

**THE SILENCE OF THE DEAD: ETHICAL AND JURIDICAL  
SIGNIFICANCES OF THE EXHUMATIONS AT PRESTWICH PLACE, CAPE  
TOWN, 2003-2005**

by

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## **DECLARATION**

I, Julian Jonker, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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## **The Silence of the Dead**

**Ethical and Juridical Significances of the Exhumations at  
Prestwich Place, Cape Town, 2003-2005**

‘But, first of all, is there a history of silence?’<sup>1</sup>

‘She is about eight and a half years old now. She keeps on asking questions. She wants to know who her father was. It is hard to explain to her. At times she comes and says: “Can’t you draw a picture for me? Can’t you tell me? Can’t you say something that he said?” That is very, very hard.’

(Nomonde Calata remembers the death of her husband Fort Calata at the Justice in Transition conference, February 1994)<sup>2</sup>

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<sup>1</sup> Jacques Derrida *Writing and Difference* (trans Alan Bass) (Chicago: University of Chicago Press, 1978) 35.

<sup>2</sup> Alex Boraine, Janet Levy and Ronel Scheffer (eds) *Dealing with the past: truth and reconciliation in South Africa* (Cape Town: IDASA, 1994) 31.

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## **preface**

This thesis arises from the debates preceding and following the exhumations at Prestwich Place, Cape Town, between 2003 and 2005. A seemingly arcane subject, these unmarked burials places have become sites for far-reaching discussions about history, memory, space, and identity in the city, and indeed the nation. The debates about the graves should be seen as invoking ethico-juridical questions about memory, forgetting and memorialisation. These are questions that are potent in the collective consciousness of a nation still preoccupied with transition, reconciliation and transformation. I attempt, in the brief space of this extended essay, to discuss the controversy over Prestwich Place in a number of possibly unorthodox ways. My approach has been influenced by a number of discourses: those of repatriation, cultural heritage management, and the politics of cultural property; the obsession with memory in South African political discourse, and the questions of ethics and justice attendant upon institutions and gestures of transitional justice.

In accordance with requirements of form, I will discontinue the use of the 'I' in the text that follows this initial autobiographical declaration and the acknowledgements. But before we begin, a brief autobiographical preface might serve to locate this dissertation's moment of production, the sources of its methodological and disciplinary eccentricities as well as potential biases on the part of the author. In this I pay respect to an aesthetic and ethic of writing that acknowledges the centrality of the personal experience that an author brings to bear upon the task of writing. This does not mean that I have given in to the temptation to speak from the confidence of prior commitment. I have tried to establish the distance that suits free enquiry. But one's attempts are always historical, and one's enmeshment in contemporary controversies is always deep and difficult to disentangle, thus I owe the reader this brief account before we start. I also indulge in what may be a vain sketch of my intellectual development, since it is deeply tied to the issues set out here, as well as to the choice of method.

My frustration with the professional orientation of academic legal studies was initially assuaged by an introduction to analytical philosophy's engagement with law, followed by my discovery of the wealth of interdisciplinary experimentation and post-disciplinary

engagements spawned by critical legal studies. Most importantly, what I gained was an awareness of the legitimacy of historical and narrative accounts in the study of law.

However, I became convinced of the value of narrative and memory in action outside of legal studies, during my first encounters with the District Six Museum, which is dedicated to the commemoration of District Six and the victims of forced removals throughout South Africa. In their 'reimaginative' method and focus on living memory and cultural production, I thought I could discern an antidote to the impasse of finding justice through law.

I have since been employed by the Museum, although not for the most part of the writing of this thesis, and I continue to be affiliated with them. Their ethical and political commitments have focused my own engagements with the world; even while the position taken in this thesis remains entirely my own, formed in the course of free enquiry, and possibly at odds with the views of friends and former colleagues. It was while working at the District Six Museum that I nearly became a participant in the Hands Off Prestwich Place Ad Hoc Committee, which would later rename itself the Prestwich Place Committee. I have sympathised with the general thrust of their political commitment, while being less sympathetic with specific items on their agenda. My involvement with the group has been interested but peripheral; I attended a few meetings, indicated an initial willingness to help, and later withdrew in order to complete the present work. Critical distance allowed me to use the unfolding events as the starting point for research and writing, faithful to the perspective required by academic rigour and open to insight.

As will be seen, the present work is not only about Prestwich Place; it is about constitutional monumentalism, cartographies of transitional justice, the enigmas of memory, speaking and unspeaking silences, religiosity in the time of transition. While writing this thesis I have been aware of the debt I owe to self-indulgence, not only for not contributing to praxis, but for producing work that is possibly opaque and not immediately useful to the current discussions. Now, looking over what I have written, I can offer only (a) an apology; and (b) the hope that the work's broadness of vision makes up for its lack of exacting conclusion and prescription.

## **acknowledgements**

Prefacing acknowledgements have always struck me as being like the preambles of statutes: memorial tracings of fidelities and betrayals still to be revealed.

The genealogical-pool of this work begins with a debt to unnamed ancestors:

...

As for the living, this work has been encouraged and inspired by conversations with some highly intelligent and companionable spirits. Francois du Bois supervised, encouraged and gave me plenty of space to follow my own leads. Adam Haupt has been a vital partner in crime at all times. Nicola Menne went through much of the manuscript with her dictionary and her fine-toothed comb. Heidi Grunebaum lent reassurances and books. Dana Rosenstein spent some time explaining isotopic analysis to me, and many other things. Erin Finnegan was passionate about archaeology. Tim Hart discussed sangomas and radar devices. Noëleen Murray's advice was anything but 'mundane'. Nick Shepherd made me think seriously about archaeology, as did Ciraj Rassool. Valmont Layne, Zayd Minty and all who work at the District Six Museum provided fertile soil for the initial seeds of the work to grow.

Premesh Lalu inspired thoughts about anomaly and heterotopia. Rustom Bharucha reminded me that behind the stacks of book were flesh-and-blood people. Karen Till's work has been an inspiration, and her words encouraging. All of these people have had immeasurable effect on how the project has been shaped. Some of the most vital moments in the text were born in conversation with Talya Chalef.

I found invaluable the interest, questions and advice of the organisers and participants of the Rulci/Latcrit Colloquium (University of the Western Cape, 9-10 August 2004); the Dialogues Across Cultures conference (Monash University, Melbourne, November 11-14 2004), and the Law and Society Conference (Griffith University, Brisbane, 13-15 December 2004). Premesh Lalu invited me to give a seminar at the History Department of the University of the Western Cape. The input of all those present has been seminal.

Much of the research was enabled by the kindness and generosity of those who participated in the debates. Antonia Malan spent much time discussing issues and informing of related sites and issues, and generously made available all the resources of

the Cultural Sites and Resources Forum. Michael Weeder welcomed me to the first meetings of the Prestwich Place Committee. Bonita Bennett allowed me to look at the Prestwich Place Committee's documentation. Yazir Henri's energy made me aware of what is at stake. None of this work would have been possible without the genuine kindness of these people.

The hospitality of Steven Pritchard and Lynette Russell of the Centre for Australian Indigenous Studies, Monash University made Melbourne a welcoming and inspiring place to be between October 2004 and January 2005. Wendy, Liz, Diana, Marie and everyone else at the Centre are sorely missed. Sophie Rudolph, Clare Land, Robbie Thorpe, and everyone they introduced me to, welcomed me to Aboriginal Australia. Gary Foley showed me that weapons inspectors existed in 19<sup>th</sup> century Australia.

The University of Cape Town's extremely generous grant of the Sir William Solomon Scholarship, the K W Johnston Scholarship, a UCT Council Bursary and an Overseas Scholarship made it possible to pursue this research without distraction.

Finally, the largest debt is owed to my parents, who sponsored large amounts of love and support and didn't ask too many questions.

## **introduction**

### ***a. method***

Despite the author's formal education in legal studies, this thesis is not loyal to its disciplinary canon and methodology. The initial assumption made is that insight often lies beyond well-worn disciplinary habits and haunts. Nor does the thesis engage in any particular interdisciplinary fad, any fashionable 'law and ...'; it is merely eclectic.

Descriptions of the debates about Prestwich Place are derived from news accounts, correspondence between participants, reports generated by participants, interviews with participants, personal experience, and archaeological and historical accounts of the city. In this regard, Chapter One is at times historiographical. But Chapter One shifts from this method to a consideration of the legal frameworks in which the Prestwich Place controversy played out. This is not a black letter law analysis, but one that borrows from Rosemary Coombe's anthropological account of law, as well as the vast amounts of work in cultural studies and postcolonial studies on the politics of identity.

Chapter Two's study of memory has been influenced by phenomenological and sociological accounts of memory, as well as psychoanalysis' discourse of trauma and mourning and ethical discussions of transitional justice. The largest debt is owed to Paul Ricoeur's phenomenology. It is impossible to talk of memory without mentioning Freud, and psychoanalytic concepts have been used throughout. The author has been aware of the need for caution in such territory, especially when neither versed in the vast disciplinary literature nor initiated into the practice of psychoanalysis. Yet the vast impact of Freud on modern thought means that all contemporary scholarship is haunted by his influence. One may as well speak to the ghost.

Derrida's spirit is invoked constantly, in relation to his thoughts about writing, as well as his last endeavours to describe the interior archive, and the hauntings of heritage. His work, which continues to be entirely unassimilable, is at some level an intense occupation with the questions of death and memory.

Chapter Three comes closest to a study of laws, even though it is not primarily intended as a positivist legal analysis of the law governing graves, burials and human remains. Thus it is neither as detailed nor as exhaustive of the sources as it might have

been. Yet Roman Law, Roman-Dutch Law and South African sources have been referred to wherever readily available. Many questions are immediately raised by even (and especially) the most positivist moments of the analysis: most urgently, the assumed legitimacy of the reception of European law imposed during colonisation, and the way in which we today assimilate apartheid-era common law and legislation. Although these questions are crucial to the study of law in South Africa, they are not addressed because of the usual constraints.

Chapter Three also makes use of the work of Yan Thomas on law's 'institutional self-reference', Foucault on the heterotopia, and Nicolas Abraham and Maria Torok's psychoanalytic work on mourning and haunting. Broadly, the methodological starting point might be said to be one that does not regard law as an autonomous sphere (despite its 'institutional self-reference'), but that probes law's deepest relations to other discourses and institutions of social reality

The sweep of this methodological eclecticism accords with an engagement that is throughout philosophical, as opposed to professional or pragmatic; 'any thinking that serves an end by producing a projected result is, by definition, not philosophy'<sup>3</sup>. The merits of approaching such a topical issue in such an indulgent manner must be debated elsewhere.

There are two broad philosophical heritages between which the thesis finds itself torn: Ricoeur's reconciliation of competing conceptions and literatures through his constant invocation of the dialectic; and Derrida's constant discovery of the double-nature, the duplicity, of all thought. As in life, the author finds himself constantly caught between reconciliation and 'deconstruction'. It is hoped that this internal conflict has been creative rather than destructive.

### ***b. outline***

In name and form, this thesis concerns the ethical and juridical significances of the exhumations at Prestwich Place. It has three parts, dealing with the political debates of the site, the ethics of the unearthing of the dead, and the juridical significance of the grave. More broadly put, the thesis takes up the questions of memory, mourning and haunting. There are wider significances of the discussion for other sites, and for thinking

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<sup>3</sup> Panu Minkinen *Thinking without desire: a first philosophy of law* (Oxford: Hart, 1999) 5.

about law and nationhood generally; it is hoped that these will become apparent to the reader.

Chapter One describes the unearthing of the Prestwich Place burials, and the debates that ensued. The burials are at first discussed in the context of the discourses of repatriation and cultural heritage management. What emerges is a problematic of the ascriptions of identity and the attributions of possession of cultural heritage. Uncertainties about identity are entirely relevant to the debates about Prestwich Place; the site is central to the development of the fraught identity politics of the city, and the law's language of 'direct descendancy' has aggravated some of these tensions. Finally, Chapter One locates the site within a broader landscape that might be called a cartography of transitional justice. For Prestwich Place is not the only burial place that raises questions of nationhood, identity, space and memory.

The concerns of Chapter Two arise from the most recent disputes about Prestwich Place, which have occurred between those claiming scientific expertise and those claiming descendancy from the Prestwich Place dead. Chapter Two, asking who has the right to speak *of* and *for* the dead, rephrases this question as one of ethics and memory. How should the dead be remembered? Finally, it concludes, how should the dead be *recognised*? Here, naming is advocated as a way to proceed ethically in the encounter with the silent dead. Immediately the vast question of naming is raised: *what* is naming and *who* may name the dead? A short postscript has been added, late in the preparation of this thesis, as the beginning of an answer: the postscript relates different archaeologies, in order to ask about the relation of trace and testimony, and about the significance of the materiality of the dead.

Chapter Three, finally, addresses the law, which has hung like a specter over the political enquiry of Chapter One and the ethical enquiry of Chapter Two. It does this in the form of a simple question: how has the law regarded the burial place, and how does it do so today? The Roman Law heritage is discussed, and the fidelities and betrayals of Roman-Dutch and South African law are mapped. What is at stake is the relationship between law and the sacred. While the old Roman Law classification of *res religiosae* and *res divinis iuris* apparently acknowledged the presence of the sacred and its heterogeneity from the things of law, it also worked to confine and manage its anomalous

nature. This tradition, of law and the anomaly, is traced up to contemporary legal encounters with the grave as archaeological relic, as land reform right, and as heritage resource. The new religiosity, it proposes, concerns the nation rather than the gods.

What does this mean in the context of Prestwich Place? Chapter Three tries to rescue the site's significance as an anomaly, and also tries to discern how the anomaly haunts the law. Here again, it is memory that is at stake. But how are the nameless dead remembered? How is silence archived? Chapter Three urges the reader to believe in ghosts.

## CHAPTER ONE

### Excavating the Legal Subject: Archaeologies of Transition

#### *a. uncanny Cape Town*<sup>4</sup>.

Cape Town, traditionally the most liberal of South Africa's apartheid cities, sits poised between the construction of a new urban future and the presence of a monumental past. Bouyed by a ceaseless property market boom, the cranes and scaffolding of property development have become fixed features of the humble urban skyline. Amidst this, a highway that was started decades ago still juts out, unfinished, over the city centre, suspended in a phantasm of grand urban planning. Construction haunts the city. This perpetual incompleteness of the built environment props itself up against the fixed and permanent: Table Mountain and the Atlantic Ocean, the two natural features which have played a defining role in the geography and history of the city. While Johannesburg can be imagined as a place discontinuous with its past, a deconstructed apartheid city whose past remains only in 'vestiges and debris'<sup>5</sup>, Cape Town's past is always present, at least partly because of the monumental nature of its topography.

Nestled between sea and mountain, the concrete and asphalt of colonial and apartheid urban planning constructs spatial segregation in wordless conspiracy with the textures of rock and water. This complicity of architecture and nature continues to both reflect and effect the racial segregation that, until the early 1990s, was strictly legislated. Today, thinking about justice and legality in Cape Town lends itself to a preoccupation with space and memory. Cape Town is still marked by the enactment of land segregation laws, as are all South African cities. To travel from centre to periphery is to experience the visibility of racial stratification. Poor black people remain on the edges of the city, only

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<sup>4</sup> The title is inspired by Ken Gelder and Jane M Jacobs *Uncanny Australia: sacredness and identity in a postcolonial nation* (Melbourne: Melbourne University Press, 1998), an insightful and engaging look at what Australia's sacred landscapes mean for non-Aboriginal people. The present section does not wholly share that book's intentions, but refers to its application of the Freudian *umheimlich* (uncanny), an experience of the familiar place becoming unfamiliar or out of place. See 'The uncanny' (1919) in Sigmund Freud *The standard edition of the complete psychological works of Sigmund Freud* vol 17 (trans and ed James Strachey) (London: Hogarth Press and the Institute of Psychoanalysis, 1953-74) 217. For Gelder and Jacobs, the uncanny refers to the strange co-existence of the familiar and unfamiliar in 'a productively unstable dynamic' (24). It is this instability of the familiar and unfamiliar that I wish to capture in the present portrait of transitional landscape.

<sup>5</sup> Achille Mbembe 'Aesthetics of superfluity' (2004) 16(3) *Public Culture* 373 at 404.

able to access the centre as labour. There is a contemporary politics of urban planning that plays out between poles of change and stasis, and is often regarded as a choice between logics of development and of redistribution. In this equation development figures as *plus ça même chose*, leaving the segregated cartography of the city unaltered.

While the geometry of greater Cape Town follows the vision of early 20<sup>th</sup> century social engineering and mid-to-late century apartheid segregation, the roadmap of the city centre traces even older colonial demarcations. The first boundaries of the colony are still clearly named: Strand Street (‘Beach Street’) recollects where the ocean-bound edge of the city once was. Parallel to it is Waterkant Street (‘Water’s Edge’) which ran alongside the water’s edge before part of shallow Table Bay was reclaimed to create space for the city’s commercial and administrative district. Buitenkant Street (‘Outer Edge’) marks the easternmost boundary of the old city, its intersection with Strand Street guarded by the old military sentinel that is the Castle of Good Hope. Buitengracht Street (‘Outer Canal’) marks the western boundary of the old city, beyond which once lay the ‘menace of wild animals [and] the depredations of marauding Hottentots’<sup>6</sup>, the alien natives who once inhabited the Cape. The early colonists ventured past these very first frontiers long ago; yet the erstwhile boundaries between self and other continue to haunt the city in unexpected ways.

Follow Strand Street today and, at the point where it intersects the old west boundary, it becomes the main drag of the area known as Green Point, once named District One. Previously home to the city’s red light district, gay and lesbian village, and a burgeoning narcotics trade, Green Point has now become less risqué, more well-heeled, and is considered ‘some of the most sought-after real estate in the country’<sup>7</sup>. Just below the main road, nestled between an old school that remains from pre-forced removal days as a coloured working class neighbourhood and the now fashionable restaurants and clubs of the area, is a cordoned-off construction site. Soon a seven-storey complex dedicated to luxury living will stand in its place, but for now the site lies empty.

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<sup>6</sup> Marischal Murray *Under Lion’s Head* (Cape Town: A A Balkema, 1964) 3.

<sup>7</sup> Gil Moodie ‘Old bones of contention. Historians want development of slave graveyard halted’ *Sunday Times* 25 January 2004 at 12.

If you stand here, says archaeologist Antonia Malan, ‘the urban landscape can be read like a political history book’<sup>8</sup>. The built environment is layered according to period and style, revealing traces of previous inhabitants and their movement through the city’s religious and political past. Yet standing here, the very earth, this ‘most sought-after real estate’, also conceals layers of political history deposited directly below. In mid-2003, demolition and excavation on this site, subsequently to become known as Prestwich Place, came to a sudden halt as the dull white bone of human remains was revealed. These skeletons were to become the focal point of a legal dispute about heritage and development, knowledge and identity, and the discovery would be seen as a metaphorical unearthing of the city’s unfinished business.

The significance and extent of Prestwich Place were quickly determined. With, on average, one skeleton found per square metre<sup>9</sup>, the full and disarticulated skeletons found at Prestwich Place amounted to almost 3000 individuals. These re-discovered burial grounds are as extensive as they are dense: an area of about 1km x 1.5 km, stretching from the Bo Kaap to the Waterfront, is thought to contain unmarked graves and burial sites<sup>10</sup>. Newspapers reported that the burials were those of ‘a cosmopolitan community of slaves brought to the Cape from East and West Africa, second-generation slaves and freed slaves.’<sup>11</sup> Documentary, archival, oral and archaeological evidence painted a picture of an area that had been used up until the mid-19th century for the formal and informal graveyards of the city’s underclass: these included not only slaves, but Khoikhoi, Europeans, Africans, Muslims, free blacks and ‘other members of the Cape

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<sup>8</sup> Antonia Malan ‘Skeletons in our cupboards: publicly contested sites and implications for archaeology in Cape Town’, paper presented at the Southern African Association of Archaeologists Conference (Kimberley, 31 March 2004).

<sup>9</sup> Cultural Sites & Resources Forum ‘Prestwich Place. Exhumation of accidentally discovered burial ground in Green Point, Cape Town. Public consultation process 9 June to 18 August 2003’ (report prepared by Dr Antonia Malan, Cultural Sites & Resources Forum, for South African Heritage Resources Agency & the Developer) at 4.

<sup>10</sup> Sameer Vasta ‘Is history repeating itself at Prestwich?’ *Muslim Views* Nov 2003 at 31. Archaeological exhumations had already taken place after other accidental discoveries of burial grounds in the area, including Cobern Street in 1994 and Marina Residential at the V&A Waterfront in 2000 (Cultural Sites & Resources Forum (note 9) at 6). The developer of Prestwich Place claimed that ‘[t]he problem is not unique to my site – I’m just one of the first to own up’ (‘The issue “is about us as South Africans”’ *Cape Argus* 5 November 2003 at 14). Indeed, in October 2003 the city council was to issue a warning that developers must expect to find skeletons when developing in the extensive western area of the central business district and neighbouring Bo Kaap and Green Point areas. Developers applying for permission to rezone or build would also have to appoint an archaeologist, until such time as a long-term plan for dealing with such finds could be made (Melanie Gosling ‘Council says developers must appoint archaeologists’ *Cape Times* 30 October 2003).

<sup>11</sup> Moodie (note 7) at 12.

underclass'<sup>12</sup>. This was where these lower strata of society buried their dead, the denial of access to the Dutch Reformed Church's formal graveyards a final marker of their lack of citizenship.

What followed the rediscovery of this site was then as much an excavation of human remains as an excavation of the silences of the archive, of the law, and of the disciplines of archaeology and historiography. A public consultation, held in terms of the National Heritage Resources Act (NHRA)<sup>13</sup>, quickly revealed that a small but outspoken section of the public were adamant that the bodies should not be exhumed at all. The South African Heritage Resources Agency (SAHRA), the public body tasked with guiding the course of action in such matters, announced its decision a month later: the bodies were to be exhumed forthwith, and reinterred somewhere else. There would be no grand memorialisation on the site. In response to this a group of concerned members of the public formed the Prestwich Place Committee (PPC)<sup>14</sup> to campaign for the exhumation and development to be halted. The group also disputed the priority of archaeology as a body of knowledge and methodology for determining the meaning of the site.

That the dead should obstruct development in this part of the city is uncanny. Their apparition speaks of a haunting of modernity by the frontier. For the boundary between city-zen and other was a founding feature in the history of the burial ground, lying as it did outside the city's original perimeter, as the final resting place for all those denied formal burial within. This geography of bounds would in turn be reflected in the centrality of the frontier to the colonial history of the Western Cape<sup>15</sup>.

In the first decade of the 20<sup>th</sup> century a still-born child was buried by a Muslim congregation at a cemetery that had been closed by the colonial authorities. The men were charged and convicted; on appeal to the colony's Supreme Court, the men complained that the motive for the closure of the cemetery had been segregation, since a nearby Christian cemetery had remained open<sup>16</sup>. As an act of morbid protest, their burial procession had been still less dramatic than that which took place twenty years earlier at burial grounds in the vicinity of Prestwich Place, on the slopes of Signal Hill. Three

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<sup>12</sup> Cultural Sites & Resources Forum (note 9) at 6-7.

<sup>13</sup> Act 25 of 1999 (hereafter referred to as the NHRA).

<sup>14</sup> Initially named the Hands Off Prestwich Place Ad Hoc Committee (HOPAHC).

<sup>15</sup> Valmont Layne 'Towards a national heritage site: District Six as a national site of forced removals', presented at the Hands On District Six! Conference (Cape Town, 25-28 May 2005).

<sup>16</sup> *R v Abduroof* 1906 23 SC 451. The appeal was lost.

thousand Muslims had congregated for a funeral at Tana Baru, the final resting place for such holy men as Tuan Guru, founding figure of Islam at the Cape. The funeral was held in protest of the 1884 legislation closing these western cemeteries in the wake of a devastating smallpox epidemic. When policemen arrived to take the names of mourners, a riot broke out, and a second burial took place that day<sup>17</sup>.

The unrest of the 19<sup>th</sup> century were a response to an imperial order that legitimised its plans for reordering the growing colonial settlement<sup>18</sup> in terms of advances in medical knowledge and a desire for modernity, and in spite of the religious beliefs and traditions of those affected. It would be a premonition of how sanitation and illness would become a pretext for the removals and slum clearances of the next century<sup>19</sup>. Today, after democratisation, the site of the old boundary between citizen and subject<sup>20</sup> still haunts the city. The postcolonial phantom appears at the frontier of inner city gentrification and development, and provides an opportunity for enquiry into not only the histories of the dead, but of their descendants' modes of struggle. Indeed, how would contemporary law respond to the descendants' desire to mourn the unnamed dead?

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<sup>17</sup> Nigel Worden, Elizabeth van Heyningen and Vivian Bickford-Smith *Cape Town: the making of a city* (Cape Town: David Philip, 1998) 210-11.

<sup>18</sup> On the growth of the city and the imposition of social order at the turn of the 19<sup>th</sup> century see generally Chapter 5 of Worden, Van Heyningen and Bickford-Smith (note 17) generally.

<sup>19</sup> M W Swanson 'The sanitation syndrome: bubonic plague and urban native policy in the Cape Colony, 1900-1909' (1977) 18 *Journal of African History* 387-410.

<sup>20</sup> The distinction is used in the sense described by Mahmood Mamdani *Citizen and subject: contemporary Africa and the legacy of late colonialism* (Princeton, NJ: Princeton University Press, 1996).

***b. dispossessed identities, unidentified possessions, and the politics of mourning.***

**Dispossessed Identities**

The activism of the Prestwich Place Committee borrowed from some of the stances taken at the very first public consultation, at which one person had shouted from the floor: ‘stop robbing our graves!’ This sentiment is not a new one; it is echoed around the world in the struggles of indigenous peoples to claim back skeletons and human remains that have been kept in colonial museum and university collections, or to prevent scientific study of newly found remains. This global contestation of the proprietorship of human remains has begun to be reflected not only in political action and rhetoric, but increasingly in legal and policy developments.

The most well-known legislation of this kind is the United States’ Native American Graves Protection and Repatriation Act (NAGPRA)<sup>21</sup>, passed by Congress in 1990 in response to the growing ‘Red Power’ and Native American reburial movement of the 1970s and 1980s<sup>22</sup>. NAGPRA was meant to open up space for negotiation between Native American tribes and museums and other institutions. Senator Daniel Inouye summed up the intended consequences:

For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans *greater ability to negotiate*.<sup>23</sup>

Whether the legislation has been successful or not is arguable: no doubt the changed law has played at least some part in the increased willingness of archaeologists and anthropologists to enter into collaborations with indigenous communities. But the Act has also created certain arenas of conflict.

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<sup>21</sup> Native American Graves Protection and Repatriation Act 25 USC §§ 3001-13.

<sup>22</sup> For a history, as well as a history of the anthropological practices and legal formations that preceded Native American consciousness, see David Hurst Thomas *Skull Wars: Kennewick Man, archaeology, and the battle for Native American identity* (New York: Basic Books, 2000).

<sup>23</sup> Statement of Sen. McCain, 136 *Cong Rec* s 17174 (daily ed 26 October 1990), quoted in Jack F Trope and Walter R Echo-Hawk ‘The Native American Graves Protection and Repatriation Act. Background and legislative history’ in Devon A Mihesuah *Repatriation reader: who owns American Indian remains?* (Lincoln: University of Nebraska Press, 2000) 123 at 140, emphasis found.

For the Act to be applicable, remains and artefacts must first be shown to be Native American<sup>24</sup>. If the Act is applicable, then it sets out a threefold hierarchy of entitlement<sup>25</sup> to such ‘Native American cultural items’, a definition encompassing human remains, funerary objects, sacred objects and other items of cultural patrimony<sup>26</sup>. Entitlement is awarded first to a lineal descendant<sup>27</sup>, that is, someone who can trace her ancestry directly and without interruption in terms of the kinship system of her tribe, or in terms of the common law system of descentance<sup>28</sup>.

Where lineal descendants cannot be ascertained, entitlement is next awarded to the tribe on whose land the remains or objects were found<sup>29</sup>, failing which entitlement is awarded to the tribe which has the closest cultural affiliation to the remains or objects, and which claims them<sup>30</sup>. Cultural affiliation requires ‘a relationship of shared group identity which can be reasonably traced historically or prehistorically’ between a present day claimant and an earlier group<sup>31</sup>. Ascertaining cultural affiliation should be based upon ‘an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record’<sup>32</sup>.

The third and final allocation of entitlement occurs where cultural affiliation cannot be reasonably ascertained, but the objects were found on Federal land that has been recognised as aboriginal land of a particular tribe by the Indian Claims Commission or the United States Court of Claims. In this case, entitlement is awarded to that tribe, if it claims the remains or objects, and it has not been shown by a preponderance of the

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<sup>24</sup> *Bonnichsen v US* 367 F.3d 962 at 972.

<sup>25</sup> 25 USC §§ 3003.

<sup>26</sup> See 25 USC §§ 3002 for a detailed definition.

<sup>27</sup> 25 USC §§ 3003(1).

<sup>28</sup> Native American Graves Protection and Repatriation Act Regulations, Final Rule 43 CFR 10.14(b) (1 Oct 2003).

<sup>29</sup> 25 USC §§ 3003(a)(2)(A).

<sup>30</sup> 25 USC §§ 3003(a)(2)(B).

<sup>31</sup> 25 USC §§ 3002(2).

<sup>32</sup> Native American Graves Protection and Repatriation Act Regulations, Final Rule 43 CFR 10.14(d) (1 Oct 2003). Regulation 10.14(c) gives further guidelines on the ascertainment of cultural affiliation, and invokes the use of a wide range of evidence ranging from archaeological to oral histories. It is quite likely that such broad guidelines set the stage for ‘fundamental cultural and legal conflict’ (Patty Gerstenblith ‘Cultural significance and the Kennewick skeleton: some thoughts on the resolution of cultural heritage disputes’ in Elazar Barkan and Ronald Bush (eds) *Claiming the stones/Naming the bones: cultural property and the negotiation of national and ethnic identity* (Los Angeles: Getty Research Institute, 2002) 162 at 173).

evidence that another tribe has a stronger cultural relationship with the remains or objects<sup>33</sup>.

Intentional excavation and removal of human remains and objects are only allowed where a number of conditions are complied with, including the obtaining of a permit issued in terms of the Archaeological Resources Protection Act of 1979<sup>34</sup>, and after consultation with or obtaining consent of the appropriate tribe<sup>35</sup>. Where human remains or cultural objects have been inadvertently discovered on Federal land, the Act requires that the Secretary of Department, or the head of any other agency with primary management authority with respect to the land, be notified; such a discovery on tribal lands entails that the appropriate Indian tribe or Native Hawaiian organization must be notified<sup>36</sup>. The discoverer must cease any activity in connection to which the discovery was made, and must make a reasonable effort to protect the remains or objects. Activity may be resumed thirty days after the relevant state or tribal authority has certified that they have received notification<sup>37</sup>.

NAGPRA had its most controversial application in the case of Kennewick Man, a human skeleton discovered in Kennewick, Washington, in 1996. The skeleton, unearthed from the bed of the Columbia River by natural processes, was determined to be around 9000 years old, and one of the oldest found in the Americas<sup>38</sup>. While anthropologists worked to unravel the puzzle of one of the oldest skeletons found in North America until that time, various Native American tribes claimed the skeleton as theirs and therefore off limits to scientific examination. The difficulties of identification were evident not only in various tribes' wishes to claim a relation to the skeleton, but also by scientists' claim that remains so old could be related to *anybody* in the world. Many of the media reports focused on the 'caucasian' resemblance of an artist's reconstruction of the ancient man. James Chatters announced Kennewick Man's resemblance to Captain James Picard, of *Star Trek* fame, and various newspaper headlines announced that this was proof that there

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<sup>33</sup> 25 USC §§ 3003(a)(2)(C).

<sup>34</sup> 16 USC 470aa et seq.

<sup>35</sup> 25 USC §§ 3003(c).

<sup>36</sup> 25 USC §§ 3003(d)(1).

<sup>37</sup> 25 USC §§ 3003(d)(1).

<sup>38</sup> James C Chatters *Ancient encounters: Kennewick Man and the first Americans* (New York: Simon & Schuster, 2001) is a first person account by the first forensic anthropologist to examine the skeleton. Jeff Benedict offers an account of the ensuing controversy from the point of view of Doug Owsley, a forensic anthropologist who subsequently examined the skeleton, in Jeff Benedict *No bone unturned* (New York: HarperCollins, 2003).

had been other Americans before Native Americans; quite possibly ancestors of Columbus!<sup>39</sup> At one point the Asatru Folk Assembly, who claim to be descendants of a pagan European group, also claimed the skeleton for reburial and as their kin<sup>40</sup>. At stake was not simply to whom the skeletal remains belonged, but who could claim the right to inhabit America and recall its history.

The dispute incited confrontations between such sensationalist and esoteric readings of history, the uncertainty of anthropological theories of human origins in the Americas, and Native Americans' own oral histories; it also raised thorny questions about the constitutional relationship between religion, science and the state<sup>41</sup>. What is repeatedly questioned in encounters such as this is the validity of forms of knowledge, with indigenous activists often highlighting the historical complicity of the anthropological and archaeological disciplines with colonisation, eugenics and race science, and with grave robbing and looting of cultural property<sup>42</sup>. Archaeologists not only deny that their discipline carries the trace of this history, but also claim that the study of human skeletons is still useful. Kennewick Man is thus seen as of special scientific value because of the few remains of that age and completeness that have been found, and because it can help scientists' speculation on how the Americas came to be populated<sup>43</sup>.

As if it was a distillation of these complexities, the legal dispute centred on identity. The pivotal question was whether the Kennewick skeletal remains were Native American, and thus whether NAGPRA was applicable. NAGPRA defines 'Native American' as meaning 'of, or relating to, a tribe, people, or culture that is indigenous to the United States'<sup>44</sup>. What, then, is indigenous? The Act does not explicitly say. A Department of Interior memorandum issued early in the dispute stated that indigenous refers to

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<sup>39</sup> David Hurst Thomas (note 22) at *xxi*.

<sup>40</sup> Gerstenblith (note 32) at 164.

<sup>41</sup> Douglas W Owsley and Richard L Jantz 'Kennewick Man – A kin? Too distant' in Elazar Barkan and Ronald Bush (eds) *Claiming the stones/Naming the bones. Cultural property and the negotiation of national and ethnic identity* (Los Angeles: Getty Research Institute, 2002) 141 at 156 claim that government support for Native American claims constituted inappropriate state support for a religion.

