Officiis* (2016). Cicero's work was an exemplary model of Renaissance education and imitation – from establishing the dignity of the offices of the Church to the training of young gentleman for the Royal Courts (Haldar 2015, Goodrich 1990). Cicero's work establishes the range of practical engagements of ethics that surround an ethic of office. For Cicero, both philosophical and rhetorical training were shaped in public through the importance attached to decorum (Guerin 2009: 130). In one register, decorum was part of the sphere of duties which addressed the appropriateness of public speech and deliberation (Haldar 2016). Decorum was

concerned with the ways in which an orator should consider the time, place and audience of his speech. In this respect, decorum is a matter of proportion and circumstance. In another register, decorum was also important to the training in character and the virtues or disposition of the orator (Guerin 2009: 131; Dugan 2005: 129-131). In the *Orator*, for example, Cicero associated decorum with eloquence, with a sense of fairness (*aequitas*) and honour (*honestas*) and with philosophical wisdom (Cicero 1939: 9-10; Guerin 2009: 136-137).

In the Renaissance humanist reception of Cicero, decorum became associated with general attributes of speech (including poetry) (Burchell 1998: 108). Among humanists with a more direct interest in matters of law, decorum was understood both in relation to the work of the jurists in the philological authentication of texts and the disciplines that were associated with the *studia humanitatis* (Minson 2009; Goodrich 2015). Most visibly marked through Renaissance legal humanist scholarship, the Ciceronian elevation of eloquence and persuasion in the *studia humanitatis* provided a model of the scholar-jurisprudent's engagement with forms of office and public life through the linking of decorum and eloquence with honour (*honestas*) (Kristeller 1979). If dignity (and later decorum) were related to appropriate conduct (*officia*), then eloquence in its various forms directed attention to the cultivation of a *persona* (Dugan 2005: 329). Eloquence, for some, also became the means by which the philosophical understanding of the good life was instituted and transmitted (Haldar 2016). While ostensibly concerned with *persona*, for Haldar, eloquence nevertheless provides a different account of public life, one which emphasises forms of ceremony and the propriety which transcends and holds in place the dignity of office.

For others, however, such as Robert Cape, what is important is not to transcend with eloquence, but to hold to performance. *Persona* is shaped by decorum and by that performance. He, then, detaches Cicero's thought from office and treats it as concerned mainly with the rhetoric and performance of a *persona* (Cape 2004.). Burchell affirms this. He contends that Cicero's offices are more or less empty forms (Burchell 1998). They are also strikingly modern in the sense that an 'office' connotes a public institutionally defined role which is shaped by duties and responsibilities. (This draws the concerns of Cicero and Weber into relation.) For both Burchell and Cape, however, these duties are contingent on the situation in which the statesman or public

figure finds themselves.[3]

Both the significance of the *persona* of the office holder, and of the relative formality of the generation of the character required to fulfil that *persona*, have been a strength and weakness of thinking with office. The formulation and dispute of the conduct of office provided a repertoire of actions for both social and instituted offices. Importantly it was office, and the *persona* of the officeholder, which gave character to the language of approval and criticism. Condren has argued that it was this very flexibility of discourse that also led to the loss of status and importance of character and office in the eighteenth and nineteenth centuries (Condren 2006).

The account of office and *persona* made so far has been located within a political and scholarly milieu, both as a matter of action and as a matter of reflection. Drawing on two senses of office – as appropriate conduct and, in a modern sense, institutional, often bureaucratic, order – I have linked the ethical to the rhetorical conduct of office. In so doing, I have drawn one thread out of the network of arguments about the conduct of public life. Arranging arguments in this way, however, carries a risk of downplaying both the institutional forms of public life and the contest of who can participate in public life (Genovese 2014; Weber 2004). For example, as Ann Genovese notes the relationship and access to forms of public life and pubic office have, and continue to have, a specific gendered (and racialised) history (Genovese 2013).

In Part Two, the language of the *persona* will be deployed in order to draw out the limits and specificity of the use of terminology such as 'legal subject' and 'legal personality'. Modern legal thought holds the central relation of law and life to be that of artificial legal personality and natural personality (Maitland 2003; Davies and Naffine 2001). Modern ethical disputes about the status of the dying and assisted dying have often been conducted in terms of personality and the transformation of personality (Dworkin 1993).

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[3] Importantly for the work of this thesis, Cicero's writings also appear as the background for the civil jurisprudence of both Samuel Pufendorf and Thomas Hobbes as well as for the historically and rhetorically inflected ethics of their modern interpreters and critics (Minson 2014). This is the topic of Chapter Three.

3. Training in Conduct

So far, this chapter has looked at the conduct of office and the importance of the Ciceronian and Weberian traditions of thinking about office. In this account, *persona* is the figure which occupies an office (or not). In the Ciceronian tradition, decorum and eloquence provide the performance of the activity of the *persona*. In the Weberian tradition it is duty which does the work of action and argument. This section, then, moves to thinking about the training of the *persona* in conduct in the philosophical and rhetorical traditions. In order to do so, this part draws the 'spiritual exercises' of the Ancient philosophers into relation with the rhetorical training of the political orators (Hadot 2002). The importance of the 'spiritual exercises' of the philosophers lies in training in transcendence – the training to withdraw from and overcome the everyday political or commercial world, and to take up the search for truth, beauty and justice. Cicero, as already mentioned, attempts to hold this philosophical tradition in relation with the rhetorical, political and legal forms of public argument. However, what I want to emphasise in this section is not the discursive forms of those arguments, but rather the aspect of training which relates to the cultivation of the *persona* and the office of the Philosopher and Jurisprudent. Here, then, I turn to the ways in which the disciplines of philosophy, jurisprudence, rhetoric and history deploy forms of 'spiritual exercises' (Hadot (1995)), 'practices of the self' (Foucault (2010)) or 'training in conduct'. The first section of this chapter provided a general account of office and *personae*. Here I begin the work of drawing this material into jurisprudence.

The training and conduct of the jurisprudent can be treated both historically and as a practice. In this thesis, the cultivation of the *persona* of the jurisprudent and the training in conduct of office are represented in a variety of ways (Genovese, McVeigh and Rush 2017). As historians and philosophers, Pierre Hadot and Michel Foucault have done much to revive the sense that philosophy is a project engaged in the transformation of the ways in which we live and conduct ourselves in the world (Cooper 2012: 17-23). The transformation of the conduct of both the officers of law and of the persons and subjects of law has also been the conscious project of jurisprudents (Hunter 2001; Minson 1993).

Hadot has redescribed classical Greek and Roman philosophy in terms of training in a 'form of life' (Hadot 1995: 59-61). He was concerned with identifying the varieties of

spiritual exercise and practice as they moved from one school to another. For Hadot this provides a way to investigate the continuities of a tradition practised in both philosophy and in Christian and Islamic spiritual training (Davidson 1995: 15-17). Hadot approaches the Ancient philosophical schools and their writings through the techniques of modern philology and history writing. Philosophy becomes a practical training or series of teachings of 'spiritual exercise' that were undertaken in 'institutions': the Platonic academy; the Aristotelian Lyceum; the Epicurean garden; and the later Platonist schools. The works of the philosophers, argues Hadot, were presented as dialectical exercises (and student exercises) (Hadot 1995: 61-64). This perhaps is easier to see when teaching is addressed to a specific audience than when it is presented as a systematic teaching to a public in general. The teaching of the philosophers was into a way of life (*bios*), its exercises designed to assist in the transformation of the 'arts of living', rather than simply of discourse. In this light, the concern with decorum and eloquence in Cicero, a follower of Philo of Larissa and head of Plato's Academy, should be viewed as an ethical concern with how to conduct oneself well, and not merely persuasively. Hadot is insistent that philosophical transformation is a matter of acting upon oneself and others existentially. (This might also be seen in the genres of writing and advice-giving in letters, studies in conduct, consolations as well as practical advice of questions of government, oration and so forth.)

The means of establishing a training in a conduct of life vary between institutions, disciplines, schools of thought and spiritual and political ambitions. For example, philosophy, or at least philosophy in the spirit of the Ancient philosophers, provides training exercises in contemplating how to die well (Hadot 1995: 95-101; Montaigne 2004: 1: 20). Such exercises were exercises in learning to reflect on the value of life and to minimise the lure of worldy existence. It is also, among Hadot's chosen philosophers, a matter of doing so in an examined way – with lucidity and consciousness about the immateriality of the soul (Hadot 1995: 261). Philosophy and the schools of philosophy share and dispute versions of the good life as well as the means of training the student to achieve such aims. Even the precepts of the schools were considered as timely ways of engaging the rules of life (Hadot 2002: 175-177; Davidson 1995: 61-63). For Hadot, the ambition of the Hellenic and Roman schools is comparable to the work of Christian religious orders. They all created institutions, a

teaching (*paideia*), and an orientation through which to inherit and live a form of life (Hadot 1995: 126-131).

The historian Peter Brown has expanded on this understanding and completed a number of studies on the 'spiritual exercises' of the Christian church in the conduct of the lives of Bishops and military leaders in late Antiquity (Brown 1967; Brown 2003; Williams 2014). These studies range from a biography of St Augustine to the study of power and persuasion in late antiquity (Brown 1992). Brown establishes his sense of theological and patristic writing as a training in a religious form of life through an insistence on a political and social context. This contextualisation, he argues, does not diminish theological concerns. Rather, they provide a way of drawing out the significance of difference forms of engagement and interpretation of spiritual and theological texts (Brown 1992).

Hadot also speculates that the traditions of spiritual exercises are used by modern (German-speaking) philosophers such as Immanuel Kant, Friederich Nietzsche and Ludwig Wittgenstein (Hadot 1995: 167-170; Force 2011). These writers, argued Hadot, were like the 'pagan' philosophers in the ways in which they investigated the practices and means of achieving 'inner freedom' and, perhaps, a non-Christian sanctity. In making these observations Hadot is asserting a continuing history of practice, marking a form of affiliation in the style of his scholarship, as well as tacitly offering his own training (Hadot 2001: 7-9; Lyotard 1989). This orientation of materials provides an important point of engagement with the links between the training of philosophers and jurisprudents in the matter of dying. As I will argue in Chapter Four, one way of reading the work of Ronald Dworkin is to consider the ways in which he joins the forms of training for a philosophical life to that of the jurisprudent – or, more directly, the way in which he wants the office of the jurisprudent to be occupied by a philosopher trained in a certain manner.

Finally, by way of expanding the repertoires of 'spiritual exercise', the work of Foucault on the practices of care of the self, hygiene, sexual pleasure and truth-telling has made the transformation of the self and the conduct of life a significant aspect of the literature of social and cultural studies in the last fifty years (Hadot 1995; Frow 2014). His studies have emphasised the ways in which works of philosophy, medicine and rhetoric were directed to both the government of the self and of others (Foucault 2010). Foucault's work is also important for the ways in which it has presented the

material practices of particular conducts of life. His work, for example, has addressed a range of sources linking practical training manuals in health and rhetoric to philosophical treatises, such as those of the Stoic philosophers. For Foucault, and those who draw on his forms of engaging conduct, these practices spread across all the modern 'psy' sciences and into medicine and biology (Minson 1985).[4] Locating these concerns within the faculties of humanities draws out the sense in which the education and the formation of the self remains a central concern of the university (Hunter 1994).

The diversity of the 'spiritual exercises' and the spread of their reception in time, place and institutions, makes it almost inevitable that any account of their reception into legal thought and training as part of an ethic of the conduct of office will be eclectic and eccentric. The forms of training within the philosophical tradition are varied: Hadot emphasised a training in a philosophical-spiritual life; Foucault the political-aesthetic life; and Minson the rhetorical-civil life. In this thesis I adapt and develop these accounts in order to address contemporary jurisprudence projects as a training in office. Some accounts of what this might look like are addressed in the next two chapters. I would emphasise here that much of the continuity of the reception that can be found is the result of deliberate institutional practices of transmission. This institutional reception is understood as much through history writing and legal commentary as it is through philosophical ethics. [5] In the balance of this chapter I draw the accounts of spiritual exercises and training into the discourse and concerns of jurisprudence as a training in the conduct of office.

4. Writing from within a Tradition

If the first commonplace of this thesis is office and the cultivation of a *persona* adequate to the tasks of office and a life in public, the second commonplace is shaped around the

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[4] This I take to be one way of linking Foucault's work to the more general genres of writing jurisprudence. The more usual ways are through Foucault's investigations into police, government, discipline and, more recently, rights (Golder 2015).

[5] This is a particular inflection of the work of Hadot and Foucault that they would not necessarily accept. The centrality of their arguments lies in the transformations of the self through the cultivation of specific relations to life. While Hadot's examination of the work of Marcus Aurelius addresses the use of Stoic thought the conduct of the emperor, it is not greatly concerned with the conduct of office (Hadot 2001). Foucault's account of freedom is quite frequently written against the bureaucratic account of office (Dumm 2002)

office of the jurisprudent. This section considers the way in which different disciplines address tradition and filiation to their office. While there is a strong sense among scholars in the university that working within a tradition is no longer an appropriate way to think with the practices of legal institutions, the argument of this thesis is that it is precisely by attending to the responsibilities of office, and the traditions of training into public life, that it becomes possible to attend to the plurality of jurisprudences and their attempts to establish the conduct of lawful relations as a conduct of life.

One problem (and advantage) of thinking with tradition arises from the engagement of thought, exercises and conduct in *media* res (in the midst of arguments and events). In this section, then, the task is twofold: one is to point to the ways in which a 'jurisprudence project' might form a part of a common law tradition; the other is to pattern the ethic and conduct of office into the jurisprudence of common law thought. I am open to the argument that 'we' – those who study law – are no longer meaningfully engaged with a tradition, or that the forms of transmission are now decisively shaped by a distinct set of arrangements which deny tradition. As is further discussed in Chapter Three, this has been the assertion of the civil jurisprudents and is the assumption of much political science (Pufendorf 2001; Bentham 1977).

To engage jurisprudence through a tradition today remains a practice of authority and filiation (McVeigh 2013). A jurisprudent might draw on a tradition in order to establish their repertoires of thought and action. This does not in itself establish a tradition, but it does say that a jurisprudent works with this law and not another, or takes responsibility for the conduct of this law (the laws and relations shaped by the jurisdictions of the common law). As will be discussed in Chapter Seven in the context of the care and placement of the dead, it is always open to observe and question the experience, vitality or worth of a tradition. Taking up an account of tradition and of belonging to law, then, becomes both a point of filiation and of investigation. If office is understood in terms of conduct and training, then tradition provides one way of paying attention to the form and pattern of relations through which appropriate conduct is addressed or not. In Australia, for example, the reference to common law tradition directs attention to a particular body of law, a tradition of thought, and a set of topics, which in turn are addressed through the jurisdictions established by the sovereign territorial state of Australia. It also marks a limit and point of distinction from, as well as a relation to, the plurality of laws of the Indigenous peoples of Australia.

One well-established starting point for the consideration of tradition from within philosophy lies with the work of the philosopher Alisdair MacIntyre (2013a). Since the 1980s MacIntyre's work has attended to the ways in which western accounts of morality and moral philosophy have lost their ability to bind a community to common judgment (and action). MacIntyre presents his understanding of the contemporary world in terms of rival philosophical traditions (and so, here, rival accounts of training into conducts of life). A tradition, writes MacIntyre, 'is an argument extended through time in which certain fundamental agreements are defined and redefined' (2013b: 12). This formulation makes tradition a question of allegiance to a practice of philosophy and the history of philosophy – a history shaped by the desire to address what is good for humankind. In MacIntyre's account, the three most significant traditions are the Aristotelian/Thomist tradition of metaphysics and practical ethics, the Enlightenment traditions of subjective moral philosophy, and the Nietzschean tradition of genealogy and the trans-valuation of values (2013a). For MacIntyre, it is Aristotle, and then Aquinas, who have provided the most powerful resources of communal thought and existence available for living well of our present (2013c).

In MacIntyre's account, the most significant tradition is Thomist and Aristotelian. For MacIntyre this tradition is the most powerful Western inheritance. It is shaped by a concern to maintain a connection between being a good person, the good of that person and of the good for human beings understood as the respect for practical reasoning and the conditions of community (MacIntyre 2013a: 35). Much depends on being able to articulate the virtues or excellences of a life lived in common and in finding accounts of the purpose or purposes of human life. For MacIntyre, there is a serious question as to whether a philosophical life can still be lived in common in the West. The world that for him is lost in one where moral theory and practice embody objective standards, themselves amenable to justification, that are capable of providing rational justification particular policies, actions and judgments (MacIntyre 2013b: 19). MacIntyre, along with many others, sees state institutions and bureaucracy as destroying tradition (or perhaps as the product of a tradition that has been destroyed). As a consequence, MacIntyre's project considers much sociology and jurisprudence to be a hindrance to developing a proper understanding of how to live well (MacIntyre 2013b). He argues that the objective understanding of the good has collapsed and is only addressed through subjective feeling and morality (MacIntyre 2013a).

MacIntyre works with two accounts of tradition, both of which are important. The first account of tradition, found in *After Virtue* (MacIntyre 2013a), treats Aristotelian Thomism as *the* tradition and modern accounts of value as a falling away from ethics. In this, he joins a long engagement with the relative value of ancient and modern thought. The second account, found in *Whose Justice? Which Rationality?* (MacIntyre 2013c), contends that there are rival traditions in which we place ourselves and that we judge other traditions from this standpoint. Modern liberalism, for example, can be thought of as a tradition. It is this second account which is followed here. Acknowledging rival traditions enables recognition of the depth of dispute, both within Western legal thought and Western legal orders, and between the West and non-Western thought (in particular Indigenous jurisprudences) as to the conduct of life (Black 2011). We can only think of these rivalries within a tradition. Nor need there only be one account of any tradition. (It would in any event be hard to sustain a single account of 'the common law tradition'.)[6] It does, however, mean that on taking up an office one is answerable to the traditions in which one finds oneself and with which one is in conversation. As will be argued in Chapters Seven and Eight, this form of answerability can impose significant obligations.

In a somewhat different vein, another influential account of tradition and common law tradition is taken from the work of jurisprudents drawing on social theory (MacIntyre would call this 'modern'). For these jurisprudents the discussion of tradition is shaped by a range of debates which are situated more comfortably in the human sciences. The Australian jurisprudent Martin Krygier has written extensively on social institutions and tradition, especially in relation to the practice of the rule of law. In his characterisation, a tradition should be considered in terms of three features: (i) a relationship with the past; (ii) the authoritative presence of a practice or doctrine derived or sustained by reference to tradition (or the past); and (iii) be sustained by (conscious) transmission (Krygier 1987: 242-245). To this might be added an element of allegiance or filiation: a tradition must be experienced as such if one is to belong to it.

Krygier's essay 'Law as Tradition' (1987) is concerned with establishing the

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[6] For an account of tradition in nineteenth century Anglican and Catholic theological thought that touches on the difficulty of linking tradition and doctrine, see Biemer (1967: 24-32, 138-148); Newman (1850: 155-8). Both Biemer and Newman link Anglican thought to jurisprudence.

traditionary character of extant legal systems as well as with the importance of maintaining the past in the present and of finding the present in the past. For Krygier, a sense of tradition need not be fully coherent, changeless or inarticulate custom. Legal tradition, writes Krygier, 'provides substance, models, exemplars and a language in which to speak within and about law' (1987:224). Drawing on Oakeshott, he notes that the acceptance of social or customary practice, the mastery of tacit knowledge, the sense of belonging to a form of life, are all understood as part of a common practice and, importantly, of experience (Oakeshott 1962).

For Krygier, the traditionary element of the common law is tied to the practice of jurists and lawyers as a social practice, rather than as philosophers (and theologians) considering the good life.[7] His work is also explicitly critical of the analysis of the rule of law through its technical forms alone (Krygier 2016). Unlike Hadot and MacIntyre, Kygier is not writing about forms of training in conduct. Instead, Krygier returns legal thought to social relations. MacIntyre and Krygier offer two ways of writing into a tradition. Both struggle with the form and practice of law and prefer to authorise their work in terms of the practice of the scholar (MacIntyre) and the human scientist (Krygier).

In this thesis, then, the challenge is to work through the materials of a legal tradition by holding questions of training in conduct, including intellectual training, to an account of the conduct of lawful relations, and of a life lived with law.

5. Jurisprudent of the Common Law Tradition

I have taken as a starting point in this thesis that the office of the jurisprudent of the common law has obligations for the care of its own traditions and for relations with other traditions. In Australia, for those who are jurisprudents engaged with a common law tradition, this specifically involves a relationship with both Indigenous laws and jurisprudence and with international and transnational laws and jurisprudence. The final section of this chapter turns attention to the forms of training presented by various scholars as part of a training in the conduct of the office of jurisprudent of the common law.

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[7] This is, perhaps, not so different to MacIntyre in *After Virtue* (MacIntyre 2013a; Gaita 2004: 133). In *Dependent Rational Animals* (2013c), MacIntyre emphasises an account of virtue connected with creaturely existence and vulnerabilities of human existence.

This concern with training has been taken up by legal historians over the last thirty years where it has been linked, both biographically and institutionally, to the lives and writing of particular jurists, the (honourable) conduct of the profession, and the specific formulations of tradition in the jurisprudence and adjudication of the courts of the common law.[8] The accounts of the common law jurisprudence tracked in this thesis are treated as belonging to rival or conflicting traditions. Such conflict and dispute are addressed as matters of ideas and institutions. These disputes about the status of tradition and of the common law form part of the repertoires of the engagement of the conduct of office (Dorsett and McVeigh 2008). As will be discussed later, disputes about the ethics and legal forms of assisted suicide, for example, are engagements with questions of ethics, political authority, the scope of government, and the obligations of physicians and healthcare providers. They are also a resource of argument and training in legal and moral argument within law schools.

In the earlier sections of this chapter approaches to an ethic of office of jurisprudent were divided between the formulation of relations between institutional office and conduct and suggested some of the tasks of the office of the jurist and jurisprudent. Taking up the repertoires and tasks of the office of jurisprudent allows for the consideration of the immediate means and purpose of this engagement with law. Specifically, thinking with office allows for the material ordering of law to be considered as a legal practice and as a concern with the forms of lawful conduct or the conduct of a lawful life. In taking up office, the jurist or jurisprudent also takes up responsibilities for the transmission of common law. How this responsibility is represented is open to dispute. At one level, this is a responsibility owed to the institutional office of the university, the legal profession, or the state and, from there, to the plural engagements of law, society, the world. At another level, the office of the jurisprudent forms a part of the discourse of scholarship and its engagement with the

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[8] For example, within the histories of legal concepts and philosophy, Donald Kelley (1990) has offered an account of the longue durée of *nomos* as custom and measure; J.G.A. Pocock (1987) has presented a disenchanted historical account of the common law mind as it was formed in the sixteenth century; David Lieberman (1989) has given an account of the uptake of the 'science of legislation' within the common law in the eighteenth century in a way that superseded the traditions of judicial experience and judgment; Michael Lobban (1991) has considered the question of the relation of common law and jurisprudence in terms of the practical descriptions of the institutional and doctrinal writings of jurists; A.W.B, Simpson (1987) has offered an explicit alignment between the character of the jurist and craft-work legal thought; Pue (2016) has explored how lawyers in England and the Empire sought to reshape the profession through their social roles. For an accounts specific to Australia see Thornton (2012) and for histories of feminist thought and institutional life (Genovese 2016).

law.

The concern with the conduct of office can be found in much of the writing of common law jurisprudents. The Australian jurist and philosopher, John Finnis, for example, has provided an important contemporary gloss on the Thomist and scholastic natural law traditions (Finnis 2011). Within this tradition, the office of the jurisprudent is concerned with the conduct of social relations in the light of practical reasoning about the good life. For Finnis, like MacIntyre, ethical judgment is shaped by practical reasoning and the (reasonable) moral law. It is directed towards the happiness and common good of the political community and humankind (MacIntyre 2003b: 188). The responsibility of the scholar is like that of every human being in that appropriate conduct involves deepening the understanding of human realities and the cultivation of the opportunities of human wellbeing (knowledge, life and health, friendship, family, play and spiritual experience).

A second kind of inheritance in training in conduct draws on traditions of nineteenth century social theory. It treats the training in conduct of the jurisprudent, as do Weber and Krygier, as part of a training in human sciences. In this tradition, then, the jurisprudent conducts themselves as a human scientist. Roger Cotterrell, for example, draws on the natural law accounts of Gustave Radbruch and the sociological accounts of Emile Durkheim in order to shape the work of the jurisprudent. The obligation of the jurist, argues Cotterrell, as does Weber, is to confront, and find ways of being responsible for, the conflicts between law, justice and social reality. It is to be 'guardian of law' (Cotterrell 2013: 24). This responsibility extends beyond a concern with technical means. For mid-twentieth century positivists, the office of the jurist was engaged differently. Herbert Hart has shaped the office of the jurisprudent around the search for clarity of concepts and the plurality and seriousness of obligations of citizens and jurisprudents (Hart 2012). The office of the jurisprudent is concerned with describing attitudes and reporting social facts and the forms of (normative) conduct of those who live with law (Hart 1957, Finnis 2007, 2013). The jurisprudent has something to say to officials and citizens (perhaps as social or political office holders) who want to conduct themselves or judge actions in terms of the authority of law and reasons for action (Finnis 2007). Hart and Weber also align the office of jurisprudent with the science of legislation and human sciences. In this context the office of the jurisprudent is addressed in terms of the authority, forms of representation,

technology and the articulation of lawful relations of a (worldly) state-centred ethics (Hunter 2001). In later chapters, these different accounts of office are followed and given shape through engagement with the institutional concerns of government, public and social policy and with health care provision, the management of hospitals, or the medical or pastoral care of the terminally ill or the dying. In so doing, the rival schools of legal thought are treated as rival accounts of training in office.

6. Dignity (and Civility)

The final work of patterning into the office of the jurisprudent conducted in this thesis relates to the concern with dignity. As indicated, this thesis is not proposing a philosophy or even, explicitly, a jurisprudence of dignity. Rather, it follows some of the ways in which forms of civility and dignity are addressed as an attribute of status and office, as a value of jurisdiction (respect, worth) and as aspect of comportment.

Contemporary engagements with dignity, human dignity, and human rights are both extremely diffuse and, in certain academic debates, very specialist. The engagement with dignity offered here is phrased in terms of a restricted range of concerns which relate to the conduct of office. As a consequence, the consideration of substantive philosophical accounts of dignity from within moral philosophy and with the emerging jurisprudence of dignity within human rights law is addressed as part of discussion of the training in conduct found in a jurisprudence. In the first part of the thesis I follow some of the ways in which dignity is treated as a mark of office ('dignity of office') and as a human status ('dignity of the person' and 'human dignity'). Civility likewise carries a similarly broad valence of status, value and comportment relating to community and to citizenship, order and orderliness. In the matter of the dignity of office, I follow the ways in which both civility and dignity are linked to forms of community. Krygier, for example, draws civility out of relations of respect found in voluntary associations. It involves a certain level of decency and trust – but not too much (205: 160-163).

While for the most part the address of dignity in this context has been held to a language of respect and of worth and sacredness, I note, with Jeremy Waldron (2012), that the language of dignity as an attribute of status and comportment also plays an important role in the elaboration of office. In writing about the conduct of office, it is not so much the conceptual arguments about dignity and civility that dominate, but

conduct related arguments about 'adequate to the task' and 'worthy of the name' (or 'not unworthy of the name') that carry the weight of the argument. 'Not unworthy of the name' is a phrase common in the literature on Stoic philosophy (Sellars 2013). Slight though these phrases are, they provide a link between training in conduct and the substantive commitments of office for both dignity and civility. In Parts Two and Three of this thesis I collect together 'dignity practices' and consider the ways they are linked to office and jurisdiction. In doing so I also consider something like the 'dignification' and 'dignifiability' of the conduct of lawful relations as matter of the capacity, means and possibility of dignifying or being dignified. If questions of jurisdiction direct attention to questions of law and ask 'which authority' and 'who speaks?', and 'who interprets?' and 'who listens?'; questions of office and dignity hold jurisprudents to questions of 'lawfulness' and living well with law. The same gesture and procedure are followed in the matter of civility, although in the case of civility it is easier to hear and consider the performative connotations that are carried with civilisability and civilisation.

Conclusion

The ethic of the office of the jurisprudent has been drawn broadly in this chapter. I have drawn out the repertoires of the engagement of office as a matter of practice and prudence. In so doing, attention has been paid to the ways in which an ethic of office is shaped by rival understandings of tradition and training in conduct. Rather than address conduct directly through schools of legal thought or the contests of philosophical reason, I have deliberately left open the repertoires of training. The pattern of an ethic of office has been addressed through overlapping engagements with pairings of philosophers, jurisprudents and social thinkers. In doing so, I have held the joining of appropriate conduct and institutional ordering to a range of concerns with decorum and eloquence and begun to link them with civility and dignity. Decorum and eloquence, I have noted, have a valence in both the philosophical and rhetorical education of the orator and, I suggest, the scholar and jurist as jurisprudent. The analysis presented here links prudence to training in conduct. Chapters Three and Four now go on to address two forms of engagement from within the common law tradition.

In summary, what is important in this thesis is the ways in which 'belonging to law' is understood through the office of the jurisprudent. However, belonging to a tradition might make that tradition meaningful, but not necessarily dignified or valuable. One consequence may be that in the end the common law tradition of Australia (or, say of the United Kingdom) is not capable of describing a practice or law of an ethic or office that carries much meaning.

Chapter Three

Civil Prudence, Civil Jurisprudence and the Practice of Civility

Introduction

This chapter turns to civil jurisprudence and the forms of civility. It sets up an intervention into the civil jurisprudence and prudence traditions revived by a group of scholars in Brisbane, Queensland, from the late 1980s. The chapter examines the historical sources of this revival and considers its prudential resources for a training in the conduct of the office of the jurisprudent. I report on the practices of this group of Australian jurisprudents to articulate my own method of engaging with my tradition – that of the common law. Chapter Two elaborated the repertories of office for a common law tradition. This chapter looks at the training in office offered by one group of scholars. This engagement is with the general pattern or shape of contemporary jurisprudence and how it trains people. Parts Two and Three of this thesis look at how these traditions provide accounts of the training in conduct of the jurisprudent – and of others – in taking up their responsibilities to the dying and the dead. This chapter offers an opening account of a civil jurisprudence and prudence which links the concerns of office with those of civility. It does so through two case studies, one of the work of Ian Hunter and David Saunders, and one of the scholarship of Jeffrey Minson.

Civil jurisprudence, as understood in this thesis, relates to the cluster of jurisprudence projects developed since the end of the seventeenth century in Europe which shape their accounts of law, obligation and prudence around the authority of the civil-state. Civil jurisprudence has pre-eminently been associated with the jurisprudence of German and English Protestant natural law scholars, as exemplified by the work of Samuel Pufendorf and Thomas Hobbes. In the seventeenth century, their work was important in providing a juridical form through which to express the formation of the European territorial state. It did so by developing accounts of sovereign authority ordered around the concerns of security and civility. In the eighteenth century, civil jurisprudence also gave shape to both the the practice of

government and commerce. Civil prudence – practical reasoning in relation to the authority of the state – provided an alternative means of training cadres of administrators and governors in a conduct of office that did not rely on religious authority. The present reception of civil jurisprudence in Australia draws on those same related concerns of sovereign authority and its relation to security and civility.

The focal point of this chapter is how to develop an account of prudence within the common law tradition which is sensitive to the concerns of civil jurisprudence. In this thesis I take prudence and jurisprudence to be addressing questions of practical reasoning and training in conduct. I take prudence to refer to the general scheme of reasoning developed in the *studia humanitatis* (which covers the whole range of arts, including rhetoric, history and philology). Civil jurisprudence centres on the juristic traditions relating to natural law, public law (*Staatslehre*) and government. The two usages are closely related. Following Jeffrey Minson (2014), I separate the terminology according to standpoint and subject-matter. Not all prudents are civil jurisprudents – although civil prudents require an account of civil life and its relation to law (civil jurisprudents must have an account of civility). I develop my own account of prudence by describing and re-describing the civil jurisprudence tradition into the common law tradition. This description and re-description centres on a research project on civil jurisprudence in Australia developed since the late 1980s by a loosely affiliated group of scholars working initially at Griffith University, and then at the University of Queensland. Their work provides a distinct engagement with civil jurisprudence by historians, philosophers and humanities scholars. What is important about their work, and why it is a key focus of engagement for this thesis, is that they reinvigorate civil jurisprudence. While they are not entirely alone in this endeavour, what is distinctive about their scholarship is the way in which they draw on historical accounts of civil jurisprudence in order to engage in contemporary issues of public life in Australia.[1] Moreover, the revival of civil jurisprudence is important because it addresses squarely the relationship between state and religion from the viewpoint of the state. My re-description enables a consideration of how civil jurisprudence is engaged within an Australian common law tradition as a cultivation of the *persona* of the jurisprudent and a training in the conduct of office.

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[1] For other endeavours see, for example, the work of Cambridge historian Knud Haakensson (1996).

In order to give shape to questions of office within what is a broad range of jurisprudential debates, two decisions have been made: one to address civil jurisprudence in terms of its contemporary reception; and the other to bring civil jurisprudence into relation with office and the common law tradition. The first decision draws out the sense in which civil jurisprudence is treated here as a jurisprudence project that continues to influence the genres and styles of juridical thought within the common law tradition. The second decision was made in order to acknowledge some of the complexities of treating civil jurisprudence in relation to the care of the dying and the dead as an aspect of government and civility.

1. Civil Jurisprudence Projects

Civil jurisprudence names a tradition of jurisprudence thinking which developed in seventeenth century Europe, particularly in German-speaking areas. It was a jurisprudence that developed out of an immediate project of securing the authority of German Princes to act against the authority of the Church in University and political life. It was formed as an eclectic mix of natural law, public law and renaissance humanist jurisprudence joined for the purpose of creating a German 'states jurisprudence' (*Staatslehre*). In the jurisprudence of Samuel Pufendorf (and, with a different emphasis, the civic humanist jurisprudence of the Scottish and English Enlightenments) the key component of this task was the construction of an ethic and jurisprudence capable of responding to questions of political order – more so than to questions of ethical conscience, redemption or fulfilment.[2]

In Europe, in the seventeenth century, sectarian religious dispute became the focal point for a religious and civil war that resulted in the death of a third of the population of Europe. At the centre of political and juridical attempts to secure civil peace was the drawing apart and pluralising of forms of political authority in communities and nations which were divided by Christian religion. Some of these measures involved the creation of civil domains set apart from forms of sacramental religious authority. So within Europe, the Peace of Westphalia in 1648 is often taken as a significant point in bringing to an end thirty years of religious war. It did so by separating the warring

[2] See Hunter (2001) for details of the German civil jurisprudence; Pocock (2003) for civic republican accounts; and Phillipson (1993) for accounts of politeness and civic humanism in eighteenth century England and Scotland.

religions within and between states. In so doing, religious truth (and canon law) was subordinated to a civil authority and public law that had been established in order to undertake peace negotiations in the name of civil peace. Within this understanding of civil peace, civil authority is pitched against religious authority. Within civil jurisprudence this new political and civil ordering was shaped around security rather than freedom. For civil jurisprudence, both sovereignty and the practice of government within a sovereign territorial state go about their business without reference to a further or 'higher' source of authority (Kreigal 1995; Miaolo 2007).

In its broad political and juridical forms, then, civil jurisprudence might be taken as engaging forms of civil authority and of securing the means of sociality (Hunter 2001). In its dogmatic forms, it was often presented in terms of codes, institutes and commentary. In its governmental forms, it provided advice to governors in terms of welfare, government and economy. In more non-dogmatic, critical or essayistic form, civil prudence took part in the humanist discourses of civility and government. Locating a jurisprudence, and in this case rival jurisprudences, in a tradition requires a commitment to thinking about jurisprudence and philosophy historically. The argument presented here addresses the importance of the early modern displacement of religion by the forms of de-sacralising jurisprudence in order to think about both jurisprudence and the office of jurisprudent (MacIntyre 2013a). The early modern assertion of temporal authority in European, repeated in Australia, has been decisive in the ordering of public institutions and public law (Loughlin 2010 ; Dorsett and McVeigh 2012).

Jurists and philosophers, such as Thomas Hobbes (1588-1679), as well as a generation of German jurists following Samuel Pufendorf (1632 –1694) and Christian Thomasius (1655-1728), made the sharpest of many assertions of the primacy of civil or public authority. Pufendorf and Thomasius wrote jurisprudences that excluded religion from the political legal sphere by creating juridical forms that gave absolute authority to sovereign territorial states. They also argued for limited forms of civil and political rights. These jurisprudence projects have become part of the repertoires and traditions through which contemporary thought about law is addressed. The civil jurisprudence traditions, and the forms of history writing and philosophy that developed alongside them, treated the relationship between jurisprudence and its prudence in terms of institutional history, rather than through normative justification.

The English political settlement with religion was engaged through the establishment of the Anglican Church and the creation of the confessional state. This settlement maintained the presence of the Anglican Church in the political sphere but displaced, and at times appropriated, the importance of liturgy, ritual and ceremony. It excluded both Roman Catholic and radical Protestant dissenters (Green 1978; Clark 2000; Hunter 2013). The Australian political settlement was marked through a relationship of Empire and colony more so than through a direct concern with religion – although, as elsewhere, the contest of religion and the practice and conduct of British empire and colony were never far apart (Hogan 1987; Hughes, 1986; Ford, 2011).

Despite the subject matter of civil jurisprudence, the development of a 'civil jurisprudence', or prudence project, in Brisbane, Queensland, in the 1980s was not directly undertaken as a project of state formation (although that certainly has been a concern in Queensland). Rather, it was a project more concerned with the conduct of the scholar in relation to the state. As such, projects of civil jurisprudence, prudence and historiography were variously engaged with:

1. the education and training of students to take up positions in the public sphere in general, and in educational and bureaucratic offices in particular;
2. a training in the *persona* and office of the Citizen and the Scholar, as well as other offices that seek to transcend civil authority; and
3. a series of scholarly projects centred on history, philosophy, education and laws to do with civil authority and public life.

A preliminary point to note about this scholarship is the range of engagements that touch on questions of office, conduct and jurisprudence: the history writing and historiography of early modern German and English civil jurisprudence (Hunter 2000; Saunders 1997) and civil prudence (Minson 2014); the historiography of international law (Hunter 2010a), political histories of German constitutional thought (Hunter 2012a) and English regulation of religion (Hunter 2014; Saunders 1997), contemporary accounts of governance and prudence (Minson 2006), critical histories of education (Hunter 1994a), critical legal thought (Saunders 1997), histories of critical theory (Hunter 2014) and the development of the *persona* of the scholar (Minson 2009). Here only a limited number of these issues will be taken up in order to give some texture to the sorts of projects that have been engaged and to make clear the ways in which I am

crafting these engagements with civil jurisprudence. Running through these engagements is a series of polemics directed against rival accounts of the office of Scholar and training in forms of life. The most important of these has been the contest with forms of perfectionist thought, university metaphysics and political romanticism (Hunter 2001; Minson 1993; Saunders 1997). These scholarly exercises are not all of a kind, but they do present a distinct engagement with the mode and manner of conducting oneself as a citizen and scholar within the limits of civil authority.

A second point to note is that the engagements with civil jurisprudence and prudence addressed here take place within faculties of humanities. They have been undertaken in the context of the political settlement of Australia, the expansion and transformation of the Australian university system in the 1980s and 1990s, and the development of forms of scholarship and teaching within humanities. The emergence of universities as a site of critical politics in the 1960s and 1970s, and the expansion of student numbers since the 1980s, brought with it a different role for the humanities with respect to the aims of education, the development of public research and the cultivation of the *persona* of the student of humanities. These centred around the institutional cultivation of genres of 'critical engagement' in universities that were directly critical of the state and forms of state-centred civil administration (Hunter 1994). These critical discourses have established distinct genres of scholarship in humanities centred around the reception of Marxist thought, 'Theory' (a generic term given to the generation of the social and cultural engagement drawn from the reception of French and German phenomenology, hermeneutics, and sociology) and genres of cultural, media and legal studies (Curthoys and Docker 2010; Docker 1974; Hunter 1988, 2014; Morris 1988). The civil jurisprudence writings of Hunter, Minson and Saunders contested these forms of education and training that were provided in the humanities (the so-called 'new humanities'). They did so on the basis that these forms of education do not pay sufficient attention to the exigencies of state authority and government. They create ideal *personae* and ideal worlds which are ill-fitted to public office. (Versions of this argument are addressed in detail in Chapter Four.)

This thesis addresses the ethos of the jurisprudent through the engagement of genres of jurisprudence within the faculties of law. Given this context, there is a story to be told of humanities scholarship and the reception of it within Australian law schools. While a part of the general expansion of tertiary education in the later 1980s,

the main expansion of law schools took place in the 1990s (Thornton 2012).[3] These 'new' law schools are mainly committed to forms of education which are shaped by the requirements of accreditation by the legal profession. However, many of them also have missions that are concerned with social justice. Some are explicitly interdisciplinary (Barker 2013; Samford 1998; Thornton 2012).

Like faculties of humanities, law schools have addressed a curriculum which is shaped by mass education and by a transformation of forms of media, technology and public policy. Where the emergence of 'new' humanities has been influenced by the changing understanding of social theory, educational practices in law schools has been more closely shaped by changes in the juridical and university understanding of politics and culture. The reception of the concerns of the 'new' humanities scholarship in law schools came to the fore at the same time as the High Court of Australia became fully independent from the Privy Council in 1986 (Genovese and McVeigh 2015). In this period, Hunter (1994b), for example, contested the forms of education and training in the humanities on the basis that they invoke higher moral values and new forms of natural law. His concern was that these forms of scholarship repeated the sectarian tendencies of religious dispute. This was a concern shared generally by the civil jurisprudence and prudence scholars, including Minson. He was also, for example, sharply critical of the High Court for reviving what he saw as a 'natural law' account of Australian law – one that, he thought, introduced principles of equality which were not present in Australian law. Instead he argued, relations of law should be understood as political and legislative (Hunter 1994:102-105). By contrast, the new law schools, in part as a result of the articulation of a distinct common law by the High Court of Australia in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, embraced a discourse of legal and moral rights.[4] Developments in common law jurisprudence were also addressed and contested within the 'new' law schools through an engagement with the disciplines of politics, cultural studies and history. It was not until the mid-1990s that law journals began to publish scholarship that joined these themes together in

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[3] There are currently thirty-seven university law schools in Australia (Barker 2013:1; Barker 2017; CALD 2017). Sixteen law schools were created between 1989 and 1997 and a further twelve since 2000.

[4] That decision recognised the continued legal existence of Indigenous peoples and their laws and traditions. It addressed this, in part, by creating a doctrine of 'native title' that acknowledged some aspects of the laws of Indigenous peoples within and as a part of the common law of Australia (Pearson 2000).

discourses of rights and principle. These discourses, and their associated critiques of the state, developed out of the 'new' humanities (Genovese and McVeigh 2014; Duncanson 2011; Hunter 2014; Leiboff and Sharp 2016).

The concerns of civil jurisprudence rest at the centre of the common law tradition (what is contested by civil jurisprudence and by common lawyers is how authority is understood). What is being disputed in the 1990s is the language around which the state is juridically authorised and the ways in which the jurisprudent is trained in a conduct of office in response to these matters.

2. Civil Jurisprudence and Prudence Traditions

This section turns to civil prudence and the rhetorical training in the conduct of office. Topically, Jeffrey Minson has presented the predominant elements of civil jurisprudence as shaped by:

1. the paramountcy of a civil authority which has a limited range of authority and interests;
2. a distinct account of human nature (moral anthropology) that points to the imperfect character of humans;
3. office-based accounts of the exercise and practice of authority;
4. a limited account of the *personae* which occupy office and of those who are the subjects of government and law (ie legal persons, patients, citizens); and
5. a concern with the style and manner of the conduct of office (Minson 2014).

The concern with civil authority was addressed in the last section. The remaining topics within civil jurisprudence will be addressed in terms of the repertoires of argument within civil prudence. This section, then, turns from histories and institutions to prudence to conduct. In Part Two of this thesis they will be set to work to give shape to the ways in which care for the dying and the dead are given shape through the jurisdictional authorisation of lawful relations.

Moral Anthropologies

The sense in which civil prudence provides an alternative to the theological

understanding of life and its representation in the universities is not always easy to grasp. This is so in part because relatively little contemporary jurisprudence is viewed as working with a theological understanding of law. However, it is also the case that a considerable amount of jurisprudence inherits, without comment, distinct account of forms of life associated with religion and theology (Berman 1995; Hunter 2001; Schmitt 2006).

The civil jurisprudence of the German Enlightenment and the civil jurisprudence of the Scottish enlightenment were directly engaged with rival civil forms of juridical understanding of the world. Both Pufendorf's civil jurisprudence and, for that matter, Adam Smith's civil humanist jurisprudence, were written within and against forms of Protestant theology which were established in the universities (Pabst 2011, Hunter 2001). In addition to the re-ordering of the political sphere, civil jurisprudence also re-worked the literatures of natural law in order to provide a moral anthropology (or account of human nature) suitable for the conduct of life subject to civil authority (Minson: 2006). This moral anthropology was drawn from Epicurean philosophy. The moral anthropology of Epicurean philosophy presented an account of human nature which acknowledged human imperfection or fallibility. It argued against accounts of human nature as being perfect or perfectible. It did so in order to lower the expectation of human (and worldly) transformation. In this way, it claimed to resist the temptations of religious thought to perfect human life on earth (Minson 2014; Finnis 2007).

The ways in which a civil prudence might be committed to a particular moral anthropology are eclectic. Pufendorf's moral anthropology, for example, encompassed a voluntarist moral theology. By contrast, David Hume was happy to drop all religious and theological associations from his moral anthropology and to tie character to convention (Baier 2008). Both Pufendorf and Hume, however, were committed to articulating forms of sociality and argument that could constrain the destructive passions and enthusiasms of human nature (Pufendorf 1991: 130-132; Hume 1742-1754; Haakonssen 1981). As Minson notes, Pufendorf's moral anthropology suits the form of civil authority which is concerned with security and sociality and forms of government and reason that present an authority and a middle path between force and pure reason (2006: 77- 78).

Office and Persona *and Training in Conduct*

In addition to the comments made about office in Chapter One, two specific further comments can be made here. The first relates to civil jurisprudence and office, and the second relates to prudence.[5] The first point is editorial, and is simply that civil jurisprudence remains within the field of contemporary juridical thinking even though its eighteenth century sources are rarely addressed. In this account, following Minson (1993), I emphasise the relationship between civil authority and civility. The second point, already touched on in Chapter Two, is that the understanding of office is contested at almost every point. While it is a central topic within civil prudence, the formulations of office presented by civil jurisprudents have been the object of intense criticism (and defence). In this chapter I am taking up some civil prudential accounts of jurisprudence and office in order to examine how they are discussed by the civil jurisprudents of Brisbane and what weight of meaning they might carry for contemporary legal thought. The civil prudential argument that is of interest here is that it is necessary to think with something like civil authority and the 'office of the Sovereign' so as to be able to understand the contemporary ordering of government and the conduct of lawful relations. The strength of civil prudential thinking is that it allows for an engagement of the offices of government that can be described in both historical and political terms (Skinner 2002).

For Pufendorf, the state is best characterised in terms of a plurality of offices which have been created in the conduct of government. Here the questions of office and of the *persona* required to fulfil office are closely related. One consequence of this is that the normative status of state reason and reasons of government is linked to the purposes of office (as discussed in Chapter Two). Rival traditions have considered office in terms of excellence in the performance of a public role. In so doing, he drew on Aristotle's account of virtue (*arête*) of role (Condren 2006). Aquinas drew office into both the institutional and sacramental life of the church (Agamben 2013; Hunter

[5] Quentin Skinner offers a different account of the context of civil prudence. His account is one which is more attuned to the political response to the French religious wars. For Skinner, absolute sovereignty 'was originally the outcome of one particular theory of politics, a theory at once absolutist and secular-minded in its ideological allegiances. That theory was in turn the product of the earliest major counter-revolutionary movement within modern European history, the movement of reaction against the ideologies of popular sovereignty developed in the course of the French religious wars, and, subsequently, in the English Revolution of the seventeenth century' (Skinner 2002: 405). See also Orford (2011: 208).

2017). For Aquinas, and later for the Anglican theologian Richard Hooker, it was necessary to align the formulation of religious office with natural law (Williams 2004: 32-34, Condren 1997). An office in this respect was not only subject to divine authority but was elaborated through the practical reason of Thomist natural law (Finnis 1998). By contrast, Pufendorf's account linked office to the authority of the state and focused on the ways in which the tasks of an office can be described (Jordan 2005: 296-299; Drakopolou (2015)).

The casting of authority in terms of the civil authority of the ruler and government of the sovereign territorial state also required the recasting of the relationship between office and citizen and office and *persona*. For Pufendorf (1991) it was through the construction of 'a system of impersonal and jurisdictionally delimited offices' that this was achieved (Minson 2006: 77). As Hunter notes, these offices were, for Pufendorf, to be viewed as distinct from both medieval-Christian and Princely conceptions of office (as franchise or property held by a personal superior) (Dorsett and McVeigh 2012: 39; Hunter 2001). Pufendorf conceived of moral personhood as a plurality of instituted offices and associated *personae* of office (Condren 2006). In the early modern period, jurisprudential accounts of office were held in place not so much by elaborated forms of institutional responsibility (or function) but by the *persona* or character of the office holder. In developing his civil prudence Minson draws an analogy between Ciceronian and modern interpretations of office. He notes the way in which the Ciceronian understanding creates a plurality of roles and relationships as well as 'internal moralised boundaries' between official obligations (Minson 2006: 78).[6] In pluralising offices and obligations, Minson's civil prudence points both to the variety of, and the constraints on, roles taken up in public life. There can be many offices, but the occupation of office is limited by civil authority.

The adaptation of questions of authority in Cicero's accounts of *persona* and office provided a common point of reference for much of the sixteenth and seventeenth century discussion of the office of Advisor to the Prince (Hunter 2001: 96-105). For Pufendorf, this office was one to be occupied by the state-jurist rather than by the philosopher or priest. Shaped as it was by the concerns of civil security and social

[6] Against the Platonic-Theological elevation of the soul, Pufendorf, for example, followed the Roman Stoics in treating the soul as one office among others (Pufendorf 1991; Burchell 1998; Hadot 1998).

peace, the office of Advisor – and that of university teacher and scholar – should not be concerned with questions of salvation or perfection (Minson 2014: 449; Pufendorf 1991). The *persona* or character of the office holder had to be shaped by the ability to act only in the name of civil authority and the promotion of forms of sociality.

The political and conceptual *personae* which have populated the religious and public offices of the West are varied. At the centre of the account of the *personae* of the offices of law is an account of the qualities that characterise the *personae* of the judge, jurist, counselor and legislator. In the previous chapter the aspects of *persona* were discussed in general terms of attributes of office and the of the character necessary to fulfill them. For Minson, Pufendorf's accounts of *persona* might usefully be considered as a series of situational capacities. There is no unifying ethical source that operates behind the *persona* (Minson 2014: 462). Within this scheme, the attractions of being subordinate to civil authority were not always immediately obvious. Skinner notes that 'practical political reasoning' had to be taught and disseminated (2002: 370-376).

For many scholars in England and Wales the question of civility was shaped by the need to displace religious enthusiasm. This education was undertaken both in the Inns of Court and in the emerging civil sphere (the city, the pamphlet and the coffee house, as well as through the dissemination of publications and manuals relating to the occupation of office (Oestreich 1982: 3-15; Klein 1996; Ellis 2004; Cowan 2005). Minson has argued that civility should be treated as a mutable form of engagement with civil life. Drawing on the work of Norbert Elias, Minson argues that civility as manners and decorum formed a significant part of a rhetorical and social conduct of public life and of civil existence. As will be discussed in Chapter Five, Minson notes that civility, as courtesy and manners, formed a part of the formation of the culture of the Royal Court, as well as of the cultivation of forms of public life apart from religious and martial authority (Minson 1993: 16-40; Elias 1989). For civil prudents and jurisprudents, a training in subordination to civil authority in order to maintain civil peace has it limits. It is not necessarily the case that all human life has been thought through the state, or that every form of conduct should be considered in terms of office as the vehicle for the conduct of life in public (du Gay 2012).

With the formulation of a training and conduct of office of the civil Jurisprudence in place it is possible to address the different forms of civil existence that Pufendorf establishes through his natural law. Writing as feminist philosopher and jurisprudent,

Maria Drakopoulou has drawn out some of the consequences for ways in which Pufendorf's assertion of secular authority makes civil obligations the bedrock of social existence (Drakopulou 2014: 75). Pufendorf establishes an account of humanity bound by empirical history. In so doing he displaces prudence from the consideration of the good, the beautiful and the true and directed prudential concerns towards the useful in the realm of empirical social existence. Pufendorf imagines a civil society where all obligations are civil obligations (Drakopoulou 2014: 76). Finally, and this is a point that will be returned to in Part Two of this thesis, while Pufendorf's natural law and civil jurisprudence separate religion from the sphere of politics, all other forms of filiation are also removed. Women are not excluded from the civil sphere, but, Drakopoulou notes, inclusion turns all obligations into civil obligations. It severs the filiations that might establish feminine genealogies or plural authorities within a sovereign state order (2014: 80).

How, then, does one train oneself into offices under civil authority? The short answer is that one is trained into living with constraints. The longer answer for humanist scholars and civil prudents is to return spiritual exercises of the Ancient tradition and re-work them for civil office. Accepting the constraints of office in the seventeenth century (and today) requires the cultivation of forms of impartiality and 'disinterestedness'. The institutional requirement of impartiality and the quality of the character of disinterestedness are linked through the practice of *adiaphorism* (the studied distancing of the office holder from their particular interests). Hunter, Minson and Saunders all give weight to the importance of *adiaphorism*. In a series of essays, Saunders has shown the ways in which the adiaphoristic requirements of judicial office, and the development of a distinct adiaphoristic *persona,* were at the centre of the development of the office of the Judge (Saunders 1997). Saunders' work joins the elaboration of the office of the Judge to the *persona* of the judge. In his account of the development of a civil jurisdiction over heresy and witch trials in the second half of the seventeenth century, Saunders notes that the office of Judge is shaped by the development of a distinct common law jurisdiction to hear heresy and witch craft trials. This jurisdiction was presented in rivalry to the ecclesiastical jurisdiction of the church. He also notes that the civil elaboration of heresy was cast in terms of a crime against the good order of the state, rather than as an offence against religion. Hunter makes this point more elaborately in his essays about heresy in seventeenth century

Europe. There Hunter treats the 'de-sacralising' of the crime of heresy and blasphemy as part of a distinct civil prudential project of drawing apart civil (temporal) and church (spiritual) authority (Hunter 2013).

The link that both Saunders and Hunter make between office and *persona* is further developed by Saunders in his account of the judicial life of Matthew Hale, Lord Nottingham. Saunders notes that *adiaphorism* was treated both as a matter of official role as a judge and as an attribute of personality. It was necessary to be impartial in matters of procedure and to remove personal prejudice on matters of religion. For Saunders, the concern is not expressed in terms of neutrality, but in terms of the appropriate register of attention to the matter at hand. To this might be added that Lord Nottingham's (or, better, Matthew Hale's) diaries record the achievement of *adiaphora* as part of a 'spiritual exercise' or training. This practice, then, joins the concern with civil prudence to the Roman and Greek traditions of philosophical training and training for public office (Hadot 1995, discussed in Chapter Two).

Minson's account of the virtues of offices characterises *adiaphorism* in a slightly different way. He treats it more firmly as a virtue of office (Minson 1993: 2009). Officials and citizens should go about cultivating an indifference or distance from forms of confessional religious excess and, as a consequence, be able to develop the ability to live with a plurality of official obligations independently of disputing religious views. For the jurists, philosophers and humanists of the seventeenth century, Pufendorf among them, the cultivation of techniques of distancing also formed a part of the engagement of the scholarship of humanist civil jurisprudence. The resources of a civil jurisprudence tradition, Minson argues, can still be put to work in present-day Australia.

3. Genre and style

To meet the constraints imposed by civil jurisprudence, it is necessary to recast the limits of that jurisprudence as practical materials of the conduct of office. In order to so do, what is required is the crafting of a style of analysis which can be adequate to the task of conducting office with civil authority. This style of analysis is alert to judgments and arguments that assert rival authority to judge apart from the state, as well as sentimentality (pity) and romanticism about the perfectibility of political, social

and juridical life. The analysis also must craft the conduct of lawful relations around civility. This section addresses the characteristic style of contemporary civil jurisprudence: rhetorical redescription; (empirical) history writing; and rhetorical ethics. These activities can also be considered as exercises or training in conduct (Hadot 1995: 102-105). The list is far from exhaustive and is directed towards drawing out the ways in which civility is addressed within contemporary civil prudence.

Description, Redescription and History Writing

A short comment will be made on two characteristic forms of argument and training in civil prudence. The first relates to the rhetorical arguments of description (*descriptio*) and moral redescription (*paradiastole)* and the second to the practice of history writing (Skinner 1996, Pocock 2011). In part this is undertaken for historical reasons. Both are features common to civil jurisprudence. In part this is undertaken for the practical reason that they are resources which allow for my engagement with forms of contemporary civil prudence.

According to Minson, for the jurists, jurisprudents, philosophers and humanist scholars of the seventeenth century (Pufendorf among them) the cultivation of techniques of distancing (*adiaphorism*) formed a part of an array of techniques and genres within humanist scholarship (Minson 2014, 442-444; see also Maclean 1992). The writings of the early modern humanists were contextual and historical: they drew on the rhetorical traditions of ethics – rather than scholastic and philosophical traditions – and they relied on Roman and common law, rather than canon law, for the sources of their argument. For early modern humanists and civil jurisprudents, the work of argument was phrased in terms of description – concrete, causal, and historiographic – rather than dialectic. As Minson notes, description belongs first to the rhetorical tradition and epideictic discourses of praise or blame (Minson 2014: 442). When attention is given to the descriptive elements of civil jurisprudence – or modern positivism for that matter – some wariness is required before simply labelling the description as empirical. The polemical edge of civil jurisprudence – like much humanist criticism directed towards changing reputations and opinion – was conducted by historical and moral re-description (Skinner 1996). The re-descriptions of the early modern civil prudents provided a way of distancing ethics and law from the concerns

of sacred and transcendental philosophy – or indeed from the conduct of the transcendental life of philosophers in general (Pocock 2011). The practice of description and redescription emphasise the sense in which what is at stake is not rival accounts of ultimate philosophical truth.

The historical narratives of the civil jurisprudents exposing the deleterious effect of confessional religion were presented in order to counter the moral theology showing the effects of sin. The task for Pufendorf and Thomasius was not to produce a rival metaphysics, but to produce a different account of a politics and government amenable to an ethic of state (Hunter 2001). Distinct styles of history writing were developed in order to prosecute this task.

The work of civil jurisprudence scholars in Brisbane has done much to revive the history of early modern civil jurisprudence. Hunter and Saunders have also investigated the writing of history as a distinct civil jurisprudial project. Hunter has cultivated a distinct style of history writing and polemic that continues the work of civil jurisprudence (Hunter 205). His elaboration of civil jurisprudence extends beyond the elaboration of empirical, contextual history and is also directed towards a training in conduct. The link between civil jurisprudence and its political engagement with the creation of de-sacralised political space runs alongside the development of de-sacralised forms of history writing. As Minson has noted, this is not itself a feature of civil jurisprudence, although it was part of a more general Renaissance inheritance of civil prudence (Minson 2014: 442). Hunter's contribution, taken up here, is the way he links the writing of civil jurisprudence to the creation of a distinct civil *persona* for the jurist and the historian. (For Hunter, if not for my argument, the jurist and the historian inhabit their *personae* in much the same way).

Hunter's history writing presents a number of commitments to the office of Historian. Relevant to this thesis, one commitment is create the *persona* of the historian who can render an account of de-sacralised life. Insofar as we continue to live with the inheritance of the disputes between state, church and rival forms of political authority this remains an important point of engagement. Hunter's history writing carries with it both a training in conduct of office and the practice of the discipline of a community of scholars. Here it can be noted that Hunter's characterisation of empirical history writing as de-sacralised also marks his engagements with jurists, philosophers and jurisprudents. Drawing on Thomasius, Hunter's use of empirical

history writing is in part a technique to draw attention to worldly concerns of civil politics. It also becomes a training in how a jurist should conduct themselves. History writing in this sense also becomes a technique of jurisprudence (Hunter 2010b). The contest of *personae* and commitments to history and jurisprudence between Hunter's civil jurisprudence and jurisprudence writing in the Kantian tradition is addressed in the next chapter.

The work of Saunders is closely aligned with that of Hunter. Like Hunter, Saunders engages the *persona* of the jurist and historian through an 'empirical stance' (although Saunders would not see the jurist and the historian as so closely related). Here I emphasise two aspects of Saunders' work that have been helpful in developing an account of civil jurisprudence and that will be used further in thinking about the historical and conceptual *personae* which engage the juridical understanding of assisted dying and the care of the dead. The first aspect of civil jurisprudence that Saunders draws out, along with Minson, is that civil jurisprudence projects join those of both state formation and institutional civilisation (Minson, 1993; Saunders 2002b). While the emphasis within formal civil jurisprudence has been placed on the development of distinct formulations of natural law and public law jurisprudence, in his writings on Matthew Hale, Saunders points to the ways in which related, and often rival, institutional writings were being developed within a common law jurisprudence. As an historian, Saunders also emphasises a broad range of institutional and personal writings that might be considered in thinking about the formation of a judicial *persona*. The self-scrutiny and training that Hale reports in his history writing, judicial notebooks and diaries, assist in the formation of plural *personae* which draw on a common stock of stoic 'spiritual exercises' as well as on institutional instruction in court procedure and jurisdictional responsibility (Saunders 1997; Saunders 2010; Saunders 2015).

The polemical writings of Saunders and Hunter share a confidence that the insights of early modern jurisprudence and its techniques of polemic remain effective and dispositive of many forms of dispute between state and non-state forms of ordering. The confidence, in one way, is that of writing histories that can be tested within the institutional arrangements of the faculty of humanities. In another way, it rests on the sense that the combination of political power, conscientious faith, and philosophical education continues to cause the problems it did in the seventeenth century – and that the *persona* of the empirical historian can provide an alternative conduct of scholarly

engagement. Pitched as public rhetoric, today the effect of such polemical forms are more variable, particularly in the legal arena. However, the claim of Hunter and Saunders is that the need for contextual sensitivity to time, place and genre of argument suggests that the defence of civil authority, historical contextualization and the linking of training in conduct to spiritual exercise, is open to the judgment of success or failure.

Minson, the Rhetorical Ethics of Civil Prudence and its Relation to Civility

Minson's account of civil prudence is presented from the office of a Philosopher working within (and recreating) a distinct tradition. As with Hunter and Saunders, his work shares a common interest in the resources of civil jurisprudence and the institutional histories that shape civil prudence. However, his work differs in genre. Hunter and Saunders write as historian-legists. It also differs in style of argument. Minson is interested in developing the repertoires of a civil prudence. Minson's work might be characterised in terms of an historically inflected rhetorical ethics. His work takes up themes from civil jurisprudence – how to create and institute a juridically shaped de-sacralised state – and then sets about thinking about the repertoires available to forms of contemporary civil prudence. In *Questions of Conduct* (1993), Minson argues that significant strands of early modern philosophy drew their resources from the rhetorical traditions of institutional argument and dispute. It is an error, he argues, only to equate ethics with the sorts of philosophical ethics found in Kantian philosophy. The Kantian tradition bind us to certain kinds of principled, systematic philosophy that has little use for the rhetorical skills of argument, contextual consideration of practical reasonableness and usefulness, or the virtues or excellences of office. These are the sorts of argument, in short that you might expect to find in public offices of the state.

Minson's work opens up the ways in which a civil jurisprudence might be addressed as a prudence and it offers insight into how modern civil jurisprudential arguments might be developed as part of the ordinary virtues and vices of official life. While Minson's work joins civil jurisprudence to a civil prudence, there is a sense in which his understanding of the rhetorical tradition remains outside of the bureau and the institutional life of law. The humanist rhetorical traditions on which Minson draws are

far from exhausted by contemporary formulations of civil jurisprudence. Here it becomes possible to see how Minson's approach offers different resources for thinking about law than those offered, on the one hand, by Hunter and Saunders and, on the other, by critical jurisprudents and rhetoricians such as Goodrich (Goodrich 1984, 2001).

Minson's virtues of offices are ordinary. They are linked to the present concerns of government, but are shaped by Renaissance and early modern formulation of the rules of existence in the court and in early forms of state government.[7] Minson's lesson about the ethic of the civil prudent is that there is no single principle or principled set of arguments that can establish a morality system. This is an observation shared by philosophers such as Bernard Williams (1985) and jurisprudents such as William Twining (2009: 18-25). Where Williams wishes to hold philosophy to a Greek (and German) concern with ethos and character, Minson invites consideration of ethics in terms of office and *persona*. Minson's engagement with questions of law carries with it the sense of an improvisation or investigation of a situation, rather than the work of the creation of a normative system. Even the 'interests of the state' or 'survival' do not rank as establishing overarching principles that could become the source of a civil jurisprudence of human rights. 'Interests of state' and 'survival' provide a horizon for judgment and action, rather than the grounding of normative value. Civil prudence does address normative value, but they are not treated as principles so much as points of orientation. This makes judgment and argument central rather than a normative arrangement. (Minson, 1993; Minson 2014).

In the earlier sections of this chapter, Minson's account of rhetorical ethics was used to illustrate the ways in the state and its officials and citizens might go about cultivating an indifference or distance from forms of confessional religious excess and, as a consequence, develop the ability to live with a plurality of religious and temporal views. In a similar way, his account of description and re-description as a mode of engagement with rival conducts of life has been important to the formulation of the practice of a contemporary civil prudence. As with Hunter's and Saunders' related engagements with civil jurisprudence through history, Minson's account of civil

[7] For Charles Taylor, 'ordinary virtues' are dispositions accessible to anyone. They are a matter of daily life and relate to private and public relations, historical, and, in a sense, local, narrated experience rather than codified rules (custom) (Taylor 1989). The ordinary vices might begin with Judith Shklar's list: cruelty; treachery; misanthropy; and hypocrisy (Shklar 1985).

prudence has been inflected in this chapter toward a practice of jurisprudence. Care is needed, however, to hold on to the variety of juridical arrangements that are engaged under the heading of jurisprudence. As I will demonstrate in Chapter Four, it is by no means certain that the ethic of the state can simply be established or be cultivated in opposition to a transcendent ethics. Nor is it clear that there are, in common law jurisprudences and jurisdictions at least, clear distinctions to be had between appeals to civility and foundational normative values.

Minson's own redescriptions of early modern humanist and civil prudence provide one way of living well within the constraints of civil authority.[8] The historical understanding of civil prudence as an ethic of office that exists in time and place provides the material for describing the ways in which civil authority is practised as part of an ethic of office or as an aspect of citizenship (Minson 1993: 31-36). It might be thought, then, that the office of jurisprudent and the care for the conduct of lawful relations need only be described within the constraints of usefulness. There is a sense in which this is so, as Minson's ethic of office is one that draws on a 'disenchanted' rhetoric of office. However, it is not simply an assertion of a realist ethos of government. It also offers an invitation to acknowledge a broader range of obligations and repertoires of action that might be written into the conduct of office, and of the office of the scholar in particular.[9] In so doing, Minson presents an account of civil honour associated with decorum. Much of the energy (and humour) of Minson's writing is devoted to showing how it could be honourable to take civic commitments seriously with respect to political, moral and legal action. Civility and decorum might require ceremony and protocol, but they could also require conflict and contest. This is so both in securing the conditions of, and in maintaining the practice of a citizenship based around civil and social equality. Civil prudence and citizenship require forgoing a certain romanticisation and sacralisation of public life but not the sacrifice of life in public. There could be dishonour, for example, in romanticising civil obligations into a transcendent nationalism, just as there might be dishonour in failing to find a form of civic expression of social relations.

Finally, to direct Minson's ethic of responsibility towards the office of Scholar a brief

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[8] Minson's analyses of civil institutions includes the regulation of the conduct of sexual harassment (1992), a defence of civil forfeiture (2006), and the conduct of offices of state (Minson 2002).

[9] Exercises in disinterestedness have also formed a part of a Stoic training disciplining of the self against the feeling of suffering or the temptations of glory (Hadot 1995).

reference to his discussion of the Renaissance humanism of Pico della Mirandola and Marsilio Ficino is required (Minson 2009). In one reading of these exemplary Renaissance figures their eloquence directs attention to the universal dignity of man, shaped in the image of God. Minson, however, argues that Ficino's 'humanism' and philanthropy (love of man) is best understood as an 'office of humanity' which is given shape within a rhetorical rather than a philosophical tradition (2009: 2). This office (or mode of appropriate conduct) is treated as a project 'centred upon the persona, curriculum and erudition of the University Humanities professors' and focused on the relation of the scholar and teacher to the student (Minson 2009: 7). Hold on to the question of office in Pico della Mirandola's 'Oration on the Dignity of Man' (2012), Minson argues, and the oration ceases to be a text written in praise of dignity of all of humanity, but rather becomes a more specific address in praise of the dignity of the philosopher in the work of the spiritual transformation of the student (Minson 2009: 12-13).

If humanist ideals are held in the office of Scholar, then its training might be viewed as one that cultivates the *persona* of a scholar capable of participating in public life without directly engaging in the contest of political authority (Minson 2009: 11). Pluralise the sources of obligation, even within the constraints of a Ciceronian account of public life, and the vocation and the shape of the office of jurisprudent is crossed with a range of obligations of public service, of affiliations of profession, guild and union, of the vocation of scholarly discipline, of the obligations of employment contracts and public regulation as well as of humanist commitments of philanthropy and civic conscience. The performance of the office of Scholar involves achieving a *modus vivendi* with what are, often, competing and conflicting obligations. Within these obligations, Minson suggests, it is still possible to take up the responsibility for maintaining a 'gift' relation in the transmission of the love of knowledge between teacher and student (Minson 2009: 13). Whether the ethic of responsibility in the office of Scholar and Jurisprudent can be attractive depends in part on whether the occupation of office can be honourable, performed with appropriate decorum – or, as occasion demands, *sprezzatura* (elan) – and carry sufficient weight of meaning.

Conclusion

This chapter has presented a prudence and jurisprudence which are shaped by the histories and concerns of a civil jurisprudence tradition. Part of the claim of this thesis is that this tradition has something to add to the ways in which questions of civility and dignity in dying and in death have been articulated. In presenting an account of the civil jurisprudence writings of a group of scholars in Brisbane, Queensland, this chapter has drawn out some aspects of an ethic of office shaped around civility. The scope of this argument has been quite narrow. It is not advancing a general account of civility or citizenship. Rather, what has been presented here are several ways in which civil prudence and jurisprudence have generated an ethic of office and an account of civility. The civility that has interested the civil jurisprudents has been directed towards sustaining forms of sociality and decorum. Minson has expanded the repertoires of civility to encompass a whole range of engagements with public institutions (whether understood as bureaucracies or not) and civil authority.

The repertoires of civil life do not usually extend to the consideration of forms of dignity. In part, I think that early modern thinking quite regularly separated *honestum* (honourableness) and *dignitas* (authority, reputation) from law. In the attempt of civil jurisprudence writers to hold authority to state law and the interests of the state, *honestum* was often attributed to religious orders and *dignitas* to old (Roman) orders (Saunders 1997: 65-72). However, the language of dignity remains a part of the common law tradition. The terminology of office, status and rank have all been addressed as matters of dignity (Waldron 2012: 57-61). Given the range of engagements that carry the weight of dignity and human dignity, one task of a contemporary civil jurisprudence might be to describe the ways in which such engagements might make sense within civil prudential idioms. One aspect of this task is addressed in Chapter Four, where a range of jurisprudences that draw common law thought into the orbit of the 'principled' jurisprudent will be discussed. Another aspect of the civil jurisprudential address of dignity is addressed in Part Two of this thesis where the jurisdictional arrangements of the repertoires of the lawful conduct of assisted dying are given shape in relation to the practices of dignity.

Chapter Four

Dignity and Training in Conduct

Introduction

This chapter is concerned with the training in office and conduct recommended by jurisprudents. This is examined in the specific context of how jurisprudents think about the problem of dignity. In the particular context of office, dignity is central to ideas of worth, status and comportment. This chapter considers how, if at all, dignity can be drawn into office generally, and into the office of the jurisprudent in particular. Chapter Two elaborated the repertories of office for a common law tradition. Chapter Three examined the conduct of office from the point of view of a civil prudence. This chapter, then, moves to training in office, and in particular of the office of the jurisprudent. It considers how disputes about dignity shape the office of the jurisprudent. As with the last two chapters, here the engagement is with the general pattern or shape of training in office and with concerns of dignity. Parts Two and Three of this thesis look at how these are addressed as appropriate conduct by the jurisprudent in taking up their responsibilities to the dying and the dead. This chapter offers an opening account of training and training in dignity for the office of the jurisprudent and focuses on accounts which are, in some way, in dispute with or draw on the Kantian tradition of dignity.

The analysis of training in conduct in this chapter develops the account of office and *persona* in a number of ways. First, this chapter moves from the general consideration of institutional forms and a style of thought (civil prudence) to addressing specific practices of training in the conduct of office. Second, it addresses dignity in terms of the rival accounts of office, *persona* and conduct that are made available by jurisprudents. Third, it reports on two discussions on the office of Scholar and jurisprudent which are shaped around a concern with dignity. Finally, some qualifications to the conduct of office of jurisprudent as offered by civil prudence are introduced.

At the outset, in order to frame the discussion which follows, some brief comments

on *persona*, office and dignity are needed. Contemporary formulations of dignity divide their topic according to inherent worth, status (rank) and comportment (Debes 2017: 5; Waldron 2012). For many, dignity is concerned with the ways in which we give value to human lives, and the status of being human, within forms of juridical ordering. In its various guises, dignity has also been taken as addressing a series of concerns with authority, reputation, honour and the relation of the person to public life. The interest here is not to present an analytical argument for a 'proper' use or prescription of the term 'dignity'. Rather, it is to examine a number of formulations of accounts of dignity as an aspect of 'training in conduct' from within a tradition of prudence or, more precisely, from within a number of inter-linked forms of jurisprudence in a 'common law tradition'.

In thinking about an ethic of office, in Chapter Two the quality that was tested is knowing how to recognise that there is an office (here thought through appropriate conduct and institutional form). Chapter Three tested the ability to occupy an office through acknowledging training in conduct as a central aspect of that office. The central concern of this chapter, then, is attending to the ways in which training in conduct orientates the jurisprudent and their office towards legal thought and the world. Here the quality tested is one's ability to examine or reflect on what a specific training trains you to do. From this perspective, the contemporary literature on dignity and training in office and *persona* can be shaped around three themes.

The first theme in the literature is the work dignity does in rival traditions. Here we can point to the scholarship of Ronald Dworkin (*Justice for Hedgehogs* (2011), Jeremy Waldron (*Dignity, Rank, and Rights* (2012)) and Mark Rosen (*Dignity: Its History and Meaning* (2012)). They all accept forms of Kantian inheritance, even if, in Waldron's case, with some resistance. Civil prudence stands in contrast to this idealist tradition of Kantianism (although I will later make an argument that in some senses the differences are not so great insofar as they share a concern with decorum and eloquence). In this chapter, this theme is addressed from the viewpoint of civil jurisprudence through the work of Ian Hunter.

The second theme considers the ways of attaching dignity to forms of institutional life. It questions whether dignity attaches to office or to *persona* or to the natural person. In Chapter Two we considered the work of Kantorowicz (1957). He provides an example of an older literature which would see dignity as attaching to the office or

corporate body of the Crown. Minson's civil prudence also shapes dignity around office (Minson 2009). By contrast, the Kantian traditions align dignity with the dignity of man. For modern thought this is increasingly associated with the natural person (Dworkin 2011; Gaita 2000). In this formulation (the division between office and natural person) the training or cultivation of *persona* becomes the point of contest. In this chapter, I discuss the work of Kant, Dworkin and Gaita (Kant 1996a).

The third theme asks how your training invites you to relate to yourself and the world. I take Hunter as organising a response to this concern around the office of the Scholar and the interests of state. Dworkin and Raimond Gaita directly respond to this concern. For Dworkin the answer lies in a respect for human life and rational deliberation. Gaita orients us to the love of the world and an acknowledgement of common humanity. In this chapter, I discuss Dworkin and Gaita (Dworkin 1986, 2006, 2011; Gaita 2002, 2017a, 2017b).

In joining dignity and office it is necessary to be careful about the shape of that joining. In *Technicians of Dignity,* Gaymon Bennett (2015) has argued that our contemporary accounts of dignity need to be set within the contexts of the public discourse of institutions such as the Vatican (and its political-theological discourses), the United Nations (and the juridical-ethical discourses of the Universal Declaration on Human Rights) and university and health care institutions on bioethics (and institutional-ethical discourses of health care). It is important to locate the discourses of dignity institutionally because so doing makes clear that training in conduct is not simply an intellectual training but is part of the formation of an office. For example, someone trained in the constraints of bureaucratic ethics would have a different relationship to questions of assisted dying than someone trained in a Thomist appreciation of the value of life. A related comment is that contemporary university discussion of dignity is heavily influenced by Kantian and Thomist accounts of worth, and rather less by the consideration of status and comportment (McCrudden 2013; Düwell et al 2014).

In addition to scholarly work that addresses dignity within public institutions, there is a significant body of feminist scholarship that addresses questions of dignity and experience. Much of this work questions the importance of office and official thought. Elements of this opposition to office arise from a desire to transcend the constraints of office, others from an exclusion from office. There is, for example, a significant body of

work, inherited from Simone de Beauvoir and philosophers such as Moira Gatens, which has shaped accounts of dignity around *persona* and relationship (Bouvoir, de 2011; Brown 1986; Drakopoulou 2014; Gatens 1995; Genovese 2015; Naffine 2009).

Finally, as with thinking about the responsibilities of office, where you start with accounts of dignity makes a difference to the sorts of questions that are asked and the types of jurisprudence that you read. As already discussed, the shape of this research has been given by the revival of a civil jurisprudence tradition in Australia from the 1980s and the conducts of lawful relation it makes available. By way of drawing out some links of terminology and associations of dignity, this section returns briefly to the work of Cicero in order to show how he links *dignitas* and *persona*. Despite a somewhat fictive quality in finding a common point of reference and dispute for dignity, Cicero's work, as I have already noted in Chapter Two, is important in offering an account of office and of dignity within the Stoic inflected traditions of philosophy. It is also important as a plausible source of argument for much Renaissance and early modern jurisprudence.

For Cicero, *auctoritas, dignitas* and *decorum* (moderation and restraint) are closely linked terms. *Dignitas* relates to standing, rank (office) or status in a community and to the prestige associated with its holder. This prestige, in the form of public honour, can be passed on from one generation of the family to another. This includes worthiness and respect. For Cicero, it depends on personal achievement. Dignity is also relational in the sense that it depends on the judgment of others. In this context, human dignity is a question of rank (humans are superior to animals, Romans to Barbarians). It also relies on the judgment of others (Griffin 2017: 49-50). Balsdon (1960) reminds us that *dignitas* is closely with *auctoritas* (here *autoritas* can be understood as prestige and the ability to influence events). *Auctoritas* is related by Cicero to the public speech of the elders of the Senate in Rome. *Dignitas* is also related to honestas (honour or moral good) and the virtues (glory, good faith, loyalty and justice) (Griffin 2017: 53). Two further links should also be mentioned. The first is the link *between dignitas and* decorum (seemliness) discussed in the last chapter. The second link is between *dignitas* and *persona*. As discussed in the last chapter, Cicero organises his account of human relations and human duties around the elaboration of four *personae.* Of these, two concern dignity. The first of these two relates to the role imposed by human nature (as superior in rank (dignity) to other creatures The second relates to our individual

natures and abilities. It is here that Cicero mentions the 'dignity of man (humankind)' (Cicero 1991: 1.105-107, 110; Griffin 2017: 56). As a matter of decorum we have obligations to live up to our natures. It is the dignity of the person who fulfills their duties (Griffin 2017: 56; Rosen 2012: 29). The sense of dignity relating to worth is addressed by Cicero in the context of justice and how to practice the virtue of liberality. Kindness should be shown to others according to their *dignitas* (merit).

This web of associations around prestige, status, reputation, and activity provides many of the contemporary topics of evaluation for a range of concerns of public life. It also provides a starting point for linking office and dignity in contemporary legal thought (Hollenbach 2013).

1. Hunter and Histories of Training in Conduct

The revival of interest in early modern civil philosophy and jurisprudence has provided a number of ways in which to recast a concern with 'spiritual exercises' by paying attention to the development of the *persona* of the philosopher and of the jurisprudent. As has been noted, in *Rival Enlightenments* (2001) Ian Hunter both presents an account of the German Enlightenment and offers a methodology for engaging with the rival forms of enlightenment. Hunter also gives consideration to the ways in which empirical history writing forms a part of the civil prudential tradition. Central to these considerations is the historical link drawn between the projects of civil jurisprudence and the writing of state-centred empirical histories.

Hunter's civil philosophical and historical orientation toward descriptions of practices provides a vantage point from which to draw out what is at issue in tying jurisprudence to a training in conduct and office. His historical method takes as its first point of investigation training as a technique in comportment – whether it is addressed to civil behaviour or forms of conscience. Writing in the 1990s, Hunter draws on Foucault's work on ethics and technique in order to describe various forms of pedagogy in the development of school education in Australia in the nineteenth century. For Hunter, these techniques of nineteenth century pedagogy are developed in part from within forms of religious education which were designed to create a conscience. Hunter notes the ways in which the state's concern with education established different modes of civil education that followed the interests of

government and welfare. This was so both for the civil education of administrative and commercial classes and for techniques designed for the mass education of the new industrial work force. Both forms of education were directed towards a training in conduct and citizenship, rather than towards religious conscience (Hunter 1994a, 1988).