<sup>42</sup> See David Hurst Thomas (note 22), Devon A Mihesuah 'American Indians, anthropologists, pothunters, and repatriation. Ethical, religious, and political differences" in Devon A Mihesuah *Repatriation reader: who owns American Indian remains?* (Lincoln: University of Nebraska Press, 2000) 95.

<sup>43</sup> See Chatters (note 38), Owsley and Jantz (note 41).

<sup>44</sup> 25 USC §§ 3002(9).

human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes.<sup>45</sup>

Such a definition would mean that NAGPRA applied to the Kennewick remains, and that scientists could legitimately be barred from their study.

However the Oregon Court of Appeals finally allowed the scientists access to Kennewick Man, deciding that NAGPRA was not applicable<sup>46</sup>. That the Act's definition of Native American referred to a community that 'is indigenous' was taken as meaning that the Act intended that 'human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American'<sup>47</sup>. This was, according to the court, in accordance with a purposive reading of the Act:

NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or the display of their ancestors' remains.... Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them.<sup>48</sup>

The court's decision was also consistent with a particular frame of remembrance of the nation. Native American is defined in terms of groups that are indigenous 'to the *United States*', which gave to the meaning of Native American a specific historical reading:

The "United States" is a political entity that dates back to 1789.... This term supports that Congress's use of the present tense ("that is indigenous") referred to tribes, peoples, and

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<sup>45</sup> Francis P. McManamon, letter to Lieutenant Colonel Curtis, 23 December 1997 (online at <http://www.kennewick-man.com/kman/legal/story/3280882p-3310389c.html>, last accessed 4 August 2005).

<sup>46</sup> *Bonnichsen* (note 24); The same court subsequently rejected a request for rehearing by four Native American tribes, see 'Scientists win another battle over Kennewick Man' (Associated Press, 20 April 2004) (online at <http://www.kennewick-man.com/kman/news/story/4985988p-4914180c.html>, last accessed 4 August 2005). Later that year the Justice Department said it would not ask the US Supreme Court to review the case. 'Justice won't appeal Kennewick Man case' (Associated Press, 22 July 2004) (online at <http://www.kennewick-man.com/kman/news/story/5328772p-5266824c.html>, last accessed 4 August 2005).

<sup>47</sup> *Bonnichsen* (note 24) at 972, emphasis found.

<sup>48</sup> *Ibid.*, 973-4.

cultures that exist *in modern times*, not to those that may have existed thousands of years ago but who do not exist now.<sup>49</sup>

Clearly, as suggested by the debates around Kennewick Man, repatriation and reburial reflect the sensitivities of identity politics and the particular power relationships they entail. In the UK, archaeology is considered an indigenous tradition rather than a colonial one<sup>50</sup>; thus, descendants of the dead buried in the 18<sup>th</sup> and 19<sup>th</sup> centuries in the crypt of Spitalfields Church ‘were not only deeply interested in [an archaeological project] but were able to contribute valuable historical information about their dead ancestors’<sup>51</sup>. This does not mean that all archaeological digs in the UK have gone unhindered by identity politics. Burials in Jewbury, York, dating back to the 12<sup>th</sup> and 13<sup>th</sup> century, were deemed to be Jewish and were reburied after pressure from members of the Jewish community<sup>52</sup>.

Repatriation issues are most hotly disputed in countries, such as Canada, USA and Australia, where indigenous peoples have struggled against devastating colonial legacies and continue to be marginalised in their ancestral land. In Australia, heritage legislation in the different states typically dates back to around thirty years ago. Aiming to protect archaeological sites from amateur diggers and relic hunters, such laws<sup>53</sup> generally vest ownership of artefacts in the Crown, and provide for administration by a government department without effective Aboriginal input<sup>54</sup>. Such legislation is greeted with anger by Aboriginal representatives such as Wayne Atkinson: ‘In today’s scientific terms [Aboriginal cultural heritage] is regarded as archaeological evidence, but really it is the tangible evidence of our ancestors’ occupation of this continent.... They are in fact Aboriginal sites, not archaeological sites’<sup>55</sup>. While there is as yet no federal legislation that returns ancestral remains to their Aboriginal descendants, two policy statements were issued in 1993: *Previous Possessions, New Obligations* by the Council of Australian Museums Association, now known as Museums Australia; and *National Principles for*

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<sup>49</sup> *Ibid.*, 976, emphasis added.

<sup>50</sup> Mike Parker Pearson *The archaeology of death and burial* (Phoenix Mill: Sutton, 1999) 185.

<sup>51</sup> *Ibid.*, 184.

<sup>52</sup> *Ibid.*, 179-180.

<sup>53</sup> Thus in Victoria, for example, the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) protects Aboriginal cultural heritage only in relation to its value to archaeological study.

<sup>54</sup> Sharon Sullivan ‘The custodianship of Aboriginal sites in Southeastern Australia’ in Isabel McBryde (ed) *Who owns the past: papers from the annual symposium of the Australian Academy of the Humanities* (Melbourne: Oxford University Press, 1985) 141.

<sup>55</sup> W Atkinson ‘Aborigines’ perception of their heritage’ 1985 *ANZAAS Papers* 1 at 4.

*the Return of Aboriginal and Torres Strait Islander Cultural Property* by the Australian Aboriginal Affairs Council, a state-federal ministerial body. *Previous Possessions* asserts that there remains a scientific interest in keeping human remains, while acknowledging that museums cannot unilaterally place conditions on the return of remains<sup>56</sup>. Aboriginal reactions have suggested that these policies don't go far enough, especially in the light of the recognition of pre-common law Aboriginal rights by *Mabo v Queensland [No 2]*<sup>57</sup>.

Archaeologists have also confronted demands for repatriation and reburial by issuing codes of ethics at a global level. Shortly before the enactment of NAGPRA, the World Archaeological Congress, the 'only representative world-wide body of practising archaeologists'<sup>58</sup>, had responded to debates about reburial and repatriation with the Vermillion Accord, a code of ethical principles adopted in 1989. Its provisions could hardly be condemned, and they begin by stating that '[r]espect for the mortal remains of the dead shall be accorded to all, irrespective of origin, race, religion, nationality, custom and tradition'. Yet such broadness inevitably means vagueness. On the one hand, article 3 urges '[r]espect for the wishes of the local community and of relatives or guardians of the dead ... whenever possible, reasonable and lawful'. On the other hand, article 4 requires '[r]espect for the scientific research value of skeletal, mummified and other human remains ... when such value is demonstrated to exist'. The accord ends with the hope that '[t]he express recognition that the concerns of various ethnic groups, as well as those of science are legitimate and to be respected, will permit acceptable agreements to be reached and honoured'<sup>59</sup>.

The World Archaeological Congress subsequently published a more specific First Code of Ethics<sup>60</sup>, drawn up by indigenous representatives and a non-indigenous archaeologist, and in terms of which members agree that they 'have obligations to indigenous peoples', and agree to abide by principles such as acknowledging the 'special importance of indigenous ancestral human remains'<sup>61</sup>, and that 'the important

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<sup>56</sup> See Lyndon Ormond-Parker 'A Commonwealth repatriation odyssey' (1997) vol 3 no 90 *Aboriginal Law Bulletin* 588 on the history of these policies and reactions to them.

<sup>57</sup> (1992) 175 CLR 1.

<sup>58</sup> 'About the World Archaeological Congress', World Archaeological Congress web site (available online at <http://ehlt.flinders.edu.au/wac/site/about.php>, last accessed 4 August 2005).

<sup>59</sup> Vermillion Accord on Human Remains (South Dakota World Archaeological Congress Inter-Congress, 1989) (online at [http://ehlt.flinders.edu.au/wac/site/about\\_ethi.php](http://ehlt.flinders.edu.au/wac/site/about_ethi.php), last accessed 4 August 2005).

<sup>60</sup> World Archaeological Congress First Code of Ethics (1991) (online at [http://ehlt.flinders.edu.au/wac/site/about\\_ethi.php](http://ehlt.flinders.edu.au/wac/site/about_ethi.php), last accessed 4 August 2005).

<sup>61</sup> principle 3.

relationship between indigenous peoples and their cultural heritage exists irrespective of legal ownership'<sup>62</sup>. Further principles commit members:

6. To acknowledge and recognise indigenous methodologies for interpreting, curating, managing and protecting indigenous cultural heritage.
7. To establish equitable partnerships and relationships between Members and indigenous peoples whose cultural heritage is being investigated.
8. To seek, whenever possible, representation of indigenous peoples in agencies funding or authorising research to be certain their view is considered as critically important in setting research standards, questions, priorities and goals.

The Code of Ethics goes even further in committing members to certain rules, including that they shall 'with rigorous endeavour seek to define the indigenous peoples whose cultural heritage is the subject of investigation'<sup>63</sup>, that they shall not 'interfere with and/or remove human remains of indigenous peoples without the express consent of those concerned'<sup>64</sup>, and finally that they shall 'recognise their obligation to employ and/or train indigenous peoples in proper techniques as part of their projects, and utilise indigenous peoples to monitor the projects'<sup>65</sup>.

The International Council of Museums has addressed the matter of human remains in its Code of Ethics as well<sup>66</sup>. The Code does not go so far as to bar research on human remains or oblige members to repatriate collections, but rather states that acquisition, research and display should be done 'in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where known'<sup>67</sup>. Display of such remains must be 'with great tact and respect for the feelings of human dignity held by all peoples'<sup>68</sup>.

International law has not been particularly helpful in allocating entitlements to ancestral remains. Although the 1970 UNESCO Convention on the Prohibiting and

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<sup>62</sup> principle 4.

<sup>63</sup> rule 1.

<sup>64</sup> rule 5.

<sup>65</sup> rule 7.

<sup>66</sup> ICOM Code of Ethics for Museums (2004) (available online at <http://icom.museum/ethics.html>), last accessed 4 August 2005).

<sup>67</sup> sections 2.5, 3.7 and 4.3.

<sup>68</sup> section 4.3

Preventing of the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>69</sup> has been touted as being a first step towards the protection of cultural property, it fails to make provisions for repatriation and reburial<sup>70</sup>. However, the United Nations Draft Declaration on the Rights of Indigenous People<sup>71</sup> protects the right of indigenous peoples

to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.<sup>72</sup>

More specifically, the draft law promises the right ‘to the repatriation of human remains’, and calls on states to ‘take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected’<sup>73</sup>.

In South Africa, there have been similar calls for the repatriation of skeletons by indigenous communities. One successful claim has been for the remains of Griqua chief Cornelius Kok II, previously held by the University of Witwatersrand’s Department of Anatomy<sup>74</sup>. Yet this one example is, as in other countries, a result of a systematic history of museological and scientific acquisition of human skeletons. Martin Legassick and Ciraj Rassool’s *Skeletons in the Cupboard*, which reveals the extent of a competitive trade between grave robbers and South African and European museums in the early 20<sup>th</sup> century, has called upon South African museums to take stock of their collections of

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<sup>69</sup> Not ratified by South Africa as at 3 October 2003: see UNESCO web site, [http://www.unesco.org/culture/laws/1970/html\\_eng/page3.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml) (last accessed 4 August 2005).

<sup>70</sup> Skeletal material could be regarded as being cultural property within the meaning of article 1(c) of the Convention, which includes ‘products of archaeological excavations (including regular and clandestine) or of archaeological discoveries’ in its definition; yet this would merely protect it from illegal trafficking and say nothing further about relations within states.

<sup>71</sup> UN doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

<sup>72</sup> para 12.

<sup>73</sup> para 13.

<sup>74</sup> See Chapter 4 of Colette Pietersen *The politics and policies of repatriating archaeological skeletal material: a case study into South Africa’s indigenous past* (MA thesis, University of Cape Town, 1997); also Martin L Engelbrecht ‘The connection between archaeological treasures and the Khoisan people’ in Cressida Fforde, Jane Hubert and Paul Turnbull (eds) *The dead and their possessions: repatriations in principle, policy and practice* (London: Routledge, 2002) 243.

bones<sup>75</sup>. In the first decade of the 20<sup>th</sup> century, racial anthropometric study began its decline in the Northern hemisphere following Franz Boas' loss of confidence in its importance. Yet at the same time, this practice of relating the measurements of human anatomical features to racial characteristics became a motivating force of acquisitions for South African museums<sup>76</sup>. The desire for Bushman remains, considered relics of a dying race, became steadily more unsavoury. The living and the dead were not well differentiated in the haste to acquire their bodies as natural history specimens. One missionary, Reverend H Kling, was in the practice of sending Bushman skeletons to South African Museum director Louis Péringuey. It appeared that the remains were of recently deceased people with whom Kling had been acquainted, since he was able to clearly identify the individuals<sup>77</sup>.

Even more notorious was the reputation of Viennese anthropologist Dr Rudolph Pöch, whose programme of racial classification aimed at identifying Bushmen as one of the remaining pure human races<sup>78</sup>. The legacy of his research is 'one of *systematic* grave robbery, and of clandestine deals for newly dead corpses in the name of science'<sup>79</sup>. Even more horrifying was his shady employee, 'Dr' Mehnarto, whose grisly reputation derives from cooking recently dead bodies to obtain their skeletons<sup>80</sup>.

Old Katje, the wife of one of the people exhumed and boiled by Mehnarto, was alive to witness it:

After I heard that the white men had taken my relatives' bodies and cooked the flesh off their bones, I prepared to leave for Langberg to report the matter to the Police, but I was told that Bushmen were outside the Law, and that I would get no hearing. People at Kuie told me this, I thought they were right and kept quiet.

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<sup>75</sup> Martin Legassick and Ciraj Rassool *Skeletons in the cupboard: South African museums and the trade in human remains 1907-1917* (Cape Town and Kimberley: South African Museum and McGregor Museum, 2000).

<sup>76</sup> *Ibid.*, 3.

<sup>77</sup> *Ibid.*, 7; Alan G Morris 'Reverend Kling's skeletons' (1987) 10(4) *South African Journal of Ethnology* 159.

<sup>78</sup> Legassick and Rassool (note 75) at 11. Legassick and Rassool trace his research, via his work in Austro-Hungarian prisoner of war camps of the early century, to its implication in the origins of Nazi ideology (at 12); on his wife's continuation of his work after his early death in 1922, his membership of the German national 'racial hygiene' society and his close links to Eugen Fischer, whose theories influenced *Mein Kampf*, see Legassick and Rassool 100; also Robert Gordon 'The rise of the Bushman penis: Germans, genitalia and genocide' (1998) 57(1) *African Studies* 38.

<sup>79</sup> Legassick and Rassool (note 75) at 12, emphasis found.

<sup>80</sup> *Ibid.*, 15.

Since I heard that my relatives bodies were taken and cooked I am sick from sorrow and I will not recover from the shock for a long time. I wept for days.<sup>81</sup>

It is clear that Mehnarto was not the only one guilty of boiling bodies to derive specimens of indigenous anatomy<sup>82</sup>. In contrast to the reviled activities of Europe's Resurrectionists, who illegally exhumed bodies to make them available to anatomists, those who excavated Khoisan bodies in South Africa would not have regarded themselves in the same light: 'for the occupation was considered to be quite legal as long as it was non-European bodies that were being exploited.'<sup>83</sup> Péringuey himself believed that no permission was required for excavating 'these old relics'<sup>84</sup>.

Yet, as Legassick and Rassool point out, while there was no law governing exhumation in the Cape colony, the Cape government had stated that it would allow no such exhumations without permission being granted by the Minister. After enquiries as to the date and cause of death, permission might be granted subject to the agreement of cemetery authorities, and on condition that it would not be a danger to public health, or a public nuisance, or go against the requirements of local authorities<sup>85</sup>. The Cape Law Department cited Matthaeus and Voet's *Commentaries on the Pandects* to the effect that it was a crime to violate a sepulchre, and that it did not matter that the graves were not within an official burial ground<sup>86</sup>.

The Bushman Relics Act of 1911<sup>87</sup> was introduced partly to stem what came to be seen by officials as a 'ghastly business'<sup>88</sup>, although it seemed that the Department of

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<sup>81</sup> Statement of Old Katje, quoted in Legassick and Rassool (note 75) at 23.

<sup>82</sup> *Ibid.*, 51. One vivid 19<sup>th</sup> century account by a colonial officer goes like this:

Dr A- of the 60<sup>th</sup> had asked my men to procure him a few native skulls of both sexes. This was a task easily accomplished. One morning they brought back to camp about two dozen heads of various ages. As these were not supposed to be in a presentable state for the doctor's acceptance, the next night they turned my bath into a caldron for the removal of superfluous flesh. And there these men sat, gravely smoking their pipes during the live-long night, and stirring round and round their heads in the seething boiler, as though they were cooking black-apple dumplings.

(Stephen Lakeman *What I saw in Kaffir-land* (Edinburgh: Blackwood, 1880) quoted in Legassick and Rassool (note 75) at 75).

<sup>83</sup> Alan G Morris 'Trophy skulls, museums and the San' in Pippa Skotnes (ed) *Miscast: negotiating the presence of the Bushmen* (Cape Town: University of Cape Town Press, 1996) 67 at 71.

<sup>84</sup> Letter quoted in Legassick and Rassool (note 75) at 25.

<sup>85</sup> Governmental communication quoted in Legassick and Rassool (note 75) at 25.

<sup>86</sup> Legassick and Rassool (note 75) at 26 citing letter of the Law Department. These common law authorities will be discussed in greater detail in Chapter Three.

<sup>87</sup> Later the Bushman-Relics Protection Act 22 of 1911.

<sup>88</sup> Department of Justice memo cited in Legassick and Rassool (note 75) at 1.

Justice<sup>89</sup> was at least equally motivated by the desire to keep valuable ‘relics’ from unfairly bolstering the work of foreign scientists. Take, for example, the skeletons impounded by Port Elizabeth customs in 1910, *en route* to Dr Pöch in Vienna, and collected by George St Leger Lennox<sup>90</sup>. It is thought by some that Lennox simply shot the Bushmen whose skeletons he needed<sup>91</sup>; although some think it more likely that he exhumed recently buried people, and knew where to do so since he was familiar with the people of the area<sup>92</sup>. Péringuey wrote to Lennox, bargaining with him to obtain the skeletons even as Lennox threatened to sell his skeletons for more money to Pöch. Said Péringuey: ‘I feel so much more disappointed that I fear these relics are going to leave the country which as I told you is laid systematically bare of this valuable scientific material.... Why should all scientific work of that kind be sent to Germany, when it is ... as well done in England?’<sup>93</sup> <sup>94</sup>

Grave robbing did not stop with the promulgation of the Bushman Relics Act. Leggassick and Rassool, tracing their story up to 1916, point out that Péringuey continued to collect skeletons. He claimed an exclusivity to do so because of the new Act’s prohibition on exports; and ‘[h]is scientific avidity for human remains meant that he continued to create a climate in which the search for and sale of even recent human remains was encouraged’<sup>95</sup>. There is evidence that the famed palaeontologist Dr Robert Broom, who would later recount his practice of boiling the flesh off human heads<sup>96</sup>, was in the 1920’s obtaining his research material by a relatively slower process: he would

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<sup>89</sup> Leggassick and Rassool conclude that the Bushman Relics Act of 1911 ‘undoubtedly’ had its origins in the conversations of Péringuey, Medical Officer of Health Dr A J Gregory, and the Cape Law Department; (note 75) at 15-16.

<sup>90</sup> Better known as ‘Scotty Smith’, ‘South Africa’s Robin Hood’; see F C Metrowich *Scotty Smith: South Africa’s Robin Hood* (Cape Town: Books for Africa, 1962).

<sup>91</sup> Morris (note 83) at 72; Morris ‘The reflection of the collector: San and Khoi skeletons in museum collections’ (1987) 42 *South African Archaeological Bulletin* 12 at 18; Metrowich (note 90) at 194.

<sup>92</sup> Leggassick and Rassool (note 75) at 31.

<sup>93</sup> Letter quoted in Leggassick and Rassool (note 75) at 32.

<sup>94</sup> So too, for example, when the magistrate of Kuruman, in what was then Bechuanaland, wrote to the Law Department in Cape Town in 1910, asking whether there would be any objection to the exhumation and examination of Bushman remains by Mehnarto, the Law Department replied that this did ‘not seem fair to the dead’. The Medical Officer for Health concurred on the basis that even if these were of scientific value, they should be retained in the Cape Colony; Leggassick and Rassool (note 75) at 15. That year a police report was submitted detailing Mehnarto’s activities: he had removed rock carvings by drilling them from the rock, and had removed the bodies of three Bushmen, and reputedly boiled the flesh from their bones (15, cf 18-19). A police report on Mehnarto’s activities condemned them on the basis that the feelings of Bushmen would be wounded, but also because the removal of ‘valuable specimens of art’ would ‘[deprive] the country and future generations of one of its most valuable treasures so far as art is concerned’ (police report quoted at 15-16).

<sup>95</sup> Leggassick and Rassool (note 75) at 45.

<sup>96</sup> L H Wells ‘The Broom Collection of Nama Hottentot skulls in the Edinburgh University Anatomical Museum’ (1951) 48 *South African Journal of Science* 97; Leggassick and Rassool (note 75) at 51-2.

inter the bodies of the recently deceased in order that decomposition might take its course, and he would retrieve their clean skeletons soon afterward<sup>97</sup>. Graham Avery, of the South African Museum, writes that '[s]keleton hunting, conducted under the guise of 'physical anthropology', continued to devastate large portions of significant Stone Age archaeological sites and was only stopped just prior to the promulgation of the National Monuments Act in 1969'<sup>98</sup>. Avery also suggests that the provincial Human Tissue and Anatomy Acts of the mid-1920s were a response to this nefarious history of skeletal acquisitions<sup>99</sup>.

What such accounts make clear is the historical complicity of anthropological and archaeological discipline with the colonising project; indeed their articulation as a project of knowledge. After military subjugation, the Khoisan 'were opened to the scientific gaze of the all-powerful coloniser'<sup>100</sup>, and their bodies became 'the centre of the transformation of the museum in South Africa as an institution of order, knowledge and classification'<sup>101</sup>.

It would be exactly this gaze that Pippa Skotnes tried to interrogate in 1996, with questionable results. Skotnes' exhibition entitled *Miscast: negotiating Khoisan history and material culture*, held in the same year that the TRC hearings were to begin, provoked strong emotions that had been stoked by past museological practices of collection and display. *Miscast* collected ethnographic representations of the Khoisan, from the beginning of colonial history to the present, together with the artefacts, plaster casts of humans remains and anthropometric instruments of colonial science, and had been intended as a 'a critical and visual exploration of the term "Bushman" and the various relationships that gave rise to it'<sup>102</sup>. However, indigenous representatives objected vociferously to what was, in their eyes, simply an offensive and gratuitous exhibition of Khoisan bodies at the South African National Gallery<sup>103</sup>. The reactions of many critics were no doubt inflamed by memories of the South African Museum's

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<sup>97</sup> Legassick and Rassool (note 75) at 51-2.

<sup>98</sup> *Ibid.*, 82.

<sup>99</sup> *Ibid.* The development of heritage laws since then will be discussed in Chapter Three.

<sup>100</sup> *Ibid.*, 2.

<sup>101</sup> *Ibid.*, 1-2.

<sup>102</sup> Pippa Skotnes 'Introduction' in Pippa Skotnes (ed) *Miscast: negotiating the presence of the Bushmen* (Cape Town: University of Cape Town Press, 1996) 15 at 18.

<sup>103</sup> See especially Yvette Abrahams 'Miscast' (Jul/Aug 1996) 43 *Southern African Review of Books*; Yvette Abrahams 'Yvette Abrahams responds' (Jul/Aug 1996) 43 *Southern African Review of Books*.

‘Bushman diorama’, an exhibition of plaster casts of indigenous people, naked and frozen in an imagined state of nature<sup>104</sup>.

While Skotnes’ intention to critically exhibit the exhibitors was misread by some indigenous representatives, and was cause for ceaseless controversy, there was much broader consensus on the question of Sara Baartman’s remains. Baartman, a twenty-year old Khoi Khoi woman, was taken from Cape Town to London in 1810, where she became known as the ‘Hottentot Venus’ and exhibited as a freak and a spectacle of exaggerated African sexuality. When she died in 1816, her body was dissected and her brains and genitals displayed at the Musée de l’Homme in Paris. Her remains were successfully repatriated and reinterred in 2002, following a dedicated campaign by South African activists and capitulation by the French Senate<sup>105</sup>. Subsequently, the body of Sara Baartman, and the narrative of the return of her remains, have been appropriated as symbols of the national estate with relevance beyond localised struggle by descendants of the Cape’s indigenous peoples.

### Unidentified Possessions

In many cases then, repatriation has been plagued by doubts about the identities of the repatriated and of the community to which the remains are to be returned<sup>106</sup>. This is the heart of the politics of cultural property: this difficult intersection of the cultural expression of identity and the legitimacies of senses of proprietorship and patrimony<sup>107</sup>. The success of claims to representation and proprietorship are especially interesting in the

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<sup>104</sup> Gabrielle Ritchie *Dig the herders/Display the Hottentots: the production and presentation of knowledge about the past* (MA thesis, University of Cape Town, 1990); cf Annie E Coombes *History after Apartheid: visual culture and public memory in a democratic South Africa* (Johannesburg: Wits University Press, 2004) 224ff on ‘deconstructive’ strategies taken to mediate the display after 1988.

<sup>105</sup> Zola Maseko *The Life and Times of Sara Baartman* (First Run/Icarus Films, 1998); Zola Maseko *The Return of Sara Baartman* (First Run/Icarus Films, 2003); Pietersen (note 74) Chap 3.

<sup>106</sup> For examples within South Africa, see Tshimangadzo Israel Nemaheni ‘The reburial of human remains at Thulamela, Kruger National Park, South Africa’ and Warren S Fish ‘“Ndi nnyi ane a do dzhia marambo? – “who will take the bones”: excavations at Matoks, Northern Province, South Africa’, both essays in Cressida Fforde, Jane Hubert and Paul Turnbull (eds) *The dead and their possessions. Repatriations in principle, policy and practice* (London: Routledge, 2002). For an example of repatriation that may have been made to the wrong country, see Neil Parsons and Alinah Kelo Segobye ‘Missing persons and stolen bodies: the repatriation of ‘El Negro’ to Botswana’ writing in the same volume. For a general discussion of instances of claims for repatriation and the protection of cultural heritage, as well as the problems posed for these claims by controversies about identity, see Michael F Brown *Who owns native culture?* (Cambridge, MA: Harvard University Press, 2003) and the essays collected in Elazar Barkan and Ronald Bush (eds) *Claiming the stones/Naming the bones. Cultural property and the negotiation of national and ethnic identity* (Los Angeles: Getty Research Institute, 2002).

<sup>107</sup> For more on this point, see Julian Jonker (2003) ‘Own/Other. Negotiating cultural ownership and social identity in the post-colonial state’ in Herman Wasserman and Sean Jacobs (eds) *Shifting selves: post-apartheid essays on mass media, culture and identity* (Cape Town: Kwela, 2003).

case of Prestwich Place, where the anonymity of the dead and the fraught identity politics of the Western Cape give rise to particular obstacles. From the beginning, the difficulty of representing the descendant community seemed apparent, and the connections between descendancy, mandate and right were not always convincingly articulated by those wishing to speak for Prestwich Place under the banner of the Prestwich Place Committee.

When SARHA announced on 1 September 2003 that exhumation would continue, it was clear that the Committee's main aim would be to prevent exhumation, rather than to take part in the discussion about off-site memorialisation. Father Michael Weeder, the main organiser of the campaign, told the media: 'A plaque is insufficient. It is an insignificant gesture. Those skeletons are the ancestors of everybody'<sup>108</sup>.

Yet, at the same time, the Committee's press statement alluded to rifts along the lines of cultural identity:

[SAHRA has] repeatedly claimed that no immediate descendents of people buried there could be found. The conclusion that the significance of the site is therefore questionable, suggests a lack of understanding of this city's history.... We ... question how the Prestwich Street burial ground would have been dealt with if it were located in another part South Africa. Would heritage authorities have ignored the cry for the remains of ancestors to be dealt with sensitively and with respect?<sup>109</sup>

While statements like this hinted at a rhetoric of regional (and, implicitly, coloured) marginalisation, the Prestwich Place Committee also positioned itself as part of a broader black (and non-regional) struggle<sup>110</sup>. Weeder delineated his specific concerns in an opinion piece published in a regional newspaper soon afterwards. He recalled the words of a speaker from the floor at the first meeting, who had asked: 'Why are white people digging up black bodies?'<sup>111</sup> Describing his feelings on seeing a white archaeologist at work, Weeder recalled the words of Malcolm X: 'Just because a person feeds the fish, it

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<sup>108</sup> A'eysha Kassiem 'Skeletons may remain in Green Point "closet"', *Cape Times*, 4 September 2003.

<sup>109</sup> Hands Off Prestwich Street Ad Hoc Campaign 'A press statement on the Prestwich Place burial ground', undated press release.

<sup>110</sup> The terms 'Black' (with an upper case 'B') and 'coloured' are part of apartheid's terminology of racial classification. As objectionable as uncritical use of such terms is, they are still used popularly and therefore reproduced here. On the other hand, 'black' (with a lower case 'b') is an inclusive term first adopted by those within the anti-apartheid movement, and refers to all those who were not classified white under the old racial regime. It continues to be used by those who claim a progressive identity politics, but it does not yet heal the antagonism that often exists between those who self-identify with the terms 'Black' and 'coloured', especially in the Western Cape. The antagonism between 'Black' and 'coloured' is increasingly portrayed and perceived as a regional/national tension.

<sup>111</sup> Michael Weeder 'A Vital Link to our unknown past' *Cape Times* 5 September 2003.

doesn't mean that he is a friend of the fish'<sup>112</sup>. And yet, in the same article, voicing a vision of an inclusive descendant community, he wrote: '[y]es they are ours, whether by blood or in the way we choose to love them as our neighbours'<sup>113</sup>.

Such equivocation by activists and other commentators would foreshadow the Prestwich Place Committee's failing attempt to articulate a marginalised subjectivity while refraining from deploying apartheid categories. In the face of this, the developer impassively referred to the legislation, which required that a representative community show 'direct descendancy' in order to be granted any authority over the future of the object of heritage<sup>114</sup>. Later, in an administrative appeal, the developer would elect not to contest the Committee's claims to direct descendancy; this seemed to be disappointing to the group, which perhaps wished to use disagreement about descendancy as a stage for re-imagining conceptions of identity<sup>115</sup>.

Yet the identity issue did not end here. In a subsequent appeal, this time to a tribunal constituted by Department of Arts and Culture, the campaign group pleaded that the law had a much more insidious blindspot regarding identity. It contended that the public consultation process, which had drawn an intense response but from a small group of people, had assumed a 'middle-class familiarity' with methods of public consultation, and indeed, with the significance of the issue. The process failed to 'take into account the erasure of layers of undervalued history and of memory which have come to be associated with the very communities who by history and association would have an interest in this site'<sup>116</sup>. The contention was that the very act which the site symbolised was the erasure of subjectivity of the people buried there – their anonymity and the conditions of their non-recognition by contemporary descendants. What really defined the Prestwich Place Committee's efforts, then, as well as its chief obstacle, was this attempt to re-imagine identity and community, and to obtain legal recognition for this re-imagined sense of a community of descendants.

Valmont Layne would later write that the reference to direct descendancy was

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Section 36(6)(b) of the National Heritage Resources Act 25 of 1999 (hereafter referred to as the NHRA). The heritage legislation will be discussed at greater length in Chapter Three.

<sup>115</sup> Hands Off Prestwich Place Ad Hoc Committee 'Issues arising from Prestwich Street hearing, Thursday 23<sup>rd</sup> Oct 2003' (informal notes kept by Bonita Bennett).

<sup>116</sup> Prestwich Place Project Committee *Submission to DAC Tribunal* (20 May 2004).

... a bitter reminder of Apartheid's most powerful claims in which "colouredness" was posited as a condition of hybridity, of step-child status, of in-betweenness, a condition with only a fragmentary claim to history, so to speak. Against this legacy is a diverse community charting new paths through modernity with the lingering burden of colouredness in contemporary memorial politics. It did not seem to matter that the remains found on the site in fact represented a complete cross-section of humanity at the colonial Cape, all faiths, all racial designations. What mattered in the heat of the moment was the racial representivity of the contestants.<sup>117</sup>

While this encapsulates the core problem with the language of direct descendancy, it is perhaps more correct to say that all participants in some way based their claims upon genealogical or representational privilege, or the lack thereof.

Prestwich Place is but one example of a range of diverse scenarios involving collective interests and senses of proprietorship that may sensibly be grouped under the umbrella of the term 'cultural property'<sup>118</sup>. Disputes over cultural property form a vivid image of how law produces and limits subjectivities, since they typically invoke claims that are simultaneously claims *of* law and claims *against* law. As Elazar Barkan and Ronald Bush note, the term 'cultural property', used in so much of the literature about claims of this sort, is itself a paradox<sup>119</sup>. Advocates for legal measures against cultural appropriation claim that property is at the foundation of the Enlightenment doctrine of universal rights and individual liberties, which do not sit well with dynamic conceptions of collective identity and ownership<sup>120</sup>. Claims to cultural property aspire to be claims of legality; yet often, by invoking the cultural as opposed to the civic, these claims are not recognised by the law, or they are recognised only as exceptions to deep-seated civic rights<sup>121</sup>. Cultural

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<sup>117</sup> Valmont Layne "Hands on District Six": towards a politics and poetics of memorialisation at a South African site museum', paper presented to the Institutions of Public Culture Workshop (University of Cape Town, 7-9 July 2005).

<sup>118</sup> For an introduction to the diversity of claims for repatriation of cultural property and for protection against cultural appropriation, see the essays collected in Bruce Ziff and Pratima V Rao *Borrowed power: essays on cultural appropriation* (New Brunswick, NJ: Rutgers University Press, 1997); Barkan and Bush (note 106).

<sup>119</sup> Barkan and Bush (note 106) at 2.

<sup>120</sup> For example, Barkan and Bush, who describe (Western) law's assumptions as 'universalist and neocolonial'; see (note 106) at 2.

<sup>121</sup> This is evidenced by the burgeoning literature that advocates *sui generis* protection for indigenous knowledge and cultural expression, desiring to formulate some form of legal protection for these cultural forms but unable to find as simple a formula as the intellectual property rights that protect individual authors. See, for example, Darrell A Posey and Graham Dutfield *Beyond intellectual property: toward*

property disputes are therefore generally imbued with a deep confusion of subjectivity and citizenship. Part of the problem is that cultural property only reveals its identity when it has been lost<sup>122</sup>; as if alienation was an intrinsic property of identity, and loss an identifying element of possession. Claims to cultural property must therefore always look back, memorialise, risk reification.