In *Rival Enlightenments* (2001), Hunter discusses a number of features appropriate to the writing of a history of philosophy. For Hunter, as historian, the most important methodological orientation for addressing 'forms of life' is to hold on to the question of conduct as a *paideia* (teaching) rather than as an expression of truth. Hunter's mode of engagement with Kant and the post-Kantian tradition follows three lines of dispute. The first is historical and relates to the rival forms of enlightenment that emerged in Europe in the eighteenth century. Hunter argues that there were many forms of enlightenment and that each had their particular intellectual and institutional existence. Treating philosophical and juridical writings as specific forms of teaching, argues Hunter, allows both for the analysis of specific intellectual projects and for the analysis of the sorts of disputes and institutional activities these projects were designed to (and perhaps did) influence (Hunter 2006). The second element, already discussed, is that the rivalries between intellectual enlightenment projects do not necessarily allow for any neutral meeting ground. Indeed, for Hunter, as for Schmitt, intellectual history is precisely a history of rivalries (Schmitt 2006).

In order to make sense of these disputes between rival accounts of enlightenment as disputes in teaching and conducts of life, it is necessary, argues Hunter, to treat them as recommending rival moral anthropologies that are addressed (or achieved) through 'spiritual' or 'technical' exercises of *ascesis* (self-discipline). Hunter's next concern lies with the appropriate forms for the historical contextualisation of such exercises. For Hunter, the context of 'rival enlightenments' is not best viewed as part of the epochal defeat of religion by secular forces. (This is one of Hunter's many points of disagreement with MacIntyre, discsussed in Chapter Two.) Rather, both civil prudential and scholastic-metaphysics were engaged in trying to re-configure religion and theology (Hunter 2001: 26-28). One part of this re-configuration involved elements of de-sacralising the political and juridical spheres. The protestant civil jurists generally favoured a 'voluntarist' account of religion that made religion a matter of private conscience and faith. The metaphysical jurists and philosophers created 'natural

theologies' which produced 'new moral theologies for public life, shifting the locus of salvation to metaphysics itself' (Hunter 2001: 26). Civil jurisprudence and its natural law, argues Hunter, were not part of a general 'rationalisation' of political life, but were presented as a series of specific forms of de-sacralisation which had been established through the development of political and juridical science. The most important of these was the project to remove 'transcendental' claims of authority and to develop (or revive) accounts of government which addressed the consequences of man's empirical social (but vicious) nature, rather than addressing a concern with salvation (Hunter 2001: 27).

A further point made by Hunter can also be addressed here. In turning attention from the training in conduct to the genres of writing natural law, it is worth noting the ways in which civil and metaphysical philosophies drew on the traditions of natural law thought in order to present their project. In writing the histories of German enlightenment projects, Hunter also directly addresses the ethos (and *persona*) of the scholar and jurist. Hunter notes that the metaphysical tradition drew on the work of neo-scholastics – notably Vitoria and Suárez – in order to develop its accounts of a civil rule which was based on a higher order (Hunter 2001: 27-28). Civil philosophers, such as Hobbes, and civil jurisprudents, such as Grotius and Pufendorf, modified the natural law tradition by establishing an Epicurean moral anthropology (man as social but passion-driven and destructive). They also restricted the civil authority to that of the Sovereign (and sovereign command). This intellectual contest, argues Hunter, can be thought of as a 'central instance' of the contest of German enlightenments (2001: 28). The different 'schools' and the modes of engagement, disciplines of knowledge and styles of argument, were part of a way of establishing a distinct ethos and training amongst scholars and students.

To the account offered here of the rival German enlightenments should be added another gloss, namely that of Hunter's own engagement with historiography. A central part of Hunter's own project has been to pitch civil jurisprudence, philosophy and historiography against revivals and continuations of university metaphysics (Saunders 1997). In these writings Hunter presents a series of engagements to counter (and profane) the reception and continuation of university metaphysics (Hunter 2007, 2014, 2015). The first of these engagements is methodological and polemical, and insists that history be written as a single field of empirical inquiry. That field is then taken as the

point of engagement of the rival schools. This is far from a 'neutral' writing of histories. It is history written in combat from the viewpoint of the maintenance of civil existence. So, for example, the contest between civil and university scholastic jurisprudents in early modern Germany is treated by Hunter as an instance of a dispute about religious and civil governance, rather than as a dispute within philosophy about the best ways to understand the 'laws of human reason or the autonomy of the moral subject' (Hunter 2001: 28-29).

Hunter's practice of historicising 'spiritual exercises' as pedagogic exercises, rather than as the philosophical work of establishing the truth in the fields of metaphysics or moral anthropology, is aligned with his civil philosophy. (It is worth noting that this is not the only way of understanding the *paedeic* aspects of philosophical traditions (Hadot 1995).) In so doing, Hunter describes university metaphysics as being engaged in religious and political conflicts, rather than addressing their work in terms of the realization of the forms of universal rational being or truth. Hunter does not deny that such projects have as their aim forms of metaphysical truth. Rather, he contests the purpose of such activities in the light of the interests of civil authority and peace.

The style of history writing that Hunter has developed is important in formulating the present concern with the office and *persona* of the jurisprudent. It brings with it sets of constraints for the description of the conduct of lawful relations. The value of these constraints for the consideration of the office of jurisprudent will be reviewed in the final part of this chapter. The methodological affiliation to historical history writing not only ties Hunter to a civil jurisprudence project, but also to a professional practice. Hunter argues that empirical history writing is open to forms of factual testing in ways that university metaphysics is not. This position is something that would be contested both by his friends and enemies in contemporary historiographic debates (Jameson 2008). Friends would contest the ease with which empirical history can secure a single field of history writing. Enemies have argued that his history writing is tied to a reactionary political project, rather than one of civil authority. A second set of concerns is more disciplinary. A question arises then as to how such styles of history writing mark the formulations of the office of jurisprudent of the common law tradition. As common law jurisprudence, and the offices it recommends, have never been identical to civil jurisprudence and its accounts of office, the ways in which accounts of conduct attend to such differences also becomes a part of history writing

and jurisprudence.[1]

2. Kant's Training in Dignity

This section provides a brief reading of Kant's account of dignity and training in conduct. In part it illustrates how Hunter, as civil historian and prudent, focuses on conducts of life. In part it does so to to show how a rival tradition, now prevalent in human rights scholarship, presents a training in conduct. These readings establish the continuity of technique and exercise among a diverse group of scholars who argue about the status of assisted dying and the care of the dead from within a 'Kantian' tradition. There is no attempt made here to provide a systematic survey. Rather, what is important is to draw out the gestures of two writers whose work engages in the Kantian tradition. The authors chosen – Dworkin and Gaita – present different ways of inheriting styles of training in conduct. The various disputes with which they engage also provide some sense (or test) of the sureness of the claim for the continuity of *paedeia* in jurisprudence. They are not addressed in terms of their allegiance to a 'Kantian tradition' as such but to give substance to the ways in which the conduct of the office of the jurisprudent has been treated as a matter of dignity (Chou 2016). The Kantian tradition, then, might be viewed both in terms of its technical philosophical training and as part of a more general discourse of public edification. The reception of Kantian thought into legal theory and doctrine follows this pattern. In this section I follow Hunter's engagement with Kant in order to show how dignity might be set in place in the office of the jurisprudent.

It is worth starting with a brief example of a form of Kantian engagement that can be found in essays commissioned by the President of the United States Council on Bioethics (2001-2009). The Council was set up in 2001 to 'advise the President on bioethical issues that may emerge as a consequence of advances in biomedical science and technology' (US Executive Order 13237). In her chapter in this report, Susan Shell puts forward what might be viewed as an 'official' version of American Kantian pragmatic liberal thinking about human dignity. For Shell, Kant's account of human dignity is formulated in the *Groundwork of the Metaphysics of Morals* (Kant 1996a). Dignity (*würde*) relates to that which is 'beyond price' or taste and is an 'end in itself'

[1] On the links between common law and Anglican thought (Goodrich 1991; Rudolph 2013.

or an 'inner value' (Shell 2008: 334; Kant 1996a: 84-85) Central to this story – bearing in mind that Shell's presentation is not primarily for an academic audience – is Kant's claim of conscience as encapsulated in the various forms of 'categorical imperative': act 'only according to those maxims that one could at the same time will to be a universal law' or, for Shell, more saliently: 'so act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means' (Shell 2008: 335; Kant 1996a: 80).

At the centre of these formulations is the engagement of a moral law that applies equally to all rational beings. Important here in Kant's explanation is the way in which action is tied to good will and good will to rationality or rational being (Kant 1996a: 79-81). Only by respecting humanity can one be worthy of esteem. This formulation provides, for Shell, the necessary formulation of the limits to the use of others and the self (Shell 2008: 336). It also opens a space for the consideration of a moral anthropology which joins the concerns of freedom to obey the universal law to the limits of embodied life. It is the disposition to the good which gives us the account of personality and moral life. It runs through living existence, rationality, and responsibility.

In making these brief gestures, Shell orientates Kantian thought to the pragmatic engagements of embodied subjective life and the requirements towards 'moral health'. This, perhaps, is enough to get a taste of how Kantian thought might be approached today. Shell casts off the metaphysical forms of Kant's teaching and concentrates on the formal and universal rationality of Kantian practical reason. For Shell, the formality of the categorical imperative is let rest on a pragmatic reciprocity. This is what allows humans as free agents to be free (Shell 2008: 339, 341). Where political philosophy has typically treated these concerns as being historical, rather than transcendental, Shell is interested in Kant's moral anthropology as a means through which to develop Kant's relevance to bioethics. Human beings have dignity, for Shell and Kant, because they are capable of acting morally (Shell 2008: 347). It is a capacity realised through acting in the world as living, rational and responsible beings (Kant 1996a: 74). For Shell, thinking with Kant in the field of bioethics in a liberal democracy would require us to attend to ourselves as purposive and worldly agents 'directed, first, to physical well-being and, second, by demands upon others and ourselves that can be regulatively understood as the appearance in the world of a higher principle of life' (Shell 2008: 343). Shell also

notes that Kantian principles maintain a sense of the pricelessness (dignity) and mysteriousness of persons (Shell 2008: 344).)[2]

In contrast to Shell and the pragmatic encounter with Kant, Hunter insists on reading Kant's metaphysics as a direct training. His reading of Kant's *Groundwork of the Metaphysics of Morals* is designed to show the 'techniques' and 'spiritual exercises' which belong to an intellectual tradition and which, if properly practised, establish an appropriate ethical comportment (or conduct of life) (Hunter 2002, 2010; Kant 1996a). In this context, Kant's thought is linked to the disciplines of the earlier intellectual projects of seventeenth century university metaphysics. Once re-described as a history of techniques and spiritual exercises, Hunter then addresses Kant's philosophy from the viewpoint of civil history.

In order to develop the account of the sorts of conduct of life recommended of jurisprudents (and to those concerned with assisted dying and the dead), Hunter's reading of Kant will be followed a little further. The form of argument is deceptively simple and is shared by Hadot (Hadot 1995). Modern philosophy, like Ancient philosophy, must: induce a desire for a philosophical life; provide a teaching and training in transcendence (or resistance thereto if you are a civil jurisprudent); establish a community or college based on that teaching (faith in metaphysics for Kant, profession of historians for civil humanists); and offer a reward (prestige of seeking, or living by, what is intrinsically good or effectively civil). Unlike Shell, who treats Kant's distinction as an unproblematic programme in moral improvement, Hunter joins Kant's teaching to the Christian-Platonic tradition of metaphysics and 'spiritual exercises'. The *Groundwork of the Metaphysics of Morals* draws on a metaphysical anthropology which identifies metaphysics with 'pure (non-spatiotemporal) insight into a moral law binding on a universe of pure intelligences not all of whom are human' (Hunter 2002: 911). This training involves refining human sensibilities in order to enable the reception of the moral law and participation in the world of rational beings (and the desire for moral purity). Where Shell narrates Kant's metaphysics in terms of establishing the means of mutual respect, Hunter is interested in showing how the metaphysical anthropology of the *homo duplex* – the two-natured man: sensible and rational,

[2] A moment of circumspection might be found in the complex network of arguments Kant develops around dignity. Sensen notes that Kant uses the language of dignity as ranked status or elevation as well as the language of respect and worth (2017: 240-43).

phenomenal and noumenal – links Kant (and many of his followers) to the university tradition of metaphysics 'inducting students into the cultivation of a prestigious moral life' (Hunter 2002: 914; Shell 2008: 343, Sensen 2017: 249).

These techniques can be followed into Kant's juridical engagement and the formulation of the office of the jurisprudent. In the *The Metaphysical Elements of Justice (*Part I of the *Metaphysics of Morals*) (Kant 1999) and in his essay *Towards a Perpetual Peace* (Kant 1996b), Kant sets out a political and legal doctrine which is organised around the idea that justice or right originates in pure reason or intelligence (Hunter 2010a). Or, rather, it originates when intelligence tries to exercise its 'external' freedom by occupying the (global) surface of the earth. In *Perpetual Peace* this exercise is joined and linked to the figure of the cosmopolitan citizen. The task for the philosopher-legislator – following the principle of right or justice – is to harmonise the external freedom of each with that of all according to a universal law. The order of law, and of the community of law, is moral, and moral in a particular way which is connected to both the reasoning and spiritual training that Kant offers. This training allows Kant to settle upon a principle of 'universal reciprocal coercion' as a mode of harmonization, rather than on the universal 'kingdom of ends' of a true moral community (Hunter 2010a: 175 discussing Kant 1999: 78-79). A form of cosmopolitan political order also follows on from this: for Kant, as Hunter notes, 'justice simply is the mutual interdependence between the communal occupation of the entire globe by rational beings and the formation of a global will as the condition of this occupation' (Hunter 2010a: 178).

What of the jurist and jurisprudent in this arrangement? Kant's response to this question is unequivocal. The philosopher is to be preferred to the jurist as advisor to the Prince. The Jurisconsult as advisor serves the interests of power. The Philosopher serves that of right. The Jurisconsults are, in a telling phrase, 'miserable comforters' of the *ius gentium* tradition (Koskenniemi 2009; Hunter 2010a; Hunter 2013). Or, in another formulation, the Jurist acts in the office of private reason, in comparison to the Philosopher who, by virtue of speaking in the name of right, acts in the name of public reason (McVeigh 2011: 172). The Philosopher takes up office not for power, riches, honour or health, but through a sense of 'duty for its own sake' (Kant 1996a: 52) in order to realise their own moral self within a community of rational beings. This life is lived through according respect to the moral law (Kant 1996a: 55-56). The

obligations of office, like the practice of the virtues, become a matter of instrumental value and taste and carry no genuine morality apart from the universality of obligation (Minson 1993: 28-31). Following the civil philosophers, Minson notes the ways in which the obligations of civil obligation and worldly office (and ethics) are displaced by a concern with 'inner' duty (conscience). Finally, Hunter argues that the Kantian philosopher or office holder, having received a sectarian moral education into the truth of rational life, would also be given to presenting the obligations of office in terms of the 'unconditional duty' and the 'Idea of Reason' (Hunter 2002: 919). The philosopher orients their relation to action by treating the intelligible world as reality lying beyond human understanding. This orientation maintains respect for the moral law. 'We' belong as member of the kingdom of ends 'only when we conduct ourselves in accordance with the maxims of freedom as if they were laws of nature' (Kant 1996a:108).

What complexion does Kantian dignity take on under Hunter's redescription of the metaphysics of morals as a morality of metaphysics? For Hunter, the claim of dignity as beyond worth or price is one made within an historical scheme of thought. Hunter has argued that, as an object of historical study, Kant's style of argument should be held within his metaphysical cosmology and anthropology. It is to be treated as a training in becoming a rational being or pure intelligence (or acceding to the noumenal aspect of the *homo duplex)*. For political philosophers, such as Rosen, the question of dignity (or worth) (*würde*) is identical to that of the respect shown between intelligible beings irrespective of all empirical ends (Rosen 2012; Kant 1996a: 177). Treating dignity as a resource of norms for the regulation of healthcare practices, Shell transforms Kantian dignity into an aspect of rational choice and its limits (Shell 2008: 343).

Treated as a form of spiritual training in conduct, Kant's training links the exercises in formulating the moral law, and the training in making forms of experience intelligible, and the willing of the form of law. The realisation of the 'pricelessness' of dignity is part of the realisation of a (good) will which transcends sensuous inclinations and a participation in the 'kingdom of ends' (Hunter 2010a: 176; Hunter 2001: 321-323; Kant 1996a: 81-84). Dignity takes juridical form as part of the 'doctrine of right' in the formation of juridical communities as a spatial expression of will. In so doing, politics

and law are subject to ethics (and religion) (Hunter 2001: 332-43).[3] In this scheme, dignity as preciousness beyond worth does not form the basis of morality. For Kant, the basis of morality is the relationship between freedom and moral autonomy. The practice of freedom is the willing of the moral law (and its independence from anything else) (Chou 2015: 76). Dignity, then, is not part of this grounding. Instead, 'dignity' – in this usage – describes how human beings are special in nature by virtue of having freedom (Sensen 2017: 257).

In following Hunter's reading of Kant into the office of the jurisprudent, I have noted the way in which Kant provides a very particular form of spiritual training. In Kant's account what is most important is freedom and the ability to will the moral law. The office of jurisprudent, then, only has dignity insofar as they are able to will in this manner. While the jurist or jurisprudent might have civil rank or status, this is nothing compared to the dignity conferred in willing the moral law. One consequence, as noted, is that the exigencies of political and legal action can never have value simply as political and legal action.

The struggle with Kant's training can also be addressed in another way. Beverley Brown (1986) has undertaken a similarly textured engagement with the 'moral competence' required of a Kantian ethic. Drawing on a brief correspondence between Maria von Herbert and Kant (1791), Brown notes the ways in which 'the capacity to be a moral agent is predicated upon a more mundane level of non-ethical competence in, at least, reading other human beings as objects, characters and types, as dispositions and predictable behaviours' (Brown 1986: 162). Maria von Herbert, in writing of her admiration of Kant's inner soul and calm, also declares her sensual desires and her love for him. Kant, having replied to these letters, then passes them on, with his responses, to a third party. In this correspondence, Maria von Herbert is judged a madwoman, unrestrained by prudence.

For Brown, what Kant demonstrates is not exactly a realisation of the equality of subjects, but a more worldly prudence. This prudence is not based on a duty and subjectivity to love humanity and the ability to test the morality of actions that are

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[3] There are ways in which Kant's account of dignity can be spread more broadly than Hunter's training might suggest. Chou (2015), for example, notes that Kant's thought is rather less controlled as a system (and less Kantian) than the critics of the metaphysics of morals might suggest (Chou 2015: 105-108). Sensen (2017) draws out a version of dignity that stresses the continuity with Stoic versions of dignity.

universalisable. It requires an ability to make distinctions of status and ability (Brown 1986: 159). This struggle, to hold on to prudence and decorum in the middle of arguments and events, touches both civil prudence and the ethics of humanity. The problem for Brown is not so much the relation between the abstract and the particular but between the noumenal world of rational beings and the 'theatre of representation' of the approximations to noumenal rationality – the dignity of appearances. Like Hunter, Brown notes the ways that in Kant's 'training in transcendence' one never fully ascends to the noumenal world but only trains oneself to life as if this were possible. Like Minson, Brown finds an art of appearances and association in the mundane skills. Here Brown has raised a concern with the ability to 'differentiate human objects within a field of knowledge' (Brown 1986: 162). (A skill that is not part of a training in noumenal being, but one that is required in order to address others as humans as different and as a limit.)

3. Dworkin, Dignity and Contemporary Kantian jurisprudences of Common Law

The focal point in this section is the work of Ronald Dworkin, who is addressed here for the ways in which he links dignity to conduct and office through the concerns of jurisprudence. Dworkin does so by casting Kantian thought into the idiom of common law legal theory. Where Kant abstracts worth to the realm of the philosopher, Dworkin transports the philosopher into the office of jurist and jurisprudent. Where Kant treated jurists as 'miserable comforters', Dworkin elevates them to the status of the philosopher.

On Dworkin

More so than many other contemporary jurisprudent, Dworkin makes the link between training in conduct and the formation of the *persona* and character necessary to occupy the office of jurisprudent. In the context of this chapter, what is of interest in Dworkin's work is the way that the question of the appropriate form of life is linked to a training in conduct and office. The link is provided by the way in which Dworkin draws on a Kantian tradition of *ascesis,* already discussed, in order to develop a particular ethos, *persona* and 'juristic civic consciousness' (Hunter 2001: 10). What I

want to do here is to follow one influential way in which dignity (as respect for the moral law) is treated as an aspect of a training in conduct. In order to draw out what this involves, and to link Dworkin's training in conduct to that of Hunter, I will take four brief examples from Dworkin's work: his hermeneutics of legal interpretation and the community of reason in *Law's Empire* (1976); his account of value in *Life's Dominion* (1993); his description of a dignified ethic of life in *Justice for Hedgehogs* (2011); and, his account of transcendence in *God without Religion* (2013). Dworkin's account of the value of life from *Life's Dominion* (1993) will be addressed again in Chapter Six. Here, it will be considered as part of a *paedeia* or a training in conduct.

In *Life's Dominion*, Dworkin engages with the understanding of the status of assisted suicide and abortion under the Constitution of the United States. In such matters of life and death, argues Dworkin, we are concerned with the formulation of our most profound religious and ethical beliefs. As a philosopher and a jurisprudent, he offers a way of connecting the moral, religious and political understandings of assisted dying. Dworkin is interested in showing that, despite intense disputes about the status and value of abortion and assisted suicide, there is a rational and principled way of deliberating about the intrinsic value of the sanctity or the sacredness of life or, in the language we have been using, of dignity (Dworkin 2011).

Dworkin links his account of public reasoning to a specific orientation towards the conduct of life. If people are prepared to acknowledge that they are engaged in disputing a common concept with respect then there are means of weighing the value of rival conceptions. In his account, due process and the integrity of due process are one part of the means by which we engage our common response to the profound questions of human life. A central element of Dworkin's legal theory is an account of interpretation and community. In *Law's Empire*, Dworkin sets out a practice of integrity which is shaped by a form of legal hermeneutics. Here, I want to emphasise two elements of interpretation before moving to Dworkin's concern with dignity – one relating to comportment and the other to interpretation. The first is a commonplace: whatever else is going on in Dworkin's writing, it is competitive and combative. His account of law is pitched against forms of civil jurisprudence which link legal authority to the sovereign territorial state, rather than to a general morality. In so doing, Dworkin turns a question of political authority into a metaphysical argument about the truth or truth conditions of law (Hart 2012: 250, 253-254). This, as Hunter would have

it, repeats the engagement of rival enlightenments of early modern Europe (Hunter 2001).

Second, when Dworkin points to the ways in which judges write and dispute cases through an appellate system in the United States of America and the United Kingdom, he is both having an argument about how a jurisprudent should understand the institutional life and community of those who live with law, and presenting a training in so doing. Dworkin's dismissal of conventionalism or the 'plain fact' view of interpretation as failing to offer an adequate descriptive account of law is accompanied by an account of living with value. This is understood through 'integrity'. Dworkin's training in integrity can be expressed briefly in two ways. The first element of this training lies in his training in resistance to internal and external skepticism. The second element of training in integrity provides a training in linking law and life.

External skepticism, for Dworkin, is founded on a sort of relativism that reduces all judgment to opinion (Dworkin 1986: 78). For Dworkin, external scepticism is based on a metaphysics which claims that there is a position of objective truth outside of the language games through which questions of value are shaped. Internal skepticism, by contrast, accepts social practices but calls into question the possibility of generating a sound interpretation. Law as interpretative integrity offers an account of interpretation that presents the best reasons for value within a community of interpretation and reason. The internal skeptic might present their own account of interpretation, for example one based on a hermeneutics of suspicion, which shows that there is no objective account of interpretation (Kennedy 2014; McVeigh 2017). In Dworkin's contest with skepticism these rival positions are drawn into paradox. In *Law's Empire*, Dworkin proposes a hermeneutics of integrity, or faith, shaped around arguments of value that can be expressed in legal doctrine. This joins the project of the legal philosopher to that of the university jurist and the appellate common law judge. In this way, institutional forms of law are brought within the domain of the contest of interpretive value.

Much has been written about the technical forms of Dworkin's account of integrity (Raz 2016; MacInnis 2015). I would note here, as a second aspect of integrity as a training in conduct, that the practice of the creation and maintenance of community of interpretation is directed towards achieving the unity of legal value. In *Law's Empire*, integrity relates consistency in principle to the doctrinal body of the common law. It

commits the judge to the ideal of decision-making shaped around the best expression of the legal principles of the political community of which they are members (Dworkin 1986: 210-219). Dworkin is also prepared to argue about how to understand the importance of human life through such means.

In *Justice for Hedgehogs*, Dworkin offers a unified account of law and life shaped by living well and the pursuit of the good life for oneself and for others (2011: 419). In *The Mandate for* Justice (2015), Drucilla Cornell and Nick Friedman argue that Dworkin's work has moved progressively towards a Kantian account of dignity which is shaped around the aspirational life of an ethical community – a 'we' that is called into existence – and an embodied account of reciprocal relations (Cornell and Friedman 2015: 10, 96-97). The ideals of this life are expressed in modern constitutional legal systems, such as those of South Africa, which are shaped around a concern with dignity (Cornell and Friedman 2015: 29-30). For present purposes, I want to link Dworkin's account of justice and dignity to his account of the ethics of living well and to the morality of the conduct of life that we share in common with others. Dworkin's Kantian-inflected account of dignity is far from unique, but it is significant in the way it is integrated into his accounts of community, interpretation and political morality. In *Justice for Hedgehogs*, dignity serves as the point of focus for Dworkin's concern with the ordering of the conduct of ethical life – that is, the conduct and training of the self. Dworkin's elaboration of dignity also presents a series of exercises that are, as Dworkin puts it, adverbial (rather than adjectival). They are activities, or accompany activities, as exercises rather than proofs (Dworkin 2011: 197, 217-219). These exercises – still shaped by Dworkin's account of integrity – present a training in ethics and morality.

For Dworkin in *Justice for Hedgehogs*, dignity is an aspect of ethics – or the consideration of how one treats oneself – while morality is the consideration of how to treat others. The account of dignity Dworkin offers here relates to an understanding of the desire to live well. Dworkin wants to present an account of dignity which can be a guide to the interpretation of moral concepts (and vice-versa) – at least insofar as this is a matter of critical interest (Dworkin 2011: 193-194) The distinction that Dworkin makes between living well and living a good life joins that of the moral distinction between the right and the good. The requirements of (human) dignity relate to living well. They are directed towards the ways in which 'we' strive for

the good life for ourselves and others (Dworkin 2011:195). For Dworkin, living well and the responsibility to live well are of objective importance insofar as they are concerned with giving ethical meaning to life: 'We value human lives well lived not for the completed narrative, as if fiction would do as well, but because they too embody a performance: a rising to the challenge of have a life to live.' (196)

The challenge is to establish a central ethical concern for living well that does not simply become an aspect of morality, politics, aesthetics or justice. In Dworkin's account of ethic this dignity is achieved thought self-respect and authenticity (Dworkin 2011: 204-205). One aspect, self-respect, involves a concern with treating living well (being ethical) as important. However, respect is also a matter of status (2011: 205). The status concerned is not a legal or public status but one of critical attitude (evidenced in pride, shame and regret about the way one's life is lived) (2011: 207). Authenticity is the second feature of dignity that Dworkin addresses. Authenticity in living well 'means expressing yourself in your life, seeking a way to live that grips you as right for you and your circumstance' (Dworkin 2011: 209). Authenticity should be understood in terms of ethos or as a responsibility for giving adverbial value to life. The responsibility is that of judging the quality of character and style. Dworkin has more to say of authenticity in terms of ethical independence. Living well means 'designing' a life in response to a judgment of ethical value (independently of our will) (2011: 212); and situatedness and connection, whether in relation to the cosmos or a particular place (2011: 216).

Dworkin's account of dignity and humanity owes much to Kant, particularly in the way in which it joins ethics and morality (Dworkin 2011: 264-266). As Dworkin reads Kant: 'a person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms' (2011: 20). However, Dworkin draws on Kant in a way that is familiar to American pragmatism: by attempting to remove Kant's metaphysical account of the noumenal character of mind. He does so by narrating ethics and morality as an engagement in the conduct of a dignified life. In this account, Kant is understood as providing a training in responsibility which is shaped around the objective judgment of value (Dworkin 2011: 108-110, 264-267). Or, as Dworkin writes of Kant's principle:

> If the value you find in your life is to be truly objective, it must be the value of humanity itself. You must find the same objective value in the lives of all other

> persons. You must treat yourself as an end in yourself, and therefore, out of self-respect, you must treat all other people as ends in themselves as well. Self-respect also requires that you treat yourself as autonomous in one sense of that idea: you must yourself endorse the values that structure your life. That demand matches our second principle: you must judge the right to live for yourself and resist any coercion designed to usurp that authority (2011: 264-265).

Dworkin's account of dignity and responsibility in *Justice for Hedgehogs* is most comfortable in showing how dignity emerges through the obligation to live well. For Cornell and Friedman, Dworkin's revival of Kantian autonomy is most striking for the way in which the ideal of dignity is kept at the centre of ethical, moral and political commitments. In the reading presented here, what has been significant is the way in which the understanding of dignity and of interpretation forms part of a training in an ethical, moral, aesthetic and political life. It is also a training in a life lived with law, insofar as law and legal institutions form a part of an examined life. Dignity remains at the centre of this activity of judgment and interpretation. It does so not because it is a fundamental value – the complex relation of freedom and autonomy serves for that – but because dignity becomes the point of realisation of respect.

Plural Forms: Hunter and Dworkin

This chapter has presented a partial engagement with the formulation of dignity. It has done so by following the different evaluations of Kant's training in conduct by Hunter and Dworkin. Clearly these are rival evaluations. They have been set in place in order to draw out something of the contest in the training in dignity. The challenge presented by the revived civil jurisprudence of Hunter and Saunders has been to present an account of law, politics and (humanities) education that is capable of living with the authority of the state and the dangers of sectarian thought. For Dworkin, the sorts of civil jurisprudential argument put forward by Hunter and Saunders would differ very little from those put forward by Hart (Hart 2012). Dworkin sees Hart's work as presenting failed accounts of truth and semantics (law as fact and practice) and a compromised account of utility and ethics. Hunter and Saunders offer even less by way of an alternative to an ethic shaped by civil authority.

For Hunter, Dworkin's engagement with dignity remains very close to the training in conduct presented by Kant. While Dworkin disengages with the presentation of the noumenal world, his characterisation of training through integrity, and the conduct of the examined life, forms part of a reception of Kant within the United States of America which gives emphasis to the social and institutional realisation of the moral law. The burden of Hunter's engagement with Kant is that Kant's moral anthropology, ethical purism and the subordination of institutional life to the moral law offer no sustainable account of the conduct of office. Such a training in conduct, argues Hunter, is a training in indignity. Kant's kingdom of ends is shaped by a rational being who subordinates the worldly happiness of existing humans to that of moral rights (Hunter 2001: 308).

I would note here the continuity of training with Kantian thought that Dworkin offers:

1. The movement beyond the empirical and material in all forms of interpretation of legal materials. Law is to be viewed, ultimately, as an interpretive moral project. As such it is not distinct from forms of political morality. While Dworkin writes about the office of the Judge and of the Scholar, his work shapes the obligations of office around a transcendent account of right, rather than an institutional account of obligation. The limits of office are those of the limits of reasoned morality.
2. For Dworkin, the training in responsibility is directed towards a training in subjectivity in which our interests are harmonised and dignified with other moral beings. In this respect, Dworkin's training is still a training in the creation of a community of the shared ethical, moral and political life. Dworkin's ethical community remains individual and ideal. In Hunter's analysis, this draws argument into the realms of the sectarian elect rather than the government of populations.
3. Dworkin's training modifies that of Kant in some respects. There are two places where Dworkin differs from Kantian training. The first, significantly, is how he links dignity to authenticity. This directs attention to the existential character of projects. Dworkin cites Nietzsche and Kierkegaard as avatars for his analysis (Dworkin 2011: 209). However, the authenticity at issue here is the rendering of an account of oneself and others. The second significant difference

lies with Dworkin's accounts of interpretation and integrity. While Dworkin's account of integrity in *Justice for Hedgehogs* is shaped through Dworkin's engagement with Kant, his account of interpretation owes more to the hermeneutics of Gadamer (Dworkin 1986). His training in interpretation marks a limit on the purism of the moral law by acknowledging the conduct of interpretation in the middle of institutional events. However, this interpretation is also directed towards 'working itself pure' which in *Justice for Hedgehogs*, at least, means aligning justice with the moral law.

4. Hunter's analysis of Kant returns Kant to the schools of German university metaphysics. He presents the analysis of Kant's training as a teaching that draws on the scholastic traditions that are sectarian in the sense that they promote a confessional accession to rational truth. He also notes that despite the aspiration to objectivity and universality, the training provided is regional both in the sense that it has developed and been transposed from Protestant (Lutheran) Prussia to the United States of America (see Dworkin 1986). Such contextualisations address the particularity of claims to universality and the transposition of forms of jurisprudence. Is finding Kant in New York less surprising than finding Pufendorf in Brisbane?

4. Dignity and Common Humanity

The second account of the shape of the offices of Scholar and, I argue, Jurisprudent, is taken from the writing of the Australian philosopher Gaita. For Gaita, the vocation of the philosopher remains that of Ancient philosophy: to think and live well with others shaped by the love of knowledge and of humanity. Much of Gaita's writing has been directed towards showing the ways in which the affirmation of the preciousness of life is 'wondrous' (and far from easy to achieve) (Gaita 2017b: 170-171). For Gaita, such an affirmation of the love of humanity should be truthful – hard-headed and unsentimental – and should be able to cultivate joy in sharing humanity, as well as shame and remorse at failing to do so. His exemplars are the saintly, who show unconditional love, or goodness, whether they be nuns, parents, friends or teachers. The political officials and public workers (scholars, writers and artists) who attract his attention grapple with what it means to be answerable to an office and a vocation. What is addressed here is the way in which a concern with style, or eloquence, becomes a part of 'our'

answerability for the conduct of human relations (Gaita 2017b: 173). Like Dworkin, Gaita's work draws heavily on Kant. However, unlike Dworkin, it is the rationalism of the moral law that Gaita rejects. In its place, he gives shape to dignity through the work of achieving common understanding and humanity.

Since the 1990s, Gaita's writing has engaged publicly with the ethical understanding of the responsibilities and actions in the moral, political and legal spheres of our shared lives. In the context of an Australian life, this has involved a sustained investigation of the ethical understanding of race, genocide and education (Gaita 1999).[4] Something of Gaita's relationship to office can be shown in his approach to the formulation of the place and work of ethics. In light of the way that Gaita makes strong links between goodness and love, it might be possible to imagine a public life without any significant account of office, or at least, one where the language of office does not carry any serious ethical meaning. What is important, for Gaita, is the needs of the soul (love, truth and justice) (Gaita 1999: 237). However, Gaita, I think, does give shape to office by addressing appropriate conduct (*officia*) in the ethical engagements of the political, moral and legal spheres. Gaita's positive understanding of office begins with the sense that each sphere has distinct forms of responsibility (obligation) and conduct (Gaita 2017a: xvii-xix). While these spheres are not organised around the facts of institutional life in the way that Weber suggests, for example, or around the institutions of state as they are for Hunter, they are organised around accounts of the appropriate conduct of actors in public institutions. For Gaita, there is no reason to assume that the demands of politics (the survival of the political community), law (justice) and morality (the conduct of human relations) can be met without conflict (Gaita 2017a: xxi). The political requirements of the survival of a community have, and frequently do, run into conflict with the moral requirements of the acknowledgement of common humanity and the legal requirements of justice. In regards to the ethical concern with how to live well, Gaita argues (as does Minson) that each sphere creates its own obligations and responsibilities for which we must be answerable. To elevate the requirements of morality above those of politics will not fulfil political obligations (or vice-versa). Both are subject to ethical judgment.

What is striking in Gaita's accounts of politics, morality and law, however, is the

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[4] In a different register Gaita has also addressed the living of a philosophical life (Gaita 1999, 2002, 2010).

way in which those accounts are pitched into middle of the arguments and events of human life (*media res*) (Gaita 2000: 14). Where Minson links social life to civil authority, Gaita sets the acknowledgement of humanity and the consideration of appropriate conduct within the ethically inflected forms of natural language – the realm of meaning (Minson 2009). Within this milieu, ethical meaning can be understood by way of an analogy to literature. Great literature, Gaita argues, speaks to all, but not through a single universal language. It does so by deepening the realm of meaning in particular cultures. Great literature is not simply written in a universal language. It is written in a particular language in which the valuing of human relationships is translated from one natural language to another (Gaita 2000: 283-285).

Gaita's account of the preciousness of life and of the ethical conduct of life is shaped around a concern with the acknowledgement of 'our' common humanity – with those we address and with those by whom we are addressed. In thinking about what it means to engage humanity, Gaita draws on Kant. Gaita takes Kant, and the Kant of *The Groundwork of Metaphysics*, as being exemplary in his concern with 'the authority which morality claims over us' (Gaita 2001: 25). Kant's formulation of ethical conduct in terms of an injunction to treat persons as ends and not means, forms a part of his concern with addressing the ways in which rational beings can be unconditionally respectful of each other (Gaita 2000: 25). Where Hunter has seen this formulation as resting on a (pernicious) training in ethical purism, and Dworkin has addressed it through a process of hermeneutic reflection and reasonable deliberation, Gaita worries that Kant's rationalism loses what is most human about being human through Kant's emphasis on the conduct of rational beings. In response, Gaita transposes Kant's concern with the authority of morality to the realm of common language and shared meaning (Gaita 2017b: 176). He treats the authority of morality as being one expressed in the acknowledgment of common humanity.

For Gaita, some of the power of the language of dignity arises because it can carry meaning across languages and between peoples. This is lost in the political and legal spheres if dignity is considered only in the register of abstract universal rights. In most circumstances, dignity as expressed in human rights is far from abstract. It is addressed in the register of the noble and the heroic and is related to the fight against political oppression (Gaita 2017a: 171-172). Gaita also notes that there are circumstances in which dignity and the language of duties and rights fail to carry the significance of

events or wrongs. This is when dignity is required to address matters that touch our sense of humanity in ways other than the noble and the heroic, such as the expression of the wrongs of torture and genocide. Here Gaita notes how the sense of violation of those who are tortured, or who suffer genocide, can only be met through a language of justice and love (Gaita 2017b: 184). In other circumstances, dignity is addressed in the register of the sacred, especially in the care of the vulnerable. The use of the language of dignity might distract someone from appreciating the difference between dignity as an expression of respect and dignity as an expression of love which transforms human fellowship (Gaita 2000: 17-27). The same can be said of the understanding of office. It too can distract.

For the jurist and jurisprudent the language of office is most readily expressed in terms of duties, rights and responsibilities. The occupation of office is frequently addressed in terms of profession. However, Gaita, like Weber, notes that the language of vocation better captures the seriousness of the calling of, for example, the scholar (Gaita 1999: 196-206). For Gaita, many of the most important aspects of human relations are conducted in the registers of love and justice rather than of obligations and rights. The realisation of the limits of the ethical language of office as expressed as duty and obligation opens onto another aspect of the ethical, that of the relation between reason and sensibility. Philosophers and jurisprudents who engage in the realm of meaning, as they must, err when they tie their sense of cognition too closely to formal rationality. An excessive sentimentality or pity might indeed distort our judgment by defeating our ability to reason clearly. However, not paying attention to sentiment can also defeat our understanding where judgments of feeling or sensibility are required, as they are for ethical deliberation in the moral, political and legal spheres. In these circumstances, 'vulnerability to sentimentality is intrinsic', as it is joined to forms of enquiry about living and dying well (Gaita 2017b: 174, 176). The calling of the philosopher and, I argue, the jurisprudent involves being prepared to transform oneself by 'ridding oneself of sentimentality, pathos and similar affliction'. It does not, however, involve divesting oneself of all sensibility as sensibility is required in order to allow 'justice, love and pity to do their cognitive work, their work of disclosing the world' (Gaita 2004: xxxvii).

Insofar as jurisprudence is discursive, it also joins philosophy in addressing conceptual concerns – with or without sensitivity to tone and sentiment (affect), and

with or without deepening the meaning or understanding of what is shared in being human. The linking of reason and sensibility, and form and content, I argue, places an account of style or eloquence at the centre of the effort to be lucid about what it means to be human. Eloquence here does not simply relate to the ability to persuade or entertain, but to our ability to articulate truthfully what it means to live well. Eloquence also relates to the ethos and training in conduct or character of the philosopher and jurisprudent. This training, for Gaita, I think, joins the calling of the philosopher to the task of being properly human.

Gaita's concern with goodness, and the ethical responsibility to live well with others, produces an exacting account of ethical life. It does the same for the training in the conduct of the scholar (Gaita 2000: 187-214). While Minson's pursuit of the calling of the scholar focuses on the 'office of humanity', Gaita's account of the training in office and vocation of the scholar is shaped by an understanding of the intrinsic worth of seeking understanding and of following knowledge and truth for the love it – for the joys and obligations it imposes. For Gaita, this involves 'thought in dialogue with a history of reflection'. It also involves induction into a way of (philosophical) life that has been given a home in the university (Gaita 2012: 1-3; Hadot 1995). Whether the involvement of a scholar in thought 'for its own sake' involves something serious and responsive, or not, depends, at least in part, on whether teachers and students are prepared to be answerable to a concept of the truth. It also depends on a broader community, as the value of the life of the mind, particularly of the unworldliness required for prolonged thought and education, needs many kinds of support (Gaita 2004: 248-249, 306-308. It also imposes many social and political obligations. Like Weber, Gaita argues that the university no longer answers to a concept of truth (Gaita 1999: 198). It has lost its sense of the seriousness of the cultivation of the life of the mind (and the love of truth) in an excessive pursuit of instrumental gain. Some of the difficulties in which the university finds itself are the result of external constraints. Mostly, however, Gaita argues, it is because scholars and others are no longer prepared to struggle to maintain a concept of the university which is answerable to or willing to assume 'responsibility for the world' – including the unworldly space of education (Gaita 2012: 15-17; Arendt 2006). This does not end the office of Scholar within the university but something other than duty and profession is needed (although the university would be diminished in other ways if those were not present).

Conclusion

Rather than tie the various forms of training in the dignity of the conduct of office into a typology, this concluding comment will simply note some of the different ways in which the interlocutors in this chapter have described what is at issue in their forms of training. I will also draw out the sense in which the training in conduct is tied to a training in decorum and eloquence.

The sections of this chapter have been presented as rival accounts of a training in dignity which are shaped in reaction to Kant's account of the inherent dignity of man. The first point is to emphasise that the account presented is partial. It concentrates on training in conduct. This has meant that many institutional questions about both the training of jurisprudents, and the institutional contexts of the development of 'discourses' of dignity, have not been addressed. The focus of this chapter has been on the formulation of training practices.

The focus of training in conduct for Hunter is the elaboration of Kant's metaphysical anthropology and cosmology. These as central to Kant's construction of ethical conduct and the principle of justice alike. The formulation of the moral law permits Kant to treat legal principle as an aspect of moral principle. While moral principle is concerned with rational willing, legal principle governs 'sensibly embodied intelligences'. At the centre of Hunter's account is the criticism of Kant's division of noumenal and phenomenal aspects of the individual ('*homo duplex*'). For Hunter, Kant's account recapitulates the Christian theological anthropology of intelligible being and its embodiment in material existence (ensoulment). The training of moral and juridical thought and ordering is designed to uphold the intelligible (noumenal) freedom around which inherent dignity of man is shaped. Autonomy and dignity are a matter of inner motivation (Hunter 2001: 328). Hunter would also draw out similar elements of moral anthropology in Dworkin and Gaita, although both naturalise Kant's anthropology. (Hunter's counter-weight is Thomasius' training in civil peace. It is a training that recognises not the perfectiability of man, but his weakness and need for sociability to survive (Hunter 2001:158). Dignity, as indicated in the last chapter, is a matter of honour and rank).

Given the sharpness of Hunter's reading of Kant, and of the long running polemic between 'rival enlightenments' and beyond, it is tempting to organise the engagement

with dignity only as a matter of disputed inheritance. In this chapter, in treating Kant's account of dignity as one account of dignity amongst others, I have pluralised accounts of dignity. In addition, rather than treating the jurisprudential concern with dignity as one of 'grounding' legal thought, I have given emphasis to the mode and manner of training in conduct. So in following Dworkin's account of dignity, I have noted both the Kantian transformation of dignity, and the different methods of training. In doing so I have followed Hunter's focus on the movement between the phenomenal and noumenal worlds and the different formulations this might make. Where Hunter finds this ordering vicious, Gaita has turned attention to the distinctions between duty and love, not as a Christian but someone living in common.

Finally, I have noted the ways in which training in conduct and in dignity and civility is linked to decorum and eloquence. In doing this, I have begun to draw out my own gloss on the conduct of life appropriate to the office of jurisprudent.

Part Two: An Introduction

Appropriate Conduct – Exercises of Jurisdiction

Part One of this thesis considered the training in conduct required of office, and of the office of the jurisprudent. In Part Two, attention is turned to the occupation of office and to the relations between jurisprudence, jurisdiction and the repertoires of the conduct of lawful relations. This Part addresses the ways in which jurisprudents have addressed the conduct of lawful relations and the forms of government of oneself and of others. The central focus is on the ways in which the repertoires of assisted dying are authorised and represented. It takes as its central concern the jurisdictional authorisation and arrangement of the conduct of dying under medical supervision. This Part draws out the ways in which the contemporary practice of the office of jurisprudent has organised accounts of assisted dying according to different, often rival, jurisdictional modes of authorising the conduct of lawful relations. Chapter Five addresses jurisdictional arrangements which emphasise civility of conduct. Chapter Six considers those arrangements that organise assisted dying as a matter of dignity of conscience.

In talking about office, conduct and training, Part One does two things. First, it seeks, as a reflective activity, to understand the rival traditions of the conduct of office. It proceeds by addressing the ways in which the repertoires of engagement of office can be made visible through the analysis of disputes over conduct and training in office. Part One takes as central to the understanding of training in office a training in civility and dignity. Civility and dignity are key to both the evaluation and conduct of office. In order to understand contemporary accounts of office, it is argued, the appropriate register through which to address these is that of decorum and eloquence. (It is this register, rather than that of fact, history or politics which holds a rhetorical ethic of office in place).

This Part turns specifically to the office of jurisprudent and addresses the duties and responsibilities taken up by that office in the care of the dying and the dead. Part One examined training in conduct. If one accepts that such training is necessary, then that entails also accepting a style of thought which accepts that duties, obligations and

responsibilities are part of office. It is argued that what is important, then, in taking up an office is to recognise the duties and responsibilities of *that* office, and to be prepared to take those up. The claim is that this is done through reading law and jurisprudence materials (rather than, say, following university management practices). Part Two moves to a specific examination of the ways in which the *persona* of the jurisprudent takes up and assigns responsibility to the office of the jurisprudent. It looks at the duties and responsibilities of that office in relation to the care of the dying and the dead. Of course, jurisprudents, particularly over the last 30 years, have written about, and taken up, duties and responsibilities for the care of the dying and the dead. What is important here, however – in a thesis which is concerned with conduct and office – is to focus attention on the procedure of taking up an office and of being prepared to take on its duties and responsibilities – as a deliberate action. These concerns with conduct of office are addressed in the register of eloquence and decorum in order to hold in place both the acknowledgement of rival accounts of the obligations of the office of the jurisprudent and rival accounts of the appropriate comportment of the dying and the dead.

The formulation of relations between jurisdiction and civility and dignity, it is argued, provides an important way of analysing the conduct of lawful relations and of linking the writing of jurisprudence to the formulation of the diverse *ars moriendi* recommended in contemporary projects of common law jurisprudence. The treatment of the conduct of lawful relations as a concern of jurisdictional authorisation opens the way for a substantive engagement with the crafting of lawful relations. Such forms of analysis give emphasis to explanations shaped by instituted techniques which in turn can be described in terms of histories and conducts of institutional life. This is not the only way of engaging conduct of others and conduct of the self. Raimond Gaita, for example, as discussed in Chapter Four, presents an account of dignity that places weight on the practices of meaning-making and community. He considers legal forms more responsive to, than creative of, conduct. Finally, considering the conduct of office also directs attention to the ways in which the *persona* of the jurisprudent recommends forms of conduct of others and conduct of the self for those who are dying and those who assist in dying.

What is addressed in this Part of the thesis is the quality of relations of civility and dignity established, and made visible, through a practice of jurisdiction. What is

addressed is the characterisation of the conduct of lawful relations as part of a range of jurisprudence projects. One consequence of this style of analysis, as developed in Part One, is the distancing of substantive engagement with accounts of dignity from a direct appeal to the ethical engagement with those who seek assistance in dying. This Part, then, does not produce a strong normative theory of dignity or establish dignity as a horizon of reason. Instead, it offers accounts of a number of 'civility and dignity practices' understood from within the office of jurisprudent and through rival jurisprudences of jurisdiction.

The pattern of this Part of the thesis, then, repeats that of Part One. It begins with the repertories of civil prudence and brings these into relation with rival jurisprudences found in the idealist inheritance. Chapter Five is patterned around civil jurisprudence and Chapter Six is patterned around the engagement of a civil prudence with forms of idealist prudence. In this Part, these engagements are treated as part of a jurisprudence of jurisdiction. It stresses the ways in which the jurists, law officers, and jurisprudents present and represent a training in the conduct of medically assisted dying subject to a civil authority. In so doing, it provides a gloss on the training in comportment for the dying which is presented through the office of the jurisprudent.

Chapter Five

Civility and Dying in a Dignified Manner

Introduction

The immediate concern of this chapter is the conduct of the office of the jurisprudent. Its subject matter is the elaboration of the contemporary ordering of assisted dying in Australia and the United Kingdom as a concern of civil jurisprudence. It addresses this institutional ordering to draw out the ways in which forms of civil jurisprudence might establish a jurisdiction shaped (patterned) around dying with civility or in a dignified manner. The second concern of this chapter is to consider the responsibility of the office of (civil) Jurisprudent in the care of the dying. If, as is suggested, civil jurisprudence and prudence projects suggest conducts of civic life, what kind of citizenship projects are jurisprudents elaborating? To answer this question, this chapter redescribes the sense in which dying in a dignified manner relies on a civil jurisdiction of persons. As well as providing a formal point of engagement between jurisprudence projects and institutional arrangements, it also allows for treating questions of dignity to be considered as part of a juridical practice rather than as an external moral measure (Hart 2012: 79-100).

In this chapter the duties of the jurisprudent in relation to forms of dying under medical supervision are drawn through the civil ordering of assisted dying in Australia and the United Kingdom. The subject-matter of this chapter is formed out of two case studies and a brief note framing an account of dying in a dignified manner. The first case study is that of the Northern Territory's *Rights of the Terminally Ill Act* 1995 (NT) and the subsequent litigation and legislation in Australia relating to this act.[1] The *Act* permitted, in certain circumstances, a registered medical practitioner to assist a patient to 'die in a humane and dignified manner' without being subject as a consequence to prosecution for unlawful killing.[2] The validity of the legislation was unsuccessfully

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1 The legislation can be viewed at www.nt.gov.au/lant/parliament/committees/rotti/rotti95.pdf (last accessed 1 December 2017).

2 The terminology of 'dying in a humane and dignified manner' is taken from Schedule Seven of the *Rights of the Terminally Ill Act* 1995 (NT).

challenged in the Northern Territory Supreme Court in *Wake and Gondarra v NT and Asche* (1996) NTR 109:1 before the Act was finally rendered ineffective by the *Euthanasia Laws Act* 1997 (Cth). The *Act*, I think, is instructive for the direct way in which it drew on a civil jurisprudential tradition in order to establish a civil authority over assisted suicide. It also describes something like the status or legal personality of the terminally ill person. The second case study is the decision of the Supreme Court of the United Kingdom in *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent); R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions* (UKSC 38) (*Nicklinson*). These cases, which were heard together, formed part of a series in which the court addressed the question of whether the law of the United Kingdom in relation to assisted suicide infringed the European Convention on Human Rights (ETS 5; 213 UNTS 221). The case is of particular interest here for the way in which it addressed the obligations of the office of prosecutor in the formulation of the public interest in relation to assisted dying.[3] Finally, a brief note addresses the recently enacted *Assisted Dying Act* 2017 (Vic) which permits, in certain circumstance, assisted dying of the terminally ill in Victoria, Australia. It is the first piece of legislation in Australia to permit assisted dying in the form of active voluntary euthanasia.[4]

Over the last thirty years in Australia there has been a major re-ordering of the civil jurisdiction over dying under medical supervision. The treatment, care and management of the 'end of life' in hospital and in institutions of aged care have been cast in terms of public care and choice (Veitch K 2007; Murphy 2013). Such regulation includes the 're-juridification' of the circumstances under which it is permissible to refuse medical treatment, the conditions that establish decision-making and care regimes at the end of life, and the provision of palliative care. Depending on the crafting of legal regimes, assisted dying can either be treated as part of such regimes or as a moral-political exception.

The licit forms of dying before the law are varied. The contemporary debates around assisted dying have revived philosophical debates about the ways of giving value

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[3] The formal question for the Court was whether the code published by the Department of Public Prosecutions as to when they would prosecute those who were alleged to have assisted a suicide was lawful [para. 1, per Neuberger L].

[4] The Victorian Act was enacted after the completion of this thesis. It does not come into force until 2019. However, for completeness I have added some short commentary on it.

to life and to suicide. They have brought to the fore the ways in which dying even in hospitals has not until recently been the subject of modern legal regulation. Advances in medical technology, changing understandings of health and the increased numbers of people dying in hospitals have all intensified the requirement to articulate the conditions of dying. The projects of governance started in the 1980s have done much to subject dying in hospital to governance. This regulation, while producing forms of governance, has also made more complex the legal contest over the status of the value of life and dying under medical supervision. At present homicide law shapes the law of dying under medical supervision. Ways are found to craft relations which allow a care at the end of life that acknowledges that such care will hasten death. This has produced a sophisticated jurisprudence and practice that have found distance between the duties and activities of health care providers and the juridical ordering of homicide.

To encapsulate what might be at issue in dying in a dignified manner, it is worth noting the licit forms of assisted dying in hospital current available in Australia. The image which opened this thesis (Chapter One) was of patients voluntarily starving themselves in order to end their life. As a statement of law, in Australia the medical practitioner is able to hasten death provided it is a part of pain relief. The patient can refuse all forms of medical treatment but the question, for health care practitioners, whether they can assist someone in dying by ameliorating the effects of starvation. The counter-images are ones of the good death, which will be discussed at the end of this chapter. In this chapter the legal forms created to allow various types of assisted dying will be figured in terms of repertoires of conduct. They then will be addressed as a matter of comportment and of 'dying in a dignified manner'.

1. Dying in a Dignified Manner[5]

A concern with 'dying in a dignified manner', I argue, has been at the centre of accounts of assisted dying in the schemes of civil jurisprudence. This section draws out the way in which civil jurisprudence and prudence make available a variety of *ars moriendi* – that is, a variety of ways of dying under medical supervision. In the polemics surrounding assisted dying, the presentation of styles of *ars moriendi* are contested in

[5] This section and the first subsection of the next section extends *Jurisdiction* (Dorsett and McVeigh: 2012: 85-89).

terms of the power of life and death over the natural person and the responsibilities of medical practitioners and health care providers. Both the proponents of autonomy and of the sanctity of life arguments lay claim to the authority of what would, I argue in the next chapter, once have been a spiritual jurisdiction (or a jurisdiction that is capable of being spiritualised). As noted in Chapter One, such a jurisdiction – which is named as a jurisdiction of conscience here – has historically claimed authority through the Church. The civil jurisdiction, however, is primarily concerned with state interest and civil order, as well as with social conduct and, I argue, social honour (see Chapter Three). Death with dignity, under a civil jurisdiction, might be understood as a matter of honour or at least avoiding dishonour or shame.

What might count as an interest of the state or a matter of public interest is quite varied in both Australia and the United Kingdom. This might include the preservation of the authority of the civil authority of the state and the protection of life of its citizen-subjects. Disputes over the status of dying have created irreconcilable conflict. However, in Australia and the United Kingdom such disputes do not create widespread civil unrest, as has occurred in the context of the provision of reproductive health.[6] They do, however, raise widespread opposition to assisted dying from religious bodies. They also demonstrate the presence of rival sources of authority for conduct. Concerns of civil jurisprudence here include the government and self-government of the health of its citizen-subjects, the protection of the vulnerable, the protection of the dignity (or reputation) of the medical profession, the maintenance of insurance schemes, the management of scarce financial and medical resources of the state and the protection of religious freedom.

The link between the public interest in the life and death of the population of a civil state and particular accounts of assisted dying is also diffuse. However, I suggest such concerns can usefully be encapsulated in terms of 'citizenship projects' relating to health (Minson 1984, 1993). A civil and civic *ars moriendi* can be understood as establishing repertoires of dying shaped by as an interest of government, citizenship and the government of the self (Lawton 2000: 17–20; Elias 1985: 33). The commitments of government are general – the cultivation of an *ars moriendi* as a health project. The commitments of the citizen are quite specific – the requirements of

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6 For example, the *Public Health and Wellbeing Amendment (Safe Access Zones) Act* 2015 (Vic). This Act sets up zones outside of health clinics in which people cannot protest against abortion.

citizenship asked of the terminally ill. The argument that assisted dying can be conceived of as a project of citizenship will be tested (and qualified) in this chapter. Its strength is that it provides a register of civil authority and civic action. Its weakness relates to the sense in which the obligations of citizenship are no longer readily articulated as positive duties in the spheres of labour, health and family life (Porter 2011). At issue here is the *ars moriendi* given shape within the office of jurisprudent.

The common law tradition has inherited the literatures of the Christian *ars moriendi* (Lacquer 2015; Lavi 2009). Manuals for preparation for death, for mourning and for the conduct of funerals are emblematic. In Christian liturgies and theologies, preparedness for death has two elements. One relates to the teaching of the church, sacramental or otherwise, and the other relates to the spiritual preparation for death. These provide forms of spiritual exercises that cultivate the sense of separation of the spirit (soul) from the (mortal) body (Rose 1993: 110-134; Llewellyn 2013). Many contemporary non-religious guides to dying and death share both a practice of spiritual exercises and a desire for a transformation of the end of life. Preparation for death is addressed through the cultivation of an 'inner' or 'spiritual' comportment (Elias 1985). Shai Lavi, for example, notes the impact of Christian Methodist preparations for a 'joyful death' in the literatures of death and dying in the United States of America (Lavi 2005: 14-41).

The institutional and therapeutic aspects of palliative care continue many facets of a spiritual preparation for death within a Catholic tradition. While at one level this is perhaps not surprising since the palliative care 'movement' grew out of the practices of religious foundations in their care for the dying, what is notable is the way that these practices have been integrated into health care institutions (Nuland 1994). Some of the institutions of palliative care oppose assisted dying as being against the ethos of medical practice (euthanasia is a harm and against life). They are also opposed because it presents an inadequate spiritual preparation for death. These concerns are expressed both within and without the medical profession in Australia.[7] Their arguments are

[7] Institutions of palliative care have also distinguished themselves from those who support physician assisted dying and have resisted legislation decriminalising assisted suicide. An indicative account can be found in Radruch et al (2015). See also the statement by Palliative Care Australia (2011) on assisted suicide: http://palliativecare.org.au/wp-content/uploads/dlm_uploads/2015/08/20160823-Euthanasia-and-Physician-Assisted-Suicide-Final.pdf (accessed 2 December 2017).

closely aligned in outcome to those of professional bodies in Australia.[8]

2. The Status and Conduct of the Terminally Ill Patient

This section and the next turn to the crafting of a jurisdiction over dying and the creation of the status of a 'terminally ill' legal person. In this context assisted suicide is considered as a concern of government and civil order and addresses those who occupy a number of roles (offices): citizen, medical practitioner, social worker and so on. Here I follow two aspects of giving of juridical form to assistance in dying under medical supervision: the status of the terminally ill patient and the relations between the carer and the dying.

Rights of the Terminally Ill Act 1995 (NT)

It is usual to date modern judicial and legislative consideration of assisted dying under medical supervision to the late nineteenth century, especially in its relation to, or contrast with, eugenics (Legemaate 1998). However, as Lavi has noted, issues of how to die well date from an earlier period (Lavi 2005). The legal regulation of the terminally ill under medical supervision, however, has a more recent history (Otlowski 1997; Bartles and Otlowski 2010; Pritchard 2012; Geddis and Gavaghan 2016). The Northern Territory's *Rights of the Terminally Ill Act* was one of a number of such legislative interventions in the 1990s. There are currently some fourteen jurisdictions in Europe and the United States that have enacted forms of assisted suicide legislation (Otter 2017).[9]

The Northern Territory's *Rights of the Terminally Ill Act* established a status (the-terminally-ill-patient-under-medical-supervision) and a mode of conduct phrased in terms of an ethics of comportment. The Act set out a limited number of duties, rights, immunities and administrative arrangements. Section 4 confirmed a right to request assistance in dying in a dignified manner, while sections 6 and 7 set out the requirements that had to be fulfilled before a doctor could give assistance without

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8 For the recent position statement of the Australian Medical Association on euthanasia and physician assisted suicide (24/11/201): https://ama.com.au/position-statement/euthanasia-and-physician-assisted-suicide-2016 (accessed 2 Dec 2017).

9 https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13834-voluntary-assisted-dying-bill-2017.

criminal prosecution. The doctor was given the right not to treat (s 5). What is of interest here is the range of jurisdictional devices relating to office, legal status and the administrative delimitation of role used to shape the status of the terminally ill patient under medical supervision. The patient was represented as a petitioner before the medical practitioner and the medical practitioner was considered in relation to the Northern Territory (the civil state). In the Act, a patient could initiate proceedings by petitioning the medical practitioner for assistance to die in a dignified manner (s 4).

The legal relations enacted in the *Rights of the Terminally Ill Act* did not, as might have been be expected, express a direct legal relation between the doctor and the patient. This relationship remained regulated by general law. What held the activity of dying in a dignified manner in place was a series of documentary exchanges between the patient and the doctor and between the doctor and public administrators. Section 6 addressed the comportment of the medical practitioner and section 7 that of the patient. Section 6 asserted that the medical practitioner should not act in bad faith or for undue financial reward. Section 7 set out the conditions under which the medical practitioner might have assisted the patient. In summary terms, these were that the medical practitioner must have been satisfied that: (i) the patient had the capacity to make a decision in relation to assisted suicide; (ii) the patient was suffering from a terminal illness whose only reasonable treatment was palliative care; and (iii) the patient's illness was causing intolerable pain and suffering. Further, the medical practitioner also had to judge whether the patient had considered their decision to commit suicide and that the formalities required by the Act had been met.

By framing its understanding of the status and conduct of the terminally ill patient under medical supervision in terms of the requirements to be established by the medical practitioner, the Act did not make any general statements as to either status or conduct. However, as with establishing criminal responsibility and decision-making capacity for the young, tests of capacity do relate to status and standing.[10] As argued in Chapter Two (and again in Chapter Six), the evidential concern with demonstrating a capacity to understand the purpose of killing oneself in social, ethical and clinical terms is also a statement of conduct. First, the patient would have had to possess a set of competencies in the management of one's affairs in relation to kin. Second, it was

[10] For example ALRC Report on Equality, Capacity and Disability in Commonwealth Laws (ALRC 2014: 219-233).

necessary to master the protocols of self-administered suicide. The status established by the legislation, then, is specific and of limited scope. It does not relate directly to either public office or the household, but it does require that various public obligations to the state, the medical profession and kin be met. Viewed in terms of a training in conduct, the occupation of the office of Medical Practitioner required a practice of restraint or disinterest (*adiaphora*). It involved the medical practitioner taking a distance from their ethical beliefs or conscience in order to adopt the appropriate 'professional' manner – for example, the setting aside of personal beliefs in order to carry out medical treatment. However, while the Act clearly establishes a new status – the status of being a terminally ill patient under medical supervision – one can speculate that under the Act this was also an office. The patient had duties and responsibilities to the medical practitioner and to their kin. They were also required to do other things: write letters; meet with social workers; and reflect seriously on the nature of their decision. In both cases – that of the medical practitioner and of the patient – the state was only interested in a limited range of interests and concerns. The obligations raised by the Act did not address all the responsibilities of the medical practitioner or the patient. Nor did they address all the possible concerns surrounding either a good or lawful death. Within a civil jurisprudence there is a plurality of offices that can be occupied for limited purposes.

The second aspect of the *Rights of the Terminally Ill Act* addressed here relates to the crafting of a jurisdiction to establish and delimit the rights of the terminally ill patient. This is a jurisdiction organised around a personal status – that of the terminally ill patient under medical supervision. The shape of this jurisdiction created under the *Rights of the Terminally Ill Act* is delimited by the general law relating to homicide and assisted suicide. Briefly, the *Act* established an immunity from criminal prosecution for homicide if the conditions of the *Act* were met (ss 20(1) and (2)). This granting of immunity from prosecution was subject to a number of reporting conditions. The provisions relating to homicide and assisted suicide in the general law remained in force (s 26(3) and the then ss 167 and 168 of the *Criminal Code* (NT)).[11]

The question of how the *Rights of the Terminally Act* represented the rights of the terminally ill is more complex. The legislation did not deal with the provision of health

[11] These sections have since been repealed. The matters would now be covered by s 156 (murder) and s 165 (encouraging and assisting suicide).

care services that shorten life. Nor did it deal with the ethics and morality of these. So, for example, in the appeal against the authority of the Northern Territory legislature to enact this law, arguments were restricted to those concerning the legal validity of the legislation (*Wake and Gondarra v NT and Asche* (1996) NTR 109:1). Substantive law was not discussed. Rather, the arguments centred on the validity of the administrative procedures already discussed.

One sharply critical way of reading this legislation is to treat the arrangement of the legislation as a suspension of the legal order. It allows a legal person to be killed without assigning responsibility. Here I will follow a civil prudential representation that defends the ordering of this legislation. The first point to note, then, is that this legislation was not structured simply around an assertion of a sovereign-subject relation. The displacement of the operation of the criminal code recognised competing interests of state and health care professionals.

The characterisation of the relation between the doctor and patient as being a voluntarily assumed obligation, rather than a duty of medical professional care, reflected another contest of authority and office. The legislation joined a practice of allowing the medical practitioner to not treat the patient as a concern of 'conscience' (Saunders 2004, Goodrich 2013). This gesture should be understood both morally and politically as acknowledging that health care practitioners can have reasons, acceptable to a court, not to participate in the subject matter of the regulation.[12] The model of this legislation joined long established forms of legislation that authorised people to carry out particular activities through the of crafting an exception to the general law on the grounds of a risk to health or life. The regulation of abortion in Australia and the United Kingdom provides the template for this form of regulation (Blom-Cooper and Drewry 1976: 187-207).

How such arrangements of rival authorities and interests are best understood and managed has been a subject of jurisprudential dispute. Oenen has argued that such legislation allows for the contest or, in his words, the 'scandal', of assisted suicide to remain visible, even as it is described into legal form (Oenen, 2004: 153–55). This

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[12] The ongoing religious contest as to assisted dying can be seen in the recent reaction by Catholic Health Australia to the newly passed Victorian Act, 27 October 2017: https://www.cha.org.au/images/Media_Releases/20171020_MR_VAD_Vic_Final.pdf (accessed 1 December 2017).

formulation captures something of the concerns of conscience in the regulation of assisted dying. However, it assumes a position in which a public or religious morality would find a scandal. Within the idioms of civil jurisprudence, it can be noted that the *Rights of the Terminally Act* does not necessarily recognise a rival source of public authority over the care of the dying. Rather, it tolerates a form of private conscience.

Whether the *Rights of the Terminally Ill Act* should be understood as a partial de-sacralisation of the Australian state, or as the enfolding of a jurisdiction of conscience into the common law, depends on how the contest of authority is understood. The Act did not comment. It did not so much address the world through a complex engagement with forms of moral and legal authority as leave open a place of law shaped by public health concerns and social honour. The civil jurisprudential account presented here acknowledges a contest of authority. This account would treat the formulation of assisted dying as an exception to general law. It would also treat conscience as an exception to working within the law. Both are, therefore, instances of toleration. Such toleration assumes state authority and accepts dissent on the basis of private conscience rather than rival public authorities (Hunter 2015).

Finally, what is to be made of the 'dignified manners' of assisted suicide? The legislation established a limited conduct of life based on institutional arrangements. Those arrangements did not carry great meaning within the legal domain but were described in terms of an *ars moriendi* without general reference to human status, general rights or political ambition. The risk of such a 'thin' account of dying in a dignified manner is that it might also make the description of office more difficult through legal ordering. From the viewpoint of a civil jurisprudence there is little problem in attaching the duties and responsibilities of those who assist in care of the medically assisted dying to an office. The same can be said in representing assisted dying as a distinct citizenship project. However, the thinness of description also opens the civil jurisprudential account to criticism for its limited concern with the conduct of dying. Assisted suicide legislation, such as the *Rights of the Terminally Ill Act*, continues to be opposed by medical practitioners on the grounds of professional ethics. Similarly, religious groups oppose such legislation on the grounds of religious belief and the sanctity of life. Civil authorities, by contrast, have been content to treat care at the end of life through administrative forms and procedure. Civil prudence and dignified manners might seem a rather slight way to give weight to matters of assisted dying.

However, as the discussion of decorum and civility undertaken in Part One of this thesis suggests, such arrangements are capable of carrying considerable meaning.

R (on the application of Nicklinson and another)

This section briefly addresses another form of civil prudence, this time shaped by the practice of the office of the prosecutor. The recent decision of the Supreme Court of the United Kingdom in *Nicklinson* tested the legality of laws in the United Kingdom that make assisting suicide a criminal office. The Supreme Court provided an exhaustive analysis and consolidation of nearly fifteen years of litigation linking assisted suicide and dying under medical supervision with the rights expressed in the *European Convention on Human Rights* (ECHR) and *Human Rights Act* 1998 (UK). The litigation invited the Supreme Court to declare that s 2 of the *Suicide Act* 1961 (UK) was contrary to the right to respect for private and family life in Art. 8 of the ECHR. A declaration was also sought that the DPP should refine its policy for prosecution pursuant to s 2(4) *Suicide Act* (criminal liability for complicity in another's suicide).[13]

The applicants sought declarations from the Court that various forms of assistance in dying would not be the subject of prosecution. Mr Nicklinson died from starvation after refusing nourishment in August 2012. Mr Lamb was unable to move any part of his body except his right hand. The third applicant, Mr Martin, suffered a brainstem stroke in August 2008. He was at that time unable to move and wished to go to Switzerland to end his life in the care of the organisation *Dignitas*.

A substantial part of the judgement was concerned with the authority of the court to declare s 2 of the *Suicide Act* incompatible with Art. 8 of the ECHR (Neuberger at [111]). A majority of the court declared that was a significant interference with the rights of the applicants under Art. 8 by the that provision of the *Suicide Act* (Neuberger at [111]). Two judges, Lady Hale and Lord Kerr, would have gone as far as making declarations of incompatibility (Hale at [300]; Kerr at [327]).

In *Nicklinson*, Lord Neuberger noted that the decision of the European Court of

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[13] Crown Prosecution Service (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide: Issued by the Director of Public Prosecutions* (February 2010) http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf (Viewed 1 December 2017).

Human Rights in *Haas v Switzerland* ((App. 31322/07) 2 ECHR 2011) had made explicit that the respect for private and family life in Art. 8 includes respect for the decision of how and when to end a life. Nevertheless, in the context of assisted suicide, the European Court of Human Rights held that States have a right to legislate on matters of assisted suicide as they think appropriate – even if such legislation prohibits assisted suicide. Art. 8 also conferred a duty to protect vulnerable persons (Lord Neuberger at [51], [67]). This last aspect of the Court's judgment in *Nicklinson* will be addressed again in Chapter Six, where consideration will be given to the importance of, and forms of, appeal to conscience, suffering and the value of life. In that chapter, they will be addressed as part of a jurisdiction of conscience. In this chapter, the policy on prosecution will be considered as part of a jurisdiction of government and a civil prudence.

In the matter of the policy on prosecution the Court held unanimously that the current policy was sufficient. In order to address this matter, the *Nicklinson* Court reviewed a series of earlier cases on the obligations of the State in interpreting the ECHR.[14] The Department of Public Prosecution (DPP) has the responsibility to prosecute in the public interest. In *Purdy v DPP* (2009) the (then) House of Lords instructed the DPP to produce a document outlining their policy on prosecution. The existing *Code for Crown Prosecutors* was considered unclear on this matter. There was a disparity between that policy and the actual practice of prosecution (*Purdy* at [55]; White and Downie 2012: 663-667; Weeks 2016: 68-75; Downie 2016).[15] In 2010 the DPP produced a policy document which provided sixteen factors that might indicate when prosecution should be pursued, and six factors that indicted [indicated?] that it should not.

In the context of this chapter the policy is interesting for the way in which it can be understood as a policy directed by the interests of the state. The interest taken here lies with the comparison with the approach taken in the *Rights of the Terminally Ill Act*. The policy is not surprising. It is shaped by the existing law relating to assisted

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[14] *M v N and Others* [2015] EWCOP 76; (2015) 18 CCL Rep 603; *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; [2014] AC 591; W v M [2011] EWHC 2443 (Fam); [2012] 1 WLR 1653; R (Purdy) v DPP [2009] UKHL 45; [2010] 1AC 345; *Pretty v United Kingdom* (2346 / 02) [2002] 2 FLR 45; *Airedale NHS Trust v Bland* [1993] AC 789.

[15] Details of the reporting of the Crown Prosecution Service can be found at: http://www.cps.gov.uk/publications/prosecution/assisted_suicide.html (accessed 1 December 2017).

suicide and a combination of concerns relating to securing a possible conviction and the public interest in so doing.

The sixteen factors included matters tending to favour prosecution which were related to:

1. The status and capacity of the victim;
2. The settled quality of decision-making of the victim and the communication of that decision-making;
3. The relationship between the victim and suspect;
4. The motivation of the suspect; and
5. Whether the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer (whether for payment or not) or a person in authority, such as a prison officer. And it asked whether the victim was in that person's care.

Public interest factors tending against prosecution were:

1. The victim had reached a voluntary, clear, settled and informed decision to commit suicide.
2. The suspect was wholly motivated by compassion.
3. The actions of the suspect were minor, had involved dissuasion and the suspect had co-operated with the police.

The list, for the most part, is as it is stated to be: a non-exhaustive list of factors that would be taken into consideration in judging whether to prosecute as part of the judgment of a prosecutor on a case-by-case basis (UK DPP Policy [39]-[40]). For Downie and White, this list is not shaped around guiding principles and is not directed towards offering direct advice to citizens who might be contemplating assisting someone to kill themselves (2012: 667). For Downie and White, the prosecutorial concern with the elements of a criminal office (assisting suicide) did not assist those who wanted to know if they would be prosecuted. Mr Martin, for example, wanted a health care worker or a member of the public to be able to assist his suicide. He challenged the lack of clarity in the DPP prosecutorial charging guidelines with respect to health care providers. In his application Mr Martin noted that the guidelines did not cover hospital or professional care at the end of life. They were concerned with excluding individual acts of compassion from the prosecutorial process. The

prosecutorial advice, in other words, addressed the sorts of situations found in mercy killings (Devlin 1985). In this respect they protected a sphere of action that was not directly engaged with the concerns of civil prudence – although they may also reflect the immediate circumstance of the *Purdy case*. The Supreme Court in *Nicklinson* preferred not to intervene, although it held that it had the power to do so where the guidelines were not clear (Lord Neuberger at [132]-[146]; Lord Sumption at [236]-[254]; Downie and White 2012: 667-9; Downie 2016: 91-93).

This section concludes by drawing out the ways in which *Nicklinson* joins a civil prudential account of assisted suicide and also by considering three lines of argument that suggest that it might not. The first is the civil prudential alignment. Easily missed in the detail is the simple assertion of state interest in euthanasia and assisted dying as a matter of public health and public morality. The Crown Prosecution Service is, itself, an institution of the administration of justice in the public interest. A decision as to what might constitute the public interest is particular to each case and made *ex post facto* (Mance at [272]-[279]). In addition, the public interest in the regulation of the end of life is varied and not necessarily shaped, or shaped only, by either a principle of human right or a search for the good death.

The first line of argument that runs against the consideration of *Nicklinson* as embedded in the idioms of civil jurisprudence and prudence is that of the frame of the ECHR itself. Within this convention the public interest is treated as an exception to the order of human rights. The complex status of the reception of human rights legislation by the United Kingdom has been finessed in the *Human Rights Act* 1998 (UK). That Act produces an alignment of rival authorities in terms of a procedural arrangement of hierarchies of sources of argument. A second argument notes that, in significant ways, the argument used in *Nicklinson* draws on methods of interpretation of human rights. It is this argument that is addressed next. A third argument is a concern with the reverence or sanctity of life. This is a concern with perfection or transformation of life that does not play a part in civil jurisprudence. This is addressed in the next chapter.

In one account of civil jurisprudence, the appropriate form of law is legislation and judicial rule application. If legal method turns away from this form, it is argued, it runs the risk of claiming another authority aside from that of state law. This is especially so in the conduct of human rights arguments which often do claim authority

independently of the state (Saunders 1997, Genovese 2013). The judgment in *Nicklinson*, it is argued, did not exclusively rely either on legislation or legalism. In academic discussion of the case, it is the concern with human rights and the care of the vulnerable that has raised most interest (Herring 2013, Wicks 2015). Therese Murphy argues, for example, that there is a distinct 'human rights method' which forms a distinct kind of legal reasoning within legal discourse. What is distinct about human rights method, Murphy argues, is the way that method participates in a number of institutional arrangements of human rights. At the centre of her argument is a concern with 'speakability' and the difficult choices that are made in the context of reproduction and dying. For Murphy, these concerns are drawn into the office (my interpolation) of being a 'human rights lawyer': respecting dignity of choice; and listening to and bearing witness (Murphy 2013: 183-187). This is also the case for both patients and medical practitioners (Magnussen 2002). In writing about deepening the language of dignity, listening and bearing witness, Murphy's account can be read as turning human rights method towards a jurisdiction of conscience shaped by an ethnographic description of ethical and legal practice and the *persona* of human rights lawyer (Jean-Klein and Riles 2005).

In Murphy's formulation, the human rights lawyer develops a distinct *persona* and a mode of conduct appropriate to human rights institutions – whether or not they are subject to state ordering.[16] Here the question is whether such a formulation can form a part of a civil prudence and jurisprudence. Both the deepening of the affective language and responsiveness of the institutions of law, and the pluralising of the obligations of office, can be framed in the language of dignified manners and comportment. In Chapter Four, I noted that Gaita argues that ethical judgment about human relations requires both reason and sensibility (Gaita 2000). Minson's account of civil prudence also includes an account of the sensibilities that might be required of an official (Minson 2014). While the concerns of Chapter Three related to cultivating a certain disinterestedness (*adiaphora*), these did not limit the range of responses that could be asked of a judge or other legal official. Murphy's account, then, might be held to the range of responses within the idiom of civil prudence. It depends in on a sense

[16] See also WT Murphy (1997) for a more detailed version of this argument framed in terms of the history and epistemology of the techniques and measures of law and the conduct of government through legal institutions. Murphy notes that legal institutions are more concerned with review than with government (Murphy 1997: 194-209).

of whether the languages of dignity and human rights address comportment and conduct rather the conscience of the lawyer and those who come before the law. The central concern of this chapter has not been shaped by the deepening dignity of choice so much as by dignified manners and comportment.

In closing this section, it can be noted that the criteria that will be taken into account when the DPP has to decide whether to prosecute also provide a comportment or form of conduct for both the person assisting and the person assisted. Whether social honour, dignified manners and compassion remain sufficient to sustain a civil prudential account of dying in a dignified manner is uncertain. Whether a jurisprudence can sustain such attributes in a language of civility is similarly uncertain. In the context of assisted dying in the United Kingdom, the Court in *Nicklinson* assigned the DPP the task of addressing 'the scandal' of not being able to live with the law relating to dying. This sets the legal discourse of dying within the realm of civil prudence.

Voluntary Assisted Dying Act *2017 (Vic)*

The third case study is the state of Victoria's recently passed *Voluntary Assisted Dying Act* (2017) (29 November 2017) which is due to come into effect in mid-2019. Like certain legislation in the United States it permits assistance in dying, in certain circumstances, to a person who is terminally ill with a progressive, incurable disease that has no tolerable treatment. It also permits doctors to assist dying in certain circumstances when the patients are unable to do so by themselves.[17] Here, brief comment only is made, because, as already noted, this Act was passed after while the final draft of this thesis was being completed.

In following an account of civil prudence, I would like to consider some of the ways in which the status and the comportment of the terminally ill person are addressed in this legislation. The first point to note is the continuity of the substance of the legislation with the older legislative forms used in the *Rights of the Terminally Ill Act*. There are a number of obvious points of connection between the two Acts. The new

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[17] For example seethe Washington *Death with Dignity Act 2009* c 1 § 26 (Initiative Measure No. 1000, approved November 4, 2008) which is discussed in Chapter Six. A survey of the regulation of assisted dying in the legislation of the states of the United States of America can be found at: https://euthanasia.procon.org/view.resource.php?resourceID=000132 (viewed 1 Dec 2017).

Act is much more detailed. While the *Rights of the Terminally Ill Act* was a mere 21 sections in total, this new legislation has 141 sections. Nevertheless, they have much in common in terms of form and technique. The narrative of Victorian legislation follows that of the request and response for assistance that we saw in the earlier legislation. In shaping the legislation around the voluntary request, the Act arranges its duties, rights, privileges and immunities in terms of the capacity and status of the patient (ss 6, 9), the voluntarily assumed obligations of the medical practitioner, the actions that are permitted (including assistance in dying (s 53)) and the review and audit of practice. So, just as was found that in the *Rights of the Terminally Ill Act* the provisions create a status, here it might be described somewhat inelegantly as 'a person who is eligible for access to voluntary assisted dying' (s 9). Whether that also can be considered an office is subject to the same uncertainty as we saw with respect to the earlier Act – although we might think not, as this seems an even thinner status than that in the Northern Territory legislation.

Second, despite being considerably more detailed, the new Act is nevertheless also framed in terms of procedures. It sets out the process, commencing with determining the status of who can make a request. It specifies who can respond and sets out under what circumstances that response can be made. The detail of procedure and documentation belies the simplicity of the instruction, which is to ensure that the terminally ill person is eligible to access voluntary assisted suicide and that the coordinating medical practitioner is able to prescribe, supply, report on and, if necessary, administer 'the voluntary assisted dying substance' without incurring criminal liability (ss 45, 46, 53, 79-82). Third, this Act also treats the arrangement of the legislation as a suspension of the legal order and the accompanying creation of a legal person who can be killed without responsibility.