Rosemary Coombe, in her discussion of appropriation and the cultural politics of intellectual property, claims that law cannot avoid setting limitations on the collective subject, and is forced to adopt certain rhetorical positions which Coombe calls Orientalist and Romantic<sup>123</sup>. From the former perspective, law regards identity as discrete, fixed and based upon biological or cultural essences. The latter perspective borrows from Romantic thought, with its preoccupation with genius, originality and authorship<sup>124</sup>: the qualities of the self-contained individual defined by the property in his or her possession are lent by the logic of modernist thought to nation-states and ethnic groups, who are then individualised in the political imaginary<sup>125</sup>. From this perspective, then, the nations or ethnic collectives that would hold cultural property must be ‘territorially and historically bounded, distinctive, internally homogenous, and complete unto themselves. In this worldview, each nation or group possesses a unique identity and culture that are constituted by its undisputed possession of property’<sup>126 127</sup>.

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*Traditional Resource Rights for indigenous peoples and local communities* (Ottawa: International Development Research Centre, 1996); Paul Kuruk ‘Protecting folklore under modern intellectual property regimes: a reappraisal of the tensions between individual and communal rights in Africa and the United States’ (1999) 48 *American University Law Review* 769; Darrell Posey ‘Intellectual Property rights: and just compensation for indigenous knowledge’ (1990) 6(4) *Anthropology Today* 13; Alan Jabbour ‘Folklore protection and national patrimony: developments and dilemmas in the legal protection of folklore’ (1983) XVII(1) *UNESCO Court Bulletin* 10.

<sup>122</sup> Barkan and Bush (note 106) at 15. See also David Lowenthal *The heritage crusade and the spoils of history* (Cambridge: Cambridge University Press, 1998) that ‘[i]dentity is succored more by a quest for lost heritage than by its nurture when regained’ (at 238).

<sup>123</sup> Rosemary J Coombe ‘The properties of culture and the possession of identity: postcolonial struggle and the legal imagination’ in Bruce Ziff and Pratima V Rao *Borrowed power: essays on cultural appropriation* (New Brunswick, NJ: Rutgers University Press, 1997) 74 at 75ff.

<sup>124</sup> On the intertwined genealogies of notions of authorship and original genius, and individualist rights in intellectual property, see Mark Rose *Authors and owners: the invention of copyright* (Cambridge, MA: Harvard University Press, 1993); Martha Woodmansee and Peter Jaszi (eds) *The construction of authorship: textual appropriation in law and literature* (London: Duke University Press, 1994); David Saunders *Authorship and copyright* (London: Routledge, 1992).

<sup>125</sup> Notions of cultural property and heritage evolved together in the 18<sup>th</sup> and 19<sup>th</sup> century with the reification of nation and race, although in sometimes complex ways. See Elazar Barkan ‘Amending historical injustices: the restitution of cultural property – an overview’ in Elazar Barkan and Ronald Bush (eds) *Claiming the stones/Naming the bones: cultural property and the negotiation of national and ethnic identity* (Los Angeles: Getty Research Institute, 2002); Lowenthal (note 122).

<sup>126</sup> Coombe (note 123) at 84.

<sup>127</sup> For examples of these assumptions in operation, and the difficulties they create for the dynamism of culture, see Gerald Torres and Kathryn Milun ‘Stories and standing. The legal meaning of identity’ in Dan

This difficulty with articulating a conception of identity that is hybrid, dynamic, and constantly subject to incomplete description of its rights to cultural property is a structural silence within law's discourse of right and justice: law's inexpressible subject. In this view, the Prestwich Place Committee failed because it invoked a hybrid and dynamic identity that often intended to open up rather than determine questions about genealogies and notions of descendancy. It might be argued, then, that it was the inexpressibility of this open-ended conception of identity that can be found at the basis of law's inability to come to the aid of the group.

But this silence wells from deeper discourses than the legal: descriptions of hybridity at any level are fated to be fraught with tautology and vagueness. More usefully perhaps, critique needs to shift from questioning the responsibility of law – the question of to whom does the law respond – and towards another, prior questioning of the source of law, the founding myths that are responsible for law. A creative legal activism then invests itself in the potential not to find but to found responsibility. This potential exists in the role of memory and the presence of the past in the very constitution of the law, at the time of the law's constitutional mo(nu)ment. A work of excavation of these memorial foundations of law, of the relationship between memory and the constitution of the law, would allow activism not to approach the law as found, but to find how its responsibilities might be re-activated.

### ***c. landscapes of transition and constitutional monuments***

If the struggle centered on Prestwich Place has seemed uncanny, then perhaps it is because its will to re-imagine identity has recalled vestiges of the open-ended cultural formations of District Six, location of Cape Town's most notorious forced removals<sup>128</sup>. District Six's multicultural community has increasingly been imagined as a vibrant pre-apartheid identity, source of a cultural dynamism that was destroyed by apartheid's racial

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Danielsen and Karen Engle (eds) *After identity: a reader in law and culture* (New York: Routledge, 1995) 129; also Philip W Scher 'Copyright heritage: preservation, carnival and the state in Trinidad' (2002) 75 *Anthropological Quarterly* 453; Jonker (note 107); Julian Jonker 'Making culture public: author, authority and intellectual property in the living archive' (2004) 30 *South African Museums Association Bulletin* 45. For more on the complications that arise from the legal protection of cultural property, see Brown (note 106).

<sup>128</sup> For a social history of forced removals in Cape Town, see John Western *Outcast Cape Town* (Cape Town: Human & Rousseau, 1981); on memory and oral histories of forced removals in Cape Town, see Sean Field (ed) *Lost communities, living memories: remembering forced removals in Cape Town* (Cape Town: David Philip, 2001). On forced removals more generally in South Africa, see Laurine Platzky and Cheryl Walker *The surplus people: forced removals in South Africa* (Johannesburg: Ravan Press, 1985).

classifications, their attendant cultural stereotypes and supposed biological aggregates. An area on the eastern outskirts of the city centre, the District was, since early colonial days, a vital manifestation of Cape Town's existence as a port city. All kinds of people lived, worked and loved there: immigrants from Europe, the Caribbean and the Americas, slaves and freed slaves of Southern African and South East Asian origin. Recent descriptions of Cape Town that narrate the city's history as a locus of creolisation<sup>129</sup> identify District Six, as place and as community, as an important catalyst for processes of cultural contact and exchange and the formation of novel, hybrid identities. District Six also had a reputation for intense and vibrant artistic, intellectual and political activity, and is often summoned to represent the uniqueness and vibrancy of cultural life in Cape Town before removals, much as Sophiatown does for the Witwatersrand<sup>130</sup>. If apartheid's metaphor of apart-ness made of it a primarily spatial ordering<sup>131</sup>, then District Six was 'not of South Africa in its apartheid guise, but a place apart'<sup>132</sup>.

Truly the District did not fit into apartheid's vision of urban planning<sup>133</sup>, for between 1966 and 1982 its 60 000 residents were methodically removed to townships on the margins of the metropolis. Their houses were bulldozed to the ground, so that today the only remnants of the once vibrant community are the churches, mosques and synagogues which stand painfully alone on the otherwise empty land. The barren landscape that remained would become a 'monumental emptiness'<sup>134</sup>, an icon of the remembrance of forced removals.

In the mid-eighties, after removal had been completed, District Six became the object of what may be described as practices of memory as resistance. These practices – humble

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<sup>129</sup> For example, Denis-Constant Martin *Coon Carnival: New Year in Cape Town: past to present* (Cape Town: David Philip, 1999), Zimitri Erasmus (ed) *Coloured by history/shaped by place: new perspectives on coloured identities in Cape Town* (Cape Town: Kwela, 2001).

<sup>130</sup> Sophiatown was destroyed by forced removals shortly before District Six. The area was rebuilt as low cost housing for whites and renamed Triomf ('Triumph').

<sup>131</sup> The insight is Peter Andersen's.

<sup>132</sup> Crain Soudien 'District Six and its uses in the discussion about non-racialism' in Zimitri Erasmus (ed) *Coloured by history/shaped by place: new perspectives on coloured identities in Cape Town* (Cape Town: Kwela, 2001) 114 at 115, emphasis found.

<sup>133</sup> Although urban segregation is less a product of apartheid spatial ordering than its precursor. Mid-century urban planning of Cape Town was modeled on an appropriation of European modernism, its project of reconstruction, and the ideas of Le Corbusier. See, for example, Alessandro Angelini 'Spaces of Good Hope: inscribing memory, territory and urbanity in District Six, Cape Town' (Isandla Institute Dark Roast Occasional Paper no. 13, 2003) at 9, Alan Mabin 'Reconstruction and the making of urban planning in 20<sup>th</sup>-century South Africa' in Hilton Judin and Ivan Vladislavić (eds) *Blank\_\_* (Cape Town: David Philip, 1998) 269 at 270.

<sup>134</sup> Peggy Delport 'Signposts for retrieval: a visual framework for enabling memory of place and time' in Ciraj Rassool and Sandra Prosalendis *Recalling community in Cape Town: creating community in Cape Town* (Cape Town: District Six Museum Foundation, 2001) 31 at 36-7.

acts and gestures such as the writing of poetry, the staging of plays, the painting of murals and graffiti, the gathering of ex-residents around dinner tables – were persistent and self-consciously resistant, and finally imprinted the District onto the popular imagination as one of the key symbols of the injustices of forced removals, as well as of the struggle not to forget. ‘*Remember District Six*’ urges a Plaque of Remembrance at the entrance to the District Six Museum, reminding us that the urge to remember became a key mode of cultural resistance during the most turbulent years of apartheid<sup>135</sup>:

*Remember Dimbaza.  
Remember Botshabelo/Onverwacht,  
South End, East Bank,  
Sophiatown, Mukuleke, Cato Manor.  
Remember District Six.  
Remember the racism  
Which took away our homes  
And our livelihood  
And which sought  
To steal away our humanity.  
Remember also our will to live,  
To hold fast to that  
Which marks us as human beings:  
Our generosity, our love of justice  
And our care for each other.  
Remember Tramway Road,  
Modderdam, Simonstown.*

These practices of memory were an important part of the formation of an activist grouping called the Hands Off District Six Campaign, which won an important victory during the 1980s when it was able to exert enough pressure to prevent the intended redevelopment of the District. The group, somewhat ironically, had its origins in what seemed to be the apartheid government’s dismantling of its land segregation laws in the

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<sup>135</sup> One need only think of the fighting title of Don Mattera’s *Memory is the weapon* (Johannesburg: Ravan Press, 1987), or indeed Bloke Modisane’s description of Sophiatown: William Bloke Modisane *Blame me on history* (1963) (Johannesburg: AD Donker, 1986).

late 80s<sup>136</sup>. In November 1986, British Petroleum (BP) announced that it would invest R100 million in the ‘renewal’ of District Six, in what would be the first ‘open residential area’ in the country<sup>137</sup>. BP explicitly looked on its plan to rebuild a racially integrated business environment as a ‘post-apartheid solution’, committed to using the land equitably. Yet many former residents and activists looked upon the land as ‘salted earth’<sup>138</sup>, and denied that the BP development would be a positive one. Out of this debate came the Hands Off District Six committee, and the image of the barren land, which commuters to the central business district must pass everyday, began to symbolise the spirit of the fight for land, restitution and justice.

Much of the area therefore still stands empty, an ‘open wound’<sup>139</sup> between mountain and sea that disturbs the city’s natural beauty. It is a powerful marker of destruction and memory that meets the eye of every commuter entering Cape Town’s central business district. Preventing development on the land fulfilled both strategies of resistance of the Hands Off campaign. Firstly, the land remained visually scarred, a powerful symbol of memory as resistance. At the same time, it remained physically empty, waiting for a time when those who had been removed would be able to return.

With the arrival of freedom in 1994, return became a real possibility, in line with the new government’s land restitution programme. The District Six Beneficiary Trust, which has administered the land claim for ex-residents of the District and now manages the process of return, grew out of the initial activist agenda. It was formed in the wake of the Restitution of Land Rights Act<sup>140</sup> and a successful appeal to a newly constituted Land Claims Court, and resolved ‘to drive, co-ordinate, and monitor the land restitution

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<sup>136</sup> The Black (Urban Areas) Act 25 of 1945 was repealed by the Abolition of Influx Control Act 68 of 1986 on 1 July 1986, which abolished the pass system. The direction of legislative reform was not exactly clear. The Free Settlement Areas Act 103 of 1988 created ‘open’ residential areas in which people of all races could live. Yet at the same time a Group Areas Act Amendment Bill provided for more stringent penalties for contravention of the Group Areas Act, although the Bill was eventually dropped after public protest. See Vinodh Jaichand *The restitution of land rights: a workbook* 1<sup>st</sup> ed. (Johannesburg: Lex Patria, 1997) 20.

<sup>137</sup> In terms of the Free Settlement Areas Act of 1988.

<sup>138</sup> Sandra Prosalendis, Jennifer Marot, Crain Soudien and Anwah Nagia ‘Punctuations: periodic impressions of a museum’ in Ciraj Rassool and Sandra Prosalendis *Recalling community in Cape Town: creating community in Cape Town* (Cape Town: District Six Museum Foundation, 2001) 74 at 79.

<sup>139</sup> Valmont Layne and Karen Till ‘Keynote Lecture on memorialisation, world heritage, and human rights’, presented at the Hands On District Six! Conference (Cape Town, 25-28 May 2005) used the term to evoke other incomplete memorials and memorials under construction such as Berlin’s Topography of Terror.

<sup>140</sup> Act 22 of 1994

process until all claims are validated, verified, and settled'<sup>141</sup>. The Hands Off campaign also gave birth to another programme for change, one that continued to work with practices of memory, such as oral history collections and the production of creative work, and that resulted in the establishment of a District Six Museum<sup>142</sup>.

These two programmes, of restitution on the one hand and memorialisation on the other, share origins institutionally, historically and even conceptually. Yet with the achievement of return, one can begin to discern a divergence. Those involved in the legal programme have been concerned with the meeting of requirements of the legislation, and such matters as the establishment of a social contract between residents (aiming, amongst other things, to define and limit rights to use and transfer property in the area). The Beneficiary Trust's programme is an entirely necessary one, and a victory that is in line with the initial activist agenda. Yet it is a process that through its reliance on modes of legality must engage in the discourses of proprietorship and patrimony. Thus, who is entitled to restitution? What does this right entail? Who is an ex-resident? Who is the descendant of an ex-resident? Who belonged to the community of District Six, and who will belong to a reconstituted community? Justice is understood, in this language, in terms of right, inclusion and exclusion<sup>143</sup>.

The programme of memorialisation, on the other hand, can read the signification and significance of the site in a different way. The Museum, and related practices of memory, use the District as a text from which to read an alternative history of the city and re-imagine possibilities for citizenship and identity. In this work of memory, the history of District Six is not simply one of the material dispossession of individual residents, but related to a much wider cultural dispossession, a legacy of social engineering that has curtailed the cultural imaginary of the city and is thus intrinsically related to the city's contemporary geography and its persistent racial stratification. The Museum's work, at its most productive, involves itself not only with the commemoration of a discrete community of the District, but with questions about race and citizenship in the city generally, about the re-imagination of the built environment generally, and about what

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<sup>141</sup> District Six Beneficiary Trust website, <http://www.d6bentrust.org.za/> (last accessed 31 August 2004).

<sup>142</sup> For the history of the District Six Museum Foundation, see Ciraj Rassool and Sandra Prosalendis *Recalling community in Cape Town: creating community in Cape Town* (Cape Town: District Six Museum Foundation, 2001) 3-20 and *passim*.

<sup>143</sup> For a recent account of the tortuous seven years of political wrangling that resulted, inter alia, from such questions, see Coombes (note 104) at 144-47.

indigeneity and creolisation might mean in the city generally<sup>144</sup>. While the Beneficiary Trust's legal activities work within a reconstituted civic sphere, the Museum continues to ponder the renewal and reconstitution of that civic sphere.

This divergence between projects of restitution and memorialisation has practical implications for the redevelopment of the District. The Beneficiary Trust, in managing the return of ex-residents, discusses the establishment of utilitarian housing schemes and the possibility of a social compact amongst residents. The District Six Museum, on the other hand, discusses the possibility of establishing memorial parks and other public spaces and places for civic activity. The two approaches are not contradictory, and indeed both have been complementary in arriving at the recent slogan of *Hands On District Six!*<sup>145</sup> Yet there is the potential for a politics arising from the choices made necessary by budgetary and spatial constraints as the processes of cultural and physical restitution unfold. What is immanently at stake is whether the District is primarily a place for the 'direct descendants' of those who were forcibly removed, for a diaspora more widely conceived, for all who have been deprived of civic access to the city, or even for all the people of the city<sup>146</sup>.

Annie Coombes characterises District Six Museum's memory work, for example its psychogeographic tours through the city's haunted spaces, as a 'Freudian archaeology'<sup>147</sup>; and archaeology has been literally practised at the site of the District's destruction<sup>148</sup>. Most interesting though is the archaeology of the site's hauntologies<sup>149</sup>

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<sup>144</sup> This characterisation of the Museum's work is taken from the author's personal experience as an employee. An introduction to the methodology of the Museum is given in Coombes (note 104) at 116-148; see also the essays collected in Rassool and Prosalendis (note 142).

<sup>145</sup> This name was given to a conference held by the District Six Museum in May 2005, coinciding with the date of return of some of the families. The continued use of this metaphor of the hands gives rise to interesting questions about the tangible and the intangible, especially in the context of heritage and legal discourses which tend to distinguish between the two. The complementarity of the projects of memorialisation and restitution have so far worked to refuse an easy distinction between tangible and intangible.

<sup>146</sup> These issues were raised persistently at the Hands On District Six! conference, and are inherent in the Museum's wish that the site be classified as a 'Grade I' national heritage site within the meaning of the NHRA.

<sup>147</sup> Coombes (note 104) at 133.

<sup>148</sup> For example, Antonia Malan and Crain Soudien 'Managing heritage in District Six, Cape Town: conflicts past and present' in J Schofield (ed) *The archaeology of twentieth century conflict* (London: Routledge, 2002). On the different archaeologies of the site, see especially Nick Shepherd *Archaeology and post-colonialism in South Africa: the theory, practice and politics of archaeology after Apartheid* (PhD thesis, University of Cape Town, 1998) 227-236.

<sup>149</sup> Being more or less faithful to, but perhaps out of joint with Jacques Derrida *Specters of Marx: the state of the debt, the work of mourning, and the New International* (trans Peggy Kamuf) (New York: Routledge, 1994), the 'hauntology' is used here to describe a discursive haunting: discourses of the spectral that are themselves spectral, a haunting of the rhetoric of haunting.

that took place with the District Six Public Sculpture Project, in which the empty space was (re)populated with sculptures and public art works by 96 artists<sup>150</sup>. Through such memorial imaginings, characterised by a creative engagement with hauntings<sup>151</sup> as much as by physical and literal archaeologies, emerge the traces with which the contemporary city's memorial and constitutional topographies are formed and inscribed.

The Prestwich Place Committee had originally been named the Hands Off Prestwich Street Ad Hoc Committee, recalling the stridency of the Hands Off District Six Campaign. Indeed, a number of Hands Off District Six's members were instrumental in formulating the Prestwich Place campaign, and both organisations arose from what has been called 'a crisis of authority, of the right to speak'<sup>152</sup>. This crisis of political representation is also the crisis of re-imagination, the necessity of being creative in the face of the old racial identities that continue to crowd out the social and political imagination<sup>153</sup>. Both the campaigns for District Six and Prestwich Place battle against these fixed and restrictive delineations of identity, and against an amnesia of the future anterior, of what might have been possible.

Their work of re-imagination is a backward-looking, or memorial, work of the imagination, that arises from the potentiality of a 'short-circuit between imagination and memory'<sup>154</sup>. For example, the popular, if romanticised, narrative of District Six is one which trumps official, bureaucratic or statistical narratives because of its 'power of reinvention and renewal.... It matters not therefore that the details of a story are wrong.

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<sup>150</sup> Crain Soudien and Renate Meyer (eds) *The District Six Public Sculpture Project* (Cape Town: District Six Museum Foundation, n.d.).

<sup>151</sup> See also Coombes (note 104) at 134ff on the hauntings of District Six.

<sup>152</sup> Valmont Layne 'Towards a politics of the emerging community museum sector in South Africa', presented at the 68th South African Museums Association Conference (Cape Town, 1-3 June 2004), emphasis found.

<sup>153</sup> As one commentator has put it, 'under apartheid what was construed as the problematic conjuncture of working-class origins, cosmopolitan aspirations, and being African or "colored" has left a complicated legacy. This means that the memory of District Six is not easily accommodated in the "new" South Africa either.' Coombes (note 104) at 118.

<sup>154</sup> Paul Ricoeur *Memory, history, forgetting* (trans Kathleen Blamey and David Pellauer) (Chicago: University of Chicago Press, 2004) (hereafter referred to as Ricoeur *Memory, history, forgetting*) 5. Cf Sean Field 'Fragile identities: memory, emotion and coloured residents of Windermere' in Zimitri Erasmus (ed) *Coloured by history/shaped by place: new perspectives on coloured identities in Cape Town* (Cape Town: Kwela, 2001) 97 at 102-3 on how the victims of traumatic forced removals resort to myth-making and romanticisation of their pre-traumatic memory of the place.

*What matters is the right to remake*<sup>155</sup>. Without condoning the excesses of re-  
imagination, what is at stake is a creative element in the work of recognition and  
identification. This contiguity of the work of memorialisation and of imagination gives us  
a clue as to why memory became such a vital element of the liberation struggle's  
optimism, and has enduring potency after 1994. It also suggests how one might  
approach, in a narrative or memorial way, what was earlier named the 'constitutional  
moment' of the law.

The successes of the struggle for District Six are indicative. Even as the everyday  
legality of apartheid rule determined and produced stratified racial identities through the  
minutiae of segregation, it was the imagination of District Six, its image held in memory,  
that located it as an important site for struggle, for re-imagining law and hoping for a new  
legal compact. This creative struggle for memory would make of District Six a  
constitutional monument, in the sense that it is the remembrance of such sites and events  
that inform a new constitutional regime's monumental vision of justice and legality.

Indeed, the apartheid past is explicitly memorialised in the fundamental laws of the  
new dispensation<sup>156</sup>. The epilogue or 'postamble' of the Interim Constitution had  
conceived of the founding document as not a rupture but a 'historic bridge' between the  
apartheid past and a future of reconciliation and reconstruction<sup>157</sup>. The final version of  
the Constitution, perhaps hoping that we had crossed this bridge, urged us to look  
backwards before looking forward:

We, the people of South Africa,  
Recognise the injustices of our past;  
Honour those who suffered for justice and freedom in our land;  
Respect those who have worked to build and develop our country; and  
Believe that South Africa belongs to all who live in it, united in our diversity.<sup>158</sup>

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<sup>155</sup> Crain Soudien and Lalou Meltzer 'District Six: representation and struggle' in Ciraj Rassool and Sandra Prosalendis *Recalling community in Cape Town: creating community in Cape Town* (Cape Town: District Six Museum Foundation, 2001) 66 at 69, emphasis added.

<sup>156</sup> On this "constitutional entrenchment of memory", see Edouard Fagan 'The Constitutional entrenchment of memory' in Sarah Nuttall and Carli Coetzee (eds) *Negotiating the past: the making of memory in South Africa* (Oxford: Oxford University Press, 1998); the constitution 'regulates the future conduct of government, of course, but it also contains a number of unusual provisions which are best explained as deliberate attempts constantly to remind the interpreter of the constitution of the unequal society that forms the backdrop to the text' (at 250).

<sup>157</sup> Epilogue of the Constitution of the Republic of South Africa Act 200 of 1993 (the 'Interim Constitution').

<sup>158</sup> Preamble to the Constitution of the Republic of South Africa Act 108 of 1996 (the 'Final Constitution', hereafter referred to as the Constitution).

The constitutional jurisprudence of these early years has been, at least at first, appropriately monumental. Thus the judges of the Constitutional Court have on occasion placed equality at the centre of the Constitution ‘in the light of our own particular history’<sup>159</sup>; while urging an understanding of equality that goes beyond formal equality, because of the memory of the inegalitarian past<sup>160</sup>; they have reflected on the respect for diversity that arises because ‘reconciliation so as to overcome the strife and division of the past’ underpins the constitutional order<sup>161</sup>; and read the right to life as being ‘influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned’<sup>162</sup>. And so on, like a lodestar guiding from behind. This memorial jurisprudence has perhaps its finest moment in Judge Albie Sachs’ historical exegesis of the values informing the right to life, in that nigh inaugural case of constitutional reform, *S v Makwanyane*:

Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. When reviewing the past, the framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate, and those that brutalised us as people and diminished our respect for life.<sup>163</sup>

Here then is the constitutionalism not of the ‘historical bridge’ but of the rupture, one that exchanges death for life. The past is dead, long live the constitutional memorial, viva! But what of the dead? Especially when they arise at awkward moments?

Furthermore, what would the role of imagination and the memorial be beyond the transition of 1994-1996, and indeed, following the ten-year honeymoon period of constitutional transformation? Has the jurisprudential influence of memory, the constitutional topography of transition, been exhaustively mapped by the cartographies of the Constitution and post-Constitutional legal texts? This is the question to which legal and ethical debates arising from the Prestwich Place and a larger post-1994 landscape of cultural memory are made to respond.

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<sup>159</sup> Dissenting judgment of Kriegler J in *President of RSA v Hugo* 1997 (4) SA 1 (CC), para [74].

<sup>160</sup> Goldstone in *Hugo*, para 41.

<sup>161</sup> Per Sachs in *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 10 BCLR 1348 (CC), para [147].

<sup>162</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para [218].

<sup>163</sup> *Makwanyane* at para [391].

Prestwich Place captures a certain political *zeitgeist*, to admit a pun in bad taste. Aside from national and global resonances alluded to earlier, similar claims also animate a more expansive landscape of unnamed burials that has begun to emerge over recent years in the Cape<sup>164</sup>. Most recently, a dispute has erupted over the Tana Baru, parts of which had fallen into the hands of private owners who wish to develop the land. A fatwa has been issued by the Muslim Judicial Council (MJC) forbidding development of the land<sup>165</sup>, although there have previously been varying opinions issued by Islamic universities<sup>166</sup>. The key issue remains the significance of what is not so much intangible but buried sacred heritage, even as gentrification in a rapidly growing city threatens not just burial sites but the rest of the surrounding culturally significant area, the Bo Kaap<sup>167</sup>. Similar development has been prevented by legal action at the Oudekraal kramats<sup>168</sup>.

At 'The Woods', an area next to St Cyprians School and at the foot of Table Mountain, a protracted dispute evolved between 1998 and 2000 when oral histories conflicted with archaeological evidence about the significance of the site. The school wished to develop the area, yet members of the MJC claimed that beneath the earth lay the sacred burial site of Sayed Abdul Malik. While the archaeologist employed by the school failed to find evidence of the kramat, customs and oral histories attested to traditional significances of the place to worshippers<sup>169</sup>. A negotiated agreement to embark on a heritage project at the site was finally reached; yet elsewhere other events continue to question the claims of archaeology and other methods of historiography. This year, a sangoma alleged she could identify the burial sites of chiefs on Robben Island after dreaming about them in the Eastern Cape<sup>170</sup>. In Simons Town, a search for the

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<sup>164</sup> An overview is given by Noëleen Murray 'On remembering and forgetting: sites of memory in post apartheid Cape Town' *Architecture South Africa* 2004; also Antonia Malan "'Noises off ...': claiming a central role in reinterpreting South African cities' *Architecture South Africa* 2004; Antonia Malan, Noëleen Murray and Ulrike Rivett 'Managing heritage – mapping 'sacred sites' in Cape Town: a collaborative approach' paper presented at the Southern African Association of Archaeologists Biennial Meeting (Cape Town, 7-10 July 2002).

<sup>165</sup> Muslim Judicial Council Fatwa Committee, fatwa, issued 8 March 2005; see also Marianne Merten 'Muslim council issues fatwa against property development' *Mail & Guardian* 1 July 2005.

<sup>166</sup> For example, the opinion of Azhar University Dispensation Committee, issued 14 November 1979, which states that building is allowed where remains have 'disintegrated'. See also the opinions contrary to the MJC fatwa mentioned in Marianne Merten 'Muslim council issues fatwa against property development' *Mail & Guardian* 1 July 2005.

<sup>167</sup> John Reed 'Booming real estate prices cloud the view from the top' *Financial Times* 29 July 2005.

<sup>168</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 3 All SA 1, also reported as 2004 (6) SA 222 (SCA).

<sup>169</sup> Unpublished papers of Abdulkader I Tayob, Mary Patrick, Anthony Haggie and Auwais Rafudeen, on file with the Cultural Sites and Resources Forum, University of Cape Town.

<sup>170</sup> Personal conversation with Tim Hart, March 2005.

kramat of 17<sup>th</sup> century political exile from Sumbawa has been prompted by the sighting of his ghost, and has provoked debates about the merits of archival evidence and oral histories that are equivocal about whether he had ever arrived in the Cape<sup>171</sup>.

Like the dead, these sites of burial and exhumation proliferate, typically causing controversy and contestation on their surfacing. But Prestwich Place makes a particularly eloquent cartographer of the topography of transition, because of the magnitude of the space implicated, its historical significance, its location in the heart of the city (at least in terms of property values), and the time of its emergence, as if an omen, shortly prior to the sometimes violent confrontations over space and identity that would take place in Cape Town in the year 2005. Addressed by claims to place/space, memory and justice, Prestwich Place is a site located at the intersection of discourses of cultural property, urban planning, and transitional justice.

Yazir Henri and Heidi Grunebaum, two activists involved with the Prestwich Place struggle and with broader landscapes of memory in the Western Cape, argue that the discovery of the Prestwich Place burial ground disrupts a post-Truth and Reconciliation Commission (TRC) reality in which ‘mourning ... has become both depoliticised and increasingly psychologised’<sup>172</sup>. The TRC was established after South Africa’s first democratic election in order to provide some sense of closure for the traumatised national psyche<sup>173</sup>. Yet focus on individual memory and trauma has placed the project of truth and reconciliation in a therapeutic paradigm even as experiences of ongoing hurt and marginalisation bring the past into the present, exceeding discourses of memory as trauma and exacerbated by the lack of reparations<sup>174</sup>.

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<sup>171</sup> Unpublished papers and correspondence of Ebrahiem Manuel, on file with the Cultural Sites and Resources Forum, University of Cape Town.

<sup>172</sup> Yazir Henri and Heidi Grunebaum ‘Re-historicising trauma: reflections on violence and memory in current-day Cape Town’ (unpublished paper, 2004).

<sup>173</sup> This psychotherapeutic metaphor is apt, given, for example, the psychobiographical introspection of Antjie Krog’s description of the proceedings of the TRC in *Country of my skull* (London: Random House, 1999). See also the account by psychologist Pumla Gobodo-Madikizela *A human being died that night. A story of forgiveness* (Cape Town: David Philip, 2003). Psychotherapy also informed the comment of Albie Sachs, made before the establishment of the TRC, when he had encouraged the establishment of something named the ‘commission of truth and repair’! See Sach’s comments recorded in Alex Boraine, Janet Levy and Ronel Scheffer (eds) *Dealing with the past: truth and reconciliation in South Africa* (Cape Town: IDASA, 1994) 129.

<sup>174</sup> Christopher J Colvin “‘Brothers and sisters, do not be afraid of me’: trauma, history and the therapeutic imagination in the new South Africa” in Katharine Hodgkin and Susannah Radstone (ed) *Contested pasts: the politics of memory* (London: Routledge, 2002).

For Grunebaum and Henri, the claiming of Prestwich Place is an act of memory that disrupts the official amnesia of ‘nation-building-as-reconciliation’<sup>175</sup>. By this, they refer to how the TRC, as Grunebaum has said elsewhere, has underwritten a discourse of reconciliation which discerns ‘admissible from inadmissible forms of historical consciousness and representations in the domains of the public’<sup>176</sup>. The TRC’s establishment was a product of negotiated settlement, and marked by compromise. The moral calculus of transition was a simple if relatively novel one: retribution would be foregone in exchange for the truth about apartheid’s violent history. A public process opening out into catharsis, the narration of grief and, hopefully, remorse and forgiveness would then clear the path to reconciliation.

Yet if the TRC has been unable to achieve enduring reconciliation, it is because, as Mahmoud Mamdani had already pointed out in 1997, its hearings and Report narrated apartheid as a history of the few, of perpetrators and individual victims, rather than as a history of the many, of beneficiaries and shared victimhood<sup>177</sup>. What has been left out, the violence of the everyday and the continuities of the colonial past, is ‘unfinished business’ in the words of Terry Bell and Dumisa Ntsebeza<sup>178</sup>. In Cape Town this structural legacy is visible in the planning of the urban built environment and experienced through the popular racial imaginary. Derrida would later warn that forgetting was the very purpose of the TRC<sup>179</sup>, but it is from Mamdani and other critics that we can learn the specific terms upon which this forgetting happened.

The TRC became like the archive of which the postcolonial theorist Achilles Mbembe warns:

Archiving is a kind of interment, laying something in a coffin, if not to rest, then at least to consign elements of that life which could not be destroyed purely and simply. These elements, removed from time and from life, are assigned to a place and a sepulchre that is

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<sup>175</sup> *Ibid.*

<sup>176</sup> Heidi Grunebaum ‘Invisible synchronicities, the “new” and the politics of time’, (unpublished paper, c2004).

<sup>177</sup> Mahmood Mamdani ‘Reconciliation without justice’ (Nov/Dec 1996) 46 *Southern African Review of Books* 3; also Mahmood Mamdani ‘A diminished truth’ in Wilmot James and Linda van de Vijver (eds) *After the TRC: reflections on truth and reconciliation in South Africa* (Cape Town: David Philip, 2000).

<sup>178</sup> Terry Bell and Dumisa Ntsebeza *Unfinished business: South Africa, apartheid and truth* (Cape Town: Redworks, 2001).

<sup>179</sup> Jacques Derrida ‘Archive fever’ (seminar given at University of the Witwatersrand, August 1998, transcribed by Verne Harris) in Carolyn Hamilton, Verne Harris, Jane Taylor, Michele Pickover, Graeme Reid & Razia Saleh (eds) *Refiguring the archive* (Cape Town: David Philip, 2002); see also Ciraj Rassool, Leslie Witz and Gary Minkley ‘Burying and memorialising the body of truth: the TRC and national heritage’ in Wilmot James and Linda van de Vijver (eds) *After the TRC: reflections on truth and reconciliation in South Africa* (Cape Town: David Philip, 2000).

perfectly recognisable because it is consecrated: the archives. Assigning them to this place makes it possible to establish an unquestionable authority over them and to tame the violence and cruelty of which the ‘remains’ are capable, especially when these are abandoned to their own devices.<sup>180</sup>

Mbembe’s words echo those of others who have described the TRC as a ‘paradox ... of history’s simultaneous exhumation and burial’<sup>181</sup>, and are at the same time a striking reminder of Prestwich Place and the *revenants* who emerge, uncalled, from the absences and silences of the state’s archives. If there is an ethical fulcrum upon which these issues turn, it is how we deal with our past.

The critiques of the TRC and its approach to transitional justice then also provide a framework in which to address the articulation of sites such as District Six and Prestwich Place. These sites, and the broader emerging cultural landscape that they represent, are claimed as the ‘unfinished business’ of transitional justice, markers on a cartography of incomplete political transformation. Occupying central and prominent spaces in the city, as well as places of desire in the plans of development capital, these places speak to the continuity of racial stratification and the haunting presence of the past. They prompt us to think about forms of descendancy, genealogies of proprietorship, and histories of citizenship, and remind us that we need to reconceptualise received ideas of identity, belonging and the civic. But mostly what these sites present to us are archaeological potentialities, places where excavation might unearth the relationships between the memory of the past and the juridical self.

Transitional justice, as an institutional and discursive field, is concerned with societies in transition between totalitarianism and democracy and how they deal with the leaders of the old regimes and the perpetrators of the past. It is an attempt to unearth the truth and lay ghosts to rest, one that simultaneously exhumes and buries. The question of transitional justice is also two-fold, in that it is at once an epistemological question and an ethical question. ‘How should we remember the past?’ is a question of *what* we remember, and what we ought to do with that memory: remember, forget, prosecute, forgive, etc.

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<sup>180</sup> Achille Mbembe ‘The power of the archive and its limits’ in Carolyn Hamilton, Verne Harris, Jane Taylor, Michele Pickover, Graeme Reid & Razia Saleh (eds) *Refiguring the archive* (Cape Town: David Philip, 2002) at 22.

<sup>181</sup> Rassool, Witz and Minkley (note 179) at 116.

Paul Ricoeur has described how transitional justice forums confuse the roles of historian and judge<sup>182</sup>. While the judge approaches the past in order to deliver an adjudication that is final, the historian knows her narration of the past will be open to constant revision and critique. This influences the method by which they go about their work, their visions of understanding the past, until ‘one can wonder whether the judge and the historian hear testimony, that initial structure common to both roles, with the same ear’<sup>183</sup>. The trials of transitional justice often confuse the roles of judge and historian, where judgments are entered as historiographical works, and historians work under the pressure of conformity to a judicial verdict.

Yet the institutions and discourses of transitional justice are not only concerned with historiography and adjudication, but become vehicles for collective remembrance<sup>184</sup>. If the historian is concerned with history, and the judge with adjudication, then it is the citizen who is concerned with collective remembrance, as the imagination of what constitutes citizenship<sup>185</sup>. The citizen has a memorial gaze, looking back upon the work of judge and historian in order to form his own opinion as ‘the ultimate arbiter’<sup>186</sup>. It is in this sense that the TRC’s shaping of public memory can also be seen as concerning itself deeply with the formation of citizenship, as can the remembrance of the cultural geographies discussed so far. The next chapter will argue that it is *recognition*, as an aim of the work of memory, that links the commemorative project and the juridical subject.

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<sup>182</sup> Ricoeur *Memory, history, forgetting* (note 154) at 314ff.

<sup>183</sup> *Ibid.*, 322.

<sup>184</sup> Mark Osiel *Mass atrocity, collective memory, and the law* (New Brunswick, NJ: Transaction, 1997).

<sup>185</sup> Benedict Anderson *Imagined communities: reflections on the origin and spread of nationalism* (New York: Verso, 1991).

<sup>186</sup> Ricoeur *Memory, history, forgetting* (note 154) at 333.

## CHAPTER TWO

### The Ethics of Memory and Silence

#### *a. speaking of the dead*

The dilemmas of Prestwich Place are inflected with silence. There is a resonant silence that can be discerned first in the silence of the bones themselves, in the absent testimony of the dead, and so profoundly echoed by the namelessness of their bodies.

The silence of the bones is a silence of the archive, which resonates also in the contemporary discourse of the living. It sounds in the inability of descendants to claim or accept the remains as ancestral, and in their unwillingness even to do so. There is the silence that is produced by the technical legislative requirement of ‘direct descendancy’, but it is in some sense a more primordial silence that is simply reproduced by this language. There is also the echo of a difficult but intimate silence in the Prestwich Place Committee’s Sunday evening vigils; these were a moving expression of commitment by its members to the remembrance of the dead, yet nevertheless failed to attract much popular support, even to a site of such profound political and spiritual significance.

As we continue to confront anonymity and failed recognition, silence proliferates in the wake of the exhumation of the dead. The politics of memory instituted by the Prestwich Place Committee’s activism opposes those who would make the bones speak by the methods of archaeology and anthropometry<sup>187</sup>. In April 2005 a meeting convened by SAHRA and the Prestwich Place Committee denied two University of Cape Town graduate students permission to study the bones for the purposes of thesis research and a broader anthropometric project.

There have been at least three shades of objection to SAHRA’s decision<sup>188</sup>, and an understanding of what is common to them will indicate an avenue for further thought. Firstly, there are claims that the Prestwich Place Committee’s position obfuscates a

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<sup>187</sup> The naming of the disciplines which would engage in study of the bones – archaeology, forensic anthropology, anatomy – reveals an institutional politics and a politics of knowledge that is entirely relevant to the current discussion, but is not discussed here because of the usual constraints. ‘Anthropometry’ will be used, as if it were a term of art, to refer to these related disciplines that would draw conclusions from the study of human bones. ‘Professional’ or ‘practical’ archaeology will refer to any excavation that has as its purpose the unearthing of remains or artefacts, including exhumations.

<sup>188</sup> These objections have been heard in various forms in personal discussions.

legitimate scientific research project, that the bones are legitimate subject matter for science, and that scientists have some legal or ethical *right* to study the bones. This is an appeal to law and the legitimacy of scientific method, and even to their natural mutuality. While such a claim may well derive legal support from the Constitutional right to freedom of scientific research<sup>189</sup>, it is not yet clear what this right will support or how it would be shaped by the limitations analysis<sup>190</sup>. It is not the purpose of the current discussion to engage in legal positivist analysis, especially in the absence of prior jurisprudence<sup>191</sup>. Ethically, this objection raises even more interesting questions about the scientificity and invasiveness of specific anthropometric methods, and whether these methods are tainted by the colonial history referred to in Chapter One. Given the possibility of conflicting versions of history told by anthropometry, historiography, oral tradition and popular mythology, the question of methodological licence must also be understood as a question of who has the (ethical) right to speak *for* the dead and *of* the dead.

Related to this question of the right to speak is the second type of objection: that the Prestwich Place Committee do not have a legitimate claim to accurately represent the descendant community, and thus have no legitimate authority to influence scientific access to the remains. This objection adds that without further study we will never know who the descendants truly are; and so implies that Prestwich Place Committee's claims to represent the descendant community will never be valid until study of the remains has

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<sup>189</sup> Section 16(1)(d) of the Constitution grants the right to 'academic freedom and freedom of scientific research'.

<sup>190</sup> Section 36 of the Constitution allows that such a right may be limited by a law of general application, 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

Should scientists' access to the Prestwich Place be deemed to fall under the right to freedom of scientific research, section 36 of the NHRA, which sets out the authority of direct descendants to direct the reinterment of human remains, would qualify as a law of general application and thus a possible limitation upon the constitutional right.

Descendants might find assistance in the s 15 right to freedom of religion, belief and opinion, and the s 10 right to dignity. That the remains are not regarded as property by the NHRA means that the s 25 right to property would not assist descendants who wish to prevent scientific research. Chapter Three further discusses conflicts between the right to property and the right to freedom of religion, belief and opinion.

<sup>191</sup> There has been little analysis of the right and no jurisprudence. For an application to a topical medico-legal problem see Jerome Amir Singh 'Freedom of expression: The constitutionality of a ban on human cloning in the context of a scientist's guaranteed right to freedom of scientific research' 1999 (62) *THRHR* 577, who claims that the right questions ban on the ban on genetic engineering contained in s 39A of the Human Tissues Act 65 of 1983.

named the nameless. But this argument must first recall all that has already been said about the technical language that requires ‘direct descendancy’ and the difficulties of memory and imagination that are invoked in the present context. Moreover, the second objection could be said to mistake the role of the Prestwich Place Committee, to the extent that it claimed descendancy instrumentally and is more appropriately described as an interest group. Their claim to authority is then not based on a claim to descendancy but on their advocacy of a particular interest in the site and remains. The question then is not *who* may speak for the dead, but *what* is to be said of them. How, and *of what* are the dead made to speak?

The third type of objection leads from this, and is expressed in the puzzlement and frustration of those who, claiming a benevolent interest in the bones, insist that the forgotten and suppressed histories of the people buried at Prestwich Place will be lost to present and future generations without anthropometric study. Again, not who has the right to speak for the dead, but how are the dead themselves to be heard? The fear of this objection is that the namelessness of the nameless dead will remain unalleviated. This fear of silence crucially highlights a contradiction within the activist position, which deplores the silence of the dead but is at best equivocal about how to alleviate it.

It seems indisputable that anthropometry could provide some form of knowledge about the silent dead<sup>192</sup>. At the same time there is the historical complicity of the anthropometric disciplines with the morbid colonial histories mentioned in the first chapter, and a fear that these disciplines continue to be invasive, dehumanising and colonial<sup>193</sup>. There is the fear that a certain sanctity of silence will be violated by a

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<sup>192</sup> For general arguments in the context of the repatriation debate that the study of skeletal material is useful, see Susan Pfeiffer ‘Tenacity and adaptation: the contribution of skeletal evidence to heritage knowledge’, paper presented at the Research for Khoe and San Development conference (University of Botswana, 10-12 September 2003); Patricia M Landau and D Gentry Steele ‘Why anthropologists study human remains’ in Devon A Mihesuah *Repatriation reader: who owns American Indian remains?* (Lincoln: University of Nebraska Press, 2000) 74. For overviews of the use and merits of forensic anthropology, see generally Paul Bahn (ed) *Written in bones: how human remains unlock the secrets of the dead* (Newton Abbot, Devon: David & Charles, 2002); Christine Quigley *Skulls and skeletons: human bone collections and accumulations* (Jefferson, NC: MacFarland & Company, 2001); Mike Parker Pearson *The archaeology of death and burial* (Phoenix Mill: Sutton, 1999). Analysis of the skeletal remains of past populations is also said to garner information important for modern health (Landau and Steele at 88, Quigley at 13ff; but cf Mihesuah (note 42) at 96-7).

<sup>193</sup> On this crucial question, see Shepherd (note 148); Nick Shepherd ‘Heading South, looking North: why we need a post-colonial archaeology’ (December 2002) *Archaeological Dialogues*; Nick Shepherd ‘Disciplining archaeology; the invention of South African prehistory, 1923-1953’ (2002) 28 *Kronos* 127; Nick Shepherd ‘State of the discipline: science, culture and identity in South African archaeology, 1870-2003’ (2003) 29 *Journal of Southern African Studies* 823.

discipline that has not assessed its complicity with the colonial project<sup>194</sup>. Which silences are appropriate to remembrance, and which to forgetting? Are the histories of the unspeaking dead to remain silent, or the complicities of disciplinary knowledge?

The current impasse at Prestwich Place can be phrased in terms of these difficulties of silence and memory. Is there an ethics of silence? This is not simply a question of an excavation of the dark Foucauldian archive but, more and less than this, a question of practice and profession. Who may profess to speak for the dead at Prestwich Place? What practice may allow itself to break an ancestral silence? Understanding the potential roles of anthropometric disciplines requires a deep theoretical exegesis of their methods and assumptions, a Foucauldian excavation even, that is not possible here. The present chapter attempts merely to situate that enquiry in an ethical framework that asks how to respect the silence of the nameless dead, and upon what conditions that silence may be broken. What, it asks, is the ethical significance of silence in the context of the remembrance of the dead?

### ***b. enigmas of memory***

What, first of all, is the relation between ethics and memory? The first chapter has located Prestwich Place in a chronotope<sup>195</sup> of unfinished political transformation and a cartography of transitional justice. The crucial questions addressed at this site-in-time are those of ethical memory and remembrance: what ought to be remembered? Who should remember? How should we remember? What is the relationship between silence, memory and forgetting? How to respond to the profound silence of the unnamed dead?

Given the current enthusiasm for memory, not only in South Africa but globally and following the infamous atrocities of the 20<sup>th</sup> century and the early 21<sup>st</sup> century<sup>196</sup>, it

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<sup>194</sup> For a thorough and very readable account of the historical complicity of archaeology and anthropology with the American colonial project, see David Hurst Thomas *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (New York: Basic Books, 2000). Even if this collaboration is only historical, it is worth assessing its impact on the present state of disciplinary knowledge.

<sup>195</sup> Michael Lambek and Paul Antze 'Introduction: forecasting memory' in Paul Antze and Michael Lambek (eds) *Tense past: cultural essays in trauma and memory* (New York: Routledge, 1996) xi use the term in denying an easy distinction between memory and fantasy. Memory is narrative, and 'its world and the shape of its action [are] constituted by spatio-temporal dimensions particular to a narrative convention' (xvii); see also Michael Lambek 'The past imperfect. Remembering as moral practice' in Paul Antze and Michael Lambek (eds) *Tense past: cultural essays in trauma and memory* (New York: Routledge, 1996) 235 at 246ff.

<sup>196</sup> Andreas Huyssen *Present pasts: urban palimpsests and the politics of memory* (Stanford: Stanford University Press, 2003) makes an insightful assessment of this global, and very modern, passion for memory.

might seem hard to deny the ethical imperative of remembrance. Yet this is too simple; the nature of memory is far too enigmatic to imagine that ethical remembrance is a simple duty.

There are four aspects to this enigma of memory and remembrance.

### **Enigma 1: Memory and Image**

Firstly there is the enigma of memory itself. Since the Platonic discourses of memory as image or impression, a tradition continued by empiricism and phenomenology, philosophy has been confronted with the aporetic nature of memory as the presence of an absence. Descriptions of memory as the re-presentation or re-presentification of the absent past raise a double question of how absence is made presence and anteriority is made present.

Paul Ricoeur claims this difficulty as the *aporia* common to the phenomenology of memory, the epistemology of historical representation, and the historicity of the human condition<sup>197</sup>. The difficulty for phenomenology becomes one of distinguishing between memory and imagination, exacerbated by the empiricist tradition's reliance on the notion of memory as *image*. This difficulty of confusing memory and image, the possibility of 'remembering' what has never happened, follows memory into testimony, into the document, the archive, and so on into historiography and all our attempts to know the past<sup>198</sup>.

The ambiguous relation between memory and image speaks already from one of Plato's accounts of memory, given in the course of a Socratic dialogue about sophistry and false argument. The presence of memory, despite the absence of the thing remembered, is enigmatic: Socrates' solution is the wax block, gift of *Mnemosyne* (Memory), 'the mother of the Muses', and placed inside the soul. Upon this wax block is made an impression, and it is this image, *eikōn*, that presents itself to us when we remember<sup>199</sup>. Memory, described in these terms, is an *aporia* of presence and absence; yet in the *Sophist*, Plato will complicate the distinction between the absent thing and the present thing. In the *Sophist*, the Stranger is discussing sophistry with Theaetetus, and

<sup>197</sup> Ricoeur *Memory, history, forgetting* (note 154).

<sup>198</sup> Ricoeur *Memory, history, forgetting* (note 154) can be read in large part an examination of how this enigma follows memory from its inception to the end of what he calls the 'historiographic operation'.

<sup>199</sup> *Theaetetus* 191; (trans F M Cornford) in *The Collected Dialogues of Plato*, ed. Edith Hamilton and Huntington Cairns (Princeton, Princeton University Press, 1961).

compares it to the art of portrait making. He divides this art in two: one art, *tekhnē eikastike*, produces the the *eikōn* or likeness, while the other produces *phantasma*, the semblance or simulacrum<sup>200</sup>. But the distinction encounters difficulties, since the likeness is a copy, lacking ‘real existence’ although it ‘really is what we call a likeness’.

Concludes Theaetetus: ‘[r]eal and unreal do seem to be combined in that perplexing way, and very queer it is.’<sup>201</sup>

While the Platonic discourse acknowledges the paradox of presence and absence, it does not discuss that essential feature of memory upon which Aristotle insists: ‘to remember the future is not possible ... nor is there memory of the present ... But memory *relates to the past*’<sup>202</sup>. In the title of his meditation on memory, *Of Memory and Reminiscence*, Aristotle makes use of a Greek linguistic distinction between a passive form of memory, *mnēmē*, denoting the memory spontaneously evoked, and an active form, *anamnēsis*, reminiscence or recollection, which involves an active search for a memory. This distinction evokes the enigma of memory: presence, which comes unbidden with *mnēmē*; and absence, that which frustrates *anamnēsis*.

How is it then that memory can re-present what is absent? Is memory presence or absence? ‘One might ask how it is possible that though the affection [the presentation] alone is present, and the [related] fact absent, the latter – that which is not present – is remembered’<sup>203</sup>. Again the metaphor of an impression is used: ‘[t]he process of movement [sensory stimulation] involved in the act of perception stamps in, as it were, a sort of impression of the percept, just as persons do who make an impression with a seal’<sup>204</sup>. But the enigma remains: ‘when one remembers, is it this impressed affection that he remembers, or is it the objective thing from which this was derived? If the former, it would follow that we remember nothing which is absent; if the latter, how is it possible that, though perceiving directly only the impression, we remember that absent thing which we do not perceive?’<sup>205</sup> This would imply the possibility of ‘remembering’ that which was never present to us; thus arises the difficulty of distinguishing memory and imagination. ‘A picture painted on a panel is at once a picture and a likeness: that is,

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<sup>200</sup> *Ibid.*, 236b-d

<sup>201</sup> *Ibid.*, 240b-c

<sup>202</sup> Aristotle, *Parva naturalia* 449<sup>b</sup> 10-15, emphasis added.

<sup>203</sup> *Ibid.*, 450<sup>a</sup> 27-29.

<sup>204</sup> *Ibid.*, 450<sup>a</sup> 30 - 450<sup>b</sup> 1.

<sup>205</sup> *Ibid.*, 450<sup>b</sup> 11 - 450<sup>b</sup> 17.

while one and the same, it is both of these, although the ‘being’ of both is not the same, and one may contemplate it either as a picture, or as a likeness’<sup>206</sup>. The mnemonic phenomenon is to be distinguished as a likeness; but *eikōn* still runs the risk of being mistaken for *phantasma*.

In Aristotle’s account, what is common to the two forms of memory, *mnēmē* and *anamnēsis*, is temporal distance<sup>207</sup>. This relation to time – that is, that memory is of the past – also distinguishes the memory-image from the image of that which has not happened. This relationship to time, that memory is memory of something previously perceived, means that ‘remembering, as we have conceived it, essentially implies consciousness of itself.’<sup>208</sup> For it is possible for the mind to evoke an image and mistake it for a memory; yet we do not remember without being conscious that the memory is a memory. Memory bears the mark of anteriority.

Drawing on this Platonic and Aristotelian heritage, it is possible to describe the enigma of memory in terms of a dialectic of presence and absence, mediated by temporal distance. The temporal element distinguishes memory from imagination. According to Hobbes, ‘[f]ancy and memory differ only in this, that memory supposeth time past, as fancy does not’<sup>209</sup>.

In contrast, Mary Warnock disagrees that a simple feeling of ‘pastness’ can be used to distinguish memory and imagination, since memory must be invoked in order to experience the pastness of an image<sup>210</sup>. Plato’s paradigm of the memory-image, memory as wax block or as *eikōn*, haunts every philosophical engagement with memory. There is for Warnock a general characteristic of images and representation; that is, that images are not simply images but images that refer to what they are images of. ‘It is as if every picture had to declare to us, as we look at it, what it is a picture of’<sup>211</sup>. Here again is Aristotle’s question: do we, in remembering, perceive the impression or the seal that made it?

Warnock therefore reaches for an understanding of memory based on *recognition*: in order to remember correctly, rather than imagine, yet another work of memory is required

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<sup>206</sup> *Ibid.*, 450<sup>b</sup> 21-24.

<sup>207</sup> Ricoeur *Memory, history, forgetting* (note 154) at 17-8.

<sup>208</sup> Aristotle, *Parva naturalia* 452<sup>b</sup> 25-30.

<sup>209</sup> *Elements of Philosophy: The first section concerning Body*, part IV, XXV, 8 and 9.

<sup>210</sup> Mary Warnock *Memory* (London: Faber and Faber, 1987) 22.

<sup>211</sup> *Ibid.*, 23.

to recall the anteriority which is supposedly remembered. This work of memory in relation to memory is better described as the work of recognition; it is the *re-cognising* of the anteriority referred to by the memory-image. The past is made present by recognition. What exactly is the past that recognition makes present? It is past cognition. Thus it is better to restate the mnemonic phenomenon as a sort of *knowledge* than as the perception of an image. ‘Happy’ memory – recognition - is a knowledge that contains in itself the past, rather than an image referring back to the past.

For Sartre too, memory need not rely on images, but is *of the real*: an event, once it has happened, does not become unreal but goes ‘*into retirement*’; it is always real but *past*. It exists *past*, which is one mode of real existence among others<sup>212</sup>. Sartre’s recollection is a form of time travel: ‘[w]hen I recall this or that memory I do not *call it forth* but I betake myself to where it is, I direct my consciousness to the past where it awaits me as a real event in retirement<sup>213</sup>. Memory is not ‘given-in-its-absence’ but ‘given-now-as-in-the-past’<sup>214</sup>.

For Ricoeur the necessity of rescuing memory from a tradition that couples it with imagination lies in the need to argue that imagination is aimed at the fantastic, the possible and the unreal, and memory at elapsed reality<sup>215</sup>. Yet recognition only describes a certain ideal of regaining the past. Even when conceived of as knowledge, memory encounters difficulties, for it must distinguish between experience and other sources of knowledge. One might ‘remember’ seeing an event that one has in fact only read about. Knowledge is itself imagined in this case.

Yet this persistence of the image and imagination can be helpful, since it leaves us with the possibility of the creative work of reimagination mentioned in the preceding chapter. Reimagination productively uses the overlap of memory and imagination. For Warnock, it is the coincidence of memory and imagination that produces narrative truths such as autobiography: ‘[t]he value we attach to recollection is understandable at precisely the point where memory and imagination intersect’<sup>216</sup>. This is where the human capacity for remembrance, as a sort of narrative work, exceeds merely knowing again

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<sup>212</sup> Jean-Paul Sartre *The psychology of imagination* (London: Methuen & Co Ltd, 1972) 210.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> Ricoeur *Memory, history, forgetting* (note 154) at 6.

<sup>216</sup> Warnock (note 210) at viii, see also Chap 7.

one's times tables and grocery lists. Recognition is, after all, an ideal of 'pure' memory, and an ideal is something sought after but seldom captured. Reimagination might then be something which takes into account remembrance's desire for perfect recognition, but works with and even revels in its slippages and impossibilities.

## **Enigma 2: The Persistence of Forgetting**

Jorge Luis Borges' *Funes el memorioso* tells the story of a man with perfect memory, whose mind is 'like a garbage heap'. Funes does not see a wine glass on a table but 'every grape that had been pressed into the wine and all the stalks and tendrils of its vineyard'<sup>217</sup>. The recollected moment in all its details takes up every waking moment of life, displacing the present and allowing for no sense to be made of experience. This cautionary tale would show us how unthinkable memory without forgetting is.

This deep relationship between memory and forgetting is another enigmatic aspect of memory and remembrance. Marc Augé's book *Oblivion* points out poetically how memory and forgetting are intimate and complicit: the traces of memory are 'the product of an erosion caused by oblivion. Memories are crafted by oblivion as the outlines of the shore are created by the sea'<sup>218</sup>. They are like life and death: death is the horizon of life, but also takes on a 'more subtle and more everyday meaning'<sup>219</sup>. In the same way oblivion defines and is a part of memory and remembrance. 'Memory is a structuring of forgetting', concurs Ricoeur on this entanglement<sup>220</sup>; or, in the memorable words of Verne Harris, memory and forgetting 'open out of each other'<sup>221</sup>.

Recall and recognition only occur *after* forgetting; and so we can never be sure whether we have 'really' forgotten. 'So late did I recognize you, is the emblematic admission of all recognition ... If a memory returns, this is because I had lost it; but if, despite everything, I recover it and recognize it, this is because its image had survived'<sup>222</sup>. Ricoeur introduces a second type of forgetting to explain this persistence of

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<sup>217</sup> Jorge Luis Borges *Labyrinths: selected stories and other writings* (ed Donald A Yates and James E Irby) (London: Penguin, 2000).

<sup>218</sup> Marc Augé *Oblivion* (trans. Marjolijn de Jager) (Minneapolis: University of Minnesota Press, 2004) at 20.

<sup>219</sup> *Ibid.*, 15.

<sup>220</sup> Ricoeur *Memory, history, forgetting* (note 154) at 450.

<sup>221</sup> Verne Harris 'Blindness and the Archive: an Exergue' in Philippe Denis (ed) *Orality, memory & the past: listening to the voices of black clergy under colonialism and apartheid* (Pietermaritzburg: Cluster Publications, 2000) at 118.

<sup>222</sup> Ricoeur *Memory, history, forgetting* (note 154) at 430.

memory, which he calls ‘forgetting in reserve’<sup>223</sup>. It is after all a mystery whether we ever forget absolutely: ‘[t]his uncertainty regarding the essential nature of forgetting gives the search [*anamnēsis*] its unsettling character’<sup>224</sup>, as if we are seeking whether the memory has been effaced forever or only temporarily. We can only suppose that it lies in this ‘forgetting in reserve’.

What then is memory, if it is so bound up with forgetting? How do we navigate their waves and erosions? ‘So late did I recognize you...’ If memory and forgetting exist only in counterpoint to each other, then it is best that we learn something from their movements. It is *recognition* that identifies the ideal of this complicity of memory and forgetting; for in striving for recognition one attempts to move from forgetting to memory.

### **Enigma 3: Involuntary Memory**

The complicity of memory and forgetting reminds us that both are involuntary. Memory is spontaneous, as is forgetting: this is what frustrates the notion of a *duty* to remember. Even if one were *obliged* to remember a birthday or a stranger’s face, one might conceivably forget it without fault of the will. Often the greater the will to remember, or to forget, the more likely the opposite result is achieved.

Does this difficulty obstruct all possibility of an ethics of memory? It may be wrong to begin with the assumption that an ethics of memory relies on obligation or responsibility to remember. Agamben describes responsibility as ‘irremediably contaminated by law’<sup>225</sup>. Following an etymology of the word and its appearance in ancient Roman law, Agamben finds responsibility to be rooted in the juridical, and not the ethical:

in the [ancient Roman] promise of marriage, the father would utter the formula *spondeo* to express his commitment to giving his daughter as wife to a suitor (after which she was then called a *sponsa*) or to guarantee compensation if this did not take place. In archaic Roman law, in fact, the custom was that a free man could consign himself as a hostage –

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<sup>223</sup> *Ibid.*, 428.

<sup>224</sup> *Ibid.*, 27.

<sup>225</sup> Giorgio Agamben *Remnants of Auschwitz: the witness and the archive* (New York: Zone Books, 1999) 20.

that is, in a state of imprisonment, from which the term *obligatio* derives – to guarantee the compensation of a wrong or the fulfilment of an obligation.<sup>226</sup>

Both obligation and responsibility are then at root juridical notions, delimited by these gestures of imprisonment and judgment of culpability: ‘[h]ence the insufficiency and opacity of every *ethical* doctrine that claims to be founded on these two concepts’<sup>227</sup>. Remembrance is thus more properly the object of the *juridical* duty and its gestures of judgment and binding. Ethics aims at the good life, and no duty to remember can produce ‘good’ memory. Instead demands upon memory are juridical, and imply a juridical technology, a *tekhnē* of memory, a way to imprison memory and to sponsor mnemonic debts.

Thus the involuntariness of memory and forgetting induces us to leave the realm of individual memory and consider how memory is captured in writing, in archives, in memorials – all the devices of mnemotechnics and forms of *hupomnēsis*; and also in collective works of remembrance, in which one relies upon others to assist in the task of memory.

More can be said of collective memory, which can be regarded as assisting us against the involuntariness of memory. Is this not part of the purpose of anthems, religious rituals, commemorative festivities, and the monuments of nations? Avishai Margalit, for example, describes a ‘shared memory’ which is more than the mere statistical aggregation of individual memories, but instead ‘integrates and calibrates the different perspectives of those who remember the episode ... into one version’<sup>228</sup>. This integration of this collective work of memory is based on communication, with the work of remembering being ‘built on a division of mnemonic labour’<sup>229</sup>. Memorial objects and rituals play a key role in this scheme of sharing. In modern societies the division of mnemonic labour is elaborate, says Margalit, as there are no direct lines between a people and their shaman or storyteller: ‘shared memory in a modern society travels from person to person through institutions, such as archives, and through communal mnemonic devices, such as monuments and the names of streets’<sup>230</sup>.

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<sup>226</sup> *Ibid.*, 21-2.

<sup>227</sup> *Ibid.*, 22, emphasis added.

<sup>228</sup> Avishai Margalit *The ethics of memory* (Cambridge, MA: Harvard University Press, 2002) 51-2.

<sup>229</sup> *Ibid.*, 52.

<sup>230</sup> *Ibid.*, 54.

Collective memory is spoken of so regularly in the popular domain that it may be surprising to stop for a moment and ask whether such a thing actually exists. Or, since an idea with such great popular tenacity must correspond with some strongly held belief about social experience, it may be more productive to rephrase the question and ask whether collective memory is really memory, or whether it is metaphor or analogy.

It was Maurice Halbwachs who first introduced the notion of collective memory, influenced by Durkheim's new sociology and its urge to investigate the collective psychology. Halbwachs hypothesised that collective memory and individual memory were interconnected, and attacked the 'psychologism' which proposed that individual memory is the basis of recollection and recognition. Most memories, he said, 'come back to us when our parents, our friends, or other persons recall them to us.... it is in society that people normally acquire their memories. It is also in society that they recall, recognize, and localize their memories'<sup>231</sup>. Thus the experience of individual memory could have no existence outside of 'social frameworks of memory'. In those times in which the individual is outside of these social frameworks – dreaming, for example – his experience is fragmented and disorganised because he can no longer rely on social frameworks of memory, which act as systems of conventions<sup>232</sup>.

This conception of collective memory is more radical than Margalit's. The past is not preserved in something called individual memory at all, but 'is reconstructed on the basis of the present'<sup>233</sup>, using collective frameworks of memory. What Halbwachs implies is that the subject who remembers is collective. Indeed, the very idea of a collective memory must question notions of subjectivity, since the notion of personal memory assumes a model of individual interiority<sup>234</sup>. Halbwachs instead argues that '[i]t is necessary to place oneself in the perspective of the group or groups'<sup>235</sup>. Yet group boundaries are porous and shifting, and it is notoriously difficult to define collective identity. How are we to identify the subject of collective memory?

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<sup>231</sup> Maurice Halbwachs *On collective memory* (trans Lewis A Coser) (Chicago: University of Chicago Press, 1992) 38ff.

<sup>232</sup> *Ibid.*, 39, 41-42.

<sup>233</sup> *Ibid.*, 40.

<sup>234</sup> *Ibid.*, 168. Ricoeur remarks that for the phenomenological tradition, individual memory 'is a model of mineness, of private possession' (*Memory, history, forgetting* (note 154) at 96).

<sup>235</sup> Halbwachs (note 231) at 40.

Halbwachs provides three candidates for this collective subject who remembers: the family<sup>236</sup>, the religious group<sup>237</sup>, and the social class<sup>238</sup>, and acknowledges that there are other groups. Yet the questions of boundaries and identity remain<sup>239</sup>. Perhaps it is better to conceive of the collective subject as being formed by the act of remembering, rather than preceding it. This is a dynamic conception of the ‘we remember’, in which the ‘remembering’ and the ‘we’ are fashioned in the same activity – rather than reifying the subject by assuming that it arrives, perfectly formed, at the task of remembering. Doing the latter reduces the idea of a collective memory to what Margalit had called ‘common memory’: the mere aggregation of individual memories<sup>240</sup>.

The power of the notion of collective memory is instead that it has a life of its own, and is deeply linked to the creation of the very collective that remembers. There is an interesting comparison to be drawn here with the psychoanalytic concept of the ‘chosen trauma’. More than the trauma experienced by an individual, chosen trauma is experienced by a group in a certain uniform manner. The experience generates a group affective response, and this becomes a mark of collective identity. ‘One could say, in fact, that no individual event took place that resulted in a trauma, and that the trauma is indeed only an affect resulting from group identification (whether individually willed, or imposed externally)... The chosen trauma, or the event qua event, takes on a particular resonance for the history of the people, their most deeply felt cultural affiliations and anxieties, and collective symbols of a community’<sup>241</sup>. The formation of a traumatised collective is bound up with the formation of the traumatic affect, rather than there being a simple memory-event correspondence. To venture a generalisation of the concept, perhaps the act of remembering and the creation of the remembering subject might be viewed as simultaneous too, so that there is no simple relation of priority between memory and subject.

Ricoeur’s solution of these problems is, as usual, elegant and dialectic. Memory can be placed in a dialectic of ‘reflexivity’ and ‘worldliness’, since one always remembers

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<sup>236</sup> *Ibid.*, 54ff.

<sup>237</sup> *Ibid.*, 84ff.

<sup>238</sup> *Ibid.*, 120ff.

<sup>239</sup> For a critique of Halbwachs’ conception that points out the inconsistency of his conception of collective memory with the shifts between groups that he describes and the importance he ascribes to individual viewpoint, see Ricoeur *Memory, history, forgetting* (note 154) at 120-24.

<sup>240</sup> Margalit (note 228) at 51-2.

<sup>241</sup> Ranjana Khanna *Dark continents. Psychoanalysis and colonialism* (Durham: Duke University Press, 2003) 14.