The innovation of the *Voluntary Assisted Dying Act* is to set assisted dying within the framework of care for the end of life. At least the Act is placed there by the Legislative Council Legal and Social Issues Committee of the Parliament of Victoria's Inquiry into End of Life Choices (PoV 2016). Despite the opposition from many palliative care organisations to the linking of palliative care with assisted dying, the Inquiry treated both as part of the overall concern of government with 'life choices at the end of life'. The Inquiry also noted that the ways in which the existing legal framework shaped end of life experiences did not reflect either the current practice of end of life care or the

wishes of many who were consulted (PoV 2016: 194-206). In this respect, while the legislation is formally constructed as an exception to the law of homicide and assisted suicide, it is shaped within a general governmental scheme of healthcare. ('Life Choices', I think, reflects a concern not to be seen as regulating the end of life itself.) Thus, the place of conscience and exception is seen as part of a schema within existing government policy in relation to health rather than as an exception to the general law of homicide.

Finally, I would note the language of value which frames the *Voluntary Assisted Dying Act* (Vic). Section 5 sets out the values as follows:

> (1) A person exercising a power or performing a function or duty under this Act must have regard to the following principles—
>
> (a) every human life has equal value;
>
> (b) a person's autonomy should be respected;
>
> (c) a person has the right to be supported in making informed decisions about the person's medical treatment, and should be given, in a manner the person understands, information about medical treatment options including comfort and palliative care);
>
> (d) every person approaching the end of life should be provided with quality care to minimise the person's suffering and maximise the person's quality of life;
>
> (e) a therapeutic relationship between a person and the person's health practitioner should, wherever possible, be supported and maintained;
>
> (f) individuals should be encouraged to openly discuss death and dying and an individual's preferences and values should be encouraged and promoted;
>
> (g) individuals should be supported in conversations with the individual's health practitioners, family and carers and community about treatment and care preferences;
>
> (h) individuals are entitled to genuine choices regarding their treatment and care;
>
> (i) there is a need to protect individuals who may be subject to abuse;

(j) all persons, including health practitioners, have the right to be shown respect for their culture, beliefs, values and personal characteristics.

These principles express a language of public value and health care ethics but are not expressed explicitly in a language of human rights (for example, the right to life, the right to be free from cruel and degrading treatment, the right to privacy, to conscience and to religion). As elements that cross theology, ethics, government and law they have considerable reach. As Gaita has argued in relation to dignity, they have value in the world of meaning. They also have provenance within legal forms. The first two (a-b) reflect directly human rights discourse, although the language of dignity is not used. The second three (c-e) relate to government policy and current law and reflect citizens' rights and public duties. The next set of principles presents a distinct shape for a citizen at the end of life (f-g). They are encouraged to talk about death (in terms of preferences), be supported in conversations and given genuine choices. The next subsection (h) concerns patient choice. Subsection (i) addresses vulnerability, while (j) returns us to the language of human rights and respect for the plurality of life.

These are not duties in the sense that the *Rights of the Terminally Ill Act* imposed conditions prior to securing assistance. However, they reflect the sense that assisted dying is part of being given genuine choices. They are about conduct and being trained in a conduct. The citizens of Victoria are being trained to die well. Finally, there is a statement of dignity as respect or, as I have argued, civility (and manners). There is no indication in this legislation what would happen if these principles were not met.

3. Conduct of Dying

The extent to which the elaboration of dying in a dignified manner can be considered a citizenship project shaped around social honour (dignity) and public health remains an open question. The joining of the elements of civil authority, social government and civic life, Minson argues, provides the basis for thinking within a state-centred understanding of the regulation of public conduct. It provides a language of social honour, or dignified manners, for so doing. I have argued that the practice of jurisprudence and government is a training in conduct. However, to say this is some way from assigning specific tasks to a citizenship project or even to a training in dying well. For Minson, the specifically Christian and humanist contexts of the fifteenth and

sixteenth century writing on manners have been transformed into civility projects. In his reading, the writing of humanists, such as Erasmus, was directed to the creation of a sensibility and sentiment suitable for living in court and civil society (Minson 1993: 31-40, Porter 2003: 21–26). In *The Loneliness of Dying* (1985), Norbert Elias made a similar kind of argument in addressing dying in hospital. He argued that the repertoires of dying were largely concerned with the management of fear and the maintenance of propriety and status. Whether or not the fears were existential or social, they were to be addressed through the statuses and roles that were taken up in hospital by carers and the dying. The repertoires of the organisation of dying in hospital were not concerned with ontological concerns with death 'as such'. In this context the argument presented in this chapter rests within a tradition of civil prudence and social honour.

An argument for civility and citizenship can be extended in two further ways: first, in relation to the government of health and second, in relation to 'end of life choices'. Civil jurisprudence, as taken up from Pufendorf, requires limited forms of social relationship. David Armstrong, for example, has noted the ways in which the development of medicine in the nineteenth and twentieth centuries increasingly turned attention from the skill of the doctor to identify and reveal the invisible causes of ill health to investigation of the social understanding of illness. This requires the understanding of the patient as a social actor rather than a bearer of symptoms (Armstrong 1983). In this sense, Armstrong argues, the alignment of social health and personal health in the twentieth century has produced a distinct and new account of persons (and autonomy).[18] Drawing on Foucault's work, Armstrong argues that the 'spiritual exercises' and therapeutics of dying well as an aspect of the 'care of the self' can also be considered an aspect of government. Far from there being a silence or withdrawal from death, there has been a proliferation of the discussion of death and dying (Armstrong 2002; Lacquer 2015; Rose 1999, 2006, 2008; Magnusson 2002).

To the extent that the establishment of civic aspects of public health is seen as relating to an account of civil government, then the analyses offered by Minson and Elias of social honour still have a point of contact with the concerns of government and law. However, as the discussions of *Nicklinson* and of the *Voluntary Assisted Dying*

[18] Armstrong, I think, provides a different inflection of training in the persona of the patient than Foucault in the sense that his account points to the ways that many aspects of medicine are not shaped around confession and conscience (Armstrong 2002).

Act suggest, a contemporary civil jurisprudence cannot simply rest on an eighteenth century conception of sovereign command. To this I have added a juridical concern with the conduct of office. In civil jurisprudential terms, taking issues of civility and manners as a starting point for the regulation of death and dying under medical care has a number of attractions. It establishes (or attempts to establish) the authority under which disputes over the significance of assisted suicide and euthanasia are to be conducted. It provides a point of consideration of the conduct of social relations (Hunter 2001). This takes on importance both with respect to the negotiation of health care provision and the consideration of the civil prudential framing of the task of legislation in areas of moral controversy.

In what has been presented here, a concern with the office of jurisprudent has been elaborated through a number of jurisdictional practices and legal devices. As a matter of comportment, dying in a dignified manner has been linked to a concern with both office (*dignitas*) and the legal ordering of office and role, and social honour. Dignity, when associated with office, concerns questions of the duties of rank and authority. To think of the offices of medical care in terms of dignity or reputation is not controversial, although, as has been argued in Chapter Three, what this dignity entails is disputed. If the dignity of office is related to the dignity of manners as has been argued here, what was presented in the *Rights of the Terminally Ill Act* was a civil prudential account of dignity delimited by a range of concerns relating to social honour. Forms of juridical engagement shaped around social honour also provide the central engagement of the *Nicklinson Case* and of the *Voluntary Assisted Dying Act*.

In considering the language of end of life care and of end of life choices as a question of civility and social honour it is possible to set these concerns within some older forms of legal regulation in order to find a pattern of regulation within the idioms of a common law tradition. For much of its existence, sumptuary law, for example, related to the government of life in public. Its modern inheritance can still be observed in laws relating to the government of the common weal. This includes contemporary healthcare law. On one level sumptuary law was concerned with civil conduct – the appropriate forms of display and consumption at ceremonial events, the proper use of weights and measures and the rationing of provisions (Hunt 1996). Sumptuary law was a way of regulating rank (status) and comportment. Goodrich notes that sumptuary laws also had a role in law relating to the proper display of status

and the role of the spiritual order (Goodrich 2008). Part of the work of civil jurisprudents has been to produce an account of dying in a dignified manner that does not draw the dying into the juridical arrangement of the spiritual requirements of dying well. If the concern with dying in a dignified manner is treated as a matter of sumptuary law, then this gives a juridical home for the conduct of dying under medical supervision. If viewed as a public matter, the concern with end of life care can be phrased in terms of a government and citizenship project – whether referenced to a social domain of health, a humane alleviation of suffering or the practice of an *ars moriendi* (Rose and Novas, 2005). If viewed as a voluntarily assumed obligation, the language of autonomy and consumer choice comes to the fore. Finally, and still within a civil ordering, they might be understood as a concern with the dignity of the offices of the dying.

Conclusion

Jurisprudents within contemporary offices of law have taken up the task of creating new legal forms of regulating the end of life, both under medical supervision and more generally. In so doing, I have argued, they also take some responsibility for the creation of a civil *ars moriendi* which is suited to contemporary modes of dying. In this chapter the conduct of the office of jurisprudent has been tested in two ways. First, by following the accounts of civil jurisprudence into the contemporary juridical ordering of the care of the dying and considering patterns of civil relationship and citizen that are being presented. Second, by presenting some specific formulations of dignity and dying in a dignified manner and by considering the forms of life recommended by jurisprudents. Both of these concerns are linked to the prudence and practice of the care and conduct of dying in a civil prudence tradition. While aligning the project of crafting the conduct of the end of life (under medical supervision) to civil prudence, I set the work of legislators, judges, jurists and policymakers in the context of a limited citizenship project and the elaboration of the obligations of office. In so doing I have shown some of the resources available to the office (or, possibly, offices) of the Jurisprudent. While civil prudence is most usually seen as a training in the disinterest, disenchantment and a de-sacralised care for office, I have argued that the ethic of office has a broad range of responses available. These offices take on different valences in different contexts in law, health and education. In tracking juridical forms, it is part of

the work of the office of jurisprudent to note the different ways and sites in which life and law come into relation.

The next chapter turns attention to a number of accounts that seek to re-enchant life and law and, perhaps, to re-sacralise such relations in addressing the status and care of the terminally ill.

Chapter Six

Jurisdictions of Conscience

Introduction

This chapter continues the investigation of the manner in which jurisprudents take up and fulfil the obligations of their office. It continues the exploration of training in conduct and government of the self and others in the cultivation of a jurisprudentially arranged *ars moriendi*. It follows the ways in which the exercise of office through jurisdictional practices ordered around the person gives shape to forms of conscience and authorises the repertoires and practices of dignity as worth.

The body of this chapter investigates three ways in which conscience has been represented and crafted through jurisdictional forms. The first is concerned with the ways in which questions of dignity – as a form of human worth – and forms of jurisdictional practice are brought into relation within philosophical jurisprudence. The focus here is on the way in which Dworkin's elaboration of ethics gives shape to the conduct of assisted dying under the Constitution of the United States – specifically Amendments 1 (freedom of religion) and 14 (the due process clause). It examines the obligation of dignity, to 'die well', that Dworkin imposes on the dying. The second way in which conscience has been represented and crafted is through the use of jurisdictional forms and techniques that repeat older arrangements of the ecclesiastical and chancery jurisdictions. This is addressed through forms of *parens patriae* jurisdiction. The exercise of this jurisdiction, and associated jurisdictional forms, has been one of the ways through which assistance in dying have come to be addressed through the courts in Australia and the United Kingdom. I test the ways in which dignity as worth might be engaged within the technical forms of a jurisdiction. The third examination extends the first two examples and considers briefly the forms of conscience in contemporary legal thought. It addresses forms of 'relational jurisprudence' and the ways in which conscience and conduct interact. What is of particular interest is the ways such idioms establish forms of conscience. In this Part of the thesis I examine the care of the dying through jurisdictional arrangements ordered

around persons. This is in contrast to what seems to me to be a contemporary impulse to return to jurisdictions which are organised around activities (in some cases, perhaps unknowingly) (Veitch K 2007; Harrington 2017). The conclusion to this chapter addresses the ways in which forms of dignity and civility have been understood within the office of jurisprudent.

This chapter moves from civil jurisprudence and prudence that shape civility towards forms of jurisprudence of conscience that shape dignity. This approach is held in place not by asking whether law defeats conscience, or whether conscience should be differently formulated (these are the concerns of the critic), but rather 'How are forms of conscience established?', 'How do jurisprudents write about and take responsibility for such forms of conscience?' and 'What forms of conduct (worthy of the name) do jurisprudents recommend?' As argued in the last chapter, there is no simple relation between framing questions of conduct in terms of a jurisprudence and the institutional arrangements produced through the exercise of a jurisdiction. Rather, jurisprudential and institutional projects have proposed a number of different ways to elaborate the conduct of self and others and to craft forms of lawful relation with respect to assisted dying. All such projects struggle to find an appropriate legal form through which to express the idea of dignity as a worth beyond value.

The concerns of this chapter are similar to those of the last. However, the pattern and texture of this chapter differ. In the last chapter the task was to draw attention to the ways jurisprudents have crafted the juridical ordering of assisted dying in a dignified manner through existing forms of civil authority. This is not possible when considering the crafting of a jurisdiction of conscience. The main difference between the jurisdictions of civility and conscience – and their jurisprudences – turns on how contemporary jurisprudents respond to the institutional ordering of the common law. For some, jurisdictions of conscience are established through a separate source of authority, for others the jurisdiction is situated uneasily in relation to those of a jurisdiction of civility which is ordered through government and organised around sovereign territorial states. A second difference lies in the complex relation between university jurisprudence, theology, philosophy and social theory. Jurisprudences of conscience, and the training in conduct they envisage, do not necessarily align with the rival training programmes found in the disciplines of philosophy and theology (Hunter 2001).

The obligations of office are created and vary according to jurisdictional forms. Conscience is addressed in this chapter through re-arranging the jurisdictions of civility and conscience. University metaphysics and canon law have cast the relation between conscience and civil conduct in terms of 'internal' and 'external' fora (see Chapter One). In this arrangement it is conscience that judges conduct. In this Part of the thesis, however, the arrangement of jurisdictions is presented as contiguous and often competing and rival. By localising accounts of office and dignity through considering them in terms of the jurisdictional ordering of the common law tradition, it is possible then to see the rival and contest of authorities from the viewpoint of a civil prudence.

1. Dignity of Worth

In *Life's Dominion* (1993) and *Justice for Hedgehogs* (2011), Dworkin links dignity to the inherent sacredness and inviolability of life. His training in dignity is ordered around self-respect (taking one's life seriously) and authenticity (the requirement to give form to one's life). For Dworkin, such work on the self (ethics) takes place within a political community in which what we owe to others (morality) is closely linked to what we owe ourselves (ethics) (Dworkin 2011: 203-204, 491). For Dworkin, dignity as respect for the human person and human roles is, as in most liberal accounts, most readily framed in terms of freedom, political equality and liberty (Millbank 2014: 187, 191; Veitch K 2007). Both the dignity of respect and of authenticity require forms of autonomy which have been cultivated through choice and deliberation. In this way, dignity as self-respect and respect for the independent decisions of others takes up a central position in his account of politics and law (each should have the equal opportunity to choose their plans and conduct of life). In Dworkin's account of political community both the ethic of dignity and the morality of political association share a commitment to the creation of a common horizon of a just and true (or at least correct) community. Dworkin takes up the juridical form of such convictions in different ways in his writings. One central aspect, however, links convictions and principles to the moral and constitutional justification of 'guiding and constraining the power of government' (Dworkin 1986: 93, 107, 117; Finnis 1987: 372). It is from this position that Dworkin frames the political liberties relating to religion, conscience, thought and belief (Naussbaum 2008).

In Chapter Three one issue addressed was the training in a way of life and the conduct of the office of the jurisprudent. What binds Dworkin's person to law is the conscience of the person and a cultivating a *persona* capable of reflecting on and reasoning about dignity, autonomy or the sacredness of life (Gentzler 2003: 28, 461-487). The issue addressed here is how to characterise the legal techniques that form a jurisdiction of persons shaped by conscience. Jurisdictional activities should be elaborated in terms of the forms of authority, modes of authorisation and techniques of creating and arranging lawful relations. In order to draw out an account of a jurisdiction of conscience it is necessary, then, to begin with the sources of authority. For Dworkin, authority is drawn from the rational form and deeply held beliefs (convictions) of both the individual and the political community. The relevant beliefs are the same in both registers: the sacredness of life and the dignity of man (Dworkin 1993: 13). From this perspective, it is the deeply held beliefs of the community that shape jurisdictional practice (Douzinas, McVeigh and Warrington 1992).

If the authority of law and of jurisdiction is linked to deeply held convictions, the modes of the authorisation of law and jurisdictional practice are addressed through Dworkin's accounts of meaning and interpretation – his accounts of the concepts and conceptions of dignity and values such as the sanctity of life and justice. While a concern with meaning and interpretation might more usually be considered as a matter of practical reasoning – or as a guide to action – rather than as a technical means of creation, this is not, I think, the case for Dworkin. For Dworkin, meaning and interpretation are also the central technical means of establishing truth and justness. In a positive sense, Dworkin treats interpretation and 'law as integrity' as creative (2013: 87). They are creative in the same way that mixes making a work of art with interpreting a work of art (Auerbach 2013).

Here attention is paid to two features of Dworkin's account of the exercise of office in order to show the ways in which his account of conscience is given shape through a jurisdiction of conscience. The first aspect concerns the ways in which meaning and interpretation are closely linked in the creation of the community or association of principle. The second relates to the training in conduct established by a principle of integrity that commits a judge or interpreter to find the best answer to any dispute or matter of legal interpretation (1986: 255, 404). The mixing of creation and interpretation in Dworkin's account of meaning wraps the jurisdiction of persons into

the hermeneutic work of interpretation. Within this ordering the interpreter establishes their authority to judge. They discover and elaborate principles, interpret texts and contribute to the furthering of the principled engagement of a dignified and lawful life (Minkinnen 1999: 121-133; Haldar 2016: 161-164).

Something of the complexity of the formulation of a jurisdictional arrangement of persons around conscience can be found in Dworkin's *Life's Dominion* (1993), as well as in the *Philosopher's Brief* (1997) which was presented by Dworkin and others as an *amicus curiae* brief in the Supreme Court hearing of *Washington v Glucksberg* 521 US 702 (1997) and *Vaco v Quill* 521 US 793 (1997).[1] In *Life's Dominion*, Dworkin engages with the Constitutional understanding of the status of abortion and assisted suicide in the United States America. The formulation of liberty and conscience is joined in 'matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy' (*Planned Parenthood v Casey*, 505 US 833 (1992), 851). The rights associated with assistance with dying, Dworkin has argued, should be shaped around the requirement that people should never be treated in a way than denies the distinct importance of their own lives. According to Dworkin: 'Making someone die in a way others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny' (Dworkin 1993: 217). Therefore, for Dworkin, the juridical means of giving form to such decisions is expressed in the liberty established and protected in the United States Constitution.

For Dworkin, as law is a part of political philosophy and ethics, the reasoning of law as integrity directly shapes the juridical ordering of living and dying well. It also realises the dignity of the law, the philosopher (public or university), the jurisprudent (judge or advocate) and the citizen. When Dworkin writes of law 'working itself pure' this is also the work of the writer, reader and human, as personal ethics, political morality and constitutional interpretation all share the same commitments.

To die well in Dworkin's jurisdiction of conscience requires considerable philosophical engagement and reflection. It requires an inner personality capable of deep conviction and an authentic concern to give shape to one's life by rendering an

[1] Parts of this section are taken from *Jurisdiction* (Dorsett and McVeigh 2012). This part of that book was written solely by Shaun McVeigh. The philosopher's Brief can be found at: http://www.nybooks.com/articles/archives/1997/mar/27/assisted-suicide-the-philosophers-brief/ (viewed 1 Dec 2017.)

account of a life, and reflecting on, and reasoning about, dignity and the sacredness of life (2011: 216). As a matter of integrity and authenticity dying well has a narrative form and unity. A dignified death will be one that 'keeps faith with the way we want to have lived' (1993: 199). He wonders, as in a classical tradition, whether from the viewpoint of the 'end of life' the ending of life in a way that does not fit with the narrative of life will diminish it. Dworkin considers that we might judge a life like a literary work, one, for example, 'whose bad ending mars what went before' (1986: 27). In these comments Dworkin joins the philosophical traditions of 'spiritual exercise' discussed in Part One of this thesis (Hadot 1995).

The complexity of establishing a jurisdiction of conscience within the United States constitutional order was indirectly addressed in *Washington v Glucksberg*. In *Glucksberg*, as in Dworkin's jurisprudence, the concerns of assisted suicide are considered in terms of liberty. As in Dworkin, the argument of liberty in *Washington v Glucksberg* also addresses decisions about life and death in terms of concern with deeply held convictions. Both Rehnquist CJ and Stevens J offer accounts of liberty and jurisdiction that remain public in their understanding. The public interest in the preservation of life is unqualified (even if the interest itself is not fully elaborated). For Rehnquist CJ, such interests include: the prohibition of intentional killing and preserving human life; the protection of the reputation of the medical profession; preventing the serious public health problem of suicide; protecting the vulnerable, including the terminally ill; and resisting voluntary and involuntary euthanasia. (*Glucksberg*, 728-735). For Rehnquist CJ the jurisdiction of persons remains within the jurisdiction of the state. The conscience of the state and that of the citizen are not necessarily the same. The state's interest in the preservation of life is not necessarily directed to the citizen's concern with dying well. As for Dworkin, for Rehnquist CJ what dominates is the 'internal' forum of the conscience of the Court.

For Stevens J, the presentation of the interest in liberty is different from that of Rehnquist CJ. Stevens J invokes a concept of freedom linked to dignity and commemoration that is 'older than the common law' (*Glucksberg*, 745). He stated that:

> I insist that the source of Nancy Cruzan's right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law. This freedom embraces not merely a person's

> right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death. (*Glucksberg*, 745)

It is, added Stevens J, 'an interest in deciding, how, rather than whether, a critical threshold shall be crossed' (*Glucksberg*, 745). This interest supported by a freedom older than the common law marks out a natural account of personal freedom that weighs against the interests of the state. For Stevens:

> The interest in the preservation of life not only justifies – it commands – maximum protection of every individual's interest in remaining alive, which in turn commands the same protection for decisions about whether to commence or to terminate life-support systems or to administer pain medication that may hasten death. Properly viewed, however, this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom. (*Glucksberg*, 746)

It is Stevens' appeal to tradition that takes dignity and commemoration as a source of meaning and autonomy as its particular expression (Fleming 2010: 852). This takes Stevens closer to a natural rights argument than Dworkin's engagement with integrity normally allows.

One consequence of such jurisdictional arrangements is that the *ars moriendi* suggested in *Washington v Glucksberg* is engaged with both the dignity of the dying patient and the dignity of the state. This is perhaps more visible now that a number of states of the United States of America have adopted legislative forms of assistance with suicide and 'death with dignity'. This legislation, like the Australian legislation, is concerned with questions of government, administration and the ordering of legal relations.

Dworkin's jurisdiction of persons offers an account of conscience and dignity linked by integrity and turned to the 'inviolability of life'. The jurisdiction of persons set out in *Glucksberg* offers two accounts of personal jurisdiction: one is framed within a common law tradition shaped by a public interest in the preservation of life and the limiting of state sanctioned killing; and the other appeals to freedoms older than the common law

that are still capable of being understood as liberty and privacy. However, this is not an account of human worth that is shaped around an internal ordering of autonomy (whether or not it is one shaped by Dworkin).

In Dworkin's exercise of the office of jurisprudent, a life of dignity or a life worthy of the name is one lived as a citizen (of the community of reason). His concern with dignity is a concern with a life lived in public. What has been drawn out here is the sense that Dworkin's account of dignity creates and joins political-legal obligation and personal conscience within the jurisdiction of the Supreme Court of the United States of America. In so doing Dworkin rests his jurisdictional account of conscience on the authority of the Court and on the ability of the judge and the philosopher to align their forms of review.

To die well, following Dworkin's jurisprudence of dignity and conscience, requires considerable philosophical engagement and reflection. It requires, or encourages, an inner personality capable of reflecting on, and reasoning about, dignity, autonomy and the sacredness of life. It also requires a relation to law and public reason that addresses relations with others. Dworkin's person of conscience is bound to law by their ability to reflect on the dignity of their life and of others. In considering the ways in which Dworkin provides a training in achieving this end, his work also joins back to a distinct (Protestant) tradition of spiritual exercise.

In reading Dworkin, it is sometimes difficult to draw out the sense in which arguments about the quality of reason are also arguments about the conduct of the life and are an assertion of a jurisdiction of conscience.[2] As with Kant, the quality of reason potentially joins all in a community of reason, here one shaped around a concern with the intrinsic importance of human life (Dworkin 1993: 236; Dworkin 2011). Ensuring that this is so, for Dworkin, is part of the task of the office of jurisprudent.

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[2] Perhaps inevitably given the relatively recent revival of 'dignity' as a working concept within common law legal thought, the recent English collections of essays on dignity edited by McCrudden (2013) and Düwell (2014) treat relations between legal form, jurisdiction and dignity generically. Of the one hundred plus essays published in these two books very few essays directly address legal form and the particularity of jurisdictional thought. The exceptions, both in the Düwell collection, are two authors addressing theology and religion: Millbank (2014: 187-206) and Riordan (2014: 423-435).

2. Best Interests and Dignity of Care

This section follows the ways in which a jurisdiction of persons does (or does not) give shape to relations of conscience and dignity. The section sets the concerns with the sanctity, preciousness or reverence for life within a set of jurisdictional arrangements of conscience. It takes as its point of engagement the *parens patriae* jurisdiction. In the last section, Dworkin's account of conscience sought a unity of an ethical life in a practice of dignity. In this section what is emphasised is the plurality of relationships and forms of conscience arranged through forms of jurisdiction. Just as it is possible to pluralise the practices of conduct, so it is possible to pluralise the practices of conscience. Where Dworkin folds the world and the institutions of law into a life of dignity, the operation here is the reverse. Conscience and dignity are held in place (or not) through the exercise of technical means. It is through these that the conscience of the judge is expressed. I will take up two points here in tracking a jurisdiction of conscience. The first relates to the exercise of jurisdiction and the second relates to the value of life. The first point is – roughly – that conscience is exercised through jurisdiction; the second point is that conscience is exercised through the office of the Judge.

The *parens patriae* jurisdiction is considered today as a 'protective' jurisdiction which can invoked in order to make decisions in the 'best interests' of people who cannot care for themselves.[3] It is one of the jurisdictions through which the legal ordering of the end of life has been given form. In the United Kingdom and Australia this jurisdiction has been invoked to hear a number of cases relating to withdrawal of treatment (one of the most notorious of which is *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1991) 175 CLR 218, a case relating to forced sterilization). The modern discussion of the *parens patriae* jurisdiction of the courts (especially relating to family and guardianship matters) has been predominantly shaped by acting in the best interests of the ward or patient. In the1970s and 1980s, the formulation of *parens patriae* was set within governmental projects which joined the emergence of a distinct body of regulation addressing the protection and welfare of

[3] The term 'protection' itself has a history. In the Australian context see, for example, the comments of Brennan J in *Secretary, Department of Health and Community Services (NT) v JWB* (1991) 175 CLR 218, at 280 per Brennan J, and commentary by Mason CJ, Dawson, Toohey and Gaudron JJ (at 258).

the child, the mentally ill (particularly the sterilisation of mentally incapacitated women) and Aboriginal people (Berns 2002a). In different ways, this regulation joined the contest of public authority between paternalism and autonomy (Unsworth 1987; Jackson 2011). However, the legal forms of this body of regulation are diverse and have not necessarily followed an argument for the liberalisation of laws or for a strong account of autonomy (Veitch K 2007: 89-92; Ewald 1990). Since the 1990s, however, the concern with 'best interests' has increasingly turned attention to linking welfare and autonomy to a concern with dignity. In the United Kingdom this shift of attention has been shaped by reference to the European Convention on Human Rights. However, it also marks the ways in which the courts and welfare agencies address 'best interests' in terms of quality of relationships. In this sense, dignity and civility arise out of welfare (and social justice) and the forms of regulation through which such concerns are administered. Further, I argue, it points to the different ways through which conscience can be addressed.

In the last chapter, the exercise of office was approached historically and then jurisprudentially through the arrangements of jurisdiction. The setting of the care of the dying within the provision and regulation of health and modern welfare, family regulation and the protection of the young draws on older jurisdictional forms relating to the care of the indigent and disadvantaged. This array of jurisdictional and institutional arrangements, bodies of law and repertoires of argument can be traced as a matter of intellectual history and practice of government as well as of legal doctrine (Haldar 2016; White 2014; Veitch S 2007, Berns 2012a, 2012b). However, the relation between historical engagements, patterns of jurisdiction and contemporary repertoires of conduct as discussed here is more speculative. I argued in Chapter Two that there are analogies of legal form and practice to be drawn between contemporary and 'past' forms of jurisdictional arrangement. However, I also acknowledged a strong strand of jurisprudence and legislative practice which in their accounts of statutory interpretation and their articulation of forms of 'legalism' suggest otherwise (Murphy 1997; Kirby 2011; Genovese 2013). The contemporary shape of the *parens patriae* jurisdiction has been overlaid by legislation which relates to acting in the 'best interests' of the incapacitated or the young. In *Gardner; Re BWV* (2003) 7 VR 487; [2003] VSC 173, Morris J noted in relation to the Victorian guardianship and administration laws that: '[a]lthough the *parens patriae* jurisdiction of the Court is of

considerable historical interest, I doubt if it should play any current role in the day to day administration of guardianship matters' [at 99]. The contemporary juridical ordering of the end of life – guardianship, wardship and the representation of 'interests' before the courts – is established through legislation relating to guardianship, medical care, testamentary dispositions and human rights (in the United Kingdom and the state of Victoria in Australia).[4]

The source of the authority for the *parens patriae* jurisdiction is the prerogative of the Crown, but the resources for assembling the practice and subject-matter of the jurisdiction are diffuse. They are not all shaped by a concern with either the protection or 'best interests' of the vulnerable. Recognising a history of plurality sits against Dworkin's work of unifying law and life through dignity. What I want to show is how it can be pluralised (as an historical question) and how this pluralisation of conscience can be useful as a matter of prudence. To pluralise conscience is to also pluralise accounts of worth and value.

Although the formal source of authority of the *parens patriae* is the prerogative of the Crown, we can point to (at least) two distinct historical origins. The first relates to tenure and the second to canon and ecclesiastical law (Custer 1978: 195, 200; Cogan 1970). By the late seventeenth century these two sources had been folded into Chancery. In 1696, Lord Somers, sitting in the High Court of Chancery, asserted a general authority and jurisdiction to act in the matter of 'disadvantaged' children (*Falkland v Bertie* (1696) 23 ER 814).

The first of these origins, Seymour notes, derives from the military tenure of knight service (chivalry). Under these tenures, the tenant acquired lifelong use of land in return for service. However, the Lord was not bound to allow the tenant's heir to take up the tenancy unless they paid a 'relief' (MacPherson 1842: 68-80; Seymour 1994: 163). If the heir was an infant, the Lord assumed wardship. As guardian the Lord had assignable rights, including of marriage, over land and person for his own profit. For land held in socage, the relationship of wardship was different. In this case, if the tenant of land held under socage died, an infant heir was placed under the protection

4 *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

of a relative (by virtue of a relationship to tenure).[5] Wardship in this context might also be considered as bound into forms of honour. After the abolition of tenures (*Tenures Abolition Act* 12 Car II, c. 24 (1660)), this jurisdiction was incorporated into that of Chancery (Spence 1846-9 vol 1: 605-611). As noted, this was a jurisdiction that did not emerge in any substantive sense from the need to protect the vulnerable. Rather, it emerged from the Lord's relationship with, and right to the profits of, the land.

The second of these origins is the canon law of the Roman Catholic Church and the ecclesiastical law of the reformed Anglican Church. Both of these established a broad authority for their courts to protect the disadvantaged. Helmholz (1996) notes that in mediaeval England the jurisdiction of canon law was entwined with that of the Crown. While canon law was primarily concerned with matters of church governance, it also exercised jurisdiction over lay people in a number of circumstances. In Helmholtz's account, the Church in mediaeval England took jurisdiction by: subject matter (marriage); status (the disadvantaged (*miserabilis*)); and action (circumstances where the King's courts either did not provide a remedy or were inadequate in so doing (*ex defectu justititiae*)). This included a supervisory jurisdiction over widows and orphans.

In the English courts in mediaeval and post-reformation periods, the consistory courts also addressed matters of infanticide, guardianship and illegitimacy (Helmholtz 1996: 118-122). Much of the Canon law concerned with the subject matters above became the subject-matter of ecclesiastical law and was later incorporated into the Chancery jurisdiction and, to a lesser extent, the common law. While canon law did, to some extent, seek to protect the vulnerable, this was often in the context of matters of administration: status; wills; and other financial matters. Some of these concerns related to sacramental life; others, clearly, did not.

However, there are also alternative sources and genealogies of the forms *parens patrae*. Buti, for example, places emphasis on the different origins. He contends that it is through the forms of Roman law that guardianship was given its decisive contemporary shape (Buti 2003:106-108; Gordley 2013).

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[5] The *Statute of Uses* 27 Hen. VIII, c. 10 (1535) was one example. It vested legal ownership of land in the beneficiary and thereby enabled the King to claim rights of wardship as well as to establish a Court of Wardship and Livery (1540-1660) (Seymour 1994: 164).

The pattern of jurisdictions, activities and aspirations that shadow a *parens patriae* jurisdiction can still be seen in the subject matter of contemporary legal forms. Like the varied concerns of the earlier jurisdiction, the forms of guardianship, powers of attorney, healthcare plans and end of life directives of the contemporary world all draw their subject-matter from the varied concerns of the jurisdictions which became the *parens patriae* (Willmott, White and Smit 2012). All require relations of authority, guardianship and trust where judgment is exercised in the best interests of another. The plural sources and topics described above are all taken up in contemporary regulation. The question that can be asked, then, is 'What forms of conscience and affiliation are established through forms of guardianship and end of life care?'. In order to consider this I now turn to a discussion of the contemporary regulation of the withdrawal of medical treatment at the end of life in the United Kingdom and Australia. In both jurisdictions the end of life, including all aspects of guardian and attorneyship, have been regulated.[6] Here, however, I will focus on the ways in which the courts in Australia and the United Kingdom have characterised 'withdrawal of treatment orders'.

The legal discussion of withdrawal of medical treatment at the end of life became a public ethical concern in the early 1990s, although a concern with capacity and medical treatment dates from early twentieth century concerns with eugenics and forced sterilisation (Unsworth 1987). In cases like *Airedale NHS Trust v Bland* [1993] AC 789*,* the appellate courts in the United Kingdom established the legal form of, and a distinct genre of, juridical writing through which to address forms of assisted dying under medical supervision. Tony Bland was a young man who had been severely injured at a football match. He had been clinically assessed as being in a persistent vegetative state (PVS). His brain was still functioning but he was not conscious. He could breathe independently but was unable to survive independently of clinically assisted nutrition and hydration (CANH). With approval from Tony Bland's parents, the hospital applied to the Family Court for a declaratory order that the cessation of CANH would not amount to homicide. This was not, as might be thought, a prayer for relief under the *parens patriae* jurisdiction; that jurisdiction had been effectively rendered moot some three years before by the House of Lords in *F v West Berkshire AHA* ([1989] 2 All E.R.

[6] In Victoria for example, the Medical Treatment Act 1998 (Vic), Guardianship and Administration Act 1986 (Vic), Powers of Attorney Act 2014 (Vic), Charter of Human Rights and Responsibilities Act 2006 (Vic).

545). There it was stated by Lord Goff that he could 'see little, if any, practical difference between seeking the court's approval under the *parens patriae* jurisdiction and seeking a declaration as to the lawfulness of the operation' (at [83]). The hospital, therefore, sought a declaration. This was effectively echoed later in the request in *R v Nicklinson R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent* [2015] AC 657): it was a request that there be no prosecution. It may seem that the substantive issues in *Bland* were ones of 'best interests' and concern for the sanctity of life and the aligning of medical, ethical and legal arguments about the duties of the doctor to care for the patient. However, all these discussions in fact hinged on finding an appropriate juridical form through which the court could exercise its jurisdiction.

Despite the Court in *Bland* noting that it did not have jurisdiction under a *parens patriae* jurisdiction to make an order to withdraw medical treatment in cases of PVS, it continued to be considered that 'good practice required a court application before withdrawal of CANH in cases of PVS' (*M (by her litigation friend, Mrs B) v A Hospital* 2017 EWCOP 19 [28]). Much of the complexity of the jurisdictional arrangements – although not the topics and patterns of argument – were recast in the *Mental Capacity Act* 2005 (UK). The legislation has formalised the complex engagements of case law and re-established in statutory form both a Public Guardian (ss 54-59) and a Court of Protection as a superior court of record (s 45). It also gives extended directions as to how to give shape to the legal care of the incapacitated through court hearings, allocating powers of attorney, appointing litigation friends and setting out guidelines for conduct. Practice directions stipulate that decisions relating to the withdrawal of CANH should be referred to the Court (Practice Direction E: Applications relating to Serious Medical Treatment). The recent case of *M v A Hospital* has begun to ease this requirement where withdrawal from CANH is not contested by anyone concerned with the care of the person lacking capacity ([37]-[38]).[7]

It not always easy to identify a concern with conscience or to see the working of a jurisdiction as a training in conduct because when such matters are tied so closely to

[7] Here, as elsewhere, there is a contrast to be drawn with approaches to withdrawal of CANH in Australia. Willmott, White and Downie (2013: 912-913) note that the general approach to questions of the cessation of futile treatment has been to point out that that there is no general duty to treat and to leave the decision of cessation to the medical profession. There is no decision to be made in the sphere of judicial conscience.

administrative arrangements (Halliday, Formby and Cookson 2015). Murphy has argued that this is because the legal form of judgement is thoroughly penetrated by concerns with conscience (Murphy WT 1997: 1-36). I am arguing here, however, that conscience as a specific practice is not so easily placed (and humanity is not necessarily greatly threatened by this). In Chapter Five the discussion of dying in a dignified manner was treated as a matter of external behaviour. If that approach were taken here, the focus of attention would be on who is protected, reassured and distressed by the need for decisions to withdraw CANH. Here these jurisdictional arrangements and forms of administrations are read as a series of investigations into the practice of care by the courts. The measure of conscience of the judge may or may not be articulated in either the substance or style of a legal judgment.

The second topic of this section can now be addressed: that is, that conscience exercised through the office of the Judge. In cases involving withdrawal of medical treatment from the incapacitated, there is also a consistent concern as to whether withdrawal of treatment transgresses the concern of the courts with the sanctity, inviolability or respect for life. In *Bland* the court devoted extensive consideration to these matter and set its discussion in the context of a concern with human dignity and self determination (*Bland*, 866 per Lord Goff). Critics have questioned the technical arguments of the decision. They have questioned whether distinctions drawn between medical treatment and care, or between active acts of killing and passive acts of letting die, or between primary and secondary intentions (the doctrine of 'double effect'), are sufficient to draw a distinction between withdrawal of food and nutrition and an act of intentional killing (see, for example, Keown 2012: 13-22). Others have argued that no account of withdrawal of treatment can avoid making a claim that the life in question was not worth living. There is no 'tragic' choice to be made balancing the sanctity of life against the dignity or best interests of the patient. The sanctity of life should be respected (Finnis 1987).

A civil prudential response might simply be to not to ask any question about the value of life as such, but rather to ask what it means to die well. Or, it might be to simply remove the decision from the courts. I think, however, there is a more interesting argument to be had about the way the value of life is understood. Halliday, Formby and Cookson are right to point out that the work of the court is to reassure the various parties that what they are doing is not illegal and has the approval of an

institution of justice (Halliday, Formby and Cookson 2015). Similarly, jurists might be right to say that their role is to uphold the intrinsic morality of law (Brazier and Ost 2013: 89). I would rather argue that the invocation of the sanctity of life is, at least in part, a training in orientation of the officers of the court to articulate their concern for the value of life. This is a concern which is now addressed to all aspects of care and value. What was once a specific jurisdictional concern is now becoming a general responsibility. This training in orientation and conduct is not just a training for the office of the Judge, but also for the audiences of the court.

In *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, Lady Hale (as she then was) noted that the purpose of Art. 2 (the right to life) and Art. 3 (right to protection from inhuman and degrading treatment) of the European Convention on Human Rights (ETS 5; 213 UNTS 221) is to ensure that all have full equality before the law. The same approach is found in the United Nations Convention of the Rights of Persons with Disabilities (adopted by General Assembly, New York, 24 January 2007, A/61/106). This approach, Baroness Hale states, requires a presumption that it is in the best interests of the patient to stay alive (*Aintree* [35]). Baroness Hale, following the terminology of the *Mental Capacity Act*, approaches best interests in terms of a modest inquiry:

> The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or are interested in his welfare, in particular for their view of what his attitude would be (*Aintree* [36]).