*oneself acting in the world*<sup>242</sup>. Edward Casey's phenomenological account of memory names these poles of worldliness and reflexivity as 'memory in mind' and 'memory beyond mind'<sup>243</sup>. Between these poles lie other 'mnemonic Modes': reminding, reminiscing, recognizing. Reminding makes use of clues in order to aid recollection. Reminiscing is an activity engaged in with others, or internalized as a meditation with the self, which, unfolding, seeks to reanimate the past. Recognizing is all important, as it identifies the anterior presence of the memory-image. Recognition, that ideal which Ricoeur likens to a 'small miracle'<sup>244</sup>: here again is the recurring theme of our confrontation with enigmatic memory, and the anterior absent made present. One might venture to say that collective memory has no other goal than individual recognition of the collective subject. Recognition forms not only a bridge between presence and absence, past and present, but also the remembering individual and the remembering collective.

Just as recognition provides the link between our own memories and the collective, we also recognise what we have saved from faulty personal memory by all the techniques of *hypomnēsis* – memorials, archives, writing. These things are even essential, as Margalit has said, for the workings of the collective memory. But this invocation of *hypomnēsis* leads to the fourth enigma.

#### **Enigma 4: Hypochondriac Memory**<sup>245</sup>

The work of remembrance is susceptible to an ambivalence of *hypomnēsis* – an ambivalence of artificial memory, of memorials and archives – that is related to the ambiguity of the *pharmakon* that Derrida points out in Plato's discussion of writing. The *Phaedrus* records Socrates telling the story of how the god Theuth, inventor of writing, presented the Egyptian king Thamus with his gift of writing, saying:

'Here, O king, is a branch of learning that will make the people of Egypt wiser and improve their memories; my discovery provides a recipe (*pharmakon*) for memory (*mnēmē*) and wisdom (*sophia*)'<sup>246</sup>.

<sup>242</sup> Ricoeur *Memory, history, forgetting* (note 154) at 36.

<sup>243</sup> Edward Casey *Remembering: a phenomenological study* (Indianapolis: Indiana University Press, 1987).

<sup>244</sup> Ricoeur *Memory, history, forgetting* (note 154) at 39.

<sup>245</sup> According to the Concise Oxford Dictionary, the ancient Greeks regarded the *hypokhondria*, the area below the ribs, as the seat of melancholy. This, together with the descendant word's associations with panaceas and placebos, seems to be an evocative way to introduce the concerns of the present section!

<sup>246</sup> Plato *Phaedrus* 274e; (trans R Hackforth) in *The Collected Dialogues of Plato*, ed. Edith Hamilton and Huntington Cairns (Princeton: Princeton University Press, 1961) (hereafter referred to as *Phaedrus*).

The ambiguity that is introduced is inherent in Plato's use of the word *pharmakon*, which can mean either remedy or poison<sup>247</sup>. The king objects:

‘... If men learn this, it will implant forgetfulness in their souls; they will cease to exercise memory because they rely on that which is written, calling things to remembrance no longer from within themselves, but by means of external remarks. What you have discovered is a recipe not for memory, but for reminder. ...’<sup>248</sup>

Is writing then a remedy or a poison of memory? In fact, these meanings operate at the same time: Plato is suspicious of medicine, and there can be no simply beneficial remedy. The remedy can be painful in its administration; and more profoundly, is harmful in its artificiality<sup>249</sup>. Derrida compares the ambivalence of the *pharmakon* in the *Phaedrus* to that of the hemlock given to Socrates, also named *pharmakon* in Plato's *Phaedo*. Here the *pharmakon* is intended as Socrates' poison; but before drinking the hemlock Socrates spends the day arguing for the immortality of the soul. He at last bids that an offering be made to Asclepius<sup>250</sup>: this was the Greek custom to be followed on an ill person's recovery<sup>251</sup>. Thus the poison becomes a remedy: the *pharmakon* 'is transformed, through the effects of the Socratic *logos* and of the philosophical demonstration in the *Phaedo*, into a means of deliverance, a way toward salvation, a cathartic power'<sup>252</sup>. Is it not the case that we believe writing, archives and memorials to be a recipe for immortality in this way, and also a sort of catharsis in the face of mortality?

The gif/t of writing is thus both remedy (*pharmakon*) and poison (*pharmakon*). As such it aims at *hupomnēsis* rather than *mnēmē*<sup>253</sup>; it offers a primordial *hupomnēsic* dialectic of memory and amnesia<sup>254</sup>. This *hupomnēsic* dialectic must also inflect our understanding of the memorial, the archive, and every other form of *hupomnēsis*. In this way too it can be said that there is a 'victory of the scriptural at the very heart of the

<sup>247</sup> Jacques Derrida *Dissemination* (trans. Barbara Johnson) (Chicago: University of Chicago Press, 1981), 96ff.

<sup>248</sup> *Phaedrus* 275.

<sup>249</sup> Derrida (note 247) at 99-100.

<sup>250</sup> Plato *Phaedo* 118; (trans Hugh Tredennick) in *The Collected Dialogues of Plato*, ed. Edith Hamilton and Huntington Cairns (Princeton, Princeton University Press, 1961).

<sup>251</sup> Editor's note to the *Phaedo*, in *The Collected Dialogues of Plato*, ed. Edith Hamilton and Huntington Cairns (Princeton, Princeton University Press, 1961) 40.

<sup>252</sup> Derrida (note 247) at 126.

<sup>253</sup> *Ibid.*, 100.

<sup>254</sup> Writing also offers itself as the seed of a knowledge that is based upon the 'art of the dialectic': *Phaedrus* 276e.

memorial<sup>255</sup> – as *hupomnēsis* they both take part in the dialectic of remedy and poison, memory and forgetting. Here is ‘the irreducible link between thought as memory and the technical dimension of memorization, the art of writing, of “material” inscription, in short, of all that exteriority which, after Plato, we call hypomnesic, the exteriority of Mnemon, rather than that of Mnēmē.’<sup>256</sup>

How then do we live with the enigma of the memorial, which helps us to forget as much as to remember? Just as the memorial encourages us to forget what we have carefully captured in its form, we are also able to return to it. What is crucial in this movement towards the memorial, in the approach one adopts in nearing it for the second time. As Socrates remarks, written words cannot ‘do anything more than remind one who knows that which the writing is concerned with’<sup>257</sup>. A familiar theme has arisen. We are again concerned with *recognition* as the ideal movement of the dialectic which frames our latest enigma. If the *hupomnēsic* dialectic can be said to move towards an ideal, then it is that of the return to knowledge, a move towards the recognition of that of which the mnemonic aid would remind. Recognition’s idealism supposes that the memorial is just an exterior reflection of another, interior, sort of memorial, or of a knowledge that is ‘written in the soul of the learner’<sup>258</sup>, an archive-without-archive, an archive-within<sup>259</sup>.

### Recognition and Transformation

Aiming at recognition provides us with ways of living with the aporetic nature of memory that begins with the impossible presence of anteriority and absence, and persists even into the ambivalent structure of our monuments and archives.

Recognition also provides the aim for a praxis concerned with memorial ethics. Michael Lambek regards memory as *intersubjective* and *active*, in a way that reminds of what was said earlier about collective memory between the reflexive and the worldly. This memory is not the object that tourism brochures advertise for our collection on

<sup>255</sup> *Memory, history, forgetting* (note 154) at 403.

<sup>256</sup> Jacques Derrida *Mémoires for Paul de Man* (trans. Cecile Lindsay, Jonathon Culler, Eduardo Cadava) (New York: Columbia University Press, 1986) 107.

<sup>257</sup> *Phaedrus* 275d.

<sup>258</sup> *Phaedrus* 276a. The irony is obvious, and aids Derrida’s project of rethinking the dichotomy of speech and writing. This cannot detain us for too long, even though it is of central importance to everything said here! Recognition of the allusion must suffice for now.

<sup>259</sup> See also Jacques Derrida *Archive fever: a Freudian impression* (trans. Eric Prenowitz) (Chicago: University of Chicago Press, 1995), describing the *heritage* of Jewishness after Judaism as an ‘archive ... without substrate and without actuality’ (72). See the preceding note. These thoughts are out of place here, and will be entered again in the Chapter Three.

foreign beaches, nor is it the video camera passively left running<sup>260</sup>. It is rather an act; it is manifest in actions between subjects and it works to reconstitute social contracts. Memory exists not so much as an object within the mind, but rather ‘*between* people, a confirmation of the sense of continuity (caring) and discontinuity (mourning) that each person experiences in their relations with others, and likely acknowledged by additional parties’<sup>261</sup>. This vision of remembering is explicitly ethical, for it implies that memory is constantly ‘reformulating [...] social ties and commitments. The value of articulating a particular version of the past would be explicitly connected to its moral ends and consequences for relations in the present’<sup>262</sup>.

Remembrance, considered as *knowing-again*, as aiming at the ideal of re-cognising the past, must pay more attention to the actions of *living memory* than to the vain erection of monuments. And, if the ethical imperative is always to extend ethical bonds to others and so to enlarge the ethical community, then the work of memory calls for the *proliferation* of recognition<sup>263</sup>.

Such a praxis of recognition is transformative, as it engages in reconfigurations of memory and forgetting. It is possible to look at the various enigmas mentioned so far for clues to this transformative praxis. The first enigma, for example, inspires the idea of a re-imagination that engages in this reconfiguration of memory and forgetting. The problems of the memorial, on the other hand, inspire us to think about archives-within, and the sustenance of living memory. These are merely first gestures; in them lies a tantalising glimpse of the possibility of theorising *transformation*, a concept that is so important to the political discourse of our ‘new’ nation and so intriguing because, like so many of our political concepts, it hints at a theology of transition and an eschatology of memory<sup>264</sup>.

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<sup>260</sup> Lambek (note 195) at 238.

<sup>261</sup> *Ibid.*, 239.

<sup>262</sup> *Ibid.*

<sup>263</sup> This is one reason why Richard Kearney, in his bid for an ethics of narrative in the context of the Shoah, says that ‘[t]he story of the Holocaust needs to be heard and seen by as many people as possible in each new generation. And this is at bottom an ethical demand’. See Richard Kearney *On Stories* (London: Routledge, 2002) 61.

<sup>264</sup> Cf literal theological references: e.g. Enwezor et al.’s invocation of the ‘quasi-religious ethic of truth and reconciliation’ (Okwui Enwezor et al. *Experiments with truth: transitional justice and the processes of truth and reconciliation* (Ostfildern-Ruit, Germany: Hatje Cantz, 2002) 14); also in the context of the proliferation of tribunals of transitional justice, Derrida’s description of the ‘Christianization which has no need of the Christian Church’ (Jacques Derrida ‘The century and the pardon’ (trans Greg Macon) *Le Monde des débats* December 1999). To expand on these thoughts it would be necessary to discuss also Ricoeur’s

More provocatively, here is a prescription for how participants in the debates around Prestwich Place might approach the issue in a way that respects ethics and memory. The implications for anthropometric disciplines, memorial activism, and state intervention flow from the concern to engender recognition and transformation. The following section attempts to make these implications clearer.

### ***c. unspeaking silence***

#### **Knowing and Protesting The Negative**

What of the recognition of silence? How do we know-again the silent past? Is it not precisely silence that defeats recognition?

Silence and memory cannot be discussed without recalling what has been said about the representation of the Shoah<sup>265</sup>. It is necessary then to import these crucial debates<sup>266</sup> even while refusing absolutely to say anything comparative about trauma and the events of history. Auschwitz presents us with ‘the very aporia of historical knowledge: a non-coincidence between facts and truth, between verification and comprehension’<sup>267</sup>.

The Shoah is often spoken of as a historical event *at the limit*, and these limits of are two-fold. First, there is an exhaustion of the available resources of representation to adequately articulate the event at the limits. Yet at the same time, there is an ‘internal limit’, that is the demand to speak that arises before discourse from the centre of the atrocity<sup>268</sup>. The silence of the event at the limits is an unbearable one, for it *must* be spoken of, at the same time that it *cannot* be spoken of. This silence might therefore be characterised as an ethical-epistemological silence, described by the ‘impossible adequation of the available forms of figuration to the demand for truth arising from the heart of lived history’<sup>269</sup>. For it is exactly this confrontation, between the epistemological impossibility of ‘the available forms of figuration’ on the one hand, and the ethical ‘demand for truth’ on the other hand, that results in the silence.

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thoughts on forgiveness, which tend towards the theological (Ricoeur *Memory, History, Forgetting* (note 154) at 457-506).

<sup>265</sup> In the sense that it has become an ‘international prism’ focusing local debates of ethical memory - Huyssen (note 196) at 98.

<sup>266</sup> See especially Lawrence Langer *Holocaust testimonies: the ruins of memory* (New Haven: Yale University Press, 1991), Saul Friedlander (ed) *Probing the limits of representation: Nazism and the ‘Final Solution’* (Cambridge, MA: Harvard University Press, 1992).

<sup>267</sup> Agamben (note 225) at 12.

<sup>268</sup> Ricoeur *Memory, History, Forgetting* (note 154) at 254ff.

<sup>269</sup> Ricoeur *Memory, History, Forgetting* (note 154) at 260.

Therefore it is not correct to view the unrepresentable nature of the Shoah as a failure of historiography. The silence is instead an ethical, even theological protest. The silence of the Shoah marks an inability to provide an explanation in the face of trauma and radical evil. Here it is necessary to borrow from Ricoeur the idea of the attestation-protestation, the testimony of the witness that is also a protest against God<sup>270</sup>. She who bears witness to the atrocity also asks why, as if questioning the existence of God or of the Good, but is greeted only by silence. Perhaps it is this silence that is always at the core of remembered suffering, a silence not so much of doubt or blame as of the awareness of negativity. Silence, as the echo of this pure ethical-epistemological negativity, should not be easily filled. It denies representation rather than simply being incapable of it.

The silence of this deep protest, and its *denial* of representation, can be regarded as justifying an approach such as that of Lawrence Langer, who believes that narrative is incapable of representing the atrocity of the Holocaust, and that it offends the victims by its attempt<sup>271</sup>. This kind of silence has therefore pervaded monumental and memorial discourses. One example is the architecture of the Jewish Museum in Berlin, where the silence is echoed spatially by the ‘voids’ that run through Daniel Libeskind’s design<sup>272</sup>. Here the void becomes a productive mnemonic source, rather than a masking: ‘[i]ts very presence points to an absence that can never be overcome, a rupture that cannot be healed, and that can certainly not be filled with museal stuff<sup>273</sup>. The void is a ‘fundamental epistemological negativity’ that ‘cannot be absorbed’<sup>274</sup> – and yet in its negativity is more meaningful than anything that might replace it.

### **Silence That Speaks and Unspeaks**

The possibility arises then that silence can be a mnemonic and ethical response in itself, a recognition of some core truth, some ‘fundamental epistemological negativity’. Yet, even while affirming this possibility, it would be simplistic to separate silence from its

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<sup>270</sup> Paul Ricoeur ‘The memory of suffering’ in *Figuring the sacred. Religion, narrative and imagination* (trans. David Pellauer) (Minneapolis: Fortress Press, 1995) 289-292.

<sup>271</sup> Langer (note 266).

<sup>272</sup> For more on this building in relation to the memorial landscapes of Berlin, see Karen E Till *The new Berlin. Memory, politics, place* (Minneapolis: University of Minnesota Press, 2005).

<sup>273</sup> Huyssen (note 196) at 69.

<sup>274</sup> *Ibid.*

context. It is more helpful to differentiate between *articulate* silence and *inarticulate* silence, or even to describe silence as a dialectic of the articulate and the inarticulate.

Silence is articulate when it speaks. The acknowledgement of silence in the face of the unspeakability of the Shoah is articulate in this way. This silence is articulate because it speaks eloquently of the unrepresentable. Here is the namelessness of that which has no name, like the silence of God or Good or even of Evil itself. Silence is the only and most articulate way to acknowledge even while refusing to name the absence. Yet the only way to be sure of this silence is to have attempted to name that which cannot be named, and to have failed. This silence follows much speaking, and is a sort of recognition, at last.

There is another sort of namelessness; this is not the namelessness of that which cannot be named, but follows the forgetting or the effacement of the name. This kind of silence is inarticulate, because instead of some ‘fundamental negative epistemology’ it speaks only of its own inarticulacy. It does not further recognition, but frustrates it; it doesn’t follow attempts to speak, but obstructs speaking. It is not the silence of the full stop, pregnant with the weight of the unspoken, but of the ellipsis that breaks up the attempt to find words.

The frustration of remembrance at Prestwich Place mostly has to do with inarticulate silence, the silence of names that have been left out of the archive. The ethical response is the same as that which psychoanalysis recommends interminable mourning: a work of naming. To the extent that the silence represents some fundamental negativity, it will evade attempts to name it. Those silences which exist only because no attempt has been made to name them echo only the ‘desperate silence of chaos’<sup>275</sup>.

Is there then an ethics of silence? Should silence be recognised and remembered? The ethical silence is that in which memory is recognised. Returning to lessons learnt from

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<sup>275</sup> This distinction between articulate and inarticulate silence is inspired by Eva Hoffman, who at the end of her book *Lost in translation. A life in a new language* (London: Vintage, 1998) describes her attempt to find a voice:

I am writing a story in my journal, and I’m searching for a true voice. I make my way through layers of acquired voices, silly voices, sententious voices, voices that are too cool and too overheated. Then they all quiet down, and I reach what I’m searching for: silence.

...

And yet, I could not have found this true axis, could not have made my way through the maze, if I had not assimilated and mastered the voices of my time and place – the only language through which we can learn to think and speak. The silence that comes out of inarticulateness is the inchoate and desperate silence of chaos. The silence that comes after words is the fullness from which the truth of our perceptions can crystallize. (275-6)

the representation of the Shoah, competing approaches to representation take place between the poles of singularity and exemplarity. On the one hand, the disenchanted, non-narrative approach seeks to establish the unrepresentable singularity of the event. This approach seeks the recognition of the victims. On the other hand, the enchanted narrative, whether *Maus* or *Schindler's List*, aims at exemplarity. This exemplarity is one which can relate history to those who were not present. In locating an ethics of narrating the traumatic event, one might do best to seek the 'proper tension between our fidelities to the uniqueness and communicability of memory'<sup>276</sup>. One wishes to be silent, to respect the singularity of the event, yet one wishes also to recognise the exemplarity of the event. In fact this dialectic of singularity and exemplarity governs the *relating* of the event; for to mediate memory between victim and stranger concerns the establishment of an ethical relation. The always imperfect work of representation must make its way guided by this ideal of the ethical relation, that is, the recognition of the other.

This dialectic presents itself also as the difficulty of the unnamed dead. The singular silence of a site such as Prestwich Place cries out to be preserved, even as the nameless demand naming. Herein awaits the difficult task of reconciling (for example) historiographical and anthropometric methods that would read and name silent vestiges and the work of memorialisation that would preserve the articulacy of silence. This work of memory and of reconciliation – of transformation even, for all participants – stretches toward the horizon of an ideal recognition to come<sup>277</sup>.

#### ***(d. postscript on archaeology and the trace: how to inhabit the archive***

The question of naming has been raised. When the preceding thoughts were presented to a seminar audience, one participant asked just what kind of naming anthropology is able to perform; he was cynical that, in the light of its history, techniques and language, it would be capable of a humanising work of naming<sup>278</sup>. Now, as then, the author is able to produce no argument for or against what is a timely and indeed urgent question. What precedes has been intended as an ethical framework for advancing an answer. Further

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<sup>276</sup> Kearney (note 263) at 63.

<sup>277</sup> This 'to come' wishes to capture something of the Messianic, after Derrida's 'to come' (*à venir*)/*l'avenir* (the future).

<sup>278</sup> The occasion was South African and Contemporary History Seminar no 218 (University of the Western Cape, 19 July 2005). The participant was Nick Shepherd, who has written seminal works in this vein; see the references at note 193.

arguments about specific technologies must be left to those who have more specialised knowledge.

But the question of naming haunts; thus this note. Here there has been time to add only these few words about one particular name. In a debate that has too frequently been characterised as being about ‘archaeology’, it is tempting to ask what exactly archaeology is; or, much rather, what it might be. (Recall that the decision was made earlier on to use the term ‘anthropometry’ rather than archaeology – itself a dangerous decision given historical usages of the former word – to describe those disciplinary projects and techniques that concern themselves with the material remains of dead human bodies).

Archaeology, it seems, has become a metaphor, and a particularly rich one in the case of Prestwich Place, where there are different candidates for archaeological work. In the events and debates provoked by Prestwich Place, actual digging encountered the metaphorical excavations of knowledge formation and of collective and individual psyches. Practices of professional archaeology, the actual excavation of earth, were immediately summoned by the heritage legislation, even as the legitimacy of the discipline’s immediate access to the unnamed dead was questioned. Indeed, this criticism of ‘scientific’ archaeology is informed by a homonymic, Foucauldian archaeology and its suspicions that the discipline ‘carries within itself the traces of its own formation as a field of knowledge construction, and as a material practice rooted in specific historical and political contexts’<sup>279</sup>. What is urged by Foucault’s spirit is an archaeology of archaeology. And furthermore, beckoning from the discourses of transitional justice and its unfinished business, is psychoanalysis’ excavation of memory, the Freudian archaeology of the psyche<sup>280</sup>.

There is a need for a thorough excavation of what these archaeologies share; here there is only room for a few pressing thoughts. These archaeologies are of course heterogenous projects, yet their sharing in the same name seems to indicate at least figuratively similar motivations for reading traces of the past. Digging, especially for the dead, is an introspective project; perhaps this is what attracted Freud to archaeology as model and metaphor. The work of excavation aims at the thrill of discovery, but also the

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<sup>279</sup> Nick Shepherd ‘Heading South, looking North: why we need a post-colonial archaeology’ (December 2002) *Archaeological Dialogues*.

<sup>280</sup> On Freud’s fascination with archaeology, and the links between psychoanalysis and archaeology, see Khanna (note 241) at 38ff.

thrill of the dig itself. For Walter Benjamin, this is the probing pleasure of introspection and inward reminiscence:

He who wishes to approach his own buried past must act like a man who digs... and he who only keeps the inventory of his finds, but not also this dark bliss of the finding itself, cheats himself of the best part. The unsuccessful search belongs to it just as fully as the fortunate search. This is why memory must not proceed by way of narrative, much less by way of reports, but must, rather, assay its spade, epically and rhapsodically in the most rigorous sense, in ever new places and, in the old ones, to delve into ever deeper layers.<sup>281</sup>

Yet this visceral thrill of the dig finds a response in an equally deep fear, since the act of ground-breaking is a violent one, as can be the archaeologist's gaze and the archaeologist's work of naming. The fear of archaeology is that it works to objectify the subject, by taking the trace not as testimony but as *symptom*. The 'symptomatic reading' or the reading of clues, as described by Carlo Ginzburg, is an age-old tradition that goes back to the earliest practices of tracking and divination, and that came to a kind of systematic prominence in the work of Sherlock Holmes, Freud and art historian Giovanni Morelli<sup>282</sup>. What was common to all these symptomatic readings was 'an attitude oriented towards the analysis of specific cases which could be reconstructed only through traces, symptoms, and clues'<sup>283</sup>. Today the symptomatic reading animates forensics, psychoanalysis, semiotics, and all the forms of reading traces. Yet the difference between trace and testimony is crucial: '[t]he clue is noticed and decrypted; testimony is deposed and criticized'<sup>284</sup>. Practical archaeology, Freud's excavation of the psyche, and the Foucauldian archaeology of knowledge may be heterogenous, but share at least in the obsession with the surfacing of the past's *hidden* archive. The very fact that this archive is hidden means that it must be read symptomatically, as symptom rather than as testimony.

Is there then an archaeology capable of a humanising work of naming? In the archaeologist's gaze the remnant of the subject would seem to be an unresponsive object,

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<sup>281</sup> Walter Benjamin *Berliner Chronik: gesammelte Schriften* (Frankfurt am Main: Suhrkamp, 1972) 486-7, quoted in Till (note 272) at 66.

<sup>282</sup> Carlo Ginzburg *Clues, myths, and the historical method* (trans. John and Anne C Tedeschi) (Baltimore: John Hopkins University Press, 1989).

<sup>283</sup> *Ibid.*, 104.

<sup>284</sup> Ricoeur *Memory, history, forgetting* (note 154) at 174.

a desubjectified subject. The preoccupation with cryptology effaces the possibility of a speaking subject. This is most evident in Foucault's archaeology, dehumanising indeed in his explicit intention to efface 'Man'<sup>285</sup>. Could the psychoanalyst who does not hear the analysand, or the anthropometric archaeologist who does not listen to the descendants of the dead, be said to be dehumanising too, even intentionally so?

But why should testimony be valorised over clue and symptom? The two are distinct but complementary: for 'internal to the notion of the trace', remarks Paul Ricoeur in his usual reconciliatory fashion, is the 'dialectic of clue and testimony'<sup>286</sup>. The trace of writing is an adequate illustration for now. Writing records testimony, or rather, it attempts its very best to record the inscription of testimony; whereas the stroke of writing, its kinetic making, is not testimony but clue, which when decrypted can tell us about the moment and conditions of testimony's inscription. Writing is then both testimony and clue. And of course it is with writing that these distinctions crucially break down, for is the testimony that writing inscribes not better named clue? And isn't every trace that is not a sign of testimony used in the attempt to fill writing's silence, to guess at the testimony that hides behind writing?

For our purposes, another objection surfaces. What of absent testimony? When subjects can no longer bear witness, we are left with only clues. One illustration immediately avails itself, a vivid image of a work of excavation that transgressed the boundaries of all the heterogenous archaeologies mentioned so far. Berlin's Active Museum group, described in Karen Till's account of places of memory in the new Berlin<sup>287</sup>, was a response to the state planned transformation of the Martin Gropius Bau in the early 1980s. The area was on the fringes of pre-unification West Berlin, and once at the centre of the administrative headquarters of the Third Reich's terror apparatus. A protest action took place in the form of a 'Let's Dig' excavation in 1985, a complex symbolic and material excavation of the 'Gestapo Terrain':

activists questioned officials' use of the landscape as evidence of national history, at the same time that they symbolically dug for traces (*Spuren*) from the past. Their goal in this protest action was not to interpret or cite the landscape objectively as a historical object

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<sup>285</sup> Michel Foucault *The order of things: an archaeology of the human sciences* (1974) (New York: Routledge, 1980).

<sup>286</sup> Ricoeur *Memory, history, forgetting* (note 154) at 174.

<sup>287</sup> Chapter 3 of Till (note 272).

but rather to resituate and recombine texts, signs, things, and locations, and create new meanings, new opportunities for the future.... Operation Let's Dig spatially relocated the landscape through historical maps, collages, texts, and bodily performances. The dig created a different material present and presence through the excavation of "forgetful" history.<sup>288</sup>

Here was an archaeology that was simultaneously a Freudian excavation of the repressed memories of the Nationalist Socialist past; a Foucauldian archaeology of the genealogies of urban place; and at least a simulation of the actual practice of professional archaeology. It was finally, and harking back to some of the suggestions made earlier in the present work, aimed at 're-imagination' rather than discovery. Activist pressure eventually led to formal excavation of the site and the unearthing of the foundations of old Gestapo prison cells and administrative buildings. These remnants have become the site of the ongoing development of the Topography of Terror, an interactive memory centre that also leaves the unearthed remnants as an "open wound" in the German psyche<sup>289</sup>.

Besides this apposite image of a multi-disciplinary archaeology, what will detain us for a little while longer are the notions of *Spur* and *Zeugnis*. As Till explains, the *Spur* describes a material trace, a clue; while *zeugnis* is a trace of a more juridical nature, it is evidence or the testimony of an eyewitness (*Zeuge*)<sup>290</sup>. (The *Spur* will of course remind of the *spoor* (animal tracks), and thus of Carlo Ginzburg's primordial symptomatic reading, the hunter's gaze). The *Spur* is what one digs for:

Only people who arrive at a scene or search out a place find *Spuren*: the act of discovery constitutes their meaning as material traces. Detectives, historians, archaeologists, and forensic specialists and other experts who work with archives, fragments, and sites, for example, reconstruct past actions, such as criminal acts, through traces.<sup>291</sup>

Such *spuren* 'also imply secrecy'; thus the younger generations of Germans (and perhaps those who took part in Operation Let's Dig), confronted with the silent complicities of their parents, have 'assumed the role of detective in their search for the truth'<sup>292</sup>. These young detectives, enacting a sort of forensics of transitional justice, 'also

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<sup>288</sup> *Ibid.*, 95-6.

<sup>289</sup> *Ibid.*, 97ff.

<sup>290</sup> *Ibid.*, 209.

<sup>291</sup> *Ibid.*, 208.

<sup>292</sup> *Ibid.*

felt the moral duty to prosecute, to use the *Spuren* as *Zeugnisse*<sup>293</sup>. To make the trace into testimony and even eyewitness: here is a vision of a humanising archaeological gesture.

Similarly, it is the unavailability of testimony that Giorgio Agamben sees at Auschwitz in the figure of the so-called *Müsselman*, the prisoner who bore the worst of the atrocity of the camp and did not survive it. Who would dare speak for this pathetic figure? Poets, Agamben seems to say. Agamben has in fact tried to make of ‘desubjectification’ the most selfless act of testimony<sup>294</sup>. Like Foucault, Agamben also believes that it is language and not the subject that is capable of speaking<sup>295</sup>. Thus the subject is desubjectified in ‘the simplest act of speech’<sup>296</sup>. Yet this persistence of desubjectification means that it contains the potential for a superbly humanising act. In Agamben’s description of testimony one can, through desubjectification, bear witness for another’s suffering. But this is the desubjectification that the poet experiences or that of glossolalia. Finally, it is a matter of inhabiting the archive in a new way:

to bear witness is to place oneself in one’s own language in the position of those who have lost it, to establish oneself in a living language as if it were dead, or in a dead language as if it were living – in any case, outside both the archive and the *corpus* of what has already been said.<sup>297</sup>

The details of a humanising archaeology are still to be worked out. In this project lies the possibility of survivors’ recognising of the dead<sup>298</sup>. Several possibilities have been mentioned already: multi-disciplinary, poetic (in Agamben’s sense that emphasises *poiēsis*), reimaginative (in the sense mentioned in Chapter One). All involve a particular orientation towards the archive, even a way of occupying it.

Perhaps this is one way to distinguish the archaeologies mentioned by Edward Said in his *Freud and the non-European*, in which he refers to how (anthropometric) archaeology has been used both as a scientific base for national ideology, and brought into the service

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<sup>293</sup> *Ibid.*, 210.

<sup>294</sup> Agamben *Remnants of Auschwitz* (note 225).

<sup>295</sup> *Ibid.*, 117.

<sup>296</sup> *Ibid.*, 115.

<sup>297</sup> *Ibid.*, 161.

<sup>298</sup> *Ibid.*, 164.

of a liberation struggle as evidence of a living indigenous tradition<sup>299</sup>. There is a disunity of purpose: one archaeological practice uses facts to substantiate identity and rationalize the nation's founding myth, while the other is a practice which challenges archaeology 'so that those "facts" and the practices that gave them a kind of scientific pedigree are opened to the existence of other histories and a multiplicity of voices'<sup>300</sup>. Recall all that has been said here about silence: what is necessary is for an archaeology that make the archive *speak* in unspeakable ways.)

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<sup>299</sup> Edward W Said *Freud and the non-European* (London: Verso and Freud Museum London, 2003) 45ff.

<sup>300</sup> *Ibid.*, 50.

## CHAPTER THREE

### Mapping the Heterotopic: Law and the Sacred, from *Res Religiosa* to Heritage Resource

#### **a. res religiosae reformed**

Much has been said so far about memory and haunting in politics and ethics, but little about law. The rhetorical weight of precedent in legal practice, the constitutional monumentalism mentioned in the first chapter, and also well known theories of the hermeneutics of law, especially Dworkin's vision of a Herculean spirit that haunts the law<sup>301</sup>, would seem to endorse the opinion that '[c]onstitutionalism is arguably a strong form of ancestor worship'<sup>302</sup>, and law with it. What is still missing is an enquiry into law and laws. This chapter therefore ask one specific, almost positivist question: how does the law treat the resting place of the body after death?

As with any legal question there is a short answer, which in a case such as Prestwich Place must take the form of a referral to the provisions of the National Heritage Resources Act; and there is a long answer, full of the intrigues and confusions of doctrinal history and paradigmatic conceptual shifts, but no longer as clear on the implications for the rights and duties of contemporary legal actors. The latter answer is attempted here, in the belief that it will also illuminate the relationship of law and the sacred site.

#### **Res Religiosae in Roman Law**

It is necessary to start with the law of the Romans, whose respect for tomb and grave<sup>303</sup> has been both followed and betrayed by our law. In the old sources we find that the ancient Romans regarded the grave as a hallowed thing in law, a *res religiosa*. What is a *res*, a 'thing', in law? Maasdorp wrote that '[t]he term property (*res*) is applied in law to everything which can be the object of a right, that is, everything with respect to which

<sup>301</sup> Ronald Dworkin *Law's empire* (London: Fontana Press, 1986).

<sup>302</sup> John E Seery *Political theory for mortals. Shades of justice, images of death* (Ithaca: Cornell University Press, 1996) 31.

<sup>303</sup> The Romans held 'unusually high respect' for the tomb. Neville Cloete '*Res religiosae* en die stigtingsfiguur – 'n historiese ondersoek na die juridiese aard en konstitusie van die sogenaamde religieuse sake in die Suid-Afrikaanse reg' 1986 *Transkei Law Journal* 147 at 151 speaks of '*die buitengewone groot eerbied wat die Romeine vir die menslike graf en begrawing gekoester het. Hierin was die Romeine nie uniek nie, aangesien eerbied vir begrawing en die menslike graf in die oudheid 'n byna universele verskynsel was.*'

one person may be entitled to a right and another person to a duty'<sup>304</sup>. Voet stated simply that a thing is an object of which the law takes cognisance<sup>305</sup>. And yet numerous debates have turned on this matter of definition<sup>306</sup>, for example whether there is such a thing as an incorporeal thing<sup>307</sup>.

A contemporary definition might ultimately accept a thing as 'a corporeal object external to man which is an independent legal entity susceptible to private ownership and valueable and useful to mankind'<sup>308</sup>. Yet this definition already excludes *res extra commercium*. The distinction between *res in commercio* (things which are susceptible of ownership) and *res extra commercium* (things not susceptible of ownership) was Roman law's primordial classification of things<sup>309</sup>. Justinian's *Institutes* distinguished between things capable of being owned (*in nostro patrimonium*) and things not capable of being owned (*extra nostrum patrimonium*)<sup>310</sup>. According to Voet's interpretation of the Roman law, the distinction to be made is between *res in commercio* as things susceptible of ownership, private or public, and *res extra commercium* as things that were not susceptible of ownership at all<sup>311</sup>.