In this formulation there is no great assertion of self-determination or autonomy for the patient. Neither is there any formulation of human dignity. This, then, is a considerable recasting of the terms of the style of representing the ethical concern of the courts in terms of 'tragic choices' (Veitch 2007: 131-3). However, it can be noted here that this formulation carries with it its own characterisation of the scope of the office of the Judge and of the appropriate sensibility (and sensitivity) to be expressed through the *persona* of the judge. The expression of judicial care is more a matter of

empathetic decorum than of expressive eloquence. Dignity in this account relates to the comportment of the judge in their conduct of office and the dignity of the patient in acknowledging the worth (to the court) of their life.[8]

Finally, in considering relations of care shaped by conscience, it is worth returning to Gaita's account of the way that care is understood through the preciousness of life by way of the non-sentimental acknowledgement of our shared humanity. Such an acknowledgement, in the field of law, is shaped by an account of diginity that holds that 'every human being posseses an inalienable dignity to which unconditional respect is owed' (Gaita 2017b: 171). For Gaita, respect is understood in the shadow of unconditional love rather than the exercise of public duty. For him, it is unconditional love, rather than office, duty and comportment, that shows what a care worthy of the name could mean in the occupation of the office of Judge. For me, however, the courts have been at pains to separate legal and religious values, and legal and moral judgments. This does not end the matter. It is precisely because judges judge that there is an ethical judgment of conduct to be made.

3. Relations of Care

The final section of this chapter returns to the office of the jurisprudent in the university. It briefly addresses the forms of conscience established through the practices of relational jurisprudence – that is a jurisprudence that sets questions of values and the lives of people in relation – and considers such work as an exercise in care. As indicated in Chapter Four, the Christian traditions of training in conscience have had a powerful influence on how conscience has been understood both as a form of natural reason and as a practice of 'spiritual exercise'. Forms of jurisprudence which emphasise interrelatedness or interdependence have had considerable impact on a range of social, ethical and legal literatures. Kirsten Anker (2014), for example argues, that both treaties and constitutions should be seen as relational. They address relations within, between and among communities. The traditions of ethic of care within feminist and Aristotelian thought link relational ethics to forms of virtue ethics and reasoning (Naussbaum 2008). Critical scholars who emphasise relational ethics

[8] I discuss Gaita's significantly different gloss on an ethic of office in Chapter Four.

have tended to direct attention to the transformative elements of community (MacIntyre 2013b).

Here I very briefly address two writers whose work crosses closely with the protocols of research taken up in this thesis. Kenneth Veitch address what I have called the jurisdiction of conscience through a critique of power (Veitch K 2007). Ngaire Naffine addresses the confrontation of the metaphysics of the person presented in legal theory (Naffine 2009). Veitch expresses a critical concern to disenchant or unmask the ideals of law and thereby show the working of status, power and government which is at issue in the pursuit of human rights (or dignity). Veitch also proposes returning questions of authority and power to the political sphere. He argues that legal scholars and judges use the language of human rights and medical ethics in order to assert authority and jurisdiction over the medical profession. For example, in his reading of *R v Burke* (*R (Burke) v General Medical Council et* al [2004] WL 1640202), Veitch suggests that Munby J's assertion of the human dignity and right of self-determination of patients is simply an assertion of judicial authority against the medical profession. Veitch also notes that Lord Phillips, hearing *Burke* on appeal, rebuked Munby J for being too academic in his generalisations about the value of life (*Burke, R (on the application of) v General Medical Council & Ors* [2005] EWCA Civ 1003, [21]; Veitch K 2007: 123-127).[9]

Likewise, Veitch sees the promotion of the importance of autonomy and dignity by legal scholars as also being concerned with securing prestige and status (Veitch K 2007: 147). In acknowledging that jurists are seeking to give new value to law, Veitch returns to a language of the office of the jurisprudent as the keeper of the conscience of law. Where Cotterrell has argued that the office of the jurist and jurisprudent should precisely be as the keeper of the conscience of law, Veitch suggests that this is an office that can only be occupied in bad faith (Cotterrell 2013). Veitch's analysis comes close to that of Hunter, discussed in Chapter Four. However, Hunter would emphasise not bad faith so much as the continuation of confessional politics and the rival confessional assertions of the value of life (Hunter 2014). It can be noted that Veitch's own argument carries within it an appeal to conscience and idealised forms of

[9] Veitch's reading can be contrasted with Foster's view that Munby J is simply expressing the underlying value of dignity as self-determination in all human rights matters, especially those relating to Art 8 ECHR (Foster 2011).

relationship. One part of Veitch's argument is a criticism of the juridification of ethical values and human rights. For him, the positivisation or the juridification of human rights turns genuine political and moral conflict into formalized legal argument and administration (2007: 133-135). For Veitch, moral and political argument should be conducted in their own proper spheres. In his account, however, there are two dangers. The first is to assume that conflict in political and moral spheres can be carried out in good faith and without violent destruction. The second is to invest the political sphere with its own conscience. In the absence of institutional arrangements, such as law and administration, this can easily return to a confessional assertion of power.

Naffine's argument is somewhat different. In *Law's Meaning of Life*, Naffine contests the moral anthropologies and metaphysics of life presented by Dworkin. For Naffine, his rationalism and individualism add little to the understanding of creaturely existence or the existential conditions in which people find themselves at the end of life (Naffine 2009: 97-99, 150-154). For Naffine, the metaphysical philosophers of conscience, such as the 'rationalist' Dworkin and the 'religionist' Finnis, are not to be criticised for presenting a training in transcendence, but rather for presenting one that does not offer much to the creaturely embodied existence of humans. Such humans, Naffine points out, live their lives in time and place and are understood as racialised, gendered and socially and politically ordered humans.

The concluding sections of *Law's Meaning of Life* touch briefly on forms of 'relational jurisprudence'. Jennifer Nedelsky's work, Naffine notes, does much to encapsulate the ways in which women are bounded and unbounded in ways that do not bear much relation to the juridical ordering of rational persons in structures of inequality (Nedelsky 1989: 36; Nedelsky 2012). So, for example, Naffine argues that the dignity of rational respect is not worth much if it makes pregnancy abnormal or eccentric to being a (legal) person (Naffine 2009: 164). Nedelsky's relational jurisprudence also produces an account of persons as social beings who are defined in relation to, and through relations of respect with, others. As a consequence they are always engaged in forming an identity (Nedelsky 2012: 35-37). In responding to this account, Naffine emphasises the ways in which relations of reciprocity in law are not often ones of respect or love. Nevertheless, for Naffine, even the achievement of minimal legal forms of relation, such as through obligations and contract, is, in this respect, of worth.

In many respects, such legal relations may be precisely what is required in the meeting in strangers in the absence of knowledge or amity.

For Naffine, what is needed in a discussion of relational jurisprudence (or, in my language, the conduct of lawful relations) is a *modus vivendi* that can address two concerns. First, it can address the competing accounts of the metaphysical views of persons. Second, it must be able to live with social and political constraints on the choices and relations that can be made and sustained (Nedelsky 2009: 156-160, 176-78). Naffine's own characterisation of legal persons as social animals, and of the project of law being one directed towards justice, faces similar difficulties to that of Nadelsky. Where Nedelsky places faith in ever improving relations of reciprocity, Naffine embeds her preferred norms in social practices and shared accounts of equality. While Naffine inserts this account of social value into law, it does not articulate with her defence of moderate legalism (Naffine 2009:181-183). In my account of the conduct of lawful relations and of legal persons, I have framed the contest of the metaphysical schools as a conflict of institutions and conducts of life, rather than, like Naffine, as a choice of beliefs. Where Naffine presents her account of legal persons shaped by philosophy, I have presented an account of persons who are shaped by legal technique. This difference might be encapsulated in the way that Naffine's first concern is with the question 'Who is law's person?'. By contrast, mine is 'How are legal persons crafted and engaged through jurisdictional practices?'. Naffine responds to her question in terms of belief and sociality. I respond to mine through addressing the ways in which dignity and care are practised through technical means.

Maria Drakopoulou's consideration of a relational ethic of care raises further warnings for those jurisprudents who place care as a form of 'normative practice providing standards by which other practices are judged' at the centre of their engagement with law (Drakopoulou 2000: 215). To so do, she argues, will result in the establishment of a new normative principle through which to reconstruct social and legal projects (Drakopoulou 2000: 217). Drakopoulou notes that relational jurisprudence, like equity, is being called in to remedy justice. She argues that if the question which relational jurisprudence addresses is that of the proper form of a feminist legal subjectivity, then turning to social norms of care will only displace that question.

Conclusion

This chapter has followed the exercise of the office of jurisprudent in its formulations of conduct of life and lawful relations within a jurisdiction of conscience shaped around persons. At its heart has been a concern to show three different ways in which conscience might be understood within a common law tradition. It has done so in order to displace the centrality of the metaphysical accounts of persons and conscience that were discussed in Chapter Four. The first account of conscience addressed the way that Dworkin recast several guarantees in the Constitution of the United States as an aspect of a dignified life. Here the philosopher judge became the source of authority and conscience in a way that is recognisably developed from Kant. It is a dignity cast in the terms of nobility fighting against tyranny.

The second account of conscience examined the development of plural consciences from with the plural jurisdictions and administrative forms of what has been a *parens patriae* jurisdiction. Here the jurisdiction of persons shaped conscience within institutional arrangements, rather than attempting to transform and transcend them. In this account the expression of the conscience of office of Judge was carried by the decorum of care for the dignity of the office and of the applicant.

A third account of conscience returned to the office of the jurisprudent and the attempt by critical jurists to establish a jurisdiction of persons shaped by the acknowledgement of relationships. Here conscience is carried in the way in which such relationships are characterised and given value. The expression of conscience is one of the scholar, committed to truth-telling and the maintenance of good faith.

Turning to the concerns of capacity and autonomy as an aspect of a jurisdiction of conscience, it is possible, I think, to see a variety of training programmes being channeled through forms of legal engagement. Not all of these engagements belong to government without more, since government itself turns out to have had more than one legal form (Hunter 2011; Minson 1993; Veitch S 2007). Following accounts of civil prudence, the treatment of the ECHR as a source of norms, and court cases as sources of training in conduct, will depend on office and audience. The lessons presented to legal officials and university jurisprudents render the formation of a *persona* voluntary, but this does not end the account of legal ordering. The techniques of, first, argument and deliberation and, second, government and administration also

establish techniques of training in conscience. In this chapter I have argued that paying attention to the techniques of crafting lawful relations allows for the development of office-specific forms of conscience and care. I have also suggested that the language of reverence towards the sacredness or preciousness of life has a role to play within these offices which does not return conscience to confessional dispute. Nor does it diminish questions of conscience in the spheres of mortality and politics. In remaining bound to office such accounts of office are open to evaluation and subject to praise and criticism.

In Part Two of this thesis, I have addressed the exercise of the Office of jurisprudent through jurisdictional forms and arrangements. In so doing, I have assigned to that office obligations to care for legal forms and relations at the end of life. I have emphasised a number of themes. First my account places weight on legal technicalities and institutional forms. Second, it holds onto the prudential work of law as the bearer of value. Third, it is directed towards concerns of conduct and conscience as matters of civility and dignity. In Part Two of this thesis, this approach has enabled some fairly direct description of the ways in which jurisprudents engage with questions of conduct and conscience, as it is has done so by suspending, or not directly addressing, some of the more usual formulations of the questions it posed. As a consequence, in the discussion of assisted dying there was no direct substantive engagement with medical ethics or bioethics. In part, this has been in order to avoid participating in debates about the morality of assisted dying as an advocate, normative jurisprudent or bioethicist. Rather, I have been concerned to conduct myself as a jurisographer and jurisprudent. However, my stance is accompanied by its own jurisprudential forms. I have placed my interest here within a humanities tradition of civil prudence, albeit one that is less constrained by civil authority than those in the 'Brisbane School' of civil thought introduced in Chapter Two.

The final point I would make in relation to the exercises of office that have been addressed in this part relates to training in conduct. In Part One, I followed, and attempted to think with, contemporary accounts of civil prudence and jurisprudence. I emphasised the different ways in which questions of office and questions of conduct and training belong to scholarly traditions of training in conduct. In Part Two, in turning to the exercise of office, jurisdictional practices in terms of training in conduct have not been elaborated either in terms of 'empirical history' (Hunter 2012) or

'normative dignity' (Dworkin 1993). My approach touches, more closely, as does the work of Jeffrey Minson (2009), on the organisation of the relation of office through humanist traditions of rhetorical-ethics. It also touches, as does Raimond Gaita, on the judgment of what of worth is shared by the conduct of lawful relations and the acknowledgement of forms of common humanity (Gaita 2017a). I have followed the ways in which the jurisdictional arrangements of civil conduct and conscience are, or could be, imagined within extent practices of jurisprudence writing without taking either the ethics of the right (Kant) or of the good (Aristotle or Aquinas) as central. My approach has also been at some distance from moral and legal criticisms that concentrate on the critique of power and the maleficent effects of contemporary forms of government and regulation. In both cases this is not because these types of argument are unimportant. Rather, I have been tracking something else, namely what can be done with forms of legal arrangement in the office of jurisprudent. Of course, the shape given to the ethic of office, and the characteristics and capabilities of *persona* of the jurisprudent, can all be subject to criticism, as can the actual practice of jurisprudents. However, neither has this been my primary focus.

I close Part Two of this thesis by turning briefly to the forms of *ars moriendi* that have been cultivated within the office of jurisprudent. The images that have informed the juridical ordering of the end of life have been contested. Some of these images are longstanding. The images of care often draw directly from religious traditions of care as the easing of suffering in preparation for the afterlife. Much depends on whether the deathbed scene is shape around a Protestant, particularly Methodist, celebration of dying and responsibility, or around a Roman Catholic focus on the sacramental passing of life (encapsulated in the image of last offices). These images persist in many different ways without necessarily passing through a direct concern with religious doctrine or ceremony. For example, in writing about hospice design, Ken Worpole (2009), notes that the hospice movement is steeped in the ethos of a Roman Catholic tradition of care. What interests him, however, is the way in which hospices are designed to achieve a certain peaceful acceptance and contemplation of dying. Without making reference to the forms of spiritual training that might be recommended in relation to dying, Worpole is interested in the decisions and technicalities that give shape to the modern European hospice and its sense of providing a house at the end of life where everything is gathered into one room. For Warpole, in this room, the concern with

conscience and care of the soul or self is let rest. A contrast can be made with the image of assisted dying presented by Dr Philip Nitschke (Exit International 2015). Nitschke was has been arguably the most prominent Australian euthanasia campaigner since the 1990s. He was instrumental in the passing of the *Rights of the Terminally Ill Act* 1997 (NT). Nitschke's image of dying is distinctly minimal and not tied to medical supervision. The image is of a gas canister of nitrogen and a 'suicide bag'. Nitschke's device gives control, insofar as it was possible to so, to the dying person. It is a suicide kit that can be made from household appliances and is not subject to external regulation. However, it is a device and activity that is accompanied with no training in dying beyond the technical means of working the apparatus.

The images addressed in Part Two of this thesis belong to law and to the office of the jurisprudent. The images of assisted dying presented in Chapter Five can be interpreted as being shaped around the government of end of life choices. However, a better account can be found in the concerns of civility and the comportment of dying in a dignified manner. In Chapter Six the image of dying relates to care of the self and others. However, the contests of conscience have not allowed a single uncontroversial account of dignity in living and dying to emerge.

Part Three: An Introduction

Art of Association: Status and Care of the Dead

Within the common law tradition, the office of jurisprudent has been charged with the responsibility of the formulation of the conduct of lawful relations among the living, the dead and the yet to be born. In Part Three, the responsibilities of the office of the jurisprudent of the common law tradition, and their forms of prudence, are addressed in relation to the status and care of the dead in their relations between non-Indigenous and Indigenous jurisprudences.

In many ways a concern with the juridical status and care of the dead feels eccentric to a modern legal thought which is conducted against the horizon of the sovereign territorial state. Philosophers have made mortality (itself) – rather being dead – the object of attention. The care of the dead and the marking of origins, ancestors and traditions is an inheritance of Christian and Classical (pagan) thought. However, such care rests uncomfortably in modern law. The civil authority of the state and forms of modern disenchanted thought have mostly turned away forms of community and conducts of life that take the dead as a source of authority or reference for the conduct of lawful relations (Weber 2004; Harrison 2003; Aries 1974). As with the care of the dying, civil ordering is distributed according to a number of different purposes and interests. The work of jurists and jurisprudents has been to bring order, or find patterns of relationship, among the living and the dead (Sperling 2008).

A concern with the customary form of law and with the transmission of law in relation to the dead is one that can be found more easily in early modern jurisprudence than it can in contemporary legal thought. Giambattista Vico, for example, considers the dead to be generative of law and life: 'we bury the dead to humanise the earth" (Vico 1967:8). In Vico the question of dignity touches the foundations of religious and political life. Kantorowicz's (1981) reconstruction of the corporate form of the English Crown notes that with respect to the elaboration of the King's two bodies – the mortal and immortal, the human and juridical – it is the juridical, immortal form that carries the concerns of dignity, corruption and reputation. The 'honour of the crown' remains one of ordering the conduct of the state and the

duties of the crown. In Canada, for example, the 'honour of the crown' has become a doctrine that shapes the relation of the Crown to the Indigenous peoples whose nations cross that of Canada (*R v Marshall* [1999] 3 SCR 356; Valverde 2015). If in some ways the dignity or honour of the Crown remains at the centre of the common tradition, then the legal form and dignity of the Crown also remain important. With respect to honour, that dignity is shaped around the relationships of peoples and laws with the dead. It is this relationship that is the subject matter of Part Three of this thesis.

The two chapters in this part of the thesis address the status and care of the dead through plural sites of authority. In Chapter Seven attention is paid to the legal form of repatriation and the ways in which the care of the Indigenous dead is formed within the common law tradition of Australia. The location of the dead within the common law is addressed through the emergent status of national museums as places for the care of the Indigenous dead. The obligation taken up by museums is to care for the Indigenous dead pending their proper return to their land. The obligations of office addressed in this chapter relate to attending to different ways of articulating and conducting lawful relations. The prudence relates to conducts of life and modes of deliberation in relation to the dead which are made available through legal forms. In Chapter Eight attention is turned, through a specific example, to the responsibilities of jurisprudents in the acknowledgement of the Indigenous dead and their jurisprudence and law. Here the concern is the arts of association or the complicity of office. In the concluding section of Chapter Eight, this concern with the arts of association is returned to the idioms of common law: experience and the ethic of office.

What is addressed in Part Three of this thesis is the conduct of relations of civility and dignity which are established, and made visible, through the conduct of lawful relations. These are addressed through the repertoires of argument and jurisdictional practices made available within a common law tradition. In so doing it this part offers accounts of a number of ways in which forms of 'civility and dignity practices' have been taken up as a civil prudence. The prudence of the patterning of the dead into lawful relations and into their lawful place is addressed from within the common law tradition. As with the care of the dying, such relations can be considered at the level of (abstract) dignity as worth and through formulations of practical reasoning (see Chapters Five and Six). In Part Three of the thesis, prudence has not been separated

from legal form and procedure, or reflection from conflicts of office. Accordingly, prudence is not treated as a general form of practical reason that transcends office. The sources and repertoires of conduct are treated as resources within a particular institutional time and place. The prudence addressed here remains tied to technique, technology, institution and law. In one direction this approach loses the sort of clarity that might come through addressing prudence as a matter of subjective or objective right (Villey 2000, 2001; Tierney 2014). This in turn makes thinking with prudence and dignity harder to articulate as a concern of government and rule. What is gained, however, is not a rationalisation or justification of judgment, but a way of following what is afforded within a tradition in relation to the status and care of the dead.

The pattern of Part Three of the thesis, then, repeats that of Parts One and Two. It begins with the repertories of civil prudence and brings these into relation with other jurisprudences, presented here in the contest and consideration of Indigenous jurisprudences. Chapter Seven is patterned around civil jurisprudence and the concern with the ways in which the Office of the jurisprudent takes up and responds to an obligation to repatriate the Indigenous dead to their own jurisdiction and their land. Chapter Seven is patterned around the ceremonial and jurisprudential engagement of the acknowledgement of jurisprudences. Both stress the ways in which those in the office of jurisprudent present and represent protocols and practices of the engagement of laws. In so doing, they provide repertoires for the comportment of the living towards the dead – those cared for within the jurisprudence of the common law tradition and those who should be returned to their own law.

Chapter Seven

Common Law Care of the Dead

Introduction

This chapter addresses the conduct of the office of the jurisprudent through two related aspects of the engagement of laws: one relating to the conduct and quality of the meeting of laws; and the other relating to the ways in which responsibility for the conduct of law in relation to the care of the dead is expressed. The conduct of lawful relations, or ways of belonging to law, addressed in this chapter are those made available in the work of the repatriation of the Indigenous dead from the museums and universities of Europe and North America to Aboriginal peoples and nations of Australia.[1] In this account I note the difficulties found for jurisprudents of the common law in presenting legal forms adequate to the task of arranging a meeting of laws and the sense of dignity they attribute to the arranging of meetings and the return of the dead.

In Chapter Two I framed one aspect of the conduct of the office of jurisprudent in terms of an engagement of a tradition. The legal tradition of the common law has its source in custom and and is practised through precedent. As such it is filiated to forms of the past and the future – to the dead and the yet to be born as well as the living. In this chapter, I follow the ethic of responsibility and prudence of common law jurisprudence as it struggles to articulate its own fragmented tradition. What is addressed, or what is followed, in this chapter is the lawful passing of the dead from one jurisdiction to another and the ways in which that lawful passing is conducted and valued. In keeping with the form of this thesis, the analysis of this chapter starts with forms of civil prudence and jurisprudence and works its way towards their limits in responding to the care of the dead. The first section addresses the difficulty of acknowledging another jurisprudence (here an Indigenous jurisprudence) from within a

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[1] The terminology of 'old people,' 'Indigenous dead,' 'ancestral remains,' 'human remains,' 'cultural items,' 'body parts,' varies with subject matter, context, and sense of responsibility. I have generally used 'Indigenous dead' to indicate that it is the dead and the place and placement of the dead that is at issue. I indicate specific uses as relevant. I have also used the terminology Aboriginal, Indigenous and First Nations and Peoples as context suggests.

common law tradition. The second section examines the techniques available from within the office of the common law jurisprudent though which relations with other (here Indigenous) jurisdictions can be given shape (Valverde 2009, 2015). The third section looks at the juridical conduct of repatriations. Here the jurisprudent is invited to explain how repatriation is given authority and shape by the museum rather than by the court. The final section addresses the ethic of responsibility of the jurisprudent and considers how the conduct of office can be shaped to respond to the promise and demand of justice for reconciliation with Indigenous peoples and their law. It also considers how this jurisprudence can respond to an anxiety that the common law is incapable of making any adequate response at all.

In this chapter the practices of jurisdiction that engage the meeting of laws are treated as being non-reflective and non-reflexive. The practices of jurisdiction which are addressed here are not considered as either reflecting broader social relations or as a point of critical reflection and transformation. The reason for restricting the scope of enquiry in this way is to draw out the particular forms of responsibility practised in the repatriation of the Indigenous dead. In so doing it also offers an account of the jurisprudence or conduct of lawful relations as expressed through the technical (and empirical) forms of jurisdictional practice. This account in turn is shaped by the sense that it is meaningful to have a sense of honour or shame about the conduct of lawful relations within the common law tradition (Gaita 1999: 87-106). This formulation mirrors that of the concerns with civil prudence discussed in Part One of this thesis.

This chapter, then, addresses the continuing juridical importance of the repatriation of the Indigenous dead as part of a meeting of laws. Accordingly, the office of jurisprudent is charged with returning of the dead to their proper law and jurisdiction. The next chapter takes up these concerns and the histories of repatriation and addresses them as part of the art of association.

1. Repatriation and the Acknowledgement of Laws

For different reasons, the burial of the dead is important both to Indigenous and non-Indigenous relations of law. The contemporary engagement of the repatriation of the Indigenous dead held in museums, universities and state institutions has a recent history dating back around forty years. Within traditions of western law the concerns

of repatriation have generally arisen as matters of the conduct of war and the practice of religious ceremony (Kantorowicz 1951). For those who live with the common law tradition, the contemporary concerns of repatriation are often viewed as part of a necessary political and ethical response to the wrongs of the dispossession of Indigenous peoples. In this context, repatriation might be considered a part of the work of restitution and reconciliation. Repatriation is more often considered as term of political engagement than of legal art. Its current usage relates without much doctrinal unity to the return of the military dead from the battlefield, to the return of refugees and stateless peoples, and to the return of the human and cultural remains of the Indigenous dead from the museums, hospitals and other institutions of colonial and former colonial powers. In general, the concerns of repatriation are linked with the maintenance of the *patria* or the nation.

The Indigenous dead were systematically disinterred, looted and collected from the moment of the British claim of sovereign possession and settlement in Australia. The experience of Indigenous peoples in Australia in this respect follows a familiar pattern of nineteenth century British, European, and American political, military, and scientific expropriation of land and life (Griffiths 1996: 58-59). In Australia it is Indigenous peoples and groups that have largely initiated the movement for repatriation. In the 1980s, organisations like the Foundation for Aboriginal and Islander Research Action (FAIRA) and the Tasmanian Aboriginal Centre (TAC) became important in advocating for repatriation. Considerable impetus for repatriation has also been generated from within the museums and universities in Australia, the United States of America and Europe (Jenkins 2011: 1-2).

The work of repatriation engaged by Indigenous peoples has been addressed in many different contexts. Henry Atkinson, a Yorta Yorta elder, has pointed out that in matters of repatriation the concerns of Aboriginal people lie directly with the dead rather than with human remains as such (Atkinson 2010: 15, 18; Cubillo 2010: 20). In *The Land is the Source of the Law* the jurisprudent C.F. Black of the Kombumerri and Munaljarli peoples draws out the sense in which the relationship between the living, the dead, and the yet to be born might be addressed within an Indigenous jurisprudence (Black 2011: 3). This understanding sets repatriation within an Indigenous cosmology, law of relationship and of (human) rights and responsibilities. The question of the dispossession and of the repatriation of the Indigenous dead is

addressed both in terms of a relation between the living and the dead and in terms of the way which you and your kin are patterned out of and into the land. This patterning is concerned with the ecology of the law of relationship: the balance through which the dyadic relationship to the land (cosmos) is maintained and the ways in which rights and responsibilities of humans are realised (Black 2011: 15-16). The removal of people – the dead, the living, and the yet to be born – from their land is a disruption of the cosmic ordering of the land and of the modes of governance that maintain relationships (Black 2011: 107). As Black points out, the remedy for this lies with an appropriate response to the lawful relationship with the land (2011: 109). From this viewpoint, the national and international laws of the common law tradition take on value only insofar as they can be patterned into an Indigenous cosmology and law.

Black also offers a blunt epitome of relations between Indigenous and non-Indigenous laws as that of a 'full law' to a 'half law.' The rights and responsibilities that engage Indigenous jurisprudences, Black notes, are not organised in terms of the interests of state sovereignty or common humanity so much as in terms of engagements and actualisations of a full cosmology and law of relationship. The 'half law' of Western state-based jurisprudences is organised in terms of an assemblage of limited jurisdictions that suspend judgment on full cosmological accounts of law. They judge by reference to limited forms of authority and responsibility (Black 2001: 291). This can be understood as a question of knowledge and of responsibility of law.

2. Common Law, Civil Jurisprudence and Meetings of Laws

Insofar as questions of lawfulness continue to be important to those living within a common law jurisdiction, questions about the meeting of laws also remain significant – as does the concern with the sense of honour and shame with which it is possible to live with law (Gaita 1999: 87–106). A meeting of laws can be arranged in many ways and with many degrees of engagement. It could be imagined as two people meeting and acknowledging a lawful relation. Usually it is more mediated and rather less direct. While the repatriation of the Indigenous dead need not be understood in terms of law, part of the challenge of Black's formulation of what is at issue in the return of the dead is to offer an account of what it means to engage in lawful relations from within the common law tradition in Australia.

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

The contemporary regulation of repatriation is predominantly constructed in relation to the authority and interests of the sovereign territorial state and the civil prudential concerns of security, civil peace and the welfare of the population. For the most part, the care of the dead and of human remains is treated institutionally as a matter of administration and welfare. This is so at both national and international levels. At a national level, there is a range of legislation that might deal with the repatriation and burial of the Indigenous dead (Vines 1998). Much of this regulation is shaped around legal concerns with ownership and possession. These concerns are addressed through general laws relating to civil rights, private property and criminal law. In Australia, human rights and international orderings remain embedded in these legal forms. There is also a significant body of law relating to the protection of the cultural heritage of Indigenous peoples and Torres Strait Islanders.[2] This law joins the repatriation of the Indigenous dead to a political concern with cultural heritage and the self-determination of Indigenous peoples. It also addresses the circulation and exchange of 'cultural objects' by museums, hospitals, and collectors. While given form in national legislation, this law of 'cultural heritage' forms aligns with international

[2] Commonwealth policy is shaped around the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). Section 21 specifically relates the disposal of Aboriginal remains and the Minister's responsibility to those remains after their return. The States have a variety of legislative regimes. *Protection Under State and Territory Laws*, Australian Government: Department of Sustainability, Environment, Water, Population & Communities:

http://www.environment.gov.au/heritage/laws/Indigenous/protection-laws.html (last visited 1 Dec., 2017).

conventions and Australia's obligations under them.[3]

Since 2007 the repatriation of the Indigenous dead has increasingly been considered from within the domain of rights. Article 12 of the *UN Declaration of the Rights of Indigenous Peoples* (2007) has considered the repatriation of the human remains of the dead to be one of a series of rights of Indigenous peoples to religion, ceremony, privacy and cultural artefacts. However, what is also important is that Article 12 is addressed to nation states and directs them, in conjunction with Indigenous peoples, to assist in the realisation of such rights. There is, however, no direct statement of the authority of an Indigenous law or jurisprudence. The repatriation of the Indigenous dead to their own law or jurisdiction in Australia is, then, largely addressed through the law of the Australian state.[4]

In order to draw out some of the ways in which Indigenous law and common law might meet and frame the responsibilities of lawful conduct, it is useful to step back from concerns about the 'justice of repatriation' and return to a number of jurisdictional practices that address a meeting of laws. While it is more usual to think of jurisdiction as representing authority, there is a lot to be gained by treating the arrangements of jurisdiction as authorising or creating and maintaining relations of law. In Part Two of this thesis it was argued that by attending to jurisdictional concerns it is possible to make visible the ways in which the common law understands how laws meet and how those who live with the common law conduct themselves in such a meeting (see also Dorsett and McVeigh 2012: 25-31).

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

As argued in Chapter Five, jurisdiction can be treated as a technology that is

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[3] Australia is a signatory to United Nations, Educational Scientific and Cultural Organization, Convention on the Protection and Promotion of the Diversity of Cultural Expression, 2440 U.N.T.S. 311 (20 Oct., 2005) and the United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). *See* Forest (2010: 1-5)

[4] Self-determination too is shaped around the continuing existence of the state-form and interests of the state *(*Pahuja 2011: 10-43).

concerned with the crafting of relations of law. This can be contrasted with the way that jurisdiction is usually cast within discussions that give priority to sovereignty. Viewed from the position of sovereign territorial states (and international law), jurisdiction is typically related both to the exercise of sovereignty as an attribute of the state and to the fact of the exercise of authority over a (physical) territory or land. However, giving priority to jurisdiction as a practice of the authorisation of lawful relations allows for the consideration of the way in which relations of law are shaped through forms of conduct. A territorial jurisdiction is one that authorises relations according to one's place within a specific (legal) territory. A territorial jurisdiction binds people, space and place to law; it need not bind land.[5]

The story of the British colonisation of Australia and the establishment of British sovereignty and government through the common law tradition can be narrated in terms of encounters and the meeting of laws. In the colonial period, to the extent that any legal relation was acknowledged, that relation was organised around status (as subjecthood). In the decision of the High Court of Australia in *Mabo v State of Queensland (No. 2)* ((1992) 175 CLR 1) that relation was recast as one of sovereignty and territory (Dorsett 2002). For the High Court, Indigenous rights to land were not a concern of law or laws, but, rather, were framed as a common law entitlement to land to be known as 'native title' (McHugh 2011: 1-24). In that decision, then, to the extent that a meeting was even considered it could only be understood in terms of the sovereign territorial ordering of the state. In the subsequent decision in *Members of the Yorta Yorta Community v Victoria* (2002) (194 ALR 538, 549–50), the High Court of Australia elaborated that the form of the meeting of laws was to be staged between two 'normative systems': Aboriginal laws and traditions and common law (at 550–52, 548 (quoting from Fejo v Northern Territory [1998] HCA 58)). For the High Court, the assertion of sovereignty by the British Crown 'necessarily entailed' that thereafter there could be 'no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise, it stated, 'would be to deny the acquisition of

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[5] See, for example, Hannah Arendt's formulation of territory in terms of a relationship between individuals. Arendt argues that territory relates 'to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language religion, a common history, customs, and laws. Such relationships become spatially manifest insofar as they themselves constituted the space wherein the different members of a group relate to and have intercourse with each other.' (Arendt 1963: 262-263)

sovereignty and … that is not permissible' (at 552). These two cases, and the subsequent *Native Title Act 1993* (Cth), had the effect, then, of shaping how meetings between Indigenous law and Australian common law are understood – and what a meeting place (such as a court or a museum) might require by way of lawful conduct (Dorsett and McVeigh 2012: 101; Richland 2011: 220-228; Gover 2011). It is a very limited meeting (Kirkby 2012; Motha 2002; Ford and Rowse 2012; Smith and Frances 2007).

A number of points can be made about the meeting of laws in relation to repatriation. The most obvious of these is that, while 'native title' marks a limit of to the processes of colonisation and decolonisation, the affirmation of the sovereign territorial state does not end the meeting of laws (McVeigh and Pahuja 2010: 104-110). If attention is turned from what is often treated as the territorial fact of sovereignty to the practice of jurisdiction, however, it becomes possible to consider the 'native title' cases and legislation in terms of the conduct of a series of jurisdictional relationships. In this respect, the assertion of sovereign territorial jurisdiction in the manner of *Mabo (No. 2)* or *Yorta Yorta* does not end the meeting of laws: it sets conditions (Dorsett 2007: 153-156; Dorsett and McVeigh 2012). The conditions it sets are that the meeting should always be conducted from within the common law and that Indigenous laws and jurisdictions should be treated by the common law as questions of fact. As Justice Brennan stated in *Mabo (No. 2)*:

Native Title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. (at 58).

The formulation of relations of law in terms of sovereign territorial states has had the effect of displacing the repatriation of the Indigenous dead as a concern with the honouring of the laws of Indigenous and non-Indigenous peoples. Instead it has become a test of the existence of the fact of Indigenous laws from the point of view of the first assertion of British sovereignty (Dorsett and McVeigh 2012b: 480-482). For the court this makes the task of determining laws an evidentiary inquiry ('Are you a rightful claimant?' 'What customs do you have?'). This, in turn, has engendered the more sceptical question: 'Do you exist for our purposes?' (Kuprecht 2012: 38-41; Rush 1997 83–93). The assertion of an Indigenous jurisdiction (and domain of rights and

government) for the Australian Courts continues to be a contest of authority, form and conduct (Langton, Palmer, Tehan and Shain 2014: 1-3; Palmer and Tehan 2006: 85-91).

As noted in Chapter One, attending to the forms of jurisdictional practice allows for the analysis of other forms of lawful conduct in the meeting of laws. In the next section, several jurisdictional practices will be discussed in order to address the arrangements of repatriation which are shaped by the legal forms of civil authority that just been described. Without wishing away the authority of a state as shaped by assertion of sovereign territorial jurisdiction, jurisdictional practices can also be understood on a smaller scale in the form of legal relations organised around the authority of an institution (the church, a university, a museum), the practice of adjudication, the formation of a legal category (say, that of the person or of a category like 'ancestral remains') or of a legal device. Jurisdictional practices, even those that organise lawful relations territorially, can be understood in terms of the forms of relationship they create and make available. In like manner, it is possible, even within forms of common law understanding, to frame some meetings of law in terms of conduct rather than as proof of existence or fact of practice. This in turn returns questions of jurisdictional arrangement to the conduct of office.

3. Repatriations

In contemporary practices of the repatriation of the Indigenous dead in Australia and elsewhere, it is the museum that has become the central office or bearer of political, administrative and cultural responsibility.[6] In addition to being institutions and sites of the display of the glory of the sovereign and 'civic laboratories' for new forms of citizenship, a significant number of museums have now taken up the task of caring for the ancestral remains of the Indigenous dead (Pickering and Gordon 2011: 2-3).[7] How

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[6] The policy of the Australian Federal Government is captured in its opening statement: 'The Australian Government is committed to addressing the injustice of Australia's shared past as it relates to the removal of ancestral remains and secret sacred objects to empower Aboriginal and Torres Strait Islander peoples to meet their cultural obligations and contribute to the wider Australian society'. Office of the Art, Department of the Prime Minister & Cabinet, Australian Government Policy on Indigenous Repatriation 4 (2011), available at https://www.arts.gov.au/sites/g/files/net1761/f/australian-government-policy-on-Indigenous-repatriation-august2011.pdf (viewed 1 Dec. 2017).

[7] The role was articulated in Museums Australia, *Continuous Cultures, Ongoing Responsibilities: Principles and Guidelines for Australian Museums Working with Aboriginal and Torres Strait Islander*

this new task might be understood, and whether it should be undertaken, has been the subject of intense debate (Pickering 2010: 166–68; Turnbull 2010: 121–30). Museums have frequently hesitated over the return of 'ancestral remains', citing not only a lack of legal obligation to repatriate but also expressing a number of competing or overriding duties, interests and rights. Such claims have been made in the name of scientific research, the obligations of civic education and the curating or care of national or universal cultures (Flessas 2008: 392–402). These justifications and their forms of practice are not directly at issue in this chapter. Or, rather, such concerns are directly at issue, but it is argued here that they cannot be addressed without attending to the jurisdictional modes of the authorisation of the conduct of lawful relations.

In many respects the question of rival or competing interests in museum practice has been decisively answered in Australia. The Australian Government, at least, is clear that repatriation is part of its concern with remedying the injustices of its 'shared past' with Indigenous peoples. Australian regulation has followed that of the United States of America in developing an account of repatriation within domestic institutions that is based on a presumption of repatriation where it is possible to do so.[8] Rather than develop regimes of civil rights, Australian regulation has addressed repatriation through relations of cultural heritage and property (Tehan 1996: 280–87; Watson 2003: 38-40; Truscott 2006). Designated museums undertake the work of repatriation from Australian institutions and act as mediators in voluntary repatriations of work from overseas institutions.[9] These practices are set within a range of policy concerns

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Cultural Heritage 20 (2005). See now the National Museum of Australia's policy documents on repatriation: *Repatriation*, *National Museum of* Australia, http://www.nma.gov.au/collections/repatriation (last visited 1 Dec. 2017). For an account of the civic project of museums in Australia see Bennett (2005: 534–41).

8 The *Native American Graves Protection and Repatriation Act* (NAGPRA), 25 U.S.C. §§ 3001–3013 (1990) and the *National Museum of the American Indian Act* (NMAIA), 20 U.S.C. § 80(q) (1989) have shaped the presumption of the repatriation of Indigenous dead ('cultural objects') along the lines of civil rights, property, culture, and public administration. See Trope & Echo-Hawk 2001: 22-31.

9 At the level of the Commonwealth Government the 'Return of Indigenous Cultural Property Program' covered these matters. Between 2001 and 2010 the program supported the return of more than 1,400 ancestral remains and 1,380 secret sacred objects to Indigenous communities. Work has also been done to identify the origins of other ancestral remains and secret sacred objects held in the collections of these museums. This resulted in the identification, to community level, of over 1,000 ancestral remains and over 3,000 secret sacred objects. *Department of Environment, Heritage and the Arts Annual Report 2009-10*, Australian Government: Department of Sustainability, Environment, Water, Population & Communities, http://www.environment.gov.au/about/publications/annual-report/09-10/outcome5.html. See also

running from the creation of spheres of Aboriginal self-determination and participation in government to urban and regional planning and development (Schnierer 2010).

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

Plural Jurisdictions

One of the complexities of thinking jurisdictionally within the common law tradition is that there is rarely a single point where jurisdictional practice is securely bound to sovereign territory and its administration. As outlined in Chapter Six, the first division of jurisdictions and of laws within European idioms was between common law (of nations and peoples) and canon or church law. The jurisdictional arrangements of common law and ecclesiastical law hold the shape of the distinction between the forum of conscience (church or spiritual authority) and the external forum of government (civil or temporal authority). One problem for those who address the repatriation of the Indigenous dead through the common law is that the common law does not always care for its own dead. However, in matters of repatriation of the

https://www.arts.gov.au/what-we-do/cultural-heritage/Indigenous-repatriation for the general policy statement of the Commonwealth (last visited 1 Dec. 2017).

Indigenous dead, the statement of law that there can be no property in the dead has been used to explain why museums have no legal obligation to repatriate the Indigenous dead. If there can be no property in the dead, there can be no common law duty to return stolen property. Therefore, any claim for the return of the human remains had been treated as a 'moral' claim rather than an enforceable legal claim. At common law this idea can be traced either to a decision of Edward Coke in 1613 in *Haynes Case* ((1614) 77 Eng. Rep. 1389, 1389; 12 Co. Rep. 113, 113) or to Coke's *The Third Part of the Institutes of the Laws of England* (*Third Institute*) (1644), 'the buriall of the cadaver (that is, *caro data vermibus*) is *nullius in bonis*, and belongs to Ecclesiastical cognizance, but as to the monument, action is given … at the Common Law, for the defacing thereof' (Coke 1644: 213). The *Third Institute* does not say that a cadaver does not belong to law, or even that it could not be bound to the common law. Rather, it says that in the matter of burial the body belongs, or is bound to, another law – ecclesiastical law (Thomas 2004; Dorsett and McVeigh 2012: 69-72).

The decline of the significance of an ecclesiastical jurisdiction in the seventeenth century has been problematic. It has left no jurisdiction which has authority over the body and the matter of its dying. One consequence has been to leave the dead body without jurisdictional place. Of course, it is possible within Australian law to treat the body as property or being owned. The heritage legislation for the state of Victoria in Australia does something like this, declaring that Aboriginal people who can show a traditional or familial link to Aboriginal human remains become the owners of the human remains (see, for example, *Aboriginal Heritage Act* 2006 (Vic) s 13(1)). Where Aboriginal human remains are held by state institutions, they are to be handed over to the relevant museum's board with a view to returning the remains or keeping them as custodian (s 15).

Haynes Case struggled with what can be held within a jurisdiction or what happens when what were two distinct jurisdictions are joined. Following, or developing, a line of argument about the meeting of laws requires a sense of the way in which the transmission of law is also an engagement of the institution and address of law. The inheritors of the decision in *Haynes Case* lost the mode and meaning of what is bound to law. In one reading *Haynes Case* and its subsequent doctrinal development shows how failure to attend to this matter has meant that the dead of the common law and the Indigenous dead brought into the sphere of authority of the common law have

come to be treated without care or reason. They are not patterned into the ordering of forms of life and death and the relations of the living, the dead and the yet to be born, as they were within an ecclesiastical jurisdiction of conscience. Treating the dead as a concern of property and repatriation as a concern with the restoration of property relations in cultural heritage loses the sense in which repatriation is concerned with a meeting of laws (Dorsett and McVeigh 2012: 71).

In another, civic reading, *Haynes Case* simply suspends discussion of the status of the dead or displaces such concerns into the administration of the dead.[10] In the alignment of the care of the dead with property relations, a museum, for example, charged with the care of the dead conducts itself as a matter of statutory authority, administration, and policy. An Aboriginal person can be recognised as an owner of the dead under Australian law but not directly as someone with responsibilities and rights under an Aboriginal law. The *Aboriginal Heritage Act* 2006 (Vic) does not mention Aboriginal or Indigenous law. As a matter of description of policy and activity, the lack of reference to another law means that there can be no sense of the movement between laws. What might also be lost for those living within the common law tradition is the ability to formulate a relationship of lawful conduct, either of conscience or government.

Inheritance and Placement

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

[10] See also Leiboff (2016) for a patterning of fabulation and care of the dead as a series of fables.

One example of the treatment of the return of the Indigenous dead as a concern of proper inheritance can be found in the Tasmanian case of *Re: An application by Tasmanian Aboriginal Centre Inc* (2007) 16 Tas LR 139, 141. This case was initiated by the Tasmanian Aboriginal Centre (TAC) as part of their political work to secure the return to Tasmania of those Indigenous dead held in museums in England and Scotland. The application to the Tasmanian Supreme Court was sought in order to make the TAC administrators of the estates of seventeen dead Aboriginal Tasmanians whose remains were being held in the Natural History Museum in London. As administrators, the TAC were given the responsibility to secure the inheritance of any possible descendants of the dead Aboriginal men and to bury the dead men according to 'customary [Indigenous] law' (143) (Davies and Galloway 2009). Most interesting from the viewpoint of the meetings of laws is that by making the Indigenous dead a concern of inheritance and burial, rather than of heritage and property, they come to be treated as dead and as being in a relationship with the living and the yet to be born. However, the cost of such acknowledgement is that inheritance and burial must take place as a matter of Australian law.

A related jurisdictional ordering can be seen in the arrangements where there is a dispute of law and ceremony in the burial of the dead. This matter has been addressed in several common law decisions in Australia and New Zealand where the rights of executors at common law have been set against religious, cultural, spiritual and legal concerns Indigenous laws. As in *Haynes Case* (1610), however, the real concern is one of authority and care. In these cases, the questions of jurisdictional arrangement were not posed in terms of a relation between common law and ecclesiastical law but between the common law and the law of Indigenous peoples. Where there is specific contest between jurisdictions the law in Australia is mute (not least because the common law does not recognise another jurisdiction). In *Jones v Dodd* [1999] SASC 125 the father of the deceased wanted his son to be buried in his homeland at Oodnadatta in South Australia. The plaintiff, the deceased's common law partner, and her children lived in Port Augusta. She wished the deceased to be buried near his children. The court noted that burial was a practical matter and that in the event of a dispute the court ought to be sensitive to the parties' wishes. In this case 'proper respect and decency' (at [53]) meant that the court should take account of religious, cultural and spiritual aspects of the parties (at [51-54]). The deceased was, therefore,

buried on his father's land. More recently in New Zealand the understanding of the burial of the dead as a matter of law and contest of law was given sharper focus in a detailed decision by the Supreme Court of New Zealand. It also gives some insight into the obligations of jurisprudents, here in the courts, towards addressing the meeting of laws. In the case of *Takamore v Clarke* (2012) NZSC 116 a dispute arose over burial place and burial rites of James Takamore. The question arose as to whether he should be buried according to the wishes of James Takamore's wife who was also the executrix of his will or according to the wishes of the family of his birth. Mr Takamore was of Whakatōhea and Tūhoe decent. Mr Takamore's family wished him to be buried at the family marae according to Tūhoe custom. Mrs Clarke and her children wished Mr Takamore to be buried near them in Christchurch. What was at issue was the question of who had the right to decide and according to which law. The case was heard as a matter of New Zealand law. While the relevant *tikanga* was recognised as 'customary' law, the different common law courts that heard this case held different views as to the status of *tikanga* Māori and its relation to the common law and to the nation state. At first instance, In the High Court, it was held that the *tikanga* relating to burial could not be recognised as consistent with the common law [2010] 2 NZLR 525 (HC) at [86]-[88]. The Court of Appeal applied the traditional criteria of recognition of custom: recognition of time immemorial, reasonableness (non-repugnancy); certainty; and continuity (non-extinguishment). The court determined that it could not. It failed the test of reasonableness ([163]-[165]). What is extraordinary in this case is that the two laws were related not to the present situation in New Zealand of the relations of those who live by the common law of New Zealand and those who live by Māori *tikanga* but to the relation between the common law of England and the common law of Ireland. The majority of the Court of Appeal returned to the *Case of Tanistry* (1608) in order to develop a test of the recognition of custom ([109]–[110]; *Le Case de Tanistry* (1608) 80 Eng. Rep. 516 (KB)). The *Case of Tanistry* initiated the legal assertion of an English common law jurisdiction in Ireland. It did so by drawing and hearing disputes of inheritance. In doing so, it asserted the right of the courts of English common law to be the sole place from which law is heard (Dorsett 2002: 49-50). In the end, the Court determined to take what it termed a 'more modern approach', that *tikanga* should be integrated into the common law where possible [at [255]].

The majority of the Supreme Court in *Takamore v Clarke* returned the question of the authority to bury to that of the role of the office of Executor and the inherent jurisdiction of the Supreme Court to decide questions of burial where disputes are irresolvable or resolved unreasonably ([90]-[95], [152]-[155]).[11] All members of the court agreed that in determining how a person was to be buried *tikanga* should be a relevant consideration – it should be given weight and value. With this the question of the meeting of laws is returned to any array of concerns of judicial and administrative office within the common law of New Zealand (Dorsett 2017: 274-278).[12] In this way *tikanga* Māori is recognised as continuing law, but the conduct of lawful relations remains with the common law – and, as in Australia, how the common law understands Indigenous laws is as fragments and remains (Dorsett 2017: 278; Rush 1997).

The dead in this case might be buried according to custom but not law. Problematically, *Takamore* was not seen by any of the Courts as a case concerning jurisdiction. In fact, to the extent that the Supreme Court was aware that jurisdiction was at issue, it went to some lengths to craft the decision from within the common law, rather than attempt to craft it as one of relations between laws. From this perspective the common law of New Zealand (and, one might infer, Australia) remain engaged with their own pasts in the creation of lawful relations. Neither *Hayne* nor *Takamore* addressed the care of the dead as one of jurisdiction or the relations of laws. *Hayne* reduced the care of the dead to a question of common law property, while *Takamore* reduced questions of jurisdictional authority of another law to ones of 'weight' and 'value'. Both enfolded questions of authority of another law into the common law and crafted the jurisdictional forms according to those of the common law itself. Despite this (or as a result) the shadow of older personal, ecclesiastical, and rival jurisdictions points to the continuing contest of legal forms and jurisdictional ordering within the institutions of the common law tradition. The common law of a place is held by jurisdictional arrangements. Like the organisation of office, the arrangements are concerned with both institution and (appropriate) conduct.

While the discussion of the jurisprudence of jurisdiction has drawn attention to the

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[11] It is worth noting Elias CJ's acknowledgement of the importance of the obligations to the dead and the yet to be born for those who are guided by the *tikanga* of Tūhoe at para [97].

[12] See also *Tamati Mason v The Queen* [2013] NZCA 310 (Dorsett 2017: 278-280)

crafting of legal forms, the final part of this chapter turn towards what might be considered new authorities and sites of jurisdiction or, perhaps, the re-assertion of a jurisdiction. The transformation of jurisdictional arrangement into new forms of administrative and procedural arrangements has meant that questions of jurisdictional authority and authorisation have been displaced.

Finally, a return can be made to the sorts of repatriations engaged by museums in Australia and New Zealand. By holding on to the meeting of laws as an arrangement of plural jurisdictions and different practices of conduct, it is possible to open up two lines of observation about the status and authority of museums in the conduct of repatriation of the Indigenous dead. The first, in a sense, is obvious. The development of museum policy in Australia addresses the concerns of repatriation through the aspirations of the *United Nations Declaration of the Rights of Indigenous Peoples*. It acknowledges the centrality of Indigenous self-determination and proposes a practice of consultation that differs considerably from and, in part, resists the jurisdictional forms of lawful relations incorporated within the Australian common law. The way such understandings are related to the forms of conduct of law and administration is left to be determined as a matter of politics and negotiation. One consequence of this is that Australian museums no longer address their roles as custodians of a universal heritage but, for some museums, as custodians of the Indigenous dead. For example, the Advisory Committee for Indigenous Repatriation (2014) has recommended that a national resting place be established near the national war memorial in Canberra. For some, especially in the United Kingdom, withdrawing from the project of promoting national or world culture marks a loss of authority of museums (Jenkins 2011). However, at least in Australian and New Zealand, it might be the case that museums are taking up new roles and responsibilities.

The second observation is more speculative. Museums have been directly charged with the responsibility for mediating the repatriation of the Indigenous dead. In so doing they exercise a distinct authority. To consider the museum a jurisdictional entity also invites consideration of the basis of that authority and how it might be understood within the array of jurisdictional arrangements that are represented in the montage of law (Goodrich 2008: 221-223). In this section it has been argued that museums in Australia are taking up an authority and jurisdiction to care for the dead. While this is a civil jurisdiction the sense that this jurisdiction is protecting spiritual values invites

analogy with the old ecclesiastical jurisdiction of conscience. If this is so, then curators are also taking up the *persona* of jurisprudents who care for the conduct of lawful relations. For such a jurisdiction to be established it would have to take responsibility for the dead rather than for the care for human remains. Against this, legislation such as the *Aboriginal Heritage Act* (2006) (Vic) or the Australian policy on museums and repatriation, prefers to present repatriation as a matter of government and civil authority (Bennett 2013). In neither account is it clear that the legal ordering will permit a meeting of laws.

Before leaving the museum, the last account of the conduct of meeting must address the right to 'speak for country (or law)' and to conduct the proper ceremonies of the dead.[13] A plurality of legislative arrangements for the representation of Aboriginal elders has developed in the government of cultural heritage and the repatriation of human remains (Advisory Committee for Indigenous Repatriation 2012). Such forms of consultation are important in the work of the repatriation since they establish an institutional form which attends both to the care of the Indigenous dead and for their return to their own law. While the jurisprudence of the meetings of law is in a poor state this has not stopped the work of repatriation in the major national museums. This section closes with two accounts of repatriation. The first account is taken from the return of Māori Ancestral remains from the *Field Museum* in Chicago, United States, to *Te Papa Tongawera,* Wellington, New Zealand.[14] This repatriation can be contrasted with the formulation of the relation of laws in *Takemore*. The repatriation was accompanied by representatives of the Menominee Nation and involved a reciprocal gift to the Field museum. It was conducted by making the dead the centre of the attention of law. It did so by honouring both the dead and the law. It was notable that this passage of the dead was not conducted ceremonially through the common law. The second account, already addressed earlier, is taken from the recent repatriations of the Indigenous dead from the museums and institutions of the United Kingdom to Tasmania, Australia. In this particular

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[13] Outside of museums, the acknowledgement the right to 'speak for country' and to uphold Indigenous law is limited to general Australian law or rights exercised in relation to the exercise of native title rights and interests. For example, the native title 'right to protect' burial sites is notoriously limited. See *Neowarra v WA* [2003] FCA 1402, [132]–[135].

[14] *International Repatriations*, Museum of New Zealand:

http://www.tepapa.govt.nz/AboutUs/Repatriation/Pages/InternationalRepatriations.aspx (accessed 1 December 2017).

repatriation there were two ceremonies: the passing of the remains from the British Museums to the representatives of TAC in London; and then the passing of the Indigenous dead from these representatives to the TAC itself.[15] Again these ceremonies held the formal engagements of the institutions of the common law at some distance. The challenge for the office of jurisprudent is to find a form adequate to conducting such a meeting. To do so concerns both the honour and shame of the common law.

4. Ethic of Responsibility

The account of the meeting of laws in repatriation offered here has been limited and, in many respects, unhappy. The final part of this chapter returns questions of jurisprudence and jurisdiction to the office of the jurisprudent. Holding onto office here tests the institutional quality of the conduct of repatriation in the meeting of laws (Minson 2002: 134–37).

The analysis of the placement of the dead and the meeting of laws presented in this chapter has followed a number of ways in which Indigenous and non-Indigenous laws meet without necessarily coming into close relation. At its centre is an account of lawful relations that follows the contours of a civil jurisprudence ordered around sovereign territorial authority, civil peace and the welfare of the population. The social task of this jurisprudence rests on security and limited sociability. It is, therefore, a prudence. The contemporary formulation of repatriation in Australian museums responds to a somewhat different account of the conduct of the meeting of laws to that offered by civil prudence. In this account, common law and Indigenous law are in relation. This assertion returns repatriation to a more general jurisprudence of the conduct of the meeting of laws. This section turns to two characterisations of the office of jurisprudent in the meeting of laws. The first holds the honour of the meeting of law to the possibility of finding a common language and sense of justice. The second turns attention back to resources within the common law tradition

The work of the Canadian jurisprudents Jeremy Webber and Mark Walters draws

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[15] *Ancestral Aboriginal Remains Arrive in Hobart*, ABC NEWS (May 14, 2007), http://www.abc.net.au/news/2007-05-14/ancestral-aboriginal-remains-arrive-in-hobart/2548730; discussed *Aboriginal Remains Row*, Australian broadcasting Corp. http://www.abc.net.au/7.30/content/2007/s1853611.htm (1 December 2017).

attention to the ways in which both Indigenous law and common law would have to be drawn into relation for common law accounts to establish a meaningful meeting of laws. For both Webber and Walters, the prospect of a meeting of law and of the possibility of justice depends on the realisation of the customary character of both common law and Indigenous law. It also depends on developing an awareness of the 'intersubjective' quality of lawful relations and the importance of negotiating between laws. For Webber this requires both the work of comparing law and the political insistence on a common horizon of justice (Webber 2009: 623-25). Law is grounded, fundamentally, in the practices of particular societies. All law, even legislation, is in an interpretive relationship with those practices (2009: 581). Custom, for Webber, allows for the comparison and relating of Indigenous and non-Indigenous forms of legal ordering. Framing law in terms of customary conduct allows for the recognition of the plurality of practices of law – even when they are in conflict with each other. For Webber, 'inter-subjective' recognition is the basis of the formation of justness – between and in and across laws. It is here that we begin the engagement of Indigenous and non-Indigenous laws.

In Webber's account, custom is understood in terms of a grammar (attributed to Wittgenstein) whose 'structure and terms enable and constrain what a competent speaker can say intelligibly' (Webber 2009: 618-19). In a way that emphasises social practice (and tradition), Webber presents custom as part of a common pattern or narrative of action; in part as a shared grammar of law; and in part as a concern with the forms of pragmatic engagement (in good faith) of lawful relations (Webber 2009: 619-621; Dorsett and McVeigh 2012b: 491). It is the analogy of law as part of a customary form and practice of language that allows for the negotiation of recognition of commonality of laws. In turn, it is the commonality of customary form that makes negotiation and exchange the point of focus of the meeting of laws. For Walters, the task of engaging the meeting of laws is bound up with reconciliation. Reconciliation itself is the 'unwritten' principle of legality. Here, both Indigenous and non-Indigenous law in Canada are joined in the realisation and maintenance of 'social harmony, political co-ordination, and rational deliberation' (Walters 2008: 188–89). The work of repatriation, then, might be given shape in finding a common language of law and custom that relates the importance of the burial of the dead to the conduct of lawful relations.

Both Walters and Webber find a common purpose in the meeting of laws. For them the work of the office of the jurisprudent takes shape in the finding of a common language worthy of the conduct of lawful relations in the repatriation and burial of dead and in bringing laws into relation. Their jurisprudence, like that of Dworkin, carries with it an ethic of perfection. It is the 'inter-subjective' character of the engagement that will address a reconciliation of law. It is a comportment framed in terms of good will and a willingness to find a *modus vivendi.* This form of engagement is also articulated by museums in Australia.[16] The common law tradition is presented as part of a world of shared meaning and action or experience (Gaita 2017a).

Whether or not entering into and reconciling customary (lawful) relations is possible or convincing depends on whether the common law tradition has a sufficiently meaningful account of jurisdiction, conduct and experience to sustain the lawful relations required in the meeting of laws – even if this can never be a full meeting. The Australian jurisprudent Peter Rush has pointed out that much of the concern of common judges and jurists is directed towards the capabilities of the common law rather than towards reconciliation. What is at issue is the way the possibility of lawful relations is tied to the experience of law. In Rush's reading of the common law, the experience of the common law in Australia is one of anxiety and trauma rather than one of perfection and good faith (Rush 1998: 148). The remorseful acknowledgement by the Judges of the High Court of Australia of the shame of the dispossession of Indigenous peoples from their land made plain a sense of the difficulty of entering into lawful relations (*Mabo (No. 2)* at [50] per Deane and Gaudron JJ). Rush notes that this sense of shame also relates to the loss of tradition within the common law. For Rush, the ethic of those in the office of the jurisprudent should not start directly with the pragmatic meeting of laws but with the care for the law that is brought to the meeting. Where Webber's ethic takes shape in intersubjective relations, Rush's ethic of office engages the responsibility of the jurist to create and maintain some form of 'interiority' to law – an interiority or experience of law adequate to sustain conscience and

[16] See also the emphasis in the Australian context in the Australian Commonwealth Advisory Committee for Indigenous Repatriation, *National Resting Place Consultation Report 2014* (viewed 1 Dec 2017: https://protect-au.mimecast.com/s/rNKkB3tvwaa7sW?domain=arts.gov.au. Thi s is also the task articulated by Museums Australia in its recommendation of museum practice (Museums Australia (2005, 6–10). The recommendations emphasise: custodianship rather than ownership; recognition of the value of stories; acknowledgement of Indigenous cultural practices; creation of genuine relationships of reciprocity.

judgement (Rush 1998: 147; 1997). It is an ethic of responsibility that is framed in terms of finding the appropriate internal qualities to meet external realities (Rush 2013; Webber 2004: 82–84). Within Rush's jurisprudence, and Gaita's too, the repatriation of the Indigenous dead would be accompanied by a concern with the loss or recovery of the body of the common law.

In the office of the jurisprudent the work of both Webber and Rush highlights the importance of what is brought by the common law tradition to address the lawfulness (and justness) of the repatriation of the Indigenous dead. The concern with the customary form of law and with the transmission of law expressed in Webber's work depends on finding a common meaning for custom and tradition for both Indigenous and non-Indigenous peoples. While Webber and Walter provide an important reminder that the meeting of laws must be conducted as a matter of shared meaning, this does not tell us enough about the form that the relations between laws are to take. The claim made by Vico that we bury the dead to humanise the earth provides another formulation of tradition (Vico 1984: 7; Harrison 2003). It makes a direct connection between burial, the dead and the responsibilities of the living. However, two qualifications need to made to Vico's assertion. The first is that one duty of the office of the jurisprudent is to find the means of inheriting law from the dead. The discussion of the care of the dead in this chapter shows that this is an enduring problem within common law thought. The second is that burial must be done for the dead and not simply for the living. Without this honouring of the dead, it is only a body that is buried (Gaita 2004: 136-138).

In this chapter the obligations of the office of the jurisprudent of the common law have been addressed through institutional forms of conduct. Within a civil prudence the responses of Webber and Walter would be questioned for the romanticism of assuming a common language and concern for justice. Rather, civil prudence would pattern such concerns back into the technical sources of a jurisprudence which would be constrained by the responsibilities of state ordering. Civil jurisprudence would resist recourse to alignment of law with the dead. Civil jurisprudence would worry that such a claim of authority would set the common law tradition adrift from state ordering.

Conclusion

In many public institutions in Australia it is customary to begin a public occasion with a form of acknowledgement of 'country.' At the Faculty of Law of the University of Technology Sydney, New South Wales, one of the protocols takes the form: 'I would like to acknowledge the Gadigal People of the Eora Nation upon whose ancestral lands our City campus now stands. We would also like to pay respect to the Elders both past and present, acknowledging them as the traditional custodians of knowledge for this land.'[17] This protocol is interesting for several reasons, not the least of them being the way in which it offers a form of acknowledgment of a relationship between Indigenous and non-Indigenous peoples in Australia. What is also interesting is the way that the protocol suggests, but does not make explicit, that what is being acknowledged is the meeting of Indigenous and non-Indigenous laws. By referring to the Gadigal people of the Eora Nation as 'traditional custodians of knowledge' the presence and acknowledgement of two laws are let rest somewhere between a law that is past and a present that acknowledges only tradition. 'Settler' and 'post-colonial' nation states continue to struggle to create political and juridical forms adequate to the demands of the conduct of relations between non-Indigenous and Indigenous peoples (Dorsett and Hunter 2010; Genovese 2008).

From the viewpoint of those who follow the common law, I have argued that the conduct of the meeting of laws is shaped by the repertoires of jurisdictional practice and that the meeting of laws is also a practice of lawful conduct, or a jurisprudence. In considering the responsibilities for the dead, the living and the yet to be born expressed within Indigenous jurisprudences, Black has emphasised the ways in which law is authorised through experience and through the actualisation of relations. In response, I have argued that it is through a practice of jurisdiction that the common law comes closest to offering an account of the conduct of lawful relations. I have phrased these concerns in terms of the appropriate conduct of office, which has also enabled the practice of the meeting of laws and the repatriation of the Indigenous dead to be addressed in terms of the honouring or dishonouring of peoples and laws (Black 2011: 358).

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[17] http://www.gsu.uts.edu.au/policies/documents/guiding-principles-welcome-acknowledgement-country.pdf (viewed 1 Dec 2017).

Chapter Eight

Art of Association: Jurisprudents of London

Introduction

The focal point of consideration of the office of jurisprudent in this chapter is the cultivation of the *persona* of the jurisprudent in the conduct of lawful relations between non-Indigenous and Indigenous peoples. It addresses, as an aspect of the training in office, some of the unofficial ways in which a *persona* might be cultivated. I do so in order to follow the ways in which a jurisprudent might take responsibility for the conduct of lawful relations where there are no clearly established forms of appropriate conduct to do so and where the relationships of law and responsibility are not properly established through a clearly delineated office. This is not so much a matter of formal training as one of comportment. In the last chapter the responsibilities of the office of jurisprudent in the meeting of laws were presented in terms of the authority of the common law tradition, the dignity or worth of the ways in which laws meet and the obligations of meeting well. The response in terms of the obligations of office was framed through tradition and experience. In this chapter, the care of the dead is addressed as an aspect of an art of association and the creation and maintenance of lawful relations in the shadow of the common law tradition. In this chapter, the 'art of association' is understood in terms of the comportment and repertories of the *persona* of the jurisprudent. Chapter Seven looked at the practices of the institutional conduct of office. Its ethic of responsibility was concerned with the maintenance and practice of the common law tradition. This chapter looks to the cultivation and practice of a *persona* – the *persona* of a particular jurisprudent which for present purposes I have called the 'jurisprudent of London'. This jurisprudent is a jurisprudent of the common law but does not necessarily occupy a formal office.

This examination is conducted through a study of the staging of two linked exhibitions by the British Museum and Australian National Museum. The first was 'Indigenous Australia: Enduring Civilisation' ('Enduring Civilisation'), which was held in London from April to September 2015. The second was 'Encounters: Revealing Stories of Aboriginal and Torres Strait Islander Objects from the British Museum'

('Encounters'), which was held in Canberra from November 2015 to March 2016.[1] The exhibitions displayed artefacts and materials seized and received via various means from Aboriginal peoples in Australia during the eighteenth and nineteenth centuries (Civilisation 2015: 9; Encounters 2015:15-17, 232-239).

The first section of this chapter addresses the resources of an unofficial 'diplomatic' tradition of humanist jurisprudence. It shapes an art of association around the virtues and vices of complicity: the ways of creating and undermining lawful relations. The second section of this chapter presents an analysis of the Civilisation and Encounters exhibitions as they address their themes. It tests the sense that there is both a jurisprudence at play in the two exhibitions and that this jurisprudence is engaged with the dignity of the dead. The third section of this chapter returns to the jurisprudents of the common law tradition and examines the ways in which writers of jurisprudence have recast some of the topics of rhetorical ethics. These topics, I argue, represent the official responsibilities of the conduct of the meeting of laws that might be addressed under the topics of ethos, respect and the practice of the art of association in a particular time and place. In this chapter I take 'unofficial' to relate to sources of training and cultivation of the *persona* that are undertaken as part of a general engagement with the public responsibilities of the jurisprudent. I investigate three sources in order to show how ethos, meeting and place are addressed in order to cultivate an art of association. The sources are an English translation of Montaigne's Essays (1987) and a number of essays by the legal scholar Annelise Riles (2008) and the public worker (scholar/artist) Paul Carter (2013). They all touch on the forms of unofficial training in the persona of the diplomat and jurisprudent, and they both worry about how to meet well.[2] In addressing Montaigne, Riles and Carter, I test a range of materials suitable for a contemporary civil prudence of London. I do so by linking the art of association to the care of the dead.

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[1] The Australian National Museum's 'Encounters': http://www.nma.gov.au/exhibitions/encounters.
'Unsettled: the story within': http://www.nma.gov.au/exhibitions/unsettled.
The British Museum's 'Enduring Civilisation': http://www.britishmuseum.org/whats_on/exhibitions/indigenous_australia.aspx?fromShortUrl.
The two exhibition catalogues are titled: *Indigenous Australia: Enduring Civilisation (*Civilisation 2015) and *Encounters Revealing Stories of Aboriginal and Torres Strait Islander Objects from the British Museum* (Encounters 2015).

[2] I have used Michael Screech's translation of Michel de Montaigne *Essays* (1987). Frequently references are given to book and chapter, as well as page. For simplicity I will reference to pages in the Screech translation (1987) only.

The Enduring Civilisation exhibition marked the first major exhibition of the holdings of Indigenous materials at the British Museum, and the Encounters exhibition marked the first return of many of those holdings to Australia. While the two exhibitions emphasised different aspects of Indigenous encounters with the British colonisation of Australia, as will be discussed they were both concerned with an insistence on, and an invitation to, the conduct of lawful relations. The untested background of this chapter is the absence of treaties and projects of treaty-making between Great Britain and the Indigenous peoples of Australia that would establish the terms of such relations (McMillan 2014). The challenge, as noted by June Oscar, a Bunaba Woman and member of the reference group and ambassador for the Encounters exhibition, is that the institutions of government and justice surrounding the British museum 'remain an outstanding testament to London's web of Imperial power' (Oscar 2015: 23). She also notes that the histories and laws of London have become entwined and shared with Bunuba people – through forced exclusion and without negotiation (Oscar 2015: 26).

To take up the office of jurisprudent of London would be to acknowledge a particular inheritance of place and patterns of lawful, and lawless, relations (of kinship, legal tradition and nation and state). The fictive 'jurisprudent of London' reminds us that jurisprudence has a life in public. It must have responsibilities for the engagement of public life. This can be quite crude: how does a jurisprudent respond to an exhibition? Or it can be onerous: how does a jurisprudent organise a meaningful meeting of laws in the context of two exhibitions? As discussed in Chapters Three and Four, the conduct of the *personae* of office is varied. The conduct of office of the jurisprudent as teacher is not necessarily the same as the conduct of office of the jurisprudent as researcher or advocate or, here, as someone engaged in the public life of a city. The jurisprudent of London displaces the state of civil prudence to the prudence of the city and notes the different orders of responsibility. Here, for me, civil prudence is not closely aligned with the state and civil ordering, even if in a civil prudence both of those concerns have to be engaged. As Oscar notes, London is the old Imperial metropole, but it is also the home of the common law tradition (Oscar 2015, 15). In my account, the invitation is not to render an historical or juridical reckoning of the meeting of laws, but to address the comportment for the cultivation

of a *persona* for an ongoing obligation to meet well. This is, of course, a question of dignity.

1. Official and Unofficial

The relations between official and unofficial training in conduct cannot be marked easily. In Part One of this thesis training was shaped around a concern with both appropriate conduct and instituted obligations. I have taken up the terminology of 'unofficial' here in part to acknowledge that the 'art of association' discussed are not frequently considered as an attribute of the office of jurisprudent. I have also taken up the term 'unofficial' training as the training undertaken here emerges from museums and is not of the university and is address to the jurisprudent of a city and not necessarily that of the university. As indicated in Chapter Two, such an 'unofficial' training is nevertheless still conducted from within the idioms of the 'conduct of life' traditions and from within a broad understanding of office (Genovese and McVeigh 2015, Condren 2006). While the professional training of the contemporary lawyer is explicitly a training in a conduct of office, that of the office of scholar and jurisprudent is more diversely delineated. In relation to Indigenous and non-Indigenous relations, the training of the jurisprudent in the common law remains contested. The engagements of Indigenous peoples with Australian laws have never been less than pluri-jural and always involves the cultivation of plural *personae* in order to live with the plurality of laws (McMillan 2014; McMillan and Rigney 2016). The same is argued for in the development of the *persona* of the jurisprudent of London.

I am aware that locating the care of the Indigenous dead amongst the responsibilities of a jurisprudent of London runs the risk of trivialising great wrongs and complexities (Spivak 1999:113; Gaita 2001: 312-313). The conduct of office and of lawful relations raised in response to the two exhibitions that interests me here is that of the art of association and, particularly, that of relations of amity and complicity. One aspect of complicity addresses forms of moral and juridical wrongdoing – the complicity that points to the wrong kinds of association. Another aspect of complicit, however, expresses another concern with forms of association and alliance and, as its etymology suggests, the complication or folding in of relations – all forms of accomplishment. Within the old Imperial museums of London, these complicities have

been judged both in terms of specific moral and legal wrongs, as well as in terms of a more general sense of complicity shaped by a failure to take responsibility for, and acknowledge, continuing wrongdoing (Sanders 2002). Alongside these two senses of complicity and wrongdoing I would like to add an obligation to be complicit in the creation of lawful relations.

At the centre of Renaissance diplomatic and jurisprudential traditions lies a concern with negotiation and mediation, and the relationship between the honourable and the useful that still shadows contemporary common law jurisprudence. One tradition, exemplified by the Italian poet Torquarto Tasso (1544-1595), would make the role of the ambassador one of mediation in the name of the honourable (or the good), and as an expression of the humanist or Christian values of the peacemaker and the law of nations. Another tradition, found in the work of the Italian jurist Alberico Gentili (1552-1608), would make the ambassador the useful agent of the Prince subject to the laws between nations (states) (Hampton 2012: 52-54, 59-61). In his peopling of the histories of international law with non-Kantian diplomats, Hunter takes up the models of diplomacy found in Vattel's *Law of Nations* (1758) (Vattel 2008; Hunter 2012b). Writing in the mid-eighteenth century, Emeric de Vattel (1714-1767) was a Protestant diplomatic official whose writings on law operated within the idioms of diplomacy established by European sovereign territorial states. For Hunter, they are of interest because they were summative of a wide range of diplomatic rules and public law treaties. Vattel's account of the care of the dead is set within the laws of war of European states (Vattel 2008: 409-416). The laws of war relating to the care of the dead are concerned with the formal arrangements and conventions of having a truce in battle in order to allow the return and burial of the dead. This Vattel assigns to the office of humanity. Hunter's defences of Vattel's state diplomacy against claims of complicity with Empire are taken up in later in this chapter. Here I turn to the work of diplomat and essayist, Michel de Montaigne (1533-1592) who turns our attention away from the authority of the Prince and of law towards the *persona* and honour of the Ambassador (Hampton 2012: 68-72).

Montaigne's *Essays* have long been treated a vehicle of humanist argument about the cultivation of the character or *persona* necessary to live a life in public and private. The *Essays* have, however, rarely been treated as a resource for the conduct of lawful relations. Perhaps this is because he was suspicious of the office of jurist (too

scholastic) and of official life (too venal) (Tournon 2005). However, Montaigne is sensitive to both the obligations of the plural forms of office and to the cultivation of *personae* necessary to live in public life (Montaigne 1987). At the centre of his accounts lies a concern with relations of amity and complicity, of friendship and diplomacy, and the mediation necessary to cultivate and realise forms of *honestum* (honour, honesty, morality) in relation to the conduct of public life (Montaigne 1987; Friedrich 1991: 208-209, 313-316). The *Essays* too have been an important resource for the living of a certain kind of English life since the sixteenth century (Hamline 2013). Montaigne's writing of his self-portrait, the study of his self and the cultivation of a worldly, humane, *persona* of the 'gentle or noble man' provide, and report on, one kind of training in diplomatic conduct (Hampton 2009). Such a *persona*, like those of the eighteenth century jurists and diplomats, provides resources for, if not a direct application to, the contemporary engagement of law. The cultivation of a certain diplomacy is central to the responsibilities of a jurisprudent of London (Noirot-McGuire 1997; Calvino 2007).

Montaigne joins the cultivation of forms of amity and association to the practice of writing and self-examination and the conduct of office. Much depends on being able to train oneself to re-arrange law, language and life (Montaigne 1987: 457-471, 809-816). I am sympathetic to Montaigne's preferred techniques of orientation and reflection on events. His reliance on displacement, hesitation and delay, he wrote, help train him to judge and transform his relations towards the world. His training is one of how to live with human imperfection: how to judge with the bad conscience of the claims of civilisation and barbarity, how to test the claims of authority and how to establish the appropriate forms of communication in the flux of the world (Noirot-Maguire 2007). However, it is a limited training; it will tell you more about *nomos* and prudence than *physis* or the sense of cosmology required to appreciate an order of existence (Black 2011).

2. Office of Curator: Laws of Relationship

Although the Enduring Civilisation and Encounters exhibitions are very closely linked, my comments here will be directed mainly to the British Museum's exhibition curated by the head of Oceania section of the British Museum, Gaye Sculthorpe. I want to

draw attention to the sense in which the exhibition was presented both in terms of an encounter of civilisations and through the assertion of the need for the conduct of lawful relations. I will address the Encounters exhibition as part of the obligations to place and to the dead. The Australian exhibition, Encounters, later forms a contrast to that of the British Museum.

As the title of the exhibition indicates, the focus of the Enduring Civilisation exhibition was the troubled work of civilisation. The objects on display came from the collection of the British Museum from the eighteenth century to the present. It included work appropriated and exchanged in the eighteenth and nineteenth centuries as well as work commissioned specifically for the exhibition. The commentary and catalogue, which included essays by those engaged in curating the exhibition, considered the context and content of the exhibition in terms of objects, culture and knowledge.[3] It also did so in terms of country – a term that encompasses a relation of land, place and spiritual attachment (Civilisation 2015: 20-34). The challenge of the exhibition is to acknowledge both the lives that have been appropriated by the museum and the presence of the dead, and to pattern these into an account of Indigenous jurisprudence and the conduct of lawful relations (or lack thereof) by the curators (and by the jurisprudent in response). The objects in the museum are not simply material objects, they are bearers of relationships of law between the living and the dead.

The exhibition and the catalogue divided the objects in the museum and the narrative of the exhibition into three parts: 'Understanding Country'; 'Encounters with Country'; and 'Out of Country'. This formulation could be read in a number of ways. The tone of the first part was predominantly educational, and elaborated the care of the land (as hunting, gathering and exchange), the transmission of ecological and cultural knowledge as material practices and as part of a 'dreaming' (Civilisation 2015: 82-89). This part of the exhibition moved from questions of ceremony (forms of responsibility), to the place of objects in the cultural life of Aboriginal and Torres Strait Islander peoples (laws of relationship) and their place in and of country (cosmology) (Black 2011). Much of this part of the exhibition was given over to the display of old and new objects. For example, baskets collected in Queensland in the 1850s were

[3] The essays were by Gaye Sculthorpe, John Carty, Howard Morphy, Maria Nugent, Ian Coates, Lissant Bolton and Jonathon Jones.

displayed alongside contemporary baskets made from 'ghost' nets. This might be viewed as the work of jurisprudence as well as of complicity – the folding together of 'millennia-deep understandings about the world' (Civilisation 2015: 68).

The second part of the exhibition addressed the Indigenous encounter of the British Imperial arrival and narrated responses and representations from early engagements of trade and contest to contemporary re-occupations and transgressions of Indigenous land and law. These encounters were represented in terms of the military, political and cultural responses and resistance to the British. In this way, for example, a number of juridical and jurisprudential forms of encounter, such as the Flinders Petition of 1846 and the Batman Land Deed, were presented as documents of combat, conciliation and displacement (Civilisation 2015: 145 -149).[4] I argue that the exhibition also followed a concern with the quality of relations between laws into more recent encounters such as those of the Aboriginal Tent Embassy in Canberra (from 1972) (Civilisation 2015: 194-197; Foley, Schaap and Howell 2013).

The final part of the exhibition turned attention to 'Out of Country'. It addressed the life of Indigenous people and objects post-colonisation. In part this showed the political insistence on the conduct of lawful relations. It also showed in part the work of diplomacy in the conduct of contemporary Indigenous artists. Groups of Indigenous artists have been invited to address Indigenous objects held by the British Museum. The contributions of those artists were shown more fully in the exhibition "Unsettled" at the Australian National Museum. Joining questions of civilisation to those of country allows a number of concerns to be taken up and circulated. In the 'Introduction' to the catalogue book, Prince Charles stated that civilisation and spirituality were important and the sponsors of the exhibition, BP, noted their commitment to care of the land (Civilisation 2013: 8). Also noted were the enduring ties and connections – complications – between the British Museum and Indigenous Australians that provided a focus for the exhibition. Gaye Sculthorpe summarised one narrative of the British Museum collections by noting that the materials 'speak of how [Australia] was made home and the hands that made it so… they tell a story, unfolding still, of resilient and

[4] In 1846 the Aborigines of Van Diemen's Land who had been removed to Flinder's Island petitioned Queen Victoria with respect to their treatment. A copy of the petitition can be found at http://indigenousrights.net.au/__data/assets/pdf_file/0010/395794/f85.pdf (last accessed 1 December 2017). In 1835 John Batman had prepared a Land Deed in case he was able to enter into a treaty with the Indigenous owners of land at Port Phillip. He did enter a treaty; however it was disallowed by the Colonial Office.

creative peoples who forged a distinctive and enduring way of being in the world' (Civilisation 2015: 117). More sharply, and enigmatically, Sculthorpe also noted that 'Australia is the monument … to the diverse genius of the first peoples to call it home' (Civilisation 2015: 117).)

Alongside the story of an enduring civilisation that continues to shape Australia through its knowledge and culture there is also another one of law and lawful relations. [5] As Gaye Sculthorpe noted '[s]ometimes art is a funerary rite, or an initiation into new ways of seeing. Some art presents legal and historical arguments' (Civilisation 2015: 117). This story of legal and historical argument was presented in the catalogue in terms of endurance, encounter and resilience. However, it was also narrated as one of jurisprudence and of the care for the conduct of lawful relations. The resilience is neither one of universal culture nor only one of an enduring culture; it is one of insistence on the conduct of lawful relations. These relations and their obligations come from an understanding of country and law shaped by a cosmos and a cosmology.