Roman law further divided *res extra commercium* into *res omnium communes*, things common to mankind by virtue of natural law, such as the air and running water<sup>312</sup>; *res publicae*, public things, belonging the state but intended for use by the public, such as roads and rivers<sup>313</sup>; and *res divini iuris*, things of divine law, dedicated to and of the gods<sup>314</sup>. These things belong to no-one, because they belong to heaven: *Nullius autem sunt res sacrae et religiosae et sanctae: quod enim divini iuris est, id nullius in bonis est*<sup>315</sup>. Voet sums the scheme up:

Things are said to be either somebody's or nobody's. Things again which belong to nobody fall either under human or under Divine law. Those which are nobody's and

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<sup>304</sup> A F S Maasdorp *Maasdorp's Institutes of South African Law Volume II The Law of Property* 9<sup>th</sup> ed [1903] (Cape Town: Juta & Co, 1971) 1. This definition raises substantial problems within the classification of things into corporeal and incorporeal, but this must be overlooked for now.

<sup>305</sup> Voet *Elementa juris* 2 1 1: *Res est omne id de quo ius dicitur*.

<sup>306</sup> See C G van der Merwe 'Things' in WA Joubert (ed) *The law of South Africa* (Durban: Butterworths, 2002) (hereafter *Lawsa*) vol 27 (first reissue) §§ 204 *et seq*.

<sup>307</sup> A study of contemporary discourses of tangible and intangible patrimony in the context of these definitional debates immediately suggests itself, but must be postponed for the usual reasons.

<sup>308</sup> *Lawsa* vol 27 (first reissue) § 205.

<sup>309</sup> *Lawsa* vol 27 (first reissue) §§ 211-12.

<sup>310</sup> *I* 2 1.

<sup>311</sup> Voet *Commentarius* 1 8 1.

<sup>312</sup> *I* 2 1 1-5.

<sup>313</sup> *I* 2 1 6.

<sup>314</sup> *Lawsa* vol 27 (first reissue) § 217.

<sup>315</sup> *I* 2 1 7.

which fall under human law are those things said to be common by the law of nations. Things falling under Divine law are either things properly falling under that class, namely things sacred and hallowed; or falling into it by a sort of analogy, that is, things inviolable by law. Things which are somebody's are either in the public ownership of many persons, or in the private ownership of individuals.<sup>316</sup>

Let us briefly refer back to the issue of definition: what sort of thing is a thing? In Roman law, Thomas wrote in his well known *Textbook of Roman Law*, 'the law of things comprised the objects and contents of a person's estate'<sup>317</sup>. It is, he adds in a footnote, 'the law of patrimony'<sup>318</sup>. Compare this with Voet's thing, which is any thing of which the law takes cognisance. Here, with our interest in the things of divine law, we wish to concern ourselves with this law of patrimony only insofar as it defines objects outside of its *patrimonium* and outside of its power. The potential for confusion, echoed by contemporary debates about definition, is evident: if a thing is something which the law recognises, then can a thing be that which the law recognises it does not recognise? How is law to name this 'thing', without bringing it under its power by naming it as such? The *res divini iuris* finds itself between two laws, between the human and the sacred, both inside and outside the law.

Passing on from this difficulty of locating the anomaly within law's *nomos*: there were three sub-categories of *res divini iuris*: *res sanctae*<sup>319</sup>, *res religiosae*, and *res sacrae*. Before Christianity, *res sacrae* (sacred things) were 'dedicated to the gods above' and included temples, basilicas, altars, sacred groves and sacrifices; *res religiosae* were left to the gods below<sup>320</sup>. *Res sacrae* were to be consecrated by public law<sup>321</sup>. In Christian times the law was suitably adapted: Justinian notes that *res sacrae* could only include 'those properly consecrated to God by the bishops, holy churches, for instance, and gifts duly dedicated to the service of God', and did not include something which an individual tried

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<sup>316</sup> Voet *Commentaries* 1 8 1.

<sup>317</sup> J A C Thomas *Textbook of Roman Law* (Amsterdam: North Holland Publishing Company, 1976) 125.

<sup>318</sup> *Ibid* 125 note 2.

<sup>319</sup> *Res sanctae*, which will not be discussed here, were not consecrated to the gods but protected by the gods. They included such things as the Roman city walls and gates, the *limes*. They fell under divine law 'in a certain sense', as if by analogy (G II 8: *Sanctae quoque res, velut muri et portae, quodam modo divini iuris sunt*. Also D 1 8 1, 8-9; I 2 1 10).

<sup>320</sup> G II 4: *Sacrae sunt, quae diis superis consecratae sunt; religiosae, quae diis Manibus relictas sunt*.

<sup>321</sup> Gaius had said that in order to be sacred land must be consecrated 'by authority of the Roman people, by a statute on the matter, for instance, or by a Senate resolution' – G II 5, also D 1 8 6.

to make sacred<sup>322</sup>. They remained unsusceptible to ownership: such things could not be alienated or pledged, except to redeem captives<sup>323</sup>. In fact the sacred nature of a thing was persistent: the ground upon which a sacred thing stood remained sacred even though the building itself might be destroyed<sup>324</sup>.

While a *res sacra* had to be consecrated, anybody could ‘by his own will’ make a place *religiosus* through interment of a corpse<sup>325</sup>, if burying it on his own ground<sup>326</sup>. *Res religiosae* were dedicated to the gods below<sup>327</sup>, and included tombs and graveyards. *Res religiosae* were outside of commercial activity, so long as certain conditions were met, for mere interment of a corpse did not automatically make a place *religiosus*. The burier had to be the one with the responsibility of burying the body<sup>328</sup>. One could bury on another’s land provided one had consent of the the landowner, or he ratified the burial after the act, in which case the place still became *religiosus*<sup>329</sup>. Yet where a body has been buried on another’s land without their consent, it did not create a *locus religiosus*<sup>330</sup>. Only the place occupied by the body and its tomb, or the area taken up by a burial place destined for further burials, became *religiosus*<sup>331</sup>.

All three forms of *res divini iuris* were not susceptible to ownership<sup>332</sup>, and so if all the above conditions were met, then interment of the body made the place *extra commercium*; thus, ‘if a field were sold in part of which a body had been buried, the field was automatically reduced in size to that extent’<sup>333</sup>. Although nobody could own a burial place, title to it could be passed on to heirs.<sup>334</sup> A place near or adjoining a sepulchre was not *religiosus*, and could therefore be alienated<sup>335</sup>. At one point an empty tomb had been believed to be *religiosus*, but a rescript was issued to the effect that a cenotaph – a

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<sup>322</sup> I 2 1 8.

<sup>323</sup> I 2 1 8.

<sup>324</sup> I 2 1 8, D 1 8 6.

<sup>325</sup> I 2 1 9.

<sup>326</sup> D 1 8 6.

<sup>327</sup> See note 320 above.

<sup>328</sup> G II 6: *Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat*. Also D 1 8 1.

<sup>329</sup> D 1 8 6. Also I 2 1 9

<sup>330</sup> C 3 44 2. Where more than one person owned a burial place, one owner could bury even against the will of the others; yet co-owners of land that is not a burial place must have the consent of the other co-owners to bury (I 2 1 9). One retained the right of access to a sepulchre on land which one owned at the time of burial, even after the land has been sold; and one also retained the right to approach the sepulchral place for the purpose of funeral ceremonies (D 47 7 5)

<sup>331</sup> C 3 44 4.

<sup>332</sup> G II 9: *Quod autem divini iuris est, id nullius in bonis est...* See also D 1 8 1, 6.

<sup>333</sup> Thomas (note 317) 128.

<sup>334</sup> C 3 44 4.

<sup>335</sup> C 3 44 4, 9.

monument to the memory of a deceased but containing no remains – was not *religiosus*<sup>336</sup>.

What then about moving an entombed body? Justinian's *Codex* records Emperor Antoninus' edict allowing a subject to remove the remains of his son to another place if the remains 'should be threatened by the waters of a river, or any just and necessary cause should arise', and with the consent of the Governor of the Province<sup>337</sup>. A corpse could also be removed if it were 'not permanently committed to the tomb'<sup>338</sup>. But in 386 it was proclaimed that 'No one can transfer a human corpse from one place to another without permission of the Emperor'<sup>339</sup>.

*Sepulchri violatio*, the violation of a tomb, was reviled, and any person who committed this act was branded with infamy<sup>340</sup>. An interdict *quod vi aut clam* was available against demolition of a sepulchre, or of a monument attached to a tomb<sup>341</sup>. An *actio popularis* was also available against someone who violated a tomb<sup>342</sup>, which meant that any member of the public could sue<sup>343</sup>. However the action fell first to the person who owned the land<sup>344</sup>. The action was also available against someone who lived in a sepulchre or had a building on the ground above it<sup>345</sup>. The violation had to be committed with malicious intent<sup>346</sup>. However, since enemy sepulchres were not considered *religiosae*, no crime was committed in relation to them<sup>347</sup>.

The crime was also regarded as falling under the *lex Julia* relating to public violence, which prohibited anyone from preventing the interment of a corpse<sup>348</sup>. Punishment for this reviled crime was of the strictest order: he who removed bodies or bones would face

<sup>336</sup> Compare *D 1 8 6 5: Cenotaphium quoque magis placet locum esse, sicut testis in ea re est Vergilius*, with *D 11 7 6 1*. See also section C below.

<sup>337</sup> *C 3 44 1*.

<sup>338</sup> *C 3 44 10*. Also *D 47 7 3 (4)*.

<sup>339</sup> *C 3 44 14*.

<sup>340</sup> *D 47 7 1*. A citizen who had engaged in disreputable behaviour incurred *infamia*, which led to social disgrace but also legal disabilities such as disqualification from holding office, voting, or making a will; see Andrew Borkowski *Textbook on Roman Law* (London: Blackstone Press, 1994) 106-7.

<sup>341</sup> *D 47 12 2*.

<sup>342</sup> *D 47 12 3*.

<sup>343</sup> The *actio popularis* allowed anyone to sue since the matter was one that affected the public interest (W Buckland *A text-book of Roman law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1963) 694-5). In this case it even allowed the person who sued to keep the penalty awarded (*D 47 12 3 12*).

<sup>344</sup> *D 47 12 6*.

<sup>345</sup> *D 47 7 3 (6)*.

<sup>346</sup> *D 47 7 3 (1)*.

<sup>347</sup> *D 47 7 4*.

<sup>348</sup> *D 47 7 8*.

capital punishment if of low rank, or otherwise be sent into exile or condemned to the mines<sup>349</sup>. The armed despoiler of dead bodies faced capital punishment<sup>350</sup>.

### Death and Reformation in Roman-Dutch Law

Voet, that Dutch jurist most commonly referred to by South African courts, follows Roman law faithfully in his commentary on *res religiosae*: a place is *religiosus* if the dead body of a human, free or slave, or the main portion of it, that is, the head, has been interred there for its eternal abode<sup>351</sup>. Voet accepted that it was the bones themselves that were *religiosi*: a cenotaph – an empty tomb or monument erected to those buried elsewhere, or whose bodies are missing – was not *religiosus*<sup>352</sup>. The burial had to be on the burier's land, or else consent had to be obtained from the landowner or co-owner (unless the co-owner himself was to be buried)<sup>353</sup>. Burying a body in a place in which one has no right means that the place will not be *religiosus*<sup>354</sup>, but this does not mean that the rightful owner of the land may exhume the bones, except with the authority of the Emperor or the Pope: '[t]his is because the very removal of the bones embraces in itself something of a religious nature'<sup>355</sup>. And yet the one whose right has been infringed is allowed an action against the burier for the removal of the bones, or for the price of the ground or vault<sup>356</sup>.

In Voet's view, *res religiosa* could be alienated for a just cause<sup>357</sup>; and it could be sold together with land, that is, 'as an accessory to the sale of something larger'<sup>358</sup>. This was on condition that the thing continued to be used for its hallowed purpose<sup>359</sup>. *Res religiosae* were *extra commercium*: 'just as the place becomes hallowed – not wholly, but to the extent to which the body has been put under the sod, or the place marked off as hallowed – so also it starts to be withdrawn from the commercial dealings of mankind'<sup>360</sup>. Yet despite the fact that the *res religiosa* was not susceptible to ownership, there was a sense in which the burier had title to the buried: 'in so far as we have the right

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<sup>349</sup> D 47 7 11.

<sup>350</sup> D 47 7 3 (7).

<sup>351</sup> Voet *Commentarius* XI 7 1.

<sup>352</sup> Voet *Commentarius* XI 7 2.

<sup>353</sup> *Ibid.*

<sup>354</sup> Voet *Commentarius* XI 7 2 1.

<sup>355</sup> Voet *Commentarius* XI 7 3.

<sup>356</sup> *Ibid.*

<sup>357</sup> Voet *Commentarius* I 8 6.

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.*

<sup>360</sup> Voet *Commentarius* XI 7 4.

of interring a dead person in our tomb it is in that sense said to be ours, and everyone is said to inter the dead in his own place'<sup>361</sup>. There is here a sense of 'quasi-proprietorship', indeed a right of sepulture and a right to inter the dead that could be passed on to heirs, and even sold to others though the nature of the place remained *religiosus*<sup>362</sup>.

Voet also regarded *res religiosa* as acceding to the larger land, so that if the land were sold the sepulchral place would be sold with it, unless a term to the contrary were included in the agreement of sale (in which case a right of way to the *locus religiosus* would also be preserved for the funerary visitor)<sup>363</sup>. The place ceased to be *religiosus* if the remains had been removed by the command of the Pope or Emperor<sup>364</sup>.

Voet recognised the action for arising from the violation of a tomb, that had been given in the *Lex Julia* on public violence<sup>365</sup>. Damages were based not on the enrichment of the one who violated the tomb, nor on the loss which resulted, but instead on the insult caused<sup>366</sup>. This act of violating a tomb, Voet reminds us, was 'regarded not as a trivial but as a most heinous affront, nay a very monstrosity of crime to disturb the rest of deceased persons'<sup>367</sup>. A prohibitory interdict also forbade the use of force against one who was interring a dead body where he had the right to inter<sup>368</sup>. The interdict was to be given so as to avoid the delay of a full hearing, as the matter of a funeral was regarded as urgent. In addition to this lay a second reason for the availability of the interdict, that is, the law's 'favour shown to religion and to dutifulness, as well as to the public interest, to the end that corpses may not lie unburied. This favour is so great that sometimes in doubtful questions of religion we are wont to pass over and make light of the strict reason of the law, since a reason which works on behalf of religion is the highest of all reasons'<sup>369</sup>.

Yet against Voet's religiosity and faith in the Roman Law authorities, other Roman-Dutch commentators differed markedly on whether the Roman *res religiosa* was still recognised by the law of Holland. Thus Grotius wrote that:

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<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.*

<sup>364</sup> Voet *Commentarius* XI 7 6.

<sup>365</sup> Voet *Commentarius* XI 8 1.

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*

<sup>368</sup> Voet *Commentarius* XI 8 2. The interdict could even be granted to one who did not have full rights to inter the body.

<sup>369</sup> *Ibid.*

In relation to man many writers have distinguished things as belonging to God (*res divini juris*) and belonging to men (*res humani juris*); and under things belonging to God the Romans included dedicated things (*res sacrae*), the graves of the dead (*res religiosae*) and the walls of the cities (*res sanctae*): but upon a careful examination it will be found that all these things belong to men, but for separate uses; and what is more, nothing is so completely appropriated to God but that one often sees it converted to other uses ...<sup>370</sup>

Some properties belonged to a ‘smaller community (*minder gemeenschap*)’ and were indeed to be applied to specific uses<sup>371</sup>; thus churches and things associated with them were for sacred uses and might be property common to a parish<sup>372</sup>; while burial places were for ‘the service of the dead (*den dooden-dienst*)’ and belonged to the people of the town or parish or to certain families. However some burial places belonged to individuals and could be left to heirs or sold *inter vivos*; however they remained to be used only for the purpose of burial<sup>373</sup>. Such things that were for the use of specific purposes were to be put to those uses only, unless a change were permitted by the provincial or local authority<sup>374</sup>.

Groenewegen remarked that things formerly sacred and consecrated to God were now subject to commerce, as were sepulchres:

Formerly sacred buildings or temples were with due ceremony consecrated by the bishops to God. But this does not obtain by our customs, nor is any sanctity attributed to the buildings themselves by our people; so that to-day they belong, not to no-one, but to the body or person who built them, and modern sepulchres which are in temples, are possessed by right of *dominium*, and at the will of the possessor can be alienated.<sup>375</sup>

This meant also that bodies could be reinterred more freely, requiring not the permission of the emperor or priests, but merely ‘the ordinary judge of the area, or also ... the overseers or wardens of the churches (*kerckmeesters*)’<sup>376</sup>.

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<sup>370</sup> Grotius *Jurisprudence* 2 1 15-16.

<sup>371</sup> *Ibid.*, 2 1 31.

<sup>372</sup> *Ibid.*, 2 1 32.

<sup>373</sup> *Ibid.*, 2 1 37.

<sup>374</sup> *Ibid.*, 2 1 39.

<sup>375</sup> Groenewegen *Ad Inst* 2 1 8; also *Ad Cod* 3 44, *Ad Dig* 11 7 fr34.

<sup>376</sup> Groenewegen *Ad Cod* 3 44 fr14.

Huber also failed to accept that the Roman classification of things as sacred and *res nullius* could be a part of the law of his time, for ‘it is certain that according to the simple rule of the Christian doctrine nothing is in itself sacred, except the word of God and the seals of the covenant in our Lord Jesus Christ’<sup>377</sup>. Nor could graves be said to be sanctified, but were instead ‘the private property of individuals or societies, although we may owe graves a certain kind of reverence, or something of that kind, on account of the memory of the dead and the expectation of the resurrection’<sup>378</sup>.

For Van Leeuwen too, the idea of *res nullius* as things which can ‘in no way be brought under the dominion of anyone’ that is, churches, tombs and the walls of towns, no longer obtained; ‘for since the Reformation we have so far departed from it that we do not attach any veneration to the mere churches themselves’<sup>379</sup>. This applied also to tombs, which were ‘possessed by us with full right of ownership, and may be sold or encumbered by the true owner as his own property’<sup>380</sup>. Indeed, given the fading of such ‘superstititton’, ‘we ought long since to have begun to establish cemeteries beyond the city’ due to the the illnesses which proximity to the dead might bring<sup>381</sup>.

Van der Linden also found the practice of burying the dead in temples, in the city, or generally near the living to be ‘impermissible’, due to the harmfulness to health of the ‘exhalations’ from the grave. In any case, he noted:

[the] cause of such an observance is to be mainly found in superstition; as though we Christians who profess the reformed religion are ashamed to have reposed our faith in it! It cannot be that we believe there to be anything religious in having tombs in churches. It cannot be that we believe that the intercession of the saintly departed, which was the reason why the ancient Christians desired to be buried near their tombs, avails to have any result on the securing of our eternal salvation.<sup>382</sup>

Why this change, given that many of the Roman texts had been written or compiled during Christianity? There had of course been a sea change of religious doctrine. The Reformation had made itself felt in Holland in the mid-16th century, with ‘religious

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<sup>377</sup> Huber *Jurisprudence* 2 1 25.

<sup>378</sup> *Ibid.*, 2 1 28.

<sup>379</sup> Van Leeuwen *Commentaries* 2 1 9, and citing Calvin’s *Institutiones* 3 20 30.

<sup>380</sup> *Ibid.*, 2 1 24.

<sup>381</sup> *Ibid.*, 2 1 9 note (e).

<sup>382</sup> Quoted in Voet *Commentaries* note (a) to XI 7 4 (at 734-5 of Gane’s translation).

freedom' being declared in 1572. With the public practise of Roman-Catholicism banned in 1580, the Roman Church had lost its authority and all things fell under worldly political authority<sup>383</sup>.

Yet paradoxically, the violation of a tomb was still recognised as wrongful by the Roman-Dutch commentators<sup>384</sup>. For Groenewegen at least it seemed to have lessened in heinousness: thus the penalty stipulated in the Digest was not to be applied, but was instead to be 'of a discretionary nature'<sup>385</sup>. Much of what Justinian's *Codex* said on the violation of tombs Groenewegen declared obsolete or no longer observed; although it remained the case that 'no impediment must in any way be placed in the way of burying the bodies of deceased persons'<sup>386</sup>. And the authority of the Roman tradition was not unequivocally recognised. Matthaeus recognised *sepulchri violatio* as a crime in Roman law<sup>387</sup>; yet while he doubted that the crime had been abrogated by disuse, neither did he confirm that it was still used in Dutch law<sup>388</sup>.

### ***b. res religiosae in the 20<sup>th</sup> century: the hallowed as relic, land reform right and heritage resource***

#### **Res Religiosae and Sepulchri Violatio in the early 20<sup>th</sup> Century**

Are *res religiosae* recognised by South African common law? Manfred Nathan's 1904 treatise on the common law of South Africa, based on Voet's *Commentary on the Pandects*, simply mentions that Roman Law knew a class of things subject to divine law<sup>389</sup>. Broadly speaking, the Roman Law classification had 'been practically adopted in Dutch Law'<sup>390</sup>. Hahlo and Kahn declare that Roman-Dutch law principles of property

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<sup>383</sup> Neville Cloete 'Res religiosae en die stigtingsfiguur – 'n histories ondersoek na die juridiese aard en konstitusie van die sogenaamde religieuse sake in die Suid-Afrikaanse reg' 1987 *Transkei Law Journal* 136 at 211. Yet Cloete argues that when all things fell under worldly authority, this meant only that sacred things were withdrawn from the *jurisdiction* of the church, but not made entirely profane (213). Calvin's remarks about sacred things – which turned on his opinion that Christians were to turn inwards in their worship of God rather than to some physical place – are interpreted by Cloete as being directed not at whether such things were *extra commercium* or not, but rather at their purpose (214). Cloete argues ultimately that Calvin never stopped considering the burial place to be holy, and thus no secularisation of *res religiosa* can be based on his thought. Instead there should be a 'second phase' (perhaps we could consider it a sort of resurrection) of the theory of *res religiosa* (216).

<sup>384</sup> Wouter de Vos 'Grafskending' 1952 *South African Law Journal* 296 at 298-9.

<sup>385</sup> Groenewegen *Ad Dig* 47 12, also *Ad Cod* 9 19 fr 6.

<sup>386</sup> *Ad Cod* 9 19 fr 6.

<sup>387</sup> De Vos (note 384) at 298.

<sup>388</sup> *Ibid.*, 299.

<sup>389</sup> Manfred Nathan *The common law of South Africa: a treatise based on Voet's Commentaries on the Pandects* vol. 1 (Grahamstown, African Book Company: 1904) para 525 at 307.

<sup>390</sup> *ibid.*

have been ‘largely preserved’<sup>391</sup>, but note that the classification of churches, burial grounds and the walls of cities as *res sacrae*, *res religiosas* and *res sanctae* ‘was obsolete in Roman-Dutch law’<sup>392</sup>.

The contemporary comprehensive reference on South African law, Joubert’s trusted *Law of South Africa*, notes that *res sanctae* had explicitly not been recognised by the Roman Dutch Law, while *res sacrae* and *res religiosas* had taken on a secular meaning after the Reformation and John Calvin’s *Institutiones*<sup>393</sup>. These things had become *res in commercio* and susceptible to private ownership. While those things dedicated to religious worship (the old *res sacrae*) are susceptible to private ownership, for example by churches, municipalities or private persons, ownership must be exercised in a fashion that is compatible with religious worship. Graveyards on private property form part of the land and are transferred with the land; they are not inalienable because of their religious nature. The implication of this is that damages to tombstones or cemetery fences do not afford relatives of the persons buried there with an action for patrimonial loss, since these things belong to the owner of the land<sup>394</sup>. However, the common law offence of *sepulchri violatio* has been retained at common law<sup>395</sup>.

These principles of common law are derived from the fairly meagre set of cases concerning burial sites that have come before the South African courts during the late 19<sup>th</sup> and 20<sup>th</sup> centuries. The first such matter came before the Cape Colony’s Supreme Court in 1890, *Cape Town and Districts Waterworks Co. (Limited) v Executors of Elders*<sup>396</sup>. Here a conflict had arisen over a piece of land. The respondents had purchased it but not taken transfer of it before the previous owner died. They had nevertheless proceeded to use it as a burial ground. The applicants had taken transfer of the land from the owner’s heirs, and now proceeded against respondents for trespassing on the land. The respondents contended that the land had been transferred erroneously to the applicants, as it was *res religiosa* and therefore *extra commercium*.

The question was therefore whether such things were still recognised by our law. Chief Justice De Villiers found that Voet’s acceptance of the hallowedness of burial

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<sup>391</sup> H R Hahlo and Ellison Kahn (eds) *The Union of South Africa: the development of its laws and constitution* (Cape Town: Juta & Company, 1960) 571.

<sup>392</sup> *Ibid.*, 573.

<sup>393</sup> *Lawsa* vol 27 (first reissue) § 217; cf. (note 383).

<sup>394</sup> *Ibid.*

<sup>395</sup> *Lawsa* vol 20(2) (first reissue) § 324.

<sup>396</sup> 1890 8 SC 9.

places (of which he did not ‘discuss as fully as is usual with him the modifications which had been introduced by modern usage or legislation’<sup>397</sup>) was outweighed by the certainty with which Groenewegen, Van Leeuwen and other eminent Dutch writers stated that *res religiosae* were no longer part of the law of Holland<sup>398</sup>. But ultimately the issue was one of policy, and here the exigencies of modern commerce outweighed the old rule:

In this Colony it is the most usual thing for the owners of farms to have burial places for their dead upon their farms and it has never been supposed that without a special reservation of such burial places the transfer of a farm does not convey with it the ownership of the burial place.<sup>399</sup>

The Chief Justice added that, while the presence of graves did not make land inalienable, the Roman law prohibition of desecration of graves and exhumation of remains without authorisation remained in force<sup>400</sup>.

That the crime of violating a grave still existed in South African common law was confirmed by the Supreme Court in the Orange Free State in 1947<sup>401</sup>. The following year the Transvaal Provincial Division heard a similar case<sup>402</sup>. The circumstances are worth mentioning: a grave digger helped to bury a 15 month ‘European’ baby, then returned after the funeral to the grave, broke open the coffin and chopped off a portion of the deceased child’s face, seemingly for the purposes of muti. The appeal judge found that the sentence imposed by the Potgietersrust court had been too lenient<sup>403</sup>, even though the accused could be said to be motivated less by criminality than by ‘a dark superstitious mind’. Indeed, ‘the proper cure for this sort of crime is that these savage people should be converted to Christianity and led away from such gross and dark superstitions’<sup>404</sup>. The contrast with the violators of Khoisan graves of the same period, equally grisly but deemed to be at the forefront of European civilisation, could not be more stark<sup>405</sup>.

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<sup>397</sup> at 11.

<sup>398</sup> at 11-12.

<sup>399</sup> at 12.

<sup>400</sup> This last point must of course be regarded as *obiter*, since the respondents did not wish to remove the burials or desecrate them in any way.

<sup>401</sup> *R v Lekota* 1947 (3) SA 713 (O).

<sup>402</sup> *R v Sephuma* 1948 3 SA 983 (T).

<sup>403</sup> The present case concerned sentencing, the grave digger having already been convicted of violation of a tomb.

<sup>404</sup> at 983.

<sup>405</sup> See Chapter One.

The question of the violation of graves would be raised again, though in different circumstances, in the Cape in 1950. In *Dibley v Furter*<sup>406</sup>, the defendant submitted that *R v Lekota* and *R v Sephuma* had been incorrectly decided, since ‘the crime of *sepulchri violatio* was inseparably bound up with the conception that graves were *res religiosae* and, as in our law graves are no longer *res religiosae*, the foundation of the Roman Law crime had disappeared’<sup>407</sup>. Unfortunately for our historical curiosity, the court felt it unnecessary to decide, since the case instead concerned other issues<sup>408</sup>.

The events that led up to the case centred on a farm in Bellville named, amusingly, ‘Shangri-La’. The plaintiff had bought the farm from the defendant, not knowing that on it were more than 80 graves. All signs of the graves had been removed, and the plaintiff only discovered their existence after he had made the place his residence. The plaintiff thus sought a return of the purchase price and damages from the seller, alleging that the existence of the graves constituted a latent defect giving rise to the *actio redhibitoria* (redhibitory action for restoration of the positions of the parties before sale); or else that the seller had fraudulently concealed from him the existence of the graves.

For the first cause of action it had to be shown that the existence of graves was a defect capable of founding the *actio redhibitoria*; the court accepted that a redhibitory defect is one which, objectively viewed, impairs the usefulness of the thing sold, for the purpose for which it was sold or for which it is commonly used, and is a material defect<sup>409</sup>. Was the existence of the graves such a redhibitory defect? The purchaser found their presence ‘abhorrent’; he would not have bought the property had he known of their existence<sup>410</sup>. But did their presence impair the *usefulness* of the property? The main consideration here was whether it would be an offence to cultivate over the graves or whether the purchaser could be prevented from doing so by anyone<sup>411</sup>. This was where the court felt it did not need to express any opinion on the contemporary validity of the crime of *sepulchri violatio*; for no violation of the tombs would be committed by cultivation over them. The purchaser ‘would be removing nothing from them and the

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<sup>406</sup> 1951 (4) SA 73 (C).

<sup>407</sup> at 83C-D.

<sup>408</sup> at 83E.

<sup>409</sup> at 82D-E.

<sup>410</sup> at 82F.

<sup>411</sup> at 83A.

mere planting of a crop on them would not ... constitute a violation where all visible signs of them had been removed<sup>412</sup>.

(Yet even while denying that it was deciding the issue, the Court did lend some support, at least *obiter*, to the existence of the offence of *sepulchri violatio*. The purchaser, it says, would commit an offence where he cultivated over tombs which were not concealed but still identifiable<sup>413</sup>. The purchaser did not commit an offence here because no bones were removed from the tombs<sup>414</sup>. Note that *sepulchri violatio* has become a crime of exhumation, rather than one of damage to a tomb, the outer casing of a burial. Perhaps the court would have decided differently here if the purchaser had to remove bones while laying the foundations for a multi-story building?)

Even if the tombs did not constitute a redhibitory defect, could it not still be the case that the seller had been fraudulent in not disclosing their existence<sup>415</sup>? The Court thought so, since the existence of a burial ground on the property 'was so peculiar that it should be disclosed to enable the parties to contract on equal terms'<sup>416</sup>. More than 80 graves existed on the property, taking up a large portion of it, and the most recent of which were only four years old; Judge Van Zyl noted that 'the majority of people would not want to live on or own the property'<sup>417</sup>.

The dead had surfaced in another case before the Cape Provincial Division that year. *Gillespie v Toplis and Another*<sup>418</sup> had established that no action for patrimonial loss or sentimental damages lies against a property owner who removes the tombstones and railings of an earlier burial, unless this constitutes breach of contract or infringement of a servitude. In effect, a grave can effect no limits on one's ownership, except where some form of real right results from a contract or servitude.

Here a previous owner of the farm in question had allowed the plaintiff's mother to be buried on his farm, and the plaintiff had erected a tombstone and railing over this burial. Ownership of the farm changed hands, and the new owner removed the tombstone and railing, and then built a garage above the burial place. The plaintiff now sought relief

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<sup>412</sup> at 83F-G.

<sup>413</sup> at 83E-F.

<sup>414</sup> at 83F-G.

<sup>415</sup> In order to show fraudulent non-disclosure, the non-disclosed fact need not have been a defect such that would ground the *actio redhibitoria*, but could instead be a defect which, if not disclosed, places the parties on unequal terms (at 87F); or else it need not be a defect, but instead a non-disclosure of facts that forms part of the acts leading up to the contract (at 87G).

<sup>416</sup> at 88E.

<sup>417</sup> at 88F.

<sup>418</sup> 1951 (1) SA 290 (C).

against this owner's estate, inter alia, in the form of damages for patrimonial loss<sup>419</sup>. Yet this cause of action failed because the plaintiff could not prove that he had suffered patrimonial loss because of the destruction of the tombstone<sup>420</sup>. The plaintiff's argument had been interesting if somewhat tortuous: he relied upon an extended Aquilian action incorporating the old Roman *actio popularis* for violation of tombs, which had been extended in turn by way of the *actio utilis* so as to be available for personal injury and not only damage to property. The Court noted that the *actio popularis* had become obsolete in our law<sup>421</sup>, and so the basis of plaintiff's cause of action amounted simply to Aquilian liability. The plaintiff might have succeeded if he had been able to show that he had a right by virtue of a contract or a servitude in respect of the property; otherwise the tombstone and railing 'acceded to the land and became the property of the owner, who could only be made liable to plaintiff on the basis of a breach of contract or infringement of a valid servitude'<sup>422</sup>.

It is clear that there has been a shift since *Cape Town and Districts Waterworks Co. (Ltd)*, which, despite the abrogation of the classification of *res religiosae*, seemed to agree with the Roman Dutch Law authorities that the purpose of such things should be retained even after alienation of the land on which they might be situated<sup>423</sup>. With *Gillespie*, this is no longer the case. Instead, for any retention of the purpose of a burial place, real rights must be established by way of contract or servitude. The reason for this shift, spelt out also in *Dibley v Furter* and already in *Cape Town and Districts Waterworks Co. (Ltd)*, is the courts' hesitancy in restricting the rights of the property owner. Thus in *Gillespie*, where there was no such real right in respect of the tomb, the fact of its erection 'unknown to [the owner] and long prior to the date of her ownership ... would have no bearing on the unfettered nature of her ownership'<sup>424</sup>.

By the beginning of the 21<sup>st</sup> century these few cases, together with the equivocation of the old Dutch authorities, would come to be seen as confirming the existence of the crime of *sepulchri violatio*: 'it has always been an offence at common law to desecrate a grave',

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<sup>419</sup> The owner had deceased; thus the Court says nothing about the contemporary existence of an offence of violation of a tomb, since the Roman penal action was unavailable against a deceased wrongdoer. See 296A-B.

<sup>420</sup> at 296H-297B.

<sup>421</sup> at 296C-F.

<sup>422</sup> at 297H.

<sup>423</sup> *Cape Town and Districts Waterworks Co (Limited) v Executors of Elders* 1890 8 SC 9 at 11.

<sup>424</sup> *Gillespie v Toplis* (note 418) at 298A.

glossed the Supreme Court of Appeal in 2004<sup>425</sup>. One more thing remains to be noted: it has not always been a *statutory* offence to desecrate a grave. The first such general legislation appeared in the Transvaal in 1925<sup>426</sup>, and prohibited the desecration, destruction and removal of any grave within a burial place, except with the permission of the administrator<sup>427</sup>. (The Transvaal Ordinance has since been assigned to the Province of Gauteng<sup>428</sup>, Northern Province<sup>429</sup>, the Province of North-West<sup>430</sup>, and Mpumalanga<sup>431</sup>). Its provisions would mirrored by the Orange Free State's Burial Place Ordinance of 1952<sup>432</sup> (now assigned to the Free State<sup>433</sup>).

Early Natal Ordinances<sup>434</sup> have been consolidated as the Kwazulu-Natal Cemeteries and Crematoria Act 12 of 1996<sup>435</sup>, which prohibits any disturbance or excavation of a grave or removal of human remains from a grave without the prior written approval of the minister, unless it is required for the purposes of the Inquests Act, or the grave is to be opened for the purposes of interring more human remains therein, or the grave is to be re-used<sup>436</sup>.

In the Cape the first such legislation dates back to 1980<sup>437</sup>, and enacts similar provisions<sup>438</sup>. Furthermore, a municipality in the Cape may undertake the maintenance of

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<sup>425</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 3 All SA 1 at 8d, para [21] citing, without question, the statement made in *Lawsa* vol 20(2) (first reissue) § 324.

<sup>426</sup> Removal of Graves and Dead Bodies Ordinance 7 of 1925 (Province of Transvaal).

<sup>427</sup> A burial place is defined as any burial ground, public or private, in which one or more bodies are or are intended to be buried, interred, cremated or otherwise disposed of. The Ordinance also prohibits the exhumation or disturbance of a body or the remains of a body, except with the written authorisation of the administrator and the observation of precautions prescribed by a medical practitioner appointed by the administrator. Contravention of these provisions is an offence, except where a person temporarily or out of necessity disturbs or causes to be disturbed the remains for the purposes of interring another body in the same grave. See ss 1 and 2.

<sup>428</sup> Proclamation 114 of 17 June 1994.

<sup>429</sup> Proclamation 109 of 17 June 1994.

<sup>430</sup> Proclamation 110 of 16 June 1994.

<sup>431</sup> Proclamation 112 of 16 June 1994.

<sup>432</sup> Ordinance 4 of 1952 (Province of the Orange Free State) ss 1 and 2.

<sup>433</sup> Proclamation 113 of 17 June 1994.

<sup>434</sup> Most importantly, the Cemeteries and Crematoria Ordinance 39 of 1969 (Natal).

<sup>435</sup> The provisions on exhumation and reinterment apply throughout the province, as opposed to for example the provisions on cemeteries, which apply in specified areas of the province. Section 2, ss 20-22.

<sup>437</sup> Exhumations Ordinance 12 of 1980 (Province of the Cape of Good Hope). This now applies to the Eastern Cape (Proclamation 111 of 17 June 1994), Northern Cape (Proclamation 108 of 17 June 1994) and Western Cape (Proclamation 115 of 17 June 1994).

<sup>438</sup> Section 2 prohibits the desecration, destruction and damage of graves in cemeteries, as well as any coffin, urn or other receptacle containing a body but which has not yet been interred, subject to the provisions of any other law relating to the disposal of dead bodies. For the purposes of the Ordinance, a cemetery is any land, public or private, containing graves; a grave is any place, whether wholly or partly above or below the ground and whether public or private, in which a body is permanently interred or intended to be permanently interred, whether in a coffin or other receptacle or not; and the definition also includes any monument, tombstone, cross, inscription, rail, fence, chain, erection or other structure of whatever nature which is part of or associated with a grave (s 1).

a closed or disused cemetery at the request of the religious denomination or other persons interested in it<sup>439</sup>. A cemetery which has been closed or disused for more than 20 years, and of which the council is the cemetery authority, may be reused by the municipality, so long as it is for a purpose that will not desecrate the ground, or any human remains, memorials or tombstones in the cemetery<sup>440</sup>.

### **The Return of *Res Religiosae*? Death and Reform in the Constitutional Era**

Percival Gane noted in his first translation of Voet's 'Things Hallowed, Funeral Expenses and Rights of Burial' that, despite its obscurity, the title was 'of some importance in South Africa on account of the very common practice in farming areas of burying dead persons on the farms where in life they resided'<sup>441</sup>. This can be seen to have been a wise premonition, given cases such *Gillespie v Toplis* and *Dibley v Furter*. But one wonders whether Gane had foreseen the types of cases that would arise in the context of land reform following the establishment of constitutional democracy. The pre-constitutional cases diminished the importance of the Roman authorities on *res religiosae* cited by Voet. In the 21<sup>st</sup> century the law seems to look at the burial place in a different light.

Since 1994, a series of cases has developed regarding the significance of burial places and burial rights in the context of land reform. At first these cases reinforced the sanctity which property rights and commercial transactions have enjoyed in our law vis-à-vis the inviolability of the grave. The first such case was *Serole and Another v Pienaar*<sup>442</sup>, in which the Land Claims Court was asked to consider whether occupiers of land, as defined by the Extension of Security of Tenure Act<sup>443</sup> (ESTA), were granted by that Act a right to bury on the land on which they were occupiers.

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Section 3(1) of the Ordinance regulates exhumations, and provides that no person may exhume, disturb, remove or reinter any body, or cause or permit a body to be exhumed, disturbed, removed or reinterred, without the written approval of the MEC and in accordance with the conditions imposed by the MEC or by a medical practitioner appointed by the MEC. However bodies may be exhumed, disturbed, removed or reinterred in consequence of, in the course of, or for the purposes of the interment of another body by or on behalf or with the permission of the person or entity which controls and manages the cemetery.

<sup>439</sup> Municipal Ordinance 20 of 1974 (Cape of Good Hope) s 168.

<sup>440</sup> s 169. The municipality may also remove the human remains, memorials and tombstones of a cemetery or portion thereof to another cemetery, if the cemetery has been closed or disused for more than 20 years, and the council is the cemetery authority. In this case all rights, powers and privileges in respect of the cemetery cease. See ss 169 (2) and (3).

<sup>441</sup> Voet *Commentaries* XI 7, translator's note at 728.

<sup>442</sup> 2000 (1) SA 328 (LCC).

<sup>443</sup> Act 62 of 1997 (referred to hereafter as the ESTA).

The ESTA is part of the series of Acts promulgated after 1994, including the Restitution of Land Rights Act<sup>444</sup> and the Land Reform (Labour Tenants) Act<sup>445</sup>, that set out to achieve some degree of land reform and socio-economic change. The ESTA was enacted with the purpose of alleviating the hardship faced by rural occupiers of land, who had previously faced unfair evictions and general insecurity of tenure of the land on which they resided<sup>446</sup>. The Act therefore sets out the rights and duties of occupier<sup>447</sup> and owner, both of whom enjoy the rights to human dignity; freedom and security of the person; privacy; freedom of religion, belief and opinion and freedom of expression; freedom of association; and freedom of movement<sup>448</sup>. The Act also grants to an occupier a number of specific rights aimed at securing occupancy<sup>449</sup>, including the right to security of tenure<sup>450</sup> and such rights as the right to receive visitors<sup>451</sup> and have a family life<sup>452</sup>, the right not to be denied or deprived of access to water<sup>453</sup> or educational or health services<sup>454</sup>, and the right to maintain and visit family graves on the land<sup>455</sup>.

In *Serole* the Court was asked to read a new right in to the Act, one which would ensure that a family could bury their dead on the farm on which they were occupiers. Both the deceased and the father of the deceased in this case had been employed by the property owner, until their dismissal two years earlier. The owner, learning of their plans to bury the deceased family member, obtained an interdict from the magistrate's court preventing them from doing so. The family of the deceased now brought the order on review before the Land Claims Court<sup>456</sup>.

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<sup>444</sup> Act 22 of 1994.

<sup>445</sup> Act 3 of 1996.

<sup>446</sup> Preamble to the ESTA.

<sup>447</sup> An occupier is any 'person residing on land which belongs to another person', who has since 4 February 1997 had consent of the owner or another right in law to reside on the land, but excluding any person who uses the land for industrial, mining, commercial or commercial farming purposes or any person earning over R5000 a month (s 1(1) rw para 2 of Regulation R1 632 *Government Gazette* 19587, 18 December 1998). Until the ESTA's amendment in 2001, the definition excluded labour tenants as defined by the Land Reform (Labour Tenants) Act (ESTA s 1(1)(a) deleted by s 6(a) of the Land Affairs General Amendment Act 51 of 2001).

<sup>448</sup> s 5.

<sup>449</sup> s 6.

<sup>450</sup> s 6(2)(a).

<sup>451</sup> s 6(2)(b).

<sup>452</sup> s 6(2)(d).

<sup>453</sup> s 6(2)(e).

<sup>454</sup> s 6(2)(f).

<sup>455</sup> s 6(4).

<sup>456</sup> It is quite possible that the Land Claims Court's decision on this matter should be regarded as *obiter*: the magistrate had granted the interdict as a rule *nisi*, and since the order was not final the applicants were told they should have exhausted their remedies in that court before approaching a superior Court. See 333E-334B, para [11].

The Court held that granting a right of burial would be an intrusion upon the property owner's common law rights that, one that was not justified by the Act or by its purpose<sup>457</sup>. It reasoned that the Act served to protect an occupier's rights of occupation, rather than real rights in the land. Yet the right to establish a grave is not such a right of occupation, since it 'could well amount to the granting of a servitude over that property. The owner of the property and all successors-in-title will, for as long as the grave exists, have to respect the grave, not cultivate over it, and allow family members to visit and maintain it'<sup>458</sup>. An agreement between occupier and owner that the land could be used for burial purposes would be protected by Act, which protects an occupier's 'access to such services agreed upon with the owner or person in charge, whether expressly or tacitly'<sup>459</sup>. But here the Court found no proof of such a tacit agreement, despite the fact that the great-grandmother of the deceased and other ancestral relatives had been buried there<sup>460</sup>.

The same question came before the Supreme Court of Appeal, though in a more elaborate form, in *Nkosi and Another v Bührmann*<sup>461</sup>. The occupier of a farm had again argued that the Extension of Security of Tenure Act protects the right of an occupier to use the land on which she resides for the purposes of burial. Here the argument was that the Act's provision that the occupier has the right to 'reside on and *use* the land' on which she has resided<sup>462</sup> is given content by the fundamental rights of the occupier specified in s 5 of the Act<sup>463</sup>. One of these rights is the right to freedom of religion<sup>464</sup>, which has imported the constitutional right of freedom of religion<sup>465</sup> into the Act in order to ensure that occupiers could use the constitutional right 'not just in the general or in the abstract, but effectively and in the very setting where they live and where they pursue their essential livelihood'<sup>466</sup>. This was to be guided by the Act's recognition that '[b]asic to the use of land by rural people is the association between the land, the family and the

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<sup>457</sup> At 335F, para [16].

<sup>458</sup> At 335D-E, para [16].

<sup>459</sup> ESTA s 6(1).

<sup>460</sup> At 336B-D, para [17].

<sup>461</sup> 2002 (1) SA 372 (SCA); appeal from *Bührmann v Nkosi and Another* 2000 (1) SA 1145 (T), also reported as [1999] 4 All SA 331 (A).

<sup>462</sup> s 6(1), emphasis added.

<sup>463</sup> at 383C-D, para [32].

<sup>464</sup> s 5(d).

<sup>465</sup> s 15(1) of the Constitution.

<sup>466</sup> 383C-D, para [32].

exercise of religious rights<sup>467</sup>, specifically in the Act's provision that anyone has the right to visit and maintain family graves situated on the land of another, subject only to reasonable conditions imposed by the owner or person in charge of the land so as to safeguard life or property or prevent the undue disruption of work<sup>468</sup>.

The Court rejected this argument, basing its decision instead upon a belief that the burial would diminish the value of the property and prejudice the owner's rights of ownership. Thus it held that the right to practise one's religion does not allow one to diminish the patrimony of another through appropriation of their property<sup>469</sup>. The Court, having briefly analysed the common law position with regard to the nature of burial places and their implication for property, found that they were onerous on the rights of a property holder<sup>470</sup>. The effect of a grave, 'practically and legally', was to permanently diminish the rights of a property owner: '[i]f a grave site could be taken by an occupier as of right this would amount to an appropriation'<sup>471</sup>. Thus the right to freedom of religion was held to contain 'internal limits'<sup>472</sup> such that it does not entitle one to bury one's dead on another's property without permission, even if it is a right belonging to all citizens to bury their dead in accordance with their religious practices<sup>473</sup>.

As Van Der Walt would remark, the constitutional analysis employed by the SCA neglected to engage in limitations analysis of the infringement of the property right, instead interpreting the ESTA on the assumption that 'the intention of the legislature could not have been to authorise such a limitation [of ownership]' and therefore did not intend the Act to imply a burial right on the part of the occupier<sup>474</sup>.

It became apparent that the courts had been entirely wrong in their assumptions then, when in 2001, and in response to *Serole* and *Nkosi*<sup>475</sup>, the legislature changed the legal

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<sup>467</sup> 383D-E, para [32].

<sup>468</sup> s 6(4).

<sup>469</sup> 386D-F, para [45].

<sup>470</sup> 384G-J, paras [36]-[38]. The Court looked specifically at the criminal liability attaching to the violation of tombs, and the possibility that someone other than an owner may have the right to visit a grave by virtue of servitural right or s 6(4) of the ESTA.

<sup>471</sup> 384J, para 38. In this the Court echoed the reasoning used in *Bührmann v Nkosi and Another* [1999] 4 All SA 331 (A) at 347-349.

<sup>472</sup> 387I, para [49]; cf A J van der Walt 'Property rights v religious rights: *Bührmann v Nkosi*' 2002 (3) *Stellenbosch Law Review* 394 at 413, who suggests that the right to property should also be given such internal limits.

<sup>473</sup> 387B, para [47].

<sup>474</sup> Van Der Walt (note 472) at 412.

<sup>475</sup> per *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) at 329i, para [17] and 332h-333a, para [27].

position by amending the ESTA<sup>476</sup>. Section 6(2)(dA) of the ESTA now grants an occupier the right—

to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists.

The Act defines 'established practice' as—

A practice in terms of which the owner or person in charge or his or her predecessor in title routinely gave permission to people residing on the land to bury deceased members of their family on that land in accordance with their religion or cultural belief<sup>477</sup>.

In addition, the amendment inserted section 6(5), which grants to the family members of a deceased long-term occupier<sup>478</sup> a right to bury the deceased on the land on which he or she was an occupier.

Subsequently the question of a burial by occupiers in terms of the ESTA was again raised before the Land Claims Court in *Nhlabathi and Others v Fick*<sup>479</sup>. In this case the application succeeded because of the change in law, and despite a battery of factual and legal issues raised by the property owner in denial of the occupiers' right. Only the objection most relevant to our discussion will be considered here: this concerned the constitutionality of s 6(2)(dA) of the ESTA in the light of the Constitutional protection of property.

Section 25 of the Constitution of the Republic of South Africa Act 108 of 1996, provides, *inter alia*, that:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application
  - (a) for a public purpose or in the public interest; and

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<sup>476</sup> In terms of the Land Affairs General Amendment Act Act 51 of 2001.

<sup>477</sup> s 1(1).

<sup>478</sup> long-term occupier as defined by s 8(4), that is, an occupier:

who has resided on the land in question or any other land belonging to the owner for 10 years and—

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge ...

<sup>479</sup> [2003] 2 All SA 323 (LCC).

- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

The Court agreed that the establishment of a grave by an occupier would constitute a deprivation of property, but pointed out that the deprivation was now in terms of a law of general application<sup>480</sup>. It also could not be considered arbitrary because of the way in which the right is couched: like the other s 6(2) rights it must be ‘balanced with the right of the owner or person in charge’. An established practice must be shown to exist, which must have originated from initial agreement between occupier and owner; the establishment of a grave will ‘in most cases, constitute a relatively minor intrusion into the landowner’s property rights’, and the cultural or religious significance of burial would in most instances justify the deprivation<sup>481</sup>.

The Court assumed that the establishment of a grave might be deemed expropriation in terms of s 25(2) of the Constitution since, after *Serole*, this might constitute imposition of a servitude over the land<sup>482</sup>. That s 6(2)(dA) of the ESTA provides for no compensation could be justified in terms of the limitations analysis<sup>483</sup>. What favoured a finding that the limitation of the property right was justified here was not only ‘the nation’s commitment to land reform’<sup>484</sup>, but that meeting the requirements of s 6(2)(dA) entailed a balancing, so that any expropriation allowed by the section would conform with the limitations analysis<sup>485</sup>.

The only thing that should attract our interest still is the Court’s interpretation of the requirement of an ‘established practice’. Two members of the family had previously been buried on the farm, but the owner alleged that these had been ‘special indulgences’, and thus did not constitute an agreement between him and the occupiers. The court disagreed, and here considered it important that other families had been allowed to bury their dead on the farm; for an established practice had to ‘exist in respect of *the land* and not in respect of a particular family or occupier’<sup>486</sup>. Although the smallest *dictum*, these words indicate the implications this most recent shift in the law might have; for a burial place is

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<sup>480</sup> at 333g-h, para [29].

<sup>481</sup> at 334f-335a, para [31].

<sup>482</sup> at 335c-d, para [32], citing *Serole* (note 442) para [16].

<sup>483</sup> i.e. in terms of s 36 of the Constitution; see 335e-336e, paras [33]-[34].

<sup>484</sup> at 336d-e, para [34].

<sup>485</sup> at 337a-b, para [35].

<sup>486</sup> [42] 339c-d, emphasis found.

once again able to make a place *religiosus* (or its contemporary constitutional equivalent). No longer, following *Dibley* or *Gillespie*, is a servitural or contractual right necessary, but the burials of (any) occupier can institute an ‘established tradition’ in terms of a piece of land.

There is one more case of significance for our exploration of the survival of the *res religiosa* and its equivalent functions in the law. *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*<sup>487</sup> ostensibly concerned a question of administrative law, but was decided in a way which again seems to indicate a new direction in the way that law imagines the hallowedness of the burial place.

Oudekraal is the name of an area on the Cape’s Atlantic Seaboard, adjacent to Camps Bay and at the foot of the Twelve Apostles mountains. A short drive from the central business district, it is a property developer’s paradise, largely undeveloped and of unparalleled beauty. Yet it adjoins the sensitive ecosystem of the Table Mountain National Park, and is the site of Muslim kramats dating from the origins of the city. On the site, the Supreme Court of Appeal noted, were to be found twenty graves of great significance to Cape Town’s Muslim community, and including two kramats (graves of the enlightened). If the site can be distinguished from Prestwich Place and some of the other sites mentioned in Chapter 1, then it is through its great contemporary significance and popularity. The Court would describe the graves thus:

They have special religious and cultural significance to the members of Cape Town’s Muslim community. Two of the graves are kramats. A kramat is the grave of somebody who, among adherents of the Islamic faith, is regarded as having attained, through conspicuous piety, an enlightened spiritual situation. Such person having thus been a friend of God, the spirit of God is to be found at the site.

The kramats and other graves on the land are also important cultural symbols in the Muslim community of its history in the Western Cape going back to the era of slavery. Many of the graves are those of escaped slaves and some of the kramats are burial sites of spiritual leaders of the community during those times. It is believed by followers of the faith that by spending time at these sites they can enhance their own spirituality. One of the kramats on the land encompassed by the approved township is that of Sayed Jaffer.

Thousands visit it each year. Moreover, the indications are that the kramats generally

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<sup>487</sup> [2004] 3 All SA 1 also reported as 2004 (6) SA 222 (SCA); on appeal from *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2002 (6) SA 573 (C), also reported as [2002] 3 All SA 450 (C).

have been visited regularly since before the end of the nineteenth century. In the circumstances, access to the kramats is of great importance to the Muslim people of Cape Town.<sup>488</sup>

The appellant, Oudekraal Estates, owned this area, and its predecessor-in-title had gained approval for its laying out as a township in terms of the Townships Ordinance of 1934<sup>489</sup>, with notification of the approval being given in the *Provincial Gazette* in 1962<sup>490</sup>. The appellant had bought the land in 1965, but only in 1996 did it apply to the Cape Metropolitan Council for approval of an engineering services plan. The local authority's key contention had been that the development rights had lapsed, since two requirements of the Townships Ordinance had not been complied with timeously. In each case the Administrator had granted an extension of time for compliance with the relevant requirement, but only after the time originally stipulated for compliance had expired<sup>491</sup>.

The Supreme Court of Appeal took a different approach, and decided to look not at the validity of the extensions of time granted by the Administrator, but at the grant of the application to establish the township itself<sup>492</sup>. Here the existence of the graves was of central importance. The general plan submitted by the previous owner did not show the existence or location of the graves. Minutes of a meeting held in 1955 reveal that the Townships Board had inspected the site at that time, but no mention of the graves or kramats were made in the minutes, even though the burial places are visible features of the landscape. Since the Court did not have access to the entire record of the Board's decision making, it could not know whether the existence of the graves had been taken into account or not.

Yet the Court had to conclude that the authorities were either ignorant of the existence of the graves and kramats, or had else ignored them<sup>493</sup>. It was more likely that the officials were not aware of the graves, since they would have been aware that violation of graves was an offence at common law<sup>494</sup>. Even 'on pre-constitutional principles', noted the Court, the existence of religious and cultural sites of significance

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<sup>488</sup> at 6f-l, paras [14]-[15].

<sup>489</sup> 33 of 1934 (Cape Of Good Hope).

<sup>490</sup> at 4a-b, para [2].

<sup>491</sup> at 4b-g, paras [3]-[4].

<sup>492</sup> at 6d-f, para [13].

<sup>493</sup> at 8b-c, para [20].

<sup>494</sup> at 8d, para [21].

should have been taken into account by the Administrator<sup>495</sup>. Whether he had failed to do so on account of ignorance or out of error, his decision to lend approval to the township scheme now had to be considered invalid<sup>496</sup>; it was in addition *ultra vires* because ‘it permitted subdivisions and land use in criminal disregard for the graves and kramats’<sup>497</sup>. Any of the proposed plans for development would have, without more, violated the grave and kramats and thereby committed the common law offence.

This did not mean that the local authority was allowed to disregard the Administrator’s decision: until set aside by judicial review<sup>498</sup> the decision existed in fact and had legal consequences, in terms of the principles of administrative law<sup>499</sup>. The local authority was thus possibly bound to consider plans presented by the developer, to the extent that it had a legal duty to do so, and had to carry out any other statutory obligations flowing from the Administrator’s approval<sup>500</sup>. Yet there were further reasons why the developer could not develop the land in the way in which he had planned. The one that is relevant to our discussion is the simple consideration that ‘exploitation of property rights is always constrained by such laws as exist at the time that they are sought to be implemented’<sup>501</sup>. In this case, the Court stated, any present day development would be constrained not only by the common law prohibition of violation of tombs but the constitutional protection of cultural and religious sites<sup>502</sup>, as well as the provisions of the National Heritage Resources Act that protect burial sites<sup>503</sup>.

### **The Useful Dead: From Relic to Resource**

It is at last time for a brief discussion of the law which has been central to the events following the unearthing of the Prestwich Place burials. The NHRA, like much other legislation of the past ten years, is regarded as breaking with its equivalents of the past.

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<sup>495</sup> at 9b-c, para [24].

<sup>496</sup> at 9d, para [25].

<sup>497</sup> at 9d-e, para [25].

<sup>498</sup> The present case arose from appellant’s application for a declaratory order with regard to its rights; and there is no indication that the City Council and other respondents had at that time sought judicial review of the Administrator’s decision.

<sup>499</sup> at 9g-h, para [26] *et seq.*

<sup>500</sup> at 15b-c, para [40].

<sup>501</sup> at 15e-f, para [42].

<sup>502</sup> s 31(1) of the Constitution provides that:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—  
(a) to enjoy their culture, practise their religion and use their language; and  
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

<sup>503</sup> s 36(3) of the NHRA.

Yet it is necessary to begin this discussion with a brief reminder of this past, specifically the history of the anthropometric gaze discussed already in Chapter 1. It was noted there that it was due to the competitiveness of the trade in skeletal materials and a sort of protectionism for South African scientific endeavour, rather than the scientists' grisly practices in relation to Khoisan burial sites and bodies, that the Bushman-Relics Protection Act was enacted in 1911<sup>504</sup>. This was 'the earliest statute dealing with the subject', since there had been no such legislation pre-Union<sup>505</sup>. The motivations of the Act were evident in its language; it protected aboriginal paintings and sites of archaeological and anthropological interest, including burial grounds and skeletal remains as 'relics'.

The Bushman-Relics Protection Act would initiate a series of statutes and their amendments which aimed at protecting South Africa's natural and cultural heritage: the Natural and Historical Monuments Act 6 of 1923, the Natural and Historical Monuments, Relics and Antiques Act 4 of 1934 (which consolidated the Bushman-Relics Protection Act and the National and Historical Monuments Act), and finally the NHRA's predecessor, the National Monuments Act 28 of 1969.

As far as burial sites were concerned, the National Monuments Act of 1969 automatically protected the 'anthropological or archaeological contents of the graves' used by Bushmen or any other people who inhabited or visited the Republic before the settlement of Europeans at the Cape, alongside other Bushman relics and artifacts. It was an offence under the Act to destroy, damage, excavate, alter, remove from its original site or export from the Republic such objects without a permit<sup>506</sup>. Removal of such objects could take place without a permit where in the normal course of mining, engineering or agricultural activities; however anything found would have to be immediately reported to a cultural institution by the finder or the owner of the land<sup>507</sup>. In common law such found objects were regarded as *res nullius*, and ownership would vest in the finder; this principle was not affected by the Act<sup>508</sup>.

The National Monuments Act also protected war graves after amendment in 1981<sup>509</sup>; previously they had been provided for by separate statutes. In fact the first legislation

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<sup>504</sup> Act 22 of 1911.

<sup>505</sup> F G Richings 'Historical Monuments, Wrecks and War Graves' in *Lawsa* vol 10(2) (first reissue) § 271.

<sup>506</sup> s 12(2A).

<sup>507</sup> s 3.

<sup>508</sup> s 12(3)(b).

<sup>509</sup> National Monuments Amendment Act 13 of 1981.

protecting war graves had been as early as 1898, and provided for the maintenance of graves of officers and those who had fallen during duty to the state<sup>510</sup>. After the South African War of 1899-1902, the protection and maintenance of war graves was further provided for by various provincial enactments<sup>511</sup>. However in 1956 the Department of Public Works established a war graves commission to oversee the protection and maintenance of war graves at a national level<sup>512</sup>. The commission became a statutory body with its establishment by the War Graves Act of 1967<sup>513</sup>.

The 1981 National Monuments Amendment Act repealed the War Graves Act and included the provisions relating to war graves in the National Monuments Act, which then became known as the War Graves and National Monuments Act. As Steven Townsend has noted, there were 11 acts and amendments on the subjects of monuments and war graves between 1967 and 1981<sup>514</sup>. This flurry of legislative activity, according to Townsend, ‘demonstrate[s] the apartheid establishment’s pre-occupation with heritage and its management in this period after South Africa’s expulsion from the United Nations and the Commonwealth and its deepening isolation’<sup>515</sup>.

Indeed, the 1981 amalgamation of legislation governing war graves and national monuments established two separate committees for graves, the *Burgergraftekomitee* and the British War Graves Committee<sup>516</sup>, tasked with protecting the graves of those who had died in service in the War of 1899-1901, 19<sup>th</sup> century rebellions and the Great Trek of 1835-54<sup>517</sup>. Townsend notes that ‘[t]he need for two committees ... is revealing; and it

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<sup>510</sup> First Volksraad Resolution of the Zuid-Afrikaansche Republiek (7 November 1898).

<sup>511</sup> Cape Imperial Colonial and Republican Forces Burial Grounds Act 14 of 1900; Natal Act 19 of 1901 (military burial grounds); Transvaal Imperial Colonial and Republican Forces Burial Grounds Proclamation 20 of 1902; Imperial Colonial and Republican Forces Burial Grounds Ordinance 5 of 1903 (OFS). The Orange Free State also established a statutory trust fund for the maintenance of such graves – Maintenance of Graves Trust Fund Ord 24 of 1905 (Orange Free State).

<sup>512</sup> *Lawsa* vol 10(2) (first reissue) § 287.

<sup>513</sup> Act 34 of 1967.

<sup>514</sup> The National Monuments Act was amended in 1970, 1971, 1979 and 1981, and also by the Expropriation Act of 1975 and the Finance Act of 1980, and in 1986.

<sup>515</sup> Stephen Stewart Townsend *Development rights and conservation constraints. Urban conservation-oriented controls in the city centre of Cape Town* (DPhil thesis, University of Cape Town, 2003) at 62.

<sup>516</sup> s 3A of the War Graves and National Monuments Act 28 of 1969.

<sup>517</sup> The committees were tasked with identifying burial grounds and graves in any area of the Republic of persons who had died as a result of wars other than the world wars and rebellions within the area now included in the Republic (s 3A(2)(a)); as well as burial grounds and graves in the Republic of members of pre-Union garrison troops (s 3A(2)(b)), of Voortrekkers (s 3A(2)(c)), and of those who had been exiled during the 1899-1902 war (s 3A(2)(d)) This would enable the council to act towards preserving the graves and burial grounds. The committees would also report on whether it was desirable to declare them monuments. Such graves and burial grounds could not be damaged, destroyed or altered without a permit (s 12(2B)(e)).

The council could exhume and reinter the remains of a person buried in a war grave (for certain purposes such as moving graves to a central point for more convenient protection) (s 5(1)(cB)). However

reflects and emphasized the symbolic value of the graves to a divided white establishment during this period at the nadir of South Africa's international isolation'<sup>518</sup>. Perhaps it is not too bold then to say that the hallowedness of the *res religiosa* had been retained in some sense in the language and functions of these statutory provisions. Yet religiosity no longer attached to the grave as protector of the human body; rather the shift from the Roman *res divini iuris* and the consecrated thing of the Catholic Church had found in *nationalism* its new hallowed object. The nation was also consecrated by that other heritage object, the relic of the indigenous body, whose statutory reification served to place South Africa on the scientific map<sup>519</sup>.

This was not the end of statutory protection. The Commonwealth War Graves Act was enacted in 1992 in order to protect graves of members of the armed forces who died during World War I and World War II<sup>520</sup>. But it is the National Heritage Resources Act of 1999 (the NHRA), the most recent heritage legislation, having commenced operation on 1 April 2000, that will occupy us for the rest of this discussion. Although the Act is relevant in its entirety to much of what has gone before, there will only be an opportunity to discuss the general aims of the Act and the specific provisions regarding burials places.

The NHRA sets out to manage 'the national estate', establishing the South African Heritage Resource Agency to co-ordinate and promote the management of heritage at a national level. It is a renewal of heritage discourse, firmly recognising its connection to transition and the memory of past, as well as goals of reconciliation and recognition of diverse cultural identities. Indeed, the preamble proclaims:

Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character.

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the council could not do so where the owner of land was a descendant of the person buried there and objected to the reinterment (s5(4A)).

<sup>518</sup> Townsend (note 515) at 62-3.

<sup>519</sup> Legassick and Rassool (note 75) *passim*.

<sup>520</sup> Act 8 of 1992. The Commonwealth War Graves Act 8 of 1992 prohibits the desecration, damage and destruction of graves, tombstones, monuments and memorials connected with the burials of members of the commonwealth armed forces who died in the First and Second World War (s 1 and 2). The owner of land upon which such a grave is situated, nor any other body in control of the burial place, may disinter or alter the grave, unless three months' notice were given to the commission (s 3(1)). The grave may not be removed except by the commission or with the written permission of the commission (s 3(4)).

Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathise with the experience of others. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into our rich oral traditions and customs.<sup>521</sup>

The national estate is regarded as including ‘those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations’; these resources fall within the sphere of operations of the heritage resource authorities<sup>522</sup>. A variety of objects and sites may be included in the national estate, including places to which oral traditions are attached or which are associated with living heritage<sup>523</sup>, archaeological and palaeontological sites<sup>524</sup>, graves and burial grounds<sup>525</sup>, sites of significance relating to the history of slavery in South Africa<sup>526</sup>, and archaeological objects and material recovered from the soil or waters of South Africa<sup>527</sup>.

An archaeological site or object includes, inter alia, ‘material remains resulting from human activity which are in a state of disuse and are in or on land and which are older than 100 years, including artefacts, human and hominid remains and artificial features and structures’<sup>528</sup>. Graves and burial grounds include:

- (i) ancestral graves;
- (ii) royal graves and graves of traditional leaders;
- (iii) graves of victims of conflict;
- (iv) graves of individuals designated by the Minister by notice in the *Gazette*;
- (v) historical graves and cemeteries; and

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<sup>521</sup> Preamble to the National Heritage Resources Act 25 of 1999.

<sup>522</sup> s 3(1)

<sup>523</sup> s 3(2)(b). In terms of s 2, ‘living heritage’ refers to intangible cultural heritage, and may include:

- (a) cultural tradition;
- (b) oral history;
- (c) performance;
- (d) ritual;
- (e) popular memory;
- (f) skills and techniques;
- (g) indigenous knowledge systems; and
- (h) the holistic approach to nature, society and social relationships.

<sup>524</sup> s 3(2)(f).

<sup>525</sup> s 3(2)(g).

<sup>526</sup> s 3(2)(h).

<sup>527</sup> s 3(2)(i)(l).

<sup>528</sup> s 2.

- (vi) other human remains which are not covered in terms of the Human Tissue Act, 1983<sup>529</sup>.

Clearly these definitions allow the delineation of the national estate to encompass a great many objects; in the context of human remains alone it encompasses all remains except those that have been donated for the advancement of medicine as provided for in terms of the Human Tissue Act<sup>530</sup>. Section 3(2) sets out to narrow this open-ended definition, ‘without limiting the generality’ of the preceding subsections, by establishing that a place or object must have cultural significance (that is, ‘aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance’<sup>531</sup>) or other special value because of:

- (a) its importance in the community, or pattern of South Africa’s history;
- (b) its possession of uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage;
- (c) its potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage;
- (d) its importance in demonstrating the principal characteristics of a particular class of South Africa’s natural or cultural places or objects;
- (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
- (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;
- (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- (h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa;
- (i) sites of significance relating to the history of slavery in South Africa.<sup>532</sup>

Section 5 of the act sets out general principles for heritage resources management to be recognised by persons and bodies who act in terms of the legislation. The four principles are that:

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<sup>529</sup> s 3(2)(g).

<sup>530</sup> Act 65 of 1983.