The key points of engagement of this exhibition all addressed questions of authority and law. The opening image at the entry to the exhibition was 'Pukara' – relating to knowledge of spinifex men.[6] This painting was narratively paired with the image that sat at the end of the exhibition: a painting of women's knowledge – Kungkarangkalpa (Seven Sisters).[7] In the catalogue these paintings are linked to those used in native title claims where paintings were presented as law and as evidence of a relationship to land (Civilisation 2015: 84-89, 202-204). They might also be viewed as a jurisprudence.

Much of the potency of the exhibition emerged out of the sense that the exhibition was realising a jurisprudence. I will note two examples. The first relates to authority.

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5 I have kept to the terminology of story although mindful of the different disciplinary values attached to the term. Bill Neidje's *Story About Feeling* (1989), for example, is a major text of Indigenous jurisprudence.

6 Roy Underwood, Lennard Walker, Simon Hogan and Ian Rictor (2013): http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=3579983&partId=1 (acce ssed 1 December 2017).

7 Anne Ngantiri Hogan, Estelle Hogan, Myrtle Pennington, Ngalpingka Simms, Yarangka Elaine Thomas, Tjaruwa Angelina Woods (2014). http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=3597721&partId=1&ethname=24411&sortBy=objectTitleSort&page=1 (accessed 1 De ember 2017). The se two paintings also feature on the cover of the catalogue and on the website.

Gawirrin Gumana's memorial pole or 'larrakittj' (Civilisation 2015: 95, 117) show two ancestral figures asserting the authority of their respective laws, that of Barama and that of Captain Cook. In the exhibition, the pole was located between the sections relating to understanding country and to encounters on country. The two figures were not specifically identified as part of the work (but were in the Exhibition catalogue). One interpretation of their relation might be of a contest of authority. However, drawing on the work of Black, the larrakittj might also be viewed as a patterning of the objects and the British Museum back into relationship with forms of Indigenous knowledge and jurisprudence. It shows the ways in which the authority of Captain Cook becomes patterned into part of Barama's authority (Civilisation 2015: 116-117). [8]

The second example concerns jurisprudence and place. The exhibition catalogue concluded with a brief discussion of Gunybi Ganambarr's 'Buyku' which depicts a waterhole at Baraltja. In the exhibition catalogue, Gaye Sculthorpe reported on Ganambarr's observation that the shape of the Great Hall of the Reading Room of the British Museum shares a geometry and pattern with the circular forms of the fishtraps of the Dhalwangu clan area (Civilisation 2015: 250-255).[9] The image, Buyku, joined a number of important Yolngu artefacts in the exhibition and catalogue. It gave form to what was once the British Library Reading Room and the central image of public learning in Britain. The old reading room and new courtyard became part of an expression of the jurisprudence that might be actualised in the fishtrap ceremonies. This image also formed the central motif of the Encounters exhibition at the National Museum of Australia.[10]

In sum, the exhibition addressed, and had, several civilising missions that engaged different forms of complicity related to the sources of authority of the British Imperial project, the Museum collection policy, and the curation of the exhibition. I have pointed out the way that the British Museum has been patterned into relationship with

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8 Garwirrin Gumana Barama/Captain Cook (2002): http://britishmuseum.tumblr.com/post/124758343067/this-larrikitj-memorial-pole-represents-barama (accessed 1 December 2017). On the mask and the 'janus-faced' character of common law see Goodrich (1995: 152-167). See also Montaigne (1987: 111.5, 949) 'On lines of Vergil'.

9 For example: Gunybi Ganambarr (2011): http://www.annandalegalleries.com.au/exhibition-enlargement.php?current=28&workID=2235&exhibitionID=207

10 Australian National Museum Encounters website: http://www.nma.gov.au/exhibitions/encounters/blog/posts/designing_encountershttp://www.nma.gov.au/exhibitions/encounters

forms of Indigenous knowledge, experience and jurisprudence. It is through this patterning that the questions of what might be remembered, forgotten or repatriated were addressed as part of the conduct of lawful relations. In this account the British Museum is obligated according to more than one jurisprudence – so too are visitors and critics, including jurisprudents of London.

The exhibition at the Australian National Museum, 'Encounters: Revealing Stories of Aboriginal and Torres Strait Islander Objects from the British Museum', assumed the political context of the British Empire and the improper acquisition and retention of objects by the British Museum.[11] Whereas the British Museum exhibition was muted in its representation of loss and of the repatriation of the objects and materials held, the Australian National Museum exhibition took the return of objects to Australia as a point of departure. In this respect the exhibition did not present a direct narrative of politics and law, although there was commentary on that topic (Oscar 2015: 26). It was more concerned with framing encounter through history and the culture of law. In the Encounters exhibition attention moved from the political art of association to the ceremonial re-assertion of lawful relations. The ordering of the exhibition set out the protocols of encounter that the exhibition addressed. Like the Enduring Civilization exhibition it opened with a story of law. Where the Enduring Civilisation exhibition began with a painting that reports law, the Encounters exhibition began with a welcome from representatives of Ngunnawal, Ngunawal and Ngambri custodians of the Canberra region. It was a welcome to a place of law.

The spine of the Encounters exhibition shaped around an archway set in the form of a fishtrap. To walk along it was to be confronted with Gweagal shield and spears collected or seized by Captain Cook in 1770. It was a visual focal point of the first encounter (Encounters 2015: 48-50; Nugent 2009). The formal narrative of the exhibition was shaped around three encounters. The first was the historical encounter of Aboriginal and Torres Strait Islander peoples with settlers and the relationships between the makers of artefacts and their users and collectors. This formed one part of the presentation of the materials of the exhibition. The second encounter was of the reconnection of contemporary Aboriginal and Torres Strait Islander communities with the objects and the country from which they came. Some of these encounters

[11] The *Protection of Cultural Objects on Loan Act* 2013 (Cth). The legislation regulations the movement of cultural objects.

were told in interviews, others through different forms of expression and art practice. These encounters gave feeling to the exhibition.[12] Jay Arther and Lily Withycombe reported on some of the different stories (Encounters 2015 37-39). In their interview with Denise Lovett, Gundjitjmara Elder, Lovett emphasised that the reconnection was one of filiation with the stories and songs of the artefacts and the passing down of artefact and story from mother to daughter. The third encounter was between the visitors to the exhibition and the exhibition itself: the telling and listening to the stories of people, places and events (Coates 2015: 19). The time of the encounters in the exhibition was not the linear time pre- and post-settlement, as the fishtrap suggests, it was time of a network of relationships. In all three tellings of encounter there was a patterning of two laws and nations into place. This is not so much a matter of giving objects a context but of bringing them to life.

The brief account of the Civilisation and Encounters exhibitions presented here has been related through the office of Curator and presented as a jurisprudence. Alongside this, I have treated some of the exhibits and parts of the exhibition catalogues as offering examples, and presenting exercises, in the conduct of office. In doing so I have linked the work of curation and the care of people, persons and places in encounter to the practices of writing history, and the conduct of jurisprudence. The catalogues, for example, report on the exhibition and the practices of curating, consulting and historical contextualisation of the 'difficult' history of the British and Australian presence in Australia. They also provide a report and guide on how to conduct oneself in relation to the exhibition, and, it might be imagined, the meeting of laws and the conduct of lawful relations. The Encounters exhibition, and the accompanying exhibition, Unsettled, also presented ways of feeling that relation.

The two exhibitions do not put an end to disputes over questions of authority or the authorisation of a jurisprudence or the complicities of public institutions. The Encounters exhibition, in particular, stressed the unfinished nature of the meeting of laws. What was invited, was a consideration of the art of association that might be engaged in the conduct of lawful relations in particular institutions in time and place.

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[12] An oral account of this is presented by Henrietta Marrie, a Gimuy Walabura Yidinji Elder. http://www.nma.gov.au/exhibitions/encounters. The exhibition *Unsettled* ran alongside the *Encounters* exhibition. This exhibition also emphasises the vitality of the objects, even though they are still in museums in London and Canberra: http://www.nma.gov.au/exhibitions/unsettled

The brief account of the exhibitions offered here has been related through the office of Curator and presented as a jurisprudence. Alongside this, I have treated some of the exhibits and parts of the exhibition catalogues as offering examples of, and presenting exercises in, the conduct of office. In so doing I have linked the work of curation and the care of people (including those no longer living), persons and places in encounter to the practices of writing history and the conduct of the *persona* of the jurisprudent. The catalogues, for example, reported on the exhibition and the practices of curating, consulting and historical contextualisation of the 'difficult' history of the British and Australian presence in Australia.

The two exhibitions do not put an end to disputes over questions of authority or the authorisation of a jurisprudence or the complicities of public institutions. What was invited was a consideration of the forms of law of relations and the complicity and association that might be met in the conduct of lawful relations in particular institutions in time and place.

3. Jurisprudent of London

How might a jurisprudent of London respond to the jurisprudence expressed in the London exhibition? The obligations and practice of office are certainly not without dispute. Even if jurisprudents of Australia have taken up and articulated similar responsibilities to those of the curators of the Australian National Museum, it is not necessarily the case that a jurisprudent of London would meaningfully be able to do so.

At one level the protocols of the engagement of lawful relations between Indigenous and non-Indigenous peoples and laws already exist. One aspect of this is the ongoing political and diplomatic engagement of the acknowledgement of Indigenous nations, country and law. At the beginning of each exhibition there was, for example, a ceremonial engagement of creating a meeting place of jurisprudences, and perhaps laws. In London, there were ceremonies at the British Museum as well as public engagements by HRH Prince Charles, the Australian High Commission and the sponsors, British Petroleum. While the British Museum exhibition was witnessed and drawn into relation with Indigenous jurisprudence and knowledge in a number of ways, this was not case for those who attended the exhibition. Their obligations were held in place by the authority of the British Museum.

The obligation of bringing laws into relation, however, extends into London; and, given that the office and authority of the jurisprudent has long become associated with that of the scholar, this should include the institutions of the university. In the immediate vicinity such responsibilities might involve the British Library, much of the University of London (University College London, School of Oriental and African Studies, the Institute of Advanced Legal Studies, Birkbeck College, the London School of Economics, Kings College); the law schools of the University of Law and Southbank University; the schools of Arts and Humanities at the Courthauld Institute, and the University of the Arts; as well as the learning and practice of the Inns of Court. Within the University of London and elsewhere, Indigenous knowledge and jurisprudence have been a contested part of the repertoires of jurisprudential, sociological and anthropological knowledge (Memmot 2005). Contemporary juridical engagements of non-Indigenous jurisprudence with Indigenous jurisprudences have largely been conducted by migrant jurisprudents from post-colonial and settler states (Keenan 2017a, 2017b). In so doing they have concentrated on the ways in which the jurisprudents of common law tradition in Australia have failed to address Australia's own relation to Indigenous peoples and their jurisprudence. Less attention has been paid to the continuing obligations of a jurisprudent of London.

The ways in which a jurisprudent of London might understand a meeting of laws and the conduct of lawful relations depends both on their understanding of the laws for which they are responsible and on the ways in which peoples, jurisprudences and laws are brought into relation (Goodrich 2014). The orientation to being responsible to both traditions and place is not one that rests easily with the jurisprudences of the common law. Despite the very evident sense that the common law tradition articulates the law of a place, it is a tradition that proceeds by a restricting its range of responsibilities and forms of understanding (as discussed in Chapter Three). For many Indigenous jurisprudences this is not the case (Neidjie 1989; Black 2011).

If a jurisprudent of London were to fulfil their responsibilities of office in offering a training in the conduct and forms of lawful relations, then one part of that training relates to the forms of welcome and diplomacy and another to the maintenance of relations of place (Black 2011; Dorsett and McVeigh 2012; Anker 2014). In the present context, the jurisprudent of London takes up a public role as jurist or scholar but not necessarily within the university. Alongside the writings of Montaigne, whose *personae*

move in and out of public office, I want, briefly, to address writings by Riles and Carter. Of interest here is not a specific protocol or prescription (or criticism) of the conduct of lawful relations but their efforts to find the pitch of engagement between the unofficial training of the *persona* of the jurisprudent and the formulation of the meeting of laws.

Unofficial Character

I return here to Montaigne in order to consider the character of the unofficial diplomat. Montaigne starts his essay 'On the useful and the honourable' with a worry about being trivial – it is easy to overreach your knowledge – and with betrayal, which defeats public life. To be an ambassador, he argues, it is important to not rely on either the honour of the Prince, who must nearly always be expedient (useful), or on justice which may have no purchase on political action (Montaigne 1987: 891-907). What is required of an ambassador is the ability to mediate disputes and to create forms of common language and communication through which to negotiate. Drawing on his own experience, Montaigne treated the work of the ambassador as one shaped by presenting or representing his own personal status and reputation as honourable. His reputation, wrote Montaigne, was in part associated with his 'open manner' and in part with his forms of truth-telling that were, he claimed, free from personal interest (Montaigne 1987: 893). In the practice of negotiation or mediation it is necessary to be temperate (one must treat all with respect) and to cultivate an openness of communication by saying only that which can be told to both sides. To achieve this (and here, Montaigne limits public office), it is necessary both to state the limits of one's commitment to negotiation and to demonstrate one's own private honour (and honesty) (Hampton 2012: 66). In times of dispute or civil war there is no option but to take up public life and to take sides, but, even then, it is important to maintain a limit to the engagement with public office (Montaigne 1987: 894). It is dishonourable not to take sides; however, it is unwise to assume responsibility for disputes that arise from the animosity of Princes. If read for the character (*persona*) of a jurisprudent, Montaigne's writings, his self-portraiture, might, in this regard, indicate the formation of a self adequate to the tasks of office.

For example, in his essay 'On Coaches' he presents an investigation into the virtues of kingship and, by way of a detour here, the virtue of the ambassador (and jurisprudent of London). 'On Coaches' (that is, carriages), like many of Montaigne's essays proceeds by way of the accumulation of topics. Its central topic is the relation between civility and barbarity and its judgment is that the virtue of kings is justness not liberality and those of diplomats honesty not duplicity. These concerns, however, turn out not to be what is most engaging for Montaigne. His concern with coaches also joins the topics of civility and barbarity to his own dislike of coaches, coaches as a vehicle of Royal display, and coaches as a vehicle for the consideration of the Spanish Imperial project and the treatment of Amerindian peoples. The coach also carries a discussion of causes, a consideration of the impossibility of true knowledge, and reflection on the quality of the civilisation of the New World and the honour of their Kings.

By returning to an old concern with judging the mask of character, it is, for Montaigne, writing that tests the search for the appropriate ethos or demeanour for public life. 'On Coaches', is not, I think, presenting a technique designed to achieve inter-subjectivity or reciprocity. It is a challenge to appreciate the relationship between the justness of judgment and what is honourable in conduct. The movement and transformation of the coach (cause, topic, vehicle) tests the virtues of rulers as it shifts in pace and topic from the epistemological trouble with causes (How do you evaluate the judgment of someone who attributes the blessing of a sneeze to the purity of the head? Or considers enslavement of peoples natural? Or if someone cannot tell if Indigenous peoples live with law?) to those of representation in the use of coaches as a part of the ostentatious display of the authority and glory of the sovereign. It then moves further to the ethics and cruelty of the colonial war of the Spanish in the Americas (whatever the virtues of the Spanish, the peoples of the Americas shared them). According to Montaigne, the Spanish, however, were corrupted by both their cruelty and their singular concern with trade (O'Neill 2001: 184-188). It is not so much the judgment passed on greedy kings that is at issue, but the play of causes and the inability to establish grounds that tests the formation of character and invites the complicity of investigation of new worlds. Montaigne, of course, might well fail his own test. His comments on Amerindians and the Americas have been criticised both for their provisional criticism of Empire (Spanish), and the ways in which he takes the

peoples of the Americas uninvited into his intellectual project (Melehey 2010: 180-189).

In writing 'On Coaches' Montaigne arranges his complicities so that the concern with conduct is not treated separately from the ways in which he makes Amerindians the uninvited accomplices of his training of himself. In return Montaigne is joined to a project of experience that might be a test of understanding and action of a jurisprudent of London.

Techniques and Protocols

Whether a jurisprudent of London might be called to act as an advocate or ambassador for the honour of the laws that govern London (or the United Kingdom) is one issue. How one responds with honour and usefulness is another. If Montaigne offers a training in character, our contemporary legal disciplines provide plural modes of address in establishing the proper mode and manner of the meeting of laws (McMillan 2015, McVeigh 2014). Riles, among others, has argued that the disciplines of the conflicts of law (private international law) and comparative jurisprudence should be treated as part of a technique and art of jurisprudential meeting (and communication) (Riles 2008). For Riles it is not so much the honour of the ambassador but that of their technique that is important.

In thinking about conflicts of law in Western court systems, Riles notes that conflicts turn on questions of jurisdiction and authority as well as on the relations of laws and values. The question of whose laws and which values, Riles suggests, should be recognised as central to the methodologies and techniques of conflicts of law (Riles 2008: 276). In doing so they must find the means through which to address presumptions of conflict, commensurability and identity both between and within laws and jurisprudences (Riles 2008: 294).

Such a jurisprudence of conflicts draws attention to both the sources of authority of its own law and the means of addressing another law or culture. For Riles such engagements should not be understood in terms of the discovery of external facts for assimilation and adjudication but as a kind of investigation, possibly collaborative, of a meeting of cultures (or here, jurisprudences) (Riles 2008, 296). Riles, for example, uses interpretive methods of the conflicts of law as the basis for the practical formation of a

collaborative cosmopolitan ethic (Riles 2015). Riles' own formulation emphasises the complexity of forms of collaboration in thinking through problems of social action and jurisprudence 'as if' from the point of view of another (Riles 2008: 301; Strathern 1992).

At the centre of Riles' account of conflicts and collaboration is a concern with the description of what people do in conflicts and how lives are lived. As an official jurisprudence, the sense of conflict and collaboration are met by a deliberate negotiation of technical means and through specific forms of ceremony and collaboration (Riles 2015). Riles' accounts of collaboration provide a juridical mode of amity and complicity that addresses the ability to respond to the jurisprudence expressed in the Enduring Civilisation and Encounters exhibitions. It looks to establish a *modus vivendi* through the maintenance of common protocols of address. Such protocols, for the jurisprudent of London, do not unify the city under one law or ethos but engage techniques of jurisprudence.

In Place

The final resource and source of engagement with the office of jurisprudent of London is Carter's *Meeting Places* (2013). Carter is an Anglo-Australian who has taken up the office of public worker. His work in the office of public worker is addressed here for the ways in which it takes up forms of meeting as matters of encounter, ceremony and the creation of meeting places.

Carter's jurisprudence owes something to Giambatista Vico's (1744, 1984) insight that the topics of rhetoric and jurisprudence are related to earlier expressive poetic forms that nourish law (Melatinsk 2000: 3-7; Harrison 1992). Like Montaigne, Carter's work takes the forms of essays full of diversions and plural points of engagement. Establishing the protocols of just passage, developing the arts of arrangement of meetings, and actualising an eros of sociality (or lawfulness) requires a variety of approaches. This eclecticism is also in part a training in the preparation of meeting places. The book is striking for both its insistence on the possibility and dangers of meeting and for holding on to the violence and difficulty of encounter.

For Carter, and others, the moderns have rather lost the ability to be held in or by place or law. Their place-revealing and place-making skills have been lost along with

the sense that there are topics, repertoires of conduct and value that could hold public life in place. This loss, as both the Enduring Civilisation exhibition and Montaigne note, is frequently projected onto Indigenous peoples. It is, however, an experience that can also be felt within the traditions of common law thought as well as in the writings of the sociologists and anthropologists (Rush 1997). There is little in London that remains untouched by Imperial and colonial projects and, as a consequence, the jurisprudence of London is felt by many to be deracinated and muted. It struggles to establish and maintain the humanised juridical and social eros associated with the jurisdiction of female goddesses and women (Carter 2013: 161; Drakopoulou 2007). [13]

If Riles offers a meeting through legal technique and Montaigne through a training in character, then Carter's writing of meeting places is arranged through the eros of encounter and of dramaturgy and mimesis (Carter 1997). It is not only a question of meeting better, but of thinking again about what is means to meet. In this respect the office of public worker embraces that of both the curator and jurisprudent. Carter typically proceeds by establishing a relation between place (*res*) and language or rhetorical topic (*res*) (Carter 2009: 21-28; Carter 2013: 109). To do so he returns to the classical Greek term *hedra* and interprets it again as the proper place of something or a place that something occupies or moves to or from (this is read from Plato's *Timaeus*). For Carter, one sense of public place is found in the linking of physical and institutional existence like, say, a museum. This account of public place, for Carter, diminishes or loses what is required of place. In his account of *hedra* he directs attention to place as a proper fit – specifically of the complex relations that non-Indigenous peoples and institutions of Australia and the United Kingdom have with the Indigenous peoples (of Australia).

Carter's own jurisprudence of relationship proceeds by drawing an analogy between *hedra* and the Arrernte concept of *utyere*. As explained by Arrernte elder Margaret Kemarre Turner, *utyere* is like 'a big twirl of string that holds us there with our families' (Kemarre Turner 2010, 15-19; Carter 2013: 109-113). What Carter finds interesting about this analogy is the sense that this can make of *hedra* and of place as a network of meeting and dispersal that comes from the land. Rather than being a line between points, it emerges from country and marks a place by organising relations.

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[13] For a recovery of an older jurisdiction see, for example, John Levin's project on Whitefriars and *Alsatia:* http://alsatia.org.uk/site/.

Complicitly, for Carter, *hedra* becomes what 'can be thought as the inevitable relay between listening and speaking' (Carter 2013: 110). The matter of exchange is not relayed by clear unmediated speech but in an echo that repeats and shadows the communication of place.

The patterning of Greek poetics into Indigenous knowledge and then back to modern 'Western' practical wisdom itself has a history of complicity and appropriation in much the same ways as the material collections of museums. Durkheim, for example, interests Carter because he offers an account of religion that cites the Arrernte (or Spencer and Gillen's account of the Arrernte) as authority for his argument that *religio* should be understood as a sense of being united with others through social transformations (Carter 2010: 113). Carter, returning to Kamarre Turner, notes that *utyere* does not involve the ecstatic unity of *religio*, but the learning involved in living and meeting in relation to place. It is a matter of choreography and reproduction rather than the unities of geometry. Lives are lived in a net of relations rather than the through the creation of a single social bond. For Carter, jurisprudence is part of the ceremony that expresses law and organises lawful relations. In this account, even unofficial training is put to the work of meeting well.

In responding to the forms of ethos, technique and placement addressed in this section, I will note three limits to the unofficial training of the *persona* of the jurisprudent of London. The first limit, drawn from Montaigne, is the cultivation of the art of association or complicity. It can be noted that for Montaigne the first question of the dignity of the dead comes as one of reputation and wisdom. The care of the dead body is mainly concerned with the despoliation of corpses (Montaigne 1987: 130-131). In dividing the reputation of the dead from the mortal remains of the dead body, Montaigne rests his account of humanity in conscience. While Montaigne's art of association rests on creating human relations, he is not prepared to accept the authority of the dead in relation to the living (Montaigne 1987: 123-139). Gaita draws the reputation and the dignity of the dead closer to the care of the mortal remains. It is our sense of shared mortality and our grief for the dead that provide source for both morality and law (Gaita 2004: 43-45). For Gaita the care for the dead and the living is part of our creaturely existence. The care of the dead is one of the ways in which we maintain the world of meaning, and, I would add, law and morality. Acknowledging the dead within the common law is one way of ensuring the common

law's continued ability to bear meaning. Gaita's sense that mourning and grief are part of our concern for the dead becomes a part of a concern for the forms of law through which we conduct our life.

The second limit is brought out by the two exhibitions studied here. While the dead were welcomed home, or at least back to the Australian National Museum, this welcome was not expressed as a matter of law. This, I think, is a political limit to the jurisprudence of the Museums. The exhibition Encounters can be read as a story of law and jurisprudence but it may not be possible to articulate this in a given time and place. The third limit is touched on by Carter and relates to the patterning of laws into relation and into place. For Carter, this patterning is a matter of ceremony and of the alignments of our understanding of being placed. This placement, however, is not yet expressed as part of the prudence of the offices of common law. This limit is not only political; it is one of knowledge and of place and a limit caused by lack of association and witness.

Conclusion

The complicities of the office of jurisprudent presented in the Enduring Civilization and Encounters exhibitions have been presented here through the patterning of encounters of lawful relations in both Britain and Australia. This patterning has been treated as the work of diplomacy and jurisprudence as well as of politics and law. The conceit of this chapter has been that it is possible for a jurisprudent of London to take up again the obligation to create a pattern of relations adequate to respond to the jurisprudence expressed in the two exhibitions. The elegant forms of Garrawin Gumana and Gunybi Ganambarr have patterned the British Museum into a place of lawful relations; those of Montaigne, Riles and Carter might offer extended, if partial, responses to a patterning of a jurisprudence of London.

In Chapter Seven I noted Black's observations that the common law tradition is one shaped around limited responsibility and that a meeting of peoples requires witness. A meeting place also requires lawfulness – rather lawlessness (Black 2011: 25-28). In response to Black's account of meeting this chapter has presented the comportment of the jurisprudent of London in ways in which the honouring of laws might be understood. In pitching the training in conduct as unofficial, attention in this chapter

was focused on a number of ways in which the honouring of laws might be understood in a museum and a city.

Part Three of this thesis has addressed the conduct of office in relation to the dead. In these two chapters the prudence of jurisprudence has been dispersed among a number of different activities. In part, this gesture is the consequence of following the contest of the activities of office through the technical means of the institution, judgment and address of law, rather than through the more restricted forms of legal reasoning. The unsettled account of character and prudence that emerges from the account of the art of association in these chapter, is, in part, the result of the kinds of work to which the jurisprudent might be asked to attend. In presenting accounts of the practice of prudence, I have started from the basis of the civil authority of the state. In relation to the dead, the state interest relates both to the maintenance of the shape of the sovereign territorial state and to securing civil peace. I then followed the ways in which the dead have been placed through the relationships of Indigenous and non-Indigenous laws and jurisprudences. The location of the Indigenous dead within the authority of national museums and the domain of cultural heritage is both a matter of political engagement by Indigenous peoples insisting on their presence and law and a matter of engagement of those (Indigenous and non-Indigenous people and peoples) who live with the common law of Australia (McMillan 2015). In both chapters, I have noted that the authority and concern with law and jurisprudence have been conducted through museums and institutions of culture. In taking up responsibility for Ancestral remains these institutions have, I think, also become responsible for the ceremonial conduct of lawful relations. As the Advisory Committee on Indigenous Repatriation (Australia) (2014) notes:

> The return of ancestors to their traditional lands is extremely important to Aboriginal and Torres Strait Islander peoples and all Australians. It is a matter of justice and healing, and an opportunity to right the wrongs of the past. It is the first step towards honouring the ancestors' dignity and to allow them to finally rest in peace (2014: 7).

I have argued that 'resting in peace' requires both legal form and a sense of the conduct of lawful relations that should be practised in more than one legal tradition. There are many ways in which such obligations might be fulfilled either adequately or with honour. In articulating the duties of the jurisprudent, I have taken up some of the

traditional occupations of the jurisprudent and examined how they pass through existing institutional practices. In so doing I have expanded the account of prudence to meet the tasks of office.

Finally, the forms of prudence addressed in Part Three of this thesis can be considered thematically in terms of the shaping of the conduct of office around a training in a civility adequate to the task of rule and government and/or a dignity worthy of the name. These two chapters have traversed accounts of the conduct of office in slightly different registers. Chapter Seven addressed the obligations of office in regard to repatriation through the institutional prudence of common law thought. It posed the common law concern with the Indigenous dead in terms of forms of jurisdictional arrangement shaped, today, by the civil jurisprudence of the sovereign territorial state. I noted that the prudence established within the office of jurisprudent of the common law struggled to articulate its own tradition. In Chapter Eight I addressed the comportment of the *persona* of the jurisprudent of London who is freed in some respect from the offices of state. Here attention was turned to the responsibility and repertoires of meeting. In this respect, the engagement was viewed as a positive, if troubled, activity.

Conclusion

Conduct and Ethic of Office

This thesis has addressed the concerns and conduct of office in the middle of arguments and events – although some of these arguments and events, such as those of religious wars and colonisation, have been felt and experienced over a long time. I have divided my concluding comments into three parts. The first part addresses experience or prudence in the conduct of the office of the jurisprudent. I present my concerns with experience or prudence in terms of points of orientation, as this thesis has been written with forms of conduct and address in mind, rather than as a specific teleological argument or engagement with justice. The second part addresses the ethic of office; in it I report the conclusions that I have reached about the exercise of office in the care of the dying and the dead. The third and final part returns to civil prudence in order to address the character of the civil prudent and civil jurisprudent.

1. Experience or Orientation

From within the office of jurisprudent, jurisprudence is both a discourse and an activity. As a discourse, it is subject to scholarly duty. Considered as an activity, jurisprudence can be treated as part of the cultivation of a *persona* of the jurisprudent and a training in conduct of office. In this thesis appropriate conduct is elaborated in terms of a civil prudence set within the idioms of the common law tradition. These concerns have been addressed in the main topics of this thesis: training; conduct; prudence; and character. Here I note five points of orientation.

Within a Tradition or Discipline

Although fragmentary and displaced, the common law tradition is also a tradition of custom and experience. Much of its knowledge and prudence turns on ways of living with law. Its ways of valuing are still shaped through a tradition of experience. It judges and proceeds in a language of habit and custom which is addressed through the technical and institutional practice of values. In this respect the jurisprudent of the

common law is also a 'moralist' (someone who studies mores) – although this is a term today that is often understood even more pejoratively than that of office. The attempt to work within idioms of a tradition has also influenced my use of the terminology of character, virtue and prudence. The usefulness of reviving an older language of ethics, I believe, outweighs the risks of using a language that for many jurisprudents has lost its ability to speak of the world in which they live.

Jurisprudents writing within the philosophical and legal traditions have shaped their training around two enduring concerns: how to live and die well; and how to honour and live with the dead and the yet to be born. Judges, lawyers, legislators and scholars in Australia and the United Kingdom have been directly engaged in juristic and jurisprudential projects that address these concerns as a matter of institutional conduct. In this thesis these concerns have been taken back into the office of jurisprudent and treated as matters of training in conduct for oneself and others.

Training, Study and Writing

Training in the public offices of the administration of justice is extensive and professionally defined. This is not the case for the training in the office of scholar or jurisprudent. In writing about a training in conduct, including one's own, it is easy to claim more purpose, intent and sense of justice than was, or is, at hand. Part of the methods of commentary and redescription followed in this thesis is an attempt to refrain from claiming too much. This is done by adhering closely to sources and arguments.

A concern with genre and style lies at the centre of humanist scholarship. Part of the work of developing accounts of office, *persona* and conduct in order to write about the conduct of lawful relations, has been to develop styles of commentary suitable to such a task – especially one that focuses on ways of conducting oneself in office. One decision made in the writing of this thesis was to accept an openness to the disputes and forms of training addressed within common law tradition. There are clearly limits and constraints to each mode and manner of research. However, it is possible to maintain a conscious relation between the ways in which a topic is approached and how it is written about and reported. Along with Ann Genovese, Peter Rush and others, I have labelled this aspect of the engagement of jurisprudence 'jurisography'.

We did so both to note it as a specific genre of scholarship and writing and to draw out the duties and limits of writing within a tradition. Within the discipline of history there is a distinct body of literature that addresses the thought and craft of that discipline. There should be a similar literature for law. Jurisography also recognises that the study and writing of jurisprudence carries with it the obligations of scholarship, institution and place.

This thesis bears a number of obvious debts to, and is a beneficiary of, writing within a tradition. The relationships created by these obligations are intellectual, personal and institutional. In this thesis they relate to developing forms of training and conduct within the university which draws on the disciplines of law and humanities scholarship in Australia and the United Kingdom. Jurisography, in this sense, names an orientation or form of conduct and not an argument. In attending to these aspects of jurisprudence I have noted the ways in which forms of conduct are carried, or not, through the consideration of decorum and eloquence. This is a mode of engagement initiated by Cicero and revived with regularity. I have put it to use here.

The sources chosen to address questions of orientation and genre in this thesis direct attention to different aspects of the office of jurisprudence as commentator, legist, advocate, advisor, moralist and public actor. For example, the *persona* of Montaigne was deployed in Chapter Eight in order to dramatise the role of diplomat and to present an account of the obligations of the jurisprudent acting 'unofficially'. In his *Essays*, Montaigne also makes it plain that to write commentary is to accept a tradition – one in which the writer acknowledges that their work is already 'mortgaged to the world' (Montaigne 1987: 1091). Montaigne's stated preference, if not practice, was not to take his or other people's work 'back' in order to alter it (words once given cannot be taken back). Rather, Montaigne was clear that his purpose was to amplify the work of others (*amplificato*). It was both a way of avoiding 'cancelling' earlier writings and of maintaining a sense of difference between his writings and theirs.

The writing of a commentary and the formulation of a jurisprudence is an induction into a tradition. There is little reason to suppose that this experience will be one expressed only in decency and pride. There is often a sense of remorse and shame in acknowledging how those who live with that tradition conduct themselves. This is particular so for jurisprudents. On the whole I have sought to resist the temptation to

make the tradition seem better or worse than it is.

Crafting of Law Relations

This involves both orientation and method. As I have made clear on a number of occasions throughout this thesis, materials have been approached both with a concern for office and training in conduct and with a concern for legal technicalities and the crafting of legal forms. This is so as much for doctrine and precedent as it is for jurisprudence. The argument made in this thesis is that the conduct of lawful relations within the common law tradition is made through technical and material forms as well as through ideas. The technologies of law, however, have not been treated as only technical. They are also a craft or a prudence. Giving space to relations between legal technicalities and (civil) prudence provides the central point of orientation for the way that conduct is addressed in this thesis.

A number of consequences follow from the decision to foreground technical and material forms. As a matter of assertion of subject matter, giving centrality to the crafting of lawful relations displaces concerns with normative analysis and justification. Giving prominence to legal forms also plays down the embeddedness of those legal forms in webs of political, social and cultural relations. This makes visible aspects of legal relations that might otherwise be obscured.

Patterning of Lawful Relations

The fourth point of orientation relates to obligation and the pattern of lawful relations. A tradition in this research has been treated as an inheritance that can be taken up, or not, in many ways. In many respects the approach to the conduct of the office of jurisprudent through forms of civil prudence is a confrontation with tradition. It contests university metaphysics and asserts the modernity of the state. However, it also re-works, redescribes and uses as resources many of the materials of the traditions of rhetoric and jurisprudence. Jeffrey Minson's reconfiguration of Renaissance and early modern rhetorical ethics also reconsiders what it means to inherit classical rhetorical and philosophical thought (Minson 1993). The empirical inflection of Ian Hunter's civil jurisprudence resists almost all accounts of tradition, although his work acknowledges filiation to styles of history writing that have been

practised since the seventeenth century (Hunter 2001). What he resists is the comfort of finding a deeper rational or ethical unity to scholarship or community. In this thesis, I have argued that something is missing from these accounts of civil prudence. To write as a jurisprudent requires more. It requires the conduct of lawful relations. Where possible I have chosen to draw out patterns of relations rather than enter directly into contest or conflict. In some respects this is part of a cultivation of a *modus vivendi* or way of 'living with' contested forms of life. More generally it is part of the cultivation of a disposition to care for the conduct of lawful relations.

Conduct of Lawful Relations

The conduct of lawful relations and the care for the dying and the dead comprise the substantive object of this thesis. However, the question of caring for the conduct of lawful relations is also part of an orientation of the prudence of this research. This concern is investigated through the use of terminologies such as 'adequate to the task' and 'worthy of the name'. These terms point to the way in which dignity, civility and care are not so much concepts as activities and forms of conduct. Treating the work of civility and dignity as an activity provides a way of addressing the responsibility of jurisprudents for the technical forms of law. The phrases 'adequate to the task' and 'worthy of the name' provide a form of shorthand through which to address the different ways in which the institutional ordering of juridical existence is given shape. Of the two phrases, the terminology of 'adequate to the task' (usefulness) rests most comfortably in a civil prudential tradition. However, I also tried to show ways in which questions of dignity and forms of conscience might also be made available to that tradition. The intense rivalries expressed through articulations of the 'true meaning' of human dignity within and without the institutions of law have not allowed any meaning to settle.

2. Ethic of Office

The concern with the conduct of the office of the jurisprudent in this thesis draws on and recasts a tradition. In Part One of this thesis, I examined contests as to the form of, and conduct and training in, office. In Part Two, I addressed the exercise of office by the jurisprudent in relation to the care of the dying. Part Three addressed the

character and prudence of the jurisprudent in the care for the conduct of lawful relations between Indigenous and non-Indigenous peoples, jurisprudence and law. I did this in relation to the care of the dead.

My concluding observations on these matters run as follows:

Office

For me, office remains both a central concern of public life and a distinct mode of organising participation in public life. The central scholarly project in this thesis has been to provide an account of office as a plausible vehicle for addressing the appropriate conduct of the jurisprudent. The success of this project depends on being able to establish elements of thinking about office within a tradition. While there clearly was a tradition of thinking with office, my sense in this thesis is that office can be sufficiently refreshed to usefully (and perhaps honourably) orient jurisprudents towards questions of conduct. The office of jurisprudent clearly includes a broad range of duties but few of the *personae* who take up the office of jurisprudent would find a commonality in one single *persona* or way of conduct. For this reason I have proceeded by emphasising both the plurality of *personae* of office and of the forms of exercise and training undertaken in their formation. Forms of jurisprudence and history writing have been treated as matters which can be addressed as competing spiritual exercises, aspects of training in conduct and as a preparation for life in public (if not always of public life).

Exercises of Office

The duties engaged in the exercise of office of jurisprudent take on many different valences in the context of law, health and education. In tracking juridical forms, I have argued that it is part of the work of the office of jurisprudent to address and craft the different ways and sites in which the relations of life and law come into relation. Within the office of the jurisprudent, the legal ordering of the end of life is first and foremost concerned with the civil organisation of the health and wellbeing of a people. The ways in which jurisprudents respond to these concerns have also become a way through which to evaluate an ethic of office. I have sharpened the sense of the character and conduct of the jurisprudent with the concerns of civility and dignity

through the requirement to create legal forms and procedures adequate to the task of ending a life well. If the jurisprudent of the common law contributes something distinct to a concern with dying with dignity, it is through their creation of these legal forms. If dignity as beyond worth feels so troubling in a legal idiom, it is because legal forms struggle with finding a 'beyond' on a daily basis.

In addressing a civil jurisprudential approach to the understanding of the regulation of assisted dying, I noted three aspects of the work of the jurisprudent. The first was the casting of assisted dying in terms of decorum or a dignified manner. Assisted dying here, I noted, formed part of a citizenship project. Second, I stated that the work of the jurisprudent was to craft the appropriate scope of the obligations of all those concerned with assisted dying. Civil obligations do not cover every aspect of the end of life. Third, I understood the contemporary formulation of assisted dying in terms of human rights and medical ethics rather than as the creation of a higher law or a new form of conduct of dying. It is a point of orientation for officials in the way in which they express their concerns for ordering of the end of life and dying.

Prudence and Character

Part Three turned from the internal ordering of the common law to the conduct of relations between peoples and laws. In holding this obligation to the care of the dead, the jurisprudent has been charged with finding resources within the common law tradition to conduct a meeting of laws worthy of the name. I also stressed that, while the character of the jurisprudent might be recast in terms of the nobility of dignity, the qualities of the ambassador or diplomat should also be part of the repertoires of legal thought. The form of prudential advice might be 'know your law and its place among other laws' and 'learn how to create and deepen lawful relations rather than destroy them'.

I examined four features of prudence and character that are drawn throughout the thesis. The first is that a concern with the conduct of lawful relations requires the acknowledgement of a range of duties and commitments to more than one law. This has to be thought of as a question of conduct both within and without the common law tradition. Second, the conduct of lawful relations between laws is better witnessed than unwitnessed. Third, while the common law tradition is fragmented, and no doubt

troubled, it should not be redeemed through assigning it new projects of moral redemption for those who live with, or in relation to, the common law tradition. Fourth, I investigated a number of positive ways of living with the common law. It can be noted that any such investigation is an experiment in character rather than a judgment of character. This is why Montaigne was taken as figure through which to address the art of association.

3. A Civil Jurisprudence?

Finally, a point of departure. A thesis on office and conduct might itself provide a training. In many respects, a restricted version of civil prudence has formed the background for jurisprudence writing in Australia and the United Kingdom from the eighteenth century to the middle of the twentieth century. My recasting of civil prudence has expanded the accounts of conduct, character, sensibility and argument available to the jurisprudent.

The qualities of character noted in a civil prudence tradition were largely those of practical intelligence – a sense of measure and limit, an insistence on jurisprudence as a practice, and a concern with jurisprudence as being inventive. The moral characteristics are also similarly restricted. The virtues of the jurisprudent are frequently framed in terms of secular educated values: tolerance; patience; and faith in procedure, language and common sense (with or without the aid of scientific knowledge). To these I have added the concern with civility and dignity, and with decorum and eloquence, as well as an art of association shaped around honour and complicity.

The judgment of ethics within civil prudence is prudential and directed towards the government of conduct. Civil prudence notes the plurality of offices. My civil prudence also bring offices into relation. Many of the most important of these relationships are engaged through the state and forms of public sociality. However, they also include forms of intellectual and social friendship and community within the university and the office of the jurisprudent. Yet a civil prudence worthy of the name must be able contribute something to the conduct of lawful relations. This may turn out to be a modest, though interminable, contribution

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