<sup>531</sup> s 2.

<sup>532</sup> s 3(3).

- (a) Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival;
- (b) every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;
- (c) heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity; and
- (d) heritage resources management must guard against the use of heritage for sectarian purposes or political gain<sup>533</sup>.

Some additional principles are recognised in the rest of s 5: heritage is ‘an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management’<sup>534</sup>. Heritage also plays an important role in research, education and tourism and ‘must be developed and presented for these purposes in a way that that ensures dignity and respect for cultural values’<sup>535</sup>. It would seem that these two principles would come into conflict if not for the subsection’s qualification that the latter emphasis on research, education and tourism must accord with the dignity and respect of cultural values. Thus it could be argued that ‘the right of affected communities to be consulted and to participate in [heritage] management’ limits the latter emphasis on research, education and tourism.

Section 5 also sets out that the integration of heritage conservation with urban and rural planning and social and economic development must be promoted through policy, administrative planning and legislation<sup>536</sup>. Finally, the identification, assessment and management of heritage resources must:

- (a) take account of all relevant cultural values and indigenous knowledge systems;
- (b) take account of material or cultural heritage value and involve the least possible alteration or loss of it;
- (c) promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;

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<sup>533</sup> s 5(1).

<sup>534</sup> s 5(4).

<sup>535</sup> s 5(5).

<sup>536</sup> s 5(6).

- (d) contribute to social and economic development;
- (e) safeguard the options of present and future generations; and
- (f) be fully researched, documented and recorded<sup>537</sup>.

When any body responsible for the national estate makes a decision (a) to formally protect a heritage resource by notice in the *Government Gazette*; (b) to issue or to not issue a permit; or (c) in terms of an appeal, the decision must be consistent with the section 5 principles, as well as any further principles prescribed<sup>538</sup> by regulation by a heritage resource authority<sup>539</sup>.

There are a number of ways in which heritage resources are protected generally<sup>540</sup>. The Act provides for the declaration of places as national heritage sites and provincial heritage sites<sup>541</sup>, and for the designation of certain surrounding areas as protected areas<sup>542</sup>. The Act also allows for provisional protection of areas and resources<sup>543</sup>, and it requires the compilation of provincial registers of heritage resources, which must then be protected by by-law<sup>544</sup>. Such protection however does not negate the Act's specific protections of archaeological and palaeontological sites and burials<sup>545</sup>. There is provision also for places of environmental or cultural interest to be designated as heritage areas by a planning authority; by a provincial heritage resources authority; or by a municipality which has consulted the provincial heritage resources authority, owners of property in the area and affected communities<sup>546</sup>. Such a heritage area must be protected by municipal by-law or the municipality's planning scheme<sup>547</sup>.

There are also provisions for specific protection<sup>548</sup>. Section 36 is most relevant to our concerns, dealing specifically with graves and burial grounds. (As discussed in Chapter 1, this is the law that was applied after the unearthing of the Prestwich Place burials). In terms of this provision SAHRA must conserve and care for graves and burial grounds

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<sup>537</sup> s 5(7).

<sup>538</sup> s 6.

<sup>539</sup> s 10(1) and (2)(a).

<sup>540</sup> See generally Chap II of the Act.

<sup>541</sup> s 27.

<sup>542</sup> s 28.

<sup>543</sup> s 29.

<sup>544</sup> s 30.

<sup>545</sup> s 30(14).

<sup>546</sup> s 31.

<sup>547</sup> s 30(7).

<sup>548</sup> See generally Chap II of the Act.

that are not the responsibility of any other authority<sup>549</sup>. Taking over from the old war graves authorities (but not the commonwealth war graves commission), SAHRA is mandated to identify ‘graves of the victims of conflict’ as well as ‘any other graves which it deems to be of cultural significance’<sup>550</sup>. (Recall the Act’s expansive definition of ‘cultural significance’ as ‘aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance’<sup>551</sup>). SAHRA may erect and must maintain memorials associated with such graves, if they are not the responsibility of another authority.

As the idea of nationhood has changed, so has the set of the graves that are hallowed. SAHRA had been given a five year period, beginning on 1 April 2000, to compile lists of graves of those who, in connection with the liberation struggle, ‘died in exile or as a result of the action of State security forces or *agents provocateur*’; and which it believes should be protected<sup>552</sup>. SAHRA must also assist in the identification of graves of victims of conflict associated with the liberation struggle in other countries, and may enter into negotiations to reinter such persons’ remains in the nation’s capital<sup>553</sup>.

Specific graves are protected from damage, destruction, and disinterment without the permission of SAHRA or a provincial heritage resource authority<sup>554</sup>; these are the graves of victims of conflict<sup>555</sup> and graves or burial grounds older than 60 years and situated outside of formal cemeteries<sup>556</sup>. A permit to damage or destroy such a grave may only be issued if the heritage resource authority is satisfied that the applicant has made satisfactory arrangements for exhumation and reinterment of the contents of the grave at his own cost and in accordance with any further relevant regulations<sup>557</sup>. Furthermore, a permit may only be issued if the applicant has—

- (a) made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and

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<sup>549</sup> s 36(1).

<sup>550</sup> s 36(2) rw s 60.

<sup>551</sup> s 2.

<sup>552</sup> s 36(7).

<sup>553</sup> s 36(9).

<sup>554</sup> Section 23 of the NHRA allows the MEC responsible for cultural matters in a province to establish a provincial heritage resources authority for the management of heritage resources in the province. The provisions of provincial legislation that establishes a provincial heritage resources authority and provides for the management of provincial heritage resources take precedence over equivalent provisions of the NHRA, as far as they relate to provincial areas of competence (s 57). In the Western Cape, this body is Heritage Western Cape (see Provincial Notice 173/2003 of 27 May 2003, *Provincial Gazette* 6017).

<sup>555</sup> s 36(3)(a).

<sup>556</sup> s 36(3)(b).

<sup>557</sup> s 36(4).

(b) reached agreements with such communities and individuals regarding the future of such grave or burial ground.<sup>558</sup>

The section provides for a specific procedure to be complied with in the event of discoveries of unknown graves during the course of development or other activities, subject to the applicability of any other law. The activity that had been engaged in must cease, and the discovery must be reported to SAHRA or the responsible<sup>559</sup> provincial or local heritage resources authority<sup>560</sup>. The heritage resources authority, in co-operation the South African Police Service and in accordance with relevant regulations, must investigate whether a grave is protected in terms of the Act or is of significance to any community<sup>561</sup>. If the grave is protected or significant in this way, the heritage resource authority must assist ‘any person who or community which is a direct descendant’ to make arrangements for exhumation and reinterment of the contents of the grave; if no such person or community is available, the authority may make any arrangements it deems fit<sup>562</sup>.

Finally, it should be noted that the language of indigenous bodies as ‘relics’ has been relinquished, if not its functions. Certain human remains are also protected by the Act as ‘archaeological’, the definition of which includes ‘material remains resulting from human activity which are in a state of disuse and are in or on land and which are older than 100 years, including ... human and hominid remains ...’<sup>563</sup>. Such remains are the responsibility of the provincial heritage authority rather than SAHRA<sup>564</sup>, and ownership of them vests in the State<sup>565</sup>. The provincial heritage resource authority must ensure that

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<sup>558</sup> s 36(5).

<sup>559</sup> The Act outlines a three-tier system for the grading of heritage resources. Grade I resources have such exceptional qualities that they are of national significance, Grade II resources are significant within a province or region, and Grade III encompasses other resources worthy of conservation (s 7(1)). SAHRA is responsible for identifying and managing Grade I resources; provincial heritage resource authorities are responsible in this way for Grade II resources, and municipalities for Grade III resources (s 9). It seems that a resource can be protected at any level, from the wording of s 9(5), which notes that for purposes of requesting a permit or other authorisation ‘a formal protection by a heritage resources authority at a higher level takes precedence over any formal or general protection at a local level, without prejudice to any incentives offered at any level’. This three-tier grading system is to be established by regulation by SAHRA, in consultation with the Minister and provincial MECs (s 7). For the purposes of determining what a ‘relevant’ heritage resource authority is within the meaning of the noted section, this system of grading would be relevant; it may also be relevant whether an area has been declared as a national heritage site or provincial heritage site in terms of s 27.

<sup>560</sup> s 36(6).

<sup>561</sup> s 36(6)(a).

<sup>562</sup> s 36(6)(b).

<sup>563</sup> s 2.

<sup>564</sup> s 35(1).

<sup>565</sup> s 35(2).

the object is lodged with a museum or other public institution that has a collection policy acceptable to the authority. The authority may furthermore establish terms and conditions for the conservation of the object<sup>566</sup>. It seems reasonable to suggest here that these provisions do not apply to remains exhumed after accidental discovery and in terms of the s 36 procedure described above, since these remains are to be dealt with in terms of arrangements made by the heritage authority and descendants in terms of s 36(6)(b). On this interpretation, the Act does not accord any automatic right to study such remains as ‘archaeological’.

### ***c. mapping the heterotopic: nomos and anomaly***

It remains to be specific about what this too brief study of the law of burial places, dead bodies and heritage objects reveals about the politics and ethics of Prestwich Place. The point has not been to prepare a lawyer’s opinion on the matter, but rather to discern the ethical and political spirit which animates this area of the law, and divine something of the relationship between law and the dead.

A good place to start is Yan Thomas’s recent writing on the Roman *ius sepulchri* and the requirements of *res religiosae*<sup>567</sup>. In his work he has aimed not so much at a doctrinal commentary as an account of the technical nature of legal reason in Roman times. He writes that in this context, ‘law and legal rules were not the expression of [religious] taboos. Rather, they were the instruments by which taboos were transformed into a set of techniques for the management of inheritance funds’<sup>568</sup>. What Thomas is concerned with is how the law transforms the dead body into *res*; indeed, the legal reification of *corpus* and tomb.

Fundamental to this legal reification was how the distinction between body and tomb operated to make the religiosity of the *res religiosa* more manageable. Thomas emphasises how Roman law defined precisely the place which was made *religiosus* by interment of a body. Some heirs tried to extend the *ius sepulchri* to cover other properties annexed to the *locus religiosus* and intended to act as income-generating foundations for the expenses of the future funerary rites that were expected. Yet the law made a clear

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<sup>566</sup> s 35(2).

<sup>567</sup> Yan Thomas ‘*Res religiosae*: on the categories of religion and commerce in Roman Law’ in Alain Pottage and Martha Mundy (eds) *Law, anthropology and the constitution of the social: making persons and things* (Cambridge: Cambridge University Press, 2004).

<sup>568</sup> *Ibid* 72.

distinction between the tomb and its surrounds, protecting only the space actually occupied by remains<sup>569</sup>: ‘the legal quality of this *res* depended on its contact and contiguity with the body that it contained’<sup>570</sup>. Thus the rule, already mentioned earlier, that it was the bones themselves that made a place *religiosus*: an empty cenotaph did not constitute a *sepulchrum*<sup>571</sup>.

This was consistent with the way in which the law on violation of tombs was structured. It was wrongful to violate a tomb, yet there were no laws barring profanation of the tomb by actual exhumation of the body, nor indeed were there any laws protecting the body itself<sup>572</sup>. The material remains were so vital to the hallowedness of the tomb, that once removed the place no longer constituted *res religiosa*: ‘[t]hat was why the removal of a body from the tomb was not treated as a *violatio sepulchri*: the tomb no longer had anything to protect’<sup>573</sup>. This reliance on the material seems out of place: sacred things could (before Christian times at least) be constituted by consecration ‘to a divinity in which one might well have believed, but which could just as well have been invented for the purpose, given that any idea or any invocation would do’<sup>574</sup>. Does this point to a fastly held belief in the religiosity of the very body itself, rather than simply its memory?

It is too early for the present work to come to any conclusions about the nature of the relation of corporeality and religiosity in Roman times; suffice to note that this problem, taken together with the changing views of the Reformation and the fate of Canon law, and contemporary law’s preoccupation with the genome as an incorporeal thing, an intellectual property, mark out the trajectory of a fruitful study of law’s regard for the old philosophical problem of body and soul, not to mention the relation between law and the sacred.

The present objective is more humble than this. What will detain us now is instead Thomas’s paradoxical conclusion: that ‘the law sanctified tombs rather than the dead.... From this perspective, to exhume the body was to put the tomb itself to death’<sup>575</sup>. Like the law of *res sanctae*, which protected the city by making the city walls inviolable, the

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<sup>569</sup> *Ibid.*, 42-3.

<sup>570</sup> *Ibid.* 45.

<sup>571</sup> *D* 11 7 6 1, but cf the earlier *D* 1 8 6 5.

<sup>572</sup> Thomas (note 567) at 56-60.

<sup>573</sup> *Ibid.*, 61.

<sup>574</sup> *Ibid.*, 46.

<sup>575</sup> *Ibid.*, 63.

law protected not the dead body but its ramparts. In this way the ‘prohibition was spatialised in such a way as to make it perceptible, which implied according it the legal status of a thing’<sup>576</sup>. Reification consisted in making visible what had been buried, identifying its location as well as its limits. This act of enclosure was crucial for understanding how law dealt with religiosity (and also things which were *sacrae* or *sanctae*); for ‘if not restrained by legal technique, religion was everywhere: in affects, mentalities, social practices, and culture’<sup>577</sup>. Law dealt instead with things and objects.

The disjuncture between material body and resting place, even as the one relied on the other, allowed law to *manage* the dead body, submitting the intangible religiosity of death’s consequence to man-agement. This was especially useful for the concerns of patrimony. Thus the law of *res religiosae* tells not so much of Roman beliefs about the dead, or about religion for that matter, so much as it tells about the proprietary rights and inalienability of things. The hallowed space of the grave was delimited and quantified for practical reasons: ‘[i]n law, any reference to the dead ... was made only so as to establish the institutional limits of a zone in respect of which market transactions were prohibited’<sup>578</sup>. Thus, before Gaius at least, the use of the term *purus* to denote a thing that was not *sacra*, *religiosa* or *sancta*, and therefore did not in any way hinder human appropriation.

Of course Roman Law’s reification<sup>579</sup> of the dead body did not simply result from a misleading distinction between *corpus* and *res religiosa*. Within legal reality, it was a necessity. In this respect, Thomas’ article should be read in the context of his other work on institutional technique, which looks specifically at how Roman Law, for example in its fictions, operated upon itself to create a legal reality of ‘institutional self-reference’ disjointed even if adjacent to social reality’s ‘natural facts’<sup>580</sup>. By instituting a legal version of the dead body, Roman Law made protection possible by assimilating the sacred to the self-referential reality of legal fictions and institutions, and making the divine commensurable with the commercial.

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<sup>576</sup> *Ibid.*, 66.

<sup>577</sup> *Ibid.*, 67.

<sup>578</sup> *Ibid.*, 68.

<sup>579</sup> Perhaps this is similar to the reification of the individual genius of the author by copyright. See eg Mark Rose (note 124).

<sup>580</sup> Alain Pottage ‘Introduction: the fabrication of persons and things’ in Alain Pottage and Martha Mundy (eds) *Law, anthropology and the constitution of the social. Making persons and things* (Cambridge: Cambridge University Press, 2004) 1 at 12 – 18, glossing Yan Thomas ‘Fictio legis: l’empire de la fiction romaine et ses limites médiévales’ (1995) 21 *Droits* 17.

What is interesting then is how *res religiosa* has fared in later times. After its apparent demise in post-Reformation Holland, it is seemingly resurrected as the hallowed object of nationalism in South African heritage legislation, and is engaged in contemporary struggles involving the rights of property owners in the line of cases beginning with *Cape Town and Districts Waterworks*<sup>581</sup> and leading up to *Oudekraal Estates*<sup>582</sup>. What these cases reveal, beyond Thomas' insights, is that the legal *rhetoric* of hallowedness is in itself significant to the law's 'institutional self-referentiality'. After this rhetoric was rendered void in the wake of the Reformation, the grave became no longer a manageable manifestation of the *res ex commercio*, but a plain hindrance to *commercium*. The South African cases up to *Dibley v Furter*<sup>583</sup> and even *Nkosi and Another v Bührmann*<sup>584</sup>, have been the working out of this logic.

So for example, in *Dibley v Furter*, a place of burial is no longer inalienable because it is *religiosa*. Rather, it may be difficult to alienate because 'the presence of the graveyard on the property may affect its price in a sale'<sup>585</sup>. In fact, it may well be practically inalienable: the plaintiff in *Dibley* was not concerned with a lowered market value, but appealed to the court because of a 'dislike of living on or owning such a property which can in no way be compensated for by a payment of money'<sup>586</sup>. The plaintiff claimed that the graves were 'abhorrent': no longer hallowed but horrible, inspiring *horrere*. The court disagreed somewhat, proposing instead some equally graphic images of disdain, quoting yet more abrogated provisions of Justinian's *Digesta*:

this property with these graves on it falls in to the same category as the ugly slave or the slave whose breath smells, *Dig.* 21.1.12, or the slave who wets his bed, *Dig* 21.1.14.<sup>587</sup>

The point is that the grave, although not a redhibitory defect for the purposes of the case, was in the court's imaginary at least potentially *defective*. The way in which the grave is named is important (remembering our earlier discussion in Chapter Two). Hallowedness and abhorrence concern religious beliefs, whether of the most high or the most low. Defectiveness concerns worldly, pragmatic values.

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<sup>581</sup> (note 423).

<sup>582</sup> (note 425).

<sup>583</sup> (note 406).

<sup>584</sup> (note 461).

<sup>585</sup> *Dibley v Furter* (note 406) at 88H.

<sup>586</sup> at 89F-G.

<sup>587</sup> at 82H.

What then of the previous section's contention that the new hallowed thing is the object of nationalism? Evidenced by the statutory occupation with the resting place of national heroes, we might define the 'heritage resource', and before it the relic and war grave, as the new *res religiosa*. But this is not to exclude it from the law as some transcendental thing; rather the language of heritage resources provides the means for the law to grasp, to man-age intangible, transcendental, extra-legal nationalism and cultural identity. It is no longer the religious hallowed that is enshrined in the tomb, but the stuff of national identity, a new *res sacra et ex commercio* that 'helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation',<sup>588</sup>.

Prestwich Place then brings together what might at first seem disparate histories: the haunting of the law by the *res religiosa* on the one hand, and the religion of nationhood on the other. On the one hand, the history of *res religiosae* shows how law has always worked to manage the unmanageable even while speaking the language of the unmanageable thing, as if *nomos* could not abide an anomaly. On the other hand, it is nationhood that has become this anomalous thing, pre-constitutional and yet the very object of the constitutional *in memoriam* (as per Chapter One). Heritage legislation sanctifies while reifying this nationhood, in the form of the objects and institutional and procedural rigours of heritage resource management ('direct descendancy' is one such technique).

In *Oudekraal Estates* the shift from *res religiosa* to heritage resource is clear, even though the language of the NHRA is not used. Nor is the language of the offence of *sepulchri violatio* or the constitutional protection of religion used. Instead the Oudekraal kramats have become 'sites of cultural significance'; and thus the new nation (and the new religiosity) is defined and struggled for. And simultaneously managed, as the NHRA shows. It is then at Prestwich Place that a certain contestation, between the religiosity of national memory, the NHRA's management of the sacred object of memory and the anomaly that the site presents to both, is plain.

Since this discussion began in Chapter One with an invocation of the spatiality of Prestwich Place's significances, indeed a sort of cartography of transitional justice, allow

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<sup>588</sup> Preamble to the NHRA.

one more spatial metaphor to be admitted in illustration of the site's anomalousness. Prestwich Place tends toward the *heterotopic*. In 'Of other spaces', a text only published posthumously, Michel Foucault proposed the notion of a 'heterotopia', a sort of anomalous topology that further destabilises space in the wake of Galileo's revolution<sup>589</sup>. Galileo not only decentred the place of the earth by rediscovering that the earth revolves around the sun rather than vice versa, says Foucault; he also destabilised space, which had to be as seen no longer stationary but constantly in transit and open to the infinite. Foucault intended the heterotopia to be a further destabilisation of Cartesian space, a 'desanctification' of it even.

Foucault was therefore interested in places that have 'the curious property of being in relation with all the other sites, but in such a way as to suspect, neutralize, or invent the set of relations that they happen to designate, mirror, or reflect'. What he describes is a counter-site, one which disrupts the stability of the relations between all other sites. Unlike a utopia, however, a heterotopia is a real space. It is: 'a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted'. Heterotopias are 'outside of all places, even though it may be possible to indicate their location in reality'<sup>590</sup>. The idea captures the anomaly as a spatial notion, something which is part of the totality of space yet simultaneously apart. The heterotopia is also the haunted place: for phantoms 'haunt the places where cities are out of joint; out of joint in terms of both time and space'<sup>591</sup>.

Perhaps Prestwich Place is heterotopic in this sense, working to restructure the spatial imaginary and the relationships of other spaces in the city? This might explain why the conflict over Prestwich Place is as much about space as about bones: it reveals a politics of inhabiting and of memorial cartography. Yet Foucault's description in 'Of other spaces', in which he specifies the six 'principles' of the heterotopia, becomes somewhat incoherent<sup>592</sup>. It is difficult to 'tell' what a heterotopia is, what distinguishes it as an 'other' space; and so Foucault's description has ended up as a 'handy marker for a variety of centreless structures or an elastic postmodern plurality'<sup>593</sup>. It is more helpful to look at

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<sup>589</sup> Michel Foucault 'Of other spaces' 1986 *Diacritics* 22.

<sup>590</sup> *Ibid.*

<sup>591</sup> Steve Pile 'Ghosts and the city of hope' in Loretta Lees (ed) *The emancipatory city?* (London: Sage, 2004) 210, borrowing from Derrida's borrowing from Shakespeare. See Derrida (note 149).

<sup>592</sup> Benjamin Genocchio 'Discourse, discontinuity, difference' in Sophie Watson and Katherine Gibson (ed) *Postmodern cities and spaces* (Cambridge: Blackwell, 1995) 35.

<sup>593</sup> *Ibid.*, 42.

*The order of things*, where Foucault also mentions the heterotopia, but here in the context of discourse, where he refers to it as a sort internal or discursive site of impossibility<sup>594</sup>.

What should be rescued from Foucault's idea is a kind of anomalous energy, a tendency towards a limit, that limit being the site of an impossibly different and discontinuous space<sup>595</sup>. We might call this the *heterotopic*, as though we can assimilate an adjectival potentiality of Foucault's thought and not its full madness. The hallowed thing can then be thought of as tending towards such a limit, towards the heterotopic. It is this tendency that *nomos*, with its will to de-scribe and reify, cannot abide.

For those curious about the juridical significance of Prestwich Place, it should finally be located here, between *nomos* and anomaly. But this is not to protest legal reification and bureaucratisation – processes which are inevitable and necessary for any outcome, no matter what its political allegiance. This tracing of the heterotopic is rather a means to peer behind necessity, to glimpse anomaly, and to discern the spectral presence of an absence that haunts the law.

#### ***d. law in the haunted archive***

Across the history of Prestwich Place, and the genealogy of its silences, falls the shadow of law. The juridical has been implicated right since the beginning of this place, with the uncovering of the burials at Prestwich Place and their swift inclusion into the framework of new heritage legislation. But before this was another beginning, marked by the deaths of those buried at Prestwich Place, and the exclusion of their dead bodies, by the law and from the law. And before this even is the beginning that takes place through the inscription of the geo-geographical ends of the colonial city. The end of the colonial city would be prescribed by the boundary, the frontier, the first inscription of the law, the graphic line between citizen and subject, inhabitant and alien/native. The frontier along Buitengracht Street and Bree Street, marking the western end of the city and beyond which lay the 'menace of wild animals [and] the depredations of marauding Hottentots'<sup>596</sup>, would come to prescribe the (dis)location of the informal burials of the city's slaves, freed slaves and poor, who were excluded from burial grounds within city walls. Already I have suggested the uncanniness of this location; here too is the imprint

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<sup>594</sup> Foucault (note 285).

<sup>595</sup> Genocchio (note 592) *passim*.

<sup>596</sup> Marischal Murray *Under Lion's Head* (Cape Town: A A Balkema, 1964) 3.

of ‘bare death’, a thanatopolitics by which colonial sovereignty prescribed the fate of the body even after the end of bare life.

Recall also that the scene of territorial inscription locates the origin of the law:

The primordial scene of the *nomos* opens with a drawing of a line in the soil. This very act initiates a specific concept of law, which derives order from the notion of space. The plough draws lines – furrows in the field – to mark the space of one’s own. As such, as ownership, the demarcating plough touches the juridical sphere.<sup>597</sup>

Here is law, inscribed, archived, graphic, at the scene of the impression. Peter Fitzpatrick relates this primordial law of spatial order to occupation, the condition of the origins of law during imperial expansion<sup>598</sup>; it is certainly consistent with the history of the frontier and the establishment of European law at the Cape<sup>599</sup>.

This description of *nomos* and beginning returns us to the archival inscription, and to the *hypomnēsis* of the memorial, and hints at the relationship between law and memory. Derrida reminds us of the etymological roots of archive in *arkhē*, the beginning, but signifying not one beginning but two: at once commencement and commandment. The *arkhē* institutes ‘two orders of order: *sequential* and *jussive*’<sup>600</sup>. This bifurcation has its roots in Plato’s distinction between two notions of action, *archein* (beginning) and *prattein* (achieving). Greek thought had regarded these as conjoined elements of action; Plato distinguished them so that action became two separate gestures, beginning and completion<sup>601</sup>. The beginning has sovereignty over the remains, and the one who begins the action guards and governs it, as an architect or a patriarch. Here is a primordial explanation of chronological order, of the rule of what is prior and past; of *arkhē*, and of the intimacy of the archive and sovereignty<sup>602</sup>.

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<sup>597</sup> Cornelia Vismann 1997 ‘Starting from scratch: concepts of order in no man’s land’ in Bernd Hüppauf (ed) *War, violence and the modern condition* (Berlin: Walter de Gruyter, 46-64) 46-7; as quoted by Peter Fitzpatrick *Modernism and the grounds of law* (Cambridge: Cambridge University Press, 2001) 91-92.

<sup>598</sup> Fitzpatrick (note 597) at 92, 146ff.

<sup>599</sup> The history of European law at the Cape, and of sovereignty, begins not with a doctrine of *terra nullius* as was mistakenly claimed by jurists in the mid-20<sup>th</sup> century, but with the extension of jurisdiction over the inhabitants of the Cape. See Francois du Bois and Daniel Visser, ‘Der einfluss des Europaischen rechts in Sudafrika’ *2 Jahrbuch fur Europaische Geschichte* (2001) 47 (translated as ‘The influence of European law in South Africa’ by the authors). This is a territorial, geographical, basically nomological gesture prior even to ownership and sovereignty.

<sup>600</sup> Derrida *Archive fever* (note 259) 1.

<sup>601</sup> This is Arendt’s interpretation of the *Statesman*; see Hannah Arendt *The human condition* (New York: Doubleday Anchor, 1959) 199-200.

<sup>602</sup> See also Mbembe (note 180) on this intimacy of archive and sovereignty.

Insofar as this provides grounds to believe that the archive in some way documents the force and extent of law, we might also ask about the juridical function of the silences which haunt the archive. First of all, why does the figure of the phantom come so quickly to the archive? It is as if the archive is the habitual place of the phantom, its haunt. Here it is necessary to understand how haunting exists beyond its rhetorical invocation. The archival inscription (the impression of the plough, the frontier's circumscription, the memorial circumcision<sup>603</sup>) is nomological and *topological*. The archive not only records a beginning, of an order both chronological and juridical, but it is a place. The genealogy of the concept reminds us of the *arkheion*, in ancient Greece the place of domicile of the archive and also of the archons who presided over it<sup>604</sup>. But the archive's relation to place is structural rather than merely historical. As *hypomnēsis*, it is a memory aid, a memorial, a writing: not living memory, but always exterior<sup>605</sup>. (So strong is the necessity to give the archive a place that we even talk of that ideal dematerialised archive, cyberspace, in topographical terms).

Archival technology is one way to inscribe place in space; another way to make place is a most basic and non-technological gesture, it is to inhabit (to make of it a haunt). This is a gesture of embodied memory rather than of *hypomnēsis*. Inhabiting is an intimate, corporeal gesture relating place and memory, the most primordial version of which is the inhabiting of the body<sup>606</sup>. We *inhabit* because 'habit is too worn a word to express this passionate liaison of our bodies, which do not forget, with an unforgettable house'<sup>607</sup>. Inhabiting and haunting share as their basis this wearing (out) of habit, the repetition of the spatial gesture<sup>608</sup>. There is a symmetry too in this relation: the corporeality of the inhabitant is reflected in the incorporeality of the phantom. We can imagine then that haunting is *an excess of inhabiting*; that it is habit inscribed in place but without inscription, viewed without the limit between tangible and intangible, inscription and memory, (or as Socrates would have it) the living and the dead.

<sup>603</sup> Derrida *Archive fever* (note 259) 20ff.

<sup>604</sup> *Ibid.*, 2.

<sup>605</sup> See also Derrida (note 179).

<sup>606</sup> Ricoeur *Memory, history, forgetting* (note 154) 41-43.

<sup>607</sup> Gaston Bachelard *The poetics of space* (trans. Maria Jolas) (Boston: Beacon Press, 1964, 1994) 15.

<sup>608</sup> The haunted house is a silly but evocative metaphor that conjoins inhabiting and haunting, if only because 'haunting implies place, a habitation, and always a haunted house.' Derrida *Archive fever* (note 259) 86.

Here we might also briefly remind ourselves that Prestwich Place is only one place amidst a landscape of places of memory, and that the struggles that have begun to unfold across this haunted cultural landscape of death and burial reveal a politics of inhabiting, as has been glimpsed in the first chapter. Contestation of these places does not typically consist of crude political grasps at space, but instead claims to space *as* place, gestures that are imbued with memory and the desire of habit and inhabiting.

Habit is a corporeal form of memory, the *mémoire-habitude* as Henri Bergson's phenomenology names it<sup>609</sup>. Like Freud's repressed memory, that is not remembered but repeated unconsciously, the habit is something that we forget into the body:

the patient does not *remember* anything of what he has forgotten and repressed, but *acts* it out. He reproduces it not as a memory but as an action; he *repeats* it, without, of course, knowing that he is repeating it.<sup>610</sup>

The seemingly forgetful habit is thus a gesture of incomplete forgetting or, in its pathological sense, incomplete mourning, and so can be related to the secret, the crypt-ic, what the body has encrypted. The habit that is not acted *out* but borne *inside*, worn inside perhaps, like a vest of the mind, a secret. Here psychoanalysis continues to be a useful tool for excavation, specifically the work of Nicolas Abraham and Maria Torok, whose reformulation of Freudianism includes an occupation with the idea of the psychic tomb and the transgenerational secret<sup>611</sup>.

In their work, they describe the family secret as in fact being passed down to descendants, but encrypted and entombed – here is one plausible theory of what might be called a 'grave in the mind'<sup>612</sup>. The psychic tomb is then a sort of silence of the unconscious, undecipherable, a transgenerational secret or phantom. According to Abraham and Torok's thesis of introjection, in order for mourning to be completed the psychic tomb must be *named*.

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<sup>609</sup> Henri Bergson *Matter and memory* (trans. Nancy M Paul and W Scott Palmer) (London: Allen and Unwin, 1950).

<sup>610</sup> Sigmund Freud 'Remembering, repeating and working-through' (1914) in Sigmund Freud *The standard edition of the complete psychological works of Sigmund Freud* vol 12 (trans and ed James Strachey) (London: Hogarth Press and the Institute of Psychoanalysis, 1953-74) 145.

<sup>611</sup> Nicolas Abraham and Maria Torok *The shell and the kernel vol. 1* (trans. Nicholas T Rand) (Chicago: University of Chicago Press, 1994).

<sup>612</sup> This phrase was overheard at the Institutions of Public Culture Workshop, University of Cape Town, 7-9 July 2005. A participant explained that in some South African cultures one need not visit a grave in order to respect the ancestors, who are always present; one instead carries a 'grave in the mind'.

Hopefully these ideas tend towards rescuing the phantom and haunting from their excessively rhetorical use. There is in them also the beginning of an idea of embodied authority, of an archive-without-writing<sup>613</sup> of habit, inhabiting, and haunting that encompasses the corporeal and the spectral (but not the *hypomnēsic*). Here is the idea of an archive without *arkhē*, without commencement, and an authority without commandment. This archive-without-writing gives a different view of what is at stake at Prestwich Place. There is a well established connection between the monument and the constitution: the founding myth is the common gene pool of sovereign power and remembrance. The archive-without-writing is a counterpart to this, a silent heritage, a genetics even, not in a bio-ontological sense, but in a genealogical sense; an archive not of beginnings and inscriptions but of births and relations, reproducing itself corporeally and spectrally (but not by any *hypomnēsis*). Here is a very different response to ‘direct descendancy’, one that looks instead for phantoms, ‘virtual archives’<sup>614</sup>, *Spuren* instead of *Zeugnisse*.

There is in this a spectral law of silence, a silence that reproduces itself, that resonates and proliferates. This is what an ethics of memory and a theory of law must take into account if it is to take seriously the legacy of the unnamed dead.

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<sup>613</sup> This name tries to further evoke what Derrida has called a ‘*prosthesis of the inside*’ (Derrida *Archive fever* (note 259) 19), or what might be better described as a *hypomnēsic* technology of the mind. What all this irony invokes is of course Socrates’ ‘writing in the soul’ (*Phaedrus* 276a, and see note 258 and accompanying text).

<sup>614</sup> Derrida *Archive fever* (note 259) 64, describing the Freudian unconscious, and again, the ‘writing in the soul’.

## references

### Abbreviations of Old Legal Authorities

- C* *Codex. Corpus Juris Civilis* (trans S P Scott) (New York: AMS, 1973).
- D* *Digesta. Corpus Juris Civilis* (trans S P Scott) (New York: AMS, 1973).
- G* The Institutes of Gaius (trans W M Gordon and O F Robinson with the Latin text of Seckel and Kuebler) (Ithaca: Cornell University Press, 1988).
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#### **Other Abbreviations used**

<i>CFR</i>	Code of Federal Regulations (USA)
HOPAHC	Hands Off Prestwich Street Ad Hoc Committee
<i>Lawsa</i>	WA Joubert (ed) <i>The Law of South Africa</i> (Durban: Butterworths, 2002)
NAGPRA	Native American Graves Protection and Repatriation Act

NHRA	National Heritage Resources Act
PPC	Prestwich Place Committee/Prestwich Place Project Committee
SAHRA	South African Heritage Resources Agency
USC	United States Code

